was made by Gouverneur Morris to strike out "with regard to property" in the proposed clause, which would have given Congress the power to establish unlimited "uniform qualifications". 2 FARRAND 250. In response to that motion, Madison

> "observed that the British Parliamt. possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties." *Id.* at 250.

Once again these remarks of Madison were addressed to a clause which, if enacted, would have given to Congress the power to establish, without limitation, any new "standing incapacity" which the majority of the moment thought desirable. It was Parliament's abuse of this power in its legislative enactments, not a single House's use of the power to judge individual qualifications, to which he was speaking. High on the list of those abuses in Madison's mind must have been the Parliamentary Test Act (30 Car. II st. 2, c. 1 (1678)) which had excluded Catholics as a group from Parliament.* It seems at least much more plausible that this precedent was the "lesson" to which Madison referred, not the *Wilkes Case* as Warren suggests and petitioners vehemently argue. WARREN 420 n.1; Br. 32 n.6, 35 *et seq.***

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* That such statute was in the minds of the Framers is indicated by the prohibition contained in article VI, section 3, which was not contained in the draft reported out by the Committee on Detail, 2 *id.* at 188, but was introduced by Pinckney on August 20, *id.* at 342, ten days after Madison's speech.

** It should be noted that the expulsion of Wilkes was by the House of Commons which, acting alone, did *not* possess the power to "establish uniform qualifications for membership" and did not purport to act under any such power.

The provisions giving to each house the power to judge the qualifications of its members first appeared in a draft prepared by James Wilson, which was used in the Committee of Detail. 2 FARRAND 155. Gorham, a member of the Committee, had been quite active in the Massachusetts constitutional convention, which had adopted a provision limiting the power of a house of the legislature to judging those qualifications "as pointed out in the constitution", *see* p. 77-78, *supra*. Moreover, we have the testimony of another member of the committee, Edmund Randolph, that "the Constitution of Massachusetts was produced . . . in the grand Convention". 3 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 368 (1876). But the limitation contained in the Massachusetts constitution was not adopted, and the "judge qualifications" clause was reported out of the Committee of Detail in the form in which it now appears in the Constitution, 2 FARRAND 180, and adopted by the Convention "nem. con.", *id.* at 254.

If Madison had meant, as petitioners argue, to restrict the power to judge qualifications to those specified under the Constitution, and to deny the power to expel or exclude for reasons of unfitness or personal misconduct, it is strange that he did not speak to the point or suggest changes. Instead, he merely moved to insert the requirement of a two-thirds vote for expulsion.

The power to expel was first set forth in the draft prepared by Wilson, referred to above, in the following language:

> "Each House may expel a Member, *but not a second Time for the same Offense.*" *Id.* at 156 (emphasis added).

By the time the clause was reported out by the Committee of Detail, the italicized language had been excised, *id.* at 180. Thus, the Committee of Detail considered and rejected yet another provision which would have limited the power of each house of Congress in a manner which would have repudiated in part the decision in the *Wilkes Case.** As reported out by the Committee of Detail, the only change made in the clause by the Convention was the insertion, on Madison's motion, of the phrase "with the concurrence of ⅔" between the words "may" and "expel". *Id.* at 254.**

Thus the Convention considered and rejected at least two clauses (the Randolph restriction and Pennsylvania variation) and probably a third (the Massachusetts variant), which would have repudiated, in whole or in part, the English and American precedents, including the *Wilkes Case.* On the other hand, the acts of the Convention in rejecting provisions which would have given to Congress the power to create new "standing incapacities" do not, in our analysis, really bear on the question. Both Parliament and the colonial legislatures had treated the two powers as separate and distinct, and there is no indication that the Convention thought otherwise.

(d) *The Ratification Period.*

Given the long and widespread acceptance in Anglo-American law of the power of legislative bodies to judge

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* Neither "Wilkes" nor "*Wilkes Case*" appears in the index to *Farrand* (4 FARRAND 127, 226), although other names mentioned in the debates do, *e.g.*, "Blackstone", "Bolingbroke", and "Bowdoin" (*id.* at 134-35). Therefore, to the extent that our present records are complete, Wilkes was not discussed in the Convention.

** It seems much more plausible that Madison would have had the *Wilkes Case* in mind here than when considering Morris' motion; *see* pp. 83-84, *supra*, since Wilkes was "expelled" from the House of Commons. *See* p. 73, *supra.*

qualifications beyond the standing incapacities and to exclude or expel Members, it is not surprising that our review of the ratification proceedings in the several states, as set forth in Elliot's *Debates* and the leading public commentators, has not revealed any discussion of article I, section 5, or of the scope of the power to judge qualifications and to exclude or expel conferred thereby.* The power simply was not controversial.

2. *The Congressional Experience*

The above-mentioned power of the House of Commons and of the colonial and early state legislatures has been recognized and carried forward by both houses of the Congress. This experience has been summarized by Professor Chafee in his book *Free Speech in the United States*. There he discusses the two "extreme views" of the houses' powers to judge qualifications (*i.e.*, either the House may "blackball" any member whom it chooses or the House has no power to judge any "qualifications" beyond those listed in the Constitution). He concludes:

> "The arguments against both of the extreme views mentioned are so strong that the actual practice takes an intermediate ground. As to elected persons satisfying all the requirements in the Constitution, we are

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* Petitioners' suggestion that the Constitution would not have been ratified unless the Framers limited the power of each House to judge qualifications is, in our view, erroneous. We have found no discussion of the issue either in the state ratification conventions or in the principal pamphleteers and commentators of the period. The examples cited by petitioners, Br. 46-57, in the conventions of New York, Pennsylvania and Virginia, were directed to other issues, namely the power to impose new standing incapacities. Significantly, the constitutions and practices of those states placed no limitation on the power of legislative bodies to adjudge an individual as unqualified because of his personal misconduct, although in Pennsylvania, he could not be expelled a second time for the same offense. *See* Appendix D at 28-32, 36-37, 40-43.

not forced to choose between giving the House absolute power to unseat whomever it dislikes, and giving the voters absolute power to seat whomever they elect A third alternative has been adopted, fairly close to the second view. The constitutional qualifications ordinarily suffice; but Congress has rather cautiously imposed some additional tests by statute, and the House of Representatives or the Senate has probably added a very few more qualifications by established usage (a sort of legislative common law) to cover certain obvious cases of unfitness." CHAFEE 257.

In those cases of obvious unfitness, both houses have excluded or expelled members-elect or members.* Especially apt is the case of B. F. Whittemore. 1 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 464 (1907) [hereinafter Hinds]; 2 HINDS § 1273; Legislative Reference Service, *Precedents of the House of Representatives Relating to Exclusion, Expulsion and Censure* 48, 163-64 (1967) [hereinafter LRS]. Whittemore, while a Member of the House from South Carolina, was found by the House to have sold appointments to the military and naval academies. Before a vote could be taken on expulsion, Whittemore resigned. He was then re-elected, and the House excluded him by a vote of 130 to 24. *Ibid;* CONG. GLOBE, 41st Cong., 2d Sess. 4674 (1870).

Another case involving misuse of public office for personal gain is that of Frank L. Smith of Illinois. SENATE CASES 122-23. Smith was excluded from the Senate because it found that, while a member of a state agency regulating utilities, he accepted large campaign contributions from Samuel Insull and because Smith had made excessive campaign expenditures. The vote in favor of exclusion was 61 to 23. *Id.* at 123.

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* Those cases are summarized in Appendix C hereto.

There are other instances of exclusion for actions evidencing moral turpitude. Senator William Lorimer of Illinois was excluded because the Senate found that members of the state legislature had been bribed to obtain his election. *Id.* at 100-01. William S. Vare of Pennsylvania was excluded from the Senate because the Senate found he had engaged in acts of corruption and fraud in the primary prior to his election to the Senate. *Id.* at 119-22. George Q. Cannon of the Territory of Utah was excluded because he was an admitted polygamist in open violation of a federal statute. 1 HINDS § 473; LRS 49. Brigham Roberts of the State of Utah was excluded because he had been convicted for violating the polygamy statute. 1 HINDS §§ 474-80; LRS 65-108. Victor Berger of Wisconsin, at the time of exclusion, had been convicted for sedition (6 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 56-59 (1935) [hereinafter CANNON]; LRS 110-22), and subsequently, when his conviction was reversed on appeal and prosecution of the charges dropped, Mr. Berger was re-elected and admitted to the House (CHAFEE 168 n.30).

The most recent prior instance in which either house has considered excluding a single member-elect was the case of Theodore G. Bilbo of Mississippi. That was in 1947, when Mr. Powell was a Member of Congress. CONGRESSIONAL DIRECTORY, 80th Cong., 1st Sess. 164 (1947). Senator Bilbo, who had served 12 years in the Senate, was not sworn in at the opening of the 80th Congress, pending a Senate investigation of charges that he had accepted substantial gifts from war contractors and that he had attempted to prevent Negroes from voting in a primary. Senator Bilbo's credentials were tabled, and a final adjudication made unnecessary by his death. SENATE CASES 142-44.

Petitioners discuss at some length (Br. 73-97) selected instances in which a question arose as to the qualification

of a member of the House or Senate, for reasons other than age, citizenship and inhabitancy, and the legislative body decided that he should be seated. We agree that the precedents cited by petitioners are "important and persuasive" (Br. 73), but their significance lies neither in the decisions reached nor in the rhetoric in which the arguments were cloaked. They are important because in each instance the House or Senate took jurisdiction over the case, conducted an investigation and deliberated the issues. Such action clearly implies that were they to find the member not to be qualified, they alone had the power to act upon that finding.

Mr. Powell's awareness and affirmative acceptance of the power of each house to exclude a member-elect is underscored by his vote upon the resolution regarding the Mississippi Members in 1965. There, in response to a challenge to the entire Mississippi delegation's taking the oath, a resolution was offered which would have dismissed the challenge and seated the delegation. Mr. Powell voted against that resolution. 111 CONG. REC. 24921 (1965).

3. *This Court's References to the Constitutional Limitations Upon Qualifications for Membership in the Congress.*

Petitioners contend that three decisions of this Court establish the proposition that the qualifications of article I, section 2—age, citizenship and inhabitancy—are exclusive. But this Court has never so held and its pronouncements tend to the opposite conclusion. Thus, although these three cases contain dicta which may suggest that Congress may lack the power to create new "standing incapacities" by statute, they do not even question the exclusive power of either house of Congress to adjudge an individual member to be unqualified by reason of his personal misconduct of the sort on which the House acted here.

First, *Newberry* v. *United States,* 256 U.S. 232, held that Congress lacked the power to regulate primary elections and reversed a conviction for conspiracy to violate a federal statute regulating expenditures by candidates in primary elections. In discussing the scope of the authority given Congress under section 4 of article I to make or alter state regulations regarding the time, places and manner of holding elections for Senators and Representatives, the Court quoted Hamilton's remarks in *The Federalist* emphasizing that Congress could not establish preferred classes (*i.e.,* by establishing a uniform property qualification) for membership in either of its houses. But the Court also went on to point out that each house's power to judge qualifications gave Congress the "power to protect itself against corruption, fraud or other malign influences", *id.* at 258. That view was concurred in by Justices Pitney, Brandeis and Clarke, *id.* at 284-85, who thought the majority's conclusions as to lack of congressional power to regulate the primaries were inconsistent with the power of either house to judge the elections and qualifications of its members. *Ibid.*

Second, *United States* v. *Classic,* 313 U.S. 299, resolved that inconsistency by narrowly confining *Newberry* to its facts and holding that article I, section 4 granted Congress the power to regulate primary elections which were necessary steps in the choice of candidates for election to the Congress and which controlled that choice. Accordingly, the Court reversed a demurrer to an indictment under two federal civil rights acts for conspiracy to deprive qualified voters who voted in a primary election of their right to have their ballots cast for the candidates of their choice, to deprive candidates of their right to run for election to the Congress, and to have votes cast in their favor counted for them. In the course of its opinion, the

B. *The Exclusion of Mr. Powell Was a Decision Equally Supported by the House's Power To Expel a Member Upon the Vote of Two-Thirds.*

An alternative constitutional basis for the exclusion of Mr. Powell from the 90th Congress, adopted by Judge McGowan below, is the provision of article I, section 5, giving each house the power, upon the concurrence of two-thirds, to expel a Member. As noted above, in the early practice in the House of Commons, in particular the *Wilkes Case*, and in the colonial and early state legislatures, there was often no distinction made between exclusion and expulsion, and the word "expulsion" was often used to cover both situations.

Whatever limitations article I, section 2 arguably imposes upon the House's power to judge qualifications under article I, section 5, it has never been disputed that the authority of the House to expel on the vote of two-thirds is committed solely to its discretion. In particular, there can be no dispute that the expulsion power can be exercised for a host of reasons relating to past and current behavior. As this Court itself has stated: "The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. at 669-70. Here the Select Committee's findings, expressly recited in House Resolution 278 and not contested by petitioners, support the judgment of the House that Mr. Powell's conduct was inconsistent with the trust and duties required for membership in that body.*

* The power to exclude a member upon grounds such as those present in this case finds its analogues in the power to expel a member and the power of impeachment. The power of the Senate to expel a member on similar grounds was early upheld in the case of *William Blount*, SENATE CASES 3, who, in 1797, was expelled and held to be unworthy of a continuance of his public trust by the Senate for having conspired with a British agent in a plan to seize Spanish Florida and Louisiana, and at least one member of the House was expelled by a two-thirds vote for prior misconduct, instead of being excluded. *See John B. Clark*, 2 Hinds' §1262, Appendix C.

The resolution excluding Mr. Powell was duly adopted by a vote in excess of two-thirds of the 434 Members—307 to 116. 113 CONG. REC. H1956-57 (daily ed. Mar. 1, 1967).* Some Members, at least, considered exclusion and expulsion coextensive in the context at hand.** While theoretically a Member may have to be seated before he may be expelled, such formality cannot be required here, because in practical effect the two amount to the same thing and the basic constitutional requirement for expulsion—a concurrence of two-thirds—was amply satisfied. And surely the broad perimeters of article I, section 5, giving the House control over the conduct of its internal affairs, make inappropriate any judicial questioning as to the technical regularity of the parliamentary procedure involved.

Petitioners' entire argument on the merits therefore rests upon the slimmest of reeds. At most their contention is that the action of the House was not absolutely regular. If the House had taken the technical step of voting to seat Mr. Powell and then immediately expelling

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* Some have suggested that a two-thirds vote would not have been forthcoming if the Speaker had not ruled that a majority vote would suffice. *E.g.*, Note, *The Power of a House of Congress To Judge the Qualifications of Its Members*, 81 HARV. L. REV. 673 n.1 (1968). Yet, such a suggestion can be supported only by speculations into the possible motivation and subjective purpose of each Member of the House who voted on the resolution. Such speculations cannot be undertaken or indulged. *United States* v. *O'Brien*, 391 U.S. at 383-86; *Barrenblatt* v. *United States*, 360 U.S. 109, 132-33; *Daniel* v. *Family Ins. Co.*, 336 U.S. 220; *Arizona* v. *California*, 283 U.S. 423, 455 and the cases there cited. The objective fact is that a two-thirds vote was forthcoming, and beyond that fact this Court cannot go. *See also* A. 94 (McGowan, J., concurring).

** *See, e.g.*, 113 CONG. REC. H1942 (Mr. Curtis), H1944-45 (Mr. Celler) (daily ed. Mar. 1. 1967).

him by the two-thirds vote that in fact was accomplished, petitioners would have no argument left at all.

Respondents submit that the House has effectively met the stated requirement for expulsion and, if it has not, the deficiency in its resolution is merely technical and ministerial and hardly the occasion for judicial interference with the legislative branch in this case. As Judge McGowan stated, concurring in the court below,

> ". . . Powell's cause of action for a judicially compelled seating thus boils down, in my view, to the narrow issue of whether a member found by his colleagues, after notice and opportunity for hearing, to have engaged in official misconduct must, because of the accidents of timing, be formally admitted before he can be either investigated or expelled. The sponsor of the motion to exclude stated on the floor that he was proceeding on the theory that the power to expel included the power to exclude, provided a ⅔ vote was forthcoming. It was. Therefore, success for Mr. Powell on the merits would mean that the District Court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade." (A. 92-93.) *See also* A. 96-99 (Leventhal, J., concurring).

C. *Moreover, the Exclusion of Mr. Powell Did Not Infringe Any Other Constitutional Provision.*

Petitioners contend that Mr. Powell was denied due process of law, that his exclusion was a bill of attainder, and (in their brief, but not in the complaint) that it was a discrimination based upon race (Br. 98-130). These contentions lack merit.

1. *Mr. Powell Was Not Denied Due Process of Law.*

Mr. Powell's due process claim is apparently limited to the contention that the procedures followed by the House and by the Select Committee were not proper.*

Even the scope of the procedural due process claim is not easy to fathom. Petitioners apparently maintain that Mr. Powell was not accorded (1) notice of the specific charges which, if proven, would justify exclusion or expulsion; (2) effective assistance of counsel; (3) the rights of confrontation and cross-examination of adverse witnesses; (4) a decision supported by substantial evidence; and (5) the right to assert his constitutional privilege against self-incrimination. (Br. 112-19)

On their face, those contentions are without substance. Mr. Powell chose on the express advice of counsel to limit his participation in the hearings before the Select Committee, *Hearings Before Select Committee* 255, on the sole and express ground that the Committee had no jurisdiction whatsoever to inquire into anything beyond his age, citizenship and inhabitancy. *Id.* at 60-64, 109-13. As his brief submitted at the close of the hearings makes clear, Mr. Powell was advised by counsel "for that reason, *and for that reason only* . . . not to participate in the hearings of the Committee which extend beyond such limitations". *Id.* at 255 (emphasis added).

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* In the court below, Mr. Powell contended that he had been denied substantive due process because the standards of conduct by which the House judged him were not known to him beforehand. In other words, he claimed that he was not on sufficient notice that misuse of public funds, breach of public trust, contumacious evasion of lawful processes of the courts and failure to cooperate with investigations of his conduct authorized by the House might result in his exclusion or expulsion. Such a contention was without any merit, in view of the very substantial body of precedent in both Houses as a "sort of legislative common law" to cover obvious cases of unfitness, and we do not understand Mr. Powell to press that contention here. CHAFEE 257.

Mr. Powell's conduct before the Select Committee thus satisfied the strictest standards of waiver. *See Johnson* v. *Zerbst*, 304 U.S. 458, 464.

When the question of his seating was brought before the entire House, the body possessing the authority to adjudicate the question, Mr. Powell again chose to stay away.* Mr. Powell cannot now maintain that he was denied procedural due process with respect to proceedings in which he declined upon the advice of counsel to participate.

As Judge McGowan noted below:

> "It is argued that the misconduct cannot be assumed because Powell was denied procedural due process by his colleagues in the investigation of his activities. But no one can read the record of the Select Committee's relationships with Powell without concluding that there was no serious purpose upon Powell's part to participate in the ascertainment of the facts. This was unquestionably due to his fundamental constitutional theory that he was accountable for his conduct only to his constituents. One cannot escape the impression that any procedural problems would have been resolved satisfactorily if there had been willingness to accept the relevance of the alleged misconduct to his continuance in the House." (A. 92 n.2). *See also* A. 99 (Leventhal, J.).

In any event, however, Mr. Powell was accorded rights consistent with the precedents of the House and Senate as well as with the arguably analogous judicial precedents.

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* Mr. Powell could have participated in the debates on the Committee's Report and could even have had counsel present. See DESCHLER § 65.

The House is not bound by any particular set of procedures, since article I, section 5 gives it power to determine the rules of its proceedings. It has, however, attempted to accord Members, including Mr. Powell, such rights as are necessary to promote the ascertainment of truth. *See Hearings Before Select Committee* 30.

The rules of the House, as well as the Senate, followed in cases of contested elections, exclusions, and expulsions have been tailored to the nature of the case. Pure contested election cases generally resemble a civil trial* while exclusions and expulsions are often heard by investigating committees.** In exclusion and expulsion cases where the facts are extensively disputed, the privilege of cross-examination is often accorded.† Where the essential question is one of law or interpretation, on the other hand, a committee or the House may decide the question upon written statements and presentations.††

In this case, of course, the facts are not substantially in dispute. Mr. Powell never attempted to controvert the evidence of his improprieties and still does not.‡ Nevertheless, Mr. Powell received ample procedural rights from the Select Committee which investigated his qualifications.

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* *E.g., Wilson* v. *Vare,* SENATE CASES 119-22 (1927-29); *Jodoin* v. *Higgins,* 6 CANNON § 90 (1936).

** *E.g., Benjamin Stark.* SENATE CASES 34 (1862); *B. F. Whittemore,* 1 HINDS § 464; 2 *id.* § 1273 (1870); *Reed Smoot,* SENATE CASES 97-98 (1907); *Wilson* v. *Vare, id.* at 119-22 (1927-29); *Frank L. Smith, id.* at 122-23 (1927-28).

† *E.g., Phillip F. Thomas,* SENATE CASES 40 (1867-68); *William Lorimer, id.* at 100-01 (1912); *Theodore G. Bilbo, id.* at 142-44 (1947).

†† *E.g., Albert Gallatin.* ANNALS OF CONGRESS, 3d Cong., 1st Sess. 60-62 (1794); *James Shields,* CONG. GLOBE, 30th Cong. 2d Sess. App. 332 (1894); *Waldo P. Johnson,* SENATE CASES 30-31 (1861-62).

‡ *See* p. 14 note *, *supra.*

Petitioners' reliance upon judicial precedents with respect to due process is misplaced. First, none of the cited cases dealt with each house's exercise of its constitutionally delegated power to judge the qualifications of its members, to determine the rules of its proceedings, and to expel members.

Second, even assuming that the cited precedents can be relied upon, petitioners fail to recognize that, as this Court has emphasized, due process is not a fixed and immutable concept, but rather depends upon the nature and purposes of the proceedings involved. *E.g., Railway Clerks* v. *Employees Ass'n,* 380 U.S. 650, 667; *Cafeteria Workers, Local 473* v. *McElroy,* 367 U.S. 886; *Hannah* v. *Larche,* 363 U.S. at 442. Where the proceeding is investigatory rather than adjudicatory, the full panoply of formal judicial procedures need not be followed. *Hannah* v. *Larche, supra; Anonymous* v. *Baker,* 360 U.S. 287; *In re Groban,* 352 U.S. 330.

It is clear that the proceedings of the Select Committee were investigatory, rather than adjudicatory, since the Select Committee's function was limited to reporting to the House "the results of its investigation and study, together with such recommendations as it deems advisable." H.R. Res. 1.

(a) *Mr. Powell Had Ample Notice of the Charges Against Him.*

In *Hannah* v. *Larche, supra,* the Civil Rights Commission, which, like the Select Committee, had no adjudicatory powers, summoned certain voting registrars and private citizens to appear in an investigation of alleged deprivations of Negro voting rights in Louisiana. No notice of the specific charges being investigated was given, but the persons summoned did have notice of the general nature of the

inquiry. 363 U.S. at 441 n.18. This Court held that notice sufficient. *Id.* at 441-42.

It follows that the notice given to Mr. Powell was more than adequate. *See* Chairman Celler's letters of February 1 and 10, and the Chief Counsel's letters of February 6 and 11, pp. 7, 11, *supra.* And there certainly was adequate notice prior to the consideration of the matter by the House as a whole, since the Select Committee made its recommendations to the House on the basis of detailed findings of fact. REPORT OF SELECT COMMITTEE 31-32.

(b) *Mr. Powell Was Accorded the Right to Counsel.*

The right to counsel may properly be denied in investigatory proceedings without running afoul of the dictates of due process. *Anonymous* v. *Baker, supra; In re Groban, supra.*

Nevertheless, Mr. Powell was given the right to counsel. Petitioners say, however, that they were denied the right to "effective" counsel because allegedly the Select Committee did not permit his attorneys to be heard (Br. 118). The plain fact is that every time Mr. Powell's counsel asked to be heard on any matter they were accorded reasonable opportunity to speak and to file briefs. *See* pp. 7-12, *supra.*

(c) *Mr. Powell Was Given the Right of Confrontation. While He Was Not Given the Right of Cross-Examination, the Record and Circumstances of This Case Clearly Show That He Was Not Thereby Prejudiced.*

In *Hannah* v. *Larche, supra,* this Court held that the Civil Rights Commission was not required to disclose the identity of complainants and was not required to grant the right to cross-examine. 363 U.S. 441-42.* One of the prece-

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* *See also Martin* v. *Beto,* 260 F. Supp. 589 (S.D. Tex. 1966), *aff'd,* 397 F.2d 741 (5th Cir. 1968); *petition for cert. filed,* 37 U.S.L.W. 3252 (U.S. Nov. 12, 1968) (No. 732); *In re McClelland,* 260 F. Supp. 182 (S.D. Tex. 1966); *United States* v. *International Longshoremen's Ass'n,* 246 F. Supp. 849 (S.D.N.Y. 1964).

dents relied upon was the Senate proceeding with respect to the seating of John Smith of Ohio. *Id.* at 444 & n.21, 480-81.

The only authority specificially relied upon by petitioners with respect to this point, *Greene* v. *McElroy,* 360 U.S. 474, is totally inapposite. In *Greene,* all that was decided was that there was no statutory or administrative basis which authorized revocation of a security clearance without affording a hearing, including the right to confront and cross-examine adverse witnesses. That *Greene* was not based upon constitutional grounds was made clear by the subsequent decision of this Court in *Cafeteria Workers Local* 473 v. *McElroy, supra.**

Accordingly, the Select Committee was not constitutionally required either to disclose the identity of individuals who had supplied it with information or allow Mr. Powell the right to cross-examine adverse witnesses. Nevertheless, the Committee did not keep secret from Mr. Powell or his attorneys the identity of the witnesses who furnished testimony, and Mr. Powell and his attorneys made no effort to contest any of the testimony, or to avail themselves of the offer of the Committee to subpoena anyone whom Mr. Powell requested to testify. If he had requested the right to cross-examine a particular witness on a showing of need, one cannot escape the impression, as Judge Leventhal intimated, that the right would have been granted.

(d) *The Select Committee's Recommendations and the House's Action Are Supported by Substantial Evidence*

Petitioners, as a further portion of their due process argument, contend that inadmissible hearsay was received

* *See also Hyser* v. *Reed,* 318 F.2d 225 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 957; *Dixon* v. *Alabama Bd. of Educ.,* 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930.

in evidence and apparently that the findings of the Select Committee and the action of the House were not supported by substantial evidence.

Petitioners' unspecified contention as to hearsay is frivolous. The admission of hearsay evidence before the Select Committee did not violate due process. *Cf. Costello* v. *United States,* 350 U.S. 359. Moreover, Mr. Powell's attorneys did not object to the admission of any evidence on hearsay grounds and thus have waived their right, if any, to object. 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).

Petitioners' apparent general contention that the findings of the Select Committee were unsupported by substantial evidence is even less tenable. They do not point to any evidence in the *Hearings* that conflicts with the Committee's findings and do not suggest, even now, any evidence to rebut those findings.

(e) *Mr. Powell's Exclusion Was Not Punishment for Asserting His Constitutional Privilege Against Self-Incrimination.*

Petitioners also contend that the House's action is unconstitutional on the ground that it is punishment for Mr. Powell's assertion of his constitutional right to remain silent (Br. 118), citing *Slochower* v. *Board of Educ.,* 350 U.S. 551, a case involving the privilege against self-incrimination. Mr. Powell, however, never invoked the privilege against self-incrimination and did not refuse to testify on that ground. His argument is thus frivolous.

2. *House Resolution 278 Is Not a Bill of Attainder.*

Petitioners argue that House Resolution 278 is a bill of attainder (Br. 98-111), erroneously assuming that the doctrine of separation of powers assigns all adjudicatory

powers to the courts under article III. Each house of Congress, however, under article I, has expressly been given the power to *judge* the qualifications of its members as well as to punish its members for disorderly behavior and, with the concurrence of two-thirds, to expel a member. None of the cases cited by petitioners involved a legislature's exercise of these express judicial powers and are thus irrelevant. *See United States* v. *Brown,* 381 U.S. 437; *United States* v. *Lovett,* 328 U.S. 303; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277; *cf. United States* v. *O'Brien,* 391 U.S. at 383 n.30.*

The argument of petitioners was answered long ago by Alexander Hamilton in *The Federalist.* Referring to the analogous power of the Senate "as a court for the trial of impeachments" (THE FEDERALIST No. 65, at 439 (Cooke ed. 1961)), Hamilton defended the assignment of the impeachment power to the Senate (*id.* at 439-45), and specifically refuted the argument that the assignment of that power to the Senate was a deviation from the doctrine of separation of powers. He said,

> "[It is objected] . . . that the provision in question confounds legislative and judiciary authorities in the same body; in violation of that important and well established maxim, which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place [Nos. 47-52], and has been shown to be entirely compatible with a partial

* A legislature's judging of the qualifications of a member-elect was not regarded as an act of attainder or an act of pains and penalties at the time the Constitution was drafted. *Compare* 1 BLACKSTONE, COMMENTARIES *162-63, *175-77 *and* 4 *id.* *259 (4th ed. 1770).

> intermixture of those departments for special purposes, preserving them in the main distinct and unconnected. *This partial intermixture is even in some cases not only proper, but necessary to the mutual defense of the several members of the government, against each other.*" *Id.* No. 66, at 445 (emphasis added). *See also* CHAFEE 253; 1 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 742-45 (4th ed. Cooley 1873).

3. *Mr. Powell Was Not Excluded From the 90th Congress Because of His Race.*

Petitioners' contentions that the exclusion of Mr. Powell was motivated by racial prejudice are, as Judge McGowan noted below, "so purely conclusory in character as, under elementary pleading concepts, not to require a hearing on the merits" (A. 92).

More importantly, such contentions are patently unsupportable, by inference or otherwise. Mr. Powell was excluded for the reasons stated in House Resolution 278, and for no other reasons. This Court cannot disregard those unchallenged reasons for the action of the House and probe for other concealed motivations that are claimed to have led each Member to vote as he did. For as this Court has emphasized on many occasions, the integrity of legislative, administrative, and judicial processes preclude probing "the mental processes" by which legislators and judges decide matters. *E.g., United States* v. *O'Brien,* 391 U.S. at 382-86; *Pierson* v. *Ray,* 386 U.S. at 554; *United States* v. *Morgan,* 313 U.S. 409, 422; *Arizona* v. *California,* 283 U.S. at 455; *Fletcher* v. *Peck,* 6 Cranch 87. The Speech or Debate Clause also squarely precludes such an inquiry.

Furthermore, petitioners' asserted constitutional bases—the thirteenth, fourteenth and fifteenth amendments—are frivolous as applied to the facts of this case.

First, "The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery." *Civil Rights Cases*, 109 U.S. 3, 24, or to the "badges and incidents of slavery", *e.g., Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-43. The exclusion of Mr. Powell obviously has nothing to do with slavery, and since there is absolutely no showing of any intent to discriminate against Negroes as a class, there is no colorable "badge or incident of slavery" at issue.

Second, the fourteenth amendment has no application whatsoever to the federal government. And even if petitioners' reference to the fourteenth amendment is viewed as a reference to some sort of fifth amendment equal protection standard, they have failed to allege either a specific intent to discriminate against Negroes as a class or systematic discrimination against Negroes.

The statements, on and off the House floor, of a few Representatives opining that prejudice against Negroes was a major factor in the exclusion of Mr. Powell (Br. 125-27 n. 89, 127-29) do not establish petitioners' contention. As this Court knows: "[W]hat motivates one legislator to make a speech about a . . . [matter] . . . is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork". *United States* v. *O'Brien*, 391 U.S. at 384. Moreover, if this Court were to examine the legislative purpose or motive in excluding Mr. Powell, it would be obliged to consider not only the statements referred to by petitioners, but also the more authoritative *Report of the Select Committee*

which makes clear that racial prejudice played no part in their deliberations. *See United States* v. *O'Brien*, 391 U.S. at 385.

Third, the fifteenth amendment prohibits only denials of the right to vote because of race, and since petitioners do not claim that House Resolution 278 expressly denies them the right to vote because of race, they do not even allege a violation of the fifteenth amendment. *See, e.g., South Carolina* v. *Katzenbach*, 383 U.S. 301; *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Terry* v. *Adams*, 345 U.S. 461; *Smith* v. *Allwright*, 321 U.S. 649.

POINT III

In Any Event, the Circumstances of This Case Do Not Present an Appropriate Occasion for a Federal Court To Exercise Whatever Discretionary Power It May Possess To Afford Relief.

The remedies petitioners seek in this action—injunction, mandamus, and declaratory judgment—are not available to a litigant simply because he asserts or even establishes an underlying right. Such remedies are given only as a matter of sound judicial discretion, where the circumstances are compelling. A determination to withhold such relief will not be set aside unless it constitutes an abuse of discretion. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148; *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111. This is especially true of petitioners' request for declaratory relief against the House, since

> "The propriety of [such] relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of the federal judicial power."

Public Service Comm'n v. *Wykoff*, 344 U.S. 237, 243 n.41 *See also Golden* v. *Zwickler* 37 U.S.L.W. 4185 (U.S. Mar. 4, 1969).

In the circumstances of this case, it was altogether appropriate for the courts below to decline to afford any of the relief requested.

As Judge Leventhal noted below,

> "A court has a duty, in the sound exercise of discretion, to consider litigation seeking relief that raises problems of confrontation with a coordinate branch with an approach that will, wherever possible, confine relief narrowly." (A. 98)

Only circumstances of the most compelling necessity, or as Judge McGowan termed it, "the urgencies, in terms of simple justice" (A. 93-94 n.4), should induce a court to act otherwise in a case such as this. Here, there are no compelling necessities or "urgencies" that require the extraordinary relief petitioners seek.

First, petitioners have not challenged the accuracy of any of the findings of misconduct made by the Select Committee and have never proffered any evidence, either in the courts or in the House, to rebut those findings. Clearly, it was no abuse of discretion for the courts to refuse to come to the aid of a Congressman-elect whom both the Select Committee and the House itself found had improperly maintained his wife on his clerk-hire payroll, permitted and participated in improper expenditures of public funds for private purposes, refused to cooperate with Committees of the House in their lawful inquiries, and brought discredit to the House by his contumacious conduct toward the courts of New York.

Second, while the exclusion of Mr. Powell did temporarily deprive his constituents of representation in the House, that deprivation was, at least in part, perpetuated by Mr. Powell himself. After his exclusion in March of 1967, Mr. Powell was re-elected in April of 1967, but never again during the 90th Congress presented himself to represent his district.*

Third, upon the advice of counsel, Mr. Powell chose not to participate in the proceedings of the House, taking the position that neither the House nor the Select Committee had jurisdiction to inquire beyond his age, citizenship and inhabitancy. But surely, as Judge Leventhal noted below, the House had "legislative jurisdiction" to inquire into whether a Member-elect had committed acts justifying punishment or expulsion. And, pursuant to its power to determine the "Rules of its Proceedings", article I, section 5, it was authorized to conduct that inquiry prior to seating him. Against the backdrop of the potential confrontation with a coordinate branch and the courts' difficulty in molding meaningful relief, Mr. Powell's failure to participate in the proceedings led Judge Leventhal to conclude:

> "... I do not think it mandatory for a court to consider and determine the constitutional issue as he has chosen to frame it, from an erroneous premise; and specifically, I think it proper to refrain from a full determination of the merits in a case where petitioner is seeking an extraordinary remedy yet has failed to invoke to the fullest extent the remedies and procedures available within the legislative branch." (A. 101)

For these reasons alone, the decision below should be affirmed.

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* Of course, the claims asserted by Mr. Powell's constituents are unquestionably moot. *See* pp. 111-12 note * *infra.*

POINT IV

This Case May Now Be Dismissed As Moot.*

We believe that we have shown in the foregoing Points I, II and III that the courts below were correct in dismissing this action, and we submit that under those circumstances, affirmance of the dismissal would be an appropriate result, particularly since it would terminate the controversy in all its aspects. Nevertheless, we feel compelled to raise a suggestion of mootness because, wholly apart from the correctness of the result reached by the courts below, intervening events make it inappropriate now to grant the relief sought by petitioners. Time and the evolution of the political process have made this action moot and rendered the relief sought wholly academic and unnecessary. Since certiorari was granted, the 90th Congress has terminated, the 91st Congress has been convened and organized and Mr. Powell has been seated in the House of the 91st Congress. Petitioners themselves now concede, as they must, that "the remedial form of mandamus to the Speaker to require Petitioner's [Mr. Powell] seating is no longer required". Petitioners' Memorandum 16.

As against the House of the 90th Congress, however, they still seek a declaratory judgment on the constitutionality of its resolution of exclusion and an order against the Sergeant-at-Arms directing the payment of Mr. Powell's back salary. They also have asked in Petitioners' Memorandum for diverse mandatory, injunctive and declaratory relief against the House of the 91st Congress and certain of its officers, even though that body is not a party to this lawsuit and its action with respect to Mr. Powell was

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* The argument in this Point IV supplements respondents' argument in their Memorandum on Mootness filed herein on January 10, 1969.

wholly independent from the action of the prior House. *See* Petitioners' Memorandum 16.

Not one of these new claims for relief stands on any better footing than the original claims asserted in this action and in no way alters or affects the conclusion that this action is now moot.

A. *Any Declaratory Judgment Against the House of the 90th Congress with Respect to the Exclusion of Mr. Powell Would Be Entirely Academic.*

Even if declaratory relief would have been proper at an earlier stage of these proceedings, it would be inappropriate now. Such a judgment would only bind a party that is no longer in existence and would thus serve no useful purpose—it is no longer possible for Mr. Powell to be seated in the House of the 90th Congress. Under those circumstances, any declaratory judgment against the 90th Congress would be wholly empty and academic, and, hence, impermissible. As Professor Moore states:

> "It is quite clear that the Declaratory Judgment Act is not to be used as a means of securing a judicial determination of moot questions. Such would be a determination of non-justiciable issues, and it is well settled that the Act is procedural only, and that its application is restricted to cases and controversies which are such in the constitutional sense." 6A MOORE, FEDERAL PRACTICE ¶ 57.13, at 3071-72 (2d ed. 1966). *See also Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227; *Public Service Comm'n* v. *Wycoff Co., supra.**

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* It is clear that what standing, if any, the petitioners other than Mr. Powell may have had no longer exists. They are currently being represented in Congress, and there is no longer any way to enable them to be represented in the 90th Congress. *Flast*

The inability of this Court to decide moot questions is, of course, well established. In *Mills* v. *Green*, 159 U.S. 651, 653, for example, this Court wrote:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

And only this month this Court emphasized that the declaratory judgment is limited to situations "in which there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of declaratory judgment". *Golden* v. *Zwickler*, 37 U.S.L.W. at 4186 (U.S., Mar. 4, 1969), citing *Maryland Casualty Co.* v. *Pacific Oil Co.*, 312 U.S. 270, 273. In *Golden*, this Court held that the unlikelihood that Mr. Multer would again be a candidate for Congress pre-

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v. *Cohen, supra; Bond* v. *Floyd*, 385 U.S. at 137 n. 14. Thus, their claims are totally moot. It should be noted, however, that all three judges below concluded that the claims of these citizens stood on no higher ground than the claims of Mr. Powell and were equally nonjusticiable and that the citizens of that district were constitutionally guaranteed the initial right to vote, not the right to have a particular representative be seated in Congress under all circumstances (A. 76-78, 91-101). Moreover, as this Court itself has recognized, the exercise of the power to exclude or expel does not violate the rights of the electors of such a member. *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, at 615-16.

cluded the necessary finding of "sufficient immediacy and reality" to support a declaratory judgment, even though first amendment rights were urged, and even though the case was not moot when it was originally commenced.

Likewise, this case lacks the necessary "sufficient immediacy and reality" to support a declaratory judgment. Mr. Powell's period of exclusion has expired, he is sitting in the present House, and there is no more likelihood that he will again be excluded then there is that Mr. Multer will again be a candidate. Under these circumstances, the dismissal below must either stand or this case must be treated as moot.

B. *Whatever Claim Mr. Powell Has with Respect to Back Salary Is Not Cognizable by This Court and Therefore in No Way Affects the Fact That This Action Is Moot.*

Petitioners assert that Mr. Powell's claim for back salary, if any, prevents this case from being moot, and they now seek mandamus against the Sergeant-at-Arms of the House of the 91st Congress (even though he is not a party to this action) directing him to pay Mr. Powell that sum of money. Petitioners' Memorandum 16. We note at the outset that Mr. Powell's claim for back salary has always been incidental and subordinate to his now mooted demand for seating. It thus is wholly ancillary to the primary issues of this case and should not prevent this Court from dismissing this action as moot even if the claim itself could technically be resolved in this action.

In *Alejandrino* v. *Quezon*, 271 U.S. 528, discussed at pages 5-6 of Respondents' Memorandum on Mootness, this Court refused to entertain the salary claim of an individual suspended from the Philippine Senate because that claim was incidental to the mooted issue of suspension and was "not in itself a proper subject for determination as now presented". *Id.* at 535. Notwithstanding the distinction at-

tempted by petitioners (Petitioners' Memorandum 16-17 note), the same is true here, for, as we have shown, Mr. Powell cannot successfully maintain a claim for back salary in this action, particularly against the Sergeant-at-Arms.*

Thus, as pointed out at pp. 63-64, *supra*, mandamus under 28 U.S.C. § 1361 (1964) can only be issued against officers and agents of the United States, and the Sergeant-at-Arms is not such an officer. As shown at pp. 64-66 *supra*, this Court cannot require the Sergeant-at-Arms to pay Mr. Powell in violation of his statutory authority and obligations to pay only Members, and it cannot order the Members to pass a resolution directing the Sergeant-at-Arms to pay him. Thus, whatever redress Mr. Powell may have in some court with respect to his back salary claim—such as a suit in the Court of Claims against the United States rather than the present defendants, *see* 28 U.S.C. § 1491 (1964), *Wilson* v. *United States*, 44 Ct. Cl. 428 (1909)—he has no claim which can be redressed in this suit against the House or its agents.**

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* *Bond* v. *Floyd*, *supra*, is not to the contrary on the issue of mootness. There, it was not the existence of Mr. Bond's claim for salary which prompted this Court to decide the case on the merits. The determinative factors were: (1) the term from which Mr. Bond was excluded from the Georgia Legislature did not end until December 31, 1966, and accordingly had not expired when this Court decided the case on December 5, 1966; and (2) Bond had not been seated at the time of this Court's decision, and there was a substantial likelihood that the Georgia Legislature would again exclude him. Here, however, the 90th Congress has terminated, and Mr. Powell has been seated in the House of the 91st Congress.

** In a suit against the United States in the Court of Claims, some of the jurisdictional challenges raised (such as the Speech and Debate Clause) might not be applicable, while others (such as the claim that the propriety of the House's exclusion of Mr. Powell is a political question) might still require consideration. Mr. Powell has never indicated that he intends to commence such an action, and the defendant in such a possible action is not before this Court. That such defenses might again be raised, therefore, does not prevent this action from being moot. *See Bank of Marin* v. *England*, 385 U.S. 99.

We submit, therefore, that Mr. Powell's claim for back salary is untenable and in no way affects the fact that this action is now moot.

C. *Mr. Powell's Claims Against the House of the 91st Congress Cannot Be Asserted in This Action.*

Petitioners argue that the action taken by the House of the 91st Congress in some way "continued" the alleged unconstitutional action of the prior House. They even state that our contrary assertion "flies in the face of all reality", Petitioners' Memorandum 13. It is petitioners' argument, however, which has lost touch with reality.

The action taken by the House of the 91st Congress is not related to the action taken by the House of the 90th Congress. The present House seated Mr. Powell and, in addition, imposed a punishment. The House of the 90th Congress excluded Mr. Powell. What action, therefore, did the present House take which "continued" the action of the prior House?

Moreover, as the Constitution and decisions of this Court make abundantly clear, the 91st Congress is an entirely different body from the one which excluded Mr. Powell. The Constitution (article I, section 2) requires the election of Members of the House every two years with the result that "neither the House . . . nor its committees are continuing bodies". *See Gojack* v. *United States,* 384 U.S. 702, 706-07 n.4; *McGrain* v. *Daugherty,* 273 U.S. 135, 181; *Marshall* v. *Gordon,* 243 U.S. 521, 542; *Anderson* v. *Dunn,* 6 Wheat. 204, 231. Not only is the present House a different entity at law; it is a different entity in fact. Forty-one of the present Members of the House were not Members of the 90th Congress, *see* N.Y. Times, Nov. 8, 1968, at 26, col. 6, and, indeed, two of the Members of the 90th Congress who are respondents here (Messrs. Moore and

Curtis) are not even Members of the present House. It is thus not only unrealistic to state that the action of the present House "continues" the action of the 90th Congress, it is simply erroneous.

Even the record on which the House of the 91st Congress based its action was different. To be sure, the findings of the Select Committee during the 90th Congress were discussed in the House during the January 3, 1969, debate on Mr. Powell's seating, 115 CONG. REC. H4 *et seq.* (daily ed. Jan. 3, 1969). But it is significant that, although Mr. Powell was then present in the House and could have participated in the debate, DESCHLER § 65, he did not in any way contest the basic accuracy of the Select Committee's findings or the procedure by which they were reached. His continued failure in the court of the House to attempt to rebut those findings in any way,* during a de novo consideration of his case, was part of the record on which the House reached its judgment. Such judgment was independent of the judgment reached by the predecessor House two years before, not a preordained and inexorable consequence of the prior action.

Based largely on their erroneous analysis that the action of the House of the 91st Congress "continued" the action of the House of the 90th Congress, petitioners ask this Court to enter declaratory relief against the 91st Congress, Petitioners' Memorandum 16. Petitioners, however, do not suggest how such relief can be granted.

The party against whom such an order would operate is not before this Court; the respondents here are the Members of the House of the 90th Congress, individually and as represenatives of that House. The issues are also

* Of course, Mr. Powell has never, either before the Select Committee in the 90th Congress, before the 90th House itself, or in the courts suggested for a moment that those findings are erroneous. *But see* p. 14 note *, *supra.*

different. The issue in this case is whether a federal court can entertain an action against representative Members of the House of the 90th Congress to review the decision of that House to exclude Mr. Powell. The issue raised by the action of the House of the 91st Congress, which of course was not presented or considered below, is whether the House has power to admit and simultaneously punish a Member-elect for prior personal misconduct.* Petitioners cannot in effect begin a new lawsuit against an entirely different party (the House of the 91st Congress) and interject different issues at this stage of appellate review. Even if the proper parties were before it, this Court has no ORIGINAL jurisdiction to hear such a claim (U.S. CONST. art. III; 28 U.S.C. § 1251 (1964)), nor would it be exercising an appellate function since neither the House of the 91st Congress nor its actions were before the courts below.

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* We submit, however, that the action taken by the 91st Congress constitutes a proper and lawful exercise of its constitutional power to "punish its Members for disorderly behavior". U.S. Const. art. I, § 5. Though rarely exercised, the power of the House to impose a fine is encompassed under that general power to punish. *See, e.g.*, 115 CONG. REC. H. 113 (daily ed. Jan. 3, 1969); *John L. McLaurin and Benjamin R. Tillman*, SENATE CASES 94-97; 25 CONG. REC. 162 (1893).

The power of the House to take away a Member's seniority can be justified pursuant to its power "to determine the Rules of its Proceedings", U.S. Const. art. I, §5. Even petitioners seem to concede as much, for their recently filed Memorandum does not even discuss the issue of Mr. Powell's seniority. *See also* Respondents' Memorandum on Mootness 7-8. No one has any right to seniority—as the recent action of the Democratic caucus of the House in stripping Congressman John R. Rarick of Louisiana of his seniority demonstrates. *See* 115 CONG. REC. E670-71 (daily ed. Jan. 30, 1969).

Conclusion

For the reasons stated, the judgment of the Court of Appeals should be affirmed, or in the alternative, that judgment should be vacated and the case remanded to the District Court with directions to dismiss on the ground that the case is now moot.

March 17, 1969.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article I, section 1:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Article I, section 2, clauses 1, 2:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

"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."

Article I, section 2, clause 5:

"The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."

Article I, section 3, clause 3:

"No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Article I, section 3, clauses 5, 6 and 7:

"The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

"Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

Article I, section 5:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

"Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

"Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

"Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting."

Article I, section 6:

"The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They

shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

Article I, section 9, clause 3:

"No Bill of Attainder or ex post facto Law shall be passed."

Article III, section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, section 2:

"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;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a

State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

Article IV, section 4:

"The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Article VI, clauses 2, 3:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all

executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Amendment XIII:

"SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SECTION 2. Congress shall have the power to enforce this article by appropriate legislation."

Amendment XIV:

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

". . . .

"SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or

comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

". . . .

"SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Amendment XV:

"SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"SECTION 2. The Congress shall have power to enforce this article by appropriate legislation."

Amendment XX:

"SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

"SEC. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day."

United States Statutes

Act of March 3, 1875, ch. 137 [§ *1*], *18 Stat. 470:*

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between

citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

Force Act, ch. 114, § 23, 16 Stat. 146 (1870):

"That whenever any person shall be defeated or deprived of his election to any office, except elector of President or Vice-President, representative or delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to

vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States, and secured by this act."

Legislative Branch Appropriations Act, 1967, P.L. 89-545, 80 Stat. 354, 358 (1966):

". . . [T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Legislative Branch for the fiscal year ending June 30, 1967, and for other purposes, namely:

". . . .

"For compensation of Members (wherever used herein the term 'Member' shall include Members of the House of Representatives and the Resident Commissioner from Puerto Rico), $14,148,975."

Legislative Branch Appropriation Act, 1968, P.L. 90-57, 81 Stat. 127, 130 (1967):

". . . [T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Legislative Branch for the fiscal year ending June 30, 1968, and for other purposes, namely:

". . . .

"For compensation of Members (wherever used herein the term 'Member' shall include Members of the House of Representatives and the Resident Commissioner from Puerto Rico), $14,160,700."

Legislative Branch Appropriations Act, 1969, P.L. 90-417, 82 Stat. 398, 401, 403 (1968):

". . . [T]he following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the

Legislative Branch for the fiscal year ending June 30, 1969, and for other purposes, namely:

". . . .

"For compensation of Members (wherever used herein the term 'Member' shall include Members of the House of Representatives and the Resident Commissioner from Puerto Rico), $14,160,700.

". . . . .

"For miscellaneous items, exclusive of salaries unless specifically ordered by the House of Representatives, . . . $8,000,000."

2 U.S.C. § 25:

"Oath of Speaker and Members of House"

"At the first session of Congress after every general election of Representatives, the oath of office shall be administered by any Member of the House of Representatives to the Speaker; and by the Speaker to all the Members present, and to the Clerk, previous to entering on any other business; and to the Members who afterward appear, previous to their taking their seats.

"The Clerk of the House of Representatives of the Eightieth and each succeeding Congress shall cause the oath of office to be printed, furnishing two copies to each Member who has taken the oath of office in accordance with law, which shall be subscribed in person by the Member who shall thereupon deliver them to the Clerk, one to be filed in the records of the House of Representatives, and the other to be recorded in the Journal of the House and in the Congressional Record; and such signed copies, or certified copies thereof, or of either of such records thereof, shall be admissible in evidence in any court of the United States, and shall be held conclusive proof of the fact that the signer duly took the oath of office in accordance with law."

2 U.S.C. § 31:

"Compensation of Members of Congress"

"The compensation of Senators, Representatives in Congress, and the Resident Commissioner from Puerto Rico shall be at the rate of $30,000 per annum each. The compensation of the Speaker of the House of Representatives shall be at the rate of $43,000 per annum. The compensation of the Majority Leader and the Minority Leader of the Senate and the Majority Leader and the Minority Leader of the House of Representatives shall be at the rate of $35,000 per annum each."

2 U.S.C. § 34:

"Representatives' salaries payable monthly"

"Representatives-elect to Congress, whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section 26 of this title, may receive their compensation monthly, from the beginning of their term until the beginning of the first session of each Congress, upon a certificate in the form now in use to be signed by the Clerk of the House, which certificate shall have the like force and effect as is given to the certificate of the Speaker."

2 U.S.C. § 35:

"Salaries payable monthly after taking oath"

"Each Member, after he has taken and subscribed the required oath, is entitled to receive his salary at the end of each month."

2 U.S.C. § 78:

"Same; duties"

"It shall be the duty of the Sergeant at Arms of the House of Representatives to attend the House during its sittings, to maintain order under the direction of the

Speaker, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House and all processes issued by authority thereof, directed to him by the Speaker, keep the accounts for the pay and mileage of Members and Delegates, and pay them as provided by law."

2 U.S.C. § 60:

"Same; disbursement of compensation of Members"

"The moneys which have been, or may be, appropriated for the compensation and mileage of Members shall be paid at the Treasury on requisitions drawn by the Sergeant at Arms of the House of Representatives, and shall be kept, disbursed, and accounted for by him according to law, and he shall be a disbursing officer, but he shall not be entitled to any compensation additional to the salary fixed by law."

2 U.S.C. § 83:

"Same; tenure of office"

"Any person duly elected and qualified as Sergeant at Arms of the House of Representatives shall continue in said office until his successor is chosen and qualified, subject, however, to removal by the House of Representatives."

28 U.S.C. § 1331:

"Federal question; amount in controversy; costs"

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1344:

"Election Disputes"

"The district courts shall have original jurisdiction of any civil action to recover possession of any office, except

that of elector of President or Vice President, United States Senator, Representative in or delegate to Congress, or member of a state legislature, authorized by law to be commenced, wherein it appears that the sole question touching the title to office arises out of denial of the right to vote, to any citizen offering to vote, on account of race, color or previous condition of servitude.

"The jurisdiction under this section shall extend only so far as to determine the rights of the parties to office by reason of the denial of the right, guaranteed by the Constitution of the United States and secured by any law, to enforce the right of citizens of the United States to vote in all the States."

28 U.S.C. § 1361:

"Action to compel an officer of the United States"

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. § 1491:

"Claims against United States generally; actions involving Tennessee Valley Authority"

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

28 U.S.C. § 2201:

"Creation of remedy"

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the

United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202:

"Further relief"

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

28 U.S.C. § 2282:

"Injunction against enforcement of Federal statute; three-judge court required"

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

31 U.S.C. § 671:

"Appropriations for contingent expenses of Congress; restrictions"

"Appropriations made for contingent expenses of the House of Representatives or the Senate shall not be used for the payment of personal services except upon the express and specific authorization of the House or Senate in whose behalf such services are rendered. Nor shall such appropriations be used for any expenses not intimately and directly connected with the routine legislative business

of either House of Congress, and the General Accounting Office shall apply the provisions of this section in the settlement of the accounts of expenditures from said appropriations incurred for services or materials."

Federal Rules of Civil Procedure

Rule 19:

"JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION"

"(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

Rule 23:

"CLASS ACTIONS"

"(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims

r defenses of the representative parties are typical of the laims or defenses of the class, and (4) the representative arties will fairly and adequately protect the interests of he class.

"(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

"(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

"(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

"(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

APPENDIX B

EXCERPTS FROM STATE CONSTITUTIONS AS OF 1787

Connecticut	[Colonial charter; no provision.]
Delaware	DEL. CONST. art. 5 (1776): ". . . each house shall . . . judge of the qualifications and elections of its own members . . . . They may also severally expel any of their own members for misbehavior, but not a second time in the same sessions for the same offence, if reelected . . . ." 1 THORPE, FEDERAL AND STATE CONSTITUTIONS 563 (1909) [hereinafter THORPE].
Georgia	GA. CONST. (1777) [No provision].
Maryland	MD. CONST. arts. IX, X, XXI (1776): "That the House of Delegates shall judge of the elections and qualifications of Delegates." ". . . They may expel any member, for a great misdemeanor, but not a second time for the same cause. . . ." "That the Senate shall judge of the elections and qualifications of Senators." 3 THORPE 1692, 1694.
Massachusetts	MASS. CONST. part II, ch. I (1780): § II, art. IV. "The Senate shall be the final judge of the elections, returns and qualifications of their own members, as pointed out in the constitution; . . ." § III, art. X. "The house of representatives shall be the judge of the returns, elections, and qualifications of its own members, as pointed out in the constitution . . . ." 3 THORPE 1897-99.
New Hampshire	N. H. CONST. part II (1784): "The Senate shall be final judges of the elections, returns, and qualifications of their own

members, as pointed out in this constitution. . . ." 4 THORPE 2460.

New Jersey — N. J. CONST. § V (1776): "That the Assembly, when met, shall have power . . . to be judges of the qualifications and elections of their own members . . . ." 5 THORPE 2595.

New York — N. Y. CONST. art. IX, XII (1777): "That the assembly, thus constituted, shall . . . be judges of their own members, . . . in like manner as the assemblies of the colony of New York of right formerly did; . . ."

". . . that the senate shall, in like manner with the assembly, be the judges of its own members. . . ." 5 THORPE 2631-32.

North Carolina — N. C. CONST. § X (1776): "That the Senate and House of Commons, when met, shall each . . . be judges of the qualifications and elections of their members . . . ." 5 THORPE 2790.

Pennsylvania — PA. CONST. § 9 (1776): "The members of the house of representatives . . . shall have power to . . . judge of the elections and qualifications of their own members; they may expel a member, but not a second time for the same cause . . . ." 5 THORPE 3084-85.

Rhode Island — [Colonial charter; no provision.]

South Carolina — S. C. CONST. art. XVI (1778): ". . . the senate and house of representatives, respectively, shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly." 6 THORPE 3252.

Virginia — VA. CONST. (1776) [No provision.]

Appendix B

APPENDIX C

SUMMARY OF PRECEDENTS OF HOUSE OF REPRESENTATIVES AND SENATE REGARDING EXCLUSION OR EXPULSION ON GROUNDS OTHER THAN AGE, CITIZENSHIP OR INHABITANCY

I. HOUSE OF REPRESENTATIVES

A. *Exclusion Precedents.*

(a) *Member excluded.*

(1) *John Young Brown* (Kentucky). Excluded without division from 40th Congress, 1st and 2d Sessions (1867-68), for giving aid and comfort to Confederacy during Civil War. 1 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 449-50 (1907) [hereinafter cited as "HINDS"]; Legislative Reference Service, *Precedents of the House of Representatives Relating to Exclusion, Expulsion and Censure* (defendants' Exhibit No. 1 in the District Court) 124-27 (1967). [hereinafter cited as "LRS"].

(2) *John D. Young* (Kentucky). Excluded without division from 40th Congress, 1st and 2d Sessions (1867-68) for giving aid to Confederacy during Civil War. 1 HINDS § 451; LRS 128.

(3) *John H. Christy* (Georgia). Not permitted to take oath of office in 40th Congress, 3d Session (1868-69), for giving aid, countenance, counsel and encouragement to the Confederacy. 1 HINDS § 459.

(4) *B. F. Whittemore* (South Carolina). Excluded by vote of 130 to 76 from 41st Congress, 2d Session (1870), for selling appointments to the military and naval academies. 1 HINDS § 464; 2 HINDS § 1273; LRS 48, 163-64.

(5) *George Q. Cannon* (Utah). Excluded (as Delegate from Territory of Utah) without division

from 47th Congress, 1st Session (1882), for admitted practicing of polygamy in open violation of polygamy statute. 1 HINDS § 473; LRS 49-63.

(6) *Brigham H. Roberts* (Utah). Excluded by vote of 268 to 50 from 56th Congress, 1st Session (1899-1900), for conviction for violation of polygamy statute and for disloyalty. 1 HINDS §§ 477-80; LRS 65-108.

(7) *Victor L. Berger* (Wisconsin). Excluded twice by votes of 311 to 1 and 330 to 6 from 66th Congress, 1st, 2d and 3d Sessions (1919-20), for disloyalty to the United States, for giving aid and comfort to a public enemy, for publications of expression hostile to the Government, and for conviction for sedition. 6 C. CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 56-59 (1935) [hereinafter cited as "CANNON"]; LRS 110-22. [When Berger's conviction was reversed and the prosecution of the charge dropped, he was, upon reelection, admitted to the House. 65 CONG. REC. 7 (1923).]

(b) *Exclusion of Member considered, but not adopted.*

(1) *William McCreery* (Maryland). Not expelled by vote of 89 to 18 from 10th Congress, 1st Session (1807), for alleged violation of state law requiring Member of Congress to be inhabitant of district at time of election and to have resided therein 12 months theretofore. State laws cannot impose additional qualifications for membership in the House. 1 HINDS § 414; LRS 17-18.

(2) *Samuel Marshall and Lyman Trumbull* (Illinois). Marshall not excluded without division from 34th Congress, 1st Session (1856), for violation of state law preventing state judges from running for other offices. State may not impose additional

qualifications for membership in the House. Trumbull's case became moot when he was elected to Senate, which considered exclusion but eventually admitted him. See II, A(b)(1), *infra*. 1 HINDS § 415; LRS 21.

(3) *William B. Stokes and James Mullins* (Tennessee). Not excluded from 40th Congress, 1st Session (1867), for alleged disloyalty during Civil War. Debate indicated that evidence was not sufficient to sustain the allegation. 1 HINDS § 444; LRS 24.

(4) *Kentucky Member Cases* (*James B. Beck, Thomas L. Jones, A. P. Grover, J. Proctor Knott, and L. S. Trimble*). Not excluded without division from 40th Congress, 1st Session (1867), for alleged disloyalty during Civil War. Four were exonerated of charges; the charges against the other (Trimble) were not proved. 1 HINDS §§ 448, 458; LRS 38-39.

(5) *Roderick R. Butler* (Tennessee). Not excluded from 40th Congress, 1st Session (1867), for alleged disloyalty during Civil War. Case made moot by passage of statute removing disabilities for office. 1 HINDS § 455; LRS 41.

(6) *Francis E. Shober* (North Carolina). Not excluded from 41st Congress, 1st Session (1869), for alleged disloyalty during Civil War. Case made moot by passage of statute removing disabilities for office. 1 HINDS § 456; LRS 42.

(7) *John C. Connor* (Texas). Not excluded without division from 41st Congress, 2d Session (1870), for allegedly beating Negro soldiers under his command and for allegedly bribing witnesses, suborning evidence, and perjuring himself before court

martial, which acquitted him of charge of beating. 1 HINDS § 465; LRS 44-46.

(8) *Lewis McKenzie* (Virginia). Not excluded from 41st Congress, 2d Session (1870), for alleged disloyalty during Civil War. Evidence held not to sustain allegation. 1 HINDS § 462; LRS 25.

(9) *S. R. Peters* (Kansas). Not excluded by vote of 106 to 20 from 48th Congress, 1st Session (1883-84), for violation of state law barring state judges from running for other offices. State may not impose additional qualifications for membership in the House. 1 HINDS § 417.

(10) *John W. Langley* (Kentucky). Exclusion from 69th Congress, 1st Session (1925-26), considered for conviction of conspiracy charge. House delayed admission while case was being appealed. Langley resigned after losing appeal, House never having voted on whether to exclude. 6 CANNON § 238; LRS 146.

(11) *Francis H. Shoemaker* (Minnesota). Not excluded by vote of 230 to 75 from 73d Congress, 1st Session (1933), for conviction for federal felony (sending defamatory matter through the mail). Committee on Elections never reported; the nature of the defamatory matter (derogatory remarks about a banker during Depression) and debate indicates that Committee's failure to report was probably a political decision. 77 CONG. REC. 73-74, 131-39 (1933); LRS 32-36.

B. *Expulsion Precedents.*

(a) *Members expelled.*

(1) *John B. Clark* (Missouri). Expelled by vote of 94 to 45 from 37th Congress, 1st Session (1861),

for alleged taking part in Civil War on side of Confederacy. 2 HINDS § 1262.

(2) *John W. Reid* (Missouri). Expelled from 37th Congress, 2d Session (1861), for taking part in Civil War on side of Confederacy. 2 HINDS § 1261; CONG. GLOBE, 37th Cong., 2d Sess. 5 (1861).

(3) *Henry C. Burnett* (Kentucky). Expelled without division from 37th Congress, 2d Session (1861), for taking part in Civil War on side of Confederacy. 2 HINDS § 1261; CONG. GLOBE, 37th Cong., 2d Sess. 7-8 (1861).

(b) *Expulsion of Member considered, but not adopted.**

(1) *Matthew Lyon* (Vermont). Not expelled from 5th Congress, 1st Session (1799) for conviction of crime of sedition. 49 to 45 vote for explusion failed for lack of two-thirds majority. 2 HINDS § 1284; LRS 140.

(2) *Orasmus B. Matteson* (New York). Not expelled from 35th Congress, 1st Session (1858) for acts committed in previous Congress. 2 HINDS § 1285; LRS 142.

(3) *James Brooks* (New York) and *Oakes Ames* (Massachusetts). Not expelled from 42d Congress, 3d Session (1872), for alleged taking of bribes and seeking to corrupt other members of Congress, respectively, in Credit Mobilier scandal. Censured, rather than expelled. 2 HINDS § 1286; LRS 148-51.

(4) *George Q. Cannon* (Utah). Not expelled from 43d Congress, 2d Session (1874), for practicing

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* Upon several occasions, the House has also considered, but rejected, expulsion of a Member for causing personal injury to another Member. 2 HINDS §§ 1642-44, 1655-66; LRS 136-38.

polygamy (before enactment of statute making polygamy a crime). 1 HINDS §§ 468-70; LRS 28-30. [Excluded, however, from 47th Congress, 1st Session. *See* I, A (a)(5) *supra.*]

(5) *William S. King and John G. Shumaker.* Not expelled from 44th Congress, 1st Session (1874) for alleged bribery and perjury before House committee. 2 HINDS § 1283; LRS 143.

II. SENATE

A. *Exclusion Precedents.*

(a) *Member excluded.*

(1) *Philip F. Thomas* (Maryland). Excluded by vote of 27 to 20 from 40th Congress, 1st and 2d Sessions (1867-68), for giving aid to Confederacy during Civil War. SENATE SUBCOMMITTEE ON PRIVILEGES AND ELECTIONS, SENATE COMMITTEE ON RULES AND ADMINISTRATION, SENATE ELECTION, EXPULSION AND CENSURE CASES, S. Doc. No. 71, 87th Cong., 2d Sess. 40 (1962) [hereinafter cited as "SENATE CASES"].

(2) *William Lorimer* (Illinois). Excluded by vote of 55 to 28 from 62d Congress, 2d Session (1912), for bribery of state legislators to obtain election to Senate. There were 102 days of hearings and more than 8,500 pages of transcript. (An earlier attempt to exclude Lorimer failed by a vote of 40 to 46.) SENATE CASES 100-01.

(3) *Frank L. Smith* (Illinois). Excluded by vote of 61 to 23 from 70th Congress, 1st Session (1927-28), for excessive campaign expenditures and acceptance of large campaign contributions from

utilities magnates over whom he was supposed to exercise supervision as member of state regulatory agency. SENATE CASES 122-23.

(4) *William S. Vare* (Pennsylvania). Excluded by vote of 58 to 22 from 70th and 71st Congresses (1927-29), for excessive campaign expenses in primary election and for evidence of fraud and corruption in that election. SENATE CASES 119-22.

(b) *Exclusion of Member considered but not adopted.* (1) *John M. Niles* (Connecticut). Not excluded from 28th Congress, 1st Session (1844), for alleged mental incapacity. Select committee found him not to be of unsound mind. SENATE CASES 10.

(2) *Lyman Trumbull* (Illinois). Not excluded by vote of 35 to 8 from 34th Congress, 1st Session (1856), for violation of state law barring state judges from running for other offices. State may not impose additional qualifications for membership in the Senate. SENATE CASES 21.

(3) *Benjamin Stark* (Oregon). Not excluded by vote of 26 to 19 from 37th Congress, 2d Session (1862), for alleged disloyalty during Civil War. Seated, subject to investigation for possible expulsion; after investigation, motion of explusion defeated by vote of 16 to 21. SENATE CASES 34.

(4) *Theodore G. Bilbo* (Mississippi). Not excluded from 80th Congress, 1st Session (1947), for alleged acceptance of gifts from war contractors and illegal intimidation of Negroes in Democratic primary. Allegations based on reports of Senate committees. Question of Bilbo's qualifications tabled until his physical condition permitted him to return to Senate. Bilbo's death made case moot. SENATE CASES 142-44.

Appendix C

B. *Expulsion Precedents.*

(a) *Member expelled.*

(1) *William Blount* (Tennessee). Expelled by vote of 25 to 1 from 5th Congress, 1st Session (1797), for engaging in scheme to seize Spanish Florida and Louisiana with British and Indian aid. SENATE CASES 3.

(2) *Jesse D. Bright* (Indiana). Expelled by vote of 32 to 14 from 37th Congress, 2d Session (1861-62), for writing letter of introduction to Jefferson Davis, the President of the Confederacy, for an acquaintance who wished to dispose of an improvement in firearms. SENATE CASES 30.

(3) *James M. Mason and Robert M. T. Hunter* (Virginia), *Thomas L. Clingman and Thomas Bragg* (North Carolina), *James Chestnut, Jr.* (South Carolina), *A. O. P. Nicholson* (Tennessee), *William K. Sebastian and Charles C. Mitchell* (Arkansas), *and John Hemphill and Louis T. Wigfall* (Texas). Expelled by vote of 32 to 10 from 37th Congress, 1st Session (1861), for having failed to appear in the Senate since the session began. SENATE CASES 28.

(4) *John C. Breckinridge* (Kentucky). Expelled by vote of 37 to 0 from 37th Congress, 2d Session (1861), for having joined the side of the Confederacy. SENATE CASES 29-30.

(5) *Waldo P. Johnson* (Missouri). Expelled by vote of 35 to 0 from 37th Congress, 2d Session (1861-62), for sympathy with, and participation in behalf of, the Confederacy in the Civil War. SENATE CASES 30-31.

(6) *Trusten Polk* (Missouri). Expelled by vote of 36 to 0 from 37th Congress, 2d Session 1861-62),

for expression of sympathy with, and participation in behalf of, the Confederacy in the Civil War. SENATE CASES 31.

(b) *Expulsion of Member considered, but not adopted.*

(1) *John Smith* (Ohio). Not expelled from 10th Congress, 1st Session (1807), for alleged involvement in Aaron Burr conspiracy. Committee found allegation true, but resolution failed to receive a two-thirds majority (19 to 10). SENATE CASES 4-5.

(2) *Benjamin Tappan* (Ohio). Not expelled from 28th Congress, 1st Session (1884), for revealing secret Senate documents to press. Censured by vote of 38 to 7. SENATE CASES 11-13.

(3) *Reed Smoot* (Utah). Not expelled by vote of 42 to 28 from 59th Congress 2d Session (1907), for alleged practicing of polygamy, for encouragement of polygamy by being apostle of Mormon Church, and other related allegations. Found not to be a polygamist, but being apostle of church encouraged polygamy. SENATE CASES 97-98.

(4) *Robert M. LaFollette* (Wisconsin). Not expelled from 65th Congress, 1st Session (1917-18), for speech of "disloyal nature". Vote was 50 to 21 against expulsion. SENATE CASES 110.

(5) *William Langer* (North Dakota). Not expelled by vote of 52 to 30 from 77th Congress, 1st and 2d Sessions (1941-42), for various alleged instances of moral turpitude after committee compiled 10 volumes of evidence and after Senate debated exclusion for 19 days. SENATE CASES 140-41.