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.

RESPONDENTS' MEMORANDUM SUGGESTING THAT THIS ACTION SHOULD BE DISMISSED AS MOOT

In our Memorandum in Opposition to the granting of certiorari (pp. 13-15), we pointed out that the issues raised in the Petition might well become moot before they could be fully briefed and considered. Since the granting of certiorari (on November 18, 1968), two events occurred which we suggest have in fact mooted the issues raised in the Petition. Accordingly, we urge this Court to vacate the judgment of the Court of Appeals and remand to the District Court with directions to dismiss on the ground of mootness.

The two subsequent events both occurred on January 3, 1969. First, the House of Representatives of the 90th Congress officially terminated, and a new House, of the

91st Congress, was convened and organized. Second, Mr. Powell presented himself for membership in that new House, having been elected from New York's 18th Congressional District at the general election on November 5, 1968, and he was seated (115 CONG. REC. H22 (daily ed. Jan. 3, 1969)).* The termination of the 90th Congress and the seating of Mr. Powell in the 91st Congress have eliminated whatever controversy was presented by the Petition and have rendered ineffective and unnecessary any order directing that he be seated.

The complaint—the parties, the issues and the relief—is cast exclusively in terms of the House of Representatives of the 90th Congress (Appendix 7-22). Mr. Powell and certain electors of the 18th Congressional District who voted for him at the general election in November 1966 seek to have him seated in the 90th Congress. Petitioners name as defendants (a) six Members of the House of Representatives of the 90th Congress, including the Speaker, who are sued individually and as representatives of the purported class of the entire Membership of that House, and (b) three officers of that House—the Clerk, the Sergeant-at-Arms and the Doorkeeper.

The same is true of the Petition and Brief filed January 6, 1969. The only issues raised in the Petition concern the seating of Mr. Powell in the 90th Congress and claims of the constituents of the 18th Congressional District to have him seated in that Congress. The Brief characterizes the "bedrock constitutional questions raised in this appeal" as the "extraordinary, arbitrary, and unconstitutional

* The resolution seating him also provided as punishment for a fine of $25,000 and for his seniority to commence as of the date he took the oath of office. H. R. Res. 2, 115 CONG. REC. H 21 (daily ed. Jan. 3, 1969).

action of the majority of the House of Representatives on March 1, 1967, in excluding Adam Clayton Powell, Jr. . . . from membership in the entire 90th Session of the House" (Brief 4). Again and again this 172-page Brief emphasizes petitioners' contention that the House's exclusion of Mr. Powell unconstitutionally deprived his constituents of representation in the 90th Congress. It mentions only in passing the events of January 3, 1969 (Brief 23-23a, 23b note, 156 n.101).

Yet it is precisely those events of January 3, 1969, which have rendered wholly and irretrievably academic the basic issues raised by petitioners in their complaint, Petition and Brief.

First. The primary and principal relief sought in this action is the seating of Mr. Powell in the 90th Congress. But obviously such relief cannot be granted. The 90th Congress is now only history. The present House is not only a different entity at law, *see* U. S. CONST. art. I, § 2, amend. XX, §§ 1, 2; 2 U.S.C. §§ 7, 25, 26 (1964); *Gojack* v. *United States,* 384 U. S. 702, 706-07 n.4 ("Neither the House of Representatives nor its committees are continuing bodies"); *McGrain* v. *Daugherty,* 273 U. S. 135, 181; *Marshall* v. *Gordon,* 243 U. S. 521, 542; *Anderson* v. *Dunn,* 6 Wheat. 204, 231; it is also a different entity in fact.*

Moreover, the decision of the 91st Congress to seat Mr. Powell has completely eliminated the possibility that the underlying controversy might be revived. This fact alone renders inapplicable recent decisions of this Court declining to dismiss for mootness where the underlying controversy or the events which gave rise to the controversy were

* Forty-one of the present Members of the House were not Members of the 90th Congress. Indeed, two of the Members of the 90th Congress who are specifically named as defendants in this action, Messrs. Moore and Curtis, are not even Members of the present House. *See* N. Y. Times, Nov. 8, 1968, at 26, col. 6.

likely to revive or recur in the future or would have future adverse consequences which an adjudication could prevent.* Here, of course, Mr. Powell has taken his seat, and there is no present reason to believe he will not be seated again if reelected.**

But even more significantly, unlike this case, none of those recent cases required this Court to adjudicate delicate constitutional questions—questions this Court has constantly and wisely sought to avoid in advance of compelling necessity even in the absence of a possible confrontation

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* *See, e.g., United States* v. *Concentrated Phosphate Export Ass'n*, 89 S. Ct. 361 (likelihood of further antitrust violations not sufficiently remote to make injunctive relief unnecessary, despite dissolution of association); *Carroll* v. *President & Commissioners*, 89 S. Ct. 347 (municipality aggravated by petitioners' persistent and continuing acts and program might well again restrain them from exercising their rights of free speech); *Wirtz* v. *Bottle Blowers Ass'n*, 389 U. S. 463 and *Wirtz* v. *Local 125, Laborers'*, 389 U. S. 477 (statutory suit to challenge unsupervised union election not mooted by subsequent unsupervised election); *Bank of Marin* v. *England*, 385 U. S. 99 (petitioner still subject to suit for contribution on same underlying issue); *Carafas* v. *LaVallee*, 391 U. S. 234, and *Sibron* v. *New York*, 88 S. Ct. 1889 (disadvantageous collateral consequences from petitioners' state criminal convictions would continue despite their release from prison).

** Without elaboration or analysis, petitioners baldly state in their Brief that the imposition of sanctions against Mr. Powell by the 91st Congress "continues the unconstitutional conduct of the respondent, which is developed in this appeal" (Brief 23a). However, the action taken by the 91st Congress is both legally and factually different from the action of the 90th Congress, *Gojack* v. *United States*, 384 U. S. at 706 n.4. That action of the latter Congress in no way touches upon the issues raised in this litigation, which arise out of the now mooted refusal to seat Mr. Powell in the 90th Congress.

We note, however, that the recent action of the House constitutes a proper and lawful exercise of its power to "punish its Members for disorderly Behaviour". U. S. CONST. art. I, § 5; *John L. McLaurin and Benjamin R. Tillman (South Carolina)*, 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. 94-97 (1962); 25 CONG. REC. 162 (1893).

between coordinate branches, such as is present here. *Ashwander* v. *TVA*, 297 U. S. 288, 345-48) (Brandeis, J., concurring).

A precedent with remarkable factual similarity to this action is *Alejandrino* v. *Quezon*, 271 U. S. 528. There, this Court refused to review a resolution suspending a member of the Philippine Senate because the period of suspension had expired and because the suspended member had resumed his functions as a member. This Court concluded that, "It is therefore . . . a moot question whether lawfully he could be suspended in the way in which he was" and that equally moot was "the still more important question" whether the court had any jurisdiction to compel the Philippine Senate to rescind its resolution and readmit Alejandrino. *Id.* at 532-33. A similar result is even more compelled here, since this Court in this case is asked to take the more drastic step of reviewing the internal action of a coordinate branch founded on powers expressly granted to it by the Constitution, rather than the action of a territorial legislature.

It is no answer that petitioners perhaps now seek only declaratory relief. Passing the point that such relief is requested against officers and agents of a body which no longer exists—the House of Representatives of the 90th Congress, such relief is equally as inappropriate as mandatory relief would be since it is authorized only in "a case of actual controversy", 28 U.S.C. § 2201 (1964). There is no longer any "actual controversy" involving the seating of Mr. Powell.

Second. Any other matters which petitioners may urge remain to be resolved (*e.g.*, questions involving Mr. Powell's claim for $55,000 back pay and seniority) are wholly incidental and subordinate to his now mooted demand for

seating. As in *Alejandrino,* they in no way alter the fact that this action is moot. In that case this Court assumed that Alejandrino might have some incidental claim to salary and other emolument if they had been illegally withheld during the period of suspension. But since "the main question as to the validity of the suspension has become moot," this Court concluded that "the incidental issue" 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.*

Furthermore, any claim that Mr. Powell may have for lost salary cannot properly be asserted in this proceeding. Such a claim lies, if at all, against the United States, not against the Members of the House of Representatives of the 90th Congress. Moreover, exclusive jurisdiction over Mr. Powell's salary claim is vested in the Court of Claims. *See* 28 U.S.C. §§ 1346(a)(2), 1491 (1964); *Wilson* v. *United States,* 44 Ct. Cl. 428 (1909).

If Mr. Powell should choose to pursue his salary claim, there are additional reasons which make it particularly appropriate for him to proceed in the proper forum, the Court of Claims. Such a proceeding in the Court of Claims would be against the United States, not the House of Rep-

* *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, nor could there be. 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. Finally, Bond had not been seated at the time of this Court's decision, and there was a substantial likelihood that the exclusionary acts complained of would be repeated.

resentatives. Indeed, it might be possible to resolve the claim under the applicable statutory law without reaching the constitutional questions. *See, e.g.,* 2 U.S.C. §§ 31, 34, 35, 37, 39, 40 (1964). Moreover, the United States as a party to such a proceeding could counterclaim or assert a set-off of whatever money Mr. Powell may owe it.**

Similarly, any claim which Mr. Powell might make for seniority cannot in any way affect the mootness of this action. Seniority, of course, is not mentioned in the Constitution, and indeed the Constitution expressly authorizes each house of Congress to "determine the Rules of its Proceedings". U. S. CONST. art. I, § 5. Whatever influence and authority flow from seniority are, therefore, matters the Members of the House and the party caucuses must determine for themselves. Although respect for seniority is conventional, it is not required by the rules of the House and has been taken away from other Members. For example, Representative (now Governor) John Bell Williams of Mississippi was recently deprived of his seniority on the apparent ground that he supported a Republican candidate for President (CONGRESSIONAL QUARTERLY, Jan. 6, 1967, at 25); and at least three other Representatives have had their seniority removed (CONGRESSIONAL QUARTERLY, Jan. 13, 1967, at 48). Yet claims to restore seniority have never been deemed an appropriate subject of judicial intervention because, as Judge Leventhal noted in the court below,

> "... a court would be going to the extreme edge of its authority if it were to declare his status as a Congressman. It cannot reasonably be asked to provide such extraordinary relief to enable complainant to

** In a letter to the Hon. Emanuel Celler, dated January 2, 1969, the Attorney General stated that the Department of Justice is continuing to study whether Mr. Powell is civilly liable for misconduct in office. *See* 115 CONG. REC. H5 (daily ed. Jan. 3, 1969).

> obtain perquisites, however important, that are essentially a matter for legislative determination, and certainly are not assured by any constitutional clause. 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." (Appendix 98.)

Finally, all the so-called privileges and emoluments of office as a Member of the 90th Congress which Mr. Powell may contend he lost as a result of his exclusion might well not have been lost if he had presented himself for membership in that Congress after he was elected in a special election in April 1967 to fill the vacancy created by his exclusion. As Mr. Powell knew, the Speaker on two separate occasions carefully reserved for future consideration by the House the right to make a new determination if Mr. Powell were again elected and were to present himself. *See* 113 CONG. REC. H1942 (daily ed. Mar. 1, 1967); 113 CONG. REC. H4869 (daily ed. May 1, 1967). Nevertheless, Mr. Powell chose never to reappear in the House of the 90th Congress after his reelection in April.

CONCLUSION

This case no longer involves a controversy between Mr. Powell and the House over his right to a seat or the right of his constituents to have him seated. Mr. Powell is now sitting in the House. This action, therefore, lacks those elements of a live case or controversy which are necessary to make it an appropriate framework for considering the delicate constitutional issues which petitioners tender—issues which involve the possibility of confrontation between coordinate branches of the Government. Under these circumstances, this case should be governed by the salutary

principle that this Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it", *Ashwander* v. *TVA*, 297 U. S. 288, 346-47 (Brandeis, J., concurring), or "entertain constitutional questions in advance of the strictest necessity", *Parker* v. *County of Los Angeles*, 338 U. S. 327, 333. Time and again this Court, abiding by this principle, has avoided constitutional adjudication where the circumstances were not compelling. *See, e.g., Poe* v. *Ullman*, 367 U. S. 497; *Public Service Comm'n* v. *Wycoff Co.*, 344 U. S. 237; *Rescue Army* v. *Municipal Court*, 331 U. S. 549; *United Public Workers* v. *Mitchell*, 330 U. S. 75. This is such a case.

WHEREFORE, it is respectfully suggested that the judgment of the Court of Appeals should be vacated and the case remanded to the District Court with directions to dismiss on the ground that the case is now moot.

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Respectfully submitted,

BRUCE BROMLEY,
1 Chase Manhattan Plaza,
New York, N. Y. 10005
Attorney for Respondents

LLOYD N. CUTLER
JOHN H. PICKERING
LOUIS F. OBERDORFER
MAX O. TRUITT, JR.

WILMER, CUTLER & PICKERING,
900 17th Street, N.W.,
Washington, D. C. 20006
Of Counsel

JOHN R. HUPPER
THOMAS D. BARR
JAY E. GERBER
DUANE W. KROHNKE
PETER B. SOBOL

CRAVATH, SWAINE & MOORE,
1 Chase Manhattan Plaza,
New York, N. Y. 10005
Of Counsel