scribed by the Constitution as sufficient to entitle a person to membership, and where are we to stop? Every man who presents himself here as member-elect will be liable to have alleged against him some crime, some offense against the laws, and thereupon a trial must be instituted. Every man presenting himself here to be sworn in will, by the force of partisan malignity upon the one side or the other, probably have something of that kind alleged against him in order to have him prevented from taken his seat. And while that may not occur now when the House is so unequally divided between parties, there may come a time when the House will be more equally divided, and this course may be resorted to in order to prevent there being added any more to the members of this House of one part or the other.

* * * * *

"What I wish to say is that we must leave something to the people; and when they have settled all these questions by electing and sending certain persons here, there remains with us nothing but to accept their work."

The questions posed to the House in this debate which resulted in the seating of the Member-elect penetrate to the essence of the constitutional question involved in the present appeal. The question Representative Schenck asked the House in 1870 is the question Mr. Madison placed to the Founding Convention in 1787. Once the House "breaks down the rule of the Constitution", where is it to stop? This is the ultimate inquiry which goes to the very heart of representative democracy. As the House itself recognized in 1870, "there may come a time when the House will be more equally divided, and this course may be resorted to in order to prevent there being added any more to the

members of this House of one party or the other." And when this time comes, the very foundations of democratic government are placed in peril and Madison's warning in 1787 that "a Republic may be converted into an aristocracy or oligarchy" may be suddenly real.

Until the unusual events of March 1966 in which the House brushed aside the constitutional advice of its own Select Committee and the respected Chairman of its own Judiciary Committee [58] the House has in its most recent cases re-

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[58] The Honorable Emanuel Celler, Chairman of the Judiciary Committee of the House, placed the constitutional issue in these terms:

> "Some may demand exclusion—ouster at the threshold by majority vote. The Constitution lays down three qualifications for one to enter Congress—age, inhabitancy, citizenship. Mr. POWELL satisfies all three. The House cannot add to these qualifications. If so it could add, for example, a religious test or conceivably deny seats to a minority by mere majority vote.
>
> "Madison and Hamilton were aware of the danger of permitting the House to regulate qualifications. They therefore said the Constitution unalterably fixes and defines qualifications. Madison said that to allow the Congress such power would be improper and dangerous." Cong. Rec. Mar. 1, 1967, H. 1926.

See further the following revealing exchange between Chairman Celler and Representative Corman:

> "Mr. Celler: On the matter of exclusion, as I understand it—and I should like to get the gentleman's view—the Constitution provides that there shall be three qualifications—namely, age, citizenship, and inhabitancy—and that the Congress cannot add to those qualifications.
>
> "That has been borne out by the articles of Madison and Hamilton in the Federalist, and borne out by the decision in the Bond case recently decided by the Supreme Court. Am I correct in that?
>
> "Mr. Corman: The gentleman is correct. In our review we noted that at the time of the debate on this provision by the Convention of property ownership ought to be included. The Founding Fathers were very explicit that the sole qualifications should be the three specified in the Constitution. They rejected additions at that time.
>
> "Mr. Celler: These qualifications are set forth explicitly in the Constitution. And if Congress had a right to add to those qualifications then conceivably Congress could prescribe a qualification based, for example, on religion. Am I correct in that?
>
> "Mr. Corman: Yes, sir; the chairman is correct.
>
> "Mr. Celler: There could conceivably be a situation arise in which

vealed a continued acceptance of the fundamental limitations which the Constitution places upon its power to reject duly elected representatives of the people who meet the constitutional qualifications for membership.

The case of *Francis N. Shoemaker,* in the 73rd Congress (1933), contains the latest full discussions on this question in the House of Representatives prior to the debates involving Petitioner Powell. In the Shoemaker debates the House once again reaffirmed its recognition of the fundamental constitutional limitations upon its power here involved.

Representative-elect Shoemaker had been convicted of a crime in Minnesota and had been sentenced to a term in the penitentiary. The House, in seating the Congressman-elect, re-emphasized its basic acceptance of the constitutional mandate that the power of the House lies solely in determining the presence of the qualifications for membership set forth in the Constitution. Finding these qualifications present, and finding that the conviction of the Representative-elect had not deprived him of his "citizenship", the House voted to seat him. 77 Cong. Rec. 131, 132, 133, 134, 136, 139 (1933).

The debate on the floor of the House which resulted in the seating of the Member-elect reflected the continued acceptance of the constitutional limitations first discussed and acknowledged on the floor of that body in the early days of the Republic. The strict constitutional limits upon the power of the House were succinctly placed by Representa-

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the majority Members of the Congress could by some device exclude the entire minority membership. Am I correct in that?

"Mr. Corman: Yes, sir.

"Mr. Celler: And that led Hamilton to agree with Madison that:

" 'The qualifications of the person who may choose or be chosen are defined and fixed in the Constitution; and are unalterable by the Legislature.' (The Federalist, No. 60.)" Cong. Rec. Mar. 1, 1967, H. 1927.

tive Lemke, who led the successful fight for the seating of the Member-elect.

> "Mr. Speaker, the question before the House is whether Mr. F. H. Shoemaker is entitled to a seat in this House or whether he is disqualified.
>
> "I make the statement without fear of contradiction that he is not disqualified but is qualified to sit here as a Member of this House under the Constitution of the United States of America and under the rules and regulations of this House.
>
> "In the first place, the qualifications for a Congressman are the following:
>
> No person shall be a Representative who shall not have attained to the age of 25 years, had been 7 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.
>
> "This is the qualification required by the Constitution of the United States."

Representative McKeown sharply synthesized the recognition of the House of the limitations placed upon its power by the Constitution in these words:

> "The Constitution says that there are three qualifications for a Member of the House. Neither the State Legislature . . . nor the Congress of the United States can change these qualifications. They are written into the Constitution by the great fathers of the Republic, and they cannot be changed by law."

The most recent and exhaustive discussion reflecting the legislative branch's own recognition of the limitations placed by the Constitution upon its power to exclude duly elected representatives of the people is to be found in the exhaus-

tive Senate debate in the case of *William Langer of North Dakota* in the 77th Congress (1942), S. Journ. 77th Congr. 1st Sess. p. 8 et seq., 2nd Sess. p. 3 et seq: The Senator-elect was challenged at the taking of the oath. The "charges against Langer were numerous and chiefly involved moral turpitude, embracing kickbacks, conversion of proceeds of legal settlements, acceptance of a bribe in leasing government property, and premature payments on contracts of advertising." *Senate Election, Expulsion & Censure Cases,* p. 141.. The Senate after full debate seated the Senator-elect.

The debate, which resulted in the seating of the Senator-elect, reflected a fundamental reaffirmation of the constitutional limitations upon the power of the Legislature recognized from the first days of the Republic. The debate reaffirmed the recognition that the constitutional power of the Legislature in Article One, Section Five to "judge" the qualifications of its members is restricted to those qualifications set forth in the Constitution itself. Senator Murdock, who led the successful fight for the seating of Senator Langer, placed the question in words which reflect the basic philosophy underlying the constitutional issues here involved.

> "What do we judge? A man comes here and presents his credentials and claims that he has the constitutional qualifications to be a Senator. As judges of that fact, we look at his credentials; we consider his constitutional qualifications. Where do we find them stated? We find them set out in the Constitution. I believe it was contemplated by the framers of the Constitution that when a man came here with credentials from his State, and claimed to have the constitutional qualifications, the matter could be judged by the Senate in not to exceed a week or 2 weeks' time; but when the word

'judge' is construed to mean the power to add qualifications, about which the State does not know, about which the Senate does not know, then, of course, there is brought about the type of farce which resulted in taking 4 years to determine that Reed Smoot was entitled to sit here as a United States Senator, and the type of farce which has resulted in Senator Langer's right to a seat being held in abeyance for more than a year, the committee searching his life almost from childhood up to the present time.

"Oh, did the men who wrote the Constitution ever contemplate that such a thing as that would happen? *In framing the Constitution they had the right to decide what tribunal should be the judge of the morals and the intellectual qualifications of the men sent here, and they decided that the people of the sovereign States should have that power, restricted only by the very definite but simple qualifications enunciated in the Constitution itself.*" Cong. Rec., p. 1947 (emphasis added).

Senator Murdock further carefully defined the meaning of Article One, Section Five so as to exclude any possibility that this Clause justified considerations beyond the express constitutional qualifications.

"Mr. Murdock: I desire to read again the provision—

'Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . .'

To my mind, the word 'judge' means to look at the qualifications contained in the Constitution. That is what the verb 'judge' means: To judge of something in existence—law or facts—and to apply the law to the facts. To extend the definition of the word 'judge' to mean that we can superadd to these qualifications, in

my opinion, is a misconstruction of the word itself." Cong. Rec. 1942, p. 2475.[59]

The following critical exchange between Senator Lucas and Senator Murdock illustrates the original meaning of Article One, Section 5, see Point I, (i), *supra,* now once again reaffirmed by the Legislature itself:

"Mr. Lucas: The Senator referred to article I, section 5. What does he think the framers of the Constitution meant when they gave to each House the power to determine or to judge the qualifications, and so forth, of its own Members.

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[59] An interesting exchange between Senator Murdock and Senator Overton further amplifies this construction of the impact of the word "judge":

"Mr. Overton: I understand the position taken by the able Senator is that section 5, article I, of the Constitution, which vests in each House the right to judge of elections, returns, and qualifications of its own Members does not vest any authority in the Senate or in the House to add to the qualifications prescribed by the Constitution, and that the word 'judge' is not to be interpreted as the word 'prescribed' would be interpreted, but means simply that the Senate, in this case, for example, sits as a judge and, as a judge, applies certain well-known provisions of the Constitution and of statutory law to the facts of the case.

"Mr. Murdock: That is my position.

"Mr. Overton: I wish to add one contribution to the argument made by the able Senator—that is, what the Supreme Court of the United States had to say with reference to section 5 of article I, which gives each House the power to judge of the qualifications of its Members. The Supreme Court of the United States, speaking through Mr. Justice Pitney, said:

'The power to judge of the elections and qualifications of its Members, inhering in each House by virtue of section 5 of article I, is an important power, essential in our system to the proper organization of an elective body of representatives. But it is a power to judge, to determine, upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass an arbitrary edict of exclusion.' [Mr. Overton appears to be referring to Mr. Justice Pitney concurring in *Newberry* v. *United States*, 256 U.S. at 484.]

I think that fully supports the contention made by the able Senator from Utah, and I think it correctly interprets the word 'judge' as used in section 5 of article I of the Constitution."

"Mr. Murdock: I construe the term 'judge' to mean what it is held to mean in its common, ordinary usage. My understanding of the definition of the word "judge" as a verb is this: When we judge of a thing it is supposed that the rules are laid out; the law is there for us to look at and to apply to the facts.

"But whoever heard the word 'judge' used as meaning the power to add to what already is the law?"—Cong. Rec. 1947, p. 2479.

A recognition of the fundamental wisdom of the refusal of the Founders to permit the Legislature to exclude duly elected members upon its own conception of their "morality" or "unfitness" is reflected throughout the Senate proceedings. Thus, the report ultimately adhered to by the Senate in vindicating the Senator-elect's right to a seat states in words which apply with prophetic insight to the present appeal:

"The power to determine fitness was reserved to the electorate as the best judges of the social intellectual, and moral qualifications of those whom they saw fit to select as their representatives. The makers of the Constitution doubtless balanced the possibility of an unwise choice of the electorate against the possibility that an agency of government, given unrestricted discretion, might, under the masquerade of morality, decide from motives of partisanship, bigotry, or fanaticism."—Cong. Rec. 1947, 2486.

Senator Murdock further explored the basic reasons why the Constitution prohibits any inquiries by the Legislature other than those into the presence of constitutional qualifications:

"Mr. Murdock: I cannot believe that the framers of our Constitution contemplated any such result.

"Now, let us take a further example. If we have the right to go into the moral character or the intellectual ability of a Senator-elect, then do we not have the corresponding duty to do it? Think that over. What would be the results? Every Senator-elect, then, would have his enemies in his own State; we have a right, under the contention of the majority, to go on these fishing trips; if we have the right, we have the duty; and if we have the right and the duty, then what do we become? We become the triers of the moral and the intellectual life of every Senator-elect from the cradle to the time of his election. Who is going to concede that? Who is going to contend for that?"—Cong. Rec. 1947, p. 2489 [60]

The critical importance to the preservation of the "bedrock" of our political system—the principle of representative democracy—was placed in clear and eloquent terms on the floor of the Senate:

"Mr. Milliken: I suggest to the Senator that a representative form of government is the heart of a republican form of government, and when the Senate undertakes to eliminate a newly elected Senator that, instead of guaranteeing a republican form of government, it is destroying a republic form of government.

"Mr. Murdock: I think the Senator is exactly cor-

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[60] An exchange on the floor between Senator Murdock and Senator Pepper further illustrates the principle underlying the *Langer* case:

"Mr. Murdock: . . . I take the position that the Senate has no right under the Constitution to go into the morals of the Senator-elect.

"Mr. Pepper: I see. The Senator construes section 5, or article I, which gives each House the power to judge of the qualifications of its members, to be limited to the things prescribed in the Constitution?

"Mr. Murdock: Yes.

"Mr. Pepper: I thank the Senator.

"Mr. Murdock: The Senator from Florida states the matter very clearly."

rect, and I thank him for his contribution. To say to a sovereign State that by reason of its inherent power the Senate reserves the right to pass on the morals and the intellectual qualifications of the men who are sent here is disruptive of a republican form of government." —Cong. Rec. 1947, p. 2481

In concluding his arguments which convinced the Senate to seat the challenged Senator-elect, Senator Murdock restated the persuasive considerations which we have seen underlay the original conclusion of the Founding Fathers that the Legislature has no constitutional power to refuse to seat a duly elected member who meets all constitutional qualifications. Senator Murdock reminded the Senate:

"Is it to be surmised that Madison, who was one member of a committee of three—its members were Madison, Hamilton, and Gouverneur Morris—would be so emphatic with reference to this particular point, and, after retiring in order to put it into immaculate form, would bring it back with the substance changed? No, Mr. President; to make such an assertion is to question the integrity of Madison, a man who fought not for phraseology, not for some technicality, but for substance.[61] The substance was what? That the qualifi-

[61] Senator Murdock is here referring to an argument similar to the one Respondents rely primarily on in their brief submitted to the District Court, consisting of a long discredited theory that because the wording of Article I, Section 2, Clause 2 was framed in the negative, that clause states, not exclusive qualifications for membership but rather minimal disqualifications. This fallacious reasoning has been fully refuted by Professor Charles Warren and rather than discuss it at any length ourselves, perhaps it would be more useful to the Court merely to set forth Professor Warren's carefully formulated rejection of this reasoning:

"An argument to the contrary has been based on the fact that the qualifications, as reported by the Committee of Detail on August 6, were expressed affirmatively, thus: 'Every member of the House of Representatives shall be of the age of twenty-five at least; shall have

cations of Members of Congress should be specified in the Constitution itself, not left to the discretion of the Congress. Why did he take such a position? *Because*

been a citizen in the United States for at least three years before his election; and shall be at the time of his election a resident of the State in which he shall be chosen' (and similarly as to Senators); whereas, as finally drafted by the Committee of Style on September 12, they were expressed negatively as follows: '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 that State in which he shall be chosen' (and similarly as to Senators). The argument is made that this change, while giving to each House unlimited power to establish qualifications, simply imposed an obligation on them not to admit any persons having the specified *disqualifications*.

"It is to be noted, however, that the Committee of Style had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so; and certainly the Convention had no belief, after September 12, than any important change was, in fact, made in the provisions as to qualifications adopted by it on August 10. That there was no difference in legal effect between a qualification expressed affirmatively and one expressed negatively may be seen from the fact that the Constitution of Massachusetts of 1780 contained affirmative qualifications for Senators as follows: 'Every member of the House of Representatives . . . for one year at least next preceding his election shall have been an inhabitant of and have been seized in his own right of a freehold of the value of one hundred pounds within the town he shall be chosen to represent, or any taxable estate of two hundred pounds.' 'No person shall be capable of being elected as a Senator who is not seized of his own right of a freehold, within the commonwealth, of the value of three hundred pounds at least, or possessed of personal estate to the value of six hundred pounds at least, or both to the amount of the same sum, and who has not been an inhabitant of this Commonwealth for the space of five years immediately preceding his election, and at the time of his election he shall be an inhabitant in the district for which he shall be chosen.' And in each case the Massachusetts Constitution termed them 'qualifications' and empowered the House and Senate to judge them, as follows: 'The Senate shall be the final judge of the elections, return and qualifications of their own members as pointed out in the Constitution.' 'The House shall be the final judge of the elections, returns and qualifications of their own members as pointed out in the Constitution.'

'So, too, in the State Constitutions of New Hampshire of 1784, Pennsylvania of 1776, and South Carolina of 1778, the qualifications of members of the Legislature are expressed in the negative phraseology thus: 'No person shall be capable of being elected'—'no person shall be eligible to sit', etc."

he knew that the fundamental cornerstone of the government of a republic is the people's right to freedom of choice of those who represent them: and Madison knew that the qualifications should be contained in the Constitution and not left to the whim and caprice of the legislature." (emphasis added)

The sweeping reaffirmance of the recognition by the Legislature of the constitutional limitations upon its power to exclude duly elected representatives of the people who meet all constitutional qualifications for membership reflected in the *Langer* case, rested in large measure upon an historic report of the Judiciary Committee of the House of Representatives for the 42nd Congress. This report, issued and approved in the cases of *Ames* and *Brooks*, 42nd Congr., 2 Hinds, p. 866 (1872), was read in full to the Senate in the *Langer* debate by Senators Murdock and Barkley. It states in the most powerful terms the fundamental precepts of our system of government which required the conclusion of the Philadelphia Convention that the Legislature was to have no constitutional power to refuse to seat duly elected representatives of the people who met the qualifications for office set forth in the Constitution itself:

"... The answer seems to us an obvious one that the Constitution has given to the House of Representatives no constitutional power over such considerations of 'justice and sound policy' as a qualification in representation. On the contrary, the Constitution has given this power to another and higher tribunal, to wit, the constituency of the Member. Every intendment of our form of government would seem to point to that. This is a government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives, whom they are to choose, not anybody else to choose for them; and we,

therefore, find in the people's Constitution and frame of government they have, in the very first article and second section, determined that 'The House of Representatives shall be composed of Members chosen every second year by the people of the States' not by representatives chosen for them at the will and caprice of Members of Congress from other States according to the notions of the 'necessities of self-preservation and self-purification.'

* * * * *

"Your committees are further emboldened to take this view of this very important constitutional question because they find that in the same sanction it is provided what shall be the qualifications of a Representative of the people, so chosen by the people themselves. On this it is solemnly enacted, unchanged during the life of the Nation, that 'no person shall be the representative who shall not have attained the age of 25 years, and been 7 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.

"Your committees believe that there is no man or body of men who can add or take away one jot or title of these qualifications. The enumeration of such specified qualifications necessarily excludes every other. It is respectfully submitted that it is nowhere provided that the House of Representatives shall consist of such Members as are left after the process of 'purgation and purification' shall have been exercised for the public safety, such as may be 'deemed necessary' by any majority of the House. The power itself seems to us too dangerous, the claim of power too exaggerated to be confided in any body of men; and, therefore, most wisely

retained in the people themselves, by the express words of the Constitution."

This report of the House Judiciary Committee of the 42nd Congress in incisive terms states the very essence of the historic constitutional question raised in this appeal. The selection of the representatives of the people to the houses of the Legislature is not a matter which "has in any measure been committed by the Constitution to the legislative branch of the National Government. *Cf. Baker* v. *Carr,* 369 U.S. 194, 211. On the contrary, as the Report of the Judiciary Committee acknowledges, this power has by the Constitution, been assigned to "another and higher tribunal," the "people themselves," subject only to such qualifications as the "people themselves" have established in the fundamental law of the land—the Constitution itself. This flows from the basic postulate upon which this experiment in representative government rests—that "this is a government of the people, which assumes that they are the best judges of the social, intellectual and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them." When the Legislature ignores the constitutional qualifications for membership in the House established by the people and intrudes into the power vested exclusively by the Constitution in the sovereign people to select freely their own representatives, the House has dangerously invaded the powers reserved by the Constitution, and by the philosophy of government it rests upon, to the people themselves.[62]

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[62] The House has in the past ignored the constitutional limits on its power only on rare occasions and under intense partisan pressure and puhlic hysteria. These isolated cases have been seriously criticized by the House itself and have been subsequently overruled and discarded.

The case of *Brigham Roberts* in the 56th Congress, 1899, 1 Hinds, § 474, involved a member-elect from Utah who was barred from his seat on the ground that he was a polygamist in accord with the Mormon faith

(Footnote continued on next page)

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and had been convicted of violating the federal Edmonds Act prohibiting polygamy. The House, responding to a wave of anti-Mormon feeling throughout the country, barred Roberts despite a strong minority report which reasserted the constitutional principles previously adhered to by the House. Only a few years later the Senate sharply repudiated the *Roberts* action, seating, in the case of *Reed Smoot of Utah*, in the 58th Congress, 1903, 1 Hinds, §§ 481-84, a Senator-elect despite his adherence to the Mormon faith. The Senate forcefully reasserted the controlling constitutional limitation that the sole question before the legislature is the presence of the constitutional qualifications. The Senator who led the fight to exclude Senator Smoot, Senator Taylor, had been the Representative in the House who had engineered four years before the efforts to bar Mormon Representative Roberts. The positions advanced by Senator Taylor in justification of the *Roberts* exclusion were sharply and successfully refuted in the following argument of Senator Knox:

> "There is no question as to Senator Smoot possessing the qualifications prescribed by the Constitution, and therefore we can not deprive him of his seat by a majority vote. He was at the time of his election over 30 years of age and had been nine years a citizen of the United States, and when elected was an inhabitant of Utah. These are the only qualifications named in the Constitution, and it is not in our power to say to the States, 'These are not enough; we require other qualifications,' or to say that we can not trust the judgment of States in the selection of Senators, and we therefore insist upon the right to disapprove them for any reason.
>
> "This claim of the right to disapprove is not even subject to any rule of the Senate specifying additional qualifications of which the States have notice at the time of selecting their Senators, but it is said to be absolute in each as it arises, uncontrolled by any canon or theory whatever.
>
> "Anyone who takes the trouble to examine the history of the clause of the Constitution as to the qualification of Senators must admit that it was the result of a compromise. The contention that the States should be the sole judges of the qualifications and character of their representatives in the Senate was acceded to with this limitation: a Senator must be 30 years of age, nine years a citizen of the United States, and an inhabitant of the State from which he is chosen. Subject to these limitations imposed by the Constitution, the States are left untrammeled in their right to choose their Senators. This constitutional provision secures a measure of maturity in counsel, and at least a presumption of interest in the welfare of the Nation and State."

The Senate ultimately determined that because Mr. Smoot possessed the constitutional qualifications he was entitled to his seat. And a subsequent move to expel Senator Smoot failed. See generally, 1 Hinds, § 478, pp. 550-57. Significantly, the House itself, in 1933, in the case of *Shoemaker, supra,* pointedly disregarded the *Roberts* case as binding precedent. Similarly, in the *Langer* case, *supra,* the Senate specifically approvingly followed the minority report in *Roberts.*

B. *The punishment of exclusion from membership in the House for the 90th Congress inflicted upon the Petitioner violates Article One, Section 9, Clause 3, providing that "No Bill of Attainder or ex post facto law shall be passed."*

H. Res. 278, which imposed the severe punishment of exclusion from the House of a duly elected Representative who meets all constitutional qualifications for membership, is a classic Bill of Attainder prohibited by Article One, Section 9, Clause 3 of the Constitution. It is "a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *Missouri*, 4 Wall 277; *United States* v. *Lovett*, 328

Following the Civil War, in a group of cases, the House barred members-elect who had participated in the Rebellion. See the cases of the *Kentucky Members* in the 40th Congress, 1967. However, it was pointed out in subsequent Congresses that the Congress itself recognized that this action was unconstitutional under Article 1, found it necessary to adopt Section 3 of the Fourteenth Amendment to sanction barring of members elect on this additional ground of loyalty to the Confederacy. See the discussion in the *Langer* case, *supra*, Cong. Rec. 1942, March 16, p. 2484. See also 33 Virginia Law Review 332:

> "Were the Senate able to impose qualifications as it saw fit, it would not have been necessary to amend the Constitution to achieve the above result," at p. 332.

The case of *Victor Berger* in the 66th Congress, 58 Cong. Rec. (1919) involved the refusal to seat a Congressman-elect who had been found guilty in World War I of violation of the Espionage Act. The House majority took the position that Berger had in effect committed "treason" which foreclosed his right to hold office under the United States pursuant to the congressional constitutional power to fix the penalty for treason. The majority House report further justified the exclusion of Berger under Section 3 of the Fourteenth Amendment, barring from the office of Representative anyone who has "given aid and comfort to the enemies" of the United States. This exclusion of Berger, a Socialist Congressman, at the height of the post-World War One anti-radical hysteria has been severely criticized. *Cf.* the opinion of Chief Judge Tuttle of the Fifth Circuit in *Bond* v. *Floyd*, 251 F. Supp. 333, 345. The Honorable Emanuel Celler, Chairman of the House Judiciary Committee, in the March 1st debate urged strongly the "repudiation" of such precedents as *Roberts* and *Berger*, which reflect the prejudices of prior eras. Chairman Celler urged that "this House should not resurrect a long discredited view of the Constitution and follow precedents bespeaking furor instead of fairness." Cong. Rec., March 1, 1967, H. 1945.

U.S. 303 (1946); *United States* v. *Brown*, 381 U.S. 437 (1965). It represents, in the recent words of the Chief Justice, "the evil the framers had sought to bar; legislative punishment, of any form or severity, of specifically designated persons or groups." *United States* v. *Brown, supra,* at p. 447.[63]

1. There is not the slightest question that the House itself, the Select Committee which sat and presented recommendations, the House leadership which urged adoption of those recommendations, and the majority which rejected the recommendations as too lenient, regarded the actions, both proposed and as ultimately adopted, as punishment against the petitioner, Adam Clayton Powell, Jr.

The Chairman of the Select Committee, Mr. Celler of New York, placed in unequivocal terms the understanding of the Select Committee established by the House on January 10, that the objective assigned to them by the House itself was to sit in judgment on Congressman Powell and recommend appropriate punishment. Mr. Celler introduced the Report of the Select Committee in these words:

> "Mr. Speaker, the nine men appointed by the Speaker of the House were weighted with the heaviest responsibility that can be placed on any one group—to sit in judgment on their fellow man. What is asked of us when we judge one who had been a colleague for 22 years, who had been sent to Congress time and time and yet time again by his constituency? . . . *That we devise the structure of punishment that will be immediate, effective, certain and lasting.*" Cong. Rec. Mar. 1, H. 1919 (emphasis added).

Lest there be the slightest misconception of the Select

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[63] See the recent definition of a Bill of Attainder in *U.S.* v. *O'Brien*, — U.S. — 1968) as a "legislative act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial".

Committee's view of its function, Mr. Celler went on further:

> "We had to face up to the necessity of meaningful punishment. The penalties imposed satisfy a stern sense of justice. . . . Exclusion or expulsion seemed deceptively simple. *Yet neither could bring into play the punishments herein devised,* keeping as well the recommendations of this committee within the boundaries of the Constitution and the precedents." Cong. Rec. *supra,* H. 1920 (emphasis added).

The majority leader of the House, Mr. Albert, then reaffirmed the understanding that the entire proceeding was designed and did indeed lead to *punishment* of the Petitioner:

> "It is true that what the committee has recommended adds up to stern punishment. But in its wisdom, the committee has decided that this is a just punishment." Cong. Rec. *supra,* H. 1920.

The irrefutable conclusion that was in process was a "legislative act which inflicts punishment without judicial trial," *Cummings* v. *Missouri, supra,* is revealed in the exchange which then followed between Congressman Lennon and Chairman Celler:

> "Mr. Lennon: How can we say in conscience to the people of America, when this distinguished committee finds the gentleman from New York [Mr. Powell], both in his individual capacity as a Member and as chairman of a great committee, has willfully and wrongfully and falsely misappropriated public funds to his own personal use—and the *gentleman knows that that is almost identical language that is sent to a grand jury on a bill of indictment for embezzlement. Just how can we vote to do it, my friend, in conscience and morality?*

"Mr. Celler: The report speaks for itself. The report went into all those facts to which the gentleman has adverted, and we came to the conclusion and stated *our findings in the report that we feel the censure and the punishment that we would mete out to Mr. Powell would be ample and sufficient.*" Congr. Rec. *supra,* H. 1921 (emphasis added.)

Representative Moore, the ranking Republican member of the Select Committee, likewise characterized the proceedings as punitive in nature, resulting in severe punishment.

"... we feel we have come to this House with a resolution which *involves, in perhaps its harshest terms, more punishment than has ever been dealt to any single Member of the House of Representatives in the history of our Nation.*" Cong. Rec. *supra,* H. 1921 (emphasis added).

Representative Corman, member of the Committee, described the nature of the Committee's own view of its purpose to assess the proper "legislative punishment" in clear words:

"It was the consensus of your committee that the conduct of Adam Clayton Powell warranted substantially more than censure, although it certainly warranted that too. We felt the punishment should do two things: first, it must be sufficiently severe to stand as a historic warning against future misconduct; second, it ought to retrieve for the American taxpayers, at least in substantial proportions, funds which were misappropriated; and third—and I think of great importance—it ought to leave the door open for redemption." Cong. Rec. *supra,* H. 1925.[64]

[64] The dissenting views of Congressman Conyers of Michigan, fully recognizing the "punishment" aspect of the procedures and the constitutional consequences which flow from this, are interesting:

Representative McGregor, another member of the Select Committee, likewise stated emphatically his understanding that the proceedings against Mr. Powell were punitive in character for the purpose of devising proper "legislative punishment." *United States* v. *Brown, supra:*

> "Our recommended punishment is unprecedented in its severity. No one in the entire history of the U.S. Senate or House has been punished so harshly as we ask that Mr. Powell be punished. And if Mr. Powell does not appear by March 13 to take his punishment, then under the terms of our recommended resolution his seat will be declared vacant.
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> * * * * *
>
> "We have recommended the exercise of our punishment power." Congr. Rec. *supra,* H. 1939 (emphasis added.)

The majority of the House, in rejecting the punishment recommended by the Select Committee, did so precisely because they felt that the punishment proposed was not severe enough.

Mr. Curtis, who introduced the amendment which substituted exclusion for the punishment suggested by the Select Committee, made it most explicit that exclusion was punishment for the same offenses and based on the same findings which had been the foundation of the Select Committee's

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"However, I cannot allow, in good conscience, of imposing a monetary fine and loss of seniority, be allowed to go unmentioned.

"Because, Mr. Speaker, never before have we had to consider the imposition of a monetary assessment on an individual. Never before has any Member of the Congress been stripped of his seniority in the course of such proceedings.

"The severe punishment of a loss of all seniority and imposition of a $40,000 fine is, first, violative of our system of Government; second, contrary to constitutional rights of Mr. Powell; third, subjects this matter to appeal in the Federal courts; and is, fourth, totally unprecedented." Cong. Rec. *supra,* H. 1929.

recommendations. This was brought out in response to a question by Mr. Edmondson of Oklahoma:

> "Mr. Edmondson: I would like to ask the gentleman if in his view the unanimous Committee findings that are set forth on pages 31 and 32, in which specific findings are made as to the wrongful misappropriation of public funds in amounts in the Committee Report totaling up to over $46,000—if these findings are in his view a basic and fundamental requirement to the action that is being taken here today?
>
> Mr. Curtis: I wish to thank the distinguished gentleman. Yes, indeed, they are. The basis of the discussion is that this motion of mine is a substitute, but it is based upon—and I emphasize again—the fine work that this Committee did and upon its findings. Incidentally there has been little or no mention about this, but there is also a finding of forgery, which disturbs me very much." Cong. Rec. *supra*, H. 1946.

Mr. O'Neal of Georgia, another supporter of the majority imposition of the severer penalty of exclusion, commented:

> "And let us not be confused by arguments that the punishment suggested by the committee is sufficient for his wrongdoings. My background includes 23 years as a prosecuting attorney in the courts of my home State, and such arguments are clearly foreign to my concept of American jurisprudence." Cong. Rec. *supra*, H. 1948.

Still another supporter of the exclusion action, Mr. Dowdy, explained his decision on the basis that exclusion was the only proper penalty for the "criminal conduct" the Petitioner was charged with and had been found "guilty" of:

> "Mr. Speaker, I support the resolution that the Member-elect from the 18th District of New York, Adam

> Clayton Powell, be excluded from this Congress, and that the seat be declared vacant. I cannot agree with the recommendation of the select committee that he be seated and censured. *If Powell is guilty of the criminal conduct with which he is charged, and I believe he is, and it was so found by the select committee, he ought not to be seated in the U. S. Congress.* If he is not guilty, he would deserve no censure. There is no in between in a case like this. On the proof and debate we have heard here, this resolution to deny the seat demands an 'aye' vote, and I so urge." Cong. Rec. *supra*, H. 1948. (Emphasis added.)

Mr. Broyhill of Virginia spoke in terms which expressed in the frankest way the views of the majority that the action of exclusion was specifically designed to be "legislative punishment."

> "Today we are asked to determine what penalty shall be imposed upon one of our own. We have chosen nine of our esteemed colleagues to serve as a select committee to advise us, and they have reported to us.
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> * * * * *
>
> "The special committee now recommends that we seat Mr. Powell, censure him, strip him of his seniority, and require him to pay $40,000 through deductions from his congressional salary to offset liability to the U. S. Government.
>
> * * * * *
>
> "Mr. Speaker, if a member of the President's Cabinet were ever to be found guilty of having wrongfully and willfully appropriated some $44,000 of public funds for his own use, and made false certifications as to expenditures, would the Members of this House allow the President to punish that man by requiring him to pay

> back the money misappropriated and by demoting him to a lower Cabinet rank? I think we all know the answer. It is a resounding 'No.'
>
> "If Mr. Powell is guilty of the offenses as our special committee has found, a vote to seat him would be a vote to seat right along beside him every charge of corruption against the Congress of the United States. His guilt, abuses, and illegal actions will taint all of us so long as he remains a Member of Congress. It is inconceivable that we should allow this man to be seated." Cong. Rec. *supra*, H. 1947.

The truly extraordinary nature of the proceedings against the Petitioner was that the entire House, its Select Committee, its leadership and the majority which took control at the conclusion of the debates openly and frankly regarded the proceedings as a means of imposing "legislative punishment—against specifically designated persons." *United States* v. *Brown*, at p. 447. The only controversy between the majority and the minority was as to the "form or severity" of the "legislative punishment". *United States* v. *Brown*, at p. 447. The resolution of exclusion for the entire 90th Congress was therefore a classic Bill of Attainder prohibited by the Constitution. *Cummings* v. *Missouri*, 4 Wall 277; *Ex parte Garland*, 4 Wall 333; *United States* v. *Lovett*, 328 U.S. 303; *United States* v. *Brown*, 381 U.S. 450.

2. The constitutional prohibition against a Bill of Attainder has a special and demanding importance in this case. The "reasons for its inclusion in the Constitution, and the evils it was designed to eliminate", *United States* v. *Brown*, *supra*, at p. 442, are particularly germane to the issues raised in this appeal. In the first place it should be noted in fairness to the petitioner that when the precise questions of alleged misconduct upon which the legislative decree of punishment was avowedly based were presented before a federal grand jury, that body, exercising its judicial func-

tion, declined to return any indictments against petitioner and the Department of Justice announced publicly that there was insufficient evidence to ground a request for indictment. New York Times, December, 1968. This recent action merely highlights the evils involved in "legislative punishment" which the Bill of Attainder clause was designed to prohibit. As the Court has only recently reminded us, "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature" *United States* v. *Brown, supra,* at p. 442.[65]

One of the central ironies of the District Court's opinion in this case was its insistence that its impotence to grant relief flows from the doctrine of separation of powers. But as this Court has only so recently reminded us:

> "The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, 'in a representative republic * * * where the legislative power is exercised by an assembly * * * which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of

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[65] As the Court points out in *United States* v. *Brown, supra,* at p. 441, the "history [of the prohibition against Bills of Attainder] . . . provides some guidelines." A Bill of Attainder was not historically limited to sentences of death, but included "bills of pains and penalties" which were "identical to the bill of attainder, except that it prescribed a penalty short of death, e.g., banishment, *deprivation of the right to vote or exclusion of the designated party's sons from Parliament.*" [emphasis added]

United States v. *Brown,* at pp. 441, 442.

> pursuing the objects of its passions * * *,' barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the other departments. *The Bill of Attainder Clause was regarded as such a barrier.*" (Emphasis added).
>
> United States v. Brown, at pp. 443, 444.[66]

The doctrine of separation of powers therefore, completely contrary to the District Court's assumption, *requires* judicial intervention to strike down the action of the House as a "legislative act which inflicts punishment without a judicial trial", *Cummings* v. *Missouri, supra.* This is because, as the Chief Justice pointed out in *Brown:*

> ". . . the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons."
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> *United States* v. *Brown,* at p. 445

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[66] The Court in *Brown* calls our attention to the famous discussion of Alexander Hamilton explaining the fundamental policy considerations underlying the Bill of Attainder prohibition:

> "Nothing is more common than for a free people, in times of heat and violence, to gratify monetary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense."
>
> *United States* v. *Brown,* at p. 444.

For, as the Court concluded:

> "By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rulemaking. 'It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.' *Fletcher* v. *Peck*, 6 Cranch 87, 136, 3 L. Ed. 162."
>
> *United States* v. *Brown*, at p. 446.

Consequently, a bill of attainder generates a special and unique demand on the Court—a compulsion more urgent and imperative even than the striking down of an unconstitutional act. The reason is simple: a bill of attainder represents usurpation, by the legislature, of the functions assigned to the judiciary. The integrity of the judicial function itself is transgressed.[67]

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[67] Within the basic scheme of separation of powers, the Bill of Attainder Clause occupies a special place. Article I, Section 9 has been viewed by commentators as a limitation on the Legislative Branch and an affirmation of the judiciary's sphere of supremacy which is as broad and central to the separation of powers as that created by Article III.

The intensity of the opposition of the Framers of the Constitution to Bills of Attainder has been especially noted by Justice Black:

> "Are there circumstances under which Congress could, after nothing more than a legislative bill of attainder, take away a man's life, liberty, or property? Hostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal Government. They wanted to remove any possibility of such proceedings anywhere in this country. This is not strange in view of the fact that they were much closer than we are to the great Act of Attainder by the Irish Parliament, in 1688, which condemned between two and three thousand men, women and children to exile or death without anything that even resembled a trial. Black, 'The Bill of Rights and the Federal Government' in Cahn, *The Great Rights*, 57 (1963)."

The section of Justice Story's commentary devoted to Article I, Section 9 explains the relationship between the Bill of Attainder prohibition and the separation of powers doctrine.

The edict of permanent exclusion from membership in Congress during the entire 90th Congress was, as we have seen, universally acknowledged by the entire Congress to have been a "legislative act which inflicts punishment"

"§ 1337. The next clause is, 'No bill of attainder' or ex post facto law shall be passed.'

"§ 1338. Bills of attainder, as they are technically called, are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. But in the sense of the constitution, it seems, that bills of attainder include bills of pains and penalties; for the Supreme Court have said, 'A bill of attainder may affect the life of an individual, or may confiscate his property, or both.' In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions. Such acts have been often resorted to in foreign governments, as a common engine of state; and even in England they have been pushed to the most extravagant extent in bad times, reaching, as well to the absent and the dead, as to the living. Sir Edward Coke, has mentioned it to be among the transcendent powers of parliament, that an act may be passed to attaint a man, after he is dead. And the 'reigning monarch, who was slain at Bosworth, is said to have been attainted by an act of parliament a few months after his death, notwithstanding the absurdity of deeming him at once in possession of the throne and a traitor. The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its order course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent excitements; periods, in which all nations are most liable (as well the free, as the enslaved) to forget their duties, and to tramples upon the rights and liberties of others." (III Story, *Commentaries,* 210-11, Chapter 32)

Cummings v. *Missouri, supra.*[68] That it was "without a judicial trial" *Cummings* v. *Missouri, supra,* is not even contested by respondents. See Point I C, *infra.* As Representative Conyers, a member of the Select Committee pointed out:

> "As a further illustration that Congress is not the proper body to investigate, judge and impose punishment for violations of law, I would point out that our procedures do not include the usual judicial requirements. Our committee combined within itself the functions of prosecutory, judge, and jury. The committee staff made investigations. The committee passed on motions regarding questions of procedure and law. And the committee issued findings relating to the facts of the case."
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> (90 Cong. Rec., 1st Sess., H. 1928)

The Select Committee which found the "facts" upon the "legislative punishment" was based justified its denials of the most elemental procedural rights of an accused upon the ruling that "this is not an adversary proceedings" Hearings of Select Committee, *supra,* at p. 59. It needs no citation in this Court to support the threshold proposition of American law that a "judicial trial" requires an adversary hearing. The resolution of exclusion for the entire 90th Congress, universally conceded to be "a legislative act which inflicts punishment", *Cummings* v. *Missouri, supra,* was adopted as the result of a proceeding universally conceded by the House itself to have been "without a judicial trial." *Cummings* v. *Missouri, supra.*

This action of the House, a classic Bill of Attainder, which accumulates "all powers, legislative, executive and

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[68] Cf. *United States* v. *Lovett, supra,* at p. 316: "Permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."

judiciary, in the same hands—may justly be pronounced the very definition of tyranny'' The Federalist, No. 67, pp. 373-374. As this Court has so recently held, ''by banning bills of attainder, the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making'' *United States* v. *Brown, supra,* at p. 446.

In *United States* v. *Lovett, supra,* the Court, again facing a challenge to punitive action directed against named individuals, reminded us that ''when our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.'' *Supra,* at p. 318. Once again, in the words of Mr. Justice Black in *Lovett,* this Court has no alternative but to say that as ''much as we regret to declare'' that action of Congress ''violates the Constitution, we have no alternative here'' *Lovett, supra,* at 318.[69]

C. *The punishment of exclusion from Membership in the House inflicted upon the Petitioner violated the Due Process Guarantee of the Fifth Amendment.*

The action of the House in excluding the Congressman-Elect on the four stated grounds in H. Res. 278, see Statement of Facts, *supra,* for the avowed purpose of punishing him for these alleged findings of misconduct, see Point I, B, *supra,* was in violation of the Due Process Guarantee of the Fifth Amendment to the Constitution of the United States. It was not an action ''based upon reasonable consideration of pertinent matters of fact according to estab-

[69] The precise form of legislative action, bill, Act, or Resolution has no relation to the prohibition against Bills of Attainder. ''. . . legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution'', *United States* v. *Lovett, supra,* at p. 315.

lished principles of law'' *Newberry* v. *United States,* 256 U.S. at 285. It was "an arbitrary edict of exclusion.'' *Newberry* v. *United States, supra,* at p. 285.

We have demonstrated that this "arbitrary edict of exclusion", designed to punish the named individual, is in sharp violation of the constitutional prohibition against Bills of Attainder. See Point I, B, *supra.* But even if the action is sought to be justified under the powers of the House pursuant to Article I, § 5, this power to "judge'' must itself be measured by the commands of the Due Process Clause. This Court has clearly so held.

In the famous concurring opinion of Mr. Justices Pitney, Brandeis and Clarke, in *Newberry* v. *United States, supra,* at p. 285, adopted approvingly by the Court in *United States* v. *Classic,* 313 U.S. 299, this is made amply clear:

> "The power to judge of the elections and qualifications of its members, inhering in each House by virtue of Sec. 5 of Art. I, is an important power, essential to our system to the proper organization of an elective body of representatives. *But it is a power to judge, to determine upon reasonable consideration of pertinent matters of fact according to established principles and rules of law; not to pass on arbitrary act of exclusion''* at p. 285.[70] (emphasis added)

There can be no argument, as we have demonstrated previously, see Point I, B, *supra,* that the act of exclusion was

[70] See, for example, *United States* v. *Ballin,* 144 U.S. 1, "The Constitution empowers each house to determine its own rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relationship between the mode or method of proceeding established by the rule and the result which is sought to be obtained" at p. 5. See, also, *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272, 15 L. Ed. 372 (1816): "The article [Due Process Clause of Fifth Amendment] is a restraint on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

conceived of by the entire House as the imposition of *punishment* upon the Member-Elect.[71] If there is one principle which has "remained relatively immutable in our jurisprudence", *Greene* v. *McElroy,* 360 U.S. 474, 496, it is that punishment may not be meted out to American citizens without adherence to the minimal protections of due process of law required in an adversary proceeding. This is a first concept of our American law and is applicable to any form of governmental action, whether criminal or civil, executive, legislative or administrative, which results in punishing a citizen. See for example, *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123; *Shaughnessy* v. *United States ex rel. Meti,* 345 U.S. 206; *Greene* v. *McElroy,* supra.[72]

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[71] Mr. Celler himself, the Chairman of the Select Committee, characterized the task of the Committee as including the responsibility that "we devise the structure of punishment that will be immediate, effective, certain, and lasting." Cong. Rec. March 1, 1967, H. 1919. He added, "We had to face up to the necessity of meaningful punishment", id. at H. 1920. Mr. Moore, the ranking Republican member of the Committee, said that the Committee has "come to this House with a resolution which involved in perhaps its harshest terms, more punishment than has ever been dealt to any single Member of the House of Representatives in "the history of our Nation", id. at H. 1921. Those members who rejected the recommendations of the Select Committee, did so because they felt the *punishment* recommended was not severe enough. See, for example, Mr. O'Neil of Georgia: "And let us not be confused by arguments that the punishment suggested by the Committee is sufficient for his wrongdoing", id. at H. 1948. See also, for example, similar statements at H. 1946, H. 1948 and H. 1949.

[72] As Chief Justice Warren has stated in *Greene* v. *McElroy,* 360 U.S. 474, 496-97 (1919): "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be

The extraordinary nature of the proceedings in the House [73] which resulted in findings of fact upon which the House admittedly took *punitive* action against the Member-Elect was that when the Member-Elect moved for certain elementary rights of due process of law at the outset of the hearings of the Select-Committee, these were denied. The Member-Elect had requested these rights 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 an accuser;
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> (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

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confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., *Mattox* v. *United States,* 156 U.S. 237, 242-244, 39 L. ed. 409-411, 15 S. Ct. 337; *Kirby* v. *United States,* 174 U.S. 47, 43 L. ed. 890, 19 S. Ct. 174; *Motes* v. *United States,* 178 U.S. 458, 474, 44 L. ed. 1150, 1156, 20 S. Ct. 993; *Re Oliver,* 333 U.S. 257, 273, 92 L. ed. 682, 694, 68 S. Ct. 499, but also in all types of cases where administrative and regulatory actions were under scrutiny. E.g., *Southern R. Co.* v. *Virginia,* 290 U.S. 190, 78 L. ed. 260, 54 S. Ct. 148; *Ohio Bell Tel. Co.* v. *Public Utilities Com.,* 301 U.S. 292, 91 L. ed. 1093, 57 S. Ct. 724; *Morgan* v. *United States,* 304 U.S. 1, 19, 82 L. ed. 1129, 1133, 58 S. Ct. 773, 999; *Carter* v. *Kubler,* 320 U.S. 243, 88 L. ed. 26, 64 S. Ct. 1; *Reilly* v. *Pinkus,* 338 U.S. 269, 94 L. ed. 63, 70 S. Ct. 110.

[73] Until this unusual proceeding the House itself has always afforded a Member due process of law when possible punishment is involved. For example in the First Congress, during the contested election case of *Ramsay* v. *Smith,* 1 Hinds 717, the reports state: "Mr. Smith be permitted to be present from time to time when proofs are taken, to examine the witnesses and to offer counter-proofs—", 1 Hinds 717. See for example Statement of Congressman Robeson in the 47th Congress (1882) in discussing procedures to be followed in an exclusion case: "We are a court, then, of high equity, proceeding according to legal processes to investigate truths, the conditions of which are defined and fixed by constitutional law." Cf. also the full procedural guarantees afforded in every respect to the Mississippi Members challenged in the ***Mississippi Contested Elections of 1965.***

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 a transcript of every hearing." [74]

The principal requests of the petitioner for the elementary rights of due process of law required when adjudication will result in punishment, see *Greene* v. *McIlroy, supra,* were denied by the Committee upon the rather astounding ground that "This is not an adversary hearing," Hearings of Select Committee, *supra,* at p. 59. To make it amply clear why these elementary procedural rights of notice, statement of charges, confrontation and cross-examination were being denied, the Chairman concluded his ruling by stating: "Again the Committee states that this is an inquiry and not an adversary proceeding." Hearings of Select Committee, *supra,* at p. 59.[75]

The truly extraordinary nature of these rulings denying the petitioner the most elementary rights of due process of law, based on the theory that the proceeding which ultimately resulted in punishment was not "adversary" in nature but merely an "inquiry", is underscored by the procedures followed contemporaneously by the other

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[74] See motion filed by counsel for petitioner before Select Committee, Hearings of Select Committee, p. 54.

[75] It should be noted that in its final report Honorable John Conyers, Jr., Member from Michigan and a member of the Select Committee, dissented from this ruling, stating, in part:

> "A. Any Member or Member-elect and his counsel should be afforded the right to cross-examine all witnesses brought before this committee or any other committee inquiring into the qualifications, *punishment,* final right of a Member to be seated, or other related questions." (Emphasis added.)
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> Report of Select Committee, *supra,* at p. 35.

House in the hearings involving Senator Dodd. At the outset of the Dodd hearings the Chairman stated:

> "Senator Dodd will have all his rights protected at this hearing. He may attend the hearings and may testify if he wishes. He may be accompanied by counsel of his own choosing. He or his counsel will be permitted to cross-examine witnesses and offer evidence in his own behalf.
>
> "Gentlemen, Rule 13 of our Rules of Procedure limits the right of a person who is the subject of an investigation to submit to the Chairman and to the Committee questions for cross-examination. That rule is rather narrow and restricted. I said at the time of our adoption of the rules that if any staff member or any Senator was before us on investigation, that it would be unthinkable to me to give them less than the basic principles of American justice and procedure, that is for the right to cross-examine all witnesses. That is what we have arranged for here when this matter was voted, to have a hearing with reference to Senator Dodd. I have been on another committee that had hearings concerning a Senator, the late Joe McCarthy, and we, of course, extended the same rule there. Anything less than that would be less than American standards of justice." [76]

The shocking contrast between the procedural rights granted to Senator Dodd at the hearings which resulted in a recommendation of the mildest form of punishment, censure, and the denial of these rights to this petitioner at hearings which resulted in what the House itself conceived of as the severest form of punishment, exclusion from the House, is best evidenced by the Select Committee of the

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[76] See report of Hearing of Senate Ethics Committee.

Senate's own description of the conduct of the Dodd hearings and the rights afforded Senator Dodd and his counsel:

"Rights and Privileges

Subject of hearing

Senator Dodd, as the subject of the Investigation, was afforded the opportunity to attend all hearings and to be accompanied and represented by counsel. *He was given notice of the charges to be investigated and given time to prepare for hearings. He was also given the names of witnesses and a summary of their expected testimony prior to hearings. He and his counsel were permitted to cross-examine witnesses called by the Committee, and to call and examine additional witnesses and to present additional evidence. The Committee did not call Senator Dodd as a witness, respecting his right to remain silent.* He was, however, offered the opportunity to testify and did, in fact, take the stand. At his request, Senator Dodd was examined by Members of the Committee, rather than by Committee counsel. *In addition, Senator Dodd was given opportunity to raise, and be heard on, procedural and jurisdictional questions prior to and during hearings and to object and present argument on the admissibility of evidence.*" (Emphasis added.)

Report of the Select Committee on Standards and Conduct of the United States Senate on the Investigation of Senator Thomas J. Dodd of Connecticut. Rep. #193, 90th Congr., 1st Sess., p. 13.[77]

[77] In addition the Senate Committee described the rules of evidence it followed in this fashion:

"In general the Committee was guided by the rules of evidence applicable to the Federal courts. All testimony from witnesses was taken under oath and by personal appearance. Hearsay evidence

Representative-Elect Powell, facing a hearing which resulted in findings of fact upon which the severest of all punishment was inflicted upon him, in contrast to the Senate Committee's own description of its own proceedings, was (1) given no notice of the charges to be investigated except in such terms as "alleged misconduct on your part occurring at any time since January 3, 1961." [78] (2) he was not "given the names of witnesses and a summary of their expected testimony prior to hearings"; (3) Neither he nor his counsel "were permitted to cross-examine witnesses called by the Committee";[79] (4) The Committee did not "respect his right to remain silent" although he did testify freely and voluntarily as to the only relevant matters before the Committee, his constitutional qualifications for membership in the House, but the Committee drew adverse inferences from his exercise of his right to remain silent as to matters relating to possible punishment; [80]

The Committee did not permit counsel for the Congressman-elect to be "heard" on procedural and jurisdictional questions and to "object and present argument on the admissibility of evidence"; [81] and finally, the Committee was in no way "guided by the rules of evidence applicable to the Federal courts," and hearsay evidence rather than "limited" was extensive.

The words of the Honorable Chairman of the Senate Se-

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was limited and assigned appropriate probative value. Affidavits in lieu of personal appearance by witnesses were admitted only on restricted matters or where the calling of witnesses was impractical or impossible. All documents and records were properly authenticated before being accepted by the Committee." Report of Senate Select Committee, *supra*, at p. 11.

[78] *Cf.* for example: *Watkins* v. *United States*, 354 U.S. 178 (1957).

[79] *Cf.* for example: *Pointer* v. *Texas*, 380 U.S. 400 (1965).

[80] *Cf.* for example: *Slochower* v. *Board of Education*, 350 U.S. 551 (1956).

[81] It hardly needs citation to support the proposition that the right to "effective counsel", see *Powell* v. *Alabama*, 287 U.S. 45, includes the right of counsel to be heard before the Court.

lect Committee investigating Senator Dodd are particularly appropriate in evaluating the nature of the proceedings in the House upon which the most serious of punishments was inflicted upon the Congressman-Elect:

> "I said at the time of our adoption of our rules that if any Staff member or any Senator was before us on investigation, that it would be unthinkable to me to give them less than the basic principles of American justice and procedure.... Anything less than that would be less than American standards of justice." [82]

The procedures followed by the House in adjudicating the four findings of fact upon which the punishment of exclusion rested was, in the words of Senator Stennis referred to above, "less than the basic principles of American justice and procedure ... less than American standards of justice." Cf. *Palko* v. *Connecticut,* 302 U.S. 319; *Gideon* v. *Wainwright,* 372 U.S. 335. Accordingly, the punishment of exclusion ordered by the majority of the House violated the guarantee of due process of law contained in the Fifth Amendment of the Constitution of the United States. It was not an action "based upon reasonable consideration of fact according to established principles of law." *Newberry* v. *United States, supra.*

D. *The Exclusion of the Petitioner violated his rights and the rights of the overwhelming Negro majority of the citizens of the 18th Congressional District guaranteed by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.*

The uncontested circumstances surrounding the refusal of the majority of the House to seat the Petitioner, the duly elected and constitutionally qualified choice of the people of the 18th Congressional District of New York, as their repre-

[82] See report of Hearing of Senate Ethics Committee.

sentative reveals a serious question as to whether the Petitioner's rights as a Negro citizen, and the rights of the approximately 400,000 Negro citizens residing in the 18th Congressional District of New York to the freedom and equality guaranteed to them by the Wartime Amendments have been violated.

It is of course unnecessary to demonstrate by affirmative evidence subjective intent of the House that the act of exclusion was related to considerations of race prohibited by the Wartime Amendments. It has long been established that disparity of results or treatment may be sufficient to demonstrate constitutionally impermissible discrimination by reason of race even where the treatment on its face involves no overt racial classifications or stated motivations. See *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Strauder* v. *State of West Virginia*, 100 U.S. 303; *Neal* v. *State of Delaware*, 103 U.S. 370; *Gibson* v. *State of Mississippi*, 162 U.S. 565; *Carter* v. *State of Texas*, 177 U.S. 442; *Rogers* v. *State of Alabama*, 192 U.S. 226; *Martin* v. *State of Texas*, 200 U.S. 316; *Norris* v. *State of Alabama*, 294 U.S. 587; *Hale* v. *Commonwealth of Kentucky*, 303 U.S. 613; *Pierre* v. *State of Louisiana*, 306 U.S. 354; *Smith* v. *State of Texas*, 311 U.S. 128; *Hill* v. *State of Texas*, 316 U.S. 400 *Akins* v. *State of Texas*, 325 U.S. 398; *Patton* v. *State of Mississippi*, 332 U.S. 463; *Cassell* v. *State of Texas*, 339 U.S. 282; *Hernandez* v. *State of Texas*, 347 U.S. 475; *Reece* v. *State of Georgia*, 350 U.S. 85.

We would respectfully call to the Court's attention the following uncontested circumstances which we suggest lead to the inevitable conclusion that the punitive exclusion of the duly elected and constitutionally qualified representative of the overwhelmingly Negro constituency of the 18th Congressional District of New York was at least in substantial part based upon reasons of race, in violation of the Constitution.

a) In the entire history of the Nation with the exception of

a tiny handful of episodes characterized by Chairman Celler as "bespeaking furor instead of fairness" (Congr. Rec. March 1, 1967, H. 1945), in the countless cases brought before the House, Congressman Powell, a Negro citizen, representing a predominantly Negro constituency, was the only Member ever excluded on grounds which, in the opinion of the select Committee of the House, the Majority Leader of the House and the Chairman of its own Judiciary Committee, wholly disregarded the constitutional limits of the House's power.[83]

b) In full recognition that the Congressman-Elect had been overwhelmingly chosen by the predominantly Negro electorate of his district with full knowledge on their part of the alleged acts of misconduct upon which the punishment of exclusion was based, the majority of the House nevertheless further ordered that the Congressman-Elect be permanently barred from the 90th Congress. In face of the universal recognition both within the Congress and in the Nation at large that the citizens of the 18th Congressional District would overwhelmingly return the Petitioner in any new election [84] this action of the House permanently barring the Petitioner from the 90th Congress could only have the objective and result of depriving the predominantly Negro citizens of the 18th Congressional District of the rights guaranteed to them by the Wartime Amendments to an equal participation in the "political community of the United States." Cf. *Civil Rights Cases*, 109 U.S. 3 (1883).

A clearly possible inference which under such circumstances could be drawn by the Negro constituents of the 18th Congressional District was that only a representative ac-

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[83] See Point I (vi), *supra*.

[84] See for example:

The World Journal Tribune, editorial: "The Ouster of Powell," March 2, 1967; *New York Post*, "Harlem Vows to Vote Him Back", March 2, 1967; *World Journal Tribune*, "The Nomination is Powell's," and "Shock, Angry Threats in Harlem," March 2, 1967.

ceptable to the all-white majority of the House, who had overridden the sober advice of their own leadership, could be chosen by them. That in fact this was the inference drawn by almost the entire Negro community, not only the 18th Congressional District, but of the Nation, must give serious pause to this Court.[85]

Where the singling out of Negro citizens for separate and special treatment occurs, this Court has recognized time and again that this creates and furthers a sense of inferiority in the black man—the original cornerstone of the institution of slavery, see *Dred Scott* v. *Sanford,* 19 How. 393, a sense of inferiority which is at the heart of the badges and indicia of slavery this Nation solemnly promised to eliminate forever in the Wartime Amendments. See *Bell* v. *Maryland,* 378 U.S. 226, concurring opinion of Mr. Justice Douglas at

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[85] See for example an article appearing in the *New York Post* on March 2, 1967, in which Negro leaders expressed their sentiments that the House action denied the people of the 18th Congressional District their basic right to choose their own representatives. "Whitney M. Young, Jr., National Director of the Urban League, called the action against Powell 'shocking' and said that it 'denies the basic right of constituents to representation of their own choosing. Floyd McKissock, National Director of CORE, said the expulsion of Powell is a 'slap in the face to every black man in this country.' They said the issue 'goes much further and deeper than Adam Clayton Powell the man and the representative. The issue goes to the subject of representative government which black people in Harlem have been denied.'" And in an article appearing in the *Afro-American* of April 29, 1967, Roy Wilkins, Executive Director of the NAACP, said, "Since there was no code which Powell could have violated the sentiment to deny him his chairmanship, to seat him but with a humiliating, unprecedented public and oral censure, and in a final spiteful upset, to expel him from his seat altogether, had to proceed not from a finding rooted in known and commonly applicable rules, but from each Congressman's personal standards, biases and political inclinations. These, of course, are not proper bases for dispensing American justice as derived from Anglo-Saxon precedents. We presume a defendant innocent until a trial has found him guilty. We have laws. We have courts with rules of procedure. We go to extreme lengths to try to prevent personal bias and other irrelevant persuasions from influencing a verdict. Yet, no code of ethics against which a line of conduct might have been measured, the House summarily convicted and punished Powell. At the time one thought Adam's remark about 'lynching' an extreme but understandable reaction."

p. 242, *Jones* v. *Alfred H. Mayer Co.* 392 U.S. 409 (1968), See Kinoy, *"The Constitutional Right of Negro Freedom,* 21 Rutgers Law R. 387 (1967).

c) The effect of instilling and generating a sense of inferiority in the Negro citizens of the 18th Congressional District, proud of their achievements over the years in having been the first Congressional District composed predominantly of Negro citizens, to have the political ability and organization to elect a Congressman with twenty-two years of seniority,[86] able to wield enormous power in the legislative process[87] was enormously accentuated by the striking

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[86] See for example:

The following statements which appeared in the *Amsterdam News,* a leading Negro newspaper on March 4, 1967: Isaiah Brown, a constituent of Congressman-Elect Powell stated, "I think Powell should be seated without losing his seniority. That's a foul play if there ever was one. We lose a Congressman or we lose his courage. I can't help but feel that race is involved." Mrs. Ernesta Procope, "It is unfortunate that Adam Powell had to be the scapegoat, and more unfortunate that there was not a code of ethics set forth for everyone in Congress, not only to apply to Adam Powell but everyone as well. As far as I am concerned, he is still the brightest star in the House of Representatives"; Mrs. Mary Eddie, "I believe Adam Clayton Powell should be reinstated to his full position. We cannot afford to lose a Congressman. The Negro needs more representation"; Mike Lopez, "If Powell leaves his position the people who elected him and the Harlem community will be deprived of a great fighter." And in an article in the *New York Times* for January 3, 1967, Rev. Benjamin F. Payton, Executive Director of the Commission on Race and Religion of the National Council of Churches, in announcing the endorsement of Mr. Powell by the Baptist Ministers Conference of Greater New York, said, "We ask the people of the United States not to take away the one great symbol of power that Negroes have developed so painfully over the years."

[87] The significance and importance of seniority in the legislative process in this country is acknowledged by all serious students of our political processes. See for example George B. Galloway, Senior Specialist, Legislative Reference Service of Congress, *The Legislative Process in Congress* (1953), Legislation is unquestionably much influenced by the men who have scored long and occupy those important places in the House. Seniority or length of service in the House of Representatives is a large factor in giving a member position and influence in the Congress and in Washington." See also George, *The Seniority System in Congress,* 53 Am. Pol. Sc. Rev. 413. "Its significance for constituencies was expressed by Senator Byrd who explained that 'seniority of service and committee rank have

disparity in both the procedural treatment and punishment assigned to Congressman-Elect Powell, a Negro citizen, and Senator Dodd, a white citizen. We have discussed in some detail in Point I, B, *supra,* the extraordinary differences in both the procedural protections afforded Congressman Powell and Senator Dodd, and the actual punishments recommended. Disparity in punishment, as this Court has so often pointed out, has been one of the most striking remnants of the slave system. See Mr. Justice Bradley's discussion in the majority opinion in the *Civil Rights Cases,* 109 U.S. 3. Even the form of "censure" recommended in Congressman Powell's case, the humiliation of being arrested by the Sergeant-at-Arms and escorted to the well of the House to be publicly rebuked by the Speaker, see Report of Select Committee, contrasted to the mild form of rebuke proposed by the Senate for Senator Dodd, accentuates inevitably the "badge of inferiority" which this Nation has pledged itself to eliminate forever from its life. How much more sharply is the inevitable inference of inferiority drawn when the drastic and unconstitutional punishment of exclusion is applied to the one Negro Congressman who has become, whether or not portions of the white community agree, a symbol of effective and powerful Negro participation in the political life of the Nation, while the punishment suggested for the white Senator is of the mildest nature? [88] This

importance over and above the capabilities of the members' ". See also Clapp, *The Congressman* (Brookings Institute); Froman, *Congressmen and their Conscience* (1963).

[88] The Negro community cannot avoid making the bitterly obvious comparison between the treatment of Dodd and Powell. See for example the editorial comment which appeared in the Afro-American of April 15, 1967: "For Sen. Dodd, who is white, the punishment is a verbal 'naughty, naughty'. For Mr. Powell, who is not white, a brutal boot out of the door. If this is even-handed justice, we have been reading the wrong books."

Roy Wilkins, Executive Director of the NAACP, made the following statement in the *Afro-American* of April 29, 1967:

"Inevitably, comparison with the unhappy experience of Senator Thomas Dodd, of Connecticut, will be made. Senator Dodd, unlike Rep. Powell,

Court in *Brown* v. *Board of Education,* 347 U.S. 483 taught that separate treatment of Negro children instilled in them inevitably a sense of inferiority and frustration. We ask the Court to consider how much more serious is the sense of inferiority and frustration instilled in the Negro citizens of the 18th Congressional District, America's largest black urban ghetto area, as well as in Negro citizens throughout the Nation, when they see what all thinking citizens understand to be the extraordinary disparity between the treatment of the Negro Congressman in the House and the white Senator in the Senate.[89]

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had notice of nearly a year that he was to be investigated. All during that period and the time of the hearing, the Senator enjoyed his full privileges, retained control of his office and employees, served on his committees and enjoyed all the prerequisites of office. Even now, in the face of such defense as he was able to muster, he goes about his business as a United States senator. Some of the amounts mentioned in the Dodd hearing make the alleged airline ticket errors of the Powell office look like the apple-snatching of a small boy. Misuse of funds, of course, is misuse, whether the amount is $15,000 or $150; the point is that one man went through orderly procedure and the other faced a chopping block.

[89] As we have indicated, we bear no burden here, under the decisions of the Court, to prove subjective racial motivation, underlying the act of exclusion. We feel, however, that it is our responsibility to bring to the attention of this Court the remarks of Mr. Holland, of Pennsylvania, during the March 1st debate, which express at least his opinion that issues of racial discrimination entered openly into the action of the majority of the House in overriding their own Select Committee's recommendation that the Congressman-Elect be seated.

> "MR. HOLLAND, of Pennsylvania: But not even all those who voted to repudiate the committee they had established were guilty of 'racism, pure and simple'. There is little that is pure, and less that is simple about this entire situation.
>
> "Neither can I agree with those who have asserted that the question of racism does not enter into the Powell case. We have been told that 'if the gentleman from New York were white, he would have been punished long since.' Is ADAM CLAYTON POWELL the only sinner in the House? Does this House have such a long and complex list of precedents of censuring and demoting and fining Members who do not meet its high moral standards? I can think of a few cases in recent years where Members of this House were guilty of far greater moral and even criminal offenses that the gentleman from New York

(Footnote continued on next page)

(Footnote continued from preceding page)

is even charged with, and yet I cannot remember that the House took action. We left punishment for these offenses to the voters of these Members' districts.

"There is some reason, surely, that the Powell case, alone has given rise to such drastic punishment. I find it impossible to shake the conviction that a large part of the intense public campaign against MR. POWELL stems from the fact of his race. Some of this stems directly from the view entertained in many quarters of this country that the Negro enjoys the rights of full citizenship only on a tentative basis—that if a Negro offends community sensibilities in any way, he and all other Negroes should be made to suffer for it, while white men who commit the same sins are judged by a different, more lenient standard, and their punishment is not visited upon the white community as a whole.

"ADAM POWELL, is being judged, not for his sins alone. He is being punished for the statements of Stokely Carmichael and the bad poetry of Cassius Clay and the sins of every other Negro in the country, just exactly as every law-abiding decent Negro citizen finds the pattern of discrimination against him 'justified' by the argument that some Negroes break the law. This concept of joint responsibility for each other's shortcomings is a handicap that white Americans would have risen up in arms against had it been visited upon every minority group in this country.

"No, Mr. Speaker, I cannot accept the notion that ADAM POWELL is being punished by colorblind justice. I, too, have read the mail that has been cited as 'evidence of deep public concern.' Let me quote some of the mail that I received for the RECORD.

Shame on you and Congressman ————.

You are both nigger lovers. We will remember you at the polls next election.

"That postcard was, of course, anonymous. I received, naturally some letters opposed to MR. POWELL which avoided using racial slurs, and a few which did not even seem to be motivated by racial ill will. But the mail I have received on this subject left no doubt in my mind that it was largely motivated by the notion that a Negro Congressman ought to be more circumspect, more humble, and more 'grateful' than his white colleagues need to be. I submit, Mr. Speaker, that whatever may be the motives of individual Members in this case, the effort to exclude the gentleman from New York could not have succeeded, and might not even have been attempted, had ADAM C. POWELL done everything he is accused of doing, but had he been—to coin a phrase—'less colorful'. And I think, Mr. Speaker, that we all know that to be true.

"And I believe, too, Mr. Speaker, that there would not have been the intense newspaper and other public pressure—which dates back to the very day MR. POWELL assumed the chairmanship of the Education and Labor Committee—had he not been so vigorous and so

We are fully conscious of the serious nature of charges that the drastic punishment of exclusion flowed at least in part from considerations of racial prejudice prohibited by the 13th, 14th and 15th Amendments to the Constitution. Only recently the Nation has been seriously warned of the corrosive and dangerous impact of racist thinking and practices on every aspect of American life. See the Report of the National Advisory Commission on Civil Disorders, p. 91 (1968). It is out of this concern that we deem it our responsibility to call to the Court's attention the startling fact that the charges in petitioner's complaint that his exclusion from the House of Representatives was grounded at least in part in racial considerations banned by the Wartime Amendments has been substantially acknowledged by the Chairman of the Select Committee of the House itself, the Honorable Emmanuel Celler, Chairman of the Judiciary Committee of the House. In an interview on national television on May 15, 1967, shortly after the filing of the first petition for writ of certiorari prior to judgment in the Court of Appeals, Congressman Celler, who chaired the committee which conducted the proceedings against petitioner in the House made the following statements in response to questioning:

MILTON BERGERMAN: "Congressman, the introduction

successful a fighter for long-needed economic, social, educational and labor legislation. This, too, while select committee's report and while never mentioned in the editorials that demand ADAM CLAYTON POWELL's scalp—this, too, I say, is part of the 'case against' ADAM CLAYTON POWELL.

"And so, Mr. Speaker, I intend to vote against the amendment of the gentleman from Missouri, and, if it passes, against the resolution as amended. I cannot vote to deny the people of the 18th District of New York their representation among us. I suspect that these people, who have borne generations of injustice with an undiminished optimism about democracy that shames their more fortunate fellow citizens, will not learn from this episode to 'elect someone who is willing to shuffle a little'."

90th Congress, Congressional Record, H1950 March 1, 1967.

indicated that Adam Clayton Powell's brief in the Supreme Court yesterday charging that his exclusion was based on racism and charging that his punishment was to be contrasted with the mild rebuke which Senator Dodd got, or was recommended to get. You think that that position on his part is sound?"

CELLER: "Well, with reference to racism, I believe there was an element of racism in the vote in the House that rejected the resolution which I as Chairman of the Select Committee offered. It was racism accompanied by the hysteria that had resulted from the climate of public opinion due to Mr. Powell's antics and peculiarities and swagger and defiance.

The Congressman then further stated:

It's difficult to say whether or not if resolution of the type I offered before would be offered again, whether the House would accept it or repeat its action that it had made in the first instance. We're counting noses and we don't seem to find at this juncture much change of opinion with reference to the attitude of the members towards Mr. Powell. And I fear me that if the resolution, mild as I thought mine was, is again offered, it may meet the same fate and be defeated and another resolution might be offered again to oust him and I do not believe that is—I should say it's illegal to and is contrary to what I feel is reasonable and proper to oust a man. Because how can you oust—eject a man from the House before he is a member? And, my theory is that he has to be—has to receive the oath to become a member before he can be ejected from the House."

BERGERMAN: "Well, that's on the second one. That's on the current one."

CELLER: "Yes, well, I fear me that the House will

take the bit in its teeth again and for the same reasons that actuated them before racism, hysteria, and so forth and fear, because there's an avalanche of mail received by the Congressman which is all hostile to Powell, I fear me that the House will do the—respect its error again, unfortunately, and I feel that is wrong."

And finally the Congressman stated:

LYNN: "Congressman, the House leadership, including yourself as you mentioned, opposed this severe penalty for Mr. Powell, of exclusion."

CELLER: "The House leadership supported my resolution."

LYNN: "That's right. Now . . ."

CELLER: "And deplored and opposed his—his eviction, you might put it that way."

LYNN: "Now isn't the leadership doing anything to end its racism and hysteria which you called that will lead to a repetition of this exclusion?"

CELLER: "The leadership is doing all and sundry in that regard, but that racism is pretty deep. It's wide and deep. Members from the South have the strongest kinds of convictions on this matter."

See transcript of "Searchlight," WNBC-TV, Sunday, May 14, 1967. Attached as Appendix A to Emergency Supplement to Petition for Writ of Certiorari prior to judgment.

We respectfully suggest that in light of these frank concessions by Congressman Celler, the Chairman of the Select Committee, and one of the respondents in this action, it is impossible to dismiss the allegations in the complaint of racial motivation in the exclusion of petitioner as "so purely

conclusory in character as under elemental pleading concepts, not to require a hearing on the merits," see concurring opinion of Circuit Judge McGowen below, 395 F.2d at 606. Two of the three Court of Appeals judges acknowledged that at a minimum racial considerations in the exclusion of a duly elected member of the House would call for judicial relief. See opinion of Circuit Judge McGowan, 395 F.2d at 606 and opinion of Circuit Judge Leventhal, 395 F.2d at 608.

After Congressman Celler's public concessions of the seriousness and validity of petitioner's charges that racist considerations violative of the most fundamental prohibitions of the Wartime Amendments were present in the unprecedented act of exclusion of a duly qualified and elected Negro representative we cannot understand how respondents can continue to argue that this is a controversy which the judicial power cannot reach. If there is one question which we would have thought wholly settled in this Court it is that the judicial power of the United States is always available to remedy discrimination by any branch of the government, state or federal against citizens by reason of their race. *Brown* v. *Board of Education,* 347 U.S. 483; *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409. On the record now before the Court and on the basis of the public concessions of respondent Congressman Celler the Court should reverse the judgment of dismissal below and order an appropriate relief. No governmental body, or office, state or federal, in this country, no matter how august or high placed is exempt from the commands of the Thirteenth, Fourteenth and Fifteenth Amendments.

POINT TWO

The dismissal of the complaint by the District Court for want of jurisdiction of the subject matter totally disregarded the most historic opinions of this Court. The Court had jurisdiction over the subject order and the cause was justiciable.

A. *The dismissal of the complaint for "want of jurisdiction of the subject matter" was in violation of Article III of the Constitution and the most authoritative decisions of this Court.*

Once again, as in *Baker* v. *Carr*, 369 U.S. 186, the District Court's "opinion reveals that the court rested its dismissal upon lack of subject-matter jurisdiction and lack of a justiciable cause of action without attempting to distinguish between these grounds." *Baker* v. *Carr*, at p. 196.[90] As in *Baker* v. *Carr*, the District Court below "was uncertain as to whether our cases withholding judicial relief rested upon a lack of federal jurisdiction or upon the inappropriateness of the subject-matter for judicial consideration—what we have designated 'non-justiciability.'" *Baker* v. *Carr*, at p. 198. As in *Baker* v. *Carr*, here also *"the distinction between the two grounds is significant," supra*, at p. 198.

As this Court pointed out in *Baker*, "in the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry *necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be molded.* In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Con-

[90] All three opinions in the Court of Appeals acknowledge the erroneous nature of the conclusion of the District Court that the complaint must be dismissed for want of federal subject matter jurisdiction. However, since respondents would seem to continue to urge a want of "jurisdiction" upon the Court we proceed to analyze briefly the fundamental error in this position.

stitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, Sect. 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not described in the jurisdictional statute'' *Baker,* at p. 198. (Emphasis added).

Nothing could be plainer than that the matter in this complaint arises under the Constitution of the United States and that the conclusion of the District Court that the complaint must be dismissed ''for want of jurisdiction over the subject-matter'' was wholly erroneous.

As this Court reminded the District Court in *Baker,* ''Article III of the Federal Constitution provides that 'The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority. . . .' '' And, as in *Baker,* it is obviously ''clear that the cause is one which 'arises under' the Federal Constitution,'' *supra,* at 199. For, as in *Baker,* ''dismissal of the complaint upon the ground of lack of jurisdiction of the subject-matter would, therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit' *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561, 579, or 'frivolous,' *Bell* v. *Hood,* 327 U.S. 678, 683.''[91] That the claim is insubstantial must be 'very plain.'' *Hatt* v. *Keith Vaudeville Exchange,* 262 U.S. 271, 274'' *Baker,* at p. 199.

Here, all parties agree that the constitutional questions raised by the complaint are serious and substantial. The District Court, for example, holds that Petitioner's argument that the constitutional power to judge the ''qualifications'' of its members is limited to those qualifications stated in the Constitution, ''can be argued with force and conviction.'' The respondents stated in their memorandum to the

[91] It is interesting that the Court in *Baker* commented, in Footnote 17 that "the accuracy of calling even such dismissals 'jurisdictional' was questioned in *Bell* v. *Hood.* See 327 U.S. at 683", *Baker, supra,* at p. 199.

Court of Appeals opposing the motion for summary reversal, that "this case presents fundamental constitutional questions," Memorandum, p. 82; that "this case poses questions of transcendent constitutional importance," Memorandum, p. 3; that the constitutional issues "posed on the merits" are "novel and important," Memorandum, p. 3. In short, the respondents concluded in their memorandum to the Court of Appeals that the issues raised in this case are of "fundamental constitutional significance," Memorandum, p. 15. The consequences which flow from the conclusions of both the District Court and the respondents are perfectly clear. As this Court said in *Baker*, "Since the District Court obviously and correctly did not deem the asserted federal constitutional claim unsubstantial and frivolous, it should not have dismissed the complaint for want of jurisdiction of the subject matter." *Baker*, at p. 199.[92] This direction of the Court in Baker merely reflected the admonition of Chief Justice Marshall in *Marbury* that "the judicial power of the United States is extended to all cases arising under the constitution." *Marbury* v. *Madison, supra*, at p. 178.[93]

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[92] As the Court of Appeals opinions point out in addition to a finding that the case "arises under the Constitution "we can hardly conclude that Mr. Powell's claim to a seat in the House fails to present a case or controversy as those terms must now be construed". 395 F.2d at 590. Finally the Court of Appeals concluded that jurisdiction is clearly based on 28 U.S.C. 1331 (a), representing an "affirmative jurisdictional grant here", 395 F.2d at 591.

[93] It is extremely interesting while Mr. Justice Harlan dissented from the ultimate conclusion of the Court in *Baker* as to the issue of justiciability, he was emphatically in agreement that justiciability as a concept is wholly interwoven into the definition of the constitutional question involved and that resolution of the so-called "political question" doctrine was impossible without defining and considering the constitutional merits of the question. Thus, Mr. Justice Harlan wrote in his *Baker* dissent: *"Until it is first decided to what extent that right is limited by the Federal Constitution, and whether what Tennessee has done or failed to do in this instance runs afoul of any such limitation, we need not reach the issues of 'justiciability' or 'political question'* or of any of the other considerations which, in such cases as *Colegrove* v. *Green*, 328 U.S. 549, led the Court to decline to adjudicate a challenge to a state apportionment affecting seats in the federal House of Representatives, in the absence of a controlling Act of

B. *The subject-matter of this suit was justiciable and the opinions of the lower courts dangerously undermine the historic constitutional role of the Federal Judiciary as the guardian of the civil and political liberties of the people.*

The extraordinary confusion in the District Court in holding that the complaint is "dismissed for want of jurisdiction of the subject-matter" resulted in precisely the "significant" consequences prophesied in *Baker*. Since the district court confused "justiciability" with federal subject-matter jurisdiction, it never proceeded to "the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker, supra,* at p. 198.

In the setting of this case this failure of the District Court had the most serious juridical and national consequences. By failing to decide these questions, it could not possibly resolve properly fundamental issues of justiciability, *Baker* v. *Carr, supra;* leaving unresolved questions of "transcendent constitutional importance," Respondents' Memorandum *supra,* p. 3, the resolution of which is required in the interest not only of the parties here involved, but the Nation itself.

(i) *The claim that the refusal of the majority of the House to seat a duly elected Representative of the people who meets all constitutional qualifications for membership in the House violated the Constitution, is clearly justiciable.*

In the words of Mr. Justice Brennan for the Court in *Baker* v. *Carr,* quoting from *Nixon* v. *Herndon,* 273 U.S. 536, 540, the conclusion of the District Court that this con-

Congress", *supra,* at p. 331. (Emphasis added.) Cf. Mr. Justice Harlan's interesting discussion of the inevitable intertwining of the issues of justiciability with the constitutional merits of the case in his dissenting opinion in *Poe* v. *Ullman,* 367 U.S. 497.

cededly grave contention is non-justiciable "is little more than a play on words." *Baker, supra,* at p. 209. As the Court points out, "of course the mere fact that the suit seeks protection of a political right does not mean that it presents a political question." *Baker,* at p. 209. The Court then proceeded to what is the heart of the analysis of the so-called "political question doctrine":

> "Much confusion results from the capacity of the 'political question' label to obscure the need for a case-by-case inquiry. *Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is in itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution,"* at p. 211 (emphasis added).

This is the very essence of the error of the lower courts In order to decide whether "a matter has been in any measure committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed," *Baker, supra,* at p. 211, is "itself a delicate exercise in constitutional interpretation." But this is precisely what the lower Courts refused to do and what this Court is now called upon to do as the "ultimate interpreter of the Constitution." *Baker, supra,* at p. 211.

The lower courts refused to engage in the necessary judicial role which the case requires. They declined to meet their responsibility under Article III, the "delicate exercise in constitutional interpretation" which can alone answer the question as to whether the matter is one in "the performance of which entire confidence is placed by our Constitution," *Cf. Marbury* v. *Madison, supra,* at 162, in the Legislature.

This is the key to this case. If our analysis of Article One, Clause 2, and Article One, Clause 5 is correct—if 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 the House, if the state conventions would have refused to ratify the Constitution had they believed that the Constitution gave to the legislature any power to refuse to seat such an elected representative who met the qualifications set forth in the written Constitution, if indeed the House has no constitutional power to refuse to seat a duly elected representative of the people who meets all constitutional qualifications for membership—then the "matter" here, the question as to who may be the freely chosen representatives of the people to the legislature which govern them, has *not* been confided by the Constitution to the exclusive control of the legislature itself. Quite to the contrary, as we have demonstrated in some depth, this is precisely a matter which has been confided by the Constitution to the ultimate branch of our Government—the people themselves, and the written document they established as their fundamental law. *Marbury* v. *Madison, supra.* As we have fully demonstrated in Point I, A, *supra,* the fundamental premise of representative democracy *requires* that issues deeply involving the free choice of representatives of the people be specifically excluded from the control of the legislature. This is then a classic example of where judicial power *must* be exercised when "the action of that branch [in this case the legislature] exceeds whatever authority has been committed [to it]" *Baker* v. *Carr,* supra, at 211.[94]

As a matter of fact this Court has already made quite clear

[94] These words, quoted by Mr. Justice Douglas, are from the opinion of Judge McLaughlin in *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220, 236, later dismissed as moot, 256 F. 2d 728. *Baker, supra,* at p. 249.

its opinion that matters involving the free choice of Representatives to the Federal Congress are in every sense justiciable controversies. This question was discussed in full in *Baker* v. *Carr,* as a building block in what was to the Court a more difficult hurdle: the justiciability of federal interference with the selection of *state* legislators. Thus in supporting its conclusion of justiciability in cases concerning the choice of members of a *state* legislature the Court relied heavily upon its prior conclusions that controversies involving the free choice of Representatives to the Federal Congress involving interpretations of Article One, Clause 2, and Article One, Clause 5, were justiciable. Thus the Court wrote:

> "We have already noted that the District Court's holding that the subject matter of this complaint was non-justiciable relied upon *Colegrove* v. *Green, supra,* and later cases. Some of those concerned the choice of members of a state legislature, as in this case; others, like *Colegrove* itself and earlier precedents, *Smiley* v. *Holm,* 285 U.S. 355, *Koenig* v. *Flynn,* 285 U.S. 375, and *Carroll* v. *Becker,* 285 U.S. 380, *concerned the choice of Representatives in the Federal Congress. Smiley, Koenig and Carroll settled the issue in favor of justiciability of questions of congressional redistricting.* The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision. On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley* v. *Holm,* but in two opinions, one for three Justices, 328 U.S., at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U.S. at 564. The argument that congressional redistricting problems presented a 'political question' the resolution of which was confided to Congress might have been rested upon Art.

I, §4, Art. I, §5, Art. I, §2, and Amendment XIV, §2. Mr. Justice Rutledge said: 'But for the ruling in *Smiley* v. *Holm*, 285 U.S. 355, I should have supposed that the provisions of the Constitution, Art. I, §4, that 'The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .'; Art. I, §2 [but see Amendment XIV, §2], vesting in Congress the duty of apportionment of representatives among the several states 'according to their respective Number'; and Art. I, §5, making each House the sole judge of the qualifications of its own members, would remove the issues in this case from justiciable cognizance. *But, in my judgment, the Smiley case rules squarely to the contrary, save only in the matter of degree.* . . . Assuming that that decision is to stand, I think . . . that its effect is to rule that this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable." 328 U.S., at 564-565. Accordingly, Mr. Justice Rutledge joined in the conclusion that the case was justiciable, although he held that the dismissal of the complaint should be affirmed. His view was that 'The shortness of the time remaining [before forthcoming elections] makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek . . . I think, therefore, the case is one in which the Court may properly, and should, decline to exercise its jurisdiction. Accordingly, the judgment should be affirmed and I join in that disposition of the cause. 328 U.S., at 565-566." *Baker* v. *Carr*, *supra*, pp. 232, 233 (emphasis added).

This discussion in Mr Justice Brennan's opinion for the Court (joined in by the Chief Justice and Mr. Justice

Black), relying upon "our decisions in favor of justiciability even in light of these provisions" [Article One, Section 2, 4 and 5], *supra*, at 234, reflects the sharply expressed words singled out by Mr. Justice Douglas [in his concurring opinion in *Baker*]. "It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired."[95] *Baker, supra*, at p. 249.

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[95] It is of some significance that the Select Committee of the House itself virtually conceded in its formal report that *if* the House rejected its recommendations and proceeded to exclude the Member-Elect from his seat, such an action would be subject to judicial review. Thus the Select Committee unanimously gave these views on the question of justiciability to the entire House:

"C. THE SCOPE OF JUDICIAL REVIEW:

> Pertinent to the issue of judicial reviewability of the action recommended by this Select Committee is recent language of the Supreme Court in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), where the Court enumerated various factors which establish that a case before it involves 'political' (and therefore nonjusticiable) questions:
>
> 'Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; * * * or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; * * * or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'

See also *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929); *Sevilla* v. *Elizalde*, 112 F. 2d 29, 38 (D.C. Cir. 1940); *Keogh* v. *Horner*, 8 F. Supp. 933 (S.D. Ill. 1934); *Application of James*, 241 F. Supp. 858, 860 (S.D.N.Y. 1965).

In *United States* v. *Johnson*, 337 F. 2d 180 (4th Cir. 1964), aff'd 383 U.S. 169 (1966), where it was held that the Speech or Debate clause precluded a criminal prosecution based on a Member's speech on the floor of the House, the Fourth Circuit stated (p. 190):

> "This does not mean that a Member of Congress is immune from sanction or punishment. Nor does it mean that a Member may with impunity violate the law; it means only that the Constitution has clothed the House of which he is a Member with the sole authority to try him. In this respect the Constitution has made the Houses of Congress independent of other departments of the Government. These bodies, the Founders thought, could be trusted to deal fairly with an accused Member and at the same time do so with proper regard for their own integrity and dignity."

(Footnote continued from preceding page)

Nevertheless, cases may readily be postulated where the action of a House in excluding or expelling a Member may directly impinge upon rights under other provisions of the Constitution. In such cases, the unavailability of judicial review may be less certain. Suppose, for example, that a Member was excluded or expelled because of his religion or race, contrary to the equal protection clause, or for making an unpopular speech protected by the first amendment (cf. *Bond* v. *Floyd*, — U.S. —, 87 S. Ct. 339 (1966)). *The instant case, of course, does not involve such facts. But exclusion of the Member-elect on grounds other than age, citizenship, or inhabitancy could raise an equally serious constitutional issue.* The Supreme Court has stated in *Baker* v. *Carr*, *supra* (369 U.S. at 211):

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Report of Select Committee, *supra*, at p. 30.

Many Members of the House expressed the same view as the Select Committee that exclusion of a Member for reasons other than lack of constitutional qualifications would subject the action of the House to inevitable judical review. See, for example, the comments of Congressman Moore, the ranking Republican Member of the Select Committee:

> "If Members lay it aside and torture their consciences that we have not done enough to punish the Member-elect from the State of New York, I would only take a moment to say that in their desire to mete out the maximum punishment, if there is anything greater—I do not say this with any sense of levity or trying to be humorous—*if there is any greater punishment and humiliation than that which we have meted out to him, if they desire to approach the problem of expulsion or exclusion, they could very well be on a collision course with courts of this land. Some would care not to have such a circumstance present itself.*
>
> *"But the fact that must visit with us here today is: Do we want to handle the problems of this Member-elect from the 18th Congressional District of New York on the wisest and most permanent course, or do we as Members want to be continually harassed over the next number of years determining whether or not we are right in the procedures* and determination that we make, or whether the courts of the land may have a superior thought?"

Cong. Rec., *supra*, H. 1921 [emphasis added].

and the comments of Congressman Burton:

> "In my view, the Supreme Court would have to rule that the gentleman was an inhabitant of the State of New York and duly elected by his constituency to represent them in the House and that the Court

(Footnote continued on next page)

Perhaps one of the most eloquent expressions of the principles underlying the decision of the Court in *Baker* upholding justiciability of the cause then before the Court, which compels a similar conclusion here as to justiciability, is to be found in the closing words of Mr. Justice Clark's concurring opinion:

> "As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, *a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forbears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative.* That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. *National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court. Baker, supra,* at 261, 267, (Emphasis added.)

The issue presented in this appeal is, in Mr. Justice Clark's

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would order seating him if this House should ill-advisedly fail to do so."

Cong. Rec., *supra*, H. 1925.

and the comments of Congressman Teague, a Member of the Select Committee:

"I believe that substantial majority of the American people will support us when we explain to them:

"First. That there are serious problems of constitutional law involved in this whole matter. If we refuse to seat MR. POWELL, this case could well be in the courts for years."

Cong. Rec. *supra.*

words, "the keystone upon which our government was founded and lacking which no republic can survive." It is that "the form of government must be representative." We believe, with Mr. Justice Clark, that "national respect for the courts is more enhanced through the forthright enforcement of those rights than by rendering them nugatory through the interposition of subterfuges." It is in this sense that firm, decisive and speedy judicial action in vindication of the rights here asserted by the Petitioners would be "in the greatest tradition of this Court." *Baker, supra* at p. 267.

In *Reynolds* v. *Sims,* 377 U.S. 523 (1964), the Court once again faced the issue of justiciability in terms which are determinative here. The Court reminded the Nation, through the words of the Chief Justice, that:

> "Undoubtedly the right of suffrage is a fundamental matter in a free and democratic society. *Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.*" *Reynolds* v. *Sims,* 377 U.S. 533 (emphasis added).

The District Court declined to accept this high responsibility on the expressed fear that it would "crash through a political thicket into political quicksand." The answer of the Chief Justice for the Court in *Reynolds* to this same rationale for refusing to accept the responsibilities thrust upon the national courts by the Constitution remains the most effective response today to the District Court's abdication of its constitutional role:

> "We are cautioned about the dangers of entering into political thickets. . . . Our answer is this: a denial of constitutionally protected rights demands judicial

protection; our oath and our office require no less of us."

Reynolds, supra, at p. 566.

One of the most recent pronouncements of the Court in this area removes whatever question there might ever have been concerning the justiciability of the issues presented in this appeal. The opinion of Mr. Justice Black for the Court in *Wesberry* v. *Sanders* is completely determinative. The matter before the Court in *Wesberry,* as here, charged a violation of Article I, Clause 2. The opinion of the Court sustaining justiciability and rejecting the "political question" doctrine as inapplicable, is wholly instructive here. As the Court held in *Wesberry*:

"The reasons which led to these conclusions in Baker are equally persuasive here. Indeed, as one of the grounds there relied on to support our holding that state apportionment controversies are justiciable we said:

'. . . *Smiley* v. *Holm,* 285 U.S. 355, *Koenig* v. *Flynn,* 285 U.S. 375, and *Carroll* v. *Becker,* 285 U.S. 380, concerned the choice of Representatives in the Federal Congress. *Smiley, Koenig and Carroll* settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in *Colegrove* although over the dissent of three of the seven Justices who participated in that decision.'

"This statement in *Baker,* which referred to our past decisions holding congressional apportionment cases to be justiciable, we believe was wholly correct and we adhere to it. Mr. Justice Frankfurter's *Colegrove* opinion contended that Art. I, §4, of the Constitution had given Congress 'exclusive authority' to protect the right of citizens to vote for Congressmen, but *we made it clear in Baker that nothing in the language of that article*

> *gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in Marbury* v. *Madison, 1 Cranch 137, in 1803.* Cf. *Gibbons* v. *Ogden,* 9 Wheat. 1. *The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of 'want of equity' than on the ground of nonjusticiability.' We therefore hold that the District Court erred in dismissing the complaint* (emphasis added) at pp. 6,7.

The impact of Mr. Justice Black's reasoning in *Wesberry* upon this appeal is clear. Nothing in the Constitution has given to the Congress "exclusive authority" to protect the free choice of Representatives to the Legislature by the people themselves. "The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I." The extraordinary interpretation of the "political question doctrine" indulged in by the lower courts and sanctified by magical invocation of the phrase "separation of powers" would, if sustained, remove "the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in *Marbury* v. *Madison.*" *Wesberry, supra,* at p. 6.

Mr. Justice Black places his finger at the very core of the problem in the District Court's opinion. In its effort to avoid "political quicksand" it seeks to overturn over 150 years of American judicial history. The questions which the District Court refused to face have been held to be the solemn duty of American federal courts to resolve, as Mr. Justice Black reminds us, ever since the historic decision in

Marbury v. *Madison*. It is too late in the life of this Republic for the principles of *Marbury* v. *Madison* to be "easily distinguishable on its facts." Opinion of District Court. In *Marbury* the Chief Justice wrote in words which have guided this Court now for 150 years: "the powers of the legislature are defined and limited; and that these limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury* v. *Madison, supra,* at p. 175. The District Court appears to believe that where an action violative of fundamental rights of citizens challenged as beyond the powers assigned by the Constitution to a given branch of government is an action taken by the Legislature, the label "separation of powers" forbids judicial intervention. In the words of Chief Justice Marshall, written in perhaps an even more serious period of challenge and confrontation, "this doctrine would subvert the very foundations of all written constitutions . . . It would declare that if the legislatures shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure . . . it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution . . ." *Marbury* v. *Madison, supra,* at p. 178.

We respectfully suggest that a Court which has so recently placed at the very center of its own conception of its role and responsibility to the Nation its power "to protect the constitutional rights of individuals from legislative destruction, a power recognized since our decision in *Marbury* v. *Madison*," *Wesberry, supra,* at p. 6, should forthwith re-

verse decisions of lower courts which so undermine the entire juridical foundation upon which the ever increasing importance of the national courts in the protection of the rights of citizens rests.[96]

Only this Term the Court has reaffirmed its past decisions that the issue here presented is a question appropriate for judicial review. In *Williams* v. *Rhodes*, — U.S. — (#543-544 October Term, 1968, October 15th, 1968) the respondents in that action urged that questions arising under Article II, Section One involving the selections of presidential electors was a "political question" and hence nonjusticiable. In his opinion for the Court Mr. Justice Black pointed out that "that claim has been rejected in cases of this kind numerous times". In rejecting the contention that the questions concerning the selection of presidential electors were in some fashion removed from juridical competence by the Constitution, Mr. Justice Black took the occasion to reassert the holding of this Court in *MacPherson* v. *Blacker*, 146 U.S. 1. The teaching of the Court in *MacPherson* is particularly appropriate here. In *MacPherson* as here the central argument against justiciability was the contention that the legislature might disregard the decisions of the judicial branch on the question involved and that accordingly this was not an issue which the Courts ought to reach. The response of this Court to such an argu-

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[96] The reactions of the Chairman of the House Judiciary Committee, Mr. Celler, and a respondent in this action, as reported in the press directly after the rejection of the Select Committee's recommendation, is interesting:

> "Leaving the House floor after the long debate, Celler said, 'if I were Powell's lawyers, I'd go into court immediately. I think he's got a good case.'"

See, also, *New York Times*, March 5, 1967:

> "Mr. Celler pointed out that Mr. Powell had met the enumerated qualifications for House membership, and 'it is plain that the Constitution meant to exclude all others.' He added, 'If I was Powell's lawyer, I'd go into Federal court.'"

ment was sharp and clear and in every way appropriate to the present case:

> "The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissable suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own."

As in *MacPherson* any inference that the profound constitutional questions here presented should not be adjudicated by the judicial branch out of some latent fear that the legislative branch might not accept its conclusion is an "inadmissable suggestion", *MacPherson* v. *Blocker, supra.* Under the Constitution this Court "cannot decline the exercise of [its] jurisdiction" upon any such suggestion. Such an approach would "subvert the very foundations of all written constitutions." *Marbury* v. *Madison* at p. 176.

(ii) *The remaining constitutional questions are uncontestably justiciable and Respondents do not seriously question the appropriateness of judicial consideration of these contentions.*

No serious contention can be made that the remaining constitutional issues presented in the case are non-justiciable. Both the lower courts and the Respondents prefer to handle this dilemma by ignoring the claims. This is understandable since these questions are traditionally the subjects for judicial review.

(a) A claim that a legislative action violates the Bill of Attainder Clause as a "legislative act which inflicts punishment without a judicial trial", *Cummings* v. *Missouri, supra,* p. 76, is traditionally a proper subject for judicial review. *Marbury* v. *Madison, supra,* at p. 178, singles out

judicial intervention to defend the prohibition against legislative Bills of Attainder as a classic example of a proper judicial inquiry. The precise question was discussed and settled in *United States* v. *Lovett, supra.* The Government urged that the measure there challenged was appended to an appropriations bill and since "Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which the Congress has final say", *United States* v. *Lovett,* at p. 313. The Court, speaking through Mr. Justice Black, flatly rejected this argument pointing out that "were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could not be challenged in any Court. Our Constitution did not contemplate such a result", *United States* v. *Lovett, supra,* at p. 314.[97] See, also, *Cummings* v. *Missouri, supra, United States* v. *Brown, supra.*

(b) A claim that the punishment of exclusion from membership in the House violated the Due Process Guarantee of the Fifth Amendment, see Point I C, *supra,* p. , is patently justiciable. See *United States* v. *Ballin, supra*: "It [the House] may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relationship between the mode or method of proceeding established by the rule and the result sought to be obtained." See, also, *Murray's Lessee* v. *Hoboken Land*

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[97] Mr. Justice Black quotes from Hamilton's famous discussion in Federalist Paper No. 78: ". . . a limited constitution . . . [is] one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like *Limitations of this kind can be preserved in practise no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.*"

and Improvement Co., supra: "The article [Due Process Clause] is a restraint on the legislative as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." The concurring opinion in *Newberry* v. *United States, supra,* adopted approvingly in *United States* v. *Classic, supra,* clearly impels the conclusion that action of the House under color of Article One, Section Five is subject to judicial inquiry where it is not an action "based upon reasonable consideration of pertinent matters of fact according to established principles of law", *Newberry* v. *United States, supra,* at 285. The precise issue of justiciability of a claim of violation of due process under a proceeding of the Senate pursuant to its power under Article One, Clause Two were before the Court in *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597. The Court carefully stated that proceedings of the Senate pursuant to the powers bestowed upon it by Article I, Clause Five were "subject only to the restraints imposed by or found in the implications of the Constitution", 279 U.S., at 614, and that "judicial interference can be successfully invoked only upon a clear showing of such arbitrary and improvident use of the power as will constitute a denial of due process of law", 279 U.S. at 620.

(c) A claim that the exclusion of the Petitioner violated his rights and the rights of the overwhelming Negro majority of his district guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments, see Point One, *supra,* is also a traditional subject of judicial review as we have pointed out above. In *Bond* v. *Floyd, supra,* this Court pointed out that even the State of Georgia "does not claim that it should be completely free of judicial review whenever it disqualifies an elected Representative; it admits that, if a state legislature excluded a legislator on

racial or on other clearly unconstitutional grounds, the federal (or state) judiciary would be justified in testing the exclusion by federal constitutional standards." *Bond* v. *Floyd*, at p. 347.[98]

C. *This Court has ample power to grant whatever relief is required to remedy the violations of Petitioners' constitutional rights.*

(1) The relief requested by Petitioners are the normal judicial remedies traditionally designed to "protect the constitutional rights of individuals for legislative destruction" *Wesberry* v. *Sanders, supra.* They include conventional requests for injunctive and declaratory relief against the enforcement of an unconstitutional action of a legislature, the resolution permanently barring Mr. Powell from membership in the entire 90th Congress. See *Ex parte Young*, 209 U.S. 123; *Dombrowski* v. *Pfister*, 380 U.S. 479; Cf. *Marbury* v. *Madison, supra.*

(2) In addition, Petitioner sought the issuance of a writ of mandamus directed to the Speaker of the House ordering that officer to swear in the Petitioner as the Representative from the 18th Congressional District of New York. For some reason this request has created the greatest degree of consternation among the Respondents. But this is no novel issue of law. The availability of a writ of mandamus under these circumstances was settled in 1803 in *Marbury* v. *Madison.* In *Marbury*, petitioners sought a writ of mandamus against an exalted officer of the Executive Branch, the Secretary of State. Then, as now, the Respondents urged that in some way, the issuance of such a writ would be to "intrude into . . . the prerogatives . . ." of another Branch.

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[98] *Cf.* the position taken by counsel for the Respondent on oral argument before the Court of Appeals in response to a question from the bench that he saw no power of judicial review in the courts even if the House excluded a Member-Elect for racial grounds. See transcript of oral argument.

Marbury v. *Madison, supra,* at p. 168. The answer of Chief Justice Marshall to this fear established principles of law which guide us to this day. In words most appropriate to the present case, the Chief Justice wrote:

> "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone, exempts him from being sued in the ordinary mode of proceedings, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?
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> *Marbury* v. *Madison,* at p. 170.

Resting upon this essential democratic philosophy the Chief Justice concluded with the now famous words which are here determinative:

> "It is not the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* at P. 170.

Here, as in *Marbury,* "this, then, is a plain case for a mandamus. The ancient writ required "whenever there is a right to execute an office, perform a service, or exercise a franchise . . . this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy to preserve peace, order and good government."[99] As in *Marbury,* the Petitioner here "has a right in this case to execute an office of public concern, and is kept out of possession of that right." *Marbury, supra,* at 169.

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[99] The Chief Justice in *Marbury takes* this definition from Lord Mansfield's opinion in *The King* v. *Baker et al.,* 0 *Burr.* 1267.

The state courts have consistently followed the principles of *Marbury*: that a writ of mandamus may issue in the circumstances of this case. In *State* v. *Elder*, 47 N.W. 710 (1891):

> ". . . relator-plaintiff applied for a writ of mandamus to compel the Speaker of the House of Representatives of Nebraska to open and publish the returns of the general elections of 1890 under Art. 5, Sec. 4 of the State Constitution on the ground that plaintiff met the requirements for eligibility and had received a plurality of the votes for the office."

Rejecting the argument of the defendant Speaker—that as the presiding officer of a co-ordinate branch of the government, the court had no power to issue a mandamus directing him to act—the Supreme Court of the State of Nebraska held that a writ of mandamus would lie. The opinion held that,

> ". . . in considering the public, political aspect of the question presented, . . . [it is necessary to keep in mind], the no less important one of the rights of parties to a redress of grievances against those in high temporary power, as well as those in lower official station. [It is argued] . . . that the officers of each department of that government are responsible directly to the people, and not to the judicial department, for their acts. This doubtless means that an aggrieved party —for example, one who has been elected to an office, the returns of which had been refused to be canvassed and certified by a state board of canvassers—has no right of remedy in the courts, nor other redress than his future opposition to the exercise of arbitrary power as one of the people. This policy, if followed to its conclusion, would tend to make elections uncertain in result, doubly so as to the result declared. . . . But such

has never been understood to be the law of this state" (at p. 713).

In his concurring opinion, Judge Maxwell further explained:

". . . it is said that the legislature is a coordinate branch of the government, and that it is entitled to construe the constitution and statutes for itself, and therefore is not governed by the construction placed upon it by the Supreme Court. That it is a very important coordinate branch of the government is true, and the Supreme Court has never, except when its action was invoked in some of the modes pointed out by law, sought to construe statutes or constitutional provisions for the legislature. It is the province of the legislature, however, to pass laws, and of the courts to construe the constitution and the laws. . . . One of the duties imposed upon the Supreme Court is to construe the constitution and the laws of the state . . . and such construction binds every department of the government, including the legislature, and every person within the state. The construction given by the Supreme Court becomes the standard to be applied in all cases.

* * * * *

"*In a free government, no person is above the law. All are bound by its provisions . . . when a person is elected to the legislature, he, in effect, agrees to perform all the duties enjoined upon him by the constitution and statutes.* . . . In accepting this trust, he accepts it with all its incidents, viz., that, for a failure or neglect to perform the duty required, any of the parties aggrieved may invoke the aid of the courts to enforce performance . . . in case of failure to perform the trust; and it is the duty of the court to enforce the rights of the parties aggrieved" (at pp. 715, 716) (emphasis added).

Judge Maxwell went on to emphasize the fundamental philosophy of government so eloquently put forth in the early days of the republic in *Marbury* v. *Madison* which requires the issuance of the writ here requested:

> "It seems to be assumed in the answer that the legislature has the power, and that, therefore, at its option, it may declare whomsoever it pleases of the candidates voted for elected. This is a government of the people, by the people, and for the people. The constitution and laws have provided a mode in which the will of the people shall be ascertained, viz., by a canvass of the votes, and the persons whom the people have elected, as shown by such returns, are to be officers for the succeeding two years, unless, for causes which appear behind the returns, they are not entitled to exercise the duties of such offices. . . . Should the procedure set forth in the answer [of respondent speaker] be adopted, the tendency, if not the effect, would be to transfer from the people the election of its own officers, and invest the legislature with that duty" (at p. 717).

Judge Maxwell, again in the spirit of *Marbury* v. *Madison,* completely refutes the contentions of Respondents here—that Respondents are immune to the remedial directions of this Court:

> "[The Constitution] requires the parties elected on the face of the returns to be declared elected and inducted into office. Itis said that the Supreme Court has no supervision over other departments of the government. That is conceded. It has not sought to exercise any; nor has it any supervision over the affairs of any educational institution, railway company, bank, partnership, or individual in the state. Nevertheless, if any person aggrieved by any of these parties or others in-

> vokes its power, in the manner provided by law, to redress his wrongs, and grant him relief, the courts have authority to entertain jurisdiction, and render a decision confirming his rights, and redressing his wrongs. The law covers the whole state. It applies alike to every individual therein, be he rich or poor, black or white. The remedy is as broad as the law, and the courts apply the remedy. If this were not so, the wealthy corporation or individual might trample upon the rights of the weak and poor, and override the law, and justice be despised and defeated. Every denial of justice, when the relief has been sought in a proper manner, is an act of tyranny, which tends to the subversion of free government." (at p. 716).[100]

In view of the commitment of this nation to the protection of the "essentials of a democratic society" and the clear violation of that principle by the House action here at issue, ". . . [i]t is emphatically the province and duty of the judicial department . . ." to provide a remedy for the wrongs done. *Marbury* v. *Madison, supra.*

The Great Chief Justice wrote in *Marbury:*

> ". . . it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." Cranch, at p. 163.

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[100] See also *State ex rel. Donnell* v. *Osburn,* 147 S.W.2d 1065 (1941) (Mandamus issued to the Speaker of the State House of Representatives, the court quoting *State* v. *Elder, Rex* v. *Barker,* and *Marbury* v. *Madison*); *State* v. *Town Council of South Kingston,* 27 A. 559.

Mr. Justice Fortas has recently restated the traditional concepts expressed in *Marbury* and subsequent cases that courts must give protection to citizens "whenever there is a right to execute an office." See his opinion in *Fortson* v. *Morris,* — U.S. —,

> "It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office —the effect given to the vote, that is protected." (87 S.C. at 456.)

It is a first principle of a court of law that the court has power to fashion a remedy for redress of a legal wrong. As Mr. Justice Douglas, concurring in *Baker* v. *Carr, supra,* stated:

> ". . . any relief accorded can be fashioned in light of well known principles of equity."

What is here requested of the Court is wholly within the traditional role of the Court and established juridical notions as to the extent of its powers. It is inconceivable to us that the House of Representatives, which justly considers itself among the outstanding assemblies of representative governments in the world, would refuse to accept a mandate which, by the Constitution, this Court (see *Reynolds* v. *Sims, supra*) is empowered, and indeed under its oath of office is required, to hand down.[101]

It would be demeaning to the House of Representatives of this great nation to suggest that it would not adhere to the time-honored words of this Court that "the government of the United States has been emphatically termed a government of laws and not of men." *Marbury* v. *Madison, supra,* at p. 162. Like *Marbury,* this is a "delicate case" (at p. 168). And as in Marbury, we are confident that the House is deeply committed, as indeed are all Americans, to the proposition that "it is emphatically the province and duty of the judicial court to say what the law is." *Marbury* at p. 175.[102]

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[101] It should be noted that in light of the recent action taken by the House on January 3rd, 1969, the necessary remedial orders of the Court would not involve a mandamus to seat the petitioner but rather conventional remedies of declaratory judgment and relief directed against agents and employees of the House. Cf. *Kilbourne* v. *Thompson, supra; Youngstown Steel Company* v. *Sawyer, supra.*

[102] The comment of the Chief Justice in *Marbury* is interesting in this respect:

This case then calls in question "the very essence of civil liberty [which] consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *Marbury* at p. 163.[102a]

Point Three

The Court of Appeals Opinions avoid the responsibility placed upon the national courts to adjudicate this controversy.

The three opinions of the Court of Appeals reflect unusual exercises in judicial creativity which appear to be

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"In Great Britain the King himself is sued in the respectful form of petition and he never fails to comply with the judgment of his court." *Marbury* at p. 163.

[102a] The refusal of the District Court to certify the necessity for a three-judge statutory court was clearly erroneous. The issues raised are conceded by all to be of "fundamental constitutional significance." Respondents' Memorandum, *supra*. The Court of Appeals itself is of the view that "novel issues of substantial public importance" are involved (Appendix D, p. A-16). Federal subject matter jurisdiction was clearly present. See Point II, *supra*. Since the enjoining of congressional action was requested, 28 U.S.C. 2282 may have required the certification of a three-judge court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Schneider* v. *Rusk*, 372 U.S. 224; *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519 (App. D.C.);

If this statutory duty of the District Court had been met, a prompt hearing on the constitutional issues as well as issues of justiciability raised by the Respondents would have already occurred, see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*. Direct appeal to this Court by either party, allowed by the statute, of the "novel issues of substantial public importance" would have permitted the early resolution of these issues, admitted by all as essential to the public interest (see Order of Court of Appeals of May 10, App. D, p. A-16) and the statement of Respondents in their Memorandum to the Court of Appeals. Accordingly, if this Court believes that a three-judge statutory court should have been convened, we respectfully suggest that the Court of Appeals be directed to order the District Court to certify the necessity for such a court, that such a court be forthwith convened, and that this Court direct the statutory district court to issue forthwith the relief prayed for herein.

designed primarily to avoid the bedrock responsibility of the Court "as ultimate interpreter of the Constitution". *Baker* v. *Carr*, supra at p. 211. We have suggested that in essence this appeal presents once again the necessity of reaffirming the fundamental importance of a written constitution to the system of government sought to be established by the Founders. As in the early days of the Republic this case compels the question "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury* v. *Madison*, *supra*, at p. 175. A close analysis of the opinion of Circuit Judge Burger for the Court and the concurring opinions of Judge McGowen and Leventhal reveals that the complicated rationales developed below serve only to mask the inevitable conclusion that the Court of Appeals failed to meet the high responsibilities placed upon the national judiciary by the Constitution itself.

a) *The opinion of Circuit Judge Burger*

1. Circuit Judge Burger in his opinion announcing the decision of the Court acknowledges, as does his concurring brothers, the fatal weakness of the district court opinion in summarily dismissing the cause for want of subject matter jurisdiction. Rejecting the simplistic analysis urged on the district court by the respondents, Judge Burger and his colleagues unanimously agree that a) this is a case which "arises" under the Federal Constitution, that b) the complaint presents a "case or controversy" within the meaning of Article III jurisdiction, and that c) Title 78 U.S.C. 1331 (c) constitutes a statutory grant of jurisdiction over the cause to the federal courts. Accordingly all three Circuit Court Judges concur in their separate opinions that the district court erroneously dismissed the action for want of

jurisdiction under the guiding principles enunciated by this Court in *Baker* v. *Carr*.

Having found that "under *Baker* jurisdiction arises", Circuit Judge Burger turned to the more complex and subtle question as to whether the admitted jurisdiction *ought* to be exercised in this case. Once again Judge Burger sought guidance in this Court's analysis of the admittedly elusive concept of the "political question" doctrine. Conceding that problems in justiciability are not susceptible of solution through the simple application of convenient labels, Judge Burger attempted to apply to this case the "six factors" which Mr. Justice Brennan in his opinion for the Court in *Baker* found to be "prominent on the surface" of a "political question" case. But a close examination of Judge Burger's utilization of the *Baker* criteria reveals an essential failure to grasp the essence of the *Baker* analysis itself.

Central to Justice Brennan's approach to the question of justiciability in *Baker* is the formation of the first of the "criteria" suggested as determinative in the definition of a "political question", namely the existence of a "textually demonstrable constitutional commitment of the issue to a coordinate political department", *Baker* v. *Carr, supra.* Mr. Justice Brennan points out in *Baker* that the application of this first criteria itself calls for a "delicate exercise in constitutional interpretation". It requires a decision as to whether the Constitution itself has committed the issue presented by the complaint for judicial decision to the sole determination of another coordinate branch of the government. This threshold decision as to the meaning of the Constitution is a "responsibility of this Court as ultimate interpreter of the Constitution" *Baker* v. *Carr,* at p. 211. But this is *precisely* the responsibility which the Court below refuses to accept. The central issue which the first criteria of *Baker* requires a judicial resolution of, is whether the

question as to who may be an elected representative of the people has been committed by the Constitution to the sole determination of the Legislature. But this is the very question which the lower court scrupulously avoids settling.

This question, the resolution of which is essential in resolving the issue of justiciability, is in fact, at the heart of the constitutional issues raised by this case. At the very center of petitioners' contentions is the proposition that the founding fathers had no intention whatsoever to "commit" to the sole discretion of the Legislature the issue as to the nature of the qualifications for membership in the House of Representatives. This was a concept as we have pointed out which was considered fundamental to the very structure of representative government. It was in the words of Madison "improper and dangerous"* to commit the issue of the nature of the qualifications of members of the legislature to that body itself. Far from "committing" any question as to the nature of the qualifications for members in the legislature to the legislature itself the Founders made it perfectly clear that questions as to the qualifications for representatives of the people were reserved to the sovereign people themselves—that these qualifications had been "defined and fixed in the Constitution" were unalterable by the legislature."** As Hamilton said to the New York ratifying convention this reflected the "true principle of a republic—that the people should choose whom they please to govern them.***

This is the crux of the problem. The very constitutional issue which is at the center of this case, and which the lower court refuses to decide, is itself the "delicate exercise in constitutional interpretation" which the Court *must* engage in if the tests of justiciability laid down in *Baker* are to be faily applied. If petitioners' constitutional contentions are sound the issue of justiciability is resolved. If the power of the House to "judge" the qualifications of its members

granted in Article One is limited to those "qualifications" alone which are "defined and fixed in the Constitution",* then there is no "textually demonstrable constitutional commitment of the issues"** presented by this case, exclusion of a duly elected representative who meets *all* constitutional qualifications for office, to "a coordinate political department".*** Quite to the contrary, precisely the reverse situation appears—the breach of a "limitation committed to writing" by "those intended to be restrained". *Marbury* v. *Madison, supra.* This is a situation which imperatively calls for the exercise of judicial power. As in *Marbury,* if in its function as the "ultimate interpreter of the Constitution", *Baker* v. *Carr, supra,* the view of the Constitution expressed by Madison and Hamilton is sound, that the Founders, taught by the experiences of the British Parliament, were determined that the legislature shall have no power to refuse to seat duly elected representatives of the people who meet all the constitutional qualifications for membership—then a classic situation for the exercise of judicial power is presented. That the violation of fundamental rights of citizens occasioned by the breach of limitations imposed by the Constitution upon the powers of one of the coordinate branches of government is a "justiciable" issue has been settled since *Marbury.* See *Wesberry* v. *Sanders,* supra, opinion of Mr. Justice Black. The exercise of jurisdiction under these circumstances is the highest responsibility of the judiciary. Upon its exercise depends the existence of the cornerstone of free government—the written Constitution, for as the Chief Justice wrote in *Marbury,* "to what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury* v. *Madison, supra.*

The heart of the error in the Court of Appeals' decision lies then in this refusal to engage in the "delicate exercise in constitutional interpretation" which the case calls for.

The simple fact of the matter is that it is quite impossible, as Mr. Justice Harlan points out in both his dissenting opinion in *Baker,* and his dissenting opinion in *Poe* v. *Ullman, supra,* to settle the issue of justiciability within the confines of the "political question" doctrine within defining and deciding the constitutional question involved. This the lower court refuses to do. But the "political question" doctrine is not a license to reject at will the responsibilities for adjudication which "oath" and "office", *Reynolds* v. *Sims, supra,* placed upon the national courts. All the conventional tools for the solution of a problem in constitutional interpretation are at hand: the words of the document, powerful evidence of the intention of the Enactors, strong indications of contemporaneous interpretation by the men who participated themselves in the framing of the document. If the constitutional analysis first expressed by Madison and Hamilton and last reflected by this Court in its opinion in *Bond* v. *Floyd* is sound that the qualifications for membership in the House are fixed in the Constitution and cannot be ignored or disregarded by that body in refusing to seat a representative of the people duly elected who meets all of these qualifications, then the courts have a duty to say so. This is the teaching of this Court from *Marbury* to *Baker.*

2. The heart of the lower court's analysis as developed in Judge Burger's opinion is the concern expressed that in some way the protection for the right asserted here cannot be "judicially molded." *Cf. Baker* v. *Carr, supra.* In essence the lower court concedes that the first two facets of the *Baker* approach to justiciability would indicate that the question presented is in fact justiciable. The opinion of Judge Burger virtually admits that in reality the "duty asserted" can be "judicially identified" and its "breach" can be "judicially determined." *Cf. Baker* v. *Carr, supra.* The lack of justiciability flows rather from a deep felt con-

cern that the relief sought in some fashion is inappropriate for the judicial branch.

The lower court's distress at the nature of the relief requested does not flow, of course, from any concern that appropriate *forms* of relief cannot be fashioned by a court. As we have pointed out above, and as the lower court concedes, the relief requested calls for the most conventional forms of judicially fashioned remedies. The problem which the lower court opinion raises is simply the fear that the officers of the legislative branch may not obey the legal processes of a court thus inducing the possibility of a constitutional "confrontation" potentially destructive of the authority and dignity of both contending branches. This fear of the effect of a "confrontation," at the heart of the conclusion of the lower court that the constitutional questions presented are not justiciable, is conceptually garbed in the language of deference to the doctrine of "separation of powers."

But as we have pointed out before, this Court has taught from *Marbury* to *Williams* v. *Rhodes* in the present Term, that the suggestion that the judicial branch refuse to meet its obligation to "say what the law is" *Marbury, supra,* out of a fear that its role as the "ultimate interpreter of the Constitution," *Baker* v. *Carr, supra,* will be disregarded by another branch is "an inadmissible suggestion." *MacPherson* v. *Blacker, supra.* It is a "suggestion" which would undermine the most fundamental concept of a system of checks and balances. For it is of the essence of the doctrine of "separation of powers" that the "powers" of one branch be not illimitable and be subject to the ultimate "check" when its proscribed limits be transgressed. As Mr. Justice Frankfurter pointed out in a case involving a similar confrontation of constitutional dimensions, *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579:

> . . . A constitutional democracy like ours is perhaps the most difficult of man's social arrangements to manage successfully. Our scheme of society is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale. The Founders of this Nation were not imbued with the modern cynicism that the only thing that history teaches is that it teaches nothing. They acted on the conviction that the experience of man sheds a good deal of light on his nature. It sheds a good deal of light not merely on the need for effective power, if a society is to be at once cohesive and civilized, but also on the need for limitations on the power of governors over the governed.
>
> To that end they rested the structure of our central government on the system of checks and balances for them the doctrine of separation of powers was not mere theory: it was felt necessity. Not so long ago it was fashionable to find our system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience through which the world has passed in our day has made vivid the realization that the framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power.

This system of checks and balances contemplates that the fundamental "check" upon the "hazards of concentrated power," *Youngstown Sheet and Tube Co.* v. *Sawyer, supra,* is the existence of the "written constitution" which imposes the "limitations contained in writing. . . . upon those intended to be restrained" *Marbury* v. *Madison, supra.* And

the very survival of the written constitution, the fundamental "check," depends upon the role of the national courts as the "ultimate interpreter" of that document. *Baker* v. *Carr, supra.* This is a first precept of the system of government constructed in Philadelphia at the founding convention. As Hamilton wrote in Number 78 of the Federalist Papers:

> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . ."

Only recently this Court in the opinion of the Chief Justice in *United States* v. *Brown* saw fit to reassert the premises underlying the deep felt necessity for the existence of

checks upon the transgression of power by the legislature:

> The Constitution divides the National Government into three branches—Legislative, Executive and Judicial. This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny.

The words of the Chief Justice in *Brown* are particularly appropriate here where once again the Court is called upon to perform its most critical role in guaranteeing that in this Republic "the legislature would not overstep the bounds of its authority." *United States* v. *Brown, supra.* Contrary to the assumptions of the lower courts, this role of the Court is *impelled* by the doctrine of separation of powers. As Mr. Justice Brandeis pointed out in his famous discussion in *Myers* v. *United States,* 272 U.S. 52, 249, 293

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers* v. *United States,* 272 U.S. 52, 240, 293.

Where the Court must act, under its constitutional mandate to "preclude the exercise of arbitrary power", *Myers* v. *United States, supra,* as this Court has had the occasion to point out in turning point cases in its history, the fundamental considerations underlying the concept of separation of powers requires the Court to fulfill its constitutional duty where a coordinate branch overstep(s) the bounds of its authority", *United States* v. *Brown,* confident in the expectation that the other branches will accept its decision as

to the meaning of the fundamental law. Thus in *Youngstown Sheet and Tube Co.* v. *Sawyer, supra,* at a moment of awesome confrontation with the Executive Branch, Mr. Justice Frankfurter, concurring in the Court's exercise of judicial power to restrain the Executive's breach of its constitutional authority wrote the thoughtful words most applicable here:

> "It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's wellbeing, in the assured conviction that he acted to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed by the awesome issues which confront the world."

It has been suggested that the House might not accept the conclusions of this Court as to the meaning of the Constitution. This is indeed an "inadmissible suggestion" *MacPherson* v. *Blacker, supra.* The words of Justice Frankfurter in the conclusion to his concurring opinion in *Youngstown* place the question in its proper context:

> "In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington."

Over a hundred years ago, in another case of grave constitutional implications, *Ex Parte Milligan,* 4 Wall 2 (1866)

the suggestion was also made that this Court should hold its hand out of concern that the head of the Executive Branch might have disregarded the conclusions of the Judicial Branch as to the meaning of the fundamental law. In sharp words this Court rejected any such consideration pointing out that "even the suggestion is injurious to the Executive, and we dismiss it from further consideration." *Ex Parte Milligan, supra.* The words of the Court in *Milligan* go directly to the core of this controversy. The "suggestion" of the lower court, in the opinion of Judge Burger, that this matter is not justiciable because the remedies sought might impel a confrontation with the Legislative Branch, is in every way "injurious" to the Legislative Branch itself. It implies that this Branch will reject the most fundamental maxim which underlies the operation of this government, the undertaking that "this is government of laws and not men", *Marbury* v. *Madison, supra.* It would be "injurious" in the extreme to this controlling concept itself, to suggest that the legislative leaders of the Nation would not accept in good conscience the conclusions of this Court as to the meaning of the fundamental law.* At a moment when every

* See the interesting comments of Congressman Robert C. Eckhardt, (Texas) in the "Adam Clayton Powell Case" 45 Texas Law Review, p. 1211,

"Therefore, it is concluded that the United States House of Representatives acted unconstitutionally in refusing to seat Adam Clayton Powell after finding he had the constitutionally enumerated qualifications for seating, and that the matter presents an issue reviewable by the courts. Therefore, the Supreme Court should direct the appropriate officials to take the necessary steps to seat Powell. If such presents an impasse between two coordinate branches of the federal family, it is an impasse that must be risked every time the least powerful but most deliberative branch decides that the executive or legislative branch has acted unconstitutionally.

In a government in which the importance of the validating function of the Court is so deeply ingrained, the danger of an impasse is small. Certainly, it is not grave enough to cause us to throw away judicial consideration of the constitutional issue and to substitute for it a system by which erratic, legislative cross currents, churned by popular prejudice, may sweep away a man's right to be seated and his constituency's right to select him."

national leader is exhorting the country to reaffirm its commitment to law and order through justice it would be presumptuous to suggest that the leaders of the Legislative Branch of the government would themselves flaunt the dictates of the written Constitution as expressed by that branch of government committed by the Constitution itself to be the "ultimate interpreter" of the fundamental law. Far more destructive of the governing principles of the Republic would be a failure of this Court to accept its constitutional responsibilities out of a misplaced fear of "confrontation" with another branch. The words of Mr. Justice Clark in his concurring opinion in *Baker* v. *Carr* ring with a clarity which is guding here:

> "As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, *a chief function of the Court is to secure the national rights. Its decision today supports the proposition for which our forbears fought and many died, namely, that to be fully conformable to the principle of right, the form of government must be representative.* That is the keystone upon which our government was founded and lacking which no republic can survive. It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. *National respect for the courts is more enhanced through the forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court. Baker, supra,* at 261, 267 (emphasis added.)

The lower court concludes in Judge Burger's opinion that were the judicial branch to "command an elected co-equal

branch in these circumstances'' would be a ''blow to representative government.'' We would respectfully suggest that the opinions of this Court from *Marbury* to *Baker* to *Williams* in this Term teach the contrary. To refuse to exercise judicial power ''in these circumstances'' would undermine all confidence in the role of this Court as the ''ultimate interpreter'' of the Constitution; it would be in truth a ''blow to representative government.''*

3. There is some suggestion in the opinion of Judge Burger that the Speech or Debate Clause of the Constitution may in some manner support the conclusion of non-justiciability in this case. Neither of the two concurring opinions rest upon this ground and Judge Burger's opinion specifically declines to base its conclusion upon the operation of this clause. Nevertheless, since respondents have urged below that the clause operates as an absolute bar to the complaint it is appropriate for us to point out that the clause has never been interpreted by this Court as a barrier to the historic concept of judicial review of the constitutionality of actions of the legislature. Cf. *Marbury* v. *Madison, supra.* As the opinions of this Court have carefully pointed out the historical ''taproots'' of the clause, *Tenney* v. *Brandhove*, 341 U.S. 367 are to be found in the efforts of the Tudor and Stuart monarchs to utilize the criminal law to ''supress and intimidate critical legislators.'' *United States* v. *Johnson*, 383 U.S. 169, 178. The entire thrust of the legislative privi-

* It should be pointed out that in any event the conclusions of the lower court as to the inappropriateness of the remedies sought sweep far too broadly. Not only is the request for mandamus relief in respect to petitioner's right to his office perfectly proper, *Marbury* v. *Madison, supra,* but it is amply clear that relief against the non-legislative officers and employees of the House, the Sergeant-at-Arms, the Clerk and the Doorkeeper is wholly available, *Kilbourne* v. *Thompson, supra,* (relief allowed against Sergeant-at-Arms), *Dombrowski* v. *Eastland,* 387 U.S., (relief allowed against chief counsel of Senate Committee). Furthermore the relief sought in respect to salary owed petitioner is completely proper and within all conventional scope of judicial power, *Bond* v. *Floyd, supra.*

lege has been to protect legislators from punitive retaliatory action. Thus criminal or civil sanctions of a deterrent nature have been barred by the clause where they arise as an effort to intimidate legislators engaged in "legitimate legislative activity." *Kilbourne* v. *Thompson,* 103 U.S. 168, *Tenney* v. *Brandhove,* 341 U.S. 367; *United States* v. *Johnson,* 383 U.S. 169, and *Dombrowski* v. *Eastland,* 387 U.S. 82. Judicial remedies unrelated to punitive or deterrent sanctions, and designed solely to enforce the historic role of the judicial branch in adjudicating the constitutionality of actions of the legislature, Cf. *Marbury* v. *Madison, supra,* obviously do not fall within the preventative scope of the clause. In any event the immunity of the clause attaches solely to "legitimate legislative activity," *Tenney* v. *Brandhove, supra,* and the gravamen of this action is the charge that the conduct of the respondents was wholly without constitutional sanction. Finally, it is of course clear that the immunity of the clause, whatever its scope, does not attach to the Sergeant-at-Arms, the Doorkeeper, the Clerk and other employees of the House. *Kilbourne* v. *Thompson, Dombrowski* v. *Eastland,* both *supra.*

Conclusion

The judgment below should be reversed and this Court should direct the entry of a judgment embodying appropriate relief.

Respectfully submitted,

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