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Comment on Powell v. McCormack

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sitting on the Supreme Court at the time of *Powell* they would have joined the majority opinion. This assertion is based on the idea that a Supreme Court Justice attuned to the political history of the Court and steeped in the spirit of John Marshall would find his way easily in the *Powell* case.[12]

In the game of political power, the cards are stacked heavily against the Supreme Court. The power of judicial review and the notion of judicial supremacy are thus paradoxical.[13] The Court has had to develop its political power and its role in our system by walking a tightrope between public disapproval and resistance to decisions at one end and a hostile Congress or President at the other. Cases like *Powell*, where the Court has an opportunity to reassert its supremacy as interpreter of the Constitution without much risk of initiating a constitutional impasse, come along infrequently. Everyone with a feel for Supreme Court history should recognize *Powell* as a decision involving a strong element of politico-judicial statesmanship in the vein of *Marbury v. Madison.*

Terrance Sandalow*

The rapid pace of constitutional change during the past decade has blunted our capacity for surprise at Supreme Court decisions. Nevertheless, *Powell v. McCormack* is a surprising decision. Avoidance of politically explosive controversies was not one of the most notable characteristics of the Warren Court. And yet, it is one thing for the Court to do battle with the Congress in the service of important practical ends or when the necessity of doing so is thrust upon it by the need to discharge its traditional responsibilities. It is quite another to tilt at windmills, especially at a time when the Court's supply of lances is not overly large.

I.

In assessing the Court's performance in *Powell*, it may be useful to turn the clock back to the time when the petition for certiorari was

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[12] I do not mean to disparage Mr. Justice Stewart, lone dissenter in *Powell*; I think the Justice was perhaps overwhelmed by the judicial restraint precedents and failed to see that those precedents are extremely flexible in a case like *Powell* where the Court can reestablish judicial supremacy without having to risk a direct confrontation with an antagonistic Congress or President.

[13] *See, e.g.*, F. RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 3-37 (1955).

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under advisement. Four lower court judges, though their reasons were various, had concluded that Powell's complaint was inappropriate for adjudication. The already severely strained relationship between the Court and the House, as the Justices were undoubtedly aware, could only deteriorate further were the Court to intervene in what heretofore has been regarded as within the exclusive province of the House. More than in the other areas into which the Court has ventured in recent years, enforcement of a remedial order, were the Court ultimately to hold for Powell, threatened to place the Court on a collision course with the House and to do so in a context (defense of the House's traditional prerogatives) in which the membership of the House was likely to be more unified than it had been in other areas in which the Court's decisions had generated controversy.

A number of factors powerfully supported an acceptance of jurisdiction, however. Constitutional issues of substantial importance, involving the limits of Congressional competence to determine the qualifications of those elected to serve in the House as well as the extent of judicial power to define and enforce those limits, were raised by the petition. The latter issue may well have been entitled to special consideration at a time of skepticism concerning the adequacy of legal processes to protect the legitimate interests of Negroes. Powell's exclusion from the House was viewed by many, whether or not justifiably, as a bit of disguised racism, the stated grounds for the exclusion serving (in their view) as a pretext for ridding the House of the annoyance of an "uppity nigger" in its midst. In these circumstances a refusal by the Court to hear Powell's claim would have risked a further loss of confidence in legal processes among a group for whom the reservoir of confidence was already greatly diminished. Powell's claims against the House had, to be sure, been heard in two lower courts, but we may as well recognize that there are matters as to which only a Supreme Court decision is adequate to satisfy the demand for a judicial determination.

The persuasiveness of these arguments for granting the writ is rather diminished by the fact that certiorari was not granted until November 18, 1968, after the adjournment of the Congress from which Powell had been excluded. Powell had already been elected to the next Congress and, though it was not yet known whether the new House would seat him, there was reason to believe that it well might. In any event, that decision would be made within six weeks time, long before the Court could hope to dispose of the case. In these circumstances, prudence might have suggested to the Court that the decision whether to grant certiorari might be deferred until it was known whether Powell would be seated in the 91st Congress. Whether or not a decision by the House to seat Powell would

technically have mooted the controversy, a matter about which it might be expected the Court would not have fully developed views at the time certiorari was under consideration, it would have driven the props out from under the strongest arguments for granting certiorari and permitted the Court to avoid what threatened to become an unseemly and potentially dangerous confrontation with the House. Notwithstanding these considerations, the Court took jurisdiction of the case.

By the time oral argument was reached the possibility that Powell would be seated in the 91st Congress had become a reality, leading counsel for the House to suggest that the cause had become moot. The stated reasons for the Court's rejection of the suggestion seem to me less interesting than the fact that the Court reached the conclusion that it did. As Mr. Justice Stewart demonstrated in dissent, Powell's seating offered at least a plausible, even if not a compelling, basis for ridding the Court of an incendiary controversy. I am willing to concede that, as a technical matter, the Court's conclusion was equally permissible. The concept of mootness has at least that much elasticity. The intriguing question is why the Court did not avail itself of the opportunity to be rid of the case, either at the stage of the certiorari petition or when it became apparent that the central issue in the case, from a public perspective, had become moot.

II.

The Justices are practical men and it is difficult to escape the conviction that there are—or that the Justices thought there were—practical ends served by a decision which reached the constitutional issues raised by Powell. If there was a pragmatic justification for the Court's insistence upon reaching the merits, however, it did not arise from a need to protect the interests of Powell or his constituents. The power of Powell's constituents to select a representative of their own choice had, as a practical matter, been vindicated as effectively as circumstances permitted by the decision of the House to seat Powell in the 91st Congress. The denial of that power during the 90th Congress was beyond even the Court's power to remedy. So too, by its impact upon the level of public interest in the case, Powell's seating had diminished whatever need there may have been to establish the adequacy of legal processes to cope with what some viewed as racism. Nor do the grounds upon which Powell contended that a "live" controversy existed, even though he had been seated, point to any compelling need for a decision by the Court. Three issues of continuing importance were identified by Powell:

(1) whether Powell was unconstitutionally deprived of his senior-

> ity by his exclusion from the 90th Congress; (2) whether the resolution of the 91st Congress imposing as "punishment" a $25,000 fine is a continuation of respondent's allegedly unconstitutional exclusion . . . ; and (3) whether Powell is entitled to salary withheld after his exclusion from the 90th Congress.[1]

The last of these issues, as Justice Stewart persuasively argued, could as effectively have been litigated in the Court of Claims, a setting which "would clearly obviate the need to decide some of the constitutional questions . . . which the Court . . . [was required to face] and might avoid them altogether."[2] Precisely the same might be said with respect to the second issue.

Powell's reliance upon the effect of his exclusion on his seniority is a bit more complex, but on analysis provides no more compelling a basis for the Court's refusal to avoid involvement in the case. Under the practice of the House, seniority is determined by continuous membership, a member's seniority dating from the beginning of his last uninterrupted service.[3] Powell's exclusion from the 90th Congress, in consequence, resulted in a loss of the seniority which he had established over a considerable period of prior service. Nevertheless, a search for pragmatic justification for the Court's refusal to duck the *Powell* controversy is not likely to be satisfied by Powell's interests in protecting his seniority. The primary importance of seniority in the House is its influence in determining committee chairmanships and memberships. It is hardly conceivable that the Court would attempt to interfere with the internal organization of the House by involving itself in the process of selection of committee chairmen and members. Apart from the fact that such matters are by common understanding and for obvious reasons committed to the discretion of the House, which alone would negate any role for the Court, the selection of committee chairmen and members is not determined solely by seniority.[4] Indeed, the decision to unseat Powell as chairman of the Committee on Education and Labor was made quite independently of the decision to deny him a seat in the 90th Congress.[5] A decision that Powell had been unconstitutionally excluded from the House and, hence, was entitled to seniority uninterrupted by the period of exclusion from the 90th Congress could not, therefore, result in restoration of his committee assignments or chairmanship. The Court's recognition of its inability to deal with these matters is implicit in its affirmance of the dismissal of the defendants who

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1 395 U.S. 486, 496 (1969).
2 *Id.* at 572.
3 G. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES 81 (1961).
4 *Id.* at 68-69, 80.
5 395 U.S. at 490.

were House members, since their presence in the case would surely be necessary were the Court to probe the question of the effect of Powell's loss of seniority upon his standing on House committees.[6]

The absence of any need to assume or retain jurisdiction in order to protect the interests of Powell or his constituents raises the question whether other ends were served by the Court's decision to involve itself in the controversy. Only the members of the Court —and perhaps not even all or, indeed, any of them—are in a position to answer that question, but the opinion is at least suggestive of an answer.

Chief Justice Warren's opinion for the Court, from which only Justice Stewart dissented, is highly revealing concerning the Court's attitudes toward its place in the constitutional system and its relations with Congress. Throughout, the opinion reflects a conception of the Court as the ultimate interpreter and defender of the Constitution. In *Marbury v. Madison*, the power of the Court to declare Congressional legislation unconstitutional was justified as a necessary incident of the Court's duty to decide cases in conformity to law, including the Constitution as the "supreme law." *Powell* demonstrates how far the Court has moved from that rationale. In *Powell*, it is the existence of a constitutional question which leads the Court to conclude that a justiciable controversy is presented.[7] The determination of constitutional questions becomes not merely an incident of the exercise of judicial power, but a reason for it. Such a conception of its role, in the Court's view, bespeaks no lack of respect for the Congress:

> [A] determination of Petitioner Powell's right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law . . . . Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. . . . [I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.[8]

With so spacious a conception of its responsibilities, it is not surprising that the Court failed to take advantage of the opportunities which its discretionary jurisdiction and Powell's seating of-

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[6] Seniority has other consequences for House members, as in the allocation of office space, G. GALLOWAY, *supra* note 3, at 34, but these are surely of insufficient importance to provide a pragmatic justification for the Court's decision to involve itself in the Powell controversy.

[7] *See* text following note 15 *infra*.

[8] 395 U.S. at 548-49.

fered for avoiding a potential confrontation with the House. *Powell* provided the Court with as good an opportunity as it was ever likely to have to extend to an area from which it had previously been excluded the power to discharge its "responsibility . . . to act as the ultimate interpreter of the Constitution." The seating of Powell permitted the Court to assert its authority without risking the embarrassment either of an order directing that he be seated, an order it might well have been unable to enforce, or of a judgment declaring his right to be seated which might well have been ignored by the House. At the same time, the assertion of its authority, by establishing a precedent for its exercise, would tend to pave the way for acceptance of that authority in subsequent cases. With a little luck, the extension of the Court's power, and hence its ability to fulfill its "constitutional responsibility," might be established without the Congress ever having an effective opportunity to express its non-acquiescence.

III.

A confrontation with the House remains a possibility, of course. It is not beyond contemplation that a judgment awarding Powell the salary withheld from him during the 90th Congress would be met by a House resolution directing the Sergeant-at-Arms not to honor the judgment. Nevertheless, the possibility of avoiding a confrontation seems substantially greater than it would be in a case in which seating itself was at issue. The risk which remains is, in effect, the minimum possible consistent with the existence of a "live" controversy. Yet the Court sought to minimize even that risk by reserving the question whether coercive relief, presumably including a judgment for withheld salary, was available against employees of the House. In view of the strong negative reaction which the Court's extension of its authority was certain to produce in the House, so cautious an approach is readily understandable. It is a fair question, nevertheless, whether the Court's caution was consistent with its constitutional responsibility to act solely as a court, its power limited to the performance of adjudicatory functions.

The Court's affirmative answer to that question rested on the Declaratory Judgment Act. Since the Act "provides that a district court may 'declare the rights . . . of any interested party . . . whether or not further relief is or could be sought,' " the Court reasoned, "a request for declaratory relief may be considered independently of whether other forms of relief are appropriate."[9] It followed, in the

[9] *Id.* at 517-18.

Court's view, that the case was justiciable even though other forms of relief might ultimately be unavailable.

The bland, almost off-hand manner in which the Court disposed of the issue masks a considerable extension of the availability of declaratory relief. The traditional view, as stated by Borchard, is that "as a general rule a court which never could have any means of granting further relief to enforce its judgment, should not issue a declaration."[10] This restriction flows from the generally accepted proposition that the Declaratory Judgment Act has not enlarged the subject-matter jurisdiction of the courts.

> The limitation of the relief [i.e., declaratory relief] to Courts having jurisdiction is sometimes expressed as denying jurisdiction in cases where, even though the facts had been ripe therefor, no affirmative relief could have been granted if sought. In principle this seems correct, for it would hardly be asserted, for example, that a court not having jurisdiction over claims against the State could nevertheless pass a declaratory judgment that the State owed the plaintiff a certain sum.[11]

The Court's departure from this heretofore accepted limitation upon declaratory relief, to the extent that it states a position for the future, is a matter of some significance. If the Court meant to convey that a declaration concerning the lawfulness of Powell's exclusion was appropriate regardless of whether the courts were ultimately entitled to adjudicate his salary claim, the decision marks a substantial dilution of Article III's "case or controversy" requirement. Such a declaration would amount to no more than an abstract statement of law, plainly inconsistent with the requirement that the controversy be one "admitting of specific relief through a decree of a conclusive character. . . ."[12] If, on the other hand, the Court's opinion means that Powell's salary claim may be judicially deter-

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10 E. BORCHARD, DECLARATORY JUDGMENTS 374 (2d ed. 1941).

11 *Id.* at 233-34. None of the authorities cited by the Court support the proposition that the propriety of declaratory relief is determinable independently of the availability of other forms of relief. In United Public Workers of America v. Mitchell, 330 U.S. 75, 93 (1947), the Court determined only that it might grant declaratory relief to a governmental employee threatened with discharge without reaching the question whether a court of equity would enforce by injunction a judgment declaring his rights. There was no suggestion that all traditional forms of relief might be barred. Indeed, the cases cited by the Court to suggest the reasons why equitable relief might be unavailable were grounded upon the availability of a remedy at law.

The other authorities upon which the Court relied were even more remote, one being concerned only with the question whether a declaratory judgment may be granted if alternative forms of relief are also available, 6A J. MOORE, FEDERAL PRACTICE ¶ 57.08[3] (2d ed. 1966), and the other with issues quite unrelated to the ultimate availability of coercive relief, United States v. California, 332 U.S. 19, 25-26 (1947).

12 Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 241 (1937).

mined without regard to whether coercive relief would ultimately be available, different but no less serious objections are appropriately raised. Restrictions on coercive relief against other branches of the government not only embody policies concerning the appropriate distribution of power between them and the Court, but a recognition of the need for each to remain to some extent out of the others' hair if debilitating conflict is to be avoided. Both functions of the restrictions are threatened by the Court's assertion of power to rule upon disputed questions of constitutional law without regard to the propriety of coercive relief. "The fundamental theory of the declaratory judgment," as David Currie has written, "is that in a civilized society people will obey court decisions without the threat of force or punishment. . . ."[13] In the circumstances of the *Powell* case, in consequence, the propriety of declaratory relief is inextricably interwoven with the availability of coercive relief. The policies which might lead a court to deny its authority to award the latter are no less applicable to the former, at least if one assumes, as presumably the Court does, an obligation to respect the declaratory judgment.

The Court cannot, in short, have it both ways, simultaneously extending its authority to a category of controversies heretofore regarded as within the exclusive domain of Congress and avoiding the possibility of a show-down with the Congress over the legitimacy of that extension of its power. At least it cannot do so consistently with Article III, for the minimal meaning of the "case or controversy" requirement is that a judgment have some effect on the legal relations of the parties.

IV.

Nowhere in the opinion is the Court's conception of its role as the ultimate guardian of the Constitution more clearly revealed than in its discussion of the "political question" doctrine.

From the commencement of the proceedings against him in the 90th Congress Powell's central position was that the exclusive qualifications for membership in the House were those stated in Article I, Section 2 of the Constitution—age, citizenship and residence.[14] The power of the House under Article I, Section 5 to "be the judge of the elections, returns, and qualifications of its own members," he

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[13] Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 16 (1964).

[14] Additional qualifications are arguably established by other clauses of the Constitution but as there was no suggestion that Powell failed to meet any of them the Court was not required to consider Congressional power with regard to them.

consistently maintained, authorized only a determination whether those qualifications were met and exclusion on any other ground would exceed its constitutional authority.

Counsel for the House contended, as might be anticipated, that the scope of that body's authority under Article I, Section 5 involved a "political question" not appropriate for judicial decision. The Court's rejection of that argument owes much to its earlier analysis of the "political question" doctrine in *Baker v. Carr*.[15] In that case, it will be recalled, the Court identified six factors relevant to a determination whether a question was "political" and hence beyond judicial consideration. The first of these and the one with which the Court was primarily concerned in *Powell* was whether there was "a textually demonstrable commitment of the issue to a coordinate political department." To answer the question whether there had been such a commitment, the Court looked to history, examining in turn the early English and colonial experience, the records of the Constitutional Convention and the practices of the House and Senate since the adoption of the Constitution. It concluded that although the evidence was not entirely unambiguous, Congressional power under Article I, Section 5 was limited to determining whether the qualifications prescribed by the Constitution were satisfied.

I leave to others the question whether history fairly supports the Court's conclusion. The most striking feature of the Court's review of history, it seems to me, is what it failed to notice, that not until the *Powell* case can one find any suggestion that courts are empowered to sit in judgment on the question whether the House or Senate exceeded their authority in excluding a person elected to membership. The absence of any such suggestion is particularly noteworthy because of the long-standing debate over the question whether Congressional power is limited by the constitutional qualifications and the fact that each House, in a not insignificant number of cases, has excluded duly elected individuals who plainly met those qualifications.

The Court's failure to note the lack of any historical support for judicial review of cases of exclusion from Congress is related to a more fundamental defect in its analysis of the justiciability of Powell's claim. Having begun by asking the right question, whether there was a "constitutional commitment of the issue" to the House, the Court proceeded to answer a quite different one, whether the "qualifications" which Article I, Section 5 authorized the House to "judge" were only those specified in Article I, Section 2 (and per-

[15] 369 U.S. 186 (1962).

haps elsewhere in the Constitution). The opinion reflects, in short, a classic instance of confusion between "jurisdiction"—the power to decide—and "the merits"—the correctness of decisions.

The source of this confusion, it seems fairly clear, is the Court's assumption that it bears "responsibility . . . to act as the ultimate interpreter of the Constitution." On that premise, it is but a short step to the conclusion that the Court is obligated to intervene when another branch of government acts in a manner prohibited by the Constitution. If the Constitution permits the House to judge only the "standing" qualifications of those who have been elected to membership, *i.e.*, those specified in the Constitution, the Court, as the body ultimately responsible for the Constitution, must have the authority to review the decisions of the House to assure that constitutional limitations have been observed.

The opinion does, to be sure, suggest that even "if the Constitution gives the House power to judge only the three standing qualifications . . . further consideration . . . [is] necessary to determine whether any of the other formulations of the political question doctrine are 'inextricable from the case at bar.' "[16] But the Court's consideration of these other "formulations"—drawn from the analysis in *Baker v. Carr*—is at best pro forma, consisting only of a recitation of the "traditional role accorded Courts to interpret the law" and of its responsibility "to act as the ultimate interpreter of the Constitution."[17] The central importance, for the Court, of the question whether the House had exceeded its constitutional authority is indicated by its statement that "the force of respondent's other arguments that this case presents a political question depends in great measure on the textual commitment question."[18]

The Court's analysis of the political question doctrine, and especially of the "textual commitment" issue, involves a number of rather startling implications. Stated in general terms, the analysis seems to lead to a conclusion that the Court may review decisions committed by the Constitution to other branches of government at least to the extent necessary to permit a determination that any standards of decision imposed by the Constitution have been respected. If the Court may review a determination by the House that its power to judge qualifications is not limited by the standing qualification of the Constitution, it is difficult to see, for example, why it may not similarly review expulsions from the Congress or the re-

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16 395 U.S. at 520-21.

17 The major part of the Court's discussion of these other "formulations" is quoted in the text accompanying note 8 *supra*.

18 395 U.S. at 521, n.43.

moval of judges or other officers upon conviction after impeachment. Both of the latter powers are in terms conferred upon the Congress[19] but as to each there is a substantial basis for arguing that the Constitution limits the grounds upon which the Congress may act. Thus, as the Court notes, both houses have doubted their power to expel a member for conduct prior to his election.[20] It would, moreover, do no violence to the language of the Constitution to construe it as authorizing expulsion only in situations in which a member was guilty of "disorderly behavior." Article II, Section 4, similarly, suggests that the "President, Vice-President, and other civil officers of the United States" may be removed from office only "on impeachment for, and conviction of, treason, bribery, and other high crimes and misdemeanors." And under Article III, judges are entitled to hold their offices "during good behavior."[21]

A conclusion that it is the Court, not Congress, which has the ultimate authority to determine the governing law in exclusion, impeachment, and expulsion proceedings is so contrary to historical practice and to the understanding of students of constitutional law[22] that a re-examination by the Court of the steps leading to that conclusion is plainly in order. The point at which it might profitably begin that re-examination is with its unexamined assumption that it has the responsibility to act as the ultimate interpreter of the Constitution. The basis for that assumption is far from clear. Yet unless the assumption can be justified, *Powell* rests on an inadequate foundation.

Hans A. Linde*

If the Congress wants to be the exclusive judge of the elections, qualifications, and punishment of its members, it should place itself

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[19] U.S. CONST. art. I, § 5, cl. 2, provides that "Each house may . . . punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." The same article provides that the House "shall have the sole power of impeachment," *id.* § 2, cl. 5, and stipulates that the "Senate shall have the sole power to try all impeachments," *id.* § 3, cl. 6.

[20] 395 U.S. at 508.

[21] The Constitution does, it is true, state specifically that the "sole" powers of impeachment and the trial of impeachments are in the House and Senate, respectively, but on the analysis in *Powell* the House and Senate would be acting beyond their authority, and hence be subject to the corrective powers of the Court, if they applied standards other than those authorized by the Constitution.

[22] *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 8 (1959).

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