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In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF INDIANA, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ON MOTION FOR LEAVE TO FILE
ORIGINAL BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES HOUSE OF REPRESENTATIVES
DEFENDANTS IN OPPOSITION

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In the Supreme Court of the United States

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No. 102, Original

STATE OF INDIANA, PLAINTIFF

v.

UNITED STATES OF AMERICA,

UNITED STATES HOUSE OF REPRESENTATIVES,
THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER,
THE HONORABLE BENJAMIN J. GUTHRIE, CLERK,
THE HONORABLE JACK RUSS, SERGEANT AT ARMS,
THE HONORABLE JAMES T. MOLLOY, DOORKEEPER,
DEFENDANTS

BRIEF FOR THE UNITED STATES HOUSE OF REPRESENTATIVES'
DEFENDANTS IN OPPOSITION

QUESTIONS PRESENTED

1. Does the determination, made by the House of Representatives pursuant to the Constitution's directive that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members," U.S. Const., Art. I, sec. 5, cl. 1, that candidate Frank McCloskey was the duly elected Representative of the Eighth Congressional District of Indiana render plaintiff's motion for leave to file complaint moot?

2. Does the complaint present a nonjusticiable question?

3. Is this a proper instance for the Court to exercise its nonexclusive original jurisdiction where a closely related litigation is being expeditiously considered by the lower courts?

I. STATEMENT

On May 1, 1985, the United States House of Representatives adopted House Resolution 146 rendering a final judgment on the election contest concerning the Eighth Congressional District of Indiana. 131 Cong. Rec. H2783-84 (daily ed. May 1, 1985). Shortly thereafter, the oath of office was administered to Congressman Frank McCloskey. 131 Cong. Rec. H2784-85 (daily ed. May 1, 1985).

The House's action, taken pursuant to the crystal-clear directive of the Constitution that "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members," U.S. Const., Art. I, sec. 5, cl. 1, put an end to a controversy emanating from one of the closest Congressional elections in modern history.

The House's determination was based on a thorough recount conducted by auditors provided by the General Accounting Office supervised by an independent state election official pursuant to the direction of a special Task Force appointed by the House's Committee on House Administration. *Relating to Election of a Representative From the Eighth Congressional District of Indiana*. H.R. Rep. No. 99-58, 99th Cong., 1st Sess. (1985). See also *Appendices, Investigation of the Question of the Right to Frank McCloskey or Richard McIntyre, From the Eighth Congressional District of Indiana, To a Seat in the Ninety-Ninth Congress Pursuant to House Resolution 1; Meetings and Hearings Before the Task Force on the Indiana Eighth Congressional District of the Committee on House Administration*, 99th Cong., 1st Sess. (Comm. Print).

During the House's consideration of this matter, the State of Indiana filed its Motion in an effort to invoke the original nonexclusive jurisdiction of this Court to adjudicate controversies between the United States and a State. 28 U.S.C. § 1251(b)(2). This motion was submitted shortly

after the United States District Court for the District of Columbia, acting on an expedited basis, had dismissed as presenting a nonjusticiable political question a similar complaint filed by candidate Richard McIntyre. *McIntyre v. O'Neill*, Civil Action No. 85-0528 (D.D.C. filed March 1, 1985), *appeal filed*, No. 85-5212 (D.C. Cir), *appeal dismissed*, (May 7, 1985).

The House's action renders this case moot, and that mootness can be added to the litany of jurisprudential concerns which make the invocation of the Court's original jurisdiction particularly inappropriate in these circumstances.

II. ARGUMENT

A. MOOTNESS

In an earlier election controversy involving the State of Indiana, this Court discussed the question of mootness in the context of somewhat analogous litigation. In *Roudebush v. Hartke*, this Court held that, in those circumstances, "That question is not moot, because the Senate has postponed making a final determination of who is entitled to the office of Senator. . . . Until that judgment is made, this controversy remains alive, and we are obliged to consider it." 405 U.S. 15, 19 (1972).

Here the final determination has been made, rather than postponed. That judgment having been made the controversy no longer remains alive. It is, as this Court indicated, moot. As such, the motion for leave to file should be denied.

B. POLITICAL QUESTION

In *Roudebush*, this Court also stated that "Which candidate is entitled to be seated in the [House] is to be sure, a nonjusticiable political question. . . ." *supra* at 19. That unambiguous statement echoed this Court's earlier treatment of the Houses of Congress' authority under the Elections Clause to "render a judgment which is beyond the authority of any other tribunal to review." *United States ex rel. Barry Cunningham*, 279 U.S. 597, 613 (1929).

If the political question doctrine means anything it requires that the judicial branch not involve itself in a challenge to the House's textually committed authority to judge the elections of its Members. *Baker v. Carr*, 369 U.S. 186 (1962). This Court should not depart from the clear rule of law it has repeatedly stated, the Court can be just as sure here, as it was in *Roudebush*, that this complaint would present a nonjusticiable political question. Since the complaint would present a nonjusticiable political question, the Court should not grant leave for it to be filed.

C. DISCRETIONARY JURISDICTION

The Court's jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) is nonexclusive. Claims which might be properly brought to this Court on the basis of that statutory provision may also be brought before the District Courts of the United States. In this controversy, the jurisdiction of the lower courts has already been invoked and a very similar claim has been adjudicated by the United States District Court for the District of Columbia and the United States Circuit Court of Appeals for the District of Columbia Circuit. *McIntyre v. O'Neill*, *supra*. Granting the instant motion would result in an unnecessary use of the limited resources of this Court. For that reason the motion should be denied.

III. CONCLUSION

The State of Indiana seeks the extraordinary exercise of this Court's original jurisdiction to hear a complaint which this Court has already said is moot; presents what this Court has labelled an unmistakably nonjusticiable political question; and one which is receiving appropriate

judicial scrutiny in other federal forums. That the motion should be denied is self-apparent.

Respectfully submitted,

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