No. 102, Original

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF INDIANA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL.

ON MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The ultimate question on the merits is:

Whether, pending its own investigation, the House of Representatives may decline provisionally to seat a candidate who has been duly certified as elected by the appropriate state officials and with respect to whose election no allegation of fraud is made.

We do not address that question. Instead, in response to the present Motion, we pose the following two questions:

1. Whether the Complaint tenders only a nonjusticiable political question which no federal court can entertain.

2. Whether, in any event, this Court should decline to exercise its nonexclusive original jurisdiction in this case, in light particularly of the availability of other adequate forums.

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JURISDICTION

The jurisdiction of this Court is invoked under Article III, § 2, Cl. 2, of the Constitution of the United States and 28 U.S.C. 1251(b)(2). The question of jurisdiction is further discussed in the Argument, *infra*.

STATEMENT

1. The State of Indiana—in its own right and as parens patriae—has filed a motion for leave to file an original complaint in this Court, seeking an order requiring the seating (at least provisionally) of Richard McIntyre as Representative for the Eighth Congressional District of Indiana. The claim is that

refusal to seat McIntyre in the Ninety-Ninth Congress deprives Indiana and its citizens of constitutional rights relating to representation and control over the election of Representatives from the State. Named as defendants are the United States, the House of Representatives, the Speaker, and various officers of the House. The House and its officers are represented by the Counsel to the Clerk of the House of Representatives, who is filing a separate response to Indiana's Motion for Leave. The present brief is submitted on behalf of the United States only.

2. In the general election of November 6, 1984, the seat for Representative from Indiana's Eighth Congressional District was closely contested between Richard D. McIntyre and Francis X. McCloskey. For some five weeks, state officials withheld certification of either candidate. Then, on December 13, the Indiana Secretary of State and the Governor certified McIntyre as the winner. Nevertheless, when the House of Representatives convened on January 3, 1985, it passed a resolution declining to seat either candidate and referring the question to its Committee on House Administration. That Committee is conducting a recount and has not yet reported, though it appears to be close to doing so; the result, whoever wins, will be extremely narrow. In the meantime, both claimants have been tendered the salary of Representative.

3. Some weeks before Indiana filed the present Motion in this Court, Richard McIntyre and a voter from his District commenced an action against the Speaker of the House in the United States District Court for the District of Columbia. *McIntyre* v. *O'Neill*, Civ. No. 85-0528. The relief sought there was essentially the same as in this original action.

On March 1, the suit was dismissed on grounds of non-justiciability, and an appeal from that ruling is now pending on an expedited basis in the Court of Appeals for the District of Columbia Circuit, No. 85-5212, where briefing has been completed.

ARGUMENT

There are perhaps special objections to the joinder of the United States as a defendant to this action.[1]

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[1] It is arguable, first, that the United States—as distinguished from the House of Representatives and its officers—is not a "proper" party, having no separate interest in the case. Presumably, *Powell* v. *McCormack*, 395 U.S. 486 (1969), establishes that the United States is not an *indispensable* party, without whose joinder the suit could not proceed. On the other hand, it is difficult to assert that the United States is ever an improper party where *any* federal governmental matter is in controversy. See, *e.g.*, 28 U.S.C. 2322 (review of I.C.C. orders); 28 U.S.C. 2344 (orders of Hobbs Act agencies); 28 U.S.C. 2403 (constitutionality of Act of Congress drawn into question); 25 U.S.C. 201 (qui tam action for penalties in Indian cases); 40 U.S.C. 270b(b) (suit on behalf of laborers or materialmen on public works contracts); 42 U.S.C. 1973h(b) (challenge to state poll taxes). There is, indeed, much to be said for affording the Department of Justice an opportunity to participate in such litigation. In sum, we see no ground for objecting to the joinder of the United States as improper.

It is perhaps a more serious question whether *sovereign immunity* prevents the suit against the United States. The basic rule, of course, is that absent congressional consent, a suit for injunctive relief can be maintained only against its officers if they are charged with acting ultra vires or unconstitutionally. See *Block* v. *North Dakota*, 461 U.S. 273, 280-282 (1983). Here, the only arguably relevant statutory provision effecting the requisite waiver for joining the sovereign itself is 5 U.S.C. 702, which permits joinder of the United States whenever "agency" action is subject to judicial review and

We do not stop to examine any such obstacles, however, because, given that the United States is not an indispensable party, its dismissal would not prevent continuation of the suit against some or all of the other defendants. Cf. Fed. R. Civ. P. 19 and 21. For like reasons, there is no need to determine whether the joinder of the Speaker is barred by the Speech and Debate Clauses: that would not affect prosecution of the action against the other officers of the House. See *Powell* v. *McCormack*, 395 U.S. 486, 501-506 (1969). And, finally, we accept without quibble that the case, if justiciable in any federal court, falls within this Court's nonexclusive original jurisdiction as a controversy to which a state is a proper party.[2] We confine ourselves here to two sub-

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nonmonetary relief is sought. However, assuming that it applies to original actions in this Court (cf. *California* v. *Arizona*, 440 U.S. 59 (1979)), the provision expressly excludes "Congress" as an "agency." Accordingly, the question is whether the officers of one House are nevertheless covered. It is not apparent why Congress should have wished to bar joinder of the United States in such a case if the suit otherwise can be prosecuted against the officials.

[2] Notwithstanding the failure of the Judicial Code to so provide (28 U.S.C. 1251) and contrary indications in some of the Court's opinions (*e.g.*, *California* v. *Southern Pacific Co.*, 157 U.S. 229, 261-262 (1895); *New Mexico* v. *Lane*, 243 U.S. 52, 58 (1917); *Texas* v. *Interstate Commerce Commission*, 258 U.S. 158, 163 (1922)), we deem it clear that this Court enjoys concurrent original jurisdiction of *all* cases within the federal judicial power, not barred by sovereign immunity, where a state is a party, including a suit founded on federal law by a state against its own citizens. See *United States* v. *Texas*, 143 U.S. 621, 642-645 (1892); *Monaco* v. *Mississippi*, 292 U.S. 313, 321, 329-330 (1934). An independent basis for invoking the original jurisdiction of this Court is that the suit is brought by a state against citizens of other

missions: (1) The case presents only a nonjusticiable "political question" which no federal court can entertain; and (2) in any event, this Court ought not exercise its original jurisdiction, but should deny leave to file as a matter of discretion.

1. This matter is nonjusticiable, because it presents a political question. There is no exception for cases otherwise within the Court's original jurisdiction. "The effect of [Art. III, § 2, Cl. 3] is not to confer jurisdiction upon the Court merely because the State is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant." *Massachusetts* v. *Mel-*

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states. 28 U.S.C. 1251(b)(3). See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 307 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112, 117 n.1, 152-153 n.1, 230-231 (1970). And if the United States is permissibly joined, original jurisdiction also lies on the ground that the suit is between a state and the United States. 28 U.S.C. 1251(b)(2). See *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273, 277 n.6 (1982). Whichever of the three bases is invoked, this Court's original jurisdiction is only concurrent—given that a federal question is presented. Compare *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971). Accordingly, it would not affect this Court's jurisdiction if the United States were dismissed as a party.

It may be questioned whether Indiana, acting merely as *parens patriae*, can maintain an original action against the United States or its officers. See *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923); *South Carolina* v. *Katzenbach*, 383 U.S. at 324. But the Court's precedents indicate that Indiana here has sufficiently alleged injury to the State in its sovereign capacity. *South Carolina* v. *Katzenbach*, *supra*; *Oregon* v. *Mitchell*, *supra*; *South Carolina* v. *Regan*, No. 94, Orig. (Feb. 22, 1984). See also *Hodel* v. *Indiana*, 452 U.S. 314 (1981); *FERC* v. *Mississippi*, 456 U.S. 742 (1982).

lon, 262 U.S. 447, 480 (1923). It would be difficult to overstate the degree to which this controversy presents the defining instance of a political question. The classic characteristics of textual commitment to another branch and conspicuous separation of powers problems are present and pronounced. Unsurprisingly, the Court's opinions in this area strongly suggest that this precise controversy would be held nonjusticiable on political question grounds.

a. There is, in the present context, "a textually demonstrable constitutional commitment of the issue to a coordinate political department * * *." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). See *Gilligan* v. *Morgan*, 413 U.S. 1, 6-7 (1973). Article I, § 5 of the Constitution begins: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members * * *." This is specific and more directed to the matter at hand than Article I, § 4, on which plaintiff relies. See *Roudebush* v. *Hartke*, 405 U.S. 15, 25-26 (1972). The House of Commons and the legislatures of the colonies judged their own elections, and jealously protected their right to do so against other governmental entities. H. Remick, *The Powers of Congress in Respect to Membership and Elections* 1-62 (1929); M. Clarke, *Parliamentary Privilege in the American Colonies* 9-10, 132-172 (1971). So, also, the American Senate and House have been deciding election questions involving their members for nearly 200 years—sometimes responsibly, sometimes not, but never with judicial review, despite repeated requests. In light of this history and the express provision of Article I, § 5, it seems obvious the political question doctrine applies here—all the more so given that judicial review has been deemed barred where the commitment of the

issue's resolution to another entity is only implicit. *E.g.*, *Coleman* v. *Miller*, 307 U.S. 433, 450 (1939); *Goldwater* v. *Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring, joined by Burger, C.J., and Stewart and Stevens, JJ.).

It is no answer that courts regularly review other exercises of power "textually committed" to Congress. The commitment made by Article I, § 5 is different not only in degree, but in kind. The Commerce Clause, for example, makes a grant of *lawmaking* power, and it is entirely unremarkable that there should be judicial review of the exercise of that authority. Here, however, the grant is itself of an *adjudicative* sort, and review by the judiciary is redundant and intrusive. Article I, § 5 entails making specific decisions about particular disputes—not setting broad, prospective policy. The Constitution charges the legislature in this special instance with doing what courts usually do—and, logically, excluding courts from that process.[3]

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[3] See *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929): "Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred on it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. I, § 5, cl. 1." See also 279 U.S. at 616: "In exercising the power to judge the elections, returns and qualifications of its members, the Senate acts as a judicial tribunal * * *."

The Court again alluded to this special function in *Buckley* v. *Valeo*, 424 U.S. 1, 133 (1976): "[Article I,] Section 5 confers * * * a power 'judicial in character' upon each House of the Congress [citation to *Barry* v. *Cunningham* omitted]."

Finally, in *Reed* v. *County Comm'rs*, 277 U.S. 376, 388 (1928), the Court concluded that, given the Senate's own

b. This underscores some of the other criteria for political questions set out in *Baker* v. *Carr*. Judicial review in this case would repeat precisely the job which has been committed to the House of Representatives in the first instance, thereby "expressing lack of respect due coordinate branches of government * * *." 369 U.S. at 217. For the same reason, judicial review here necessarily contains "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Ibid.* As the Court in *Baker* v. *Carr* pointed out, the earmark of a classic political question is the presence of pronounced separation of powers problems. 369 U.S. at 210.

Those separation of powers concerns are further dramatized here by the remedies plaintiff seeks. They include forcing the Speaker of the House to administer an oath of office, compelling the House of Representatives to seat Mr. McIntyre, and requiring the officers of the House to provide him all the "rights, privileges, powers, emoluments, and services" of a Member. To say that the enforcement of such a decree would express "lack of respect" for the House and create a "potentiality for embarrassment" is a gross understatement. The extent to which judicial relief would necessitate unseemly judicial interference in the business of the political branches is of course a valid consideration in justiciability matters

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established powers to compel production of evidence in election disputes, it was unlikely that the statute in question allowed the Senators there to ask the courts to do so: "[The Senate] is the judge of the elections, returns, and qualifications of its members. Art. I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department."

generally. Cf. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 22-23.

c. Plaintiff relies heavily on *Powell* v. *McCormack*, 395 U.S. 486 (1969), for the general proposition that the political question doctrine is inapplicable here. But the fact is that the Court there expressly reserved the question whether a complaint seeking the sort of coerceive relief now sought would be justiciable. *Id.* at 517-518, 550. Moreover, the Court also observed: "[F]ederal 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." *Id.* at 521 n.42. The same plainly applies to the House's review of "Elections" and "Returns" as well, listed together with "Qualifications" in Article I, § 5.[4] What *Powell did* deal with was whether the Court could define what the Constitution meant in Article I, § 5, when it said "Qualifications." There is no like question in this case about the meaning of "Elections" and "Returns."

The other case relied upon by plaintiffs is *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597 (1929). There again, however, it was *not* ruled that scrutiny by a house of Congress of election returns was judicially reviewable. On the contrary: the Court indicated repeatedly in dicta that it would not be. In ruling that the Senate could subpoena wit-

[4] In his concurrence in *Powell*, Justice Douglas wrote that had the dispute there been over whether an elected candidate met one of the qualifications set out in the Constitution, then "the House is the sole judge." 395 U.S. at 552, citing *Baker* v. *Carr*, 369 U.S. at 242 n.2. Again, presumably the same would be true for "Elections" and "Returns."

nesses in the course of investigating an election, the Court said that the judiciary could intervene in such cases only upon a clear showing that due process was being denied—and stated that the Senate's *ultimate* judgment on elections was "beyond the authority of any other tribunal to review." *Id.* at 613. Similarly, the Court wrote that, when a member-elect to the Senate presented himself there (*id.* at 614):

> the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right attached by virtue of section 5 of Article I of the Constitution. Whether, pending this adjudication, the credentials should be accepted, the oath administered, and the full right accorded to participate in the business of the Senate, was a matter within the discretion of the Senate.

The Court went on to give one example, "[a]mong the typical cases in the House, where that body refused to seat members in advance of the investigation although presenting credentials unimpeachable in form * * *." *Id.* at 615 n.*. Finally, the Court stated that "the Senate [has] *sole* authority under the Constitution to judge of the elections, returns, and qualifications of its members * * *." *Id.* at 619 (emphasis added).

The Court made a similar statement, although again in dicta, in *Roudebush* v. *Hartke*, 405 U.S. 15, 19 (1972) (citation omitted): "Which candidate [of the two in the disputed election] is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate voted. [Citation to *Powell* v. *McCormack* omitted.]" *Hartke* presented the mirror image of this case: the apparently vic-

torious candidate was seeking to prevent a recount by *invoking* the Senate's Article 1, § 5 power, and arguing that a recount *by the State* would undercut the Senate's authority. In allowing the recount, the Court acknowledged that the "State's verification of the accuracy of election results pursuant to its Art. I, § 4 powers is not totally separate from the Senate's power to judge elections and returns," but made clear that the Senate could review those returns, as the House is doing in the instant matter: "The Senate is free to accept or reject the apparent winner * * *, and, if it chooses, to conduct its own recount" (405 U.S. at 25-26) (footnote omitted). The Court pointed out that "[t]he Senate itself has recounted the votes in close elections in States where there was no recount procedure" (*id.* at 26 n.24) (citation omitted).[5]

d. Indiana is asking more than that the House's determination of the election be overturned; it seems to be praying that the House be precluded even from reviewing the State of Indiana's determination of that election. The assertion is apparently that the

[5] Justices Douglas and Brennan dissented in part, on the ground that the Court should have enjoined the State's recount so that the Senate could be sure that the ballots were reviewed in pristine form. The partial dissent stated (405 U.S. at 30), that "[t]he parties before the Court are apparently in agreement that * * * there has been a 'textually demonstrable constitutional commitment' (*Baker* v. *Carr*, 369 U.S. 186, 217; *Powell* v. *McCormack*, 395 U.S. 486, 518-549) to the Senate of the decision [who] * * * received more votes. Our case law agrees." The dissent then went on to discuss *Barry* v. *Cunningham, supra,* and *Reed* v. *County Comm'rs*, 277 U.S. 376 (1928), concluding that "where all that is at stake is a determination of which candidates attracted the greater number of ballots, each [house] has supreme authority to resolve such controversies" (*id.* at 32) (citation omitted).

House must accept the State's certification of the election returns, or it will violate Indiana's constitutional right to determine the "Times, Places, and Manner of holding Elections for Senators and Representatives * * *." Art. I, § 4, Cl. 1. This cannot be right, for it would contradict the more specific constitutional provision that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members * * *." See *Roudebush* v. *Hartke*, 405 U.S. at 25-26. The Court said in *Barry* v. *United States*, 279 U.S. at 613, that in "exercising this power [of reviewing elections], the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice." [6]

Plaintiff insists that the state certification be afforded a "presumption of validity." But that is really up to each house, as the judge of its election returns. In any event, the House may well be affording just such a presumption, albeit it is unwilling to risk seating and then unseating the Representative from the Eighth Congressional District of Indiana.

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[6] With regard to plaintiff's claim that it is being deprived of its right to representation, *Barry* is also relevant (279 U.S. at 615-616):

> Nor is there merit in the suggestion that the effect of the refusal of the Senate to seat [a member] pending investigation was to deprive the state of its equal representation in the Senate. * * * The temporary deprivation of equal representation which results from the refusal of the Senate to seat a member pending inquiry as to his election or qualifications is the necessary consequence of the exercise of a constitutional power, and no more deprives the state of its "equal suffrage" in the constitutional sense than would a vote of the Senate vacating the seat of a sitting member or a vote of expulsion.

Plaintiff also stresses that there have been no allegations of election fraud or irregularity. That, however, is beside the point: everyone agrees that the election was extremely close, and the question which the House must determine is, what was the vote? It is implicit that there is a chance for honest or dishonest error. Such presumptions, in any event, are two-edged; as the Court said in *Barry* v. *United States*, *supra*, "[T]he presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority." 279 U.S. at 619.

The clarity with which this controversy presents a political question is remarkable. The House should be left to continue its recount and judge the elections and returns of its own Members.

2. The political question issue aside, the Court should exercise its discretion in favor of declining to hear the case.

The Court's jurisdiction here is neither exclusive, 28 U.S.C. 1251(b)(2), nor mandatory. It has consistently been the Court's philosophy that its original jurisdiction should be exercised "sparingly." See, *e.g.*, *Arizona* v. *New Mexico*, 425 U.S. 794, 796 (1976); *United States* v. *Nevada*, 412 U.S. 534, 538 (1973); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972); *Ohio* v. *Wyandotte Chemical Corp.*, 401 U.S. 493, 501 (1971); *Utah* v. *United States*, 394 U.S. 89, 95 (1969); and *Massachusetts* v. *Missouri*, 308 U.S. 1, 18-20 (1939). The Court exercises this discretion in the light of its increasing appellate docket—*Illinois* v. *City of Milwaukee*, 406 U.S. at 93-94; *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972); *Arizona* v. *New Mexico*, 425 U.S. at 797—and, more generally, "with an eye to pro-

moting the most effective functioning of this Court within the overall federal system." *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983).

The Court noted in *Illinois* v. *City of Milwaukee*, 406 U.S. at 93, that what is "appropriate" for the Court to hear in the exercise of its original jurisdiction involves both "the seriousness and dignity of the claim" and "the availability of another forum where there is jurisdiction over the named parties, where the issues may be litigated, and where appropriate relief may be had." See *Maryland* v. *Louisiana*, 451 U.S. 725, 739-740 (1981); *Arizona* v. *New Mexico*, 425 U.S. at 796-797. This case fails to meet either criterion. The immediacy of the claim—an important part of its "seriousness"—is undermined by the fact that the House is now in the process of recounting the ballots, and it is very much in doubt what the outcome will be. The Court cited similar ripeness problems in declining to assert its original jurisdiction in *United States* v. *Nevada*, 412 U.S. at 540.

There are available, moreover, other judicial forums for this dispute. It is, in fact, already being litigated in the District of Columbia Circuit, where it has been heard by the District Court on an expedited basis, and has now been briefed for the appellate court on an expedited schedule. *McIntyre* v. *O'Neill*, dismissed, Civ. No. 85-0528 (D.D.C. Mar. 1, 1985), appeal docketed, No. 85-5212 (D.C. Cir. Mar. 1, 1985). One plaintiff in that case is suing as a voter from the Eighth District. Also, relief against the House essentially identical to that sought here is asked for. Indiana itself is not precluded from bringing an action in another forum; nor does it appear to have been prevented from joining the action now in progress in the District of

Columbia Circuit. This Court could properly decline to exercise its jurisdiction, in any event, so long as the "issues" are being litigated in another forum and Indiana's "interests" will be "represented" there. See *Arizona* v. *New Mexico*, 425 U.S. at 797; *Maryland* v. *Louisiana*, 451 U.S. at 743. Given the relief sought and the parties represented, that is the situation here.

As the Court said in *United States* v. *Nevada*, 412 U.S. at 538, "We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." See *Maryland* v. *Louisiana*, 451 U.S. at 744; *Illinois* v. *City of Milwaukee*, 406 U.S. at 93; *Washington* v. *General Motors Corp.*, 406 U.S. at 114; *Massachusetts* v. *Missouri*, 308 U.S. at 19-20. In sum, the State of Indiana has wholly failed to establish the "practical necessity" required for invoking this Court's original jurisdiction. *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983).

CONCLUSION

The motion for leave to file an original complaint in this Court should be denied.

Respectfully submitted.

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