Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

Docket No. 138

ADAM CLAYTON POWELL, JR., et al.,

Petitioners;

vs.

JOHN W. McCORMACK, et al.,

Respondents.

Place Washington, D. C.

Date April 21, 1969

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Monday, April 21, 1969

The above-eneitled matter came on for argument at 10:52 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 138, Adam Clayton Powell, Jr., et al., petitioners; versus John W. McCormack, et al.

Mr. Kinoy.

ARGUMENT OF ARTHUR KINOY, ESQ.

ON BEHALF OF PETITIONERS

MR. KINOY: Mr. Chief Justice and Members of the Court:

With the Court's permission, Professor Reid and I will share the argument this morning for petitioners.

We rise this morning to argue this case with a sense of grave responsibility. This is, as Chief Justice Marshall said of Marbury against Madison, a case of peculiar delicacy. This is because the issues in this case raise here, as in Reynolds/Sims, issues which touch the bedrock of our political system. They strike at the very heart of representative government.

These issues arise out of certain simple, uncontested facts.

On March 1st of 1967, the House of Representatives formally concluded that Congressman-elect Adam Clayton Powell had been duly elected by the constituents of the 18th Congressional District of New York; that he held a proper Certificate of Election; that he possessed the requisite qualifications of

age, inhabitancy and citizenship set forth in the Constitution -- that pursuant to Article I, Section 2, he was over the age of 25, he was seven years a citizen of the United States, and that when elected, he was an inhabitant of that State in which he shall be chosen.

Nevertheless, over the heads of the leadership of both parties, despite the recommendation of its own Select Committee, and disregarding the warning of the Chairman of its own Judiciary Committee that such an action would be unconstitutional, the House refused to seat the petitioner, and by resolution banned him from being seated throughout the 90th Congress.

This precipitated the fundamental constitutional issue which is at the very heart of this case, and that is whether the Legislature has any constitutional power to refuse to seat a duly elected representative of the people who meets all the qualifications for membership in the Legislature set forth in the Constitution.

We suggest that this question is the key to every critical issue in this case. It is the key to the question of jurisdiction. It is the key to the question of justiciability which has entangled the lower courts in this case. It is the key to the question of remedy, and this question was first answered in 1787 at the Philadelphia Convention.

The answer was grounded on no technical word interpretation, but upon a profound conception of the fundamentals

of representative government, for the founders determined that the Legislature was to have no power to ignore, to alter, to add to, to change in any way the fixed qualifications in the written Constitution, for to give such a power to the Legislature was, in Madison's words, "improper and dangerous. Such a power," he said in Philadelphia, "would by degrees subvert the Constitution." He warned that it was the road by which the Republic may be converted into an aristocracy or an oligarchy.

His powerful warning words were recently set forth by this Court in its opinion in Bond against Floyd in the Chief Justice's opinion in Footnote 13. This reflected a profound recognition that the foundation stone of representative government, the very source of its authority, is the ability of the people to freely select their own representatives.

This is the base upon which the authority of the Legislature itself stands. This is the base upon which the dignity of the House itself stands. It is no coincidence that the greatest constitutional lawyers who served in the House reflected this view of Hamilton and Madison as to the limitation on the House's powers.

Representative Bingham, the author of the 14th Amendment, Senator Murdock who led the successful fight against the exclusion of Senator Langer by the Senate, and the eminent Chairman of the House Judiciary Committee today, Emanuel Celler, among many others, all reflected that same view.

It was for this reason that Alexander Hamilton said to the people of New York at the ratifying convention, in words that come to the heart of this case, he said, "After all, sir, we must submit to the idea that the true principle of a Republic is that the people should choose whom they please to govern them."

In urging the people of the State of New York to ratify the Constitution, Robert Livingston said to the people of New York that the Constitution was grounded on this principle; that the people are the best judges of whom ought to represent them, to dictate and control them; to tell them whom they shall not elect is to abridge their natural rights.

It was upon this understanding that the people of the State of New York ratified the Constitution. Today, the people of the 18th Congressional District of the State of New York stand here and ask this Court to enforce this understanding. This principle, written as a bedrock into our Constitution, stands as a rock against the possibilities that waves of hysteria will take place in which a majority, temporary, can overrule the free choice of the minority of citizens.

This case presents to this Court in the most striking terms the reasons why the founders wrote this principle into the Constitution, because in an atmosphere of racism and hysteria -- and I pause to point out that those are not my words, but those are the words of the Chairman of the House

Judiciary Committee, Mr. Celler -- in an atmosphere of racism and hysteria, the House of Representatives brushed aside the constitutional principle and pushed aside the free choice of the people of the 18th Congressional District unto alleged reasons and grounds which the sober second sense of the community has revealed were wholly unsupported by the facts themselves.

They talked of willful, contemptuous conduct on the part of the petitioner toward the courts of the State of New York, and on April 11th of this year, the Appellate Division of the courts of the State of New York were both rescinded and vacated, the judgment of criminal contempt against the petitioner.

They talked of alleged improper use of committee funds and yet Mr. Hays himself, the chairman of the committee which had previously investigated, said on the Floor of the House, in supporting the admission of the petitioner without any qualifications this time, he pointed out that when the supposed facts were submitted to a tribunal which has the power to investigate a Grand Jury, the Grand Jury refused to return any bill of indictment whatsoever.

This illustrates the profundity of the founders' insistence that this rock of protection be written in. Now, the respondents have a great difficulty with this constitutional analysis. They have difficulty with the writings and thinking

of Professor Warren, who after a lifetime of scholarly expertise, came to the conclusions which we have here advanced.

They suggest that Professor Warren, through his lifetime of experience, did not have the same time to examine the sources of history which attorneys for the respondents have had. We don't have to pause long on this. This Court has time and time again relied, only in Bond against Floyd, on the expertise of Professor Warren.

They have difficulty with Madison and Hamilton and they suggest that the Federalist Papers are, after all, only special pleading. Well, we do not have to pause long with that contention. This Court has characterized the Federalist Papers time and time again as the most authoritative evidence of the intention of the founders.

They have difficulty with the constitutional opinion of their own Select Committee. We point out in our brief that their own Select Committee said the House had no constitutional power to exclude Mr. Powell.

They have difficulty with the opinion of the most eminent constitutional authority in the House, the Chairman of their Judiciary Committee.

They have difficulty with this Court's decision in Bond against Floyd, which proceeds on the assumption that the statements of Madison and Hamilton meant what they said, so they suggest to this Court that its position and thinking in

Bond against Floyd is mere dictum.

Having these difficulties, respondents reach back into history for precedent to explain that Madison and Hamilton did not mean what they said, but the founders, in fact, intended to allow some sort of inherent power in the Legislature to exclude otherwise duly qualified representatives of the people, upon the Legislature's own notion of unfitness.

But what is extraordinary is that the entire constitutional edifice rests upon a precedent that they grasp from history. What is the precedent? The Wilkes case, the exclusion of John Wilkes by the British Parliament and Blackstone's rationale and justification for the parliamentary action.

They say that since American lawyers were schooled in Blackstone, as we all know, the founders must have adopted his justification for the action of the British Parliament in excluding Wilkes.

But I suggest to the Court this is fantastic, that it turns history upon its head, that the Wilkes case was the very lesson Madison said in Philadelphia was what we must prevent in the new republic, in this Republic. Blackstone's justification for the action of the British Parliament, upon which their entire constitutional case rests, they do not inform the Court was first of all not included in his first commentaries. He was very embarrassed on the Floor of Parliament when he appeared as a special pleader for His Majesty's government to justify the

Wilkes exclusion when his own commentaries were read against him.

So he revised his opinion to justify the Wilkes exclusion, and he was then attacked on both sides of the Atlantic by the leading spokesmen for the colonial cause as evidencing the precise theory of legislative tyranny which the colonists were rising against, and we have set forth for the Court's convenience in our reply brief the papers which repudiate that Blackstone position.

But most important of all, the Blackstone position was repudiated by the Parliament itself when it expunged the Wilkes exclusion resolution five years before the Philadelphia Convention, when it expunged it as what -- as subversive of the rights of the electorate of the British Isles.

Finally, the Blackstone opinion is not even considered English law today, as Professor Holsworth, in his most eminent history of the British English law sets out. So I suggest that respondents' entire constitutional argument is based upon theories and actions of the British Parliament of George III which were at the very core of American opposition, the British legislative tyranny.

This has at least proven to me the wisdom of Mr. Justice Holmes' comment that a page of history of worth a volume of logic. But I suggest to the Court that this understanding that the founders insisted that the Legislature was to have no power

to refuse to seat an otherwise duly qualified representative of the people is the key to the question of justiciability and is the key to the question of the role of this Court in this case.

In this case, as in Baker/Carr, nonjusticiability has become little more than a play on words, for Baker/Carr teaches that the test of nonjusticiability in the political question doctrine is deciding whether a matter has been in any way committed by the Constitution to another branch of Government, or whether the action of that branch exceeds whatever authority has been committed.

As Justice Harlan pointed out, in his opinion in Baker/Carr, it is quite necessary to cut through the thicket of discussion about justiciability and get to the point as to whether a complaint discloses a violation of a Federal constitutional right.

This inquiry, the Court has taught us all in Baker/Carr, requires a delicate exercise in constitutional interpretation and it is the responsibility of this Court, as the ultimate interpreter of the Constitution, to make it. This is the key to this case. The question as to who may be the freely chosen representatives of the people has not been confided by the Constitution to the exclusive control of the Legislature.

Quite to the contrary, it has been confided by the Constitution to the ultimate branch of Government, the sovereign people, in the written document they established as their

fundamental law. This is because the fundamental premise itself of representative government requires that the free choice of the people's representatives remain with the people, subject only to the qualifications they, themselves, laid down in their Constitution.

So under the teachings of the Court in Baker/Carr, this is a case in which judicial power must be exercised, where the action of the Legislature has exceeded the authority committed to it.

It is suggested that relief here would violate separation of powers. The contrary is true. Relief here is required to preserve the powers reserved to the sovereign people by the Constitution. This is the most historic role of this Court, and the words of the Chief Justice in Marbury are decisive here, and his question is the question we must all answer: to what purpose are powers limited, and to what purpose is that limitation committed to writing if these limits may bt any time be passed by those intended to be restrained?

Let me speak frankly at this point: What is at the heart of the reluctance of the lower courts to grant relief here? It is their fear of a confrontation with the House. But this fear, in itself unreal, since in the words of this Court, it is an inadmissible suggestion that the House would not accept this Court's role as the ultimate interpreter of the Constitution. This fear would paralyze the Court in its most important

function -- to preserve a rule of law, the foundation stone of which is a written Constitution. A fear to act here because respondents have power would, in the Chief Justice's words in Marbury, subvert the very foundations of all written constitutions.

At another crisis point in the history of this Court, this Court said in Cooper against Aaron, that Marbury declared the basic principle that the Federal Judiciary is supreme in the exposition of the law of the Constitution and that this principle has been respected by this Court and by the country as a permanent and indispensable feature of our constitutional system.

The reaffirmation that this is a government of laws and not men, that representative government means that ultimate power remains with the people, is particularly necessary when the crisis arises in a context in which black citizens are denied the right to elect their own black representative who had risen to great heights of legislative leadership. It is difficult, indeed, to demand law and order of American citizens if the Legislative Branch itself denies the first assumptions of an ordered society, the right of people to govern themselves.

Thus, to grant relief here would not only be to reaffirm the fundamentals of a representative government, but it would reaffirm the fact that the principles of popular sovereignty are equally applicable to citizens black and white.

Such a decision, in Justice Clark's words, concurring in Baker/Carr, would be in the greatest tradition of this Court.

Professor Reid will continue the argument.

MR. CHIEF JUSTICE WARREN: Professor Reid?

ARGUMENT OF HERBERT O. REID, ESQ.

ON BEHALF OF PETITIONERS

MR. REID: May it please the Court: We have attempted to argue in our brief and orally, first, that Congress did not have the power to exclude Congressman Adam C. Powell; that what it did and how it did it raised further constitutional objections.

At the outset, the two Judges on the Court of Appeals tried to treat this matter of exclusion as a matter of expulsion and I think clearly that should be laid to rest in the beginning.

When Congress was organized, when the House organized on January 3, 1969, the very same resolution which had been proposed on March 1, 1967, the subject matter of our discussion here, the same resolution was proposed. The Speaker was called upon to rule on whether or not a motion to expel was germane to his seating, or a motion to exclude, to which the Speaker ruled on January 3rd that such a motion was not germane; that on the seating of a Congressman, the only question open to the House was the three qualifications.

Also, the Speaker ruled on March 1st that since this was

a question of seating, that the necessary vote was a majority vote, and not the two-thirds which would have been required if it had been a matter of expulsion.

The Justices below suggest that this is an immaterial distinction, since the vote was large enough to satisfy the two-thirds requirement.

What we argue here is that, of course, the motives of the Members of the House in voting cannot be inquired into to determine how they would have voted were the issue expulsion. But more fundamentally, this was at the bottom, and grounded on the precedents of the House as demonstrated in the Speaker on the later ruling on January 3, 1969. These precedents dictated that the Speaker's earlier ruling that the vote was on exclusion, because the House could not expel for conduct in a previous session, and there was no question that the conduct alleged herein had taken place in Congresses previous to the 90th Congress, the 88th and the 89th.

Q What is the basis of that statement, Professor Reid, that the House could not expel for conduct in previous sessions?

A The precedents of the House, sir, the Speaker outlined the precedents of the House when he ruled on January 3, 1969, which we have included a copy of, the record of January 3rd, in which he said that he anticipated that this question would be raised and, therefore, he had had it briefed. It was

a very long and detailed ruling by the Speaker at that particular time citing the House precedents.

Q There is not a judicial law that says that, is there?

A Sir?

Q There is no judicial opinion that supports the statement you are making, is there?

A Well, no, because I don't know of any matter that has arisen that would have given the Court an opportunity, sir, to have decided this. There is, however, a great distinction involving judicial standards, sir.

On the question of judging an election and seating, of course, the House exercises judicial power there, but this Court has been very clear in a number of cases in saying that when the House or Senate are exercising their powers in expulsion, this is a judicial power of the highest order requiring the greatest amount of due process protection in the adversary sense.

So for an additional judicial reason, sir, we believe that this exclusion could not be treated as expulsion.

Q That is a different proposition from the one that Justice Fortas asked you about.

A Yes. Of course, as I said, in terms -- which, incidentally, we contend here, that the House did not have the power, and beyond that, the manner in which Congressman Powell

was excluded violates other provisions of the Constitution, to wit: the Fifth Amendment due process and the prohibition against bill of attainder.

Certainly the House has power to deal with a Member-elect in a way in which it may not deal with a general member of society insofar as a bill of attainder is concerned. There is judicial power there to seat and to remove one who has been seated. However, where one was never seated, and punishment was legislated, as it was here, after a legislative finding that at no time was there any semblance of due process hearing held, we contend then that the manner in which this was accomplished in the House violates first the due process, but substantively and procedural requirements, and in addition that it amounts to a bill of attainder.

At the beginning of this matter in the 90th Congress, when Congressman Powell was asked to step aside, the Hays committee had concluded its report. The Hays committee, the Committee on Administration, had been directed by a resolution which is in the Hays report at page 4, had been directed by the resolution to investigate the various committees of the House and the various Members of the House in two regards. There was nothing in this resolution which specifies any particular committee, any particular committee chairman, or any particular me Member of the House. Nevertheless, the committee proceeded to investigate only one.

Congressman Powell was invited to attend the Hays committee, which he declined, at page 84, the letter in the same report is included, in which he was not an unconditional declination but in which he suggested that the committee had a charge to investigate other committees and other people in Congress and as soon as the committee had done this, he would be glad to appear.

Now, this position was asserted for the very reason that he was entitled to know whether or not this was preferential treatment as to him, in order to lay, or predicate if necessary in the House or in the Courts if the matter had been raised. He was denied this opportunity, and then when this Select Committee was formed and directed to investigate and to report back on the seating of the Congressman, the Select Committee declined to have an adversary hearing.

If there is one thing that is clear in this record, it is Chairman Celler's position and the position of the committee that this was not an adversary hearing. As a result, he was not accorded the rights of an adversary hearing and, therefore, the findings are mere legislative findings and I think the effect of such findings are clearly illustrated by the January 3rd proceeding in the House in 1969 where even though these facts are not refuted anywhere, because we did not have an adversary hearing, they have been completely repudiated.

Mr. Hays, who was Chairman of the Subcommittee on

Administration, pointed out that not only had they been found insufficient by a Grand Jury, but he said they are "insufficient for us to act on; the way we find facts in the House," he said, "there is no basis upon which to predicate this kind of action." Mr. Hays made that statement himself in the record on January 3rd.

So the first predicate of the House's action, the Hays report, the second predicate, the proceedings in the New York Court, have both been -- the support of these has been withdrawn from the House's position.

In addition, the House purported to have punished Congressman Powell for his contumacious conduct toward the Select Committee, and that contumacious conduct was a refusal to participate in a legislative hearing to determine whether or not he should be seated. So for exercising his constitutional right, as the Court pointed out this morning in the decision in the resident requirement cases, he was being punished then for asserting a constitutional right, and that is impermissible whether the assertion is good or bad.

Beyond this, he was denied all of the procedural guarantees, and for a very good reason, I think. From the very inception of this matter, Mr. Powell was notified that the Select Committee would investigate "into his official misconduct since 1961." Of course, that is a frightening suggestion to most people. It is open-ended. And "to the date he had

assumed the chairmanship of this committee." At the time he assumed the chairmanship of this committee, there was great question raised in the House, and addressed to the Speaker, as to whether or not Mr. Powell would be elected by the House as chairman of this committee, since he was then the senior person, or would he be avoided because of his race. Of course, he was elected.

What relevance, other than this, that the notice of his official misconduct to the date of his taking on the chairmanship has, I do not know.

Q Suppose that the House determined, in whatever way, that a Member had misappropriated House funds in a substantial amount, and suppose that this determination occurred and the misappropriation had occurred during the same session. Do you challenge that the House could expel him?

A I have two problems, Mr. Justice Fortas. First, procedural due process, I have no problem that the House would have to afford him an adversary hearing affording all the requisites of procedural due process.

As to the matter of the substantive due process implicit in your question, I have some difficulty. As Members of the House have, and Members of the Senate, from time to time cautioned each body that they should write some rules and regulations before the fact, so as to avoid this same kind of situation, Congressman Fascell introduced a resolution in the House several days

after this occurred calling for a Select Committee to set up standards.

I would not go so far as to say, sir, that before these standards and rules were set up, that the House would be impotent to act. I think the House might be able to proceed on a kind of a common law reference, which has been suggested by some of the writers.

Q I want to be sure I understand your position. You would say, then, that the House could consitutionally expel a Member after a due process hearing for the misappropriation of House funds, and I assume that everything happened during a single session.

A Well, misappropriation of funds, yes, sir. However, in terms of such a proceeding and defense to that, the conduct of other Members of the House would be highly relevant, and this is one of the reasons, I am sure, that the House did not want to afford him a due process hearing, because they did not want any comparative study made, and this is indicated also by the January 3, 1969 record when Chairman Celler said, as to nepotism, judge not lest you be judged.

Q You mean you can't expel one person for misappropriation of House funds unless you expel everybody?

A No, sir; I am not saying that, Mr. Justice Fortas. What I am saying, relevant to the expulsion of the one is the conduct of others, and whether or not, he has an equal protection

argument because of being singled out. This was highly relevant in the particular case, as well as the conduct of other Members, and I think there is no other justification for the House's failure to accord him a due process hearing requiring the attendance of witnesses, and the like, other than they wanted to avoid this comparative study, to which I think he was entitled.

Beyond the constitutional infirmities of due process and bill of attainder which clearly, going back to the main brunt of our argument, would indicate that this Court had jurisdiction and that the issues were justiciable, I want to say a word about mootness and remedy.

The House has suggested that the seating of Congressman Powell on January 3, 1969 has mooted this controversy, to which we take issue in our memorandum in opposition and which we continue now to argue that the matter has not become moot (1) because this is continuous conduct, the kind of continuous conduct that we had complained about in the original suit, and on January 3, 1969, when the motion which finally passed, the motion which finally passed seating him, carried the findings from the 90th Congress, there was no question that there was the same conduct, the same activity was the basis of the discriminatory action which took place on January 3, 1969.

In addition, we take the further position that the House could not moot this case by further unconstitutional

conduct. Therefore, in order for this Court to determine that this case had been mooted by the January 3rd action by the House, this Court would have to find that the January 3rd resolution which seated him on condition of paying a fine, and other limitations, whether that action of the House was correct.

In addition to the continuing conduct, obviously, as the Court suggested in the Bond case, we have the question of the back pay for the two years in which he was not allowed to sit, in an amount I think estimated by the chairman, Mr. Chairman Celler, as $55,000. But in addition, this resolution which levied a fine upon him, thereby adding, the resolution of January 3rd seated him, but clearly and against the pleadings of the leadership of the House, Mr. Albert, Mr. Celler, to mention just a few, Mr. Udall, all suggested that the House could not punish him prior to seating him, because to do so was to add to the qualifications, as Mr. Kinoy has pointed out.

Now the position of the respondents is that this further illegal conduct moots this controversy, to which we take exception and press before you that this matter is not moot, ready for the decision, and should be decided in order to cover the matter of back pay, as well as the other punishment provisions of the resolution.

Now, as to remedy, of course, the big stumbling block in this case all along has been the remedy aspect, and whether the Court could enforce its mandate. I think the difficulty,

I think our position, the position which we took at the outset, mandamus was proper and we were entitled to mandamus from Marbury, through the cases Marbury down. I think the fact that the Congressman has been seated, however, removes this difficulty considerably. Therefore, I think the remedy problem becomes much, much easier to handle and to direct here in terms of declaring Resolution 278 of March 1, 1967 and the resolution of January 3, 1969 unconstitutional.

I think that in the light of the --

Q The 1969 resolution is not before us, is it, for adjudication?

A Well, we feel that it is. Number 1, we feel that this is a part of the illegal, unconstitutional conduct for which we had complained about in the original suit; that is, the predicate, sir, for the passage of the resolution on January 3rd was the same conduct. The fact of the matter is, it is in the same language.

Q But there is a difference between our taking notice of that for whatever bearing it may have on the mootness question, and our granting relief, because that has not been adjudicated in the lower courts, has it?

A No, it has not, sir, because this action took place while the matter was pending here. Of course, also implicit in any notion of mootness is the validity of this action.

In terms, then, of the remedy, we feel that the House

cannot be anticipated that the House would not obey the declaration of law by this Court as it has from Marbury through Cooper and Aarons, and that there is no inhibition to the kind of remedy we seek here coming out of the Constitution itself. There is no basis for believing that the historical role of this Court in the area of judicial review has been that it had judgment, that in the separation of powers what had been separated and given to the Judiciary was the matter of deciding cases.

Q Do I understand you then that your position now is that all you seek is a declaratory judgment?

A No, sir; we argue that we are entitled to declaratory judgment, injunctive relief, and we press for mandamus.

Q What injunctive relief are you asking for?

A Well, mandatory relief, sir, in the sense of the only disability to the paying of the back pay of $55,000 is, of course, a resolution of the House which has directed, in effect, that he not be paid because he was not seated.

Q Is that a separate resolution?

A No, sir.

Q That is the effect of the resolution.

A Yes, sir; of Resolution 278. And we are saying that a declaration of unconstitutionality, as the Court did in the Mangwell case, which we cite in our reply brief, it incidentally did not issue mandamus against the Comptroller,

even though it did against another Government official, under the theory that as soon as the Comptroller read in its opinion the Court felt that mandatory relief was not necessary, that he would act accordingly. We are merely suggesting here that everything indicates to us that if this Court exercises its historical judicial function and declares this resolution unconstitutional, that the House would abide by it.

Q Well, that sounds to me as if you would be content with just a declaratory judgment that Resolution 278 was unconstitutional. Is that what you are talking about?

A Yes, I think that effective here by declaration of unconstitutionality of 278.

MR. CHIEF JUSTICE WARREN: Judge Bromley?

ARGUMENT OF BRUCE BROMLEY, ESQ.

ON BEHALF OF RESPONDENTS

MR. BROMLEY: Mr. Chief Justice, and may it please the Court:

There are at least four undisputed matters before us to which my two friends have paid scant attention.

First, as this Court is fully aware, this is an action against the Members of the House questioning their action in their official capacity. As petitioners emphatically announced below, here we are suing the Legislative Branch. This action, then, is not an action against private parties or against the United States, with its consent, to secure the declaration of

unconstitutionality of a statute passed by the Congress. It is directed solely to the Members in their capacity as Members of the House, and three of their agents elected within the House pursuant to the command of the House.

It is our view that this Court does not have the power to entertain this action against the Members any more than it would have the power to order the Members to pass or repeal a statute.

Second, there is no dispute now as to the correctness of the findings made by the Select Committee of the 90th Congress to the effect that Mr. Powell misappropriated large sums of Governments funds; that he was in civil and criminal contempt at the time of the action of the New York courts; that he maintained unlawfully an improper person on his Congressional payroll; and that he refused to cooperate in a perfectly proper investigation of his conduct conducted by two committees, one of the 89th Congress and one of the 90th.

Now, the serious charges against Mr. Powell were not denied by him at any time. They were not denied by him before the committees which investigated him. They were not denied by him at the time the House convened, considered the matter and reached its decision. They were not denied by him in the complaint which was filed two years ago. They were not denied by him in the courts below, and they are not denied here.

Q Judge Bromley, it is a fact that the Speaker of

the House had already ruled that those questions were not relevant to the investigation of the committee?

A No, Your Honor; it is not.

Q I thought that counsel said that prior to this there was a ruling by the Speaker of the House that the inquiry into his conduct while he was in the Congress, on this particular investigation, was not relevant.

A No, that is not right, sir.

Q Well, then, I misunderstood, probably.

A No, I don't think so. I think they said that, probably, but if they did, it is not correct.

Q Well, don't let me interrupt your argument any more, then.

A Third, the complaint in this case does not allege that Mr. Powell was excluded because of his race and the record before the House, when it came to reach its decision of expulsion, does not even suggest that such an allegation would be supportable. Accordingly, I say it has no proper place in this case.

Fourthly, the action of the House of the 91st Congress, the present Congress, in fining Mr. Powell $25,000 and depriving him of his seniority likewise is not before this Court. The action of the 91st House is not challenged in the complaint. The parties to any such claim, that is, the Members of the present Congress, and their agents, are not parties to this

action in their capacity as Members of this Congress. Moreover, this Court, I submit, does not have original jurisdiction to hear any such claim.

So the precise question, as we see it, is whether any court, in a suit against the Members of the House of the 90th Congress, can review a decision of those Members, acting pursuant to their constitutional powers, to judge the qualifications of their own Members, to exclude a member-elect solely for reasons of personal misconduct, and that is all Mr. Powell was excluded for here.

Q Suppose he had been excluded because of his race in the form of a resolution. Would you say he would have any judicial remedy?

A I should say, sir, in answer to that question, that the action of the House would be clearly unconstitutional.

Q Would he have judicial remedy?

A As I read the speech or debate clause, he would not, sir.

So our position is that what the House did in this matter was for the House, and the House alone, to decide, and its actions should not and is not subject to judicial review.

Before discussing, however, the reasons for that answer, I wish to emphasize again, as we do in our suggestion of mootness, and in our brief, that in my judgment this action is clearly moot. The House of the 90th Congress, against which

relief is sought, has terminated. Mr. Powell can no longer be seated in that House. There is now a new House. He now sits in that House, and I believe for that reason, and that simple reason, the case is moot.

It is my purpose to devote the remainder of my time to the substantive issues.

Q How about his back salary that he would have been paid, had he been seated, Mr. Bromley?

A Back salary is so incidental to the main prayer for relief that I do not feel it can justify the jurisdiction of the Court. It is completely de minimis. He was paid up to March 1, 1967, the date on which he was expelled. He was re-elected very promptly, and he could have presented himself to the House in April of the same year and, as the Speaker said twice, the matter would be considered again in light of the very important new factor that he had been re-elected, as it was last January.

But Mr. Powell chose to stay away. He never presented himself. He never came near the House. So I say he clearly has no claim for any salary except maybe a month's salary.

Q Suppose it were 12 months' salary, Mr Bromley. Would that save the case from being moot, in your judgment?

A No, Your Honor; it would not.

Q Why not?

A Because in the first place the salary can't be

paid unless the oath is administered.

Q No, no. I am talking about -- I see what you mean. You mean that because the salary couldn't be paid, that the Courts would have no jurisdiction, even if they were wrongfully withheld and the oath wrongfully withheld?

A Yes, I think this Court would have no jurisdiction against the Sergeant and the relief would have to be against the Sergeant, ordering him to pay, when he is prohibited by statutes from doing it.

Q Well, I suppose you might concede that he might have an action in the Court of Claims.

A I certainly would, sir, and in that court, the United States should have the opportunity, which it might very well seize, of pleading a counterclaim or a set-off for the $50,000 or so of its funds which Mr. Powell had taken unlawfully.

Q Well, would a remedy in the Court of Claims foreclose a declaratory judgment action in the Federal District Court for salary?

A It is moot now, so you couldn't have a declaratory judgment, but if you could -- and I don't think you could have one anyway -- I don't think the action would foreclose it, but I don't think this Court should grant a declaratory judgment, whether the matter is in the Court of Claims or whether it isn't.

Q Judge Bromley, on your question of mootness, if

the Court should be of the opinion that this action was justiciable originally, if it had been timely, do you think that it would be moot now?

A I think so, clearly, sir.

Q Why?

A Because he has been seated. There is nothing you can do about the 90th Congress, I respectfully submit. It is gone. You can't seat him in that Congress, and the present Congress is the one in which he has been seated. That action, the propriety of the fine which he got, and the loss of seniority which he got in company with his seating, is not attacked in the complaint and is not here.

Q What happens, Mr. Bromley, if he does attack it? Then two years from now that will be moot.

A Not if he proceeded promptly it wouldn't be.

Q I am further worried about your statement that in '67 he was paid one month's salary.

A No, I didn't say he was paid. I said he was paid up to March 1, 1967, when he was excluded.

Q Well, how could the Sergeant pay him if he hadn't taken the oath.

A By resolution of the House.

Q That resolution said he should be paid?

A That is right. The resolution said he should be paid while the hearings were going on and up to the date of

decision.

Q I see.

A Of course, my point about the salary is, after he was paid to March 1st, he could have come back and the result might have been entirely different, as it was last January. The reason he didn't get his salary after April 1967, until January 1969, was because he never presented himself. He never asked the House to reconsider in the light of the important fact that he had been overwhelmingly re-elected in Harlem.

Now, I submit that there are at least five separate reasons why his demands for relief cannot be granted, and I would like to summarize them briefly before I start to discuss them.

In the first place, although we haven't heard any mention of it, Article I, Section 5, the speech or debate clause, affirmatively bars any court from questioning Members of the House, or their agents, with respect to actions taken by them within the House, such as the exercise of their constitutional power to judge the qualifications of one of their Members.

Second, I don't think Federal Courts have any subject matter jurisdiction here, because Article I, Section 5, assigns the sole adjudicatory power to the House by declaring that the House is the judge of the qualifications of its Members. That delegation of judicial power under Article I, like the power to try impeachments, if you please, is an explicit exception to

general grant of judicial power to the courts under Article III.

Since the Legislative is co-equal with the Judicial branch, the judgments which the House makes in this situation in the field allocated to it, i.e., the qualification of its Members, are exclusive and supreme.

Thirdly, the Court should not proceed in this case because it involves a nonjusticiable political question.

Fourthly, if the Courts could review the propriety of what the House did, it is clear that the House acted within its constitutional powers when it excluded Mr. Powell, for the constitutional power of each House to judge qualifications is not limited, as has been stated so many times here, to the three standing disqualifications of age, citizenship, and inhabitancy. It extends, as well, to matters of personal misconduct unbefitting a Member of the House, and even if these three standing disqualifications were exclusive, the House's action in any event would be justified under its exp sion power since the two-thirds vote required for expulsion was obtained.

Fifthly, assuming that the lower Federal Courts did have the power to rule on the merits of the case, under the circumstances presented here, those courts did not abuse their discretion in declining to grant the extraordinary and discretionary relief prayed for.

Now, I submit that any one of these five reasons is sufficient to require dismissal of the action.

Q Could I ask you a question about your nonjusticiability argument?

To put an extreme case, do you find that if the Congress had expelled Mr. Powell, saying, "Well, we will lay aside a majority vote required for exclusion and the two-thirds vote for expulsion. We will just take a general consensus and expel him." Would you say that was nonjusticiable?

A I think so. Of course, it was improper and unconstitutional.

Q No relief.

A No relief, because the power to judge includes the power to judge erroneously has been confided to the House.

Q Would you then contest the judicial power to review, in whatever procedure it might be, the action by the House holding a non-Member in contempt?

A No, I wouldn't contest that. No.

Q So there are some instances where action by the House may be subjected to judicial review.

A That is correct; yes. Outside the House, but not for action pursuant to its adjudicatory constitutional power to act within the House.

Q Well, I don't understand. Both actions take place within the House.

A In Kilbourne against Thompson, certainly that action didn't take place within the House. The witness was

seized outside the House. True, there was some authorization within the House, but the act which the court had jurisdiction of was the seizure outside the House. I think that distinction, however artificial it may seem, is one which is dictated by the allocation of the power to judge the qualifications of its Members, the power to make its own rules, of its proceedings, and the bar which is set up against attack in the speech or debate clause.

Q Judge Bromley, would your argument carry you to the extent of saying that if one party was in complete control of the House -- say it had two-thirds or three-fourths of all the Members of the House -- and that it could, on a proceeding of this kind, refuse to seat all the elected Members of the other party on the ground that their views were dangerous to the country, or for any reason that it wanted to, would you say that they could do that without any remedy whatsoever?

A No, sir; I would not.

Q What would the remedy be?

A It would reside in this Court, in spite of the speech or debate clause.

Q Suppose they did it one by one, just one by one. They take a Mr. Powell today and a Mr. Smith and a Mr. Jones the next day, and did it one by one. Where would the remedy lie?

A Well, it is a harder case, but that might in the first place --

Q No, it isn't a harder case if we have no jurisdiction whatsoever.

A Well, I think it is, because of your remark about other perversions in Bond against Floyd. I must admit there are some perversions which this Court must be ingenious enough to find a way around the speech or debate clause, or else we will be confronted with revolution or worse.

So I don't say that an utter perversion, which this may be, and lastly, this may be an attempt by Congress to add another standing disqualification which it has no power to do and which I don't think could be attacked if it tried to do it because of the speech or debate clause. I think somebody has got to draw the line somewhere.

Q Who draws that line?

A The House draws that line, sir.

Q Oh, then the Court has no jurisdiction to draw the line.

A Except in cases of utter perversion, sir.

Q In your response to Justice Black, I take it an exclusion solely on the grounds of race would not be within the category of utter perversion as you see it.

A In my opinion it would not, sir, although clearly unconstitutional, clearly improper.

Q What could be more perverse than that?

A Well, a great many things.

Q For instance.

A Seizing the President and dragging him into the well of the House under a resolution that he be beheaded.

Q He isn't seeking a place in the House.

A He isn't seeking a place, no. I am talking about House action which constitutes an utter perversion of its function.

MR. CHIEF JUSTICE WARREN: We will recess now, Judge Bromley.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter recessed until 12:30 p.m. the same day.)

(Argument in the above-entitled matter was resumed at 12:30 p.m.)

MR. CHIEF JUSTICE WARREN: Judge Bromley, you may continue with your argument.

FURTHER ARGUMENT OF BRUCE BROMLEY, ESQ.

ON BEHALF OF RESPONDENTS

MR. BROMLEY: Mr. Chief Justice, may it please the Court:

I recognize that it has a strange sound coming from any lawyer to tell this Court that something unconstitutional may have occurred, and yet you have no power to intervene, but I make that contention in this posture and I rest it squarely on the speech or debate clause as interpreted by at least three cases decided here under that clause.

That clause, providing that for any speech or debate in the House, its Members shall not be questioned in any place, underscores and enforces the separation of powers doctrine embedded in our Constitution. It has the broad purpose, I submit, of protecting the integrity of independence of the Federal Legislative Branch from any interference whatsoever by the Executive or Judicial Branches, even to the extent of imposing upon the Members the inconvenience and expense of defending themselves.

No longer does anyone question the fact that speech or debate is not limited to words spoken in debate in the House, but includes everything done in the House in connection with its

business, such as the act of voting, the passage of a resolution, directing the activities of its agents.

Q If you follow that to its logical conclusion, why doesn't that vitiate the whole power of judicial review?

A Because it is confined only, Your Honor, to the actions which the Members take in connection with the regulation of their own proceedings within the House.

Q Their own business.

A And mind you, that is why I emphasized at the outset, in a suit against the Members, it doesn't vitiate the broad area at all, sir. It only vitiates a very narrow area.

Now, the three cases that I mentioned. This immunity from attack put up by the speech or debate clause covers -- well, let's take Kilbourne against Thompson first. That involved the passage of a resolution directing the illegal and unconstitutional incarceration in prison of a private individual, a suit against the Members barred by speech or debate, even though their action was clearly unconstitutional.

The alleged unlawful and unconstitutional activity of seizing private property in the context of an effort to suppress free speech, last term's Dombrowski against Eastland.

Finally, activity which results in the clear violation of a criminal statute, United States against Johnson.

Now, the only possible limitation, as I said before, on the speech or debate clause is what this Court said in Kilbourne

and what it described as "possible utter perversions," and the example that I gave of beheading the President was given by this Court in the opinion in Kilbourne as an example of an utter perversion. I didn't make it up.

What other cases would be included in this doctrine of utter perversion? That is a very difficult question but I am willing to say, I think, for what it is worth, that probably if all blacks were excluded in any fashion, either seriatim or by the passage of a rule, that would be an utter perversion possibly. I am sure if all Republicans were excluded, it would clearly be an utter perversion.

But I say probably not if only one black were excluded, such as here, assuming, contrary to the fact, that Mr. Powell was excluded because of his race.

Q How about ten, Judge Bromley? Suppose ten blacks were excluded?

A Well, ten at one time?

Q You take it your way.

A I will take it my way. Well, ten at one time, and if there were only ten in the House, I can't tell you. I don't know.

Maybe we could get some help if we took the analogy of impeachment. Suppose the President were impeached on unconstitutional grounds of race, religion, or speech, and removed from office by the Senate. I say this Court could do nothing about

it in a suit against Members of the Senate because of the speech or debate clause, and the fact, in addition --

Q That would be because of the impeachment clause rather than the speech and debate.

A I was about to say, and because I think, as well, the fact that the Constitution lodges the ultimate power to try impeachments in the Senate under Article I, just as the Constitution allocates the power to judge the qualifications in the House.

Q But the Constitution does state what the qualifications are, doesn't it?

A Oh, no, sir.

Q I thought it did.

A No, sir. It states three or more standing disqualifications that affect a class. No person shall be a Representative who has not attained the age of 25 and is a resident citizen of the State from which he comes. Now, I think that is a standing disqualification and doesn't at all evidence an intent on the part of the framers to overrule the long-standing power of legislative bodies for over two centures to discipline their own members for personal misconduct. That goes back to the Sixteenth Century.

Q What you are really saying, Judge Bromley, if I correctly understand you, is that the Constitution has these grounds of disqualification. The Constitution provides that the

House shall be the judge of the qualifications of its Members; that the House may take whatever standard it wants to as a necessary qualification of a Member, provided that it is not so extremely outrageous. Is that about it?

A That is a fair statement; yes.

Q That is your position.

A So long as we qualify it by understanding that my contention about the power to exclude is probably limited to cases of misconduct unbefitting the trust and confidence that ought to be placed in a Member.

Q Well, that is a different matter, because if you are going to narrow it down to qualifications unbefitting a Member, unbefitting a Member --

A Conduct.

Q Well, now, is that something for the House to decide, whether the particular basis for exclusion is an appropriate basis within that standard, or is that subject to judicial review?

A Something for the House and the House alone.

Q Well, then you get back to my statement of it rather than your qualification of it, don't you?

A You well may. I am not sure I quite understand it, but my position is --

Q What I mean to say is that if I correctly understand your last statement, you are saying that the House may

adopt its own standards as to what are requisite qualifications of Members, subject to only one limitation, and that is this perversion, or whatever the correct words are. Is that right?

A Adopt its own standards? They can't adopt any additional standing disqualifications.

Q I am trying to understand your position.

A I know it is difficult.

Q It is; yes, it is, Judge.

Q Judge, suppose we had the situation they had in New York after World War I, the case in which Chief Justice Hughes, then out of office, interceded for five men who were denied admission to the New York Legislature just because they were Socialists. Now, suppose that same thing happened in the Congress today under your argument. Would there be any remedy for that?

A Under speech or debate, I do not believe so; no, sir.

Q Under speech or debate.

A Yes, sir. I must repeat, even though I know it may bore you, these questions have nothing to do with our case. There was nothing unconstitutional about Mr. Powell's exclusion once you agree that the power to judge the qualifications for misconduct is lodged in the House, as I think is perfectly clear by the practice of all the legislatures and of our Congress right down to the present time.

Q I am going to ask you one more question. In that respect, would you make any distinction between the grounds for exclusion which relate to his activities as a Member of the House, that is to say, the alleged misappropriation of funds, the alleged contumacious conduct, the alleged improper payroll practice -- would you make a distinction between those on the one hand, and on the other hand, alleged improper conduct that had no bearing upon the business of the House that related allegedly to Mr. Powell's character and his obedience to law, namely, the contumacious conduct toward a court?

A I would make no such distinction, sir, and there are many, many cases of the legislative practice of excluding felons, perjurers, we even have some precedents for persons who have been contemptuous of courts outside the House.

I think there is a well defined legislative common law that came along with this speech or debate clause into the Constitution.

I was talking about impeachment, and I said that I thought that was an analogy because the speech or debate clause applied to impeachment even though it was on an utterly unconstitutional ground.

Now, coming to this contention of the petitioners for a moment, as I understand them, they say, "Well, speech or debate may bar the imposition of criminal or civil penalties after the event, but it doesn't forbid the coercive kind of relief

inherent in an injunction or a writ or a declaratory judgment." However, it seems to us that in order to effectuate the immunity afforded by the speech or debate clause, it must apply to injunction, mandamus, or declaratory judgment, because it is far simpler to intimidate critical legislators by direct order of a court with its attendant sanctions than it is by the indirect threat of subsequent criminal or civil proceedings.

As I have indicated, I don't believe petitioners have overcome their difficulty by now limiting their prayer to a declaratory judgment, because a declaratory judgment is itself, I submit, in the most direct and positive sense, a questioning of speech or debate taken in the House.

Furthermore, in this situation, I think there should be a doctrine, and probably is, that declaratory relief should not lie where the suit for injunction is barred at least by the separation of powers doctrine, as it is here, for unless declaratory judgment is to be a wholly gratuitous and advisory and useless act, it must rely for its efficacy upon the willingness of the Members to acquiesce in the court's interpretation of the House's powers.

Thus, insofar as a declaratory judgment would be given force and effect by the Members' voluntary acquiescence, it would be, I submit, as effective an impingement and interference with legislative proceedings as a flat injunction would be.

I want to say a word about the non-Member agents, because

in Dombrowski against Eastland the court said that the immunity extends to the Sergeant-at-Arms in this case, to the Clerk and to the Doorkeeper, who are three individual defendants in this matter. This Court said the immunity extends, although it is less absolute.

But it seems to me -- of course, there the agent of the Senate, Mr. Sourwine, was held not protected by the clause because he is alleged to have conspired down in Louisiana with some people to make an illegal seizure of some papers which Senator Eastland wanted. Here, the only thing that these three gentlemen did was to obey the command of the House, within the House, and it seems to me the immunity, therefore, clearly applies to them.

I want to say a word about the power to judge qualifications and the power to expel. Let's assume for a moment, contrary to my basic position, that this Court may properly review the action of the House in this case. I nevertheless say that the action of the House in doing what it did to Mr. Powell was clearly within its constitutional powers, for it clearly was within the constitutional grant, in my view, of the power to judge his qualifications to sit.

There is no use in my repeating that I do not believe the constitutional disqualifications -- and there are more than three of them -- are exclusive. You know that the framers had before them illustrations of State Constitutions which made

this matter clear. They said that the legislatures in various States, like New Hampshire and Massachusetts, had the power to judge the qualifications contained in this Constitution. One of the men who worked on the draft of the Constitution came from Massachusetts or New Hampshire, and he was fully familiar with his own Constitution.

Yet the framers chose to adopt language not so specifically limited, and the reason they did it, I think, is because they knew full well, and realized, and wanted to retain the power to purge themselves of dishonest, disgraceful people, because of the obligation they owed to the whole Nation to have a legislative body made up of at least decent, honorable citizens.

Q How are the qualifications fixed, if not by the Constitution?

A They are fixed, sir, by the undoubted practice of all legislatures to control their own disciplinary matters and by the doctrine that the legislatures have power over their internal affairs.

Q That is to say that they can fix any qualifications they want?

A Oh, no. They can't constitutionally add to the standing disqualifications contained in the Constitution. They can't have a rule, they can't adopt a rule by resolution, that certain classes, people who do not possess $50,000 of property are not qualified to sit. They can't do that. That would

unconstitutionally add to the provisions of the Constitution.

Q What are the present qualifications for admission to the Congress?

A They are specified in the Constitution, the three that I have mentioned. In addition, there are a couple more, a person who can't take the oath of loyalty, and a person who holds a Federal office.

Q Did he comply with all of those?

A He complied with all of those; yes.

Q What other qualifications are there for the office of Congressman?

A There are not any expressed in the Constitution except as is resident in the phrase "to judge the qualifications," which has a meaning that his personal conduct is a qualification.

Q Well, Judge, does that mean that you contend that Congress, by the Constitution, is given the right to determine what the qualifications for Congressmen are, as well as to judge whether he complies with the qualifications in the Constitution?

A Yes, I do. I say in addition to following those expressed in the Constitution, under the power to judge provision, they have the right to judge whether the man's character and action is worthy of a Member of their body, or whether the man is a crook and ought to be thrown out.

I say that is so deeply embedded in our whole system that I really don't see how anybody can question it.

Q Where has it been explored, either in our Constitution or in our cases, if it is so clear?

A I don't think your cases have ever had occasion to consider it. However, the historical matter that I referred to, going back centuries, is contained in this appendix that we have filed with the Court, this smaller, blue-covered document, in which we list the precedents in England, in the American colonies and the American States, at great length, showing how widespread the power was and how widely it was exercised, and what the grounds were.

For instance, on page 19A in the back of our brief we summarize some of the things from our appendix. Mr. Whittemore of South Carolina, excluded from the 41st Congress by a vote for selling appointments to the Military and Naval Academies. Now, it doesn't say whether he did that while he was in the Congress, at least this summary doesn't, or before he got there, but it doesn't make any difference.

Q It would make a difference, wouldn't it?

A Not a bit; not a bit.

Q Why?

A Because if he is guilty of prior misconduct, he is just about as unfit to sit as though he committed the same impropriety while he was acting.

Q Does a man who is excluded under a procedure such as we have here, Judge, have the same procedural rights as a Member of the Congress has when they try to expel him from the Congress?

A Yes, he has the same rights.

Q Can he stand on the Floor of the Congress and defend himself?

A Surely, if the Congress before he is sworn gives him that right, which it did here by resolution. The rules of the House gave him the right to be heard and they offered it to him. They offered him full rights to produce witnesses, proceed in the investigations in both Houses, to appear on the Floor with his counsel, make any statement he wanted to. He never showed up. He boycotted these hearings and has never denied the factual findings which resulted from these hearings.

Q Judge Bromley, I take it, then, you do rely also on the argument that this might be viewed as an expulsion.

A Oh, yes, sir.

Q And that the two-thirds vote requirement satisfies.

A Yes. I think it is a purely --

Q Looking through your brief, I see only on page 94 and 95 where you deal with the expulsion. I am not sure that you address yourself specifically to whether or not the House may expel for conduct occurring before the Member becomes a Member. Do you anywhere deal with the precedents of the House,

for example?

A Yes, we do in that area. Furthermore, we cite in re Chapman, decided by this Court, in which the Court affirmed the action of the House and made a statement that the offense which grounded the exclusion was not a statutory offense, it was not committed while he was in the House, or at the seat of government, or not even during a session, and it negated all of the requirements that the conduct be limited to his conduct while he was in the House.

This opinion, in re Chapman, approved the case of William Blount as long ago as 1797, in which the House found his conduct, although not taking place during the time of his service, was nevertheless a proper ground for expelling or excluding him.

Q Has the House itself ever addressed itself to this matter in its own cases, in its own expulsion cases?

A Yes, it has been discussed.

Q What has been the judgment of the House about it?

A They never reached, in any case that we can find, a square decision on that.

Q So you have no precedents where the House itself expelled for conduct prior to that term of the House?

A That is right. But, of course, you understand that my contention is that that is a matter for the House to decide.

Q I understand.

A I call Your Honors' attention to page 19A of --

Q The appendix?

A Our brief, where we list a summary of precedents of the House and Senate regarding exclusion or expulsion on grounds other than the three standing disqualifications.

Q Judge Bromley, are we to attach any significance to the conclusions of the Select Committee, which is apparently contrary to the position that you take?

A Contrary?

Q Aren't they?

Q On the question of whether they may expel for conduct occurring before.

A Oh, yes.

Q The committee was to the contrary.

A Yes.

Q Are we to attach any significance to their action?

A No, no. This is a legal conclusion which no matter what the recommendation of the report was, was decided as a legal matter by the House on March 1st, and they did not accept that.

Q Well, the House itself formally never thought it was acting on an expulsion matter. I thought the Speaker put it as an exclusion matter.

A Yes, but isn't the distinction, since there was

a two-thirds vote, absolutely immaterial? What would this Court do --

Q I agree. That is the question we are investigating here.

A But I just want to say this word. Should the Court order the House not in existence to go back and seat him and then expel him?

Q Let's assume that in the precedents of the House it was pretty clear the House had always thought it could never expel for conduct occurring prior to the organizing of the House. I suppose that would be of some bearing.

A Yes, but couldn't they clearly distinguish Mr. Powell's situation? He had $50,000 which he had taken. He took it prior to the 90th Congress, but he had it in his possession at the time the 90th acted. He saw no reason for offering to give it back.

Q So he came into the House with a status in the sense that his conduct continued into that House. He still had the money.

A He had the money; yes.

Q Where does it say in this record, Judge Bromley, that he had $50,000?

A Well, I upped it a little. The specific findings of the report say that he willfully and unlawfully appropriated to his own use -- there are two findings, $25,000-odd, $50,000,

$16,000-odd, and you add them up and they come to over $44,000.

Q I thought you said that in March, in January of '67, he had in his pocket $50,000. Did I hear you correctly?

A Well, maybe I should have said $44,892.12.

Q Is that in the record, that he had it at that time in his possession?

A All I said was that he had never offered to return it. The Government never got it back. I don't know what he did with it. Maybe he spent it. But we, the citizens of this country, didn't get it back, in addition to which, there were many other improper expenditures.

Q Mr. Bromley, it sounds to me like, from what you say, they charged him with the crime of embezzlement.

A They found that he misappropriated, their finding was. I suppose that is a crime.

Q When it belonged to the United States.

A Yes, I suppose that is a crime.

Q Well, wouldn't that be embezzlement?

A It might be embezzlement; yes, sir.

Q Were they punishing him for that, or what were they doing when they fined him?

A He wasn't fined in the 90th Congress. He was fined in the present Congress, which is not before Your Honors. But what were they doing? They were exercising their constitutional power to punish him.

Q To punish him.

A That is what the Constitution says.

Q That is for a crime.

A Well, no. It just says to punish him.

Q Well, suppose they had indicted him. Could they have done that?

A No, they could not have.

Q Why not?

A The House indict him?

Q Why couldn't they?

A They could send him to a Grand Jury, I assume.

Q But it seems to me like what they have done is try him for a criminal offense, thereby denying him the opportunity to be tried before a judge and a jury.

A That was the 91st Congress, which isn't before you, and before a judge and a jury he admits all this, Your Honor.

Q He doesn't admit he is guilty, does he?

A Why not? He has never denied it, never disputed it at any time.

Q Well, he is not required to deny it, is he, under the Constitution?

A I should think in this posture that we ought to come here with some statement from him, if he didn't do it, saying "I didn't do it," but they are very careful not to say that and they have never said it.

He took checks made out to his wife and there was a forged signature on her checks, and he deposited them, then, in his own account. That is where he got the $44,000 from. They were separated. He and his wife were separated. She lived in Puerto Rico. She testified under oath she hadn't done any work for his Congressional staff since 1965, which started the period of the $44,000. She was paid, at his instigation, over $20,000 a year and never did a thing, and each month the check with the forged endorsement in her name ended up in his bank account.

Not only that, he authorized, according to the testimony of his assistant Stone the illegal and deceitful use of credit cards issued to employees of his committee for friends and family to travel in Europe, to Florida, to the Bahamas --

Q Isn't that a crime?

A Yes, it is a crime, and he should have been indicted. I don't know why he wasn't.

Q That is what I was thinking. That would probably be a better place to try him.

A Yes. Well, I don't know that it would have been any better place to try it, Mr. Justice Black, since he plainly admitted it. There wasn't any doubt about it. If he had been indicted, he probably would have had to plead guilty. I don't understand why he wasn't. The Grand Jury, by the way, to whom my friend referred, never voted no true bill. It never did anything and the Department of Justice saw fit to terminate its

existence before it took any action.

But the matter of whether he is civilly liable is still pending somewhere in the Department.

So finally, I say again that for any one of these six legal reasons, I think this matter deserves affirmance, and I believe it to be no answer to any of these arguments to say that the House might unreasonably or erroneously exercise its adjudicatory powers, for Members of the House, like Judges, take an oath to support the Constitution. We can't assume that they will violate the oath. Of course, there is always the risk of error, even constitutional error, on the part of each branch of Government in the areas in which it is granted supreme constitutional competence.

But this is not a weakness of our system of government. I think it is a strength, because some individual or some group always has to make the final decision and our founding fathers put this narrow area of adjudication not in the hands of an Article III court, but in the hands of an Article I legislative body.

There is a remedy for a situation like this, of course, but it is a political remedy, so quickly exercised by the voters in this case, and if he, Mr. Powell, had presented himself a month or two after he was excluded, since he was overwhelmingly re-elected, in the light of the Speaker's ruling that the House would reconsider the matter in the light of that important

development, he probably would have been seated.

He chose to wait. I don't know why.

Q Why would he have been seated, if he had so recently been prevented from taking his office because of these what you call crimes?

A Because the voters so overwhelmingly expressed their preference to him that his opponents practically got no votes, despite all the publicity attendant upon his derelictions and, of course, the House would consider that. That was a very important matter. When they did consider it last January, they voted to seat him, sure, but they thought "Look, we can't let this man go scot-free. We will punish him," and they did strip him of his seniority and fine him $25,000, which he has got to pay $1,100 a month out of his salary.

Q Well, there is quite a difference between those two, isn't there, quite a difference between taking away his seniority, which I presume nobody would decline to say the Congress didn't have a right to do, and fining him for a crime.

A I don't see the difference, sir, fining him for misappropriating money, making him pay it back in part. I think it was a very mild sanction, myself.

Q Is there any power to commit him to prison, as the expel clause in the Constitution?

A For disorderly behavior. They have the power to punish a Member for disorderly behavior.

Q That is what it says.

A I assume that means they can have him imprisoned.

Q And in that event, would he be entitled to -- is it your position that he wouldn't be entitled to any judicial review?

A That is my position; yes, sir.

As Professor Zachariah Chafee said long ago, "It is no answer to say that if the House should exclude a man on some whimsical ground, no appeal would lie from its action. Neither is there any appeal from the Supreme Court."

MR. CHIEF JUSTICE WARREN: Mr. Kinoy?

REBUTTAL ARGUMENT OF ARTHUR KINOY, ESQ.

ON BEHALF OF PETITIONERS

MR. KINOY: May it please the Court, there have been some rather unusual statements made in Court this morning which we would like to respond to very briefly.

In the first place, in response to the Chief Justice's question as to the Speaker's ruling, I call the Court's attention to the fact that in the Congressional Record for January 3rd, H-14, the Speaker's ruling is set forth in full. The Speaker ruled that the question as to the punishment of Mr. Powell for acts committed in the 88th or 89th Congress is not germane to the proposition that he now be sworn in. The Speaker based his ruling, Mr. Justice White, upon precedents of the House, and contrary to what Judge Bromley has said, the

precedents of the House are full and clear on this question, and they start with the case which is most famous American history, the case of Matthew Lyons in the 5th Congress, in which Congressman Lyons was convicted under the Alien Sedition Act and a motion was made to expel him before the House.

The House, then composed of gentlemen who had participated in the framing of the Constitution, thoroughly debated the issue and came to the conclusion that the House had no constitutional power whatsoever to expel -- and mind you, this is under the expulsion clause, not the exclusion clause -- no constitutional power to expel a Member for alleged acts occurring prior to his election. And in full, the annals of Congress point out that the fundamental reason was the very same reason which Madison and Hamilton advanced, and that is that the ultimate tribunal as to the fitness of a Member is not the Congress of the United States, but the tribunal as to the fitness of a Member is his constituency, the people of the United States, the people he represents.

The precedent of the Matthew Lyons case has been followed fully and completely, never deviated once in the five cases on expulsion in the history of the House, and for the convenience of the Court, we have set them out in full in our reply brief, pages 18 through 23.

Just so there will be no question about that whatsoever, the official historian of the House, Mr. Galloway, said in his

history of the House of Representatives, he concluded that, "In general, the House has been dubious of its power to punish Members for offenses committed before their election."

Q Mr. Kinoy, is that order of the Speaker here?

A The order of the Speaker, Mr. Chief Justice, is in the official record which the parties have stipulated copies are to be available to the Court.

Q It isn't quoted in any of your briefs.

A That ruling is referred to in our brief, in our reply brief. It is not set forth in full. It is in the official documents set forth in full.

Q What is the citation?

A The citation is January 3rd Congressional Record, 1969, H-14.

Now I would like to address myself to the next question. I would like to address myself now to the question advanced that this Court has no power under the speech or debate clause. I find that argument rather surprising in light of the decisions of this Court iself.

This Court has held from the beginning that the speech or debate clause, and this I recall discussing fully with the Court in the Eastland case last term, has held that the clause was designed to protect legislators in legitimate legislative business from criminal or civil sanctions. There are no criminal or civil sanctions involved in this case.

But more fundamentally, in Kilbourne against Thompson, which is the fountainhead of all teaching of this Court on the speech or debate clause --

Q Mr. Kinoy, let me get something straight here. Did the Speaker of the House in 1967 -- was that when the exclusion took place?

A Yes. He made a ruling there, too, Mr. Justice White, and I will make that very clear.

The ruling in March of 1967 was that the matter before the House was an exclusion and not an expulsion.

Q I understand that, but did he at that time refer to anything at all about expulsion, except to say it wasn't one?

A Except the two-thirds vote. That is right.

Q It was only in '69 that he referred to the precedents of the House on expulsion.

A Correct, Justice White; that is absolutely correct.

Now, in Kilbourne itself, the Court held that the resolution of the House of Representatives then before the Court was unconstitutional and void and held it directly, and the relief that flowed from that was the relief which was directed toward the Sergeant-at-Arms of the House.

So in the very case which the respondents rely on, which supposedly deprives this Court of its historic power of judicial review over actions of the Legislature when those actions transcend constitutional boundaries, in that very case

this Court did precisely what we are asking the Court to do here, and that is declare a resolution of the House of Representatives unconstitutional.

This was no minor question. This reflected the understanding of the Court that the speech or debate clause does not repeal Marbury/Madison. The speech or debate clause was known to the Chief Justice when that decision was handed down. The speech or debate clause simply has nothing todo with this case whatsoever, nothing whatsoever.

Q Which case was that?

A Kilbourne against Thompson, Mr. Justice Black, Kilbourne against Thompson, the original discussion of the speech or debate clause in this Court.

Q Is that the one that stated that in considering these conditions of the Constitution, the power that could be exercised to do something to a man was the least possible power adequate to the end proposed?

A That is right. That is precisely the case that stated that.

I respectfully would bring this to the attention of the Court: The analysis of the Constitution which the respondents have presented here today has one fundamental flaw in it. The fundamental flaw is that it is simply not the analysis of Hamilton and Madison. It is simply not the analysis of the foundaig fathers, and what I find extraordinary in the height

is that the proposition is urged before this Court that the legislative power which the British Parliament asserted in the Wilkes case, one of the most central and decisive causes of our revolution, that this power is the power which the respondents seek to sustain their action upon. I never would have expected that the Wilkes case would once again be argued in an American court.

Now I have to say one thing: I think it is outrageous that before this Court assertions are made that the petitioner was guilty of certain acts, that the petitioner never denied his guilt of certain acts. The record hasn't an ounce of evidence of that in it, and I want to make it very clear.

We did not boycott those hearings. Mr. Bromley was not there. We were there, and the petitioner was there, and we asserted our constitutional position, which we had every right to assert before that House.

More than that, I think it is not proper that the respondents make the statements they do about petitioner when the Chairman of the committee itself, Mr. Hays, on January 3rd of this year, said that the findings of his committee were not judicially ascertained and that he was satisfied that no inference could be drawn from those because a Federal Grand Jury had not seen fit to indict the petitioner. I think it is improper to make the statements about petitioner which were made.

Q You said that he made his position clear before the

committee?

A Yes, Mr. Justice Black.

Q What did he say?

A We said, before the committee, that the Congress had the power, on the question of seating a Member, to inquire into the constitutional qualifications as set forth in the Constitution. We would give evidence as to those qualifications. We did. We testified. The petitioner testified and we put in documentary evidence as to the existence of the three constitutional qualifications for membership.

We said that the House had no power under the Constitution to go beyond that question, and that was the position we took before the Select Committee.

Q Did he answer all questions asked?

A All questions on the constitutional qualifications, yes, Your Honor.

Q If the petitioner had been seated, there is no doubt, is there, that the House would have had power to punish him if it had concluded so to do under the specific provision in the Constitution.

A Justice Fortas, subject only to the constitutional mandate that they could not punish him for alleged acts occurring prior to his election.

Q I understand that. But in theory, that constitutional power is clear.

A Yes, Your Honor.

Q So that if a proceeding to punish him had been brought in the same session of Congress in which allegedly these acts were committed -- I am talking about the acts relating to Congressional funds -- there would have been no question as to the power of the House to punish, subject to judicial review, or not subject to judicial review, as it might turn out. Is that right?

A That is right. Subject to an adversary proceeding and the rights of an adversary proceeding, and subject to the limitations, as I said before, of the Constitution.

Q And also there would be no question as to the power of the House in an appropriate case and by whatever procedure may be appropriate, to expel a Member, is there?

A That is absolutely right.

Q So to a considerable extent, anyway, your submission to us depends, in the first instance, upon the distinction between the exclusion and the expulsion procedures, or the exclusion and the punishment procedures.

A I would put it this way, Your Honor: Fundamentally the constitutional argument, the constitutional position, is the same. If the expulsion power were used, in effect, to do what the House cannot do under the exclusion power, that is, to add a qualification to membership, that would equally fall as unconstitutional.

Q Oh. What you are saying is that the House can expel only because of the lack of these three specific qualifications?

A No, I am saying that the House can expel under the punishment clause for misbehavior which is found within that session of the Congress, subject, of course, to other limitations in the Constitution.

Q I have read your brief on the point, but perhaps you would tell me briefly and quickly now why you say that you have to take this problem session by session of the Congress, or Congress by Congress. That is to say, your position is that Congress cannot punish or expel for acts -- let's say disorderly behavior -- occurring in the preceding Congress by the same Member.

A That is correct, Your Honor.

Q Why is that?

A Well, the explanation for that, I think, was best put forward, the first time it was ever discussed in the House, in the Matthew Lyons case. The explanation was that this went to the fundamental principles of representative government because the founders were determined that under no guise whatsoever the House was to have the power of overruling the choice of the people as to who was to be their representative.

Now, as to unfitness or prior misbehavior, the House specifically discussed this in the Lyons case, because there

they said it was the grossest misbehavior. He was charged with, among other things, spitting at other Members of the House of Representatives, Matthew Lyons was. The House there said that it is a fundamental principle of American representative government that the court of last resort as to the fitness of a Member is his constituency. When an act has occurred prior to the election, the people have passed on it by electing him and the House may not overrule. To allow the House to overrule it would be to open up the dangerous road which Madison talked of, of subverting the fundamental principles of the Constitution.

Q And the fact is, that in this case you would say that Representative Powell could not have been expelled for the conduct that is involved in this case.

A I would say that; yes, sir.

Q Because of the time of its occurrence.

A That is right. I think the constitutional provisions are very clear, and the precedents of the House are very clear on that.

Finally, I would like to just point out to the Court that in essence, the respondents' position is a challenge to the role of this Court as the ultimate interpreter of the Constitution; that the short answer to the respondents' entire argument can be put no better than Chief Justice Marshall put it in Marbury against Madison, that it is for the Judiciary to say what is the law, and that is the meaning of the written

Constitution, and to argue a doctrine which says that the Legislature can transcend the boundaries placed in the Constitution is to subvert the very meaning of a written Constitution.

Thank you.

(Whereupon, at 1:30 p.m. the argument in the above-entitled matter was concluded.)