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Congressional Exclusion of Member-Elect and the Political Question Doctrine

On March 1, 1967, the United States House of Representatives excluded Member-elect Adam Clayton Powell, Jr., from his seat in the 90th Congress to which he had been elected in 1966.[1] The exclusion was based on findings by a select committee that Mr. Powell as a member of a prior Congress had wrongfully and willfully misappropriated public funds, had made false reports on expenditures, and had been guilty of contumacious conduct toward the courts of the state of New York.[2] Mr. Powell and thirteen voters from his congressional district petitioned the United States district court for declaratory, mandatory, and injunctive relief[3] against the House of Representatives[4] and three of its employees.[5] The complaint challenged the constitutionality of Mr. Powell's exclusion. The district court dismissed the complaint for want of subject matter jurisdiction.[6] On appeal, the court of appeals held that there was subject matter jurisdiction, but unanimously affirmed the dismissal.[7] In November 1968, the Supreme Court granted the petition for certiorari.[8] Subsequently, the 90th Congress officially terminated and Mr. Powell, having won re-election, was seated as a member of the 91st Congress. *Held, reversed*: Whether the United States House of Representatives may constitutionally exclude a member-elect is a justiciable question. *Powell v. McCormack*, 89 S. Ct. 1944 (1969).

I. The Political Question Doctrine

Article III of the United States Constitution confers upon the federal courts power to decide cases or controversies arising under the Constitution, laws or treaties of the United States.[9] To be a case or controversy, and thus justiciable, the dispute must be of a legal nature[10] and lend itself to

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[1] House Resolution 278 provides: "'*Resolved*, That said Adam Clayton Powell, Member-elect from the 18th District of the State of New York, be and the same hereby is excluded from membership in the 90th Congress and that the Speaker shall notify the Governor of the State of New York of the existing vacancy.'" H.R. Res. 278, 90th Cong., 1st Sess., 113 Cong. Rec. 1942 (1967).

[2] 113 Cong. Rec. 1918-19 (1967). Contumacious conduct is the refusal of an individual to appear before a court after having been duly cited or to obey a lawful order when he is before the court. Black's Law Dictionary 400 (4th ed. 1951).

[3] Powell sought to enjoin: the defendants from executing House Resolution 278; the Speaker of the House from refusing to administer the oath to Powell; the Clerk from refusing to perform the duties due a Representative; the Sergeant-at-Arms from refusing to pay Powell; and the Doorkeeper from refusing to admit Powell to the Chamber.

[4] Five members of the House were named individually and as representatives of a class of citizens who are presently serving as Members of the House of Representatives. John W. McCormack was named in his official capacity as Speaker of the House. Powell v. McCormack, 266 F. Supp. 354 (D.D.C. 1967).

[5] These include the Sergeant-at-Arms, the Doorkeeper, and the Clerk.

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

[7] Powell v. McCormack, 395 F.2d 577 (D.C. Cir. 1968). Two of the three court of appeals judges held that the case presented a nonjusticiable political question.

[8] Powell v. McCormack, 393 U.S. 949 (1968).

[9] U.S. Const. art. III, § 2.

[10] *In re* Summers, 325 U.S. 561 (1945); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930); Muskrat v. United States, 219 U.S. 346 (1911); Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems*, 6 Vand. L. Rev. 79, 85 (1952).

judicial standards and remedies.[11] Disputes categorized as political questions do not meet this standard and are thus excluded from adjudication by the federal judiciary.[12]

Commentators and jurists have advanced several explanations as to why a given dispute is classified as a political question.[13] The explanation recently accepted by the Supreme Court is based upon the doctrine of separation of powers.[14] The doctrine supposedly delineates the respective spheres of responsibility of each branch of the federal government, and the political question is without the Court's sphere.[15] Notwithstanding the possible inability to force all prior political question cases into a "separation of powers" mold,[16] the Court in *Baker v. Carr*[17] formulated the most comprehensive judicial expression of the political question doctrine.

> 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 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

[11] Baker v. Carr, 369 U.S. 186 (1962); Colegrove v. Green, 328 U.S. 549 (1946); *see* 6A J. MOORE, FEDERAL PRACTICE § 57.14 (1968).

[12] Cases in which the Court has found a political question include: The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); United States v. Holliday, 70 U.S. (3 Wall.) 407 (1866); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (involving the rights of Indians to recognition as a tribe); The Pedro, 175 U.S. 354 (1899); The Protector, 79 U.S. (12 Wall.) 700 (1871) (involving the duration of hostilities); Kennett v. Chambers, 20 U.S. (14 How.) 24 (1852); United States v. Klintock, 4 U.S. (5 Wheat.) 593 (1820); Rose v. Himely, 2 U.S. (4 Cranch) 87 (1808) (involving the recognition of states); *In re* Baiz, 135 U.S. 403 (1890); *Ex parte* Hitz, 111 U.S. 766 (1884) (involving a person's status as a representative of a foreign government); Doe v. Braden, 21 U.S. (16 How.) 327 (1853) (involving the negotiation of a treaty); Taylor v. Morton, 23 F. Cas. 784 (No. 13,799) (C.C.D. Mass. 1855), *aff'd*, 67 U.S. (2 Black) 481 (1862); Ware v. Hylton, 1 U.S. (3 Dall.) 164 (1796) (involving the violation of a treaty); Terlinden v. Ames, 184 U.S. 270 (1902); Mahoney v. United States, 77 U.S. (10 Wall.) 62 (1870) (involving the termination of a treaty). *See also* Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344 (1924).

[13] Justice Woodbury in his dissenting opinion in Luther v. Borden, 17 U.S. (7 How.) 1 (1849) argued that the determination of political questions are without the jurisdiction of the Court and their resolution, "belongs to the people and their political representatives, either in the state or general government." *Id.* at 19. One commentator has suggested that political questions remain unresolved because, "where no rules exist the court is powerless to act." Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 511 (1924). However, the most common explanation is based upon the doctrine of separation of powers. *See* Coleman v. Miller, 307 U.S. 433 (1939); Marbury v. Madison, 1 U.S. (1 Cranch) 368 (1803); Bear, *The Supreme Court and the Political Question: Affirmation or Abdication?*, 71 W. VA. L. REV. 97 (1969); Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1924); Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems*, 6 VAND. L. REV. 79 (1952); Tollett, *Political Question 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); Comment, *The Political Question Doctrine and Adam Clayton Powell*, 31 ALBANY L. REV. 320 (1967); Comment, *Threat of Enforcement—Prerequisite of a Justiciable Controversy*, 62 COLUM. L. REV. 106 (1962).

[14] Baker v. Carr, 369 U.S. 186, 210 (1962): "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question' . . . . The nonjusticiability of a political question is primarily a function of the separation of powers."

[15] *See* Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 363 (1924).

[16] C. POST, THE SUPREME COURT AND POLITICAL QUESTIONS 109-23 (1936).

[17] 369 U.S. 186 (1962).

already made; *or* the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[18]

II. The Historical Rationale of the Baker Formulations

Cases involving foreign affairs serve as excellent illustrations of several of the *Baker* formulations. Inherent in these cases is a textually demonstrable constitutional commitment to a coordinate political department.[19] But such a commitment has not served as the sole rationale for the relegation of foreign relations to the political question category. Indeed, the more practical formulations involving the unusual need for unquestioning adherence to a political decision already made and the potentiality of embarrassment from multifarious pronouncements have operated with as much, if not more, influence than any "constitutional commitment."[20] As to the possible embarrassment of multifarious pronouncements in the area of foreign affairs, one jurist has stated, "what an extraordinary anomaly would such . . . [court] interference present to the world."[21]

The political question formulation concerning the possible lack of respect due a coordinate branch is very closely related to the formulations involving multifarious pronouncements and constitutional commitments. Court interference in foreign relations would not only create embarrassment, but would also demonstrate a lack of respect due the coordinate political departments. In addition, *any* judicial resolution of issues described as constitutionally committed to a coordinate branch would certainly evidence lack of respect.[22]

Initial policy determinations of a kind clearly for non-judicial discretion exist in the recognition of the commencement, existence and termination of hostilities.[23] The determination by the courts of the duration or conditions of peace or war has consistently evolved from the acts of the political departments because "it would be difficult, if not impossible, to say on what precise day it [war] began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates . . . ."[24]

Cases arising under the Guaranty Clause[25] also illustrate political ques-

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[18] *Id.* at 217.

[19] Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918): "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."

[20] The Rogdai, 278 F. 294, 296 (N.D. Cal. 1920): "The national will must be expressed through a single political organization; two conflicting 'governments' cannot function at the same time. By the same token, discordant voices cannot express the sovereign will of the American Nation."

[21] United States v. Ortega, 27 F. Cas. 359 (No. 15,971), 361 (E.D. Pa. 1925).

[22] In Marshall Field & Co. v. Clark, 143 U.S. 649 (1891), the Court found a constitutional commitment to the political branches that an enrolled act signed by the presiding officers of both Houses of Congress, and approved by the President was conclusively passed by Congress according to the forms of the Constitution. The Court then noted: "The respect due coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated." *Id.* at 672.

[23] The Pedro, 175 U.S. 354 (1899); The Protector, 79 U.S. (12 Wall.) 700 (1871).

[24] The Protector, 79 U.S. (12 Wall.) 700, 701-02 (1871).

[25] U. S. Const. art. IV, § 4.

tions requiring such initial policy determinations by the political departments. In *Luther v. Borden*[26] the Supreme Court was called upon to decide which of two opposing governments was the de jure government of Rhode Island under the Guaranty Clause. Similarly, in *Pacific States Telephone & Telegraph Co. v. Oregon*,[27] the issue was whether the state had lost the characteristics of a republican form of government by adoption of the initiative and referendum. The Court in both cases found a constitutional commitment to the political branches.[28] However, the practical effect of a judicial decision heavily influenced the Court. For example, once having found Rhode Island's charter government in *Luther* to be a nullity, could the Court anticipate that relief could be afforded to all those wronged by such an illegal sovereignty?[29] The answer was provided by Mr. Chief Justice Taney: "When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."[30] Similarly, in *Pacific States* the confusing legal consequences of a judicial declaration of the unconstitutionality of the initiative and referendum, and the awarding of a decree "absolving from all obligation to contribute to the support of or obey the laws of such established state government"[31] prompted the Court to examine the justiciability of the issue. Fear of the aftermath, combined with the lack of judicial criteria for an adequate determination of the characteristics of a republican form of government,[32] led to the conclusion that the issue demanded an initial policy determination which the Court felt was of a kind for nonjudicial discretion.[33]

Consideration of practical consequences has also motivated the Court in decisions involving a lack of judicially discoverable and manageable standards for the resolution of the controversy. In *Mississippi v. Johnson*[34] Mr. Chief Justice Chase stated, "[s]uppose . . . the injunction prayed for [is] allowed. If the President refuse obedience, it is needless to observe that the Court is without power to enforce its process."[35] At least one commen-

[26] 17 U.S. (7 How.) 1 (1849).

[27] 223 U.S. 118 (1912).

[28] In *Luther* the Court simply stated that it was the responsibility of Congress to recognize the lawful government of a state and to determine the means of fulfilling the Guaranty Clause. In *Pacific States* the Court reaffirmed this principle by quoting extensively from *Luther*.

[29] For, if this court is authorized to enter upon this inquiry . . . and it should be decided that the charter government had no legal existence during the period of time above mentioned . . . then the laws passed by its Legislature during that time, were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation, answerable as trespassers, if not in some cases as criminals.

Luther v. Borden, 17 U.S. (7 How.) 1, 6-7 (1849).

[30] *Id.* at 7.

[31] 223 U.S. 118, 142 (1912).

[32] In Baker v. Carr, 369 U.S. 186 (1962), Mr. Justice Brennan stated, "[i]n the instance of nonjusticiability . . . the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Id.* at 198.

[33] A commentator has suggested: "A careful reading of this opinion [*Luther*] can leave very little doubt that the crux of the decision is the unwillingness of the court to enter into the fray." Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 343-44 (1923).

[34] 71 U.S. (4 Wall.) 475 (1867).

[35] *Id.* at 500-01.

tator feels that Mr. Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*[36] to refuse to issue an injunction against the further execution of the laws of Georgia in Cherokee territory was motivated by the rebellious attitude of the President and the Georgia legislature.[37]

Thus, the concern for judicial standards extends not only to identification of the constitutional duty asserted and the determination of its breach, but also to the possible protection the Court could effectively offer for any wrong judicially recognized.

As expounded in *Baker* the political question formulations are not merely abstractions, but rather concrete classifications drawn from the underlying rationale of prior political question cases. It may be difficult to differentiate among the application of some of the formulations in various situations because their respective areas are overlapping. Nonetheless, their presence does create the "political question" case.

III. Powell v. McCormack

Even though Mr. Powell was seated in the 91st Congress, the Supreme Court reasoned that his $55,000 claim for salary was sufficient to prevent the controversy from becoming moot. Also, the complaint against the Sergeant-at-Arms, the Doorkeeper, and the Clerk was held to be sufficient to warrant the Court's review of the constitutionality of the House resolution which excluded Mr. Powell. The Court's conclusion that the House's action was unconstitutional was the result of a detailed historical analysis which revealed the nonexistence of any constitutional commitment to the House of Representatives of the power to exclude a member-elect. Unfortunately, the Court's discussion was limited, as evidenced by its interpretation of the pre-constitutional precedents, the convention debates, and the post-ratification proceedings, solely to an analysis of the constitutional commitment formulation.

The Court concluded that an interpretation of the Constitution was sufficient to supply "judicially discoverable and manageable standards" for the resolution of the controversy. Indeed, such standards may identify the duty asserted and determine its breach. But are they sufficient to mold protection for the right asserted? As Judge Burger, speaking for the United States court of appeals stated, "When we consider whether the available 'manageable standards' are adequate for resolving the question in the sense of solving and settling it, we are forced to conclude that 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."[38] The petitioners' claims against the members of the House were dismissed, and certainly no judicial process whatever can compel the Doorkeeper, the Sergeant-at-Arms, or the Clerk to seat Mr. Powell. None of these officers has the power to make Mr. Powell

[36] 30 U.S. (5 Pet.) 1 (1831).
[37] C. Post, The Supreme Court and Political Questions 112-17 (1936).
[38] Powell v. McCormack, 395 F.2d 577, 594 (D.C. Cir. 1968).

a member of the legislative body that chose to exclude him.[39] Thus arises the question of whether the Court's declaratory judgment is sufficient in and of itself to mold protection for Mr. Powell's right to be seated. The Court's silence implies an affirmative answer, which may be correct. Mr. Powell was seated in the 91st Congress prior to the decision. This seating officially ushered the 90th Congress into the annals of history and any decision that Mr. Powell was unconstitutionally excluded from *that* Congress would *not* require judicial processes to seat him. Thus, impossibility of enforcement renders protection of the right asserted unnecessary, and the "lack of standards" barrier falls away.

The only other *Baker* formulations seemingly applicable to the controversy concern the "potentiality of multifarious pronouncements" and the possibility of "lack of respect" arising from a judicial determination. The Court dismissed these formulations by noting that an alleged conflict resulting from such a decision cannot justify the Court's avoidance of its constitutional responsibility. But this assertion does not adequately explain those political question cases[40] in which alleged conflict has in part motivated the Supreme Court to refuse adjudication of constitutional issues. Even though in *Luther, Pacific States, Johnson,* and *Cherokee Nation* the Court found a constitutional commitment to the other branches in addition to alleged conflict engendered by the possibility of "lack of respect" or "multifarious pronouncements," this difference alone does not seem sufficient to justify a different result in *Powell* since the *Baker* formulations were stated in the alternative.[41]

The Supreme Court relied heavily upon its role as constitutional interpreter as justification for adjudicating the issues in *Powell.* This reliance implies that a constitutional interpretation cannot be avoided even when the issues present some of the *Baker* formulations. This is certainly correct if the resolution of the existence of a constitutional commitment in such political question cases as *Luther, Pacific States, Johnson,* and *Cherokee Nation* was the result of an interpretation of the Constitution.[42] But the Court in those cases did not delve into pre-convention precedents or the framers' intentions as was done in *Powell.* It strongly appears that the constitutional commitments in those cases resulted from the "lack of standards," and the possibility of "lack of respect" or "multifarious pronouncements." Thus, the *kind* of constitutional interpretation that was performed in *Powell* and professed to be unavoidable by the Court even in the presence of other *Baker* formulations, *was* avoided in prior political question cases because of the same formulations.

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[39] The Speaker of the House is the only officer authorized to administer the oath of office and thus officially seat members-elect. 2 U.S.C. § 25 (1964).

[40] *See* notes 26-37 *supra,* and accompanying text.

[41] *See* note 18 *supra,* and accompanying text.

[42] It is sometimes said that the power of the court to declare that a question is without the scope of its jurisdiction must be derived by interpretation of the Constitution. As the course of our constitutional law has developed, there does not seem to be any necessary antithesis between that proposition and the application of the standard of political wisdom in the decision of cases. Interpretation is a loose word and might be applied to almost anything.

Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338, 362 (1923).

The Supreme Court claimed that its decision in *Powell* did not evidence "lack of respect." Judge Burger believed otherwise when he stated, "[i]t is difficult to see, . . . that there could be efficient judicial resolution which was contrary to the action of the House 'without expressing lack of respect due coordinate branches of government.' . . . The issue is . . . the nature of the judicial mandate requested."[43] The crucial inquiry in *Powell* then was whether the relief requested would require a mandate of a nature likely to create "lack of respect." It could well be argued that the noncoercive declaratory judgment requiring seating in a nonexistent Congress would not promote a direct confrontation with the House.

IV. Conclusion

Mr. Justice Stewart in his dissent notes that the majority in *Powell* implicitly recognize their opinion "may be wholly advisory."[44] Without discussing the merits of Mr. Powell's claim for salary, the majority remanded the issue to the courts below. Even though it is unlikely that Mr. Powell has an adequate judicial remedy for his back pay,[45] the very doubt inherent in the issue should give rise to a court's reluctance to adjudicate grave and unsettling constitutional questions. The uncertainty of the existence of any remedy for salary is sufficient to make relief somewhat remote and speculative. Decisions of complex constitutional issues demand something more than remote and speculative relief,[46] for the Court has traditionally required "absolute necessity" as a prerequisite to the resolution of such issues.[47] *Powell* does not pay tribute to this tradition, and it would seem that the vitality of the principle has suffered serious injury at the expense of what may well be an advisory opinion.

Even in the event Mr. Powell's salary claim is upheld on remand, the precedential value of the Court's decision may be severely limited. It could be difficult to rely upon *Powell* as precedent in an action contesting a congressional exclusionary proceeding where adjudication would require the member-elect to be seated in an existing Congress. Political questions concerning "lack of standards" and the possibility of "lack of respect" or "multifarious pronouncements" were not adequately discussed in *Powell.* These formulations may for a future court force such a controversy into the nonjusticiable political question category when faced with the possibility of forcing the House of Representatives to actually seat a member-elect.

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[43] Powell v. McCormack, 395 F.2d 577, 594 (D.C. Cir. 1968).

[44] Powell v. McCormack, 89 S. Ct. 1944 (1969).

[45] Congressional salaries are payable from the United States Treasury. U.S. Const. art. I, § 6. A congressman is entitled to his salary only "after he has taken and subscribed the required oath." 2 U.S.C. § 35 (1964). Mr. Powell never took the oath and hence the Sergeant-at-Arms cannot pay over his salary without violating 2 U.S.C. § 35. Furthermore, the office of Sergeant-at-Arms of the 90th Congress has expired. Can the present Sergeant-at-Arms of the 91st Congress be authorized by a court or by the House of Representatives of the 91st Congress, which is not a party to the controversy, to make payment to a member-elect of a prior Congress who never took the oath of office?

[46] Public Affairs Press v. Rickover, 369 U.S. 111, 112 (1962).

[47] Burton v. United States, 196 U.S. 283, 295 (1905).