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Constitutional Law -- Power of Congress to Exclude Persons Duly Elected

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affirmative action initiated by the plaintiff, will not provide relief from pervasive covert collection of information. The combination of an exclusionary evidentiary rule, based on the requirement of a warrant, and injunctive relief would, however, be a potent weapon for discouraging police activities likely to stifle the free and open exercise of the rights of freedom of speech, assembly, and association. Since surveillance would be permitted only if the need for it could be demonstrated to a judicial officer, the police would not be forced into illegal conduct to carry out the investigative and preventive activities demanded of them by society.

DONALD W. HARPER

Constitutional Law—Power of Congress To Exclude Persons Duly Elected

In the congressional elections of 1966, Adam Clayton Powell was duly elected to the Ninetieth Congress from the eighteenth congressional district of New York. When the House of Representatives convened, Powell was not administered the oath. On the same day, the House provided for the appointment of a select committee to determine Powell's eligibility to take his seat.[1]

The committee found that Powell met the standing qualifications of article I, section 2 of the Constitution.[2] The committee further reported, however, that Powell had misappropriated public funds, had made false reports on expenditures of foreign currency, and had asserted unwarranted privilege and immunity from the processes of the courts of New York.[3] The committee recommended that Powell be sworn and seated, but that he be fined 40,000 dollars, censured, and deprived of his seniority.[4] When the proposed resolution was presented to the House, an amendment was offered calling for Powell's exclusion and a declaration that his seat was vacant.[5] After heated debate, the amendment was adopted,

[1] 113 CONG. REC. 16 (daily ed. Jan. 10, 1967).

[2] H.R. REP. No. 27, 90th Cong., 1st Sess. 31 (1967). The relevant part of article I, § 2 declares:

> "[n]o 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."

[3] H.R. REP. No. 27, 90th Cong., 1st Sess. 31-32 (1967).

[4] *Id.* at 33.

[5] H.R. Res. 278, 90th Cong., 1st Sess., 113 CONG. REC. 4997, 5020 (1967).

and House Resolution No. 278, in its amended form, was approved by over a two-thirds margin.

Powell and thirteen voters of the eighteenth congressional district brought suit requesting injunctive and declaratory relief. They alleged that the House in voting to exclude Powell violated two specific provisions of the Constitution: article I, section 2, clause 1,[6] because the resolution was inconsistent with the mandate that the members of the House shall be elected by the people of each state; and Article I, section 2, clause 2,[7] which, it was asserted, sets forth the exclusive qualifications for membership. The district court dismissed the complaint "for want of jurisdiction of the subject matter."[8] The court of appeals affirmed on somewhat different grounds, with each judge filing a separate opinion.[9]

On certiorari, the Supreme Court reversed.[10] The Court passed over the claim under article I, section 2, clause 1, but held that under article I, section 2, clause 2 the House had no power to exclude from its membership any person, duly elected by his constituents, who met the age, citizenship, and residence requirements specified in the Constitution. In so holding, the Court insisted that it was not dealing with a nonjusticiable political question.[11]

The impact of *Powell* on the political-question doctrine is emphasized through the fact that the Court, had it based its decision on article I, section 2, clause 1, could have resolved the issue within accepted conceptions of justiciability. The theory embodied in this provision is that the right of the people in each district to choose their congressional representatives is fundamental to a democratic system of government. As stated

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

[7] See note 2 *supra.*

[8] Powell v. McCormack, 266 F. Supp. 354, 360 (D.D.C. 1967).

[9] Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968). Writing for the court, Judge Burger, now Chief Justice of the United States, held that the case involved non-justiciable political issues. Judge McGowan felt that the decision by the House that the power to expel included the power to exclude, provided a two-thirds vote was forthcoming, did not present an impelling occasion for judicial scrutiny. Judge Leventhal concluded that "[t]he House had legislative jurisdiction to consider and appraise the activities and fitness of Powell at the time he presented his credentials." 395 F.2d at 611.

[10] Powell v. McCormack, 395 U.S. 486 (1969). For a lengthy analysis of *Powell,* see generally *Symposium—Comments on Powell v. McCormack,* 17 U.C.L.A.L. REV. 1 (1969).

[11] 395 U.S. at 549.

by Robert Livingston in his speech before the New York ratification convention, "The people are the best judges [of] who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights."[12] It is this "natural right" that is the basis for the one man, one vote requirement in congressional districting.[13] Justice Black in *Wesberry v. Sanders*[14] said, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[15]

The same rationale was later a basis for the Court's decision in *Bond v. Floyd*.[16] Julian Bond had been excluded by the Georgia House of Representatives for making certain statements opposing the Vietnam War. Georgia did not argue that Bond's statements violated any laws, but contended that although such statements by a private person might be protected by the first amendment, the state may nevertheless apply a stricter standard to its legislators.[17] The Court rejected this contention:

> The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also *so they may be represented in governmental debates by the person they have elected to represent them.*[18]

When Adam Clayton Powell was elected to the Ninetieth Congress, it was the twelfth consecutive time that his constituents had chosen him.

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[12] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 292-93 (rev. ed. M. Farrand 1966) [hereinafter cited as Farrand], *quoted in* 395 U.S. at 541, n.76. At the same convention Hamilton stated: "[T]he true principle of a republic is, that the people should choose whom they please to govern them." Farrand 257, *quoted in* 395 U.S. at 540-41.

[13] Justice Douglas, concurring in *Powell*, stated in regard to the one man, one vote principle: "When that principle is followed and the electors choose a person who is repulsive to the Establishment in Congress, by what constitutional authority can that group of electors be disenfranchised?" 395 U.S. at 553 (concurring opinion).

[14] 376 U.S. 1 (1964). The complaint alleged that plaintiffs "were deprived of the full benefit of their right to vote," in violation of art. I, § 2, clause 1. *Id.* at 3.

[15] 376 U.S. at 17.

[16] 385 U.S. 116 (1966).

[17] *Id.* at 132-33.

[18] *Id.* at 136-37 (emphasis added).

In 1968 he was re-elected to the Ninety-First Congress.[19] The citizens of Harlem have consistently selected Powell despite the well-publicized allegations against him. In view of the principles stated in such cases as *Wesberry* and *Bond*, surely it follows that the power of the House to disenfranchise an entire congressional district in violation of the express terminology of the Constitution is reviewable by the Supreme Court.

But the Court passed over this ready-at-hand basis for disposition of Powell's claim to resolve the issue under the constitutional clause directly pertaining to qualifications for membership in the House of Representatives. In so doing, it elected to grapple once again with the doctrine of "political questions."[20] It was not until *Baker v. Carr*[21] that some illumination was finally cast upon the enigma of the doctrine of political questions. That case involved the apportionment of the Tennessee legislature. All such previous cases had been held "political" and, therefore, not justiciable.[22] In holding that cases involving reapportionment of legislative bodies were not political questions, Justice Brennan, speaking for the Court, reviewed much case law. His review revealed that "it is the relationship between the judiciary and the coordinate branches of the Federal Government [the separation of powers doctrine] . . . which gives rise to the 'political question.' "[23] He then ventured several factors by which a dispute could be tested for determining whether it was political in nature:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially

[19] This time the House fined him 25,000 dollars, but seated him. H.R. Res. No. 2, 91st Cong., 1st Sess., 115 CONG. REC. H21 (daily ed., January 3, 1969). This event brought forth a suggestion of mootness, but that defense was rejected by the Court in *Powell*. 395 U.S. at 495-500. See Justice Stewart's dissent, 395 U.S. at 559.

[20] *See generally*, A. BICKEL, THE LEAST DANGEROUS BRANCH 183-198 (1962); H. M. HART AND H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 192-209 (1953); Bickel, *The Passive Virtues*, foreword to *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925); Scharpf, *Judicial Review and the Political Question: A Fundamental Analysis*, 75 YALE L.J. 517 (1966); Tollett, *Political Questions and the Law*, 42 U. DET. L.J. 439 (1965); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Weston, *Political Questions*, 38 HARV. L. REV. 296 (1925).

[21] 369 U.S. 186 (1962).

[22] *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946).

[23] 369 U.S. 186, 210 (1962).

> discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
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> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.[24]

From this list two ideas emerge as dominant. First, when a constitutional power is specifically conferred upon a branch of government other than the judiciary the exercise of that power is non-reviewable. Second, if there is a possibility of divergent views between coordinate departments on a question, or resolution of a problem by one branch may express an embarrassing lack of respect due to another branch, then the matter is political and non-justiciable.

Although there is no precedent directly in point,[25] the principal federal cases prior to *Powell* touching on the subject of legislative exclusion seemed to reinforce the view that Congress has the sole authority to judge its members. The issue was generally considered political and non-justiciable.[26] In *Sevilla v. Elizalde*,[27] the Court of Appeals for the District of Columbia Circuit declared that the power to pass on the qualifications of legislators is "lodged exclusively in the legislative branch."[28] Similarly, in *Barry v. United States ex rel. Cunningham*,[29] the Supreme Court

[24] *Id.* at 217.

[25] "In our entire history, no case has been found where the judgment of either House has been overruled in a judicial proceeding." Curtis, *The Power of the House of Representatives to Judge the Qualifications of its Members*, 45 TEX. L. REV. 1199, 1204 (1967).

[26] *See* Powell v. McCormack, 266 F. Supp. 354, 356 (D.D.C. 1967).

[27] 112 F.2d 29 (D.C. Cir. 1940). This case involved a suit by a citizen of the Commonwealth of the Philippine Islands seeking a determination that the defendant did not possess the requisite qualifications for holding the office of Resident Commissioner of the Commonwealth to the United States. The court dismissed the complaint upon the grounds that it raised a political question over which the court had no jurisdiction and also that the court had no authority to pass upon the qualifications of a delegate from a territory.

[28] *Id.* at 38.

[29] 279 U.S. 597 (1929). *Barry*, upon which the respondents in *Powell* relied heavily, involved the power of the Senate to issue an arrest warrant to summon a witness to give testimony concerning a senatorial election.

declared that certain powers had been conferred upon the Houses of Congress that were not legislative, but were judicial in nature, and that among these judicial powers is that of judging the qualifications of members.[30] The Court said that a judgment in exercise of those powers is "beyond the authority of any other tribunal to review."[31] But in *Powell* the Court leaped over these apparent hurdles by ignoring *Sevilla* and distinguishing *Barry*.[32]

The respondents relied on *Sevilla* and *Barry* in contending that under article 1, section 5,[33] there was a "textually demonstrable constitutional commitment"[34] to the House to determine Powell's qualifications. They argued that the House, and the House alone, has power to judge who is qualified to be a member. The Court, to determine the merits of the respondents' arguments, was required to interpret the Constitution:

> If examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination might well be barred by the political question doctrine. On the other hand, if the Constitution gives the House power to judge only whether elected members possess the three standing qualifications set forth in the Constitution, further consideration would be necessary to determine whether any of the other formulations of the political question doctrine are inextricable from the case at bar.[35]

Stated differently, if the constitutionally enumerated qualifications are *minimum* standards for the House to judge its members, then judicial

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[30] *Id.* at 613.

[31] *Id.*

[32] *Barry* provides no support for respondents' argument that this case is not justiciable, however. First, in *Barry* the Court reached the merits of the controversy, thus indicating that actions allegedly taken pursuant to Art. I, § 5, are not automatically immune from judicial review. Second, the quoted statement is dictum; and, later in the same opinion, the Court noted that the Senate may exercise its power subject "to the restraints imposed by or found in the implications of the Constitution." Third, of course, the statement in *Barry* leaves open the particular question that must first be resolved in this case: the existence and scope of the textual commitment to the House to judge the qualifications of members.
395 U.S. at 519 n.40 (citation omitted).

[33] "Each House shall be the Judge of the Elections, Returns and Qualifications of its own members . . . ."

[34] 395 U.S. at 519. If any of the six tests formulated in *Baker* are met, the case may involve a political question and therefore be non-justiciable. Powell v. McCormack, 395 F.2d 577, 593 (D.C. Cir. 1968).

[35] 395 U.S. at 520-21.

review of its determination is a political question since the issue is textually committed to a coordinate political department. On the other hand, if those specified requirements are *maximum* standards, the issue has not been committed to a coordinate department and the extra-constitutional action of the House is subject to judicial scrutiny unless any other of *Baker's* formulations can be applied to the facts of the case.

The Court held that the standards were maximum: "[O]ur examination of the relevant historical materials leads us to the conclusion that . . . the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[36] Since article 1, section 5 is a "textually demonstrable commitment" to the House to judge only the qualifications expressly set forth in the Constitution, the " 'textual commitment' formulation of the political question doctrine does not bar federal courts from adjudicating petitioners' claims."[37] Adam Clayton Powell was duly elected and was not ineligible to serve under any provision of the Constitution; therefore the House was without power to exclude him from its membership.[38]

Since there are no cases interpreting the meaning of the phrase to "judge the qualifications of its members," the Court had to look to the records of the debates during the Constitutional Convention.[39] Early in the Convention, George Mason of Virginia had moved to include a property qualification for members of the legislature. The Convention adopted this proposal and instructed the Committee of Detail to draft such a qualification. The committee's report of August 6 provided that: "The Legislature . . . shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."[40]

The debate on this proposal is a great source of the Framers' view of the qualifications issue. James Madison stated that the proposal would vest

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[36] *Id.* at 522. The Court expressed no view on the issue of whether federal courts could review a factual determination by the House that a member did not meet one of the prescribed qualifications. *Id.* at 521, n.42.

[37] *Id.* at 548.

[38] *Id.* at 550.

[39] Much of the Court's discussion of the Convention proceedings is taken from C. WARREN, THE MAKING OF THE CONSTITUTION 418-26 (1926) [hereinafter cited as WARREN]. In his arguments before the Supreme Court, Powell's counsel relied heavily on Professor Warren's analysis.

[40] *Id.* at 418. *See generally,* Farrand 179.

> [a]n improper and dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution . . . . It was a power also, which might be made subservient to the views of one faction agst. another. Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of a weaker faction.[41]

It is significant that Madison aimed his argument not at the imposition of a property qualification per se, but at the delegation to the legislature of discretionary power to establish *any* qualifications.[42] Referring to the British Parliament's assumption of the power to regulate the qualifications of both electors and elected, Madison went on to note that "the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or Religious parties."[43]

The Convention obviously concurred with Madison's views, for both the proposal to give to Congress power to establish qualifications in general and the proposal for a property qualification were defeated.[44] It is within this context that on the same day (August 10, 1787) the Convention agreed to article 2, section 5 of the Constitution, which provided that "Each House shall be the judge of the . . . qualifications of its own members."[45]

One additional decision made that day is also important in determining the meaning of article 1, section 5. When the proposal to empower each House to *expel* its members was discussed, Madison observed that "the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies one faction might be dangerously abused."[46] He therefore moved that "with the concurrence of two-thirds" be inserted. The motion was approved. The Court in *Powell* considered this decision highly significant:

> [T]he Convention's decision to increase the vote required to expel, because that power was "too important to be exercised by a bare

[41] Farrand 249-50; WARREN 420.

[42] Chief Justice Warren also made note of this fact. 395 U.S. 534.

[43] J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 429 (A. Koch ed. 1966).

[44] WARREN 420-21.

[45] *Id.* at 419.

[46] J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 431 (A. Koch ed. 1966).

majority," while at the same time not similarly restricting the power to judge qualifications, is compelling evidence that they considered the latter already limited by the standing qualifications previously adopted.[47]

It seems only logical that if the Convention voted to require a two-thirds vote of a House to *expel* a member, it was not willing to allow either House to *exclude* a member-elect for any reason at all merely by a majority vote.[48]

Another source for examining the intent of the Framers is *The Federalist*,[49] a series of essays written for the express purpose of explaining the Constitution. Madison, for example, states in one of his papers: "The qualifications of the elected being less carefully and properly defined by the State Constitutions, and being at the same time more susceptible of uniformity, have been very properly considered and regulated by the Convention."[50] Hamilton expressed similar thoughts by saying, "[t]he qualifications of the persons who may choose or be chosen . . . are defined and fixed in the constitution; and are unalterable by the legislature."[51] Such authorities are persuasive.[52]

There are, of course, arguments that article 1, section 2 establishes only *minimum* standards. One such argument, relying on a change by the Committee of Style in the form of article 1, section 2, was proposed by the respondents in *Powell*, but rejected by the Court.[53] Another argument is that in addition to the age, citizenship, and inhabitancy qualifications of article I, section 2, there are other constitutional disqualifications;[54] thus this provision cannot provide maximum congressional

[47] 395 U.S. at 536.

[48] This argument is precisely that of Professor Warren. WARREN 424.

[49] THE FEDERALIST (J. Cooke ed. 1961).

[50] THE FEDERALIST No. 51, at 354 (J. Cooke ed. 1961) (J. Madison).

[51] THE FEDERALIST No. 60, at 409 (J. Cooke ed. 1961) (A. Hamilton).

[52] Professor Warren has concluded:

> As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply . . . . The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications.

WARREN 421-22.

[53] 395 U.S. at 525-26. The respondents argued that the change made by the Committee of Style in Article I, § 2 from positive statements of qualifications to the present negative form evidenced a design to give Congress the power to deny a seat if it deeemed one "unfit" for reasons other than the meeting of the enumerated requirements. *Id.*

[54] Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. PUB. LAW 103 (1968). First, any person convicted after im-

standards. But this argument, far from rebutting the theory of express qualifications, actually strengthens it. For if the Framers saw fit to list qualifications for office in the Constitution, they must have intended to preclude the addition of any others by the Houses of Congress.

Having decided that the issue in *Powell* was not textually committed to another branch of government, the Court still had to resolve other considerations. The respondents contended as an alternative theory that the case presented a political question under the *Baker* formulations because judicial resolution of Powell's claim would produce the "potentiality of embarrassment" from a confrontation between equal branches of the federal government.[55] The Court also had to overcome the suggestion that a determination in his favor would express a "lack of the respect due" a coordinate department.[56] But the Constitution is the "supreme Law of the Land"[57] and it is the responsibility of the Supreme Court to act as the ultimate interpreter of this document.[58] As stated in *Cooper v. Aaron*:[59]

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of

peachment by the Senate is disqualified not only from serving in Congress, but also may not "hold and enjoy any Office, of honor, Trust or Profit under the United States." U.S. CONST. art. I, § 3.

A second disqualification is found in article I, § 6: members of Congress may not hold any other "office under the United States."

The guaranty clause of article IV, § 4 points to another disqualification. This provision guarantees "every State in this Union a Republican Form of Government." In Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849), the Court interpreted this article to mean that Congress has the unreviewable power to decide what government is the established one in a state. If Congress can acknowledge that a state has a republican government and thus accept its representatives, it must also have the authority to disqualify Congressmen elected in a state not having a republican form of government. Dionisopoulous *supra*, at 114.

An additional provision pertaining to qualifications is article VI, clause 3, requiring that all public officials, national and state, "shall be bound by oath or Affirmation, to support this Constitution . . . ." This Provision was recently interpreted to mean that a "legislator . . . can be required to swear to support the Constitution of the United States *as a condition of holding office.* Bond v. Floyd, 385 U.S. 116, 132 (1966) (dictum) (emphasis added).

[55] 395 U.S. at 548.

[56] *Id.*

[57] U.S. CONST. art. VI, § 2.

[58] Baker v. Carr, 369 U.S. 186, 211 (1962).

[59] 358 U.S. 1 (1958).

> *Marbury v. Madison*, . . . that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our Constitutional system.[60]

Determination of Powell's right to be seated by the House thus but required the Court to perform its duty as ultimate interpreter of the Constitution. It is not unusual for the federal courts to interpret the Constitution in a manner at variance with the construction given by another branch. Such a division occurs whenever congressional acts are declared unconstitutional. Any conflict between the branches of government that such an adjudication may cause cannot justify the courts' avoiding their constitutional duties.[61]

The major impact of *Powell* is its effect on the political question doctrine. The doctrine has, at the very least, been seriously undermined by the holding in *Powell*. The formulations in *Baker* relating to the potential embarrassment or lack of respect of coordinate branches of government must be considered as having been read out of the doctrine. If the Supreme Court has the power, indeed the mandate, to hear all questions involving constitutional interpretation, then these bases of the political question doctrine are no longer viable; judicial review of constitutional construction of another branch of the government is, by its very nature, an intrusion upon the traditional concept of separation of powers.

Although the potential embarrassment of a coordinate branch has been eliminated by *Powell* as a test for political questions, the textual commitment concept remains. The Court in *Powell* did not find a textual commitment; however, certain powers do seem textually committed exclusively to a branch of government others than the judiciary,[62] and in such cases determinations by that branch would present non-justiciable political questions.

It is perhaps significant that the Court was unwilling to speculate what the result might have been had Powell been expelled from the House

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[60] *Id.* at 18.

[61] 395 U.S. at 549.

[62] For example, there can be little doubt that the powers given Congress by Article I, § 8 are exclusively reserved to the legislature. In addition, Article I in §§ 3 & 4 gives Congress, and not the courts, the power to impeach and to try impeachments.

rather than excluded.[63] Whether the authority of the House under article 1, section 5 to expel a member "with the Concurrence of two-thirds" constitutes an unreviewable textual commitment remains to be answered. Yet surely a legislative body has the authority to police the conduct of its own members. To hold otherwise is to conclude that it is at the mercy of its unscrupulous or disruptive legislators.

The specific holding of *Powell*—that a duly elected legislator cannot be excluded if he meets the constitutionally specified requirements—is of little significance in the day-to-day practice of law. Its real importance to the practitioner is in the partial collapse of the political-question doctrine as an aid to a policy of judicial self-restraint. It would seem that *Powell* has provided authority for federal courts to hear important constitutional issues previously held to be non-justiciable.

NEILL HOWARD FLEISHMAN

Criminal Procedure—Juries in the Juvenile Justice System?

In re Gault[1] indicated in dictum that a juvenile hearing must meet the basic requirements of due process.[2] *Duncan v. Louisiana*[3] held that trial by jury in non-petty criminal cases is a basic requirement of due process. The logical completion of the syllogism is: A juvenile hearing must involve a jury if the youth's offense is not petty or his term

[63] 395 U.S. at 508. The Court also expressed no view on what, if any, limitation may exist on Congress' expulsion powers. *Id.* at 507 n.27.

[1] 387 U.S. 1 (1967).

[2] The Court in *Gault* said that in Kent v. United States, 383 U.S. 541 (1966), [w]e announced . . . that while "We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; . . . we do hold that the hearing must measure up to the essentials of due process and fair treatment." We reiterate that view, here in connection with a juvenile court adjudication of "delinquency" . . . .

387 U.S. at 30 (footnote omitted). The Court in *Gault* was silent about trial by jury: Duncan v. Louisiana, 391 U.S. 145 (1968), had not yet been decided, and the facts might not have presented the issue in any event since Gerald Gault's offense if committed by an adult could not have brought a sentence of longer than two months. *Id.* at 8-9. The specific holding of *Gault* went only so far as to require notice of the charges, *id.* at 33-34; the right to be represented by counsel or by appointed counsel in cases of poverty, *id.* at 41; the privilege to remain silent, *id.* at 55; and the right to confront and cross-examine witnesses, *id.* at 56-57.

[3] 391 U.S. 145 (1968). *See also* Bloom v. Illinois, 391 U.S. 194 (1968).