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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. , ORIGINAL

STATE OF INDIANA, in its own right;
and STATE OF INDIANA, as *Parens patriae*
for its citizens, residents, taxpayers, and
voters residing in the Eighth
Congressional District of Indiana,
Plaintiff,

v.

UNITED STATES OF AMERICA;
UNITED STATES HOUSE OF REPRESENTATIVES;
THOMAS P. O'NEILL, JR.; BENJAMIN J. GUTHRIE;
JACK RUSS; and JAMES T. MALLOY,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

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STATE OF INDIANA, in its own right;
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Congressional District of Indiana,
Plaintiff,

v.

UNITED STATES OF AMERICA;
UNITED STATES HOUSE OF REPRESENTATIVES;
THOMAS P. O'NEILL, JR.; BENJAMIN J. GUTHRIE;
JACK RUSS; and JAMES T. MALLOY,
Defendants.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Indiana, by its Attorney General, asks leave of the Court to file its complaint against the United States of America, the United States House of Representatives, Thomas P. O'Neill, Jr., Benjamin J. Guthrie, Jack Russ and James T. Malloy, submitted herewith.

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JACK RUSS; and JAMES T. MALLOY,
Defendants.

COMPLAINT

JURISDICTION

1. The jurisdiction of this Court is invoked under Art. III, § 2, cl. 2 of the Constitution of the United States, and under 28 U.S.C. § 1251(b)(2).

PARTIES

2. The Plaintiff State of Indiana since the 16th day of December, 1816, to the present has been and is a State of the United States.

3. Defendant United States House of Representatives is one house of the United States Congress, the legislative branch of government of the Defendant United States of America.

4. Defendant Thomas P. O'Neill, Jr., is Speaker of the House of Representatives of the 99th Congress of the United States, and as such is responsible for administering the Oath of Office to United States Representatives.

5. Defendant Benjamin J. Guthrie is Clerk of the House of Representatives and, as such, is charged with informing the Speaker of the Members-elect whose certificates of election indicate they are eligible to receive the oath of office, granting Members offices in the House Office Building, providing Members with the emoluments and privileges of office, and performing for Members those services and duties to which they are entitled, including the payment of monies under the Clerk Hire Allowance for salaries and other funds necessary to maintain a congressional staff.

6. Defendant Jack Russ is the Sergeant-at-Arms of the House of Representatives and, as such, is charged with keeping the accounts for the expenses and mileage of Members and Paying them accordingly.

7. Defendant James T. Malloy is the Doorkeeper of the House of Representatives and, as such, is charged with admitting Members to the Hall of the House for purposes of voting and addressing the House.

FACTS

8. Richard S. McIntyre was duly elected as the Representative from Indiana's Eighth Congressional District to the 99th Congress of the United States at the November 6, 1984, general election.

9. On December 13, 1984, Indiana Secretary of State Simcox, as directed by Ind. Code § 3-1-26-9, certified McIntyre as winner of the election based upon duly sworn and corrected certificates of election from the fifteen counties that comprise the Eighth Congressional District. All nine other Members-

elect from Indiana—Lee H. Hamilton, Peter J. Visclosky, Phillip R. Sharp, John Hiler, Daniel R. Coats, Elwood H. Hillis, Dan Burton, John T. Myers, and Andrew Jacobs, Jr.—were certified in the same manner pursuant to Ind. Code § 3-1-26-9.

10. On December 13, 1984, pursuant to Ind. Code § 3-1-26-9, Indiana Governor Robert Orr signed McIntyre's certificate of election and sent it to defendant Guthrie.

11. Pursuant to his duties under House Rule III, Guthrie entered McIntyre's name upon the roll of the Members-elect of the 99th Congress. As Guthrie stated in opening the 99th Congress:

Representatives-elect to the 99th Congress, this being the day fixed by the 20th amendment of the Constitution for the meeting of the 99th Congress, the Clerk of the House has prepared the official roll of the Representatives-elect.

Certificates of election covering the 435 seats in the 99th Congress have been received by the Clerk of the House of Representatives, and the names of those persons whose credentials show that they were regularly elected as Representatives in accordance with the laws of their respective States and the United States will be called.

131 Cong. Rec. H1 (daily ed. Jan. 3, 1985).

12. In accordance with his status as the duly certified Member-elect from the Eighth Congressional District, McIntyre's name was entered on the electronic voting board in the Hall of the House of Representatives, he answered the roll-call opening the 99th Congress, and he cast his vote for Robert H. Michel for Speaker of the House of Representatives.

13. McIntyre meets the constitutional requirements for membership in the House of Representatives in that he has attained the age of twenty-five years, has been a citizen of the United States for more than seven years, and is a resident of the State of Indiana, all as required by U.S. Const. Art I, § 2.

14. On January 3, 1985, the House of Representatives passed House Resolution 1, which states:

Resolved. That the question of the right of Frank McCloskey or Richard McIntyre to a seat in the Ninety-ninth Congress from the Eighth Congressional District of Indiana shall be referred to the Committee on House Administration, when elected, and neither Frank McCloskey nor Richard McIntyre shall be sworn until the Committee on House Administration reports upon and the House decides such question. For each day during the period beginning on the date on which this resolution is agreed to and ending on the day before the date on which the House decides such question, Frank McCloskey and Richard McIntyre shall each be paid an amount equal to the daily equivalent of the annual rate of basic pay payable to a Member of the House.

For the period beginning the date on which this resolution is agreed to and ending on the date on which the House decides such question, the Clerk of the House shall provide for clerical Assistants in the manner provided by law for the case of death or resignation of a Member and shall otherwise perform full administrative functions with respect to the Eighth Congressional District of Indiana. There shall be paid from the contingent fund of the House such sums as may be necessary to carry out this resolution.

15. House Resolution 1 contained no charges or allegations impugning the election processes and vote-counting results pursuant to which McIntyre was duly certified by the State authorities, and contained no direction or instruction to the committee to investigate or receive evidence.

16. The vote on House Resolution 1 denying McIntyre the right to take the oath of office and, thus, excluding him from membership in the House, was by a party-line vote of 238 Democratic Members to 177 Republican Members. Eleven (11) Members were listed as not voting. 131 Cong. Rec. H11 (daily ed. Jan. 3, 1985). Pursuant to House Resolution 1, McIntyre was not permitted to take the oath of office.

17. Since the passage of House Resolution 1, McIntyre, acting as a duly certified Member, has attempted to fulfill the constitutional duties of a Member of the House of Representatives. The defendants have wrongfully prohibited McIntyre from fulfilling such duties.

18. On February 7, 1985, Minority Leader Robert H. Michel introduced House of Representatives Resolution Number 52 ("House Resolution 52") which states:

Whereas, Richard D. McIntyre won the November 8, 1984, election in the Eighth Congressional District of Indiana by 34 votes according to the certificates of election filed by the county clerks from the District's 15 counties; and

Whereas, the Indiana Secretary of State, Edwin J. Simcox, acting in accordance with his duties as set forth in the Indiana Code (Ann. Sec. 3-1-26-9), certified Richard D. McIntyre as the Representative from Indiana's Eighth Congressional District; and

Whereas the Clerk of the House stated on January 3, 1985 in opening the 99th Congress that he had 'prepared the official roll of the Representatives-elect' which included McIntyre's name. The Clerk stated: 'Certificates of election covering the 435 seats in the 99th Congress have been received by the Clerk of the House of Representatives, and the names of these persons whose credentials show that they were regularly elected as representatives in accordance with the laws of their respective States and of the United States will be called.' McIntyre's name was called and he cast his vote for Robert H. Michel as Speaker of the House of Representatives; and

Whereas the majority of the House of Representatives on January 3, 1985 voted in House Resolution 1 not to seat Richard D. McIntyre as Representative from Indiana's Eighth Congressional District despite has [sic] certificate of election issued pursuant to the laws of Indiana; and

Whereas House Resolution 1 is contrary to the precedents of the House of Representatives in that the holder of a certificate of election not tainted by fraud or irregularities has previously been granted a prima facie right to a seat with the final right being referred to the Committee on House Administration; and

Whereas Richard D. McIntyre received 418 votes more than Francis X. McCloskey in a recount of the ballots cast in Indiana's Eighth Congressional District pursuant to Indiana Code (Ann. Sec. 3-1-27 et seq.); Now, therefore be it

Resolved, That the Speaker is hereby authorized and directed to administer the oath of office to the gentleman from Indiana, Mr. Richard D. McIntyre.

Resolved, That the question of the final right of Mr. McIntyre to a seat in the 99th Congress is referred to the Committee on House Administration.

19. Congressman Wright moved to refer House Resolution 52 to the Committee on House Administration, the effect of which would be, if passed, to preclude McIntyre from receiving the oath of office. The motion to refer was adopted by a vote of 221 to 180 with one Member answering "Present" and 30 not voting. All of the 221 votes to refer House Resolution 52 were cast by Democratic Members. 131 Cong. Rec. H344-45 (daily ed. Feb. 7, 1985). Accordingly, McIntyre remains excluded from the House, and Indiana's Eighth Congressional District remains unrepresented in the House of Representatives, now for over eight weeks.

20. In judging the elections of its Members pursuant to Article 1, Section 5 of the United States Constitution, the House must follow due-process requirements, including its own established procedures, because of the judicial nature of that function. Failure to follow such requirements, as reflected in the precedents of the House itself, renders any House action so taken null and void. This is particularly so when that failure is based in whole or in part on partisan political considerations.

21. Modern precedents of the House since 1933 are that in 81 of 82 challenged seatings of Members-elect, the Member-elect who has been certified as the winner pursuant to the laws of his State has been seated pending House investigation of the election. In the one exception which occurred in 1961, the State authorities had issued conflicting certificates.

22. Congress has passed no law under U.S. Const. Art. I, § 4, cl. 1, altering Indiana's prescription of the time, place, and manner of holding elections for representatives.

23. Neither of the two candidates opposing Mr. McIntyre has filed a notice of contest under the Federal Contested Elections Act, 2 U.S.C. § 381 *et seq.*; nor has any person filed any protest or memorial with the House itself; nor have there been any allegations from any source of fraud or other irregularity in connection with the November 6, 1984 election in the Eighth Congressional District of Indiana.

24. The official acts of the properly constituted State authorities in certifying the winners of elections for the office of Representative in Congress are entitled, as a matter of comity, to a presumption of validity and correctness.

25. Defendant Guthrie has wrongfully excluded and threatens to continue wrongfully excluding McIntyre from occupying an office in a House Office Building to which he is entitled. Defendant Guthrie has also wrongfully refused and threatens to continue wrongfully refusing to perform for McIntyre certain other services and duties to which McIntyre is entitled, including the payment of monies under the Clerk Hire Allowance for salaries and other funds necessary to maintain a congressional staff.

26. Defendant Russ has wrongfully refused and threatens to continue wrongfully refusing to keep for McIntyre the accounts for, and to pay to him, the expenses and mileage to which he is entitled.

27. Defendant Malloy has wrongfully refused and threatens to continue wrongfully refusing to admit McIntyre to the Hall of the House for purposes of voting and addressing the House.

COUNT I

28. Plaintiff incorporates by reference the allegations contained in paragraphs 1-27 of this Complaint.

29. The course of conduct described above in paragraphs 1-27 contravenes the presumption of validity of its official acts to which, as a matter of comity between the States and the Federal government, the State of Indiana is entitled, and furthermore deprives the State of Indiana of its right to prescribe the time, place, and manner of holding elections for representatives, in violation of Article I, § 4, cl. 1 of the United States Constitution.

COUNT II

30. Plaintiff incorporates by reference the allegations contained in paragraphs 1-27 of this Complaint.

31. The course of conduct described above in paragraphs 1-27 deprives the citizens, residents, taxpayers, and voters of the Eighth Congressional District of Indiana of their right of free speech and association, their right to vote in federal elections, and their right to due process of law by denying them their right to representation in the 99th Congress by their duly certified and elected Representative, in violation of Article I, § 5 of, and the First and Fifth Amendments to, the Constitution of the United States.

WHEREFORE, Plaintiff State of Indiana respectfully prays the Court to:

1. Adjudge and decree House Resolution 1 and the referral of House Resolution 52 to the Committee on House Administration null and void on the grounds that they violate the presumption of validity of its official acts to which the State of Indiana, as a matter of comity, is entitled, and that they further violate the State of Indiana's right to prescribe the time, place, and manner of holding elections for representatives as guaranteed by Art. I, § 4, cl. 1 of the United States Constitution; and that they further violate the rights to free speech and

association, to vote, and to due process of law of the citizens, taxpayers, residents, and voters of the Eighth Congressional District of Indiana, as guaranteed by Article I, § 5 of, and Amendments 1 and 5 to, the Constitution of the United States;

2. Enter an order enjoining the defendants, their agents, servants, officers, employers, employees, subordinates, attorneys, and all other persons acting in concert with them from excluding Mr. McIntyre from the House of Representatives;

3. Issue a permanent injunction restraining all Defendants from denying Mr. McIntyre his seat as the duly elected Representative of the Eighth Congressional District of Indiana to the 99th Congress, duly certified as such by the State authorities;

4. Enjoin Defendant O'Neill from refusing to administer the oath of office to Mr. McIntyre as a member of the 99th Congress;

5. Enjoin Defendants Guthrie, Russ, and Malloy, from denying McIntyre any of the rights, privileges, powers, emoluments, and services, including admission to the House for the purposes of voting and addressing the House, to which the duly elected and certified winner of the State of Indiana's November 6, 1984, election to the office of U.S. Representative for the Eighth District of Indiana is entitled; and

6. Award such other and further relief as may be deemed proper.

THE STATE OF INDIANA

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Defendants.

**BRIEF IN SUPPORT OF MOTION
FOR LEAVE TO FILE COMPLAINT**

JURISDICTION

The jurisdiction of this Court is invoked under Article III, § 2, cl. 2 of the Constitution of the United States, and under 28 U.S.C. § 1251(b)(2).

QUESTION PRESENTED

May the House of Representatives refuse to seat a Member-elect, who has been duly certified as elected by the proper State authorities, when there have been no allegations of

fraud or other irregularity in connection with the election, and when such action deviates from the precedents of the House without sufficient cause?

NATURE OF THE CONTROVERSY

This is an action by the State of Indiana against the United States of America, the United States House of Representatives, Thomas P. O'Neill, Jr., Benjamin J. Guthrie, Jack Russ and James T. Malloy. The purpose of the proposed action is to establish Indiana's right to determine the time, place, and manner of holding elections for representatives in Indiana, and the rights of its citizens, residents, voters and taxpayers of Indiana's Eighth Congressional District to be represented in Congress by the person of their choice. The original jurisdiction of this Court is invoked since this is an action in which Indiana seeks relief against the United States.

On November 6, 1984, a general election was held in Indiana and the nation. Among the offices contested at that election was that of United States Representative for the Eighth District of Indiana. The election for that office was extremely close, and the Secretary of State of Indiana and the Governor of Indiana issued no certificate of election until certain tabulation errors in one county (Gibson County) were corrected. After these errors were corrected, a certificate of election was issued on December 13, 1984, by the State authorities to Richard D. McIntyre. Recounts in all fifteen counties have been completed, but they did not change the result. As of this date the State authorities have issued one and only one certificate of election, that issued on December 13, 1984, to Richard D. McIntyre.

Despite the fact that the State authorities had certified Mr. McIntyre as the winner of the election for the office of U.S. Representative from the Eighth District of Indiana, on January 3, 1985, on motion by Congressman Wright of Texas, the House denied Mr. McIntyre the right to take the oath of office, to assume the seat to which he had been elected, or to exercise any of the functions of the office of U.S. Representative from

the Eighth District of Indiana. The right of Mr. McIntyre to hold the seat was referred to the Committee on House Administration.

Despite the fact that there are no allegations of fraud or irregularity in connection with Mr. McIntyre's certification by the State authorities, the Defendants have refused to permit Mr. McIntyre to assume the seat to which he has been elected, thus depriving the voters and residents of the Eighth District of Indiana of their right to representation in the House, and depriving the State of Indiana of the presumption of validity of its official acts to which it is entitled, and of its right to determine the time, place, and manner of electing representatives in Congress from Indiana.

Defendants, it is believed, may invoke Article I, Section Five, Clause 1 of the United States Constitution, which provides that "each House shall be the judge of the elections . . . of its own members . . ." and attempt to argue that this dispute is exclusively within the power of the House to determine. Plaintiff will contend that this clause must be construed in harmony with those clauses in the Constitution protecting the State's right to determine the time, place, and manner of holding elections to the House of Representatives, protecting the people's right to freedom of speech and association, and to vote in Federal elections, and the State will further contend that the House in exercising its power under Art. I, § 5, cl. 1 is bound to accord due process of law.

ARGUMENT

I. THIS CONTROVERSY PRESENTS A JUSTICIABLE ISSUE AND SHOULD THEREFORE BE HEARD BY THIS COURT.

The Defendants will undoubtedly contend that the refusal to seat Mr. McIntyre (pending the House's determination of the outcome of the election in the Eighth Congressional District of Indiana) was taken under Article I, § 5, cl. 1 of the United States Constitution, which provides that each House of Congress "shall be the judge of the elections, returns, and qualifications of its members." Thus, the argument will run, such

action is impervious to review by the Courts. Such a conclusion, however, would be a *non sequitur*.

The fact that a particular power is granted to the House, in this case a power "to judge the elections" of its members, does not imply that such power may be exercised in a manner inconsistent with, or violative of, other provisions of the Constitution. Indeed, precisely the opposite is the case, as is clearly established by *Powell v. McCormack*, 395 U.S. 486 (1969). In that case, the House refused to seat plaintiff Powell on the grounds that he was not qualified for membership. This Court held that Powell's claim was indeed justiciable, despite the House's Article I, § 5, cl. 1 power to judge the "elections, returns, and qualifications of its members," and, citing *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929), noted that "actions allegedly taken pursuant to Art. I, § 5, are not automatically immune from judicial review." 395 U.S. at 486 fn. 40. The Court then determined that, by attempting to require qualifications beyond those prescribed by Article I, § 2 for House membership, the House had exercised its Article I, § 5 powers in an unconstitutional fashion.

In determining that a complaint alleging that the House's Article I, § 5 powers have been exercised in an unconstitutional manner presents a justiciable issue, the *Powell* court referred to *Barry, supra*. In *Barry* the Court addressed the question of the Senate's power to issue a warrant to bring before it a person whose testimony was sought in connection with an Article I, § 5 investigation of a senatorial election. The plaintiff in *Barry* challenged the Senate's warrant by initiating a federal habeas corpus proceeding. On appeal to the Supreme Court the central question was the Senate's power under the Election Clause to issue the warrant. 279 U.S. at 613.

The Supreme Court noted that the power to judge elections is not legislative, but judicial in nature. 279 U.S. at 613. The exercise of that authority is "subject only to the restraints imposed by or found in the implications of the Constitution." 279 U.S. at 614 (emphasis supplied). The Court in *Barry* then addressed the merits of Plaintiff's claim, first noting that the Senate's exercise of the power to judge the elections of its

members included "the incidental power of compelling the attendance of witnesses." 279 U.S. at 619. The Court concluded that the exercise by the Senate of that power did not constitute "such an arbitrary and improvident use of the power as will constitute a denial of due process of law." 279 U.S. at 620. A claim that Congress had exercised its power in such fashion as to constitute a due process violation would clearly, therefore, be justiciable under *Barry*: in essence that was the claim which the Supreme Court *did* adjudicate in that case, albeit not in the plaintiff's favor.

Thus *Barry* and *Powell* both make clear that the power exercised by either house of Congress under Article I, § 5, cl. 1 must be exercised in conformity to the other provisions of the Constitution in a manner that does not constitute a denial of due process. The Plaintiff State of Indiana alleges that the refusal to seat McIntyre (1) conflicts with other provisions of the Constitution and (2) denies due process of law to Indiana's citizens, residents, taxpayers, and voters in the Eighth Congressional District. Such a claim is clearly justiciable: *Powell* and *Barry* are dispositive of any issue of justiciability.

II. THE FAILURE TO SEAT McINTYRE INFRINGES THE STATE'S RIGHT TO DETERMINE THE TIME, PLACE, AND MANNER OF HOLDING ELECTIONS FOR REPRESENTATIVES.

The United States Constitution, Article I, § 4, cl. 1, provides that: "The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing senators." Thus Congressional elections in each state are conducted under the laws and procedures established by that state, unless Congress "by law" alters the state procedure. The appropriate state officials certify the outcome of the election in each district to the Clerk of the House of Representatives, who in turn, places "the names of those persons, and those persons only, whose credentials show that they were regularly elected in accordance with the laws of their respective States" on the roll of the Representatives-elect.

2 U.S.C. § 26. Thus the very organization of the House presumes the validity of the certificate of election issued to a member by the appropriate state authorities.

Congress has recognized the *prima facie* validity of the results of the state's election processes by another statute as well. Under the Federal Contested Elections Act, 2 U.S.C. § 381 *et seq.*, a person who wishes to contest the result of the state election process has thirty days following the state certification to file a notice of contest with the House. 2 U.S.C. § 382. The winner certified by the state becomes the contestee; the person challenging the result of the state's election is the contestant. Significantly, the burden is explicitly placed on the contestant to prove that the election results entitle him to the contested seat. 2 U.S.C. § 385. The same section makes clear that the burden remains on the contestant, even if the contestee fails to respond to the notice of contest, *i.e.*, the contestant cannot gain the seat merely by default on the part of the contestee. The entire statutory scheme for deciding contested elections for representatives in Congress thus begins with a presumption that the final result of the State election process, the certification of a winner by the appropriate state authorities, is correct. This, of course, is only appropriate in a federal system.

In our federal system, there is a "constitutional policy that Congress may not exercise power in a fashion that impairs states' integrity or their ability to function effectively in a federal system." *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975). The election of representatives is clearly a function that is exercised at that point where state and federal sovereignties meet, and the Constitution, by Article I, § 4, cl. 1 has committed control of that process to the State, unless Congress "by law" alters the state's scheme. Congress, of course, has passed no law invalidating or overriding the provisions of Indiana law governing the election of representatives, including its provisions for the tabulating and counting of votes and certification of results, and including also its provisions for recount procedures, which are "an integral part of the Indiana election process." *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972).

If state courts are presumed to act constitutionally, and they are: *Dombrowski v. Pfister*, 380 U.S. 479 (1965); if state administrative agencies, as creatures of state legislatures, are presumed to act constitutionally, and they are: *Olson v. Board of Education of Union Free School District No. 12, Malverne, New York*, 250 F. Supp. 1000 (E.D.N.Y. 1966), *appeal denied*, 367 F.2d 565; if even municipal officers, officers of a state's political subdivisions, are presumed to act in accordance with their duty, and they are: *Barnard and Bush v. City of Pulaski*, 327 F.2d 911 (6th Cir. 1964); then surely the State's highest authorities, its state officers, the Governor and Secretary of State, are entitled to a presumption that their acts in issuing a Certificate of election to Mr. McIntyre on December 13, 1984, were valid and in accordance with their duty. This is particularly so when they are acting in an area specifically placed within the State's sphere (in the absence of conflicting federal legislation) by Article I, § 4, cl. 1. Both as a matter of comity under our federal system, and in recognition of the powers granted the State by Article I, § 4, cl. 1, the federal authorities must allow the state's certification of election results a presumption of validity.

In the present controversy, there are no conflicting certificates, as there were in the Roush-Chambers dispute following the 1960 general election. There has been one and only one certificate of election: that issued to Mr. McIntyre by the state authorities on December 13, 1984. A state recount has been completed, and did not change the result of the Indiana election. There have been no allegations of fraud or other irregularity in connection with the election. On these facts, the House's refusal to seat Mr. McIntyre destroys the integrity of the State's explicit constitutional power, where Congress has enacted no superceding law, to conduct elections for representatives, and vitiates the presumption of validity which must be accorded the certification of Mr. McIntyre by the responsible state authorities, and all of this without any evidence or adjudicatory proceeding, either in the House under Article I, § 5, or in any other forum, which might supply any reason whatever to suppose that the State's certification should be disregarded. The result is to make a mockery of the state's power to conduct elections, and of the people's power under Article I, § 2, cl. 1 to choose their representatives.

III. THE REFUSAL TO SEAT MCINTYRE INFRINGES THE RIGHT OF THE CITIZENS, TAXPAYERS, VOTERS, AND RESIDENTS OF INDIANA'S EIGHTH CONGRESSIONAL DISTRICT TO DUE PROCESS OF LAW.

Barry, supra, and *Powell, supra*, make clear that the House of Representatives' powers under Article I, § 5, cl. 1 of the Constitution cannot be exercised in a manner inconsistent with or violative of other provisions of the Constitution. Every governmental power "must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320 (1936). Any exercise of the House's powers under Art. I, § 5 must comply, specifically, with the due process guarantees of the Constitution, since "there cannot be under the American flag any governmental authority untrammelled by requirements of due process." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974), *rehearing denied*, 417 U.S. 977, quoting *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953). Judicial review is available when an exercise of the House's Art. I, § 5 power constitutes "such an arbitrary and improvident use of the power as will constitute a denial of due process of law." *Barry, supra*, at 279 U.S. 620.

Even the exercise of a discretionary power must meet due process requirements, and does so only if "it is not arbitrarily and capriciously exercised." *Public Utilities Commission v. Pollak*, 343 U.S. 451, 465 (1952). Thus, the broad grant of prosecutorial discretion to the Executive, if exercised in an arbitrary or capricious manner, would violate the fifth amendment's guarantee of due process of law. *See United States v. McClintock*, No. 82-1480, slip op. at 5 (9th Cir. Dec. 5, 1984). *Accord, Luther v. Molina*, 627 F.2d 71, 76 (7th Cir. 1980) (Parole Commission's exercise of discretion cannot be arbitrary under the due process clause). It has also been held that the Executive power over passports, as exercised by the Secretary of State, cannot be arbitrary; "[d]iscretionary power does not carry with it the right to its arbitrary exercise." *Schachtman v. Dulles*, 225 F.2d 938, 941 (D.C. Cir. 1955).

An exercise of discretion is arbitrary if it is inconsistent with similar prior exercises and unaccompanied by a reasonable explanation for the variance. Thus, numerous such exercises of discretion have been struck down for being arbitrary or capricious. *See, e.g., Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 103 S.Ct. 2856 (1983) (National Highway Traffic Safety Administration's inadequately explained reversal of position as to requiring air-bags in automobiles is arbitrary and capricious under the Administrative Procedure Act); *Baltimore & Annapolis RR v. Washington Metropolitan Area Transit Comm'n*, 642 F.2d 1365, 1370 (D.C.Cir. 1980) (failure to justify departure from prior determinations is arbitrary or capricious); *Local 777, Democratic Union Organizing Comm., Seafarers Int'l Union v. N.L.R.B.*, 603 F.2d 862, 882 (D.C. Cir. 1978) (Even though the NLRB may change its policy, such action is arbitrary if "as here, it announces no principled reason for such a reversal"); *Schachtman v. Dulles*, *supra*, 225 F.2d at 943 (Secretary of State must give sufficient reasons for denial of passport); *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (inconsistent treatment of "similar situations lacks rationality and is arbitrary").

The House's decision not to seat Mr. McIntyre was, by this standard, clearly arbitrary. In the last fifty years, *every* candidate with a certificate of election which was not contested by his own state authorities has been seated, at least conditionally, in the House of Representatives. The House thus ignored its modern precedents, arbitrarily disenfranchising the voters of the Eighth Congressional District of Indiana.

The right of the voters to cast their ballots and have them counted has always been vigorously championed by this Court, which has held that "No right in a free country is more precious than the right to have a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). All qualified voters have a constitutionally protected right "to cast their votes and to have them counted at Congressional elections." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). Furthermore, this Court has noted that "the right of suffrage can be denied by debasement or dilution

of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), *rehearing denied*, 379 U.S. 870.

Indiana's voters have cast their ballots, as is their constitutional right. They have had them counted according to state law, as is their constitutional right. The House, by its arbitrary refusal to accord Indiana's certification the presumption of validity which by statute and precedent attaches to it, has created a situation in which the voters' ballots, and the counting of those ballots, is of no weight whatsoever: just as if the exercise of the franchise had been prohibited. They have cast their votes, but they have been denied the right "to cast their votes *effectively*." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (emphasis supplied), citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Their rights to speak and associate together for the advancement of their political beliefs and to cast their votes effectively have been infringed, arbitrarily and contrary to House precedent, in the complete absence of any allegations of fraud or irregularity, in violation of their right to due process of law.

CONCLUSION

This case presents an actual controversy between the State of Indiana and the United States and its legislative branch of government with respect to the House's refusal to seat the duly certified winner of the election for United States Representative in Indiana's Eighth Congressional District. The dispute is of serious magnitude, and the interests asserted by the State are asserted in its sovereign capacity. Those interests are Indiana's constitutional power and duty to conduct elections for representative, and its interest on behalf of its citizens in securing to them the rights to speak freely, to associate together for advancement of their political beliefs, to cast their votes effectively, and to have their votes counted.

In view of these facts the Attorney General, on behalf of the State of Indiana, respectfully urges this honorable Court that the Motion for leave to file the complaint submitted herewith be granted.

Respectfully submitted,

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