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Constitutional Law--Judicial Review of Congressional Membership Exclusion

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CONCLUSION

It appears that a reservist does not have rights protected to the same degree by the Constitution as do his fellow citizens who are civilians. Likewise, his access to the courts for review of administrative proceedings appears more constricted than his civilian counterpart. The terms of the very agreement he signed that made him a member of the reserves are subject to modification by Congress in the exercise of some paramount sovereign power. These impairments of liberty are adequately justified by the courts; indeed there are few citizens who would question the need of the military for discipline at the expense of some individual liberties.

Problems sometimes arise when the soldier is also a civilian, or perhaps, when he is neither soldier nor civilian, but in limbo between the two worlds and forced to live in both. For example, he is subject to the same rigid discipline as a full-time soldier, but only for a few days each month. The effects of this discipline, however, often persist beyond the end of his drill (a man with short hair on the weekend rarely has long hair the following week, though he has the same freedom to wear long hair then as any civilian).

Problems involving reservists multiplied with the Viet Nam War; after its end we shall see a corresponding reduction in litigation. These problems have helped define more clearly the rights and obligations of reservists.

William Robert Wooton

Constitutional Law — Judicial Review of Congressional Membership Exclusion

Adam Clayton Powell, Jr. was duly elected from the Eighteenth Congressional District of New York to serve in the House of Representatives for the Ninetieth Congress. During the Eighty-ninth Congress, a special subcommittee of the House had reported that the Committee on Education and Labor, of which Powell was chairman, had deceived the House authorities as to travel expenses and, additionally, that there was strong evidence that Powell had directed illegal salary payments to his wife. Consequently, when the Ninetieth Congress organized in January, 1967, the oath was not administered to Powell. On February 23, 1967, a select committee of the Ninetieth Congress issued a report, finding

that Powell met the standing qualifications of the Constitution,¹ but that he had asserted unwarranted privileges and immunities from the processes of the New York courts and had wrongfully used House funds. On March 1, 1967, the House, purporting to act under constitutional authority,² excluded Powell by a vote of 307-116. Powell then filed suit in federal district court, claiming that the House could exclude him only if he failed to meet the standing constitutional qualifications of age, citizenship and residency, all of which the House specifically found that Powell met. The district court dismissed the petitioners' complaint for want of subject matter jurisdiction and the court of appeals affirmed in part, reversed in part. The Supreme Court granted certiorari. *Held*, reversed. The Court declared that the House exceeded its authority in the exclusion of Powell. In response to petitioners' request for additional equitable relief, including mandamus for back pay, the Court reversed and remanded. *Powell v. McCormack*, 395 U.S. 486 (1969).

The *Powell* case presented the Court with at least five major questions. First, was Powell's claim rendered moot by his subsequent election to and seating in the Ninety-first Congress? Second, were the respondents immune from judicial review by virtue of the speech and debate clause of the Constitution? Third, was the House authority to exclude in its authority to expel? Fourth, did the Court lack subject matter jurisdiction? Fifth, was the case non-justiciable as a "political question"?³ The Court considered each of these questions at length and answered all of them in the negative. The scope of this comment, however, is limited to the Court's discussion of the political question doctrine.

Respondents maintained that even if the case were otherwise justiciable, it presented only a political question,⁴ which, by well-established principle, federal courts will not adjudicate.⁵ Writing

¹ U.S. CONST. art. I, § 2 provides as follows: "No Person shall be a Representative who shall not have attained to the age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

² U.S. CONST. art. I § 5 provides as follows: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members. . . ."

³ *Powell v. McCormack*, 395 U.S. 486, 495 (1969).

⁴ *Id.* at 518.

⁵ In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), the first important United States case to apply the doctrine of non-intervention with political questions, the Court declined to determine which of two Rhode Island governments was the legitimate one. Over a half century later, the Court declared that the question of who is the *de facto* or *de jure* sovereign of a territory is a political question, the legislative or executive determination of which binds the judges.

for the Court, Chief Justice Warren relied on the legislative apportionment case of *Baker v. Carr*⁶ for a functional definition of a "political question".⁷ In the *Baker* majority opinion, Mr. Justice Brennan had noted that "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."⁸ The *Baker* Court then specified that a question was "political" when there existed "a textually demonstrable constitutional commitment of the issue to a coordinate political department."⁹ This definition of a political question primarily bars judicial review of the actions of a coordinate branch of government. Mr. Justice Brennan rejected the traditional categorization¹⁰ of political question issues and called for a determination of justiciability on an *ad hoc* basis.¹¹

In the *Powell* case, the respondents argued that the case presented a political question because there is a textually demonstrable commitment to the House of Representatives of the "adjudicatory power" to determine Powell's qualifications.¹² The Court was, therefore, called upon to determine for the first time the scope of

Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). Later, in *Colegrove v. Green*, 328 U.S. 549 (1946), petitioners alleged that the congressional districts created by Illinois law were malapportioned under the fourteenth amendment. Mr. Justice Frankfurter, writing for the majority, declared that the issue was of a "peculiarly political nature and therefore not meet for judicial determination." *Id.* at 552. For practical purposes, *Colegrove* was overruled by *Baker v. Carr*, 369 U.S. 186 (1962). However, Professor Bickel argues that *Baker v. Carr* does not deny the "essence" of *Colegrove*, because *Colegrove* did not hold that the Court may never interfere with the electoral process. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L. J. 39 (1962).

⁶ 369 U.S. 186 (1962).

⁷ 395 U.S. at 518-9.

⁸ 369 U.S. at 210.

⁹ *Id.* at 217. A political question was also deemed to exist where there was present "a lack of judicially 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 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." *Id.*

¹⁰ The general subjects which the courts have traditionally deemed "political" are: negotiations violation and termination of treaties; beginning and ending of wars; admission and deportation of aliens; jurisdiction over territories; recognition of states and governments; war and measures short of war; status of Indian tribes; and the guaranty of republican form of government. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924).

¹¹ 369 U.S. at 210-11.

¹² 395 U.S. at 519. Respondents based their claim on Article I, section 5 of the Constitution. See note 1, *supra*.

the constitutional commitment to Congress of the power to judge the qualifications of its own members.¹³

Chief Justice Warren relied on historical precedent, which he divided into three basic periods,¹⁴ in order to support the Court's decision that both Houses of Congress are without authority to *exclude* any duly elected person who meets the constitutional qualifications for membership.¹⁵ The Chief Justice concluded that the pre-Constitutional Convention cases of Parliamentary exclusion, including, notably, the Robert Walpole case, "demonstrate that a member could be excluded if he had first been expelled."¹⁶ Nevertheless, over a century later, the exclusion of John Wilkes from the House of Commons, contemporaneous with the American Revolution, had a profound effect on the Founding Fathers.¹⁷ Wilkes was expelled from Commons for seditious libel in 1763, and, although re-elected five times, was denied his seat until 1782.¹⁸ Chief Justice Warren agreed with the petitioners' conclusion that the Founding Fathers manifested their intention to deny Congress the power to alter the constitutional qualification for membership.¹⁹ Accordingly, for nearly one hundred years, Congress "limited its power to judge the qualifications of its members to those enumerated in the Constitution."²⁰

¹³ The Court had applied the *Baker* test in *Bond v. Floyd*, 385 U.S. 116 (1966), and concluded that the judiciary has the power to review a state legislature's exclusion of a duly elected member. *Id.* at 131. Julian Bond was elected to the Georgia House of Representatives in 1965 and subsequently endorsed a Student Coordinating Committee statement against the government's Vietnam policy. The House refused to seat him on the grounds that the statements aided the enemy, violated the selective service laws, discredited the House and were inconsistent with the oath of office required of House members. Bond met the constitutional requirements of age, citizenship and residency (GA. CONST. art. III, § 6), but the district court held that Bond had not been denied due process and that the House had a rational basis for excluding him. Furthermore, the district court stated that to grant Bond relief would be to "crash through a political thicket into a political quicksand." *Powell v. McCormack*, 266 F. Supp. 354, 359 (D.D.C. 1967). The Supreme Court reversed the district court and established judicial review of the exclusionary action of a *state legislature*. However, the political question doctrine still remained a potential barrier to review of *congressional* decision.

¹⁴ 395 U.S. at 522-48. Chief Justice Warren's periods are "the pre-convention precedents", "convention debates" and "post-ratification". *Id.*

¹⁵ *Id.* at 522. The Constitution specifically empowers both Houses to *expel* a member by a two-thirds vote. U.S. CONST. art. I, § 5.

¹⁶ *Id.* at 527.

¹⁷ *Id.* at 530.

¹⁸ *Id.* at 527-8.

¹⁹ *Id.* at 532. Note specifically the pre-convention & State convention debates.

²⁰ *Id.* at 542.

In 1807 the House of Representatives seated William McCreery, who met the constitutional qualifications for membership but did not meet additional residency requirements imposed by the state of Maryland. The House election committee declared that Congress cannot "prescribe" the qualifications of its members, but, rather, it can only "judge" members in light of the Constitution.²¹ Subsequent congressional practice has been "erratic", and some members-elect meeting the constitutional requirements have been excluded. However, Chief Justice Warren pointed out that even if the criteria for exclusion had been more consistent, their precedential value would nevertheless be quite limited, since an act is not rendered any less unconstitutional merely because it is repeated at a later date.²² History, therefore, confirms the conclusion of the *Powell* court that "the House is without power to exclude any member-elect who meets the Constitutional qualifications for membership."²³ Furthermore, even had the intent of the Framers been less apparent, the Court would nevertheless "have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude member-elect."²⁴

As a pragmatic technique of avoiding judicial review of potentially embarrassing issues, the political question doctrine historically has been highly effective. Underlying the Court's understandable reluctance to adjudicate thorny political questions is the judiciary's obvious lack of the physical power to enforce its decisions. Regardless of the strength of the theoretical foundations of a particular course of judicial action, as a practical matter, the Court cannot recklessly risk having its decisions ignored by the other branches.

It is arguable, however, that *Marbury v. Madison*²⁵ established the principle that "it is emphatically the province and duty of the

²¹ *Id.* at 543.

²² *Id.* at 546-7.

²³ *Id.* at 547. *But see The Supreme Court, 1968 Term, 83 HARV. L. REV.* 62, 71-75 (1969).

²⁴ *Id.*

²⁵ 5 U.S. (1 Cranch) 137 (1803). Two of the three issues which Professor Van Alstyne has pinpointed in *Marbury v. Madison* could easily be transposed onto the issues of *Powell v. McCormack*. "(1) Was the Secretary of State answerable in court for the conduct of his office? (2) Could the Court countermand a presidential decision respecting a subordinate appointment? (3) By what means could any such judicial decision possibly be enforced?" Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 5 (1969). In the *Powell* case, the issues could be (1) Was the House answerable to the Court for the conduct of its office? (2) Could the Court countermand a congressional decision regarding legislative exclusion?

judicial department to say what the law is,"²⁶ and that there is a qualitative difference between the Court's interpretation of the law and its usurpation of a function of a coordinate branch of government.²⁷ In the *Powell* case, the Court was called upon to grant declaratory relief²⁸ — to declare that Powell had unconstitutionally been deprived of his seat in the House of Representatives. It was not called upon actually to seat Powell. This distinction, although perhaps difficult to ascertain, is the essential distinction between the functions of the judiciary and those of the other branches of government. Viewed in this manner, the political barriers of the *Baker* definition, notably a commitment to a coordinate branch, would become immaterial.²⁹

The vagueness of Article I, section 5 of the United States Constitution has led to considerable disagreement among legal scholars as to the power of judicial review over the congressional determination of the qualifications of its members.³⁰ The Constitution does not declare that Congress is to be the *sole* judge of the qualifications of

²⁶ 5 U.S. (1 Cranch) 177 (1803) (emphasis added).

²⁷ Professor Finkelstein, who long ago charged the Court with a pragmatic application of the political question doctrine, has suggested that the doctrine of separation of powers which was employed in the *Baker* and *Powell* decision, is useless as a principle and even as a guide for the decision of cases. Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344 (1924); Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 223 (1925). He argued that the courts are called upon to determine by whom certain powers shall be exercised and if the powers thus possessed have been validly exercised. The determination of the validity of an act is a different function from the actual performance of the act: "In the one case we are seeking to ascertain upon who devolves the duty of the particular service; in the other case we are merely seeking to determine whether the Constitution has been violated by anything done or attempted by either an executive official or the legislature." *Id.*

²⁸ Petitioner's request for mandamus for back pay was remanded to the district court. 395 U.S. at 550.

²⁹ 369 U.S. at 217.

³⁰ Judge Learned Hand has noted that the text of the Constitution at its emergence from the Constitutional Convention in 1787 gave no ground for inferring that the decisions of the Supreme Court and, *a fortiori* of the lower courts, were to be authoritative vis-a-vis the legislature and executive. On the other hand, without some arbiter of who was to make the final decision, the entire system would have collapsed; and it has been an accepted rule in the interpretation of documents to interpolate into the text such provisions as are essential to prevent the defeat of the "venture at hand". L. Hand, *THE BILL OF RIGHTS* 14, 15, 27, 29 (1958). This power, Hand concluded, "is not a logical deduction from the structure of the Constitution, but only a practical condition upon its application." *Id.* at 15. For the same approach, see Bickel, *Foreword: the Passive Virtues*, 75 HARV. L. REV. 40 (1961).

Professor Wechsler, disagreeing with Judge Hand, concluded that what is crucial is "not the nature of the question but the nature of the answer that may be validly given by the courts", and that the power of Congress to judge the

its members,³¹ and there is no apparent textual reason why Article I, section 5 prevents judicial intervention. The ambiguous language precludes an effective denial of judicial review on the basis of textual commitment to Congress, as the Court makes evident in the *Powell* decision.³² Even the commitment of a question to a coordinate branch of government would not necessarily render a question "political" and therefore nonjusticiable.³³ The *Powell* case seems to establish that subject matter or question alone, even when another department or branch is primarily concerned with it, does not forestall the courts from deciding the matter in question.³⁴ Nor does the "potentiality of embarrassment" from coordinate branches pose an insurmountable barrier to judicial review.³⁵

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qualifications of its members is beyond judicial review. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

Professor Scharpf has viewed the political question doctrine as a discretionary technique of avoidance, the effect of which is quite different from that of avoidance on jurisdictional or procedural grounds. Scharpf, *Judicial Review & the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 536-37 (1966). Grants of power pursuant to Article I, section 5 are essentially adjudicative. Scharpf concluded. Therefore, it is reasonable to construe the authorization of these powers to Congress as an explicit exception to the Article III grant of judicial power. *Id.* at 539-40.

Mr. Ralph Bean had concluded in a recent number of this Review that *Baker v. Carr* and subsequent decisions have led to the demise of the three general principles underlying the political question doctrine, namely, the Court's non-interference with a matter committed to another branch, the lack of judicially manageable standards and "judicial non-intervention where the organization of a government is the basis of the complaint." Bean, *The Supreme Court and the Political Question: Affirmation or Abdication?*, 71 W. VA. L. REV. 97, 130 (1969). "The short of it is that respect for federalism and the principle of separation of powers as between the federal judiciary and the states have been subordinated to concepts of individual liberty and equality for which the Court claims to have no difficulty discovering standards." *Id.* at 131.

³¹ U.S. CONST. art. I, § 5. The Constitution does grant the Senate the sole power to impeach.

³² 395 U.S. at 521.

³³ *Wesberry v. Sanders*, 376 U.S. 1 (1963). In his dissenting opinion, Mr. Justice Harlan insisted that Congress has exclusive supervisory powers under U.S. CONST. art. I, § 2, 4, 5. *Id.* at 23. See also Judge Tuttle's district court dissent in *Wesberry v. Sanders*, 206 F. Supp. 276, 285 (1962), which the Supreme Court noted approvingly in *Wesberry*.

³⁴ See Tollett, *Political Questions and the Law*, 42 U. DET. L. J. 439, 468-70 (1965); cf. *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62 (1969).

³⁵ 369 U.S. at 217. The philosophical trend of the *Baker* and *Powell* decisions was anticipated by Professor Weston in 1925. "[T]he line between judicial any political questions in given constitutional situation is the line drawn by constitutional delegation and none other. The actual delegation as it has occurred has depended upon men's current beliefs as to what ought to be delegated, upon their political and social theories and their notions of expediency." Weston, *Political Questions*,³⁵ HARV. L. REV. 296, 331 (1925).