University of Miami Law Review

Volume 24 | Number 2 Article 8

1-1-1970

Adam Clayton Powell's Exclusion from Congress: Increased Judicial Review of Legislative Action

F. Lawrence Matthews

CASES NOTED

ADAM CLAYTON POWELL'S EXCLUSION FROM CONGRESS: INCREASED JUDICIAL REVIEW OF LEGISLATIVE ACTION

The Ninetieth Congress refused to let Adam Clayton Powell be seated because of his misconduct during the period of the Eighty-ninth Congress.[1] Powell challenged this congressional act by filing suit in the federal courts seeking, *inter alia*, a declaratory judgment that his exclusion was unconstitutional; arguing that the power of a house of Congress to judge the qualifications of its members[2] was limited to the criteria of age, citizenship, and residency of the member-elect.[3] The district court dismissed the complaint for lack of subject matter jurisdiction.[4] The court of appeals affirmed, finding subject matter jurisdiction, but declaring the case non justiciable.[5] The Supreme Court, speaking through Chief Justice Warren, found the case justiciable and *held*: Congress has no power to exclude a duly elected member-elect who satisfies the three constitutional requirements of age, citizenship, and residency. *Powell v. McCormack*, 395 U.S. 486 (1969).[6]

The Court first determined that this was an exclusion and not an expulsion case. This is not a minor distinction, as the court of appeals had thought,[7] since "it might be easier to bar admission than to expel one already seated."[8] An expulsion requires a two-thirds majority, while an exclusion needs only a simple majority.[9] The nature of the proceeding of the House was made clear by the Speaker:

> Mr. Celler, chairman of the Select Committee, then posed a parliamentary inquiry to determine whether a two-thirds vote was necessary to pass the resolution if so amended "in the sense that it might amount to an expulsion." The Speaker replied that

1. 113 CONG. REC. H191856-57 (daily ed. Mar. 1, 1967).

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

3. "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." U.S. CONST. art. I, § 2, cl. 2.

4. Powell v. McCormack, 266 F. Supp. 354(D.D.C. 1967).

5. Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968).

6. Hereinafter cited as POWELL.

7. Therefore, success for Mr. Powell on the merits would mean that the district court must admonish the House that it is form, not substance, that should govern in great affairs, and accordingly command the House members to act out a charade. Powell v. McCormack, 395 F.2d 577, 607 (D.C. Cir. 1968) (concurring opinion of McGowan, J.).

8. POWELL at 553 (concurring opinion of Mr. Justice Douglas).

9. *Id.*

> "action by a majority vote would be in accordance with the rules. [Citation omitted.][10]

The respondents tried valiantly to show that the House of Representatives possessed the inherent constitutional power to judge its member's qualifications and suitability for office. Their argument was that article I, section 5 of the Constitution, "Each House shall be the *Judge* of the Elections, Returns and *Qualifications* of its own Members" (emphasis added), was an expression of the Framer's intent to continue the English Parliamentary practice of letting the House of Commons judge the qualifications of its members in addition to the specific requirements of age, and citizenship.[11] The Court was not persuaded and held that the specific requirements listed in article I, section 2 of the Constitution, *i.e.*, age, citizenship and residency, were the only qualifications for membership.[12]

> A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose who they please to govern them." 2 Elliot's Debates 257. As Madison pointed out at the Constitutional convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.[13]

The problem of qualifications for Congress arose during the Constitutional Convention, and the failure of the Convention to make property ownership a requirement led Professor Charles Warren, whose work was relied upon by the petitioner, to conclude that age, citizenship- and residency were the only requirements that the Framers intended.[14] His conclusion was not uniformly accepted,[15] but the controversy has now been laid to academic rest by the *Powell* decision.

The Supreme Court did not base its conclusion on the contstitutional debates alone but examined the English and early American precedents,

---

10. *Id.* at 508. That the final vote received a two-thirds majority was unimportant when the crucial amendment passed by only a simple majority.

11. Brief for Respondents at 22, Powell v. McCormack, 395 U.S. 486 (1969).

12. POWELL at 550.

13. *Id.* at 547.

14. Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members other than those qualifications established by the Constitution itself, viz., age, citizenship, and residence.

C. WARREN, THE MAKING OF THE CONSTITUTION 420-21 (1928).

15. There is nothing new about the arguments in the Powell case that a member-elect may only be judged on the grounds of his age, citizenship and inhabitancy. They have been reiterated for more than a century. However, they are neither sound nor likely to prevail, for the precedents of the past 100 years reveal that majority support is with a . . . justification in more than three constitutional qualifications. . . .

Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. PUB. LAW 103 (1968). What Professor Dionisopoulos overlooks, however, is that previous unconstitutional conduct cannot justify present unconstitutional conduct, and none of the "cases" he cites were litigated before the Supreme Court.

especially the case of John Wilkes,[16] and post-ratification examples of legislative exclusion.[17]

When our Constitution was framed, it created a new form of government, radically different from the English Parliament.[18] The Framers of the Constitution did not intend to follow the English example of governmental organization. The primary drafter of the Constitution, James Madison, clearly stated his intention not to be bound by the English experience in the legislature's power to control qualifications:

> The British Parliament possessed the power of regulating both the electors and the elected; *and 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 the views of political or Religious Parties.[19]

That the national legislature should be immune from the pressures of the political party or group having control is thoroughly consistent with Madison's basic philosophy that the purpose of the federal form of government is to minimize the effect of "factions."[20]

The decision on the merits of the *Powell* case seems sound and well-supported by the intent of the Framers of the Constitution.[21] Litigation on the issue of congressional power over qualifications is scarce, however, and the importance of the *Powell* case lies elsewhere.

This case should not be considered a "good" case or a "bad" case (depending on one's political viewpoint) because a certain Negro con-

16. POWELL at 527-31. *See* Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES 242-47 (1941).

17. POWELL at 541-47.

18. The English Parliament is a national, unitary government, whose members can campaign from any district. It is the only government of the country. Until the division of Parliament into the House of Lords and the House of Commons, the one legislative body also had the judicial function of being the highest appeals court, and was called the High Court of Parliament. *Cf.* Kilbourn v. Thompson, 103 U.S. 168 (1880). Our government, on the other hand is a *federal* republic, where representatives of several sovereign states meet to pass laws for their mutual benefit. It is frequntly asserted that the federal courts are ones of limited jurisdiction; the same is true of the federal legislature. If it were otherwise, none of the controversies over the "supremacy clause" of the Constitution would ever have been litigated.

19. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (A. KOCH ED.) 428 (1966) (emphasis added).

20. *See* THE FEDERALIST No. 10 (J. Madison).

21. The *Powell* decision would also be persuasive authority that a house of Congress could not expel a person for conduct occurring before the beginning of the current term. Conduct occurring during a previous term will presumably have been approved by the voters of that jurisdiction, and according to *Powell*, their vote is the final word. An exception might be conduct during a prior term which does not become known in time for the voters to express their approval or disapproval at the ballot box. Previous nonlitigated congressional cases have reached this conclusion. *See* POWELL at 508-09. The same might be said of any instance of congressional discipline of members for conduct before the current term by fine or other measures short of expulsion. The consequence of this decision may be that any effective disciplining of members will be confined to the current term of Congress. Certainly, the obvious effect of *Powell* is that any future case concerning congressional discipline will be litigated in the federal courts.

gressman received judicial relief, or because the principle of "strict construction" was followed.[22] The immediate result of this case will, in the long run, be unimportant. What is of great importance is the reasoning used, and the changes rendered in the law in order to reach that result. Professor Herbert Wechsler, a leading scholar of constitutional law, stresses this point in his approach to the judicial process:

> The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law. If he may know he disapproves of a decision when all he knows is that it has sustained a claim put forward by a labor union or a taxpayer, a Negro or a seggregationist, a corporation or a Communist—he acquiesces in the proposition that a man of different sympathy but equal information may no less properly conclude that he approves.[23]

The remaining sections of this note will discuss the areas of the law where major changes were made to enable the Court to reach the result discussed above: declaratory judgment jurisdiction; justiciability of political questions; and the immunity of the speech or debate clause of the Constitution.

The most important change made by *Powell* in declaratory judgment jurisdiction is the definition of a moot question.[24] Professor Wright states that the purpose of declaratory judgments

> is to provide a means by which rights and obligations may be adjudicated in cases involving an actual controversy that *has not reached* the stage at which either party may seek a coercive remedy, or in which the party entitled to it fails to invoke it.[25]

In other words, it is basically a preventative remedy which is used to declare rights before actual damages accrue and thus prevent the accrual of such damages.[26] Cases rarely have a single issue, and the problem is usually whether the "mootness" of one issue will prevent adjudication of the other issues.[27]

---

22. "Had the intent of the Framers emerged from these materials with less clarity we would nevertheless have been compelled to resolve any ambiguity in favor of a *narrow* construction of the scope of Congress' power to exclude members-elect." (emphasis added). POWELL at 547.

23. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959).

24. It remains axiomatic that courts should not decide moot questions. Fowler v. United States, 258 F. Supp. 638, 646 (C.D. Cal. 1966).

25. 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1262 at 247 (C. Wright ed. 1958) (emphasis added).

26. Clearly it would not be available where an actual controversy was lacking, Golden v. Zwickler, 394 U.S. 103 (1969), but it is not necessary to decide whether other relief is available before rendering a declaratory judgment. Baker v. Carr, 369 U.S. 186, 197-98 (1962). *See also* Zwickler v. Koota, 389 U.S. 241, 252 (1967).

27. Declaratory judgments may be used in cases where the damage has already been

The issue of mootness in *Powell* was first raised before the Supreme Court because during the period between the decision of the court of appeals and the decision of the Supreme Court, the Ninetieth Congress ended and the Ninety-first Congress began. Representative Powell, having been reelected, was seated by the Ninety-first Congress.[28] The respondents argued that (a) since Powell was already seated, injunctive relief was unnecessary to give him a seat in Congress; and (b) in any event, the Ninetieth Congress had been terminated thus making the question moot because relief could not be granted against a body no longer in existence.[29] Powell argued that when the Ninety-first Congress seated him, the fine it levied against him and its stripping him of his seniority "continued" the unconstitutional acts of the Ninetieth Congress, thus keeping the controversy "alive" and not "moot."[30] The Supreme Court, while not accepting the respondents' argument, did not agree with the petitioner either,[31] and the Court's conclusion that Powell's claim for backpay remained viable even though he was seated by the Ninety-first Congress redefined the meaning of mootness.

Until *Powell*, the leading case on mootness in an action for a declaratory judgment was *United Public Workers of America (C.I.O.) v. Mitchell*.[32] The Supreme Court declared the issue moot as to some of the petitioners and live as to another and then decided the merits of the argument of the petitioner to whom the case was live. This led Professor Moore to conclude that the issue had also been decided for those whose claims had been mooted.[33]

This interpretation of *Mitchell* may have led the Supreme Court in *Powell* to cite *Mitchell* for the proposition that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy."[34] This is not accurate, however, because in *Mitchell* the question was the mootness

done, and where that damage is of a continuing nature and is susceptible of judicial correction. Carafas v. LaVallee, 391 U.S. 234, 237 (1968). It may also be used when the issue is mooted by the voluntary action of one of the parties. Grey v. Sanders, 372 U.S. 368, 375-76 (1963).

28. H.R. Rep. N. 2, 91st Cong., 1st Sess. 1, 115 CONG. REC. H21 (daily ed. Jan. 3, 1969).

29. Respondents' Memorandum Suggesting That This Action Should Be Dismissed As Moot at 2, Powell v. McCormack, 395 U.S. 486 (1969).

30. Memorandum for Petitioners In Opposition to Respondents' Memorandum Suggesting That This Action Should Be Dismissed As Moot at 3, Powell v. McCormack, 395 U.S. 486 (1969).

31. POWELL at 495-500.

32. 330 U.S. 75 (1947). In that case several government workers attacked the constitutionality of the Hatch Act which prohibited political activity by civil service workers. Of the group, only one had actually engaged in active political work and was in danger of losing his job. The others only wished to so act and were seeking a declaratory judgment that would enable them to actively work in a specific political compaign. By the time the case reached the Supreme Court, the election was over and the Supreme Court declared the action moot as to the petitioners who wanted to work in the campaign, but had not done so. Irrespective of the Court's action, they could not work in a campaign which was finished.

33. 6A J. MOORE, FEDERAL PRACTICE § 57.13 (2d ed. 1966).

34. POWELL at 497, *citing* United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75 (1947).

of *one* issue in relation to several different petitioners, and in *Powell*, the question was the mootness of one of *several* issues in relation to one petitioner. The Supreme Court concluded "that Powell's claim for back salary remains viable even though he has been seated in the 91st Congress and [we] thus find it unnecessary to determine whether the other issues have become moot."[35] The result of *Powell*, then, is that so long as one of the issues remains "live," it is unnecessary to determine the mootness of the others. [36]

Until *Powell*, this was not the law. Instead, in a case with several issues, the courts looked to see if there was a controlling issue. If there was, and it became moot between trial and appellate review, the appeal would be dismissed.[37]

The Supreme Court had previously considered this issue, although neither party raised it in the *Powell* case, in *Atherton Mills v. Johnston*.[38] Johnston sued in federal court, challenging the constitutionality of the Child Labor Tax Act of 1919. He alleged that the unconstitutional Act of Congress would cause him loss of earnings and other damages.[39] These monetary claims were specifically pled.[40] By the time the case reached

---

35. *Id.* at 496. The other issues included, for example, whether the exclusion was a deprivation of voting rights or a "badge of slavery."

36. By not deciding whether the seating claim was moot, the Court avoided the problem of discussing the constitutionality of the seating of Powell in the Ninety-first Congress with the fine and loss of seniority.

> This Court can not determine that the conduct of the House on January 3, 1969, when Powell was seated, fined and deprived of his seniority, has mooted this controversy without inferentially, at least, holding that the action of the House on that day was legal and constitutionally permissible.

Memorandum For Petitioners In Opposition to Respondent's Memorandum Suggesting That This Action Should Be Dismissed as Moot at 9-10, Powell v. McCormack, 395 U.S. 486 (1969).

It would seem that Powell might have an even better claim that the fine imposed was an additional qualification beyond those of art. I, § 2, Cl. 2. and thus be unconstitutional. *See* pp. 389-91 *supra.*

37. One or more of the issues involved in an action may become moot prior to or during the trial of the action in the lower court. In this event, the trial court should refuse to make an adjudication of the moot issue(s). If the nonmooted issues that remain are sufficient so that the action itself remains justiciable then the trial court properly proceeds to adjudicate *those* issues; but if the mooted issues are controlling the trial court should dismiss the action. Siimilar principles apply where one or more of the issues becomes moot pending appeal, or pending the decision of the appellate court. Where the remaining, nonmooted issues are sufficient so that action itself remains justiciable then the appellate court properly proceeds to adjudicate those issues. *In the event the mooted issues are controlling the appellate court should refuse to review the merits.*

6A J. MOORE, FEDERAL PRACTICE 3072 § 57.13 (2d ed. 1966).

38. 259 U.S. 13 (1922).

Although *Johnston* was not a declaratory judgment case, declaratory judgments neither enlarge nor decrease federal jurisdiction, but are merely a different procedure for trying an actual controversy. Nashville, Chattanooga & St. L. Ry. v. Wallace, 288 U.S. 249 (1932).

39. 259 U.S. at 14.

40. *See* POWELL at 498-99 (distinguishing the case of Alejandrino v. Quezon, 271 U.S. 528 (1926), which had a factual pattern very close to that in the instant case). "Alejandrino stands only for the proposition that, where one claim has become moot and the pleadings are insufficient to determine whether the plaintiff is entitled to another remedy, the action should be dismissed as moot." *Id.* at 499. ***But see*** the dissenting opinion of Mr. Justice Stewart, who believes that the issues in *Powell* and *Alejandrino* are identical. *Id.* at 565-66.

the Supreme Court, Johnston had passed the age of twenty-one. Since the Act could no longer have any legal effect on him, the Supreme Court dismissed the action as moot.[41]

In both *Powell* and *Johnston*, an act of Congress was attacked as unconstitutional, and the act was alleged to have caused money damages. In both cases the passage of time (aging Johnston and terminating the Ninetieth Congress) made judicial review of the congressional act turn upon whether the issue was moot. In both cases, the validity of the money claim was controlled by the constitutionality of the congressional act. Neither of the two plaintiffs (petitioners before the Supreme Court) would have a money claim if the congressional act was constitutional. In *Johnston* the mootness of the controlling issue caused the case to be dismissed,[42] but in *Powell*, the existence of one live issue did not require a determination that any other issue was moot.[43]

Thus, no longer will it be necessary for a plaintiff in a declaratory judgment action to prove that there is a controlling issue, or that such an issue is not moot. This is a large break with tradition.[44] It would appear that Professors Moore and Wright will have to revise their treatises. If the rule expressed in the *Powell* case is expanded by the courts, the issue of mootness may eventually become moot itself. On the other hand, the *Powell* decision may become an anomaly in an otherwise uniform body of law since the exercise of declaratory judgment jurisdiction is discretionary and one case is not precedent for another if the facts differ.[45]

Having decided that the case was not moot, and that there was subject matter jurisdiction because the controversy arose under the Constitution,[46] the Court turned to an issue in one of the most fascinating areas of the law, whether *Powell* presented a "political question" and was, therefore, not justiciable in the federal courts.

It is in the area of conflict between the power of the legislature and of the judiciary that *Powell* has the most contemporary interest. What will its effect be on the separation of powers? In finding the case justiciable, Chief Justice Warren reversed the unanimous decision of the court of appeals, where one of the opinions was written by his successor, Warren Burger. A comparison of the reasoning of the two chief justices on the same case is of great importance to any student of the Supreme Court.

---

41. 259 U.S. at 16.

42. *Id.*

43. POWELL at 497.

44. *See* Cook v. Fortson, 329 U.S. 675 (1946); Chandler v. Wise, 307 U.S. 474 (1939); Atherton Mills v. Johnston, 259 U.S. 13 (1922); Cover v. Schwartz, 133 F.2d 541 (2d Cir. 1942).

See also Aetna Life Ins. Co. v. Hayworth, 300 U.S. 227 (1936); Mills v. Green, 159 U.S. 651 (1895); 6A J. MOORE, FEDERAL PRACTICE § 57.13 (2d ed. 1966).

45. Baker v. Carr, 369 U.S. 186, 236-37 (1962) *quoting* Cook v. Fortson, 329 U.S. 665 (1946).

46. POWELL at 512.

Only on the issue of justiciability was there a divergence of opinion.[47] But even on the question of justiciability, it cannot be assumed that the presence of Warren Burger on the Supreme Court would have changed the result.[48] First, the Supreme Court decision was by a vote of seven to one, and the change of one vote would not have affected the result. Second, Warren Burger, as judge of an inferior appellate court was bound by the facts and law existing at the time he wrote his opinion; the Supreme Court, on the other hand, was faced with different facts (the Ninetieth Congress had terminated) and had ultimate authority to interpret and to modify the Constitution in reaching its conclusion.

Prior to *Powell, Baker v. Carr*[49] was the leading case on what constituted a nonjusticiable "political question." Judge Burger listed the six factors which Mr. Justice Brennan, in his majority opinion in *Baker v. Carr,* suggested as criteria for a "political question."[50] Judge Burger then stated:

> Treating these as "symptoms" of a nonjusticiable political question, rather than as the exclusive criteria for identifying one, we turn to their application to this record, having in mind that under *Baker* the presence of any one of these six factors may be a bar to justiciability. *This much Baker has settled.*[51]

Judge Burger used his judicial discretion to declare the case nonjusticiable because of both the presence of these "symptoms" and his doubt that effective judicial relief could be molded.[52]

The *Baker* criteria which Judge Burger "seemed" to find in *Powell* was "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[53] The wording of article I, section 5 of the Constitution that "Each House shall be the judge . . . of qualifications" on its face gives some measure of a "judicial" function to a house of Congress. Judge Burger went no further, noting that a determination of the *measure* of this judicial function lay with the Supreme Court and not with the court of appeals.[54]

The Supreme Court's interpretation of the Constitution found no "textually demonstrable constitutional commmitment . . . to a co-

---

47. The issue of mootness was not raised until after the court of appeals had rendered its decision. Both Chief Justice Warren and Judge (now Chief Justice) Burger agreed that there was subject matter jurisdiction. Judge Burger found the case nonjusticiable, so his thoughts on the merits were not set forth in his opinion.

48. *But see* note 53 *infra* and accompanying text.

49. 369 U.S. 186 (1962).

50. Powell v. McCormack, 395 F.2d 593 (D.C. Cir. 1968), *rev'd*, 395 U.S. 486 (1969) [hereinafter cited as BURGER OPINION].

51. *Id.* at 593 (emphasis added).

52. Reviewing the six criteria of *Baker* in light of the facts of the case, Judge Burger found two existed, two had limited application, one was inappropriate, and one "seemed" to be present. BURGER OPINION at 593-95.

53. BURGER OPINION at 593, *citing* Baker v. Carr, 369 U.S. at 217.

54. *Id.* at 594 n.38, *citing* Baker v. Carr 369 U.S. at 211.

ordinate political department"[55] because the *measure* of Congressional power to judge the qualifications of members-elect was limited to the explicit constitutional requirements of age, citizenship, and residency. This was the only *Baker* criterion discussed by the Supreme Court in depth; the other five criteria, including the ones which Judge Burger found to be present, were dismissed as "other considerations."[56]

The impact on the "political question" doctrine is this: whereas before *Powell*, the criteria of *Baker v. Carr* were considered to be equally important, now the primary criterion to be considered is whether there is express language in the Constitution conferring the authority on a co-ordinate branch. If there is not, under a narrow reading of the Constitution,[57] the courts will then have the power to adjudicate the action of either the legislature or the executive. The six criteria have, in effect, become one. In addition, the court will not need to determine whether a declaratory judgment will terminate the controversy.[58]

With this virtual elimination of the criteria which make a case nonjusticiable, increased litigation of a political nature, seeking judicially to determine the limits of the power of the other two branches of government, can be anticipated. In litigation over the power of the legislature, the immediate problem is the speech or debate clause of the Constitution.[59] Here, too, *Powell* will be a very important case.

It is quite clear that individual congressmen will not be held per-

---

55. POWELL at 548.

56. *Id.* at 548-49.

57. *See* note 22, *supra.*

58. The Supreme Court's decision has not terminated the controversy since Powell has not yet received his back pay. POWELL at 1979. While it is not necessary to seek other relief when requesting a declaratory judgment, it is assumed that a declaratory judgment will either terminate the controversy or that other relief is available based on that declaratory judgment. *Baker v. Carr* went no further than stating "we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial." 369 U.S. at 198. In POWELL, although the petitioner has prevailed on the constitutional issue, there remains real doubt whether any effective remedy is available. The respondents maintain that since the action is against the Ninetieth Congress, and that body no longer exists, the only way the Ninety-first Congress could pay Powell is by passing a special bill authorizing payment. Brief for Respondents at 66, Powell v. McCormack, 395 U.S. 486 (1969). It is inconceivable that any court could direct the legislature to pass such a bill. Respondents suggest that the only way that Powell could maintain his action for pay would be by an action against the United States in the Court of Claims. Brief for Respondents maintain that since the action is against the Ninetieth Congress, and that body no be able to maintain such an action. *Cf.* Memorandum for Petitioners in Opposition to Respondents' Memorandum Suggesting That this Action Should be Dismissed as Moot, note at 20-21, Powell v. McCormack, 395 U.S. 486 (1969). Assuming that both sides are right, there is a very real possibility that no relief can be granted by the district court. The question is thus raised whether the Supreme Court should have decided the case at all since the claim may not be susceptible of judicial resolution.

59. "They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses . . . and for any Speech or Debate in either House, they shall not be questioned in any other Place." Art. 1, section 5, cl. 6.

sonally liable for their activities as congressmen in any action.[60] The employees and agents of Congress, however, do not enjoy the same immunity. Since they can be held personally liable, the courts can go through them to review the constitutionality of the underlying legislative action.[61] In effect, this removes any constitutional bar to judicial review of legislative acts or decisions at a level below the passage of a law.[62]

Again, this is not necessarily good or bad, only new, and it extends the role of the courts. It can be argued that this is merely a logical extension of the doctrine of *Marbury v. Madison.*[63]

In any litigation over political activity (which falls outside the scope of the reduced criteria of a "political question") the personal liability of the specific congressmen is unimportant; the purpose of the litigation is to obtain a judicial interpretation of the legislative act. While the scope of legislative action has traditionally been drawn broadly,[64] the *Powell* case is the forerunner of litigation designed to limit the definition of "legitimate legislative activity." The result may well be an interpretation that the speech or debate clause refers only to the personal actions of individual congressmen engaged in debate in the legislature, a type of expanded first-amendment right for congressmen. Additionally, congressional investigating committees may be declared unconstitutional, or at least without the power of subpoena.

This last statement is based on a current case pending in the Northern District of Illinois, *Stamler v. Willis,*[65] remanded from the Court of Appeals for the Seventh Circuit on August 5, 1969 for a trial on the merits of the plaintiff's claim that the House Un-American Activities Committee is unconstitutional.[66] In remanding the case, *Powell*

60. POWELL at 505, *citing* Kilbourn v. Thompson, 103 U.S. 168 (1880).

61. The issue of the immunity conferred by the Speech or Debate Clause reached the Supreme Court four times before the *Powell* case. POWELL at 501. Two of these cases did not involve employees and therefore will not be discussed here. The two others allowed tort claims against the employee while holding the congressmen immune. Dombrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1880). Of the two, the most important is *Kilbourn v. Thompson*, which sustained a claim against the Sergeant-at-Arms of the Senate for false imprisonment. These cases might be analogized to the Federal Tort Claims Act: There can be no liability at the planning stage, but there can be liability at the operational stage. *Powell* goes further and allows a mere money claim to support an action. It can be supposed that any type of claim against Congress involving an employee or agent can now be litigated.

62. That an act of Congress can be judicially reviewed is well settled. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

63. 5 U.S. (1 Cranch 137) (1803). In our system of checks and balances, this can serve as an additional check against unconstitutional acts of the legislature which were not reviewable before, while some acts of the executive were reviewable. *Cf.* Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952).

64. United States v. Johnston, 383 U.S. 169, 180 (1966).

65. 415 F.2d 1365 (7th Cir. 1969). For a history of the prior litigation in this action see Comment, *Speech or Debate Clause Held Bar to Injunction Against Contempt of Congress Proceeding*, 43 N.Y.U.L. REV. 1127 (1968).

66. It is interesting to note that Professor Arthur Kinoy of Rutgers University is the lawyer for Stamler. He was also the lawyer for Powell in the instant case, and for Dombrowski in Dombrowski v. Eastland, 387 U.S. 82 (1967).

v. McCormack was the authority cited by the court of appeals for the proposition that the speech or debate clause is not a bar to the action.[67]

The opinion of the court of appeals concluded with these words of Judge Cummings:

> If these plaintiffs should ultimately prevail in this consolidated action, members of Congress will not be imperiled in their Congressional functions but will merely have to conduct their future investigations under a narrower, constitutional mandate. A decision for plaintiffs here would signify no less respect for a coordinate branch of the Government. . . . Thus permitting this action to proceed will have no chilling effect on the legislators' performance of their duties.[68]

The case of *Powell v. McCormack* settled the academic question of the power of a house of Congress to judge the qualifications of its members. This case will have long term effects transcending the decision on the merits.[69] The analysis and reasoning utilized to reach the result will affect any future attempt at congressional discipline,[70] broaden the scope of judicial review of acts of the legislature, yield a different definition of mootness, and, at least until *Stamler v. Willis* reaches the Supreme Court, provide the major restricted interpretation of the immunities conferred by the speech or debate clause of the Constitution.

F. LAWRENCE MATTHEWS

ANOTHER JURISDICTIONAL LIMITATION PLACED ON COURTS-MARTIAL

Petitioner, a member of the United States Army stationed in Hawaii, was convicted by court martial of attempted rape, housebreaking, and assault with attempt to rape. The nature of the crime was purely "civil," and was committed while the petitioner was off duty, not on a military post, and not in uniform. After his arrest by civilian police, however, he was turned over to the military authorities for questioning and subsequently charged with violations of Articles 80, 130, and 134 of the

67. 415 F.2d at 1370.

68. *Id.*

69. "I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved." H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

70. Since all congressional discipline cases will involve a fine, or other continuing punishment, it is likely that any future congressional discipline case will certainly be litigated in the federal courts to see if the action was constitutional.