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Comments on Powell v. McCormick

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influence the character and composition of the House of Representatives.[105]

But sir! What of the Constitution?

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Powell v. McCormack is an unfortunate decision, principally because the Supreme Court should never have exercised its jurisdiction over the case. The ruling, however, is chiefly open to criticism, not because it is demonstrably contrary to established rules of law, but because it runs counter to those less clearly articulated, and essentially precatory, admonitions of judicial restraint which are implicit in the separation of governmental powers. The crucial point is not the jurisdiction of the subject matter, the Speech or Debate Clause, the issue of mootness raised by Justice Stewart in dissent or the substantive merits of Adam Clayton Powell's exclusion. Rather, the crucial point is justiciability—the problem of whether, out of a due regard for the separation of powers, the Court should refrain from exercising the jurisdiction which it otherwise might exercise.

Powell v. McCormack is primarily vulnerable on this issue.[1] There is no compulsion upon the Supreme Court to exercise jurisdiction in every case in which it is conferred. On the contrary, there are situations where the most salutary use of the judicial power lies in abstention.[2] This is particularly true where political questions are raised.

The fact that a case "seeks the enforcement of a political right

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[105] Curtis, *The Power of the House of Representatives to Judge the Qualifications of Its Members*, 45 TEXAS L. REV. 1199, 1202-03 (1967). *Cf.* Eckhardt, *The Adam Clayton Powell Case*, *id.* at 1206, 1210-11.

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[1] This should not be confused with jurisdiction of the subject matter, as the District Court confused the two. Powell v. McCormack, 266 F. Supp. 354 (D.D.C. 1967). On the contrary, as the Court of Appeals and the Supreme Court both held, the Powell case did vest the courts with jurisdiction of the subject matter, pursuant to the criteria laid down in Baker v. Carr, 369 U.S. 186, 198 (1962): (1) the cause must "arise under" the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Article III, Section 2), and (2) the cause must be a "case or controversy" within the meaning of Article III, Section 2, and (3) the cause must be described in a jurisdictional statute enacted by Congress.

[2] *See* Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). *See also* Justice Brandeis' enumeration in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-48 (1936).

or a claim to political office, as here, does not necessarily mean that it raises a political question."[3] In *Baker v. Carr*[4] the Court ruled that "the nonjusticiability of a political question is primarily a function of the separation of powers."[5] Since *Baker v. Carr* and *Bond v. Floyd*[6] involved confrontations between the federal and state governments, rather than between co-ordinate branches of the federal government, they did not present political questions as above defined. *Powell v. McCormack*, however, presents just such a confrontation. If the separation of powers is not involved in *Powell* in such a way as to constitute a political question, it is difficult to envision a case where it ever would be involved. It clearly involved, as was noted in the opinion by Circuit Judge Burger,[7] three of the six factors described in *Baker v. Carr* as symptomatic of a nonjusticiable political question:

1. A textually demonstrable constitutional commitment of the issue to a coordinate political department. Article I, Section 5, clearly provides this commitment.

2. A lack of judicially discoverable and manageable standards for resolving it.[8]

3. The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.

At the very least, it is unrealistic for the Supreme Court to conclude that its ruling in *Powell* entails no disrespect for the House of Representatives. Again the Burger opinion put the problem in focus:

> Any judgment which enjoined execution of House Resolution 278, or commanded the Speaker of the House to administer the oath, or commanded Members of the House as to any action or vote within the Chamber would inevitably bring about a direct confrontation with a co-equal branch and if that did not indicate lack of respect due that Branch, it would at best be a gesture hardly comporting with our ideas of separate co-equal branches of the federal establishment. These circumstances would give rise to a classic political question and fall within the definition of such a question under *Baker*. On this record, therefore,

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[3] Powell v. McCormack, 395 F.2d 577, 591 (D.C. Cir. 1968).
[4] 369 U.S. 186 (1962).
[5] *Id.* at 210.
[6] 385 U.S. 116 (1966).
[7] 395 F.2d at 593-95.
[8] As the Burger opinion put it, ". . . courts do not possess the requisite means to fashion a meaningful remedy to compel Members of the House to vote to seat Mr. Powell or to compel The Speaker to administer the oath." *Id.* at 594.

> the claims of Appellants for coercive equitable relief are inappropriate for judicial consideration.[9]

The majority of the Court, however, was not deterred by the prospect of a confrontation with Congress. The theory of the majority seems to be that the determination of a basic right by the Supreme Court carries with it a sort of absolutist entitlement to a single-minded enforcement of that right—with insufficient regard for other rights, whether of Congress or the states, which may interfere. In some matters there was lacking in the Warren Court a due regard for that salutary diffidence in the exercise of power which is often the lubricant for the machinery of coordinate branches of government. As Circuit Judge Burger put it,

> Conflicts between our co-equal federal branches are not merely unseemly but often destructive of important values. In the interpretation of provisions which are pregnant with such conflicts the unavailability of a remedy and the consequences of any unresolved confrontation between coordinate branches weigh heavily in pointing to a conclusion either that no jurisdiction was intended or that if jurisdiction exists it should not be exercised.[10]

Unfortunately, in recent years, the Supreme Court has taken entirely too literally the principle it articulated for itself in *Baker v. Carr* that "[i]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution."[11] It is the responsibility of the President and Congressmen as well to guide their actions by the Constitution. And it is quite clear that in some areas the judgments of the Chief Executive or of Congress as to constitutionality are to be given finality, whether it be through an absolute denial to the courts of jurisdiction of the subject matter or a no less emphatic though implicit interdict against judicial intervention in certain areas where jurisdiction is technically present but where its exercise would disrupt the balance among coordinate branches of government. It would be helpful for the Court to recur to the principle enunciated by Justice Harlan in his dissent in the 1964 legislative apportionment decisions:

> [t]hese decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be

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[9] *Id.* at 596.

[10] *Id.* at 604-05.

[11] Powell v. McCormack, 395 U.S. 486, 549 (1969). *See also* Baker v. Carr, 369 U.S. 186, 211 (1962); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

> thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.[12]

Although *Powell v. McCormack* was an unfortunate decision, the damage done by it is largely symbolic and not irremediable. It is not likely that such cases will arise often and, if they should, Congress could exercise its broad power to expel, as distinguished from exclude, by a two-thirds vote. Even if the House of Representatives were to exclude an elected representative in circumstances substantially indistinguishable from *Powell*, it still would remain open for the Supreme Court simply to decline to review the case. Such would amount to an implicit overruling of the *Powell* decision, but it would avoid a constitutional crisis. We are entitled to hope that such a crisis will be avoided by the exercise of caution in both the Congress and the Supreme Court. But we may fairly hope, too, that succeeding terms of the Supreme Court will see a redirection of attitude in the specific area of justiciability and in the broader functioning of the Court as a coequal and not a "supreme" branch of government.

Stanley K. Laughlin, Jr.*

> Formal logic intended universal validity for the laws of thought. And indeed, without universality, thought would be a private, noncommittal affair, incapable of understanding the smallest sector of existence. Thought is always more and other than individual thinking; if I start thinking of individual persons in a specific situation, I find them in a supra-individual context of which they partake, and I think in general concepts. All objects of thought are universals. But it is equally true that the supra-individual meaning, the universality of a concept, is never merely a formal one; it is constituted in the interrelationship between the (thinking and acting) subjects and their world. Logical extraction is also sociological abstraction. There is a logical *mimesis* which formulates the laws of thought in protective

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[12] Reynolds v. Sims, 377 U.S. 533, 624-25 (1964).

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> accord with the laws of society, but it is only one mode of thought among others.
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> —Herbert Marcuse, *One-Dimensional Man*.[1]

When, as in the *Powell* Case, members of a democratically chosen governing body exclude the duly elected representative of one of their constituencies, the basic vulnerability of representative democracy is exposed. The same type of vulnerability was illustrated by the acute malapportionment of state legislatures that preceded *Baker v. Carr*.[2] Throughout his dissenting opinion in that case, the late Justice Frankfurter condescendingly referred to the under-franchised Tennesseans who brought the suit as "these petitioners." Meanwhile, upon the putative legislators of the state, who held office by virtue of their own dogged adherence to an illegal and unconstitutional "crazy-quilt" apportionment scheme, the Justice bestowed the simple but ponderous accolade "Tennessee."

Frankfurter would have presumed that those men who currently wore the governmental mantle must be, ipso facto, the government, and would have used that premise to establish their legitimacy. One hundred and fifty-nine years earlier, however, John Marshall had presumed that the Supreme Court possessed the ultimate power to interpret the Constitution and, proceeding from that premise, established that it did have.[3]

From the time when the Senate offered a crown to Caesar, up to the time of the Rhode Island government of Marshall's day, a major threat to democratic government had been the possibility that the people's transient governors would change the ground rules and make themselves intransigent. In *Marbury v. Madison*, Marshall, speaking in terms obviously inspired by Rousseau, referred to the people's right to exercise their "[o]riginal and supreme will [to organize] the government . . . [and] establish certain limits not to be transcended by [it]."[4] Such a solution to the ultimate dilemma of government by the people was particularly appropriate for the Age of Reason and largely dependent upon its precepts. Constitutionalism presupposed that honest men, applying reason and neutrally predetermined techniques could fairly interpret the social contract without regard to preferred outcomes. Whether or not Justice Marshall entertained doubt on this score, many of his contemporaries and some of his predecessors already had. Marshall's colleague, Story, acknowledged in *Martin v. Hunter's Lessee* that "judges of equal learning and in-

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1 H. MARCUSE, ONE DIMENSIONAL MAN 138-39 (Beacon ed. 1964).
2 369 U.S. 186 (1962).
3 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
4 5 U.S. (1 Cranch) at 176.

tegrity . . . might differently interpret . . . the constitution itself."[5] And, of course, the anti-federalists (among others) shared the belief of Bishop Hoadly that the law interpreter would, in fact, become the law giver.

By the first third of the Twentieth Century, a series of events had brought this conflict to a head. Freud, himself an eminent rationalist, had cast forever in doubt man's ability to fairly apply reason to his interpersonal affairs. Meanwhile, political developments in the United States that cast the Supreme Court in the role of rear guard for economic liberalists were making more obvious the Court's role as a law giver. Adding Freud's fuel to earlier legal skepticism, the writers known as Legal Realists, exposed with appealing clarity the sophistry of politically motivated judicial opinions. A new class of justices emerged for whom the watchword became "judicial restraint"; that court judges best which interferes least with other branches of government. But, as so often is the case, the fresh air let in by iconoclasts soon created an unwanted chill. The old guard had practiced judicial activism on behalf of economic *laissez-faire*. The new breed exercised judicial restraint on behalf of the principle of representative democracy. But, judicial restraint began to look less appealing as the political establishment took advantage of its own absence of restraint, not to institute reform but for the perpetuation of its own self-interest.[6] Conceptually, judicial restraint came a cropper in the Reapportionment Cases. How could the Court practice restraint with regard to legislative action in deference to the will of the people when the issue before the Court was what to do when the legislature in no sense represented the people?[7]

Meanwhile, the scholarly crisis progressed along similar paths. Many constitutional scholars seemed to be putting old wine in new bottles. In a cryptic, one-shot epistle, an eminent lawyer suggested that since it had been proven that the principles by which judges in the past had "neutrally" decided cases were not, in fact, neutral, we should now climb to a higher mountain, there to discover new, transcendent "neutral principles."[8] Noble as the aspiration was (and more than a few were inspired by it) Professor Wechsler neither then nor since has suggested just how this might be done. Others appealed to quasi-mystical concepts such as "lawyer-like" decision-

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[5] 14 U.S. (1 Wheat.) 304, 346 (1816).

[6] For a highly original analysis of this problem see Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[7] *See* Baldwin & Laughlin, *The Reapportionment Cases: A Study in the Constitutional Adjudication Process*, 17 U. FLA. L. REV. 301 (1964).

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

making.[9] The nostalgic harkening back to an older security was self-evident. Some scholars worked out elaborate, and often brilliant, technical manuals for the slick application of judicial restraint and called it a new jurisprudence.[10] This scholarship, however, smacked of the pro-establishment relativism that has become the grating agitation of younger social scientists. Some academic commentators threw these all in one bag and mixed in some of the pop criticism of the Court, seemingly oblivious to the contradictions between the various themes.[11] What most of these critiques had in common was what psychiatrists call "secondary gain." They all pointed toward less action on the part of the Court.

In this post-realist, post judicial restraint milieu, the Warren Court decided the *Powell* case. White liberals had joined southern racists in the vanguard of the "Dump Powell Movement." Powell's unrepented sinning and dusky color made it possible this one time for them to satisfy both their consciences and their racially frustrated constituents. Black men almost universally saw the Powell exclusion as an exhibition of racism and their evaluation is hard to dispute. Given the fact that Congress usually refuses even to investigate the gravest charges against its members, and when forced by public pressure to do so normally deals out ineffective reprimands for offenses that would send other public officials into limbo, it is hard to understand the swift and severe meting out of punishment in Powell's case in other than racial terms. Powell asked for, and got, the full pent-up resentment of the white community. In light of the recent mayoralty campaigns, there can be little dispute that racism is politics. The fact that it is a particularly current political force does not detract from the principle involved. The *Powell* case must be seen as one in which the representatives of a *political* majority sought to disparage the representation of a *political* minority.

That is not to say that the *Powell* case was one of the most difficult, important, or challenging cases that the Warren Court faced. The seating of Powell in the 90th Congress without seniority and with $25,000 fine represented a virtual settlement of the matter. Congress had extracted (and Powell had yielded) its pound (or half-pound) of flesh. What the Court could do to repair the damage was

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[9] Hart, *The Supreme Court 1958 Term: Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). *Cf.* Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

[10] Kurland, *The Supreme Court 1963 Term: Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143 (1964).

[11] A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

minimal. By virtue of the same settlement the potential conflict between the Court and Congress was reduced to name-calling.[12]

On the doctrinal level, the Court in *Powell* clearly had the upper hand on three issues and better than held its own on the other two.

On the ultimate constitutional merits, to say that the portion of the Constitution providing that Congress shall have power to "Judge . . . the Elections, Returns and Qualifications of its own Members,"[13] fairly interpreted means the power to judge its members only with reference to their constitutional eligibility and the regularity of their election is an eminently reasonable interpretation of the text, consistent with a rational conception of the nature of representative government and a position often taken by Congressmen themselves (including many in this case).

The Court has already given Congress far more immunity under the Speech and Debate Clause than a literal reading of the text requires.[14] Extending it to anyone acting under congressional direction would have been an innovation of extreme dimensions.

The respondent's suggestion that the Court read jurisdictional exceptions into the unambiguous language of 28 United States Code 1331, on the basis of an inference from a clearly inapplicable 1870 statute,[15] bordered on frivolous. The respondent Congressmen would have screamed with righteous indignation if the Court had so warped one of their statutes to reach a result that they did not like.

The mootness issue was considerably more complex. To advocates of the "passive virtues," it did, as Justice Stewart pointed out, offer a plausible means of refraining "from deciding . . . novel, difficult and delicate constitutional questions. . . ."[16] The Court's dispo-

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12 Some commentators have suggested that a real showdown might come when and if Powell presses his back salary claim. Further analysis makes this assertion dubious. If the District Court enters a judgment against the Sergeant-at-Arms, Congress can choose either to indemnify or not indemnify him, neither of which would be a very effective resistance to the Court's mandate. If Powell is relegated to the Court of Claims, it is indisputable that Congress has the power to refuse to pay its judgments. Hence, such a refusal would again fail to create a confrontation or impugn the Court's authority. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962). In a sense, this case may partake of some of the judicial statescraft of Justice Marshall. The Court has succeeded in establishing its jurisdiction in a context which makes it difficult for Congress to refute it.

13 U.S. CONST., art. I, § 5.

14 *See, e.g.*, Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966).

15 The Force Act of May 31, 1870, now incorporated in 28 U.S.C. 1344 (1964).

16 Powell v. McCormack, 395 U.S. 486 at 559 (1969) (Stewart, J. dissenting).

sition of this point was equally plausible, if somewhat less well articulated than one might have hoped.[17]

On the justiciability issue, Justice Warren exhibited a purist approach. While ostensibly using the six[18] criteria of justiciability set forth in *Baker v. Carr*, he in effect reduced the six to one (the first): Was the question of the seating of representatives textually committed to another branch for exclusive decision? If not, then by definition no embarrassing conflict with or lack of respect for Congress could ensue, nor could there be an unusual need for adherence to a decision already made. In effect, Warren said Justice Marshall had decided that the Court should assume these risks when he committed the Court to judicial review. Justiciability thus was stripped of policy considerations and made a matter of textual extrapolation. In Warren's view, there was no textual commitment to Congress if Congress were to judge its members' qualifications pursuant to the standing requirements of Article I, requirements which obviously constituted judicially manageable standards that could be implemented without the need for a nonjudicial policy decision. Thus, in the Warren opinion the decision on justiciability became coterminous with judicial feasibility, which in turn became coterminous

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[17] The unusual mootness issue in *Powell* is the result of the respondents' unique but historically plausible argument that the position of House Sergeant-at-Arms not only expires but in effect disappears at the end of each session, and that Sergeants-at-Arms of subsequent Congresses are neither responsible for nor empowered to remedy the misdeeds of their predecessors (even if they are, as here, the same person). Normally, when a person or agency liable to pay a claim loses the ability to do so because of change of officers, death or even abolition of office, the claim transfers to another entity for payment (*e.g.*, the successor in office, the estate, or another agency). Respondents did not completely deny that it happened in *Powell* but argued rather that since the claim now lay directly against the United States Treasury, a new form of action, a suit in the Court of Claims, needed to be commenced.

The Court's answer was (1) a declaratory judgment would still be useful in any subsequent action to recover the salary; and (2) the issue of whether an action would lie against the Sergeant-at-Arms was one that should have been determined first in that Court of Appeals, the Supreme Court being free at this point to resolve legal errors already made which could be considered prefatory to that issue. The Court's answer itself suggests the manipulatory nature of the mootness doctrines.

[18] ". . . [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 395 U.S. at 518-19, quoting from Baker v. Carr, 369 U.S. 186, 217 (1962). While there is a considerable amount of redundancy and overlap in all six criteria, in a general way it is possible to say that the first three focus more on technical considerations and the last three on policy considerations. *See generally* Baldwin & Laughlin, *supra* note 7.

with the decision on the merits. Once the merits were resolved, the justiciability criteria fell into place.

The idea that the issue of justiciability (or what until recently was called the issue of "political question") is at bottom a question of textual interpretation—and not a matter for sound judicial discretion—is a position that has found few recent supporters.[19] But in one sense, at least, Chief Justice Warren was eminently correct. A decision that the *Powell* case posed a "political question" would have been a victory for the respondents of equal or greater magnitude than a decision that Powell was properly excluded under Article I, Section 5, for it would have conceded that Congress has unfettered power to exclude members-elect for whatever reason it chooses. Mootness was undoubtedly the only way to actually avoid this issue.

Should the Court have used Justice Stewart's exit? I have already suggested that the "confrontation" aspect of the *Powell* case has been overplayed. In *Wesberry v. Sanders*[20] the Court had already successfully sent a substantial number of Congressmen back home to private law practice and, at the very least, disturbed cozy districting arrangements for many others. The Court's decision in *Powell* got nobody out of jail, and was not even necessary to get Powell back in the House.

In the *Powell* case, the democratic process was vindicated by a quasi-democratic institution. It is, however, time the democratic process vindicated itself. Whether judicial action or inaction is most likely to cause it to do so has been the undercurrent of much constitutional analysis in recent years. On the surface, however, the issue is more often, and perhaps more properly, phrased in terms of principled and reasoned decision-making. The decision of the Court in *Powell* was a principled decision precisely because it was an exercise of reason on all of the information the Court was entitled to utilize, and not the half-blind selective reasoning of the "new jurisprudence." Many of the proponents of reasoned and principled decision-making refuse to evaluate the Court's decisions by the one criteria that should be most appropriate: Have the decisions of the Court been reasonable applications of the fundamental principles embodied by the Constitution? A simple evaluation of the Warren Court is that it was good because most of its decisions were good. (If another Court fails to make good decisions it will *not* be a good Court.) If we cannot use reason to critique the substantive value

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[19] Professor Wechsler supports this position. *See* Wechsler, *supra* note 8.

[20] 376 U.S. 1 (1964).