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TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

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

Petitioners,

—against—

JOHN W. MCCORMACK, *et al.*,

Respondents.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union and its New York affiliate, the New York Civil Liberties Union, are committed to the protection of constitutional rights and individual liberty. In furtherance of these goals, *amici* have traditionally defended the rights of citizens of every persuasion in the courts, the legislatures, and the executive departments of government.

No right is more fundamental to citizenship and democracy than the right to representation in legislative bodies in accordance with the mandate of the voters. When so basic a right is challenged, grave concern is occasioned for our most precious institutions, as well as our rights.

The rights of the people of the 18th Congressional District of New York to be represented by Adam Clayton Powell, Jr., and his right to his seat is therefore an issue of pressing public concern. Here the right of the man is indivisible from the right of the people, and ultimately of the national electorate. If the choices of the voters duly expressed through orderly democratic procedures are allowed to be thwarted, those processes will soon no longer be looked to for the vindication of grievances. *Amici* believe therefore that a decision for respondents would have effects beyond the repudiation of the rights of the individual parties herein involved and would constitute a threat to democratic government itself. This brief is therefore submitted in support of petitioners and in the public interest.*

Questions Presented

1. Whether the House of Representatives violated the Constitution of the United States when it refused to seat in the 90th Congress a duly elected Representative who met all the constitutional qualifications for membership in the House.

2. Whether the constitutional validity of the exclusion of a duly elected Representative who met all the constitutional qualifications for membership in the House is a justiciable question appropriate for determination in the federal courts.

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* Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

Statement of the Case

This case has its origins in the decision of the 90th Congress to exclude petitioner Adam Clayton Powell, Jr. from the House of Representatives. At the general election of November 8, 1966, petitioner was duly elected to the office of Representative from among four candidates by the voters of the 18th Congressional District of the State of New York. A Congressional Committee of nine members was appointed to investigate petitioner's "right . . . to be sworn in as a Representative from the State of New York in the Ninetieth Congress, as well as his final right to a seat therein as such Representative . . . " Finding No. 1 of the Committee's report confirmed that petitioner was "over 25 years of age, has been a citizen of the United States of America for over seven years, and on November 8, 1966, was an inhabitant of the State of New York." The Committee found that petitioner had improperly asserted his privilege and immunity from the processes of the courts of the State of New York and that in several instances he had misappropriated public funds. It recommended that he be seated but be censured, fined, and stripped of seniority. Nevertheless, on March 1, 1967, the House refused to seat petitioner.

On March 8, 1967, petitioner and thirteen of his constituents, representing the class of the electors of the 18th Congressional District, filed suit in the District Court for the District of Columbia seeking declaratory and injunctive relief and relief in the nature of mandamus. On April 7, 1967 the District Court denied the application for a statutory three-judge court and preliminary injunction and dismissed the complaint for lack of jurisdiction over

the subject matter, grounding its decision on the doctrine of separation of powers. After delay on appeal while petitioner unsuccessfully sought certiorari from this Court in advance of decision in the Court of Appeals for the District of Columbia, that court on February 28, 1968 affirmed the dismissal of the complaint. This Court granted certiorari on November 18, 1968. Petitioner has been seated in the 91st Congress.

ARGUMENT

I.

The House of Representatives Violated the Constitution of the United States When It Refused to Seat in the 90th Congress a Duly Elected Representative Who Met All the Constitutional Qualifications for Membership in the House.

The Constitution, Article I, section 2, clause 2, imposes three qualifications for membership in the House of Representatives:

> 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 5, states that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." This case presents the question whether the combined effect of these two provisions empowers a simple majority of the House of Representa-

tives to refuse to seat a Representative duly elected by his constituency. The most convincing view is that such a reading of the Constitution is wholly refuted by the history of the framing and ratification of the Constitution, by judicial commentary on that history, by the theory of government which underlies both the Constitution and our system of government, and by those precedents of the House of Representatives which draw upon that theory of government.

It is unnecessary to repeat here the exhaustive documentation of these points which appears in petitioner's brief. But the underlying theory should be reemphasized: that Article I, section 2, clause 2 and Article I, section 5 are to be strictly construed so that the limited function of Congress to judge the enumerated qualifications of Representatives be distinctly separated from the unfettered right of the people to elect their own Representatives.

We do not mean to imply that serious questions are not left open by the words and the history of the Constitution: for example, whether Article I, section 5, precludes judicial review of the findings of fact Congress may make in judging whether an elected Representative meets the three qualifications of section 2, clause 2; whether Article I, section 5, precludes judicial review of the issue of due process of law; and whether Congress could legitimately exclude an elected Representative who still held office under the United States, taking Article I, section 6, clause 2, as setting an additional qualification for members of Congress. But none of these more difficult questions is presented by this case. The House Select Committee explicitly found that Mr. Powell satisfied the requirements of age, citizenship, and inhabitancy; and it did not pre-

tend to find that Mr. Powell failed to meet any other stated qualification set by the Constitution.

The skepticism of the framers concerning the use of power by the majority to infringe the rights of minorities is as well known and as widely recognized as any fact about the American political experience. Such fears explain the requirements of a two-thirds vote for the power of expulsion from Congress—a power thought necessary to be given Congress, even though it is otherwise unrestricted by the words of Article I, section 5, clause 2. Since the framers unquestionably realized that the expulsion power might be invoked in a case of this sort and thus sought to control the abuse of that power by increasing the voting majority required, it cannot be thought that they contemplated direct evasion of that limitation through the exclusion power. It would be a strange constitution which prevented a simple majority of Representatives from expelling a fellow member for alleged misconduct, but allowed them to exclude him when, within two years, he was reelected by his constituents and sought to be seated in the new Congress.

While the best precedents of the House of Representatives support the position taken here, the worst of those precedents illustrate the precise dangers which the Constitution must be read to prevent. The cases of Brigham H. Roberts, the Mormon, and Victor L. Berger, the Socialist,[1] show that the framers' reluctance to trust a majority of either House to safeguard the right of the people to be represented by their duly elected representatives was fully justified.

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[1] The details of these cases are reported in the Brief for Petition, p. 96, n. 62.

It was because they attached cardinal importance to representative government that the framers circumscribed the power of Congress to judge qualifications with specifically enumerated standards.[2] Thus the instability of representative government that could have resulted from a broader delegation of power was avoided by the inclusion of a section that provides a plain standard for Congressional judgment.[3]

The breadth of Congressional power claimed in this case would literally undo the clear intent of Article 1, Section 2, clause 2 to leave only minimum discretion to the House. Such discretion is constitutionally denied because its exercise is fraught with possibilities for bias. On the occasion of the challenge to Senator Reed Smoot, Senator Knox reminded his colleagues of the way in which the enumerated qualifications facilitate objectivity of judgment in the seating of Congressmen:

> "The simple constitutional regulations of qualification do not in any way involve the moral qualifications of

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[2] No less an authority than Mr. Justice Story regarded the enumeration as dispositive: "It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites. From the very nature of such a provision, the affirmance of these qualifications would seem to imply a negation of all others." *Story on the Constitution,* ¶625. See also Cooley, *Constitutional Limitations* 78; Cushing, *Law and Practice of Legislative Assemblies* 27 (2nd ed.); Foster, *Treatise on the Constitution* 367; McCrary, *Law of Elections,* ¶312; Paschal, *Annotated Constitution* 305 (2nd ed.); Tucker, *Treatise on the Constitution* 394.

[3] For cases directly involving the enumerated qualifications, see *John Young Brown,* 1 Hinds ¶418 (excluded for age); *John Bailey,* 1 Hinds ¶434 (excluded for non-inhabitancy); *Jennings Piggott,* 1 Hinds ¶369 (excluded for non-inhabitancy).

> the man; they relate to facts outside the realm of ethical considerations and are regulations of fact easily established. Properly enough, therefore, as no sectional, partisan, or religious feeling could attach itself to an issue as to whether or not a man is thirty years of age, had been a citizen of the United States and an inhabitant of a State for the periods prescribed, the decision as to their existence rests with the majority of the Senate."[4]

The inevitable danger of bias inherent in broader Congressional power was of specific concern to the authors of the Constitution. Madison regarded a Congressional power to establish qualifications as "an improper and dangerous power in the Legislature."[5] In the authoritative work, *The Making of Our Constitution* (1928), Professor Charles Warren further reports of Madison the view that:

> "If the Legislature could regulate them [qualifications], 'it can by degrees subvert the Constitution . . . by limiting the number capable of being elected . . . . Qualifications founded on artificial distinctions may be devised by the stronger, in order to keep out partisans of a weaker faction.' He also pointed out 'the British Parliament possessed the power of regulating the qualifications . . . of the elected and the abuse they had made of it was a lesson worthy of our attention.' They had made changes in qualifications 'subservient to their own views or to the views of political or religious parties.' The Convention evidently concurred

[4] 58th Cong. 1903, 1 Hinds, ¶¶481-484.

[5] Quoted in Warren, *The Making of Our Constitution* 420 (1928).

> in these views; for it defeated the proposal to give to Congress power to establish qualifications in general, by a vote of seven States to four . . . ." (p. 420)

In the *Federalist Papers* (No. 68) Hamilton agreed that the requirements for Congressional office "are defined and fixed in the Constitution; and are unalterable by the Legislature."

It cannot be doubted that broader discretion than that expressly given would give Congress a power incompatible with democratic elections and representative government. With broader discretion to judge the qualifications of its members, Congress and not the people would exercise the ultimate electoral power—a power that would reveal itself when controversial figures sought admission to the House.[6]

To its credit, Congress has with few exceptions—arising in times of special stress—been faithful to the constitutional mandate and the intent of the constitutional fathers. In modern cases, Congressional adherence to constitutional principle has been striking. Senator William Langer was seated in 1942 despite a challenge involving "charges [that] were numerous . . . chiefly involv[ing] moral turpitude," including kickbacks, conversion and bribery.[7] Rep. Francis Shoemaker was seated by the House in 1933, though convicted of a crime and sentenced.

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[6] See generally Brief filed by Special Committee of the Association of the Bar of the City of New York (Hon. Charles Evans Hughes, chairman) supporting the right of five elected Socialists to seats in the New York State Assembly. *In the Matter of Louis Waldman, August Claessens, Samuel A. DeWitt, Samuel Orr and Charles Solomon* (January 21, 1920).

[7] See *Senate Election, Expulsion & Censure Cases* 141.

The modern Congressional practice of strict adherence to the constitutional qualifications adopts the interpretation developed in the very first cases. In the first fully debated House case, *William McCreery,* 10th Cong., 1807, 1 Hinds ¶414, the House voted in favor of seating McCreery on the principle, as put by Rep. Findley, Chairman of the Committee on Elections, that Congress is "not authorized to *prescribe* the qualifications of their own members, but they are authorized to *judge* of their qualifications; in doing so, however, they must be governed by the rules prescribed by the Federal Constitution." See also the case of *Humphrey Marshall,* S. Jour., 4th Cong. 1st Sess., pp. 194, et seq. (Senate refused to consider charges of "gross fraud", and perjury because not among qualifications for which Congress could exclude); compare *Bond* v. *Floyd,* 385 U. S. 116 (1966).

Despite its laudable record, Congress has in rare instances of extreme political tension wavered from its adherence to constitutional principle and precedent.[8] The chief categories of these cases reflected anti-Mormon,[9]

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[8] Indeed it would be unusual if so political a body as the Congress were to have had a perfect record in such cases throughout our history. As Chafee notes:

> "The precedents rarely afford a satisfactory formulation of the principle on which the House acted, which can be automatically applied in subsequent cases after the manner of court decisions. A legislature is not by nature a judicial body. Its members are chosen and organized for carrying out policies, and not, like judges, for the sole purpose of thinking together . . . Moreover, the basis of legislative discussion is often obscure because of the number of persons who join in debates." Chafee, *Freedom of Speech,* 343-344 (1920).

The non-judicial nature of Congressional precedent renders even more necessary strong adherence to constitutional language.

[9] Case of *Brigham Roberts,* 56th Cong., 1899, 1 Hinds ¶474. But see case of *Reed Smoot,* 58th Cong., 1903, 1 Hinds 481-484 (Mormon subsequently seated by Senate).

anti-Confederate,[10] and anti-Socialist[11] feeling. We urge the repudiation of what little life may be left in precedents which principally reflect the prejudices of prior eras.

The debates on petitioner's eligibility leave no doubt that his conduct coupled with assorted political pressures were the bases for his exclusion from the House. But the prescriptions in Article I, section 2, clause 2, were designed to free the question of eligibility from such subjective criteria and from political moods and tensions. If Congress should now be allowed to venture beyond the constitutionally enumerated qualifications, a long discredited view of the Constitution—rooted in periods of furor not fairness—would be resurrected. This Court alone has the authority and the duty to correct the abuse of constitutional principle presented here.

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[10] Cases of *Kentucky Members,* 40th Cong., 1867. But see Sec. 3 of the 14th Amendment, enacted subsequently, which expressly disqualified former active Confederates from serving in Congress.

[11] Case of *Victor Berger,* 66th Cong., 58th Cong., Rec. (1919). But see *Bond* v. *Floyd,* 385 U. S. 116 (1966).

II.

The Subject Matter of This Suit Is Justiciable, and the Opinions of the Lower Courts to the Contrary Dangerously Undermine the Historic Constitutional Role of the Federal Judiciary as the Guardian of the Civil and Political Liberties of the People.

Given that the House of Representatives exceeded its granted power under the Constitution, Article I, section 5, in excluding Mr. Powell from the 90th Congress, the crucial question is whether this case involves a "political question," and is therefore "non-justiciable." This Court has frequently rejected any simple test for determining this issue: it involves "a delicate exercise in constitutional interpretation." *Baker* v. *Carr,* 369 U. S. 186, 211 (1962). In *Baker* this Court listed six considerations which might lead to a decision of non-justiciability:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U. S. at 217.

It should be clear that the first, second, third, and fifth considerations have no application to this case: (1) As to the first, the issue before the Court is *whether the power to exclude Mr. Powell on grounds not specified in the Constitution was committed to the House of Representatives.* It cannot be argued that there is a "textually demonstrable commitment" of that issue to a "coordinate political department." This Court could conceivably decide, notwithstanding petitioners' arguments that Congress has the power to set the qualifications of its members; this decision —and its converse—could not be said to violate this aspect of the political question doctrine. (2) Respecting the second consideration, the constitutionality of Mr. Powell's exclusion is a matter of constitutional interpretation involving the application of traditional standards. (3) Nonjudicial discretion reflecting policy is in no way involved, rendering irrelevant the third consideration. (4) As to the fifth consideration, it is not a *political* decision on the part of Congress that is being attacked, but a Congressional decision as to the extent of its own constitutionally granted powers.

What remain are the fourth and sixth considerations. In this particular case, we are unable to read into the latter—embarrassment from multifarious pronouncements—any considerations that do not apply even more strongly to the former—the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. We therefore will focus upon the "due respect" issue.

Would a decision by this Court that the House of Representatives acted unconstitutionally and the remedies necessary to enforce that judgment show such "lack of respect"

to the House and to Congress that this Court should refuse to decide this case? There are compelling arguments why the answer to this question should be "No." First, the intention of the framers of the Constitution regarding the meaning of the constitutional provisions in question is clear: a House of Congress is *not* free to set the qualifications of its members for the purposes of exclusion. As this Court early made clear, such limitations on Congress were not drafted in order to be ignored:

> . . . The powers of the legislature are defined and limited; and that these limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . .
>
> . . . [P]rescribing limits, and declaring that those limits may be passed at pleasure . . . reduces to nothing what we have deemed the greatest improvement on practical institutions, a written constitution. *Marbury* v. *Madison,* 1 Cranch 137, 175, 178 (1803).

Second, this case concerns a right which this Court has emphasized again and again as the bedrock of a constitutional republic: the right of a constituency to vote for its representative and have that vote be *effective.*

> [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, [and] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964).

A greater infringement on the right to vote than the right of a majority of the House to exclude the elected representative can scarcely be imagined. An important justification for judicial intervention in the reapportionment cases was that malapportioned legislatures could not be relied upon to cure themselves—i.e., that a system which relies upon legislatures to cure fundamental legislative abuses involving the rights of the people to be represented in those legislatures, does not adequately protect those rights at all. The same is true in this case.

Third, the remedies appropriate to this case do not involve such extensive intervention or examination into the internal workings of the House of Representatives as to justify the conclusion that the lack of respect shown will outweigh the importance of the rights involved. A writ of mandamus to the Speaker and other officers of the House, requiring that Mr. Powell be seated in the 90th Congress, is no longer necessary, since that Congress is concluded and Mr. Powell is now seated in the 91st Congress. Conventional remedies of declaratory judgment and relief directed against the agents and employees of the House raise no issue of "due respect." See *Kilbourne* v. *Thompson,* 103 U. S. 168 (1880).

But though a writ of mandamus to seat Mr. Powell is no longer required in this case, we fully agree that such a remedy is appropriate, and in fact required, in cases where a majority of a House of Congress have unconstitutionally refused to seat a qualified representative elected to that House. It is a strange "respect" which is based not upon an acknowledgment of special expertise or superior knowledge and competence, but upon fear that the legislative

branch will not "respect" the neutral determination of a constitutional issue by the appropriate branch of government. The traditional duty of this Court to act as an independent check upon legislative and executive actions, insuring that they conform to the supreme law of the land, obtains here no less than in other cases. Where, as here, there is a clear violation of a fundamental Constitutional right, this Court's duty is clear.

CONCLUSION

The judgment below should be reversed and appropriate relief granted.

Respectfully submitted,

ERNEST ANGELL
OSMOND J. FRAENKEL
EDWARD J. ENNIS
JOHN D. J. PEMBERTON, JR.
MELVIN L. WULF
ELEANOR HOLMES NORTON
ALAN H. LEVINE
156 Fifth Avenue
New York, N. Y. 10010
Attorneys for Amici Curiae

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