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The Expulsion Powers of Congress: Justiciable or Not

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THE EXPULSION POWERS OF CONGRESS: JUSTICIABLE OR NOT

This inquiry is concerned ultimately with one question. If either House of the United States Congress, purporting to act under Article 1, Section 5, of the United States Constitution, were to expel a member, would that member be able to seek judicial redress in a court of law? Or, to put the question differently, would such expulsion ever, under any circumstances, present a justiciable controversy? There appears to be no precedent on this particular issue, although at least two cases have referred to the question in a collateral manner.[1]

One thing is certain; when Congress moves to exclude a Member-elect while purporting to act under its constitutional powers,[2] there are some instances when an attempted exclusion will present a justiciable controversy.[3]

A most cursory examination of *Powell* v. *McCormack*[4] will reveal that exclusion and expulsion are not fungible proceedings.[5] Yet the Court's reasoning in *Powell*, the latest Supreme Court pronouncement on the exclusion powers of Congress, would appear to provide considerable enlightenment as to whether an expulsion case might similarly admit to judicial resolution.

Before reaching the rather delicate question of whether an expulsion proceeding falls within the confines of the political question doctrine, and thus beyond the scope of judicial review, it would be prudent to first determine whether there are any other bars to a suit by an expelled member of Congress seeking reinstatement. The *Powell* case would appear to aid in making these determinations. At this point some background on the *Powell* decision is necessary.

Adam Clayton Powell was duly elected to the House of Representatives of the 90th Congress from the Eighteenth Congressional District of New York State. Powell met the standing requirements of the Constitution as to age, citizenship, and residency.[6] The

1. Powell v. McCormack, 395 U.S. 486, 553 (Douglas J., concurring) (1969); *In re* Chapman, 166 U.S. 661, 669-70 (1897).
2. U.S. CONST. art. I, § 5, cl. 2.
3. Powell v. McCormack, 395 U.S. 486 (1969).
4. *Id.*
5. *Id.* at 506-7.
6. U.S. CONST. art. I, § 2, cl. 2 states: "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."

House found that Powell had been guilty of "misconduct" having been in contempt of the courts of New York, as well as having improperly maintained his wife on his payroll when she apparently had no duties to perform. Having so decided, the House excluded Powell by a majority vote.[7]

DOES SPEECH OR DEBATE CLAUSE INSULATE CONGRESSIONAL ACTION OF THIS NATURE FROM JUDICIAL REVIEW

The respondents in *Powell* argued that the Speech or Debate Clause[8] prohibited Powell from obtaining judicial review over the actions of the legislators or legislative employees. The Court rejected this contention saying that the protection afforded the members of Congress was for the purpose of enabling them to go about their business without being forced to go to court to defend their actions. However, the purpose of this protection was not to prevent judicial review of the legislative action itself.[9] Thus the Court adopted the method it had applied in a number of other cases[10] where the Court dismissed the action against members of Congress but did not take the Speech or Debate Clause as a prohibition of a review of the merits of the congressional action in question.[11]

Considering the above language, it seems clear that an expelled member of Congress would also not be barred by the Speech or Debate Clause from obtaining judicial review of his ouster. He could bring his action against one of the congressional employees such as the Sergeant-at-Arms, as Powell was able to do.[12]

SUBJECT MATTER JURISDICTION

In the *Powell* case the respondents attempted to gain dismissal of Powell's claim by asserting that it did not amount to a case "arising under" the Constitution within the meaning of Article III, Section 2, which mandates that the ". . . judicial Power shall extend to all Cases . . . arising under this Constitution." . . .

Citing several cases in support of its position,[13] the Court in *Powell* stated that it has long been held that a case "arises under" the Constitution if a suit will be sustained if the Constitution. . .

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7. H.R. Res. 278, 90th Cong., 1st Sess. (1967).
8. U.S. CONST. art. I, § 6, cl. 1 states: "The Senators and Representatives . . . for any Speech or Debate in either House, . . . shall not be questioned in any other Place."
9. Powell v. McCormack, 395 U.S. 486, 506-7 (1969).
10. *See* Dumbrowski v. Eastland, 387 U.S. 82 (1967); Kilbourn v. Thompson, 103 U.S. 168 (1880).
11. Powell v. McCormack, 395 U.S. 506 (1969).
12. *Id.* at 506, 550.
13. *E. g.* Bell v. Hood, 327 U.S. 678, 685 (1946); King County v. Seattle School Dist. No. 1, 263 U.S. 361, 363, 364 (1923); Osborn v. United States Bank, 22 U.S. (9 Wheat.) 737 (1824).

[is] given one construction and will be defeated if it [is] given another.[14]

Powell met the test inasmuch as the success of his case rested on the interpretation the Court gave Article 1, Section 5. Obviously, a member of Congress seeking judicial review of his expulsion would also meet this test. His success or failure would depend at least in part upon the breadth of congressional powers under Article 1, Section 5, Clause 2, as construed by the Court.

STANDING

Before anyone can bring a claim before any court, it is said that he must have standing to do so. The court in the case of *Baker* v. *Carr*[15] concisely stated what the requirements of standing consist of. There the court stated:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.[16]

It is difficult to imagine anyone who would be in a better position to contest an expulsion proceeding than the one expelled by it. He would certainly have a "personal stake in the outcome of the controversy," for his seat in Congress would depend upon the judicial decision.

CONGRESSIONAL OPINION

Before proceeding with an analysis of the applicability of the concept of justiciability to an expulsion proceedings, it would be helpful to clarify some confusing statements made by Congressmen in reference to the power of exclusion. Upon occasions, Congressmen have made statements to the effect that Congress's power to expel is plenary. Representative Gerald Ford, during the Powell hearings, stated:

> Unfortunately, during the course of this debate, statements have been made which would indicate, if not challenged, that this Congress has the power to exclude[17] a Member-

14. Powell v. McCormack, 395 U.S. 486, 512-3 (1969), *citing*, Bell v. Hood, 327 U.S. 678, 685 (1946).
15. 369 U.S. 186 (1962).
16. *Id.* at 204.
17. Although Ford's statement refers to exclusion, it is obvious that anyone who believes Congress's exclusion powers to be plenary, would also take the same position as to Congress's expulsion powers.

> elect only if such Member-elect does not satisfy the three constitutional qualifications [of age, citizenship and inhabitancy.] I do not believe that the historical record. . . support this conclusion.[18]

One writer states that Ford's attitude is typical[19] and cites previous instances of similar statements to support his conclusion.[20] However, what Congress thinks its powers of expulsion to be, is not dispositive of the issue. The House obviously thought it could exclude Powell, but the Court, on the facts of the case, ruled otherwise.

Conversely, there are statements by committees and individuals that the Congressional power to expel is limited. This issue has arisen when Congress has debated whether it can expel a member for misconduct committed prior to the convening of the Congress which is considering expelling him. The Report of the Judiciary Committee which concerned the expulsion of William S. King and John G. Schumaker concluded:

> Your committee are of the opinion that the House of Representatives has no authority to take jurisdiction of violations of law or offenses committed against a previous Congress . . . .[The] Constitution authorizes ". . .each house to determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrance of two-thirds, expel a member.". . .It [expulsion power of Constitution] cannot vest in Congress jurisdiction to try a member for an offense committed before his election:. . .[21]

In another instance, Speaker Carlisle declared that the House had "no right" to punish a member for any offense alleged to have been committed prior to the time of his election. Carlisle further asserted ". . . that it is no longer a matter of dispute in the House."[22]

The use of words such as "no authority" and "no right" immediately raises the question as to what force is so limiting Congress in its power to expel a member. The word "right" used in a legal sense usually denotes the existence of an appropriate remedy to uphold the right. Of course, it is entirely possible that Carlisle, in using the word "right" was applying a less technical meaning to the word, and in fact meant that it would not be a nice thing to do.

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18. 113 CONG. REC. H. 1940 (daily ed., March 1, 1967).
19. Dionisoyoulos, *A Commentary On The Constitutional Issues In The Powell And Related Cases,* 17 J. PUB. L. 103, 121-2 (1968).
20. *Id.* at 122 n.49. The debates in the Berger case, 58 CONG. REC. (1919); the statement by Alben Barkley, 87 CONG. REC. 3 (1941); and in 88 CONG. REC. 2475 (1942); the statement of Senator George, 88 CONG. REC. 2390 (1942); and the statement of Senator Ferguson, 93 CONG. REC. 74 (1947).
21. H.R. REP. No. 815, 44th Cong., 1st Sess. 2 (1876).
22. H.R. REP. No. 30, 69th Cong., 1st Sess. 1-2 (1925).

It is more probable, however,[23] that statements issuing from committees or individuals to the effect that the Congress is limited in its power to expel, actually refer to a self-imposed limitation in the form of a manual of rules of procedure.[24] The violation of its own rules by a branch of Congress will not, however, give rise to a judicial controversy if it occurs in an area where Congress is given complete powers to act; e. g., if Congress is given plenary powers to expel.

JUSTICIABILITY

In order that a litigant may obtain judicial relief he must present what is termed a justiciable controversy. The main question would appear to be: Is the claim presented and the relief sought the type which will admit of judicial resolution?

In the *Baker* case the Court pointed out that to determine this type of question a court must ascertain whether ". . . the duty asserted can be judicially identified and its breach judicially . . . molded."[25]

The Court found this aspect of justiciability to present no problem under the facts of the *Powell* case. It was pointed out that if the petitioners were correct the House would have a duty to seat Powell once it had been established that he met the standing qualifications laid down in the Constitution.[26] Similarly, in the case of a Congressman who was expelled, if it could be successfully argued that he was wrongfully expelled, that branch of Congress would have a duty to reinstate him.

A further question was brought to the fore in the *Powell* decision in regard to the appropriateness of coercive relief. It was asserted that the Speech or Debate Clause would be a bar to the issuance by a federal court of mandamus or an injunction. However, the Court found that it was not necessary to reach this question inasmuch as Powell sought a declaratory judgement[27] which could be granted.[28]

An expelled member of Congress seeking to litigate the legality of his expulsion would also be able to avoid the problem of coercive relief. A declaratory judgment requires only that there be a "live dispute between the parties,"[29] which would certainly be in exist-

23. This is the inevitable conclusion one must reach if he takes the position that there is no constitutional limitation on Congress's power to expel.
24. *Cf.* Powell v. McCormack, 395 U.S. 486, 509 (1969).
25. Baker v. Carr, 369 U.S. 186, 198 (1962).
26. Powell v. McCormack, 395 U.S. 486, 517 (1969).
27. Declaratory Judgment Act, 28 U.S.C. § 2201 (1964). The Act provides that a district court may " . . . declare the rights of any interested party . . . whether or not further relief is sought."
28. Powell v. McCormack, 395 U.S. 486, 518 (1969).
29. *Id.* at 518, *citing,* Golden v. Zwickler, 394 U.S. 103 (1969).

ence in litigation between a branch of Congress and an expelled member of that branch. And as the Act provides,[30] and the courts have held,[31] declaratory relief is available even if no other relief is.

Up to this point it is clear that there would be no bar to a suit by an expelled Congressman contesting his expulsion. However, there are difficult issues yet to be resolved. In an attempt to arrive at an answer it would be prudent to construct a hypothetical situation that would present the question of justiciability of an expulsion proceeding in perhaps its most difficult light. Suppose the House explicitly states that it expelled Member-X because X stated that Communism is good. X seeks to have a court reinstate him, claiming a violation of his First Amendment rights of freedom of speech. The situation appears to present a clear violation of First Amendment rights. However, given the context of an expulsion proceeding, would be a justiciable controversy exist under the facts of the hypothetical case?

In the case of *In Re Chapman*,[32] the Court stated that "[t]he right to expel extends to all cases where the offense is such as in the judgment of the Senate, is inconsistent with the trust and duty of a member.[33] However, *Chapman* dealt with the constitutionality of an act of Congress which made one subject to criminal prosecution for refusal to answer any pertinent questions while appearing before either House of Congress.[34] Therefore, any pronouncements made in regard to the expulsion powers of Congress are dicta and not entitled to the force of precedent.

Mr. Justice Douglas has also gone on record indicating his position that an expulsion case would not be justiciable. In his concurring opinion in the *Powell* case, Douglas stated, "And if this were an expulsion case I would think that no justiciable controversy were presented, the vote of the House being two-thirds or more."[35]

Assuming a case would arise where a Congressman claimed he was expelled in violation of his First Amendment rights, would the court, as Justice Douglas indicates, refuse to hear the case? It appears to be clear that Douglas believes an expulsion would present a political question, a second aspect of justiciability. Thus, in order to determine the correctness of Justice Douglas's position it is necessary to ascertain, if possible, what a political question is.

30. Declaratory Judgment Act, 28 U.S.C. § 2201 (1964).
31. Powell v. McCormack, 395 U.S. 486, 518 (1969); *accord*, United Pub. Workers v. Mitchell, 330 U.S. 75, 93 (1947).
32. 166 U.S. 661 (1897).
33. *Id.* at 669-70.
34. *Id.* at 667.
35. 395 U.S. 486, 553 (Douglas J. concurring).

POLITICAL QUESTION

To date, the court in *Baker* v. *Carr*,[36] which pointed out that the political question is primarily a result of the separation of powers concept,[37] seems to have formulated the most precise definition of a political question. There the court stated:

> Prominant 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 already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[38]

Presumably the existence of any one of these six factors would be sufficient to invoke the political question doctrine. In the *Powell* decision the court disposed of five of those aspects, exclusing the "textually demonstrable constitutional commitment" factor, in a very cursory manner.[39] Applying the same method of analysis to an expulsion case, it would appear that four of the factors enumerated in *Baker*, exclusive of the "textually demonstrable constitutional commitment" and the "lack of judicially discoverable and manageable standards" factors, be similarly disposed of in a summary manner. However, the two excluded factors would present very serious obstacles to any claim that an expulsion proceeding would ever present a justiciable controversy.

Textually Demonstrable Constitutional Commitment

An expelled member of Congress, to be successful in obtaining judicial review of his case, would have to persuade a court that the power of expulsion has not been constitutionally committed to Congress. One of the avenues of approach to aid one in making the determination as to what the writers of the Constitution intended on this question is to examine the historical background of the Constitutional Convention. In *Powell*, the court utilized this method.[40]

For whatever weight such facts are entitled to be given, the

36. 369 U.S. 186 (1962).
37. *Id.* at 210.
38. *Id.* at 217.
39. Powell v. McCormack, 395 U.S. 486, 548-9 (1969).
40. *Id.* at 548-9.

British historical precedents seem to support an unlimited power to expel. One example is that of the expulsion of a Doctor Parry for unspecified behavior.[41] And, in 1628, Sir Edmond Sawyer was expelled for attempting to suppress evidence against Sir Edmond in testimony before the House.[42] It might be argued with some force, that the framers of the United States Constitution were aware of the British precedents indicating complete freedom to expel and intended the same to be the case in this country also.

In reaching its decision in the *Powell* case that exclusion was limited to the standing qualifications enumerated in the Constitution, the Court relied to some extent on Charles Warren's records of the Constitutional Convention.[43] It was pointed out that Madison had observed that the right of expulsion was too important to be exercised by a majority of a quorum, which would present a possibility that a particular faction of Congress might be abused. Madison therefore moved, and the Convention nearly unanimously adopted the motion, that a two-thirds vote be required for expulsion.[44]

From this the Court in *Powell* concluded that inasmuch as the Convention decided that the importance of expulsion required a two-thirds vote, while exclusion required only a majority vote, exclusion was apparently intended to be limited to grounds specified in the Constitution.[45] In addition, Madison's statement as to the importance of the expulsion power,[46] is rather compelling evidence that the writers of the Constitution intended that the expulsion powers of Congress be unlimited.[47]

Such a conclusion would also seem to be the logical deduction to be made from the Court's reasoning in *Powell*. The majority states that in their opinion, the history of the Constitutional Convention reveals the Convention's intention that exclusion be limited to those instances where a Member-elect fails to meet the specific Constutional requirements. The Court says this must be so because the Convention required a two-thirds vote for an expulsion, while not

41. A Complete Journal of the Votes, Speeches and Debates of the House of Lords and House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory, 352 Cb. Ewes ed. (1708), *as cited in,* Powell v. McCormack 395 U.S. 486, 542 n.48.

42. L.H.C. Jour. 917, *as cited in,* Powell v. McCormack, 395 U.S. 486, 524 n.48.

43. C. WARREN, THE MAKING OF THE CONSTITUTION (1928).

44. *Id.* at 424.

45. Powell v. McCormack, 395 U.S. 486, 547-8 (1969).

46. *Supra* note 43, at 424.

47. *See generally* for support of this conclusion: WARREN, *supra* note 43, at 420-24. This contention becomes all the stronger when one is made aware, as Warren points out, that Madison's statement was made the same day as and in reference to, a discussion, the result of which was to require only a majority vote for exclusion. During this discussion Madison, in reference to the limitations to be set on qualifications to sit in Congress, remarked, " . . . the British Parliament possessed the power of regulating the qualifications . . . of the elected and the abuse they had made of it was a lesson worthy of our attention."

similarly restricting the power of exclusion.[48] Thus, is not the Court in *Powell*, strongly implying that the power to expel is not in any manner restricted?

Secondly, following the approach of the court in Powell, construction of pertinent provisions of the Constitution would be as essential in making the determination as to the constutional commitment of an expulsion proceeding to Congress. In *Powell*, the Court additionally based its decision on construction of pertinent provisions of the Constitution. The Court read the language of Article 1, Section 5, which relevant part reads, "Each House shall be the Judge of the Election, Returns, and Qualifications of its own members . . .," in conjunction with requirements laid down in Article 1, Section 2, Clause 2, as to "age, citizenship, and inhabitancy." Thus, the Court was able to conclude, with some logic, that inasmuch as Section 5 speaks of judging "Elections, Returns, and Qualification," and Section 2 specifically states what qualifications one must possess to be eligible for election, Article 1, Section 5, is limited by Article 1, Section 2, Clause 2.[49]

However, it does not appear that Article 1, Section 5, Clause 2, can be similarly read in conjunction with any other provision of the Constitution in a manner as to limit its applicability. The section reads in full:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member.

This provision may be saying that Congress can expel, period; or, it may be saying that Congress can expel for "disorderly behavior." If the section gives Congress blanket power to expell for whatever reason it chooses, any claim seeking judicial relief for such expulsion would summarily be disposed of as a political question.

Contentiously, however, Article 1, Section 5, Clause 2, when read as a whole, empowers Congress to expel a member only in cases where that member has been guilty of disorderly behavior. If this position were to be taken it could then be argued that the issue has not been constitutionally committeed to Congress by making the assertion that a court could inquire into Congress's determination as to what constitutes disorderly behavior. Admittedly this involves a somewhat strained reading, inasmuch as Article 1, Section 5, Clause 2, would in effect be read to say Congress may expel for disorderly behavior, but the courts may determine what constitutes disorderly

48. *See* Powell v. McCormack, 395 U.S. 486, 548 (1969).
49. *Id.*

behavior. However, even assuming the correctness of this possibly untenable position, it would still appear that a court would be precluded from rendering a decision on the legality of an expulsion proceeding.

In *Powell*, the court noted that even if it were definite that Congress's powers to judge the qualifications of its Members-elect were limited to the standing qualifications of the Constitution, a non-justiciable political question might still be presented. The problem didn't arise in the case because the respondents admitted that Powell met the standing qualifications,[50] but the Court noted:

> Consistent with this interpretation, federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution.[51]

By raising this point, the Court in *Powell* seems to imply that at least an arguable issue would be presented under such facts. If it could be so argued in an exclusion case, where the grounds for exclusion are explicitly enumerated, and a factual determination as to whether one has met these qualifications would be relatively simple to make, would not such an argument be of overwhelming persuasiveness in an expulsion situation?

It would be at this point that another of the incidents of a political question enumerated in *Baker*, that of "lack of judicially discoverable and manageable standards" for resolving an issue,[52] would present itself. Disorderly behavior is indeed a very nebulous term. Where are the "judicially discoverable and manageable standards" for determining what disorderly behavior is? Clearly there are none. There are no constitutional guidelines as to what constitutes disorderly behavior, as there are constitutional guidelines on the grounds for exclusion.

CONCLUSION

It appears very clear that Congress is given plenary powers to expel a Member-elect. Even though a court viewed with horror a particular expulsion proceeding, it would decline to rule on the case. By hearing such a case a court would be exposing itself to a myraid of difficulties, for which the standards of resolution would be amorphous at best.

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50. *Id.*
51. *Id.* at 521 n.42.
52. 369 U.S. 186, 217.