INDEX

PAGE

INTRODUCTION 1

ARGUMENT 4

I. Certiorari Should Not Be Granted To Review a Judgment Based upon Correct and Unchallenged Grounds 4

A. The Result Below Was Correct and in Accordance with the Decisions of this Court 4

1. This case presents a nonjusticiable political question 6

2. The "Speech or Debate Clause" bars this action 8

3. The relief requested should be withheld as a matter of sound judicial discretion 10

4. Review would be a matter of form, not of substance 10

B. Petitioners Do Not Challenge the Grounds Supporting the Court of Appeals' Decision 11

II. There Is No Practical Occasion or Reason for Review of this Case by this Court 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

PAGE

Alejandrino v. *Quezon,* 271 U. S. 528 14

Arizona v. *California,* 283 U. S. 423 11

Baker v. *Carr,* 369 U. S. 186 .... 5, 6, 7, 8, 12

Barry v. *United States ex rel. Cunningham,* 279 U. S. 597 .... 5, 7

Bond v. *Floyd,* 385 U. S. 116 .... 5, 14

Cafeteria Workers, Local 473 v. *McElroy,* 367 U. S. 886 13

In re Chapman, 166 U. S. 661 7

Dombrowski v. *Eastland,* 387 U. S. 82 .... 8-9, 12

Flast v. *Cohen,* 36 U.S.L.W. 4601 (U. S. Sup. Ct. June 10, 1968) 5, 8

Hannah v. *Larche,* 363 U. S. 420 13

Application of James, 241 F. Supp. 858 (S.D.N.Y. 1965) 5

Johnson v. *Stevenson,* 170 F. 2d 108 (5th Cir. 1948), *cert. denied,* 336 U. S. 904 5

Keogh v. Horner, 8 F. Supp. 933 (S. D. Ill. 1934) 5

Kilbourn v. *Thompson,* 103 U. S. 168 .... 6, 9

Peterson v. *Sears,* 238 F. Supp. 12 (N.D. Iowa 1964) 5

Powell v. *McCormack,* 387 U. S. 933 1

Sevilla v. *Elizalde,* 112 F. 2d 29 (D.C. Cir. 1940) 5

Tenney v. *Brandhove,* 341 U. S. 367 9

United States v. *Johnson,* 383 U. S. 169 9

United States v. *O'Brien,* 88 S. Ct. 1673 11

In re Voorhis, 291 F. 673 (S.D.N.Y. 1923) 5

PAGE

Constitution, Statutes and Rules

United States Constitution:

Article I, Section 2 7

Article I, Section 5 .... 5, 6, 7, 9

Article I, Section 6 .... 7, 8

Twentieth Amendment 13

Statutes:

28 U.S.C. § 1491 14

Congressional Materials

113 CONG. REC. H1942 (daily ed. March 1, 1967) 4

113 CONG. REC. H4869 (daily ed. May 1, 1967) 4

H.R. REP. No. 2349, 89th Cong., 2d Sess. (1967) 3

Hearings Before the Special Subcommittee on Contracts of the House Committee on House Administration Relating to the Investigation Into Expenditures During the 89th Congress by the House Committee on Education and Labor, and the Clerk-Hire Payroll Status of Y. Marjorie Flores, 89th Cong., 2d Sess. (1967) 3

Miscellaneous

CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 12, 13

N.Y. TIMES, June 20, 1968 12

Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L.J. 517 (1966) .. 5

Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 138

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

v.

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

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

This case was here last year when petitioners unsuccessfully sought certiorari before judgment in the Court of Appeals.* In opposing that petition we suggested that, although important issues were involved, prior consideration by the Court of Appeals, as well as possible developments in the political process, might make it unnecessary for this Court to consider the case.**

We believe that suggestion has proven sound and that certiorari should again be denied. The result reached by the Court of Appeals was correct and in accordance with

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* Petition for Writ of Certiorari Prior to Judgment in the Court of Appeals for the District of Columbia, *Powell* v. *McCormack,* 387 U. S. 933 (October Term 1966, No. 1386).

** Memorandum for Respondents in Opposition, *Powell* v. *McCormack,* 387 U. S. 933 (October Term 1966, No. 1386). This Court denied the petition.

the decisions of this Court, and time and the evolution of the political process have eliminated any practical occasion or reason for further review.*

Before amplifying these reasons for denial of the present petition, brief mention of the question presented and the circumstances in which it arises is appropriate. The question is simply:

> Whether, in the circumstances of this case, involving a suit against Members and certain officers of the House of Representatives to compel them to seat a Member-elect whom the House voted to exclude for misconduct, the federal courts can or should review the action of the House and compel the Members to vote to seat the Member-elect.

The circumstances in which this question arises are fully and fairly stated by Judge Burger in the opinions below at pages 2 to 15 (hereinafter cited as Op.). No further statement is necessary, except to point out that the Statement in the petition at pages 5 to 15 (hereinafter cited as Pet.) is deficient in a number of respects. The most glaring examples are its failure to recognize or acknowledge that:

1. Mr. Powell's exclusion from the 90th Congress had its genesis in "events involving the alleged conduct of Member-elect Powell during earlier Congresses" (Op. 2), including the hearings and report

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* Indeed, it does not appear that petitioners seriously contend otherwise. The voluminous petition totally ignores the considered opinions of the Court of Appeals. It does not even discuss the issues of nonjusticiability which all members of that Court found determinative. It argues instead the question of subject-matter jurisdiction (which the Court of Appeals resolved in petitioners' favor), and the merits (which the Court of Appeals appropriately held it should not reach because they were not justiciable).

of a subcommittee of the Committee on House Administration which contain extensive evidence of misuse of House funds and violation of law governing hire of clerks by Mr. Powell.*

2. Mr. Powell was accorded substantial procedural rights beyond those required by the Rules of the House (Op. 5-8). He chose not to avail himself of those rights solely because, in his view, the Select Committee had no jurisdiction to inquire into anything beyond his age, citizenship, and inhabitancy (Op. 6, 9-10). He failed to attend on March 1, 1967, when the House considered the report and proposed resolution of the Select Committee, although ample notice had been given (Op. 11).

3. Petitioners have not challenged the accuracy of the findings of misconduct made by the Select Committee and set forth in House Resolution 278 (such findings being to the effect that Mr. Powell's contumacious conduct toward the courts of New York had reflected adversely on the House and its Members, that he had improperly maintained his wife on his clerk-hire payroll, that he had permitted and participated in improper expenditures of public funds for private purposes, and that he had refused to cooperate with the Select Committee and with a subcommittee of the House Administration Committee in their lawful inquiries).

4. Petitioners do not allege in their complaint that the exclusion of Mr. Powell rests on any grounds other

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* *See Hearings Before the Special Subcomm. on Contracts of the House Comm. on House Administration Relating to the Investigation into Expenditures During the 89th Congress by the House Comm. on Education and Labor, and the Clerk-Hire Payroll Status of Y. Marjorie Flores,* 89th Cong., 2d Sess. (1967); H. R. REP. No. 2349, 89th Cong., 2d Sess. (1967).

than the findings of the Select Committee as set forth in House Resolution 278.

5. After his exclusion, Mr. Powell was reelected on April 11, 1967, but has never presented himself and requested that he be given the oath of office (Op. 15), even though the Speaker clearly stated on two occasions that if Mr. Powell did present himself as a result of his reelection the House would then decide what action to take with respect to seating him.*

We turn now to the reasons why the petition for certiorari should be denied.

ARGUMENT

I. Certiorari Should Not Be Granted To Review a Judgment Based upon Correct and Unchallenged Grounds.

A. The Result Below Was Correct and in Accordance with the Decisions of this Court.

The members of the Court of Appeals, each writing separately, carefully considered the issues and reached a unanimous result—that although subject-matter jurisdiction existed, the case was nevertheless not appropriate for judicial consideration.

Although we believe the court below erred in finding subject-matter jurisdiction,** that issue is of no present significance since the court was clearly correct in concluding that this case is nonjusticiable in any event. The

* 113 CONG. REC. H1942 (daily ed. Mar. 1, 1967); 113 CONG. REC. H4869 (daily ed. May 1, 1967).

** It was recognized below that the question of subject-matter jurisdiction was far from open and shut. For example, Judge Burger stated (Op. 23):

> "Analysis of English and Colonial precedents shows that after a long and bitter struggle judicial bodies were denied the power of review over legislative judgments concerning elections and qualifications of members. . . . Nothing at the Convention suggests that the 'case or controversy' language of Article III was

various reasons assigned by the members of the court below for reaching their unanimous conclusion are sound, are in accordance with the precedents of this Court, do not involve any new or novel principles, and are carefully limited to the circumstances of this case. Appropriately

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> intended to change this familiar and historical allocation of powers. . . .
>
> "No cases have been cited as directly holding, and our search has not revealed any basis for saying, that a claim to a seat in the House is of a kind traditionally the concern of courts . . . ."

Nevertheless, Judge Burger felt that the "case or controversy" requirement of subject-matter jurisdiction had been assumed or decided without discussion in *Baker* v. *Carr,* 369 U. S. 186, and *Bond* v. *Floyd,* 385 U. S. 116.

However, those cases involved review of state action, not the constitutional allocation of power among the coordinate branches of the federal government; they are hardly to be taken as foreclosing the point, especially since this Court has recently said that the words "cases" and "controversies" have "an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast* v. *Cohen,* 36 U.S.L.W. 4601, 4604 (U. S. Sup. Ct. June 10, 1968). Article I, section 5 of the Constitution gives the House the power to judge the qualifications of its Members and, like the Senate's power to try an impeachment, is an "explicit exception to the general grant of judicial power to the courts in Article III." Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 YALE L. J. 517, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 8 (1959). Accordingly, every court that has considered the judicial power of each house under article I, section 5, has concluded that it is a "power . . . to render a judgment which is beyond the authority of any other tribunal to review." *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 613; *Johnson* v. *Stevenson,* 170 F.2d 108 (5th Cir. 1948), *cert. denied,* 336 U. S. 904; *Sevilla* v. *Elizalde,* 112 F.2d 29 (D.C. Cir. 1940); *Application of James,* 241 F. Supp. 858, 860 (S.D.N.Y. 1965); *Peterson* v. *Sears,* 238 F. Supp. 12 (N.D. Iowa 1964); *Keogh* v. *Horner,* 8 F. Supp. 933, 935 (S.D. Ill. 1934); *In re Voorhis,* 291 F. 673 (S.D.N.Y. 1923).

Since the court below decided the issue of subject-matter jurisdiction in favor of petitioners, we are at a loss to understand why they devote a major portion of their argument to attacking the conclusion of the District Court that there was no subject-matter jurisdiction (Pet. 36-42). One would at least assume that petitioners would talk in terms of the issues as refined and resolved by the Court of Appeals and that they would not be heard to urge as a reason for certiorari a matter which was decided (erroneously, we believe) in their favor.

left for another day, should the occasion ever arise, are questions as to whether the House of Representatives is entirely immune from suit to compel it to seat a Member-elect.* Accordingly, there is no necessity or occasion for further review of this particular case.

All of this clearly emerges from the reasons the court below gave for ruling that the circumstances of this case make it inappropriate for judicial review:

1. *This case presents a nonjusticiable political question.*

Judge Burger's careful analysis (Op. 26-40) demonstrates that a nonjusticiable political question is present under the principles laid down in *Baker* v. *Carr*, 369 U. S. 186. Judge McGowan agreed, but with a somewhat different analysis (Op. 56 & n.3), and Judge Leventhal found it unnecessary to decide the point (Op. 58).

At least four of the six separate criteria enunciated in *Baker* v. *Carr*, 369 U. S. at 217, for identifying a nonjusticiable political question are present here in varying degrees:

First, although Judge Burger did not rely on the point (Op. 30-31), there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department". Thus, article I, section 5 gives each house the power to be the "Judge" of the "Qualifications of its own Members," a power which this Court has said is the

* As Judge Burger said (Op. 53):

> "We should resist the temptation to speculate whether and under what circumstances courts might find claims to a seat in Congress which would be justiciable. We do well to heed the admonition of Mr. Justice Miller, uttered nearly a century ago, that judges confine themselves to the case at hand [his reference is to *Kilbourn* v. *Thompson,* 103 U. S. 168, 204-05]".

To the same effect see the statements of Judge McGowan (Op. 55-57) and of Judge Leventhal (Op. 58-60).

power to "render a judgment which is beyond the authority of any other tribunal to review", *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 613. To the same effect is Mr. Justice Douglas' concurring opinion in *Baker* v. *Carr*, where he said, 369 U. S. at 242 n.2:

> "Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns, and Qualifications of its own Members'."

As Judge McGowan pointed out, the expulsion power in section 5 of article I also forms a basis for a textually demonstrable commitment of the issue to the House (Op. 56 n.3).*

Second, the prohibition directed by the Speech or Debate Clause against questioning of Members and the Privilege from Arrest Clause** bar effective enforcement of a court order against Members of the House with respect to their judgment that a Member-elect is not qualified. In this sense, there are no "judicially discoverable and manageable

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* "Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member." U. S. CONST. art. I, § 5.

Whatever limitations article 1, section 2 arguably imposes upon the House's power to judge qualifications under article 1, 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 misconduct. As this Court itself has stated:

> "The right to expel extends to all cases where the offence 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. 661, 669-70.

** "The Senators and Representatives 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." U. S. CONST. art. I, § 6.

standards for resolving'' the issue presented, for, as Judge Burger said, ''[W]e are forced to conclude that courts do not possess the requisite means to fashion a meaningful remedy to compel Members of the House to vote to seat Mr. Powell or to compel The Speaker to administer the oath.'' (Op. 31)

Third and fourth, it is difficult to see, as Judge Burger observed, how there could be an efficient judicial resolution contrary to the action of the House ''without expressing lack of respect due coordinate branches of government'' or without creating ''a potentiality of embarrassment from multifarious pronouncements by various departments on one question.'' (Op. 31-32)

These considerations intertwine with and reinforce each other, and together they lead inexorably to the conclusion that petitioners' claims for relief are inappropriate for judicial consideration. There is nothing new or novel in this conclusion. It is simply the result of applying the explicit principles of *Baker* v. *Carr* to the circumstances of this case.*

2. *The ''Speech or Debate Clause'' bars this action.*

As Judges Burger and Leventhal recognized (Op. 41-47, 59-60), the Speech or Debate Clause of article I, section 6, and the hospitable reading given to it by this Court in accordance with its prophylactic purposes, stand squarely in the way of maintaining this action.** *See Dombrowski* v.

* Indeed, the considerations relating to this result reflect the judicial doctrine of justiciability as most recently quoted by this Court. "Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast* v. *Cohen,* 36 U.S.L.W. 4601, 4605 (U. S. Sup. Ct. June 10, 1968).

** Judge McGowan did not find it necessary to pass on the Speech or Debate Clause (Op. 54 n.1).

Eastland, 387 U. S. 82; *United States* v. *Johnson*, 383 U. S. 169; *Tenney* v. *Brandhove*, 341 U. S. 367; *Kilbourn* v. *Thompson*, 103 U. S. 168.

Only last year this Court emphasized in *Dombrowski* that "legislators engaged 'in the sphere of legitimate legislative activity' . . . should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." 387 U. S. at 85. The action of the House challenged here—the exercise of its constitutional responsibility under article I, section 5—is certainly within the sphere of "legitimate legislative activity" under the precedents in this Court. The conduct protected in those cases as "legitimate legislative activity" encompassed alleged or proven activity which: (a) violated a criminal statute (*Johnson*); (b) deprived a private citizen of his right to freedom of speech (*Tenney*); (c) involved unlawful and unconstitutional seizure of private property (*Dombrowski*); and (d) even resulted in the illegal and unconstitutional incarceration of a private individual (*Kilbourn*). *A fortiori*, if such conduct is within the sphere of "legitimate legislative activity," the Members sued here should not be questioned in the courts for speaking to and voting on a resolution involving their express constitutional duty to pass on the qualifications and conduct of Members of the House. That would be so even if their action in excluding Mr. Powell were assumed to be wholly unwarranted and unconstitutional, which is far from the case as the court below indicated.*

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* Nor can this action be maintained against the agents of the House named in the complaint. The attempt to bar them from implementing within the House the command of the House excluding Mr. Powell is a transparent effort to frustrate the broad immunity afforded by the Speech or Debate Clause. Petitioners have consistently recognized throughout that their suit is against the House itself. *See, e.g.,* Op. 13.

3. *The relief requested should be withheld as a matter of sound judicial discretion.*

Although Judge Leventhal did not travel the political question route to arrive at the common conclusion of non-justiciability, he reached the same result on more conventional grounds (Op. 58-65). As he noted: the relief sought by petitioners—injunction, mandamus, and declaratory judgment—"is not necessarily automatically available to one asserting (and even establishing) the underlying right" (Op. 58); the courts have discretion, where such remedies are sought, to determine whether, when and how far to consider the merits, and their determination will not be disturbed unless an abuse of discretion is committed.* In the circumstances of this case—including the failure of Mr. Powell to invoke remedies and procedures available within the legislative branch following his reelection on April 11, 1967, the unchallenged evidence of misconduct on his part, and the confrontation between the courts and the House posed by the relief requested—it was no abuse of discretion for the court below to decline to proceed.

4. *Review would be a matter of form, not of substance.*

Judge McGowan (Op. 56-57) took an alternate and highly practical approach in concluding that judicial scrutiny was inappropriate. As he noted: the sponsor of the motion to exclude Mr. Powell had stated on the floor that he was proceeding on the theory that the power to exclude was part of the power to expel and required a two-thirds vote; and a two-thirds vote was obtained even after the Speaker announced that a majority vote would suffice.

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* Judges Burger and McGowan also discussed the discretionary nature of the relief requested (Op. 35-37, 57 n.4).

Judge McGowan accordingly concluded that the "only question really presented by this complaint is whether the House must go through the formality of seating a member before it expels him for official misconduct," and that there was "no impelling occasion for judicial scrutiny" of that question "on this record," particularly since "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." Judge Leventhal essentially agreed with this practical approach to the problem (Op. 60-63). In the circumstances of this case and in view of the broad perimeters of article 1, section 5 giving the House control of the conduct of its internal affairs, there can be no quarrel with this commonsense result—that it is inappropriate for the courts to consider whether the House, instead of excluding Mr. Powell by more than a two-thirds vote, should have first seated him before achieving the same result by expulsion.*

B. *Petitioners Do Not Challenge the Grounds Supporting the Court of Appeals' Decision.*

The petition does not challenge any of the foregoing reasons which led the court below to affirm the judgment dismissing the complaint. Nor does the petition argue that these reasons warrant review by this Court. Instead, the petition ignores the opinions below and argues the merits (along with the issue of subject-matter jurisdiction which was decided in petitioners' favor). But nowhere does the petition discuss how the threshold issues of non-

* Equally inappropriate for judicial consideration is speculation that a two-thirds vote might not have been forthcoming if the Speaker had not ruled that a majority vote would suffice. *See United States* v. *O'Brien,* 88 S. Ct. 1673; *Arizona* v. *California,* 283 U. S. 423, 455.

justiciability, decided against petitioners in accordance with *Baker* v. *Carr, Dombrowski* v. *Eastland,* and other decisions of this Court, can be overcome in order to reach the merits. This approach of the petition is hardly responsible, and it leads reasonably to speculation whether petitioners have some purpose in mind other than seeking review in this Court.*

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* Mr. Powell is a candidate for election to the 91st Congress this coming November; he won the Democratic nomination in the New York primary on June 18, 1968. N. Y. TIMES, June 20, 1968, at 40, col. 4.

Although this is not the occasion to discuss the merits, respondents wish to register their emphatic disagreement with the arguments on the merits advanced in the petition, and to point out:

(1) Petitioners' contention that age, citizenship, and inhabitancy are the exclusive qualifications for membership in the House takes too extreme a view. As Professor Chafee suggests, it is not necessary to choose between the two extremes which may be urged—*i.e.*, that the House is limited to the requirements of age, citizenship, and inhabitancy, or that the House has unrestricted power to exclude—for actual practice and usage has long taken an intermediate ground:

> "As to elected persons satisfying all the requirements in the Constitution, we are 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, FREE SPEECH IN THE UNITED STATES 257 (1941)

Under the historical precedents of England, the Colonies, the House, and the Senate, we submit that the House had power to deal as it did with misconduct in office of the sort evidenced by Mr. Powell. *See generally* Op. 49-53 (Burger, J.), 54-56 (McGowan, J.), 60, 64 (Leventhal, J.). Indeed, the Brief of the Special Committee of the Association of the Bar of the City of New York in connection with the expulsion of five members of the Socialist Party from the New York State Assembly on which petitioners rely heavily (Pet. 27-29),

II. There Is No Practical Occasion or Reason for Review of this Case by this Court.

The resolution challenged in this case, House Resolution 278, excludes Mr. Powell from the 90th Congress. That Congress is expected to adjourn some time this summer, perhaps before the National Conventions in August, and in any event well before the November elections. Its term and that of all Members of the House will end at noon on January 3, 1969, pursuant to the Twentieth Amendment. Yet, despite this timetable, petitioners took their full 90 days to file the petition, waiting until almost the last moment on May 28, 1968. Nor did they seek expedited consideration, by a more timely filing or otherwise, although the adjournment of this Court's term was imminent and subsequently occurred on June 17, 1968. As a result, the petition will not be acted upon until next October at the earliest.

Even if certiorari should be granted then, there would be almost no time left for briefing, argument and decision before the issue of Mr. Powell's exclusion will be completely mooted by the official end of the 90th Congress on Janu-

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was careful to point out that no charges had been made "of any misconduct in office or of any violation of law on their part. . . ." Quoted in CHAFEE, *supra*, at 275.

(2) Petitioners' due process claims lack substance. Mr. Powell was informed of the charges against him (Op. 5), and the procedural rights accorded him were ample. *See, e.g., Cafeteria Workers, Local 473* v. *McElroy,* 367 U. S. 886; *Hannah* v. *Larche,* 363 U. S. 420. In any event, he did not avail himself of those rights because of his insistence that the Select Committee was limited to considering his age, citizenship, and inhabitancy. As Judges McGowan and Leventhal observed (Op. 55, 62-63) any questions of procedure could have been resolved if Mr. Powell had not insisted, erroneously in their view and ours, that the question of his misconduct was irrelevant to the Committee's inquiry.

ary 3, 1969. Since the exclusion issue will become practically moot when the 90th Congress adjourns and irrevocably so when it ends on January 3, 1969, we submit that there is no practical reason or warrant for this Court to consider the matter. See *Alejandrino* v. *Quezon,* 271 U. S. 528, where this Court refused to review a resolution suspending a member of the Philippine Senate because the period of suspension had expired and it was "therefore in this Court a moot question whether lawfully he could be suspended in the way in which he was"; held equally moot was "the still more important question" whether the courts had any jurisdiction to compel the Senate to rescind its resolution and readmit Alejandrino. *Id.* at 532-33.*

The leisurely pace followed by petitioners and Mr. Powell's failure to seek his seat since his reelection on April 11, 1967, contrast with the strident but increasingly stale pleas of urgent importance and need for speedy

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* The Court reached this conclusion notwithstanding that Alejandrino might have some incidental claim to salary and other emolument if illegally withheld during the period of suspension. Since "the main question as to the validity of the suspension has become moot," the Court concluded that the incidental feature of Alejandrino's claimed salary was "not in itself a proper subject for determination as now presented. . . ." 271 U.S. at 535. The reasons assigned for that conclusion apply equally here. The thrust of this action is to compel the House to seat Mr. Powell. His asserted claim to salary is only incidental, is not properly a matter for determination in the context of this case (that suit belonging, if anywhere, in the Court of Claims, 28 U.S.C. § 1491 (1964)), and will not prevent this case from becoming moot when the 90th Congress ends.

Bond v. *Floyd,* 385 U.S. 116, is not to the contrary. In answer to the question raised in oral argument as to whether that case was moot since the session of the Georgia House which excluded Bond was no longer in existence, this Court said: "The State has not pressed this argument, and it could not do so, because the State has stipulated that if Bond succeeds on this appeal he will receive back salary for the term from which he was excluded." *Id.* at 128 n.4. There is no such stipulation here. Also, the term from which Bond was excluded did not end until December 31, 1966, and accordingly had not expired when this Court decided the case on December 5, 1966.

resolution which are sounded in the petition. Whether or not the petition is a serious effort to obtain review, this essentially political matter should appropriately be left for resolution by the political process. The shortness of time remaining for the 90th Congress, and the thorough consideration the court below gave to the reasons and precedents militating against judicial consideration, leave this case devoid of the stuff of practical importance which warrants the attention of this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

June 27, 1968

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