IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, Jr., et al., *Petitioners,*

against

JOHN W. McCORMACK, et al., *Respondents.*

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Opinions Below

The Court of Appeals for the District of Columbia Circuit, in an opinion by Circuit Judge Berger for the Court affirmed the order of the District Court denying an application for certification of the necessity of a statutory three judge court and dismissing the complaint for want of jurisdiction over the subject matter. Circuit Judges McGowen and Leventhal concurred in separate opinions. The opinion of Circuit Judge Berger is reported at 395 F.2d 577 (App. D.C. 1968). The concurring opinion of Circuit Judge McGowen is reported at 395 F.2d 605 and the concurring opinion of Circuit Judge Leventhal is reported at 395 F.2d 607. The opinion of the District Court is reported at 266 F. Supp. 354 (D.C. D.C. 1967).

Jurisdiction

The order and judgment of the District Court was entered on April 7, 1967. The order and judgment of the Court of Appeals was entered on February 28th, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Statute Involved

HOUSE RESOLUTION 278

IN THE HOUSE OF REPRESENTATIVES approved March 1, 1967.

RESOLUTION

WHEREAS,

The Select Committee appointed Pursuant To H. Res. 1 (90th Congress) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives and holds a Certificate of Election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct toward the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained in his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964 to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D. C. or the State of New York as required by law.

Fourth, as Chairman of the Committee on Education and

Labor, Adam Clayton Powell permitted and participated in improper expenditures of government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member; Now, therefore, be it

Resolved, That said Adam Clayton Powell, Member-Elect from the Eighteenth District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress, and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.

Questions Presented

1. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House, and further to bar him from membership for the entire 90th Session violates the Constitution of the United States, and in particular Article One, Clause Two, and Article One, Clause Five, thereof?

2. Whether the refusal of the House of Representatives to seat a duly elected Representative of the people, who meets all the constitutional qualifications for membership in the House violates the fundamental and inalienable rights of the class of Petitioners, citizens of the 18th Congressional District of New York to the free choice of their own representatives to the Legislature essential to a system of representative democracy?

3. Whether the legislative punishment inflicted upon the Petitioner by the enactment of House Resolution 278 violated the Constitutional prohibition against Bills of Attainder?

4. Whether the punishment by exclusion of the Peti-

tioner from membership in the House violated the Due Process guarantee of the Fifth Amendment to the Constitution of the United States?

5. Whether the exclusion of the Petitioner violated his rights and the rights of the class of Petitioners representing the overwhelming Negro majority of the citizens of the 18th Congressional District of New York guaranteed to them by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States?

6. Whether the dismissal of the complaint for "want of jurisdiction over the subject matter" was erroneous and in violation of Article III of the Constitution of the United States?

7. Whether the questions presented in the complaint are justiciable and subject to review by the national courts?

8. Whether the courts have power to grant the relief required to remedy the violations of Petitioners' rights?

9. Whether the District Court erred in refusing to certify the necessity for a three-judge statutory district court and, if so, whether this Court should order the convening of such a court and instruct such court to grant forthwith the relief prayed for herein?

Statement of the Case

The bedrock constitutional questions raised in this appeal arise out of the extraordinary, arbitrary, and unconstitutional action of the majority of the House of Representatives on March 1, 1967, in excluding Adam Clayton Powell, Jr., the duly elected Member-elect from the 18th Congressional District of New York, possessing all requisite constitutional qualifications for membership in that body, and, further permanently barring him from membership in the entire 90th Session of the House. Because many of the relevant facts relating thereto have been of necessity incorporated in the legal arguments hereinafter set forth, Petitioners will here confine themselves to a recital of the basic

uncontested facts leading up to the House's extraordinary unconstitutional action which has resulted in a crisis decisive to the future of representative democracy in this country.

A—Statement of Facts

Petitioner Adam Clayton Powell, Jr., the duly nominated Democratic candidate for the House of Representatives for the 18th Congressional District of New York, received the greatest number of votes cast for that office at the general election of November 8, 1966. The official tabulation of said votes, as certified by the Secretary of State of the State of New York, was as follows:

Lassen L. Walsh (Rep) 10,711
Adam C. Powell (Dem) 45,308
Richard Prideaux (Lib) 3,954
Rylan E. D. Chase (Con) 1,214

Based upon said tabulation a certificate of election was issued by the Secretary of State on December 15, 1966, and duly forwarded to and received by the Clerk of the House of Representatives.

The 90th Congress opened on January 10, 1967, after respondent McCormack had been elected as the Speaker of the House of Representatives and duly sworn pursuant to the provisions of Title 2, U.S. Code, Section 25. He informed the House that he would, pursuant to the said Section 25, administer the oath to the Members-elect thereof. Prior to said administration, however, Representative Van Deerlin, of California, asked that Congressman Powell stand aside during the administration of said oath, which request, because of its status as a point of the highest personal privilege, was granted by the Speaker. After the other Members-elect has been sworn, a resolution, hereinafter referred to as House Resolution 1, was introduced and passed. House Resolution 1 reads as follows:

Resolved, That the question of the right of Adam Clayton Powell to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative, be referred to a special committee of nine Members of the House to be appointed by the Speaker, four of whom shall be Members of the minority party appointed after consultation with the minority leader. Until such committee shall report upon and the House shall decide such question and right, the said Adam Clayton Powell shall not be sworn in or permitted to occupy a seat in this House.

For the purpose of carrying out this resolution the committee, or any subcommittee thereof authorized by the committee to hold hearings, is authorized to sit and act during the present Congress at such times and places within the United States, including any Commonwealth or possession thereof, or elsewhere, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee or any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

Until such question and right have been decided, the said Adam Clayton Powell shall be entitled to all the pay, allowances, and emoluments authorized for Members of the House.

> The committee shall report to the House within five weeks after the members of the committee are appointed the results of its investigations and study, together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

Subsequently, and on January 19, 1967, the Speaker, pursuant to the provisions of the aforesaid resolution, appointed five Democrats and four Republicans, all lawyers, to serve as members of said select committee under the chairmanship of the Honorable Emanuel Celler, the Chairman of the House Judiciary Committee. On February 1, 1967, Mr. Celler, at the direction of the Select Committee, invited Member-elect Powell to appear before it "to give testimony and to respond to interrogation" concerning his age, citizenship and inhabitancy and certain other matters.*

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* The chairman's letter was as follows:

Hon. ADAM CLAYTON POWELL
U. S. House of Representatives,
Washington, D. C.

Dear Mr. Powell: I enclose a copy of House Resolution 1, 90th Congress, pursuant to which the Speaker on January 19, 1967, after consultation with the Minority Leader, appointed the following Members to carry on the inquiry contemplated therein:

> Honorable Emanuel Celler, Chairman; Honorable James C. Corman; Honorable Claude Pepper; Honorable John Conyers, Jr.; Honorable Andrew Jacobs, Jr.; Honorable Arch A. Moore, Jr.; Honorable Charles M. Teague; Honorable Clark MacGregor; Honorable Vernon W. Thompson.

The Committee has directed me to invite you to appear before it on Wednesday, February 8, 1967, at 10:30 A.M., in Room 2141, Rayburn House Office Building, Washington, D. C., to give testimony and to respond to interrogation concerning your qualifications of age, citizenship and inhabitancy, and the following other matters:

(1) The status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico, with particu-

The attorneys for Petitioner Powell filed several motions and supporting memoranda before, during, and after hearings held by the Select Committee on February 8, 14 and 16, 1967, all raising the issue of the denial to him of both substantive and procedural due process by the Committee's proceeding to consider the matter of seating or expelling him without the minimum due process requirements of an adversary hearing.*

These motions and memoranda objected to: 1) the absence of any guides or standard by which alleged misconduct would be measured; 2) the absence of any charges and specification of violation of ascertainable proscribed conduct; 3) the absence of any of the procedural safeguards of an adversary hearing—such as a statement of charges, the right of confrontation, the right of cross-examination and the right of counsel in an adversary proceeding.

The total effect of these deprivations of due process was to deny to the individual and class petitioners fundamentally protected constitutional rights without any of the traditional safeguards of an adversary proceeding, although the resulting recommendations included, for example, one that "Adam Clayton Powell, *as punishment,* pay the Clerk of the House to be disposed of by him according to law, $40,000 (emphasis added.)†

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lar reference to the instances in which you have been held in contempt of court;

(2) Matters of your alleged official misconduct since January 3, 1961. You are advised that you may be accompanied by counsel and that the hearings will be conducted in accordance with paragraph 26, rule XI of the Rules of the House of Representatives.

Sincerely yours,

EMANUEL CELLER,
Chairman.

(Exhibit 1B to Petitioners' Motion for Summary Reversal below)

* (See Exhibit 1B, to Petitioners' Motion for Summary Reversal below, pp. 6-14, 31-49, 53-54, 111-113, 255-266.)

† (Exhibit 1C to Petitioners' Motion for Summary Reversal below, p. 34.)

Petitioner Powell accompanied by counsel appeared before the Select Committee on February 8, 1967, and, after certain preliminaries‡ which were made part of the record,** the Committee received a brief and heard argument by counsel for him on the principal substantive motion submitted; received, but refused to entertain argument on his procedural motions, and took all of the motions—which the Chairman initially characterized as "dilatory"†—under advisement. The Chairman, over the protest of Petitioner Powell's counsel as well as one member of the Committee, then insisted that he, Powell, take the oath and be interrogated by counsel for the Committee. The interrogation began and was interrupted shortly thereafter by the objection of Petitioner Powell's attorneys and their insistence that he would not proceed further without a ruling upon his pending motions. Thereupon, the Committee recessed and, upon reconvening, the Chairman denied all of the motions.‡

‡ These included "official notice of the published hearings and reports of the Special Subcommittee on Contracts of the Committee on House Administration of the U. S. House of Representatives, 89th Congress, Second Session, relating to expenditures during the 89th Congress by the House Committee on Education and Labor and the clerk-hire status of Y. Marjorie Flores (Mrs. Adam Clayton Powell)."

** (Exhibit 1C to Petitioners' Motion for Summary Reversal below, p. 2.)

† He later withdrew this categorization.

‡ With specific reference to Motion No. 5, which read as follows: Member-Elect Adam Clayton Powell, Jr., moves that he be afforded all the rights and protections guaranteed by the United States Constitution and the rules and precedents to a Member-Elect whose right to a seat in the House of Representatives is contested, including, but not limited to the following:

(1) Fair notice as to the charges now pending against him, including a statement of charges and a bill of particulars by any accuser;

(2) the right to confront his accusers and in particular to attend in person and by counsel, all sessions of this Committee at which testimony or evidence is taken and to participate therein with full rights of cross-examination;

(3) the right to an open and public hearing;

(4) the right to have this Committee issue its process to summon witnesses whom he may use in his defense;

(5) the right to transcript of every hearing.

Petitioner Powell, under protest thereupon proceeded to be interrogated by counsel for the Committee but limited his testimony, upon the advice of counsel, to the constitutionally prescribed qualifications of age, citizenship and inhabitancy. Counsel for Petitioner Powell then submitted and the Committee received documentary evidence as to those issues. The Chairman thereupon refused to permit Mr. Powell, as previously promised to make a statement at that time.

Petitioner Powell, under the circumstances, did not again appear personally before the Committee. However, the Committee, under date of February 10, 1967, informed him that it would appreciate receiving certain information from him or his counsel.*

The Chairman, after denying same, stated:

"This is not an adversary proceeding. The committee is going to make every effort that a fair hearing will be afforded, and prior to this date has decided to give the Member-Elect rights beyond those afforded an ordinary witness under the House rules.

The committee has put the Member-Elect on notice of the matters into which it will inquire by its notice of the scope of inquiry and its invitation to appear, as well as by conferences with, and a letter from its chief counsel to the counsel for the Member-Elect. Prior to this hearing the committee decided that it would allow the Member-Elect the right to an open and public hearing, and the right to a transcript of every hearing at which testimony is adduced. The committee has decided to summon any witnesses having substantial relevant testimony to the inquiry upon the written request of the member-Elect or his counsel. The Member-Elect certainly has the right to attend all hearings at which testimony is adduced and to have counsel present at those hearings. In all other respects, the motion is denied. Again the committee states that this is an inquiry and not an adversary proceeding."

* The Committee's letter to Petitioner Powell read as follows:

"Dear Mr. Powell: We wish to advise you that Select Committee, pursuant to House Resolution 1, 90th Congress, will hold a public hearing on Tuesday, February 14, 1967, at 10:00 o'clock a.m. in Room 2141, Rayburn House Office Building, Washington, D.C.

You and your counsel of record are invited to be present at the hearing. During the hearing on February 8, 1967, you are advised that upon the written request of you or your counsel, Select Committee will summon any witnesses having substantial relevant testimony to the inquiry being

(Footnote continued on next page)

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conducted by the Committee. I remind you of this and suggest that if you or your counsel desire to take advantage of the privilege afforded, please contact Mr. William A. Geoghegan, chief counsel of the Committee, and inform him of the names of the persons you would like summoned as witnesses and the nature of the testimony to be offered.

First and second motions made during the hearing on February 8 by your counsel Arthur Kinoy, Esquire, indicated you took the position Select Committee lacks authority to inquire into matters other than whether you have a right to take the oath and be seated as a member of the 90th Congress. And that, in making such determination, Select Committee is limited to inquiry to whether you met the qualifications for membership in the House, specifically, enumerated in Article I, Section 2, of the Constitution. These motions were denied.

The Select Committee has deferred decision on the question raised by the original motion of your counsel as to whether the qualifications for membership in the House, specifically enumerated in Article I, Section 2, of the Constitution, age, citizenship, and inhabitancy, should be deemed exclusive. Further, we are of the opinion that the Select Committee is required by House Resolution 1, 90th Congress, to inquire not only into the question of your right to take the oath and be seated as a member of the 90th Congress, but additionally and simultaneously to inquire into the question of whether you should be punished or expelled pursuant to the powers granted by the House under Article I, Section 5, Clause 2 of the Constitution. In other words, the Select Committee is of the opinion that at the conclusion of the present inquiry, it has authority to report back to the House recommendations with respect to your seating, expulsion or other punishment.

The public hearing scheduled for next Tuesday, February 14, 1967, the Select Committee would appreciate receiving from you or your counsel answer to the following questions:

One: With reference to the seating phase of our inquiry, do you refuse to give any testimony concerning (a) status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961?

Two: With reference to the second phase of our inquiry, relating to the power of the House to punish or expel pursuant to Article I, Section 5, Clause 2 of the Constitution, do you refuse to give any testimony concerning (a) status of legal proceedings in which you are a party of the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court, and (b) alleged official misconduct on your part occurring at any time since January 3, 1961?

At the public hearing scheduled for next Tuesday, February 14, 1967, you are again invited to give testimony and response to interrogation concerning the matters referred to in a letter dated February 6, 1967,

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On February 14, 1967, counsel for Mr. Powell appeared before the Committee and responded fully to its request for information.*

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from Mr. William A. Davis, chief counsel of the Select Committee, to your counsel, Mrs. Jean Camper Cahn, a copy of which is enclosed.

At the conclusion of your testimony next Tuesday, or, if you decline to testify, at the conclusion of the hearing, you will be given the opportunity to make a statement relevant to the subject matter of the Select Committee's inquiry. Unless additional matters come to our attention in the interim, the Select Committee has decided to conclude hearings on Tuesday, February 14, 1967.

EMANUEL CELLER, Chairman.

* The response of petitioner's counsel was as follows:

"The Member-Elect has received a letter dated February 10, 1967, from the Chairman of this Committee. That letter advises that this Committee had deferred decision on the question raised by Congressman Powell and his counsel "as to whether the qualifications for membership in the House specifically enumerated in Article 1, Section 2 of the Constitution) age, citizenship, and inhabitancy) should be deemed exclusive." We appreciate clarification of the Committee's action on this question.

The Committee further advises that it regards it mandate not only to inquire into Congressman Powell's qualifications for membership in the House of Representatives, "but additionally and simultaneously to inquire into whether" punishment or expulsion should be recommended to the House pursuant to powers granted under Article I, Section 5, Clause 2 of the Constitution. The provision reads:

> "Each House may determine the rules of its proceedings, punish its members for disorderly behavior and with the concurrence of two-thirds expel a member."

In short, this Committee conceives its function and scope as broad enough for it to determine Congressman Powell's right to take the oath as a member of the 90th Congress, and to determine simultaneously whether he has engaged in conduct warranting punishment by the House or expulsion therefrom, all in the same proceeding.

In connection with what this Committee conceives to be the proper scope of its inquiry the Committee invited Congressman Powell or his counsel to answer at this hearing the following questions:

> 1. As to what is described as the "seating phase" of the Committee's inquiry whether Congressman Powell refuses to give any testimony concerning:
>
> (a) the status of legal proceedings to which you are a party in the State of New York and in the Commonwealth of Puerto Rico, with particular reference to the instances in which you have been held in contempt of court; and

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(b) alleged official misconduct on your part occurring at any time since January 3, 1961.

2. As to what is described as "the second phase" of the Committee's inquiry "relating to the power of the House to punish or expel pursuant to Article I, Section 5, Clause 2, of the Constitution," whether Congressman Powell refuses to give any testimony as to matters set out in (a) and (b) above.

It is our position and contention that this Committee in seeking to resolve the legal and constitutional questions raised as to the appropriate scope of its inquiry has compounded the legal and constitutional defects initially asserted in this inquiry.

The short of our position is that H.R. No. 1 authorizes inquiry solely and exclusively into Congressman Powell's qualifications for membership in the House. If we are in error in that regard, then we take the flat position that the House could not, pursuant to H.R. No. 1, or indeed pursuant to any resolution, authorize any Committee to make the kind of simultaneous inquiry which this Committee proposes to undertake. Before the power to punish a 'member', pursuant to Article I, Section 5, Clause 2 of the Constitution can be invoked, the determination of membership must have been concluded on the basis of qualifications for membership as set forth in Article I, Section 2, Clause 2 of the Constitution.

In summary, the reasons for our position are as follows:

1. Article I, Section 2, Clause 2 of the Constitution set forth the sole and exclusive qualification for membership in the House of Representatives.

2. Article I, Section 5, Clause 2 of the Constitution deals expressly and exclusively with the power of the House to discipline its members—those persons who have been sworn and seated as members and for appropriate reasons are subject to punishment or expulsion. The meaning of the words is plain and unambiguous and the precedents and practice of the House compel the stated conclusion.

3. We concede, as we must, that the House has the power to proceed under each of these provisions. We reject, however, the Committee's assertion that the House, or any of its committees, can merge in one proceeding the power authorized by the two constitutional provisions. The precedent of the House supports this view. One of the basic reasons for the House's having consistently taken this position is because the merger of the two functions has been recognized as a method to expand unlawfully and dangerously the qualifications for membership in the House beyond the three stated in the Constitution.

4. Proceedings under Article I, Section 2, Clause 2, and proceedings under Article I, Section 5, Clause 2 involve two disparate functions which cannot be accomplished simultaneously. When the House proceeds under Article I, Section 2, Clause 2 to determine whether a member-elect possesses the requisite constitutional qualifications of age, citizenship, and

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Thereafter, the Committee held hearings and received evidence, culminating in its Report.

The following Findings, Conclusions and Recommendations appeared in the Committee's Report:*

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inhabitancy, it is exercising an investigatory function. It is merely determining what the facts are in this regard. When the House proceeds under Article I, Section 5, Clause 2, however, its action is in the nature of a judicial function. It is making a judicial determination as the trier of the facts as to whether a member charged with some form of misbehavior is guilty and should be punished even to the extent of expulsion. The Constitution itself requires that such process must take place within the framework of the minimal protections of the due process of law, including the specification of charges, right of confrontation, right to counsel, and the right to be heard. While we believe and have asserted that some of the basic requirements of due process must be adhered to in respect to proceedings under Article I, Section 2, Clause 2, since no punishment is involved, the standards are clearly not as strict as they must be in respect to Article I, Section 5, Clause 2.

5. Article I, Section 5 does not accord to the House a general judicial function. The function it has as a judicial body is limited solely and exclusively for the purpose of preventing obstructions to the House in the exercise of its legislative powers. Accordingly, the precedents uniformly hold that the "disorderly behavior" referred to in Article I, Section 5, Clause 2 relates solely to misconduct committed against the current House.

Accordingly, as to the "seating phase" of the Committee's inquiry, it is our position, as indicated by our motions, brief and oral argument heretofore that the scope and extent of the Committee's inquiry is limited to the three qualifications set out in Article I, Section 2. Therefore, we submit that the only and exclusive issues pertinent to Congressman Powell's right to a seat in the 90th Congress are whether he is 25 years of age, a United States citizen for seven years, and an inhabitant of New York. As to any issues beyond that, we are of the opinion that these are outside the jurisdiction of this Committee, and we have so advised the Member-Elect.

As to the "second phase" of the Committee's inquiry as delineated in the letter of February 10, it is our contention that neither the Committee nor the Congress can pursue an inquiry into its power to punish or expel a member without having first settled the threshold question of the Congressman's right to a seat.

Accordingly, we are of the opinion that any question except those relevant to the constitutional qualifications of Member-Elecet Powell are outside the jurisdiction of the Committee, and we have so advised the Member-Elect.

Moreover, it is our considered opinion that this Select Committee cannot legally and constitutionally pursue these two objectives simultaneously.

We request the opportunity to submit a brief developing these responses prior to the close of these hearings.

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FINDINGS

• 1. Mr. Powell is over 25 years of age, has been a citizen of the United States of America for over 7 years, and on November 8, 1966, was an inhabitant of New York State.

2. Mr. Powell has repeatedly asserted a privilege and immunity from the processes of the courts of the State of New York not authorized by the Constitution. Mr. Powell has been held in criminal contempt by an order of the New York State Supreme Court, a court of original jurisdiction, entered on November 17, 1966. This order is now on appeal to the Appellate Division, first department, an intermediate appellate court in the State of New York, and is not a final order. At the time of the Committee's hearings, there were also outstanding three court orders holding Mr. Powell in civil contempt which were issued May 8, 1964, October 14, 1966, and December 14, 1966. The order of May 8, 1964, was vacated when the final judgment against Mr. Powell was satisfied on February 17, 1967.

3. As a Member of Congress, Mr. Powell wrongfully and willfully appropriated $28,505.34 of public funds for his own use from July 31, 1965, to January 1, 1967, by allowing salary to be drawn on behalf of Y. Marjorie Flores as a clerk-hire employee when, in fact, she was his wife and not an employee in that she performed no official duties and further was not present in the State of New York or in Mr. Powell's Washington office, as required by Public Law 89-90, 89th Congress.

4. As a Member of Congress, Mr. Powell wrongfully and willfully appropriated $15,683.27 of public funds to his own use from August 31, 1964, to July 31, 1965, by allowing salary to be drawn on behalf of said Y. Marjorie Flores as a clerk-hire employee when any official duties performed by her were not performed in the State of New York or Washington, D.C., in violation of House Resolution 294 of the 88th Congress and House Resolution 7 of the 89th Congress.

5. As chairman of the Committee on Education and Labor, Mr. Powell wrongfully and willfully appropriated $214.79 of public funds to his own use by allowing Sylvia Givens to be placed on the staff of the House Education and Labor Committee in order that she do domestic work in Bimini, the Bahama Islands, from August 7 to August 20, 1966; and in that he failed to repay travel charged to the committee for Miss Givens from Miami to Washington, D. C.

6. As chairman of the Committee on Education and Labor, Mr. Powell on March 28, 1965, wrongfully and willfully appropriated $72 of public funds by ordering that a House Education and Labor Committee air travel card be used to purchase air transportation for his own son (Adam Clayton Powell III), for a member of his congressional office clerk-hire staff (Lillian Upshur), and for personal friends (Pearl Swangin and Jack Duncan), none of whom had any connection with official committee business.

7. As chairman of the Committee on Education and Labor, Mr. Powell willfully misappropriated $461.16 of public funds by giving to Emma T. Swann, a staff receptionist, airline tickets purchased with a committee

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credit card for three vacation trips to Miami, Fla., and return to Washington, D. C.

8. During his chairmanship of the Committee on Education and Labor, in the 89th Congress, Mr. Powell falsely certified for payment from public funds, vouchers totaling $1,291.92 covering transportation for other members of the committee staff between Washington, D. C., or New York City and Miami, Fla., when, in fact, the chairman (Mr. Powell) and a female member of the staff had incurred such travel expenses as a part of their private travel to Bimini, the Bahamas.

9. As chairman of the Committee on Education and Labor, Mr. Powell made false reports on expenditures of foreign exchange currency to the Committee on House Administration.

Conclusions and Recommendations

On the basis of the factual record before it, this Select Committee concludes that Member-Elect Adam Clayton Powell meets the qualifications of age, citizenship, and inhabitancy and holds a certificate of election from the State of New York. This Committee concludes, however, that the following conduct and behavior of Adam Clayton Powell has reflected adversely on the integrity and reputation of the House and its Members:

First, Adam Clayton Powell has repeatedly ignored processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct towards the New York courts has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Second, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not performed in Washington, D.C., or New York, as required by law.

Third, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of House funds for private purposes.

Fourth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member.

Simultaneously with the filing of this report and the hearings in connection therewith, the Select Committee is forwarding copies of its hearings, records, and report to the Department of Justice for prompt and appropriate action, with the request that the House be kept advised in the matter.

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This Committee recommends that—

1. Adam Clayton Powell be permitted to take the oath and be seated as a Member of the House of Representatives.

2. Adam Clayton Powell by reason of his gross misconduct be censured and condemned by the House of Representatives.

3. Adam Clayton Powell, as punishment, pay the Clerk of the House, to be disposed of by him according to law, $40,000; that the Sergeant-at-Arms of the House be directed to deduct $1,000 per month from the salary otherwise due Mr. Powell and pay the same to the Clerk, said deductions to continue until said sum of $40,000 is fully paid; and that same sums received by the Clerk shall offset any civil liability of Mr. Powell to the United States of America with respect to the matters referred to in paragraphs Second and Third above.

4. The seniority of Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. The House direct the Clerk of the House of Representatives to forthwith terminate salary payments to Corrine Huff whose name appears on the clerk-hire payroll of Representative Adam Clayton Powell.

6. The House make a study in depth to determine whether or not existing procedural and substantive rules are adequate in cases involving charges of breach of public trust which have been lodged against any Member.

7. The Committee on House Administration, which currently is undertaking a revision of its auditing procedures, be directed by the House to file annually a report of audit of expenditures by each committee of the House and the clerk-hire payroll of each Member.

• • • • •

. . . We recommend the adoption of the following resolution:

Whereas the Select Committee appointed pursuant to House Resolution 1 (90th Cong.) has reached the following conclusions:

First, Adam Clayton Powell possesses the requisite qualifications of age, citizenship, and inhabitancy for membership in the House of Representatives and holds a certificate of election from the State of New York.

Second, Adam Clayton Powell has repeatedly ignored the processes and authority of the courts in the State of New York in legal proceedings pending therein to which he is a party, and his contumacious conduct toward the court of that State has caused him on several occasions to be adjudicated in contempt thereof, thereby reflecting discredit upon and bringing into disrepute the House of Representatives and its Members.

Third, as a Member of this House, Adam Clayton Powell improperly maintained on his clerk-hire payroll Y. Marjorie Flores (Mrs. Adam C. Powell) from August 14, 1964, to December 31, 1966, during which period either she performed no official duties whatever or such duties were not

(Footnote continued on next page)

On March 1, 1967, the House of Representatives, upon presentation to it of the said Committee Report, including the recommended resolution, rejected the resolution as proposed by the Committee and instead adopted House Resolution 278.*

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performed in Washington, D.C., or the State of New York as required by law.

Fourth, as chairman of the Committee on Education and Labor, Adam Clayton Powell permitted and participated in improper expenditures of Government funds for private purposes.

Fifth, the refusal of Adam Clayton Powell to cooperate with the Select Committee and the Special Subcommittee on Contracts of the House Administration Committee in their lawful inquiries authorized by the House of Representatives was contemptuous and was conduct unworthy of a Member:

Now, therefore be it resolved,

1. That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-Elect from the 18th District of the State of New York.

2. That upon taking the oath as a Member of the 90th Congress the said Adam Clayton Powell be brought to the bar of the House in the custody of the Sergeant-at-Arms of the House and be there publicly censured by the Speaker in the name of the House.

3. That Adam Clayton Powell, as punishment, pay to the Clerk of the House to be disposed of by him according to law, $40,000. The Sergeant-at-Arms of the House is directed to deduct $1,000 per month from the salary otherwise due to said Adam Clayton Powell and pay the same to said Clerk, said deductions to continue while any salary is due the said Adam Clayton Powell as a Member of the House of Representatives until said $40,000 is fully paid. Said sums received by the Clerk shall offset to the extent thereof any liability of the said Adam Clayton Powell to the United States of America with respect to the matters referred to in the above paragraphs 3 and 4 of the preamble to this resolution.

4. That the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 90th Congress.

5. That if the said Adam Clayton Powell does not present himself to take the oath of office on or before March 13, 1967, the seat of the 18th District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.

(Exhibit 1C to Petitioners' Motion for Summary Reversal below)

* "RESOLVED, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York be, and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy."

B—*The Proceedings Below*

1. *The initiation of the complaint*

The present action, which was brought by Congressman Powell and thirteen of his constituents, as class representative of the electors of the 18th Congressional District, was instituted by the filing and service of a complaint seeking declaratory and injunctive relief and relief in the nature of mandamus, on March 8, 1967. The defendants named therein are the Speaker of the House of Representatives, five other members thereof, and the Clerk, the Sergeant-at-Arms and the Doorkeepers. The Member-defendants are sued individually and as representative of the class of Members, while the non-Member defendants are sued individually and in their respective capacities as agents or employees of the House of Representatives.

The complaint alleged that House Resolution 278 violated Article I, Section 2, Clause 2 of the Constitution of the United States in that it prescribed qualifications for membership in the House of Representatives other than those established therein. The complaint further alleged that the enactment of House Resolution 278, as to all non-white electors of the 18th Congressional District of New York, violated the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. The complaint further alleged that as to the female electors of the 18th Congressional District of New York, the enactment of House Resolution 278 violated the Nineteenth Amendment to the Constitution of the United States.

The complaint further alleged that insofar as Member-Elect Powell is concerned, House Resolution 278 constitutes a bill of attainder and an *ex post facto* law, in violation of Article I, Section 9 of the Constitution and inflicts cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution of the United States. Finally, the

complaint further alleged that the hearings before the select committee, as well as House Resolution 278 and the debate thereon, denied Congressman Powell his fundamental rights of due process of law, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

2. *Proceedings in the District Court*

After the filing and service of the complaint upon respondents, an application for the certification of the necessity of convening a three-judge court pursuant to 28 U.S.C. 2282 and 2284, and a motion for a preliminary injunction came on before the United States District Court for the District of Columbia on April 4, 1967. In addition to opposing Petitioners' application for the certification of the necessity of convening a three-judge court and their motion for interim injunctive relief, respondents moved to dismiss the action for lack of jurisdiction generally on the grounds that:

> (a) the District Court did not have jurisdiction over the subject matter of the action;
>
> (b) the District Court did not have jurisdiction over the persons of the respondents; and
>
> (c) the complaint failed to state a cause of action upon which relief could be granted.

On April 7, 1967, the District Court issued an order (i) denying the application for the certification of the necessity of three-judge court; (ii) dismissed the complaint for want of jurisdiction over the subject matter, and (iii) denying the motion for a preliminary injunction. In so doing the Court bottomed its decision on what it considered the doctrine of separation of powers. As is stated:

> "It is the conclusion of this Court that for the Court to decide this case on the merits and to grant

> any of the relief prayed for in the complaint would constitute a clear violation of the doctrine of separation of powers. For this Court to order any Member of the House of Representatives of the United States, any officer of the House, or any employee of the House to do or not to do an act related to the organization or membership of that House, would be for the Court to crash through a political thicket into political quicksand.
>
> "This Court holds, therefore, that by reason of the doctrine of separation of powers, this Court has no jurisdiction in this matter."

At the same time the District Court entered its order denying the application for a statutory three-judge court and for preliminary injunction and granting the motion to dismiss the complaint for want of jurisdiction of the subject matter. A notice of appeal from the aforesaid order was duly and immediately filed, on April 7, 1967.

3. *Proceedings in the United States Court of Appeals for the District of Columbia Circuit*

On April 9, 1967, Petitioners moved in the Court of Appeals for a summary reversal of the order and judgment of the District Court, a dispensation of the requirement for the filing of briefs and an immediate hearing thereon. On April 19, 1967, the Court of Appeals denied that portion of the motion seeking an immediate hearing thereon.

Subsequently, and on April 27, 1967, Petitioners' motion for summary reversal of the order and judgment of the District Court came before the Court of Appeals, Bazelon, Chief Judge, and Burger and Leventhal, Circuit Judges. Later that day, the Court of Appeals entered an order denying Petitioners' motions for summary reversal and to

dispense with the filing of briefs, ordered that the appeal be heard on the original record on appeal in lieu of the filing of a printed joint appendix, directed counsel to establish a mutually agreeable briefing schedule by conferring with the Clerk of the Court, and directed the Clerk "to schedule this case for argument on a day as soon after the briefs are filed as the business of the Court will permit."

On May 4, 1967, Petitioners, cognizant that they could not obtain review in this Court before well into the October, 1967 Term by any other procedure than that established by Rule 20 of the Revised Rules of this Court, informed the Court of Appeals that they intended to file an application for a writt of certiorari pursuant thereo. At the same time, Petitioners moved the Court of Appeals to defer any further consideration of their appeal pending the decision of this Court on their application for a writ of certiorari pending judgment below. Thereafter, and on May 5, 1967, Petitioners filed and served a designation of the entire record in the Court of Appeals. On May 10, 1967, the Court of Appeals recognizing "that novel issues of substantial public importance were tendered which . . . should be resolved at an early date" entered an order providing that the time for filing of briefs in that court be extended pending disposition of this Petition by this Court, that the order of the Court of Appeals would be stayed if this Petition is granted, that except as stated in the order, the appellants' motion to stay proceedings was denied without prejudice to the filing of any motion to advance argument if the briefs are filed in the Court of Appeals, and that either party may seek further relief by appropriate motion for good and sufficient cause shown.

Following the denial by this Court of Petitioners' application for a writ of certiorari pursuant to Rule 20,* argument was had in the Court of Appeals. On February

* 387 U.S. 933.

28, 1968, the Court of Appeals affirmed the dismissal of the complaint.

A Petition for Writ of Certiorari to the Court of Appeals for the District of Columbia was granted by this Court on November 18, 1968.

* * * * *

Upon the convening of the 91st Congress on Friday, January 3, 1969, Member-elect Adam Clayton Powell was administered the oath of office and seated pursuant to the following resolution:

H. RES. 2

Resolved—

(1) That the Speaker administer the oath of office to the said Adam Clayton Powell, Member-elect from the Eighteenth District of the State of New York.

(2) That as punishment Adam Clayton Powell be and he hereby is fined the sum of $25,000, said sum to be paid to the Clerk to be disposed of by him according to law. The Sergeant at Arms of the House is directed to deduct $1,150 per month from the salary otherwise due the said Adam Clayton Powell, and pay the same to said Clerk until said $25,000 fine is fully paid.

(3) That as further punishment the seniority of the said Adam Clayton Powell in the House of Representatives commence as of the date he takes the oath as a Member of the 91st Congress.

(4) That if the said Adam Clayton Powell does not present himself to take the oath of office on or before January 15, 1969, the seat of the Eighteenth District of the State of New York shall be deemed vacant and the Speaker shall notify the Governor of the State of New York of the existing vacancy.*

* Cong. Rec., January 3, 1969, p. H19.

This recent action of the House continues the unconstitutional conduct of the respondent, which is developed in this appeal.*

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* Congressman Celler, Chairman of the House Judiciary Committee, on January 3, 1969, during the debate on the seating of Mr. Powell, observed:

Mr. CELLER. Mr. Speaker, I yield the balance of the time to myself.

Mr. Speaker, there is a great constitutional question involved here, and that must be made as crystal clear as possible, and that is that the only issue at this point is in determining whether or not ADAM CLAYTON POWELL fits the qualifications laid down in article I, section 5 of the Constitution; namely, inhabitancy, age, and citizenship.

He satisfies those three conditions. He therefore should be admitted to membership in the House of Representatives. Any other qualifications are illegal as far as this House is concerned at this time.

It is true that article I, section 5, of the Constitution provides that the House shall be the judge of the qualifications of its Members.

But we have no right at this juncture to add to the qualifications of article I, section 5 of the Constitution. Make him a Member and then offer a resolution to make inquiry as to his conduct and as to his fitness, That resolution will be referred to an appropriate committee by the Speaker, and inquiry can be made. But what does the MacGregor resolution do?

Mr. CAREY. Mr. Speaker, will the gentleman yield?

Mr. CELLER. Mr. Speaker, I refuse to yield at this time.

The MacGregor resolution says that in addition to the three qualifications there shall be another qualification, a judgment shall be entered against ADAM CLAYTON POWELL in the sum of $30,000. In other words, in addition to the three qualifications, the MacGregor resolution adds sanctions, adds punishment, and adds a judgment. We have no right to do that, and I am certain the Supreme Court when it makes a decision on ADAM CLAYTON POWELL will so decide.

We have no right, none whatsoever, to enlarge the constitutional qualifications at this juncture, at this time.

(Cong. Rec., January 3, 1969, p. H11).

Summary of Argument

The sweeping constitutional issues in this case which touch the "bedrock of our political system", *Reynolds* v. *Sims*, 377 U.S. 533, the concept of representative democracy, and raise the most fundamental questions concerning the responsibility of the Court as the "ultimate interpreter of the Constitution", *Baker* v. *Carr*, 369 U.S. 194, arise out of the extraordinary action of the House of Representatives on March 1st, 1967, in excluding Adam Clayton Powell, Jr., the duly elected Member-elect from the 18th Congressional District of New York and permanently barring him from the entire 90th Session of the House, although he had been found by the House itself to possess all the requisite constitutional qualifications for membership in that legislative body.*

I

The action of the House in refusing to allow a duly elected Representative of the people who meets all the constitutional qualifications for membership in the House to take his seat violates the Constitution of the United States.

(a) The House of Representatives is required under the Constitution to seat a duly qualified Congressman who meets all qualifications for membership in the House set forth in the Constitution. It was the firm intention of the Framers that the Legislature was to have no power to alter, add to, vary or ignore the constitutionally prescribed qualifications for membership in either House. The historical

* On January 3, 1969, in admitting Adam Clayton Powell to membership in the House by creating additional qualifications for his admission in erecting certain conditions of punishment, the House continued this unconstitutional course of conduct.

taproots of this decision made at the Philadelphia convention are to be found in the contemporaneous struggles for the rights of the electorate in the British Parliament and in particular the struggle around the exclusion of John Wilkes from the House of Commons. Moreover, the history of the period of ratification of the Constitution reveals that it would not have been adopted if the ratifying conventions had believed that the Constitution was intended to give to the Legislative branch any power to refuse to seat an elected representative of the people who met the qualifications explicitly set forth in the Constitution itself. Over the years this Court has consistently restated this first precept of representative democracy as expressed by Hamilton at the New York ratifying convention that "the true principle of a Republic is, that the people should choose whom they please to govern them." Elliot's Debates, Book 5, Vol. II, p. 257. From *Newberry* v. *United States*, 256 U.S. 232 to *Bond* v. *Floyd*, 385 U.S. 116, this Court has reaffirmed the Philadelphia conclusion that the Legislature may not interfere with the free choice by the people of representatives who meet the constitutional qualifications for membership. The first principles underlying this understanding have been reenforced in many recent decisions of the Court from *Baker* v. *Carr* to *Williams* v. *Rhodes* in this Term that the right of the people to choose freely and without restraint their elected representatives is of the essence in a democratic society. Finally, the most important and persuasive precedents of the House and Senate have always acknowledged the constitutional limitations upon their own power to exclude duly elected representatives of the people who meet all the constitutional qualifications for membership in either body.

(b) The punishment of exclusion from membership in the House for the entire 90th Congress inflicted upon Congressman-elect Powell violated Article One, Section 9, Clause 3 of the Constitution prohibiting Bills of Attainder. The

action of the House was in classic terms a "legislative act which inflicts punishment without a judicial trial." *Cummings* v. *Missouri,* 4 Wall 277; *United States* v. *Brown,* 381 U.S. 437.

(c) The punishment of exclusion from membership in the House violated the Due Process Clause of the Fifth Amendment. It was not an action "based upon reasonable consideration of pertinent matters of fact according to established principles of law." *Newberry* v. *United States,* 256 U.S. 232. It was "an arbitrary edict of exclusion." *Newberry* v. *United States,* 256 U.S. at 285. Every elementary right of due process of law was denied to the Congressman-elect on the fundamentally erroneous theory that the proceeding against him was not "adversary" in nature. Hearings of Select Committee, at p. 59.

(d) The exclusion of the Congressman-elect violated his rights and the rights of the overwhelming Negro majority of the citizens of the 18th Congressional District to the equal rights guaranteed to black citizens by the Thirteenth, Fourteenth and Fifteenth Amendments. Even the Chairman of the Select Committee which tried the Congressman-elect has publicly conceded that the punitive action of exclusion of Congressman Powell was at least in part based upon constitutionally impermissible considerations of racism. Such an action tends to perpetuate theories of black inferiority at the heart of the "badges and indicia" of slavery which this nation has pledged itself solemnly to eliminate forever from every aspect of its life.

II

The dismissal of the complaint by the District Court for want of jurisdiction over the subject matter was, as the Court of Appeals acknowledged, wholly erroneous. The complaint presented issues which "arise under" the federal Constitution; it is a "case or controversy" within the meaning of Article III, and the cause is "described in a juris-

dictional statute", namely Title 28 U.S.C. 1331 (a). Cf. *Baker* v. *Carr, supra.*

Furthermore the subject matter of the suit was justiciable and the refusal of the lower courts to exercise federal jurisdiction dangerously undermines the historic constitutional role of the national courts as the guardians of the civil and political liberties of the people and negates the role of the court as the "ultimate interpreter" of the Constitution. *Baker* v. *Carr, supra.* The lower courts have failed to undertake the "delicate exercise in constitutional interpretation" which as this Court taught in *Baker* is essential to a determination of "justiciability". This "exercise in constitutional interpretation" would reveal that the issue in this case has *not* been confided by the Constitution to the exclusive control of the Legislature itself and that "the action of that branch exceeds whatever authority has been committed [to it]." *Baker* v. *Carr* at 311. Under such circumstances a classic case for the exercise of judicial power exists. This Court has taught that the "power of courts to protect the constitutional rights of individuals from legislative destruction [is] a power recognized at least since our decision in *Marbury* v. *Madison,* 1 Cranch 137 in 1803" *Wesberry* v. *Sanders,* 376 U.S. 1 (opinion of Mr. Justice Black for the Court). The concept of "separation of powers" requires, rather than prohibits judicial intervention in this case. Any other approach would "subvert the very foundations of all written constitutions" *Marbury* v. *Madison, supra,* at p. 178.

The suggestion implicit in the lower court opinions that in some manner the case is not justiciable because the Legislative branch might not respect the decisions of this Court as to the meaning of the Constitution, thus impelling a "confrontation" between the branches, is as this Court has taught, an "impermissible suggestion". *MacPherson* v. *Blacker,* 146 U.S. 1. See *Williams* v. *Rhodes,* — U.S. —,

(#543-544 October Term, 1968). The underlying precept that this is a "government of laws and not of men", *Marbury* v. *Madison, supra,* at p. 162, requires an acceptance by all branches of government, and indeed by all the people that it is "emphatically the province and duty of the judicial court to say what the law is" *Marbury* v. *Madison, supra,* at p. 175.

The courts cannot decline their constitutional responsibilities out of concern for an "impermissible suggestion" *MacPherson* v. *Blacker, supra,* that the Legislative branch is not equally committed to the first principles of a "government of laws and not men" *Marbury* v. *Madison, supra,* and will question the role of the Judicial branch as "ultimate interpreter of the Constitution". *Baker* v. *Carr, supra.*

ARGUMENT

Point One

The action of the majority of the House of Representatives in refusing to allow a duly elected Representative of the people who meets all the constitutional qualifications for membership in the House to take his seat and further barring him from membership in the House for the entire 90th Congress violated the Constitution of the United States.

Preliminary Statement

There are certain cases in the history of this Court which shape the very fabric of our society, which touch the "bedrock of our political system" *Reynolds* v. *Sims,* 377 U. S. 533 (1964), and which "strike at the heart of representative government" *Harmon* v. *Forsennius,* 380 U. S. 528. These are cases which due to their "peculiar delicacy", *Marbury* v. *Madison,* 1 Cranch 137, invoke that ultimate role of this Court which occasioned only recently words which give strength and security to a free people—

that where "a denial of constitutionally protected rights demands judicial protection, our oath and our office require no less of us" (*Reynolds* v. *Sims,* supra, at p. 565, opinion of the Chief Justice). This appeal once again brings such a case before the Court.

On March 1st 1966 the House of Representatives, by formal vote, concluded that Congressman-Elect Adam Clayton Powell had been duly elected by the constitutents of the 18th Congressional District of the State of New York, held a proper Certificate of Election from that State, and "possesses the requisite qualifications of age, citizenship and inhabitancy for membership in the House of Representatives. House Res. 278, March 1st, 1967, Par. One. Nevertheless, in an unprecedented and extraordinary action, the House, overriding the urging of its own Select Committee, the majority and minority leaders of both political parties, and the chairman of its own Judiciary Committee, refused to permit the Speaker to swear in Congressman-Elect Powell as the representatives of the citizens of the district which had overwhelmingly elected him as their representative and ordered that he "be and the same hereby is excluded from membership in the 90th Congress." H. Res. 278 [1]

This action of the House in refusing to seat the chosen representative of the citizens of the 18th Congressional District although he concededly met all constitutional qualifications for membership in the House and further barring him from representing his constituents for the entire 90th Congress was in open violation of the Constitution of the United States. It disregarded the firm intentions of the framers of the original covenant. It disregarded the clear teachings of this Court from *Newberry* v. *United States,* 256 U.S. 232 (1920), to *Bond* v. *Floyd,* 385

[1] See Statute Involved, *supra, at* p. 2.

U.S. 186, in the 1966 Term of Court. It brushed aside reasoned and thoughtful precedents and rulings of its own body. But most serious of all, it challenged the most fundamental precepts of representative democracy upon which this experiment in human government was founded and upon which its ultimate safety depends.

A. *The House of Representatives is required under the Constitution to seat a duly elected Congressman who meets all the qualifications for membership in the House set forth in the Constitution.**

(i) *It was the firm intention of the Framers that the legislature was to have no power to alter, add to, vary or ignore the constitutional qualifications for membership in either House.*

The history of the proceedings at the Constitutional Convention of 1787 during which the age, citizenship and inhabitancy qualifications for membership in the House were debated and accepted,[2] and all other qualifications whatsoever were rejected, reveals the unmistakable intention of the Enactors that neither branch of the Legislature was to have any power to alter, add to, vary or ignore the constitutional qualifications. Accordingly the power of each House to be the "judge of the . . . qualifications of its own members",[3] was in the intention of the

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* Counsel wish to express their appreciation to Harriet Van Tassel, a member of the New York Bar, for her intensive research work on the materials included in this section.

[2] Article 1, § 2, Clause 2 reads:
"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen."

[3] Article I, Section 5, reads in pertinent part:
"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."

Framers, restricted solely to these qualifications set forth in the Constitution itself.

The legislative history of both of these critical clauses during the Philadelphia convention makes this crystal clear. As Professor Charles Warren describes the proceedings in his authoritative study of the Constitutional Convention, *The Making of our Constitution,* (1928) the intention of the Founding Fathers that the Legislature was to have no power to alter, add to or ignore the Constitutional qualifications for membership in either House could not have been clearer.

After agreeing upon the age, citizenship and inhabitancy qualifications, 2 Farrand, *Records of the Federal Convention,* p. 248, et seq., the Convention turned to a proposal of Gouveneur Morris which would "leave the Legislature entirely at large" to set qualifications for membership in each House. 2, Farrand, p. 250.[4] The effect of this proposal,

[4] Gouveneur Morris' proposal arose out of a discussion which had great significance to the members of the Convention. After voting upon the age and residence qualifications the Convention was confronted with a proposal that an additional qualification of landed property be affixed to members of the Legislature. On June 26th, George Mason had suggested "the propriety of annexing to the office of Senator a qualification of property" Elliot's Debates, Vol. 5, p. 247. On July 26th, Mason further moved that "the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property . . . in members of the legislature . . ." Farrand, Vol. 2, p. 121. John Dickinson, of Delaware, strongly opposed such a clause stating that he "doubted the policy of interweaving into a Republican Constitution a veneration for wealth . . ." Farrand, Vol. 2, p. 123. On August 6, the Committee of Detail reported a provision that "The Legislature of the United States shall have authority to establish such uniform qualification of the members of each House, with regard to property, as to the said Legislature shall seem expedient." Farrand, Vol. 2, p. 179. At this point Charles Pinckney moved that the President and Judges also be required to possess "competent property to make them independent." Farrand, Vol. 2, p. 248). Benjamin Franklin strongly opposed this proposal stating that he "expressed his dislike of everything that tended to debase the spirit of the common people." Farrand, Vol. 2, p. 249. Pinkney's motion was "rejected by so general a *no* that the States were not called". Farrand, Vol. 2, p. 249. At this point Morris moved to give Congress unlimited power to fix qualifications.

Professor Warren points out, "if adopted, would have been to allow Congress to establish any qualifications which it deemed expedient." Warren, at p. 420.

A debate sweeping in its consequences for the establishment of the fundamental principles of representative democracy in this country then developed. Mr. Williamson, of North Carolina, and Mr. Madison, of Virginia, strongly opposed such a proposal. Mr. Williamson argued:

> "This could surely never be admitted. Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body." 2 Farrand, *Records of the Federal Convention,* p. 250.

Mr. Madison warned that to permit the Congress to establish such qualifications as it deemed expedient would be "improper and dangerous". Madison's own summary of his position at the Convention is compelling:[5]

> "Mr. (Madison) was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect. In all cases where the representatives of the

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Farrand, Vol. 2, p. 250. This motion was defeated and following this the Convention rejected the clause as reported by the Committee. Farrand, Vol. 2, p. 251. For a more extensive discussion of the debates and parliamentary moves see Warren, *The Making of the Constitution,* pp. 412 to 426.

[5] Farrand, Vol. 2, p. 250.

people will have a personal interest distinct from that of their Constituents, there was the same reason for being jealous of them, as there was for relying on them with full confidence, when they had a common interest . . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of [a weaker] faction."

* * * * *

"Mr. (Madison) observed that the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention.[6] They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties."

The conclusion which flows from this legislative history is inescapable for as Professor Warren points out:

"The Convention evidently concurred in these views, for it defeated the proposal to give to Congress power to establish qualifications in general by a vote of seven states to four . . . ." Warren, p. 421, Farrand, Vol. 2, p. 250

At the same time the Convention also defeated the proposal for a property qualification. Farrand, Vol. 2, p. 250.

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[6] As Professor Warren point out, Madison's reference "was undoubtedly to the famous election case of John Wilkes in England," Warren, *supra*, at p. 420, who had been excluded as a member by the House of Commons on three occasions in 1769. We discuss, *infra*, at pp. 33-45 *et seq.* the extraordinary significance of the Wilkes case in respect to an understanding of the reasons underlying the insistence of the Founders that no power may safely be vested in the legislature to alter in any way the constitutional qualifications for membership in the legislature.

And on this same day, August 10, the Convention, without debate or dissent, agreed to that section of the report which provided that: "Each House shall be the judge of the elections, returns and qualifications of its own members." Farrand, Vol. 2, p. 254.

As Professor Warren points out, "the meaning of this provision (which became Article I, § 5 of the Constitution, as finally drafted) is clearly shown" if taken in connection with the legislative actions and debates of August 10th which surrounded its enactment. Warren, supra, at p. 420. As Professor Warren summarizes this conclusion:

> "Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship and residence.[7] For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Con-

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[7] Professor Warren further documents his conclusions by noting the interchange between Dickinson, of Delaware, and the Committee of Detail. As Professor Warren comments:

> "It is to be noted especially that Dickinson of Delaware, on July 26, expressed his opposition to 'any recital of qualifications in the Constitution' at all on this very ground; for, said he, 'it was impossible to make a compleat one and a partial one would by implication tie up the hands of the Legislature from supplying the omission.' The Committee of Detail had differed from Dickinson's view and had made express provision as to qualifications. As to this express provision, Dickinson's argument was undoubtedly applicable that the recital of these qualifications did 'by implication tie up the hands of the Legislature from supplying' any further qualifications." Warren, *supra,* at pp. 421, 422.

gress power to establish qualifications in general, the maximum *expressio unius exclusio alterius* would seem to apply . . . . The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications." Warren, supra, at p. 421 [8]

(ii) *The "taproots" of this decision in Philadelphia are to be found in the contemporaneous struggles for the rights of the electorate in the British Parliament.*

This conclusion of the Constitutional Convention that the Legislature was to have no power to refuse to seat a duly elected member who meets all the constitutional qualifications did not flow from dry or technical considerations on the part of the Founders. It reflected a deep concern that the vesting of any power in the Legislature to modify or alter the strict constitutional qualifications for membership

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[8] The clear intention of the Enactors to restrict Congressional power to "judge" the "qualifications" of its members to the constitutionally enumerated qualifications is evidenced throughout the Convention proceedings. For example, Prof. Warren points out:

"It is, moreover, especially to be noted that the provisions that 'each House shall be the judge of . . . the qualifications of its own members' did not originate with this Convention. Such a provision was found in the State Constitutions of Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, and South Carolina. It was taken originally from William Penn's charter to Pennsylvania of 1701, which provided that the Assembly 'shall have power to choose a Speaker and their other officers, and shall be judges of the qualifications and elections of their own members.' Each of the State Constitutions contained provisions establishing many qualifications for members of the Legislature—residence, age, religion, property and others (qualifications expressed in both affirmative and negative terms); and it was with reference to possession of such qualifications that their Legislatures were authorized to judge as to their members. ***There is, so far as appears, no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution.***" [Emphasis added] Warren, ***supra,*** **at pp. 423-4.**

in either House would be "improper and dangerous" to the first principles of representative government. Madison, Farrand, Vol. 2, p. 249.

As Madison warned, any deviation from this strict concept would "subvert the Constitution", Farrand, Vol. 2, p. 249. To permit a Legislature to control in any way the qualifications of elected representatives of the people was the path by which "a Republic may be converted into an aristocracy or oligarchy." Farrand, Vol. 2, p. 249.

This powerful conviction of the Founders that "the qualifications of elected representatives of the people were fundamental articles in a Republican Government and ought to be fixed by the Constitution," [remarks of Mr. Madison, Farrand, Vol. 2, p. 249] reflected a determination on the part of the Enactors to guarantee that recent activities of the British Parliament "subversive of the rights of"[9] the British people never be tolerated in this country. Thus Mr. Madison "observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or religious parties" Farrand, Vol. 2, p. 250.

As Professor Warren points out, "Madison's reference was undoubtedly to the famous election case of John Wilkes, in England, who had been rejected three times as a member by the House of Commons" Warren, supra, p. 470. Perhaps in no other case is the admonition of Mr. Justice Holmes so appropriate that a "page of history is worth a volume of logic". *New York Trust Co.* v. *Eisner,* 256 U.S. 345, 349. In the deepest sense of the word the contemporaneous

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[9] See Parliamentary Debates, 22 George III, 1411, discussed, *infra,* at pp. 39 *et seq.*

struggles in England of John Wilkes against a "legislative tyranny" which "infringed more and more upon the fundamental rights of the electorate of England", Wittke, *The History of English Parliamentary Privilege* (Ohio State Univ. 1921) was the "lesson" Mr. Madison referred to in his comments on the floor of the Philadelphia convention. This "lesson" had seared deeply into the American consciousness and was at the heart of the insistence of the framers of the Constitution that the Legislature must have no power to restrict the free choice of the representatives of the people beyond those qualifications established by the people themselves in the fundamental law of the land.[10]

In 1757 John Wilkes had been elected member of Parliament for Aylesbury. On April 23, 1763, he issued the famous Number 45 of the *North Briton* attacking the government over the peace treaty with France, charging that bribery was used to secure pliant cooperation with the Commons. A general warrant was issued for his arrest, and although he was freed by the Court of Common Pleas on the grounds of parliamentary immunity, he was brought to trial before King's Bench on charges of sedition and obscenity. Prior to the trial he was expelled, on January 20, 1764, from the House of Commons by a large majority on the grounds of his publication of Number 45.[11]

Rather than stand trial, Wilkes fled to France and the court adjudicated him in contempt and passed a sentence of outlawry. In 1768 Wilkes returned to England announcing his candidacy for Member from Middlesex County. At the March 28 elections he was overwhelmingly elected over two opponents. Following an extraordinary public demonstration in London in his support, culminating in the famous

[10] See this Court's discussion of the significance of the struggles of John Wilkes upon the emergence of fundamental freedoms in *Watkins* v. *United States*, 354 U.S. 178, at pp. 190, 191.

[11] Postgate, "That Devil Wilkes" (New York 1929), pp. 11, 51-53, 82.

Massacre of St. George's Fields, the charge of outlawry was dismissed, but he was sentenced to twelve months in prison on the original seditious libel charge. On February 3, 1769, the House of Commons voted to exclude him from the House on the grounds of "incapacity of John Wilkes, Esq. to be elected a Member to serve in said parliament." [12] He was promptly returned, unopposed, by his constituency on February 16, 1769. On February 17, 1769, the Commons excluded Wilkes a second time declaring once again his "incapacity" to sit as a Member. On March 16, 1769, Wilkes was again elected by his constituents by a vote of 1,143 over one Henry Luttrell, who had received 296 votes. On March 17, 1769, the House for the third time excluded Wilkes, this time declaring Luttrell the elected member.[13]

Wilkes was released from prison in 1770, became Lord Mayor of London and resumed his seat in the House in 1774. From 1774 until 1780, in every session of Parliament he introduced and conducted bitter struggles to expunge from the records of the House the three prior resolutions of exclusion, culminating in his ultimate victory in 1782. In the course of these struggles the concepts which Wilkes insisted upon, the fundamental right of the electorate to choose their own representative free from the control of the legislature and subject only to qualifications set by established law, became a burning issue in the American Revolution. As one of the most eminent historians of British and American relations at the time of the Revolution recently wrote:

> "The cry of 'Wilkes and Liberty' echoed loudly across the Atlantic ocean as wide publicity was given to every step of Wilkes' public career in the colonial press . . . . The reaction in America took on significant

[12] Postgate, *supra*, p. 88.

[13] Postgate, *supra*, p. 146, *et seq.*

> proportions. Colonials tended to identify their cause with that of Wilkes. They saw him as a popular hero and a martyr to the struggle for liberty . . . . They named towns, counties, and even children in his honor. Finally, colonial ceremonies commemorating the repeal of the Stamp Act held by the Sons of Liberty in Boston, New York, and elsewhere during the period 1768-1770, repeatedly raised the toast, 'Wilkes and Liberty.' " Lawrence H. Gipson, Vol. XI, *The British Empire Before the American Revolution* (New York, 1965) [14]

The struggle of Wilkes against the arbitrary right of a legislature to reject elected representatives of the people who otherwise meet the qualifications of law became intertwined with America's own cause. As a leading biographer of Wilkes wrote:

> "It was a matter of common agreement at the time that the resistance of Wilkes to oppression had an immediate effect upon America . . . . The popularity of Wilkes has left its mark on the map of America. Wilkes County in Georgia has disappeared, but Wilkes county in North Carolina has Wilkesboro as its chief town, and Wilkes-Barre in Pennsylvania commemorates both him and Col. Isaac Barre . . . Children were named after him."
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> "Names like Quincy, Hancock, and Adams now bulk enormous in American history; Wilkes is forgotten. But here [in the surviving correspondence between

[14] It is indicative of the American identification of the cause of Wilkes with their own struggle that a popular song of the Revolutionary Period, entitled "Fish and Tea" linked the name of Wilkes together with the other most prominent and beloved English supporters of the American cause, the Earl of Chatham, Edmund Burke, Lord Camden, Colonel Isaac Barry, and Sergeant Glynn [Wilkes' chief advisor and counsel]. See *Diary of the American Revolution*, compiled by Frank Moore and edited by John Anthony Scott (N.Y., 1967).

> Wilkes and the Sons of Liberty] they are small men patiently soliciting the attention of a great one . . . . They formed in the eyes of the world but one section of the great mass of supporters of Wilkes and they would not at this time have objected to the description of themselves as Wilkesites." Postgate, *That Devil Wilkes* (New York, 1929) [15]

The cause which Wilkes had become identified with—the right of free men to select their own representative subject only to restrictions of fundamental law—was recognized in the mother country itself as at the very center of the struggle for American independence.[16]

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[15] The Boston Sons of Liberty wrote to Wilkes in 1768 to congratulate him on his return to England from exile and his second election, Here, in part, is what they said:

> "The friends of Liberty, Wilkes, Peace and good order, assembled at the Whig Tavern, Boston, New England, take the first opportunity to congratulate your country, the British Colonies, and yourself on your happy return to the land, alone worthy of such an inhabitant. Worthy! as they have lately manifested an incontestable proof of virtue in the honorable and important trust reposed in you by the county of Middlesex."
>
> Benj: Kent — John Adams
> Thos: Young — Jos. Warren
> Benj: Church

The Sons of Liberty to John Wilkes, Boston, June 6, 1768. See Postgate, *supra* at pp. 11-12.

See also Bancroft, *History of the United States*, Vol. III (1879 ed.) "The cry for 'Wilkes and Liberty' was heard in all parts of the British dominion", at p. 373.

[16] In the course of the parliamentary debate in 1781 on the question of expunging the exclusion resolution, the debates report:

> "Mr. Turner said, that the resolution complained of [the exclusion of Wilkes] was no subject of merriment. It had in fact been one of the great causes which had separated this country from America. It had given the colonies just reason to distrust the parliament of Great Britain. After such a resolution they could no longer consider them as the constituents of the people, but the packed adherents of a profligate ministry. Was not the suspicion hut too well founded? . . . They were

The concepts underlying Wilkes' struggle for the freedom of selection of their representatives by the people, limited only by fundamental law, reflected the very essence of the principles Madison insisted upon on the floor of the Philadelphia Convention. In an address to the freeholders of Middlesex after his second exclusion from Parliament, Wilkes wrote:

> "If ministers can once usurp the power of declaring who shall *not* be your representatives, the next step is very easy and will follow speedily. It is that of telling you, whom you *shall* send to Parliament, and then the boasted Constitution of England will be entirely torn up by the roots." Postgate, The Sons of Liberty to John Wilkes, Boston, 1768.

The debates in the Commons, resulting eventually in 1782 in the expunging of the resolutions of exclusion, expressed the concept which Madison said must be the "lesson worthy of our attention." Farrand, Vol. 2, p. 250.[17] The funda-

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no more to be considered as the representatives of the people. He called upon them with the anxious concern, to rescue themselves from the imputation of such vassalage, and in doing this they would more effectually invite the Americans to a return of their confidence, than by any other step whatever." Parliamentary Debates, 21 George III, 100 (1781).

[17] A few excerpts from the Parliamentary debates urging the expunging of the Wilkes exclusion resolutions highlight those principles which the Founders drew upon in Philadelphia in concluding that no power must be vested in the legislature to refuse to seat an elected representative of the people who meets the qualifications for office established by constitutional law. Consider, for example, these statements made on the floor of Commons in 1775:

> "But, Sir, I beg leave to assert, that this was not the case in the Middlesex business. Mr. Wilkes was qualified by the law of the land:
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> • • • • •
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> "This House, Sir, is created by the people, as the other is by the king. What right can the majority have to say to any county, city, or borough, you shall not have a particular person to be your rep-

mental idea underlying the Philadelphia conclusions flowed from a deepfelt belief that the right to choose a representative is an inherent right of the people which can be re-

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resentative, only because he is obnoxious to us, when he is qualified by law? Every county, city, or borough, has an equal right with all other counties, cities, and boroughs, to its own choice, to its own distinct deputy in the great council of the nation. Each is free and independent, invested with precisely the same powers." Parliamentary Debates, 15 George III, 366 (1775).

Or in these ringing words of Mr. Wilkes in arguing for the expunging of the exclusion resolution:

"In the first formation of this government, in the original settlement of our constitution, the people expressly reserved to themselves a very considerable part of the legislative power, which they consented to share jointly with a King and House of Lords. From the great population of our island this right could not be claimed and exercised personally, and therefore the many were compelled to delegate that power to a few, who thus were chosen their deputies and agents only, their representatives. It follows directly from the very idea of a choice, that such choice must be free and uncontrouled, admitting of no restrictions, but the law of the land, to which the King and the Lords are equally subject, and what must arise from the nature of the trust. . . . The freedom of election is, then, the common right of the people of England, their fair and just share of power; and I hold it to be the most glorious inheritance of every subject of this realm, the noblest, and, I trust, the most solid part of that beautiful fabric, the English constitution. . . . The House of Peers, Sir, in the case of *Ashby* and *White* in 1704, determined, 'a man has a right to his freehold [by the common law; and the law having annexed his right of voting to his freehold] it is of the nature of his freehold, and must depend upon it.' On the same occasion likewise they declared, 'it is absurd to say, the elector's right of chusing is founded upon the law and custom of parliament. It is an original right, part of the constitution of the kingdom, as much as a parliament is, and from whence the persons elected to serve in parliament do derive their authority, and can have no other but that which is given to them by those that have the original right to chuse them.' The greatest law authorities, both ancient and modern, agree in the opinion, that every subject of the realm, not disqualified by law, is eligible of common right. . . . This common right of the subject, Sir, was violated by the majority of the last House of Commons; and I affirm, that they, and in particular, if I am rightly informed, the noble lord with the blue ribband, committed by that act high treason against Magna Charta. This House only without the interference of the other parts of the legislature, took upon them to make the law. They

stricted only by the fundamental law made by the people themselves. This was the heart of the Wilkes argument:

> "The laws of the land are of no avail, when this House alone can make a new law, adapted to the caprice, violence, or injustice of every emergency, and when representation in parliament no longer depends upon the choice of the electors . . . Can there be a more solemn mockery of the rights of a free people?" Parliamentary Debates, 16 George III, 1339 (1776)
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> "Where, however, there is no *natural or legal disability, the capacity of being elected is the inherent right of every freeman of the realm.* He cannot be divested of it without an equal injury to the party, and to the

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adjudged me incapable of being elected a member to serve in that parliament, although I was qualified by the law of the land, and the noble lord declared in this House, 'if any other candidate had only six votes, he would seat him for Middlesex.' I repeat it, Sir, this violence was a direct infringement of Magna Charta, high treason against the sacred charter of our liberties. The words to which I allude, ought always to be written in letters of gold: 'No freeman shall be dis-seized of his freehold, or liberties, or free customs, unless by the lawful judgment of his peers, or, by the law of the land.' By the conduct of that majority, and of the noble lord, they assumed to themselves the power of making the law, and at the same moment invaded the rights of the people, the King, and the Lords. The two last tamely acquiesced in the exercise of a power, which had been in a great instance fatal to their predecessors, had put an end to their very existence; but the people, Sir, and in particular the spirited freeholders of this country, whose ruling passion is the love of liberty, have not yet forgiven the attack on their rights. So dangerous a precedent of usurped power, which may in future times be cited and adopted in practice by a despotic minister of the crown, ought to be expunged from the Journals of this House." Parliamentary Debate, 15 George III, 361-363.

[It is of some passing interest that the Wilkes exclusion resolution was cited as authority for the power of the House to exclude Congressman-Elect Powell by the respondents in their brief to the District Court. Brief to the District Court at pp. 25-26.] See also the reliance upon the Wilkes precedent by the respondents in their "compilation of English and American historical material . . ." filed with the Court of Appeals, pp. 15-24.

> constituent, in whom the power is constitutionally lodged of determining whom he thinks the most fit and proper person to act for him in the great council of the nation. The declaration of the House therefore, that any man, *duly qualified by law,* shall not be allowed to sit in parliament as a representative of the Commons of the realm, was assuming to themselves the making of a new law, to which only the three estates are adequate. It was disfranchising a whole county, and consequently in effect the united kingdom. . . . It is scarcely possible Sir, to state a question in which the people of this free country are more materially interested than in the right of election, for it is the share, which they have reserved to themselves in the legislature. When it was wrested from them by violence, the constitution was torn up by the roots." (emphasis added) Parliamentary Debates, 16 George III, 1338

The exclusion of an elected representative on grounds not stated in the fundamental law was, in Wilkes' words, a usurpation of the power of the people which, as Madison warned in Philadelphia, was subversive of a free constitution:

> "By this arbitrary and capricious vote the House established an incapacity unknown to the laws of the land. It is a direct assuming of the whole legislative power, for it gives to the Resolution of one House the virtue of an act of the entire legislature to bind the whole. The King, the Lords, the Commons of the realm, suffer alike from this usurpation. It effectually destroys both the form and essence of this free constitution. The right of representation is taken away by this vote. It is difficulty, Sir, to decide, whether the despotic body of men, which composed the last rotten parlia-

ment, intended by the whole of their conduct in the Middlesex elections to cut up by the roots our most invaluable franchises and privileges, or only to sacrifice to the rage of an incensed court one obnoxious individual. In either case the rights of the nation were betrayed by that parliament, and basely surrendered into the hands of the minister, that is, of the crown.

"We are, Sir, the guardians of the laws. It is our duty to oppose all usurped power in the King or the Lords. We are criminal, when we consent to the exercise of any illegal power, much more, when we either exercise, or solicit it ourselves. . . . This declaration, in my opinion, transfers from the people to this House the right of election, and by an uncontrouled exercise of the negative power, the House in effect assume the positive right of making whom they please the representatives of the people in parliament." Parliamentary Debates, 17 George III, 193

The danger which Madison and the Founders saw in a doctrine which would give to a legislature the power to reject representatives of the people otherwise qualified by law echoed the dangers eloquently warned against by Wilkes in the House of Commons:

"This usurpation, if acquiesced under, would be attended with the most alarming consequences. If you can reject those disagreeable to a majority, and expel whom you please, the House of Commons will be self-created and self-existing. You may expel till you approve, and thus in effect you nominate. The original idea of this House being the representative of the Commons of the realm will be lost. The consequences of such a principle are dangerous in the extreme. A more forcible engine of despotism cannot be put into the

hands of a minister." Parliamentary Debates, 15 George III, 368.

In 1782, five years before the Philadelphia Convention, the long battle of John Wilkes to vindicate the elementary rights of the British electorate to choose freely representatives otherwise qualified by fundamental law culminated in a motion carried by the House of Commons expunging the resolutions of exclusion "as being subversive of the rights of the whole body of electors of this Kingdom." Parliamentary Debates, 22 George III, 1411.[18]

The Framers of Article I, Clause 2 and Article I, Clause 5 thus found the "taproots" of these clauses in the parliamentary struggles of John Wilkes. Cf. Mr. Justice Frankfurter in *Tenney* v. *Brandhove*, 341 U.S. at 372. These constitutional provisions are understandable, this Court has taught, "once they are related to the presuppositions of our political history." *Tenney* v. *Brandhove*, supra at p. 372. Viewed in the light of the history of the Wilkes controversy, the "lesson" Mr. Madison called "worthy of our attention,"[19] it becomes overwhelmingly clear that the intention of the Framers was that the Legislature was to be utterly

[18] The resolution is reported in the debates in this manner:

"Lord Mahon, Lord Surrey, sir P. J. Clerke, and the Secretary at War spoke also for the motion: the House at last divided, when there appeared for expunging, 115; against it 47. The same was expunged by the clerk accordingly. It was then ordered, 'That all the declarations, order, and resolutions of this House respecting the election of John Wilkes, esq. for the county of Middlesex, as a void election, the due and legal election of Henry Laws Luttrell, esq. into parliament for the said county, and the incapacity of John Wilkes, esq. to be elected a member to serve in the said parliament be expunged from the Journals of this House, as being subversive of the rights of the whole body of electors of this kingdom.'"

[19] Compare George Bancroft's characterization in his famous history of the United States of the "lesson" of the Wilkes affair. "In disfranchising Wilkes by their own resolution, without authority of law, they violated the vital principle of representative government." Bancroft, *History of the United States*, Vol. IV, p. 157.

without power to refuse to seat a representative duly elected by the people who otherwise meets all constitional qualifications for office. The recent conclusions of an eminent English historian seem peculiarly relevant and sadly ironic when related to the present case:

> "Over the Middlesex election, Wilkes seems to us so obviously right that we cannot understand a government disputing it. Had the precedent been established that a member could be elected not by his constituents but by a majority of his own party in the House of Commons, there are no limits to the use which might have been made of it . . . By arousing the people of England in defense of their right to elect their own representatives, Wilkes insured that no government would ever again infringe it." Charles C. Trench, *Portrait of a Patriot* (London, 1962)

(iii) *The period of ratification of the Constitution reveals that it would not have been adopted if the ratifying conventions had believed that the Constitution gave to the Legislature any power to refuse to seat an elected representative of the people who met the qualifications for membership in either house explicitly set forth in the Constitution itself.*

The history of the period of ratification of the product of the Philadelphia convention by the state ratifying conventions reveals clearly that if the vast unfettered discretion lodged in the House to refuse to seat a duly elected Representative who meets all expressly stated constitutional requirements for membership urged now by respondents,[20] had in fact been the intention of the Framers in writ-

[20] See Brief for Respondents in the District Court at pp. 32, 33. See also "Compilation of English and American historical material . . ." filed by respondents with the Court of Appeals.

ing the Constitution, "it would not have been ratified." *Newberry* v. *United States,* 256 U.S. 232 (1920).

a) It is often forgotten that when the document which emerged from the Philadelphia convention was submitted to the states for ratification, "few of its authors and supporters imagined that it would be easy to win such a margin for approval in the chaotic political circumstances of the world's first experiment in popular government over an extended area: all recognized that a clear-cut vote against the Constitution in any one of four key states would be enough by itself to destroy their hopes for 'a more perfect union.' "[21] New York was such a state "that plainly could be lost and yet had to be won."[22] With this in mind, Alexander Hamilton, enlisting the efforts of James Madison and John Jay, wrote a series of newspaper essays designed to "explain and support the proposed Constitution."[23] These essays, now known to posterity as the Federalist Papers, not only have always "commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States,"[24] but reflect the analysis of the meaning of the Constitution by its most prominent supporters which in their opinion was essential to obtain the support of the key states upon whose decisions the hope for ratification rested.[25]

With this understanding of the significance of these essays the analysis in the Federalist Papers of the limitations

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[21] Professor Clinton Rossiter, Introduction to the Federalist *Papers,* the Federalist Papers (April 1961, Mentor Book edition) p. viii. See also Cecelia M. Kenyon, editor, *The Anti-Federalists* (N. Y., 1966) p. xcvii and Edmond S. Morgan, *The Birth of the Republic,* 1763-1789 (Chicago, 1956) pp. 149 to 155.

[22] Rossiter, *supra,* at p. ix.

[23] Rossiter, *supra,* at p. ix.

[24] Rossiter, *supra,* at p. vii.

[25] Rossiter, *supra,* at p. viii.

of the power set by the Constitution upon the Legislature to refuse to seat a duly elected representative of the people who meets all the express qualifications set by that document itself assumes special significance. Alexander Hamilton faced this question head-on in Number Sixty of the Papers. In meeting the fear of many that the new Constitution provided preference for the "wealthy and the well-born," Hamilton countered this deep-seated distrust of the proposed Constitution by writing the following words:

> "The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. *But this forms no part of the power to be conferred upon the national government.* Its authority would be expressly restricted to the regulation of the times, the places, the manner of elections. *The qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.*" [26] (Emphasis added)[27]

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[26] Federalist Papers, No. 60 (Mentor edition), p. 371.

[27] See also James Madison's words in Number 52 of the Federalist Papers, at p. 326:

> "The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity, *have been very properly considered and regulated by the convention.* A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election, be an inhabitant of the State he is to represent; and, during the time of his service, must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to property or wealth, or to any particular profession of religious faith." (emphasis added)

This analysis in the Federalist Papers of the central constitutional question in this case emphasizes clearly that the limitations upon the power of the legislature to refuse to seat a duly elected representative of the people who meets the qualifications for office set by the people themselves in the fundamental compact is no minor technical question concerning housekeeping duties of the House—but was at the storm center of one of the most critical eras in our history, the moment of decision as to whether the "world's first experiment in popular government" [28] would be accepted by the new nation.

b) As Professor Rossiter points out in his recent analysis of the ratifying period, the State of New York was pivotal to the success or failure of ratification.[29] The analysis of the constitutional limitations on the power of the House, advanced in and accepted by the New York State Ratification Convention is accordingly of great significance, for, as Professor Rossiter concludes, "plainly it was a state in which arguments voiced in public debate or actions taken in the ratifying convention might influence the course of events in other states."

Alexander Hamilton assumed leadership in the New York convention in urging ratification. In expounding upon the fundamental principles underlying the new Constitution he stressed the concept which was the bedrock of his interpretation of Article One, Clause 2, and Article One, Clause 5, contained in Number 60 of the Federalist Papers. In

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[28] Rossiter, *supra*, p. viii.

[29] "One of these states was New York, among whose claims to a vital role in the affairs of the new republic were a growing population, a lively commerce, a pivotal position on the Atlantic seaboard, and New York City, then the seat of the government of the United States. It was also the home of Governor George Clinton, a doughty politician whose principles and prejudices and skills made him the most formidable of opponents to the proposed Constitution. Plainly New York was a state that could easily be lost and yet had to be won." Rossiter, *supra*, p. viii.

words which illuminate the deep significance of the case now before this Court, Hamilton said to the New York convention:

> *"After all Sir, we must submit to the idea, that the true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."* [30] (emphasis added)

No words could more clearly express the basic first precepts of our system of government which the action of the House on March 1st of 1966 has now placed in jeopardy. The importance of this analysis by Hamilton that "the true principle of a republic is that the people should choose whom they please to govern them" was highlighted by Hamilton's insistence in defending the concept that Senators were then to be chosen by state legislatures, that the choice of members of the House was to be solely within the power of the people themselves, for, as he said, "Here, Sir, the people govern; here they act by their immediate representatives."[30a]

Again, Robert Livingston, a powerful supporter of the Constitution,[31] placed in the sharpest terms the concept

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[30] Elliot's Debates, Book I, Vol. II (Lippincott Co., 1836), reprinted in limited edition by the Michie Company, Charlottesville, Va., 1941), p. 257.

[30a] Elliott's Debates, *supra*, at p. 348.

[31] Robert R. Livingston (1746-1813) was one of the most substantial of the New York landowners, politically one of the first men of the State during the Revolutionary era, and a member of the Continental Congress. He was first Secretary of State for Foreign Affairs, and later Minister to

which lies at the very heart of this case:

> "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights." [32]

The refusal of the House to seat the duly elected representative of the people of the 18th Congressional District of New York, who by the House's own findings met all the qualifications for membership in that body which the people themselves established in the fundamental law, was an action wholly beyond the power of the House. In the words of Livingston, relying upon which the people of the State of New York ratified the Constitution, the exclusion of Petitioner Powell by the House "abridge[d] their natural rights."

c) Pennsylvania was another critical state in securing ratification. In this convention, James Wilson, later Justice of this Court, stressed the critical significance of the constitutional provisions which left solely to the people the choice of their representatives subject only to qualifications set by the people themselves in the Constitution. He pointed out that this was the postulate which lies first at the very foundation of all authority whatsoever which is vested in the national government. Thus Mr. Wilson argued to the Pennsylvania convention:

> "All authority, of every kind, is *derived by* REPRESENTATION from *the* PEOPLE, and the DEMOCRATIC *principle is carried into every part of the government.*" (Italics and capitalization are in the original Elliot Debate journals.)[33]

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the Court of France. He is perhaps best known as one of the most distinguished Chancellors of New York. See George Dangerfield, *Chancellor Robert R. Livingston of New York* (N. Y., 1960).

[32] Elliot's Debates, *supra*, at pp. 292, 293.

[33] Elliot's Debates, *supra*, at p. 482.

In this succinct statement Mr. Wilson, later Mr. Justice Wilson, captured the essence of the thinking which lay behind the original Philadelphia decisions.[34] The authority, the dignity, the very power itself, of the House of Representatives, lies in the fact that it must be composed of representatives who reflect the unfettered free choice of the people, undictated to, uncontrolled, and subject only to qualifications which the people themselves have established in their original solemn compact. [Cf. speech of Mr. Livingston in the New York ratifying convention, supra, at p. 51.] An affirmation of these principles, established in the Philadelphia convention and reasserted in the ratifying conventions, far from infringing upon the dignity of the House (cf. Respondent's brief in the District Court at p. 39), would strengthen and solidify the foundation postulates upon which the dignity, power, and prestige of that House ought rightly to rest.[35]

(d) Another state which held the balance of ratifica-

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[34] James Wilson (1742-1798) was a delegate to the Continental Congress from Pennsylvania in 1775 and a signer of the Declaration of Independence. He was a member of the Philadelphia Constitutional Convention and a member of the Pennsylvania ratifying convention. He was one of the first Justices of this Court. He was the first Professor of Law in the University of Pennsylvania in 1790. See *Harper's Encyclopedia of United States History* (N. Y., 1905), Vol. 10, pp. 398, *et seq.*

[35] It is most interesting that in the same speech in which Wilson expressed the above observations he made amply clear his firm conviction that when the legislature intruded into this area of power restricted to the people from which the very power of the legislature stems that "under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion on a former day, to state that the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles, and find it to be incompatible with the superior power of the Constitution—it is their duty to pronounce it void." Elliot's Debates, *supra*, p. 440.

tion in its hands was Virginia. Facing the intense opposition of Patrick Henry and other champions of popular democracy the pro-Constitution forces rallied their strongest arguments. Once again the free unhindered right of the people to choose their own representatives subject only to qualifications they themselves set in the Constitution become a central theme in the arguments of those supporting ratification. In response to the charges that the new document was aristocratic in nature and violated the principles of democracy,[36] Mr. Nicholas[37] relied upon the following interpretation of Article One, Clause Two, to meet head-on the anti-ratification arguments:

> "Secondly, as it respects the qualifications of the elected. It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the Legislature. *This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence which create a certainty of their judgment being matured, and of being attached to their state.*[38] (Emphasis added.)

Nothing could be clearer from the implications of the Virginia convention debates that if the interpretation of Article One, Clause Two, and Article One, Clause Five, urged upon the lower courts as a rationale for a broad unbounded discretion in the House to refuse to seat a duly

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[36] See for example speech of Mr. Henry, Elliot's Debates, *supra,* Vol. III, p. 43 *et seq.*

[37] Wilson Carey Nicholas (1757-1830), was an officer in the Revolutionary War, Commander of Washington's Life Guard, United States Senator in 1799 to 1804, Member of Congress in 1807 and Governor of Virginia from 1814 to 1817. *Harper's Encyclopedia of U.S. History,* Vol. 6, p. 465.

[38] Elliot's Debates, *supra,* Vol. III, at p. 8.

elected representative who meets all constitutional qualifications was in fact the intention of the Framers, the Constitution "would not have been ratified" by Virginia. See *Newberry* v. *United States, supra,* at p. 256.

The history of the ratifying conventions and in particular those held in New York, Pennsylvania and Virginia, a defeat in any one of which would have destroyed the hopes "for a more perfect Union"[39] reveals that perhaps no more persuasive argument was advanced to lay to rest the fears of many that the new experiment was designed to usurp the powers of the people, than the repeated assertion of the proponents of the new Constitution, most eloquently expressed in the words of Hamilton before the New York Convention that the proposed fundamental law reflected fully the "true principle of a republic—that the people should choose whom they please to govern them"—"that representation is imperfect in proportion as the current of popular favor is checked" and that accordingly, "this great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed."[40]

The experiences of these crucial ratifying conventions reinforce beyond any question the careful conclusion of Professor Warren based upon the history of the Philadelphia Convention that "the Convention did not intend to grant to either branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members other than those qualifications established by the Constitution itself," and that "the elimination of any power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualification."[41]

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[39] Rossiter, *supra,* at p. viii.

[40] Elliot's Debates, *supra,* p. 257.

[41] *Warren, supra,* at pp. 421, 422. In the Court of Appeals the respondents were careful to "avoid arguments" on the constitutional merits of the action of the House in excluding the petitioner. Thus they stated "we do

This constitutional conclusion, in the words of Hamilton,

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not discuss in this brief the 'merits' of the controversy—*i.e.*, whether the House acted properly in excluding Mr. Powell"—Appellant's Brief at pps. 13, 14. However, they filed a document with the Court of Appeals entitled "compilation of English and American historical material from the Fifteenth Century to the adoption of the Constitution of the United States relating to the exclusive power of legislatures to judge the qualifications of their members." While respondents studiously avoided arguing what they termed the "merits" of the House's action they "lodged" this document with the Clerk apparently to substantiate their opinion offered despite their disavowal of arguing the "merits", that "there is substantial historical and legal basis for the conclusion the House reached." Appellant's Brief at p. 14 (Footnote). The impact of this "historical material" may be weighed in light of several rather unusual assertions in this document which we suggest the Court may be interested in examining: 1) Professor Warren's authoritative conclusions concerning the constitutional Convention are brushed aside on the rather astounding suggestion that this eminent and recognized scholar of the Convention probably did not have "access to all the sources which we have been able to review". Not content with this unusual comparison between the lifetime studies of the leading American constitutional scholar and the time available to the attorneys for the House who compiled this document, the further suggestion is made that "we doubt that he [Professor Warren] . . . in preparing his monumental survey of the entire constitutional scheme . . . could possibly have found time to review the original source material". Appellee's Document lodged with Clerk of Court of Appeals, at p. 1. We "doubt" that Professor Warren's scholarly expertise requires defense in this Court. See *Bond* v. *Floyd*, 385 U.S. 116, Footnote 13. 2) The central precedential historical authority for the assumption of an unlimited power to exclude duly elected representatives who otherwise meet the constitutional qualifications for membership is found in the action of the British Parliament in excluding John Wilkes. Appellee's Document, *supra*, at pps. 15 to 26. We find it extraordinary, if revealing, that respondents even inferentially, rely for historical sanction upon the "lesson" which Mr. Madison said was "worthy of our attention"—an "abuse", which he warned if followed here would vest "an improper and dangerous power in the Legislature", and "abuse" which could "by degrees subvert the Constitution". See pps. 34 to 46, *supra*. Perhaps nothing more sharply reveals the constitutional infirmity in the action of the House than respondent's reliance upon the precedent of the Wilkes exclusion by the House of Commons, an action one of the most eminent historians of the early days of the Republic, George Bancroft, saw fit to characterize as a violation of "the vital principle of representative government". Bancroft, *History of the United States*, Vol. IV, p. 157. 3) Finally it is perhaps significant to note that the opinions of Madison and Hamilton in the Federalist Papers are brushed aside by the unusual suggestion that The Federalist is a "piece of very special pleading"; a quotation

is "the true principle of a republic".[42] It reflects as Chancellor Livingston said to the New York ratifying convention the axiom which underlies our entire theory of government —that "the people are the best judges who ought to represent them."[42a] This was the understanding upon which the people of the State of New York ratified the Federal Constitution. For the House to refuse to seat a representative of the people of this State, duly elected by his fellow citizens, and who admittedly, and by finding of the House itself, "possesses the requisite" constitutional qualifications for membership in the House, is to violate the original understanding underlying the basic compact. In the words of Chancellor Livingston it "is to abridge—the natural right" of the people the bedrock right the Constitution sought to protect—to "choose whom they please to govern them."

The preservation of this compact—the protection of the fundamental law which has established those principles which "the people have an original right to establish" and which "in their opinion, shall most conduce to their own happiness . . . so established, are deemed fundamental" is the highest duty of this Court to perform. *Marbury* v. *Madison,* 1 Cranch 137. In ratifying the Constitution the people of the several States were assured that their "natural right" to choose representatives "whom they please to govern them" was written into the fundamental law. This Court has proudly stated that the government of the United States, established by this written Constitution, "has been

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taken somewhat out of context from Professor Rossiter's introduction to The Federalist. Cf. his statement in the introduction that the essays have always "commanded widespread respect as the first and still most authoritative commentary on the Constitution of the United States." Rossiter, *supra,* at p. vii.

[42] Elliot, *supra,* at p. 257.

[42a] Elliot, *supra,* at p. 292.

emphatically termed a government of laws and not of men." *Marbury* v. *Madison,* supra, at p. 162. No higher responsibility is placed upon this Court when citizens of New York turn here "to claim the protection of the laws" *Marbury* v. *Madison, supra,* at p. 162, for a violation of the "natural right" to choose whom they please to govern them, a right they were solemnly assured was contained within the written Constitution. In perhaps no case in the recent history of the Court has it been more awesomely clear that if "the laws furnish no remedy for the violation" of this fundamental right—for this breach of the original covenant—this government of ours "will certainly cease to deserve this high appellation"—that it is truly "a goverment of laws and not of men." *Marbury* v. *Madison, supra,* at p. 162.

(iv) *This Court has consistently reaffirmed the conclusion that the House has no constitutional power to refuse to seat a duly elected representative of the people who meets all the qualifications for membership set forth in the Constitution.*

The central constitutional questions presented by this appeal and the fundamental premises underlying the limitation upon legislative power adopted by the Philadelphia Convention and reflected in the ratifying conventions have been authoritatively discussed by this Court and only recently vigorously reaffirmed.

In *Newberry* v. *United States,* 265 U.S. 232 (1920), the Court had the occasion directly to reaffirm the conclusion of the Philadelphia Convention that the House has no power under the Constitution to vary in any way the qualifications for membership in the House set forth in the Constitution. This discussion occurred in both the majority opinion of the Court and the concurring opinions of Mr. Justices Pitney, Brandeis and Clarke. Significantly, while the

majority and concurring Justices disagreed on the main issue of the case—whether a primary election fell within the meaning of the word "Elections" in Article I, Section Four—all the Justices specifically agreed upon the proposition that this legislature had no constitutional power to alter in any way the qualifications for membership in either House expressly set forth in the Constitution.

In Mr. Justice McReynolds' opinion for the Court, 256 U.S. at 243 (joined in by Mr. Justice Holmes, Mr. Justice McKenna, and Mr. Justice Day) the position is squarely taken that the legislature has no power to deviate from or alter qualifications for membership in either House set forth in the Constitution. Thus the opinion for the Court states, at p. 255:

> "Section Four was bitterly attacked in the State Conventions of 1787-1789, because of its alleged possible use to create preferred classes and finally to destroy the States. In defense, the danger incident to absolute control of elections by the States and the express limitations upon the power, were dwelt upon. Mr. Hamilton asserted: 'The truth is that there is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked upon other occasions are defined and fixed in the Constitution and are unalterable by the Legislature.' The Federalist, LIX, LI. The history of the times indicates beyond reasonable doubt that, if the Constitution makers had claimed for this section the

latitude we are now asked to sanction, it would not have been ratified. See Story on the Const. §§814, et seq.[43] 256 U.S. at p. 255-256.

The concurring opinion of Mr. Justice Pitney, joined in by Mr. Justice Brandeis and Mr. Justice Clarke is equally emphatic in reaffirming Hamilton's conclusions that the Philadelphia Convention intended that the legislature was to have no power to add, alter, or vary the constitutional qualifications for membership in either House. Thus the concurring opinion also adopts approvingly the statements and analysis of Hamilton in Number 60 of the Federalist Papers:

> "What was said, in No. 60 of the Federalist, about the authority of the National Government being *restricted* to the regulation of the time, the places, and the manner of elections, was in answer to a criticism that the national power over the subject 'might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others,' as by discriminating 'between the different departments of industry, or between the different kinds of property, or between the different degrees of property'; or by a leaning 'in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest;' and it was to support this contention that there was 'no method of securing to the rich the preference apprehended but by prescribing qualifi-

[43] The opinion of the Court proceeds to make it unmistakably clear which are the constitutional qualifications for membership in the House which are "defined and fixed" and "unalterable by the legislature" in its subsequent comment at page 256, "Who should be eligible for election was also stated. 'No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not when elected, be an inhabitant of that State in which he shall be chosen.'" 256 U.S. at p. 256.

> cations of property either for those who may elect, or be elected,' which formed no part of the power to be conferred upon the national government, that Hamilton proceeded to say that its authority would be 'expressly restricted to the regulations of the *times*, the *places*, and the *manner* of elections.' This authority would be as much restricted, in the sense there intended if 'the manner of elections' were construed to include all the processes of election from first to last. The restriction arose from the express qualifications prescribed for members of House and Senate, and for those who were to choose them; subject to which all regulations of preliminary, as well as of final, steps in the election necessarily would have to proceed." 256 U.S. at 283-284.

The unanimous agreement of the Court in *Newberry* as to the constitutional limitations upon the power of the legislature to alter, vary or deviate from the qualifications for membership in the House, set forth in the Constitution itself, was explicitly reaffirmed in 1940 in *United States* v. *Classic*, 313 U.S. 299. The opinion in *Classic* resolved the specific issue as to whether primary elections were "elections" subject to regulation by Congress within the meaning of Section 4 of Article I. This question, the Court pointed out, had "not been prejudged" by the prior decision in *Newberry*. *United States* v. *Classic*, 313 U.S. at 317.[44]

In *Classic*, the Court, in the opinion of Mr. Justice Stone, repeatedly reaffirmed and restated the fundamental premises which grounded the unanimous conclusion of the Court in *Newberry*—that the legislature may not interfere with the free choice of representatives who meet constitutional

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[44] See also 40 Mich. L. Rev. 460 (1941); 36 Ill. L. Rev. 475 (1941); 10 Geo. Wash. L.R. 625 (1941).

qualifications for membership in the House. In words reminiscent of the tone of the statements of the Founders, Mr. Justice Stone reminded the Nation once again:

> "That the free choice by the people of representatives in Congress, *subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution,* was one of the great purposes of our constitutional scheme of government cannot be doubted." 313 U.S. at 316. (Emphasis added.)

As Mr. Justice Stone wrote, ". . . a dominant purpose of Section 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives . . . to safeguard the right of choice by the people of representatives in Congress secured by Section 2 of Article I," *United States* v. *Classic, supra,* at pp. 318, 320.[45]

The unanimous views of the Justices in *Newberry* concerning the constitutional prohibition upon legislative power to alter or disregard constitutional qualifications for membership reaffirmed by the discussion in *Classic,* was

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[45] Only recently in *Stassen for President Citizens Committee* v. *Jordon,* 377 U.S. 914, in a case in which the issue raised was unrelated to the constitutional questions presented in this appeal, in their dissent from the denial of the petition for writ of certiorari, 377 U.S. at 927, Mr. Justice Douglas, the Chief Justice, and Mr. Justice Goldberg saw fit to restate the powerful words of Mr. Justice Stone in *Classic* that "the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article I and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government cannot be doubted" at p. 978. This reference to the statement in the *Classic* majority opinion, by Mr. Justice Douglas who dissented in *Classic,* emphasizes the obvious point that the *Classic* dissenting judges, Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Murphy did not base their dissent from the result of the case upon any disagreement with Mr. Justice Stone's formulation of the fundamental constitutional question which is decisive in the present appeal.

once again reflected in the opinion of the Court in *Bond* v. *Floyd*, 385 U.S. 116, in the 1966 Term of Court.

The unanimous opinion in *Bond* v. *Floyd* reflects a logical extension of the analysis of the Court expressed first in *Newberry* and reaffirmed in *Classic*. In understanding the teaching of the Court in *Bond* in respect to the fundamental constitutional proposition at issue in this appeal it is helpful to examine first the thoughtful dissenting opinion of Chief Judge Tuttle below which became in a significant manner the foundation stone upon which this Court's opinion in *Bond* rests.

Chief Judge Tuttle's direct holding was that the Georgia Legislature had no power to refuse to seat Representative-Elect Bond since he met all the stated qualifications set forth in the Georgia Constitution. This Court would seem to assume the soundness of the threshold proposition (see footnote 13 to the Court's opinion), and proceeds to meet Georgia's secondary argument that the legislature was merely testing one of the *constitutional* qualifications—the requirement of taking the constitutional oath. The Court's opinion disposed of this contention by concluding that the effort of the legislature to "look beyond the plain meaning of the oath provisions," in order to determine whether the Representative-Elect "may take the oath with sincerity," violated the First Amendment to the Federal Constitution.

Chief Judge Tuttle in his opinion disposed of the basic constitutional issue in a forthright manner. In the face of a concession by the State that the Representative-Elect met all the stated qualifications for membership in the House, compare the concession here by the House that petitioner met all the constitutional qualifications for membership, Chief Judge Tuttle remarked:

> "In the absence of a strong showing of judicial interpretation to the contrary, it would seem that simple

> justice would require a holding that where specific qualifications are stated for an office and the Legislature is given the power to judge whether an aspirant for the office is 'qualified,' the legislature as judge, should be required to look to the stated qualifications as the measuring stick. To hold to the contrary and permit the House as judge to go at large in a determination of whether Representative Elect "A" meets undefined, unknown and even constitutionally questionable standards shocks not only the judicial, but also the lay sense of justice."

Chief Judge Tuttle then explained in a clarifying manner a question which has seemed to confuse many commentators in the past as to why there have been few direct legal precedents exactly on the issue. He pointed out:

> "It can be readily understood why there are few legal precedents to give guidance in such a situation. In the first place, it can be assumed that members of a state or national legislature are prone to recognize the right of the electorate to choose as the representative whom they want to serve them. Thus, there may not be expected to be many clear precedents. Further, it is readily apparent that in those cases in which a legislative body has exceeded its authority the shortness of the term of office may make moot any contest in court." 251 F. Supp, 333, 352.

Because of the understandable paucity of judicial opinions, Chief Judge Tuttle relied heavily upon the legislative precedents we discuss *infra* at pp. 73. However, in addition, he placed great emphasis upon the once-famous, but now rarely remember, Report of the Association of the Bar of the City of New York in 1920 under the Chairman-

ship of Charles Evans Hughes, later Chief Justice of this Court. This Special Committee included such distinguished representatives of the American bar as Joseph M. Proskauer, Ogden L. Mills, Morgan J. O'Brien and Louis Marshall. The Committee was appointed at the time of the expulsion of five members of the Socialist Party from the New York State Assembly. Its mandate from the Bar Association was to "appear before the Assembly or its Judiciary Committee and take such action as is required to safeguard and protect the principles of representative government guaranteed by the Constitution which are involved in the proceedings now pending." The Committee filed a brief with the Assembly stating that they regarded "these proceedings as inimical to our institutions, because they tend to subvert the very foundation upon which they rest—representative government."

Chief Judge Tuttle singled out for consideration the conclusion of this eminent committee of American lawyers concerning the critical constitutional question as to the power of a legislature to exclude a duly elected member for grounds other than expressly stated in the Constitution.[46]

> "We contend that the opinion expressed by Senator Knox in the Case or Senator Smoot,[47] supra, correctly defines what is meant by qualification. The constitution expressly specifies a number of disqualifications. . . . The principle of constitutional interpretation applicable to this phase of the subject was elaborated in classic phrase by Chancellor Sanford in Barker v. People, 3 Cowen, 703, which, although decided in 1824,

[46] Although the Committee made it plain in its reports that the New York Assembly action was an action for *expulsion* rather than one to determine the qualifications of its members, it felt that it was critical, because of legislative and public confusion on this point, to state its views on the power of a legislature to judge the "qualifications" of elected members. See *Bond* v. *Floyd, supra,* at p. 353.

[47] See p. 97, *infra.*

and therefore involving the interpretation of an earlier Constitution, is nevertheless as applicable in principle to the present Constitution: 'Eligibility to public trust, is claimed as a constitutional right, which cannot be abridged or impaired. The Constitution established and defines the right of suffrage; and gives to the electors and to their various authorities, the power to confer public trust. . . . *Excepting particular exclusions thus established, the electors and the appointing authorities are, by the Constitution, wholly free to confer public stations upon any person, according to their pleasure. The Constitution* giving the right of election and the right of appointment, these rights consisting . . . essentially in the freedom of choice; and the Constitution also declaring that certain persons are not eligible to office; it follows from these powers and provisions, that all other persons are eligible. Eligibility to office is not declared as a right or principle, by any expressed terms of the Constitution; but it results, as a just deduction, from the expressed powers and provisions of the system. The basis of the principle, is the *absolute liberty* of electors and the appointing authorities, *to choose* and to appoint *any person, who is not made ineligible by the Constitution* . . . I, therefore, conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office or any general regulation requiring qualifications, which the Constitution has not required'. . . ." (Emphasis supplied by Chief Judge Tuttle.)

Brief of Special Committee appointed by the Association of the Bar of the City of New York, January 20, 1920.

Based upon all of these considerations, Chief Judge Tuttle concluded as a matter of law that "it is clear that

Bond was found disqualified on account of conduct not enumerated in the Georgia Constitution as a basis of disqualification. This was beyond the power of the House of Representatives" 251 F. Supp. 333, at 357.

As we have pointed out above, this Court does not appear to disagree with Chief Judge Tuttle's conclusion as to the basic constitutional question involved. Quite to the contrary, in the course of its refutation of Georgia's secondary line of defense that all it was doing was *testing* a constitutional qualification—the necessity of an oath supporting the Constitution—the Court saw fit to remind the Nation of the fundamental policy reasons which led the Framers to conclude that the qualifications of members of either House are "defined and fixed by the Constitution" and "are unalterable by the legislature." Thus the Court restated in full in Footnote 13 of the opinion these conclusions of the Framers:

> 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. Warren, *The Making of the Constitution* (1938), 420-422. The Journal of the Federal Convention of 1787 states:
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> " 'Mr. Madison was opposed to the Section as vesting an improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Government and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution * * * Qualifications founded on artificial distinction may be devised, by the stronger in order to keep out partisans of a weaker faction.

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" 'Mr. Madison observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected: and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties.' 2 Farrand, *The Records in the Federal* Convention of 1787 (Aug. 10, 1787), pp. 249-250.

"Hamilton agreed with Madison that:

" 'The qualifications of the persons who may choose or be chosen * * * are defined and fixed by the constitution: and are unalterable by the legislature.' The Federalist, No. 60 (Cooke ed. 1961), 409."

The entire structure of the *Bond* opinion confirms the impression that the Court was fully in accord with these conclusions of the Framers that the qualifications of representatives of the people are defined and fixed by the Constitution and are unalterable by the Legislature. This Court pointed out that as to "the only stated qualifications for membership in the Georgia legislature—the State concedes that Bond meets them all" 385 U.S. 16. And in this Court, Georgia did not argue at any length that a legislature has unbounded discretion to set new standards and qualifications for membership.[48] Instead the entire *Bond* opinion is predicated upon an assumption by both the Court and the State that the Legislature was indeed, bound by the stated constitutional qualifications. Unlike the re-

[48] Cf. the contentions of the respondents below in their brief, at page 34.

spondents in this case,[49] Georgia did not "claim that it should be completely free of judicial review", 87 S. Ct. at 346. It sought to convince the Court that its action of exclusion was based upon the testing of a *proper* constitutional qualifications—the necessity of taking an oath. The Court rejected this argument by pointing out that disqualifications even "under color of a proper standard" is reviewable and beyond the power of the House if it violates other constitutional prohibitions—in that case the First Amendment.

The entire posture of the *Bond* case in this Court would tend to confirm the observation of the Chief Judge of the Fifth Circuit that the argument that a Legislature may disregard, enlarge upon, or alter the express constitutional qualifications for a duly elected member of the Legislature "shocks not only the judicial, but also the lay sense of justice." *Bond* v. *Floyd*, 251 F. Supp. 333 at page 352.[50]

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[49] On oral argument before the Court of Appeals on the motion for summary reversal, counsel for the respondent took the position that the House was free of judicial review regardless of the grounds of exclusion even including exclusion on the basis of race, religion, or politics. See transcript of oral argument on file in this Court. See Point II, *infra*.

[50] The decisions in the state courts uniformly followed the principles enunciated in this Court from *Newberry* to *Classic* to *Bond*—that a Legislature has no power to add to, alter or disregard constitutional qualifications for office whether in respect to the national Congress or state offices in which constitutional qualifications have been set. See, for example, *Imbrie* v. *Marsh*, 3 N.J. 578, 71 A.2d 352 (1950): ". . . to ask the question is to answer it, for if the Legislature may alter these oaths or any other provisions of the Constitution prescribing the qualifications for office (such as age, citizenship, residence and prohibition of dual office holding) it would to the extent of such variance nullify the Constitution. The maxim *expressio unius est exclusio alterius*, is peculiarly applicable here. Such has been the current not only of decisions in this State and elsewhere but of the authorities on public law. 'When the constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive, and it is not competent for the legislature to provide another mode of obtaining or holding the office.' *Johnson* v. *State*, 59 N.J.L. 535, 536, 538, 37 A. 949, 950, 39 (1896), at p. 356; *Buckingham* v. *State*, 42 Del. 405, 35 A.2d 903 (1944): "It is the general law that where a constitution creates an office and prescribes the qualifications that the incumbent must possess, that the legislature has

(v) *The most recent decisions of this Court emphasize that the right of the people to choose freely and without restraint their representatives to the Congress is of the essence of a democratic society.*

This Court in recent years has again and again emphasized that "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative democracy"; *Reynolds* v. *Sims,* 377 U.S. 533 (1964) (opinion of Chief Justice Warren). See also *Harmon* v. *Forsennius,* 380 U.S. 528 (1965). The reason the right to exercise the franchise in a "free and unimpaired manner", this Court has taught, "is a fundamental matter in a free and democratic society" is because it is "preserva-

no power to add to these qualifications. 1 Cooley's Constitutional Limitation, 8th Ed., 140; Mecham on Public Offices, Secs. 65 and 98; Throop on Public Offices, Sec. 73; Annotations, 47 A.L.R. 481 and 97 Am. Dec. 264." at p. 906; *Whitney* v. *Bolin,* 85 Ariz. 44, 330 P.2d 1003 (1958): "It is our opinion that the constitutional specifications are exclusive and the legislature has no power to add new or different ones."; *People* v. *McCormack,* 261 Ill. 413, 103 N.E. 1053 (1914): "Where the Constitution declares the qualifications for office, it is not within the power of the Legislation to change or add to them, unless the Constitution gives that power. 'It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office it meant to exclude all others as prerequisites. From the very nature of such a provision the affirmance of these qualifications would seem to imply a negative of all others.* * * A power to add new qualifications is certainly equivalent to the power to vary them.' 1 Story on the Constitution, § 625. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the Constitution. Eligibility to office, therefore, belongs not exclusively, or especially to electors enjoying the right of suffrage; it belongs equally to all persons whomsoever, not excluded by the Constitution. I therefore conceive it to be entirely clear that the Legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the Constitution has not required. If, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts, or that all persons not possessing a certain amount of property should be excluded or that a member of the assembly must be a freeholder, any such regulation

tive of other basic civil and political rights''. *Reynolds* v. *Sims*, at page 562.[51]

would be an infringement of the Constitution; and it would be so, because, should it prevail, it would be in effect, an alteration of the Constitution itself."; *Burroughs* v. *Lyles*, 142 Tex. 704, 181 S.W.2d 570; "The qualifications for the office of State Senator are set out in Article III, Section 6, of the Constitution, Vernon's Ann. St. It was held by this Court in *Dickson* v. *Strickland*, 114 Tex. 176, 265 S.W. 1012, that where the Constitution prescribes the qualifications for office it is beyond the legislative power to change or add to the qualifications, unless the Constitution gives that power. That decision was reaffirmed in *State ex rel. Candler et al.* v. *Court of Civil Appeals et al.*, 123 Tex. 549, 75 S.W.2d 253. The statute here involved seeks to impose an additional test of eligibility other than what is prescribed by the Constitution, on a candidate for State office, and for that reason it is void."; *Campbell* v. *Hunt*, 18 Ariz. 442, 162 P. 882 (1917): "The qualifications for Governor are specifically detailed in the Constitution, and the Legislature is therefore powerless to add to or detract from the qualifications prescribed. No citation of authority is necessary here." See, also, to the same effect: *Hellman* v. *Collier*, 217 Md. 93, 141 A.2d 908 (1958); *Shub* v. *Simpson*, 196 Md. 177, 76 A.2d 332 (1950); *Stockton* v. *McFarland*, 56 Ariz. 138, 106 P.2d 328, 330 (1940); *State ex rel. Johnson* v. *Crane*, 65 Wyo. 189, 197 P.2d 864 (1948); *Eaton* v. *Schmahl*, 140 Minn, 219, 167 N.W. 481 (1918); *Chandler* v. *Howell*, 104 Wash. 99, 175 P. 569 (1918); *Ekwall* v. *Stadelman*, 146 Ore. 439, 30 P.2d 1037 (1934); *O'Sullivan* v. *Swanson*, 127 Neb. 806, 257 N.W. 255 (1934); *In re O'Connor*, 173 Misc. 419, 17 N.Y.S. 2d 758, 759 (1940); *Sundfor* v. *Thorson*, 72 N. Dak. 246, 6 N.W. 2d 89, 90 (1942); *Watson* v. *Cobb*, 2 Kan. 32, 58 (1863); *Wettengel* v. *Zimmerman*, 249 Wis. 237, 24 N.W. 2d 504 (1946); *Graham* v. *Hall*, 73 N.D. 428, 15 N.W. 2d 736, 740-41 (1944); *Chenoweth* v. *Acton*, 31 Mont. 37, 77 P. 299, 302 (1904); *Chambers* v. *Terry*, 40 Cal. App. 2d 153, 104 P. 2d 663, 666 (1940); *Dickson* v. *Strickland*, 114 Tex. 176, 265 S.W. 1012, 1015 (1924); *Broughton* v. *Pursifull*, 245 Ky. 137, 53 S.W. 2d 200, 203 (1932); *Mississippi County* v. *Green*, 200 Ark. 204, 138 S.W. 2d 377, 379 (1940); *Kivett* v. *Mason*, 185 Tenn. 558, 206 S.W. 2d 789, 792 (1947); *Wallace* v. *Superior Court*, 141 Cal. App. 2d 771, 298 P.2d 69 (1956).

[51] See, in this connection, *Wesberry* v. *Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964), (opinion of Mr. Justice Black for the Court): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory, if the right to vote is undermined", at p. 535. See also *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (opinion of Mr. Justice Douglas): "Long ago in *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370, the Court referred to "the political franchise of voting' as a 'fundamental political right, because preservative of all rights'", at p. 667. See also the recent opinion of the Court in *Williams* v. *Rhodes* (#533, October Term, 1968).

This understanding of the significance of the right to elect freely a representative of one's own choice has led the Court to restate in fundamental terms the reasons of policy underlying the original decision of the Philadelphia Convention that the Legislature was to be without power to disregard, alter or add to the qualifications for membership in either House. In *Reynolds,* the Chief Justice placed the postulate considerations of a democratic society which govern the grave constitutional issues raised in this appeal in these forceful words:

> "As long as ours is a representative form of government and our legislatures are those instruments of government elected directly 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."
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> *Reynolds* v. *Sims, supra,* at page 562.[52]

Only recently the Court has seen fit to reemphasize the fundamental nature of the right of the citizenry to "cast

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[52] The same concepts were recently expressed by Mr. Justice Fortas, joined in by the Chief Justice and Mr. Justice Douglas in their opinion in *Fortson* v. *Morris,* — U.S. —, "A vote is not an object of art. It is the most sacred and most important institution of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens, *results in effectuating the will of those citizens,* provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court.

In short we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose. If the vote cast by all of those who favor a particular candidate exceeds the number cast in favor of a rival, the result is constitutionally protected as a matter of equal protection of the laws *from nullification except by the voters themselves. The candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis* . . . 'the right to vote is too important in our free society to be stripped of judicial protection' by any other interpretation of our Constitution." (emphasis added).

their votes effectively". *Williams* v. *Rhodes*, —— U.S. ——, (#543, 544, October Term, 1968, opinion of Mr. Justice Black for the Court). In striking down obstacles to the free choice of electors for the Presidency by the voters of a state, the Court reminded the Nation that this right "rank[s] among our most precious freedoms". In his concurring opinion Mr. Justice Douglas wrote in words directly applicable here "at the root of the present controversy is the right to vote—a 'fundamental political right' that is 'preservative of all rights' . . . the rights of expression and assembly may be illusory if the right to vote is undermined' "

This fundamental importance to all other rights of the right to vote for one's representative in government was reflected in the insistence of Mr. Justice Fortas, joined in by the Chief Justice and Mr. Justice Douglas in their opinion in *Fortson* v. *Morris*, —— U.S. ——, ——, that "we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose . . ." "that the candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis." For as the Justices pointed out "the right to vote is too important in our free society to be stripped of judicial protection by any other interpretation of our Constitution" —— U.S. ——, ——.

In short, what is here involved is what has been characterized in other circumstances as a "mainspring of representative government". *Baker* v. *Carr at* p. 249. Fundamental to all other considerations, all other doctrines, all other rights and liberties, is the right of the people to select freely and unencumbered their representatives in the governing legislative bodies. This is the first principle of representative democracy. It is, in the words of Mr. Justice Clark in *Baker* v. *Carr* "the keystone upon which our government

was founded and lacking which no republic can survive", *Baker, supra,* at 267. If this principle is subverted all other rights, including the dignity and authority of the legislature itself, are undermined. It is in this sense that the issues in this case far transcend the rights of the individual petitioners, as important as they are. They touch, in the words of the Court in *Reynolds,* the "bedrock of our political system".

(vi) *The most important and persuasive precedents of the House and Senate have always acknowledged the constitutional limitations upon their own power to exclude duly elected representatives of the people who meet all the constitutional qualifications for membership in either body.*

With the exception of the extraordinary events culminating in the exclusion of petitioner Powell, the House itself, as well as the Senate, has in its most important and persuasive cases time and again acknowledged the constitutional limitations upon their power to exclude duly elected representatives of the people who meet all the constitutional qualifications for membership in either body.[53]

The first occasion on which the implications of Article I, Clause 2, and Article I, Clause 5 were fully debated in the House was in 1807, only twenty years after the Constitutional Convention. In the contested election case of *William McCreery,* Tenth Congress, 1807, 1 Hinds § 414, the House, after "exhaustive debate," 1 Hinds p. 381, affirmed the man-

[53] In a handful of occasions, among the many times the question has been before the House, the constitutional limitations were ignored. In the case of *Brigham Roberts,* 56 Congr. 1899, 1 Hinds, Sect. 474, discussed *infra* at pp. 96, and the case of *Victor Berger,* 66 Congr., 58 Congr. Rec. (1919), discussed *infra* at pp. 97, the principles expressed in both cases, arising in a wave of national hysteria, were later repudiated by the House itself. See *Bond* v. *Floyd,* 251 F.S. 333 at 345 (opinion of Chief Judge Tuttle).

date established at the Philadelphia Convention that the constitutional qualifications of age, citizenship and in habitancy were the sole qualifications for membership in the House. Thus, the Chairman of the Committee on Elections placed in this manner the proposition later affirmed by the full House:

> "The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislature are vested with authority to add to those qualifications, so as to change them. That the State Legislatures cannot prescribe the qualifications of their own members is evident, it is believed from their respective constitutions; and that they are authorized to judge of the qualifications of their own members by their own constitutional rules only, and of the election of their own members by their respective election laws, must be admitted. Congress, by the Federal Constitution are not authorized to prescribe the qualifications of their own members, but they are authorized to judge of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution, and them only. These are the principles on which the Election Committee have made up their report, and upon which these resolution is founded." Annals of Cong., Nov. 1807, p. 872.

The case arose on the question of whether the Representative-elect, though qualified according to the Federal Constitution to take a seat in Congress, should be denied that seat because he did not meet an additional requirement set

for Congressmen by the Constitution of his state. In announcing its adherence to the constitutional mandate that the House could not refuse to seat a Member-elect who met all constitutional qualifications, the House acknowledged certain fundamental guidelines imposed upon it by the Constitution:

a) "The people had delegated no authority to the States or to the Congress to add to or diminish the qualifications prescribed by the Constitution." 1 Hinds at p. 382. See in particular Annals of Congress for the 10th Congress, pp. 872, 875, 887-88, 893, 895, 909, 910, 915-16.

b) "If they could do this [deviate from strict constitutional qualifications] any sort of dangerous qualifications might be established—of property, color, creed, or political professions." 1 Hinds at p. 382; Annals of Congress for the 10th Congress, pp. 873, 878, 895, 980-09, 913.

c) "The people had a natural right to make a choice of their Representatives, and that right should be limited only by a convention of the people, not by a legislature." 1 Hinds at p. 382, Annals of Congress for the 10th Congress, pp. 873-74, 875, 895. Accordingly, the House voted to seat the Congressman-elect after finding that he possessed the constitutional qualifications, holding that these qualifications are exclusive and the sole requirements for taking the seat. Annals of Congress for the 10th Congress, pp. 878, 910, 911-12, 914, 918.

These principles, responsive to the constitutional mandate established only twenty years previously, reflected an understanding on the part of the members of the House in the first days of the Republic that what is here involved is the most fundamental principle of a democratic society—the right of the people to freely elect their own representatives. Thus Representative Desha expressed the deep-felt senti-

ments of the House underlying its actions in this precedent-making decision when he said:

> "On this occasion, the question was whether . . . any State Legislature, or any other power of legislation, could add qualifications to any member of that House . . . every contraction of qualifications for Representatives was an abridgement of the liberty of the citizens. The power of adding other qualifications than those fixed by the Constitution would . . . be a breach of the right of suffrage. . . . We are placed here as guardians of the people's rights and privileges. Do not then let us hold out with one hand a fair appearance of zeal for the rights of the people and the public good, and at the same time take every advantage imaginable with the other, by curtailing their Constitutional privileges, and, instead of allowing the people a complete range to select a man worthy of representing them in Congress, confine them to certain situations. I dislike this kind of political hypocrisy. I dislike anything that looks like sporting with the rights of the people, with the rights of those that I consider the firm supporters of the republican fabric." [54]

This case in the House, arising in the earliest days of the Republic, has of course great importance, for, as Chief Justice Taft said in *Myers* v. *United States,* 272 U.S. 52, 175 (1926), "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions."

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[54] Annals of Congress for the 10th Congress.

The fact that the Congress "acquiesced in" this acceptance of the constitutional mandate "for a long term of years," see *Myers* v. *United States, supra,* is evidenced in the contested election cases of *Turney* v. *Marshall* and *Fouke* v. *Trumbull* in the 34th Congress, 1856, 1 Hinds, p. 384. In these cases the House reaffirmed after full debate the principles of the earlier decisions recognizing that the Constitution requires the seating of Congressmen-elect upon a showing of the presence of the constitutional qualifications for membership in the House. The report of the Election Committee, presented by Representative John A. Bingham (R. Ohio),[55] re-emphasized these understandings.

> a) "The qualifications of a Representative, under the Constitution, are that he shall have attained the age of 25 years, shall have been seven years a citizen of the United States, and when elected, an inhabitant of the state in which he shall be chosen. It is a fair presumption that when the Constitution prescribes these qualifications as necessary to a Representative in Congress it was meant to exclude all others." 1 Hinds, at p. 385.
>
> b) "By the Constitution, the people have a right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any additional qualifications whatever." 1 Hinds, at p. 386.
>
> c) "To admit such a power [to deviate from the sole constitutional qualifications] . . . is to prevent altogether the choice of a Representative by the people." 1 Hinds, at p. 385.

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[55] Rep. John A. Bingham has been recognized as one of the most eminent constitutional lawyers of the House, and is well known as one of the primary Framers of the XIVth Amendment to the Constitution.

The Committee concluded that a failure to seat a Congressman-elect who met all the constitutional qualifications for membership in the House would be "absolutely subversive of the rights of the people under that Constitution." 1 Hinds, at p. 386.[56]

These controlling concepts were once again forcefully restated by the Senate in the *Case of Benjamin Stark*, 37th Congress (1862), 1 Hinds, § 433. The Senator-elect was challenged on the ground that he had engaged in conduct "very unbecoming and very reprehensible in a loyal citizen." Cong. Globe, p. 861. In opening the debate for the majority of the Election Committee, Senator Harris placed the fundamental constitutional propositions which limit the power of the Senate:

> "The question submitted to the committee was whether or not evidence of this description could be allowed to prevail against his *prima facie* right to take his seat as Senator. The committee were of opinion that they could not. The Constitution declares what shall be the qualifications of a Senator. They are in respect to his citizenship; and the committee were of opinion that the Senate were limited to the question, first, whether or not the person claiming the seat and presenting his credentials produced the requisite evidence of his election or appointment; and second, whether there was any question as to his constitutional qualifications."

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[56] Cf. Resolution of House of Commons expunging resolutions of exclusion of John Wilkes, supra, at p. 45. The decision of the House in *Turney* v. *Marshall* was adhered to by the Senate in a parallel situation in the *Case of Trumbull*, 34th Congress, 1 Hinds, § 416, p. 387, in which the Senate held that constitutional qualifications could not be added to. In the later case of *Wood* v. *Peters*, 48th Congress (1884), 1 Hinds, § 417, p. 387, the House specifically reaffirmed the principles set forth in Representative Bingham's report for the Election Committee in *Turney* v. *Marshall*, finding that ***"the authorities cited place the question involved in this case beyond the realm of doubt."*** 1 Hinds, at p. 389 (emphasis added).

Certain Senators eloquently urged that the dignity of the Senate required an investigation into the "unbecoming" and "reprehensible" prior conduct of the Senator-elect. Senator Harris responded for the Election Committee in words which reflected an understanding of the underlying principles first enunciated in the Constitutional Convention:

> "[It is suggested that] when a man comes to take his seat here, the Senate can inquire into his former life, see what his conduct has been, whether he has been guilty of crime or not; and if, in the judgment of the Senate, he has been guilty of crime or misconduct, it can deny him the seat to which he was elected by the proper constituency in order to punish him for his offense! Now, I do not understand that it is competent for the Senate, and I think they step aside from their only jurisdiction when they attempt to punish a man for his crime or misbehavior antecedent to his election. If this were so the Constitution ought to be amended so as to read, that the Legislature of a State, or the Governor of a State, in a certain contingency, shall elect or appoint a Senator, subject to the advice and consent of the Senate. The Senate would then be the ultimate judge whether or not the man ought to have a seat there, and it would be competent for the Senate upon any caprice or any view it might take of the capacity, moral, or intellectual, or political, of a man, to reject him and prevent his taking a seat. Sir, I do not so understand the Constitution. I understand the Senate is the judge of the election of a Senator, of the sufficiency and genuineness of the returns furnished, and the evidence of that election; and also of the constitutional qualifications of the individual to hold a seat in the Senate.

Beyond that, I apprehend the Senate have no power at all.'' [57] (Emphasis added.)

Upon this presentation of the governing concepts by the Election Committee, the Senate seated the Senator-elect, finding that he had the requisite sole constitutional qualifications. As in the earliest days of the Republic, the Senate once again accepted the concept that the limitation of its power to judge the qualifications of a member-elect to the constitutional qualifications alone was a fundamental protection of the people themselves. For, as Senator McDougall said on the floor of the Senate, "If the Senator from Oregon is denied a seat, it is a denial to Oregon of her constitutional right of representation."

The principles restated by the Senate in the *Case of Benjamin Stark* were shortly thereafter put to a severe test and wholly reaffirmed by the House in the case of *Grafton* v. *Conner,* in the 41st Congress (1870). Representative-elect Conner was charged with having brutally and severely beaten Negro soldiers under his command while in the

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[57] The debate in the Senate reaffirming the original decisions made in Philadelphia once again reflected fundamental considerations. As Senator McDougall stated, the refusal to seat a constitutionally qualified Senator-elect may be

> "one of the heaviest blows that can be struck at the foundation of our republican institutions. This is no common matter of business. It is an assertion of the right of a majority of this body to refuse entrance here to a person clothed with all the miniments of right by a sovereign State, and against whom is alleged no constitutional or legal disqualification. Whose right is to that he should be here? The right of the people of the State of Oregon—their Constitution and the laws of Congress under it, which alone bind them in this matter."

And as Senator Browning declared, such a practice

> "is one that is capable of immense abuse, immense wrong; and one which it is within the range of possible things might at some time or other be used for the worst purposes of tyranny. I am not willing to aid in establishing such a precedent."

Armed Forces and, while on trial by court martial on those charges, having bribed witnesses and suborned evidence and perjured himself before the court. Cong. Globe, Part 3, 41st Cong., 2nd Sess. 1869-70, pp. 2322-23. The debate on the floor of the House once again reflected the recognition that the House was bound by the Constitution itself to seat a member-elect who possessed the constitutional qualifications for membership in the House. Thus, Representative Orth stated:

> "Turn to the Constitution and see what is prescribed in reference to the qualifications of a member of this House. Mr. Conner has the requisite age. He has the requisite residence. He has the requisite certificate of his election from the proper authorities. The Committee of Elections has so reported, and that settles the prima facie case."

Representative Daws restated the constitutional limitations which govern an investigation by the House under Article I, Clause 5 into the right of a member-elect to be sworn:

> "Mr. Speaker, the Committee of Elections of the last Congress had occasion to consider how far it was within their province to consider questions at the threshold, in limine, before a member applying for his seat was sworn in. It arose first on charges brought against members touching their loyalty. The conclusion to which the committee came after very careful examination of this question, and in which they were sustained by the House over and over again, was this: That as to any question which touched the constitutional qualification of a gentleman claiming a seat it was proper that question should be raised at the threshold before he was sworn

in. And it was decided by the last House, when any member, upon his responsibility as a member, made any charge against any claimant to a seat that touched his constitutional qualification, the House, before swearing him in, would refer the question to the proper committee to report on it. Beyond that the Committee of Elections came to the conclusion, and the House sustained them, it was not proper to go. That question of itself was a very delicate one, and of course might be carried to such an extent as to involve great abuse to the rights of persons claiming seats here. *But never did that committee ask the House to go one inch beyond the question of the constitutional qualification of a member, and never did this House decide that we had the right to go one inch beyond that question.*" (Emphasis added.)

The statements of Representative Schenck on the floor of the House powerfully reflect the fundamental concepts of representative democracy which underlie the limitations the Constitution places upon the House:

"I do not understand that it is alleged that any of these constitutional qualifications are not possessed by the gentleman who now seeks to be admitted to a seat upon this floor. What then? It is proposed that as he has once been tried by a court-martial, or a court of inquiry, the result of which is alleged to be unsatisfactory, because of some criminal conduct on his part, because of his suborning witnesses, it is proposed that we shall try the case over again, and ascertain whether he is a person of proper moral character to be admitted to a seat upon this floor.

"Sir, break down the rule of the Constitution, once say that you can go outside of the qualifications pre-