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EARL WARREN'S LAST CIVICS LESSON: POWELL V. MCCORMACK

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The legal opinions of Earl Warren were not such as to see the development of a well-grounded constitutional theory clearly established over the course of a judicial career. Typically, they present the basic facts of a case, usually within an ethical, rather than a legal, framework.[1] Warren's last opinion delivered on the Court, *Powell v. McCormack*,[2] can in that sense be viewed as an archetype opinion.

Powell v. McCormack raised issues related to Article 1 of the Constitution that had not previously been clearly defined by the courts. Section 2 states that "No Person shall be a Representative who shall not have attained the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." What the Constitution does not say is whether these restrictions are exclusive, or whether the provisions of section 5, clauses 1 and 2 outweigh them.[3]

Many Congressmen have asserted that each house possesses the power to exclude a member-elect for a reason not expressed in the Constitution. Prior to the decision to exclude Powell, this had been done successfully only three times since the politically charged atmosphere in which the post-Civil War Congress refused to seat Southern Congressmen elected under President Lincoln's "soft" Reconstruction plan. In 1870, B. F. Whittemore was excluded following his victory in a special election. He had previously held the seat but resigned to escape expulsion for selling appointments to West Point. In 1900, Brigham Roberts, a representative-elect from Utah, was excluded for practicing polygamy. The last exclusion to occur was that of Victor Berger in 1919, following his conviction for violation of sedition laws.[4]

[1] G. Edward White, "Earl Warren's Influence on the Warren Court", in *The Warren Court in Historical and Political Perspective*, Mark Tushnet, ed. (Charlottesville: University Press of Virginia, 1993), 37-50.

[2] 395 U.S. 486 (1969).

[3] Article 1, section 5, clause 1 states that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members. . . ." Article 1, Section 5, clause 2 states that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

[4] Kent M. Weeks, *Adam Clayton Powell and the Supreme Court* (New York: Dunellen, 1971), 15-16.

Prior to *Powell*, no challenges to the congressional actions of exclusion had ever been brought into court, and such a challenge would have to surmount two hurdles. One was Article 1, Section 6, clause 1 of the Constitution, which provided that "The Senators and Representatives . . . shall in all cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." Many believed this clause barred a suit against the Congress or its members to challenge an exclusion.[5]

The second hurdle was the "political questions" doctrine, which holds that there are certain constitutional questions which are inherently non-justiciable. This doctrine traces its origins to *Marbury v. Madison*,[6] where Chief Justice Marshall wrote:

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[7]

In the 1946 decision *Colegreve v. Green*[8], Felix Frankfurter wrote that the issue involved (redistricting of Illinois congressional districts) was "of a peculiarly political nature and therefore not meet for judicial determination."[9] This remained the opinion of the Court until 1962.

Frankfurter's *Colegreve* precedent was set aside in the landmark 1962 case *Baker v. Carr*[10], which ordered the redistricting of the state legislature of Tennessee. More importantly for future cases of a political nature, Justice Brennan's majority opinion provided a specific, rather narrow definition of the "political questions" doctrine.

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a

[5] Ibid., 16.

[6] 1 Cranch (5 U.S.) 137 (1803).

[7] 1 Cranch (5 U.S.) at 170.

[8] 328 U.S. 549 (1946).

[9] Ibid. at 552.

[10] 369 U.S. 186 (1962).

coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[11]

Many Congressmen and lawyers believed that a challenge to an exclusion would contain one or more of these criteria, especially that positing a "textually demonstrable constitutional commitment" to the legislature, due to the "judicial qualifications" clause of Article 1, section 5, clause 1, of the Constitution.[12] However, those who held this view tended to ignore Brennan's remark in the *Baker* opinion that the "political questions" doctrine would not apply if it conflicted with the Court's role of constitutional interpreter.

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[13]

The *Powell* case traces its origins back to the original Congressional investigations into the conduct of the controversial Harlem Democrat. Powell had been chairman of the House Education and Labor Committee since 1961, and by 1966 he was drawing fire from members of the committee. Their three major grievances against the chairman was that he had used his position to stall legislation, misused committee funds, and had capriciously fired members of the committee staff. On September 22, 1966, the committee voted overwhelmingly to reduce Powell's power by reducing his procedural weapons and his control over committee staff, as well as more direct supervision over committee funds.[14]

Powell had spent much of the 1960s entangled in a court case against Mrs. Esther James, an elderly resident of his district. On March 6, 1960, as a last-minute substitute for the snow-bound Senator Hubert Humphrey on the New York television show "Between the Lines," Powell called James a "bag woman" (a graft collector for corrupt police). James sued Powell for defamation, and in 1963 won a judgment of $11,500 in compensatory damages

[11] Ibid. at 217.

[12] Weeks, 17.

[13] 369 U.S. at 211.

[14] Weeks, 4-5.

and $200,000 in punitive damages. The verdict was decreased on appeal, but, in 1965, after James alleged that Powell had illegally transferred property to avoid paying the judgment, she was awarded $575,000 plus costs, though that amount was reduced on appeal as well. By the end of 1966, it was estimated that the unpaid judgment amounted to some $164,000.[15]

Far more harmful to Powell than these civil judgments were the various contempt citations issued to him for his refusal to attend court sessions.[16] At least three separate civil contempt citations were issued against him in 1966 as well as two arrest orders. Since the arrest orders could not be served on Sundays, Powell returned to New York three times a month to preach at his Abyssinian Baptist Church, and absented himself from the state at other times. On November 28, 1966, however, an arrest order was issued against him that could be executed on any day of the week, and Powell stayed out of the state entirely.[17]

On October 5, 1966, the Committee on House Administration designated the Special Subcommittee on Contracts, chaired by Wayne Hays, to conduct an investigation of Powell's committee. By the time that hearings began on December 19, the controversy accelerated markedly. Editorials across the nation began to call for varying degrees of punishment for Powell, and, as early as November 30, at least one member of Congress, Lionel Van Deerlin, suggested that Powell would be excluded from the forthcoming 90th Congress, to which he had just been re-elected. The Hays subcommittee concluded that Powell had misused public travel funds for personal purposes, including the travel of certain female members of his staff, and furthermore had added his wife to his staff's payroll despite the fact that she had performed no staff duties and, in fact, had been living in Puerto Rico. The Hays subcommittee, however, had completed its work too late for Powell to be sanctioned by the 89th Congress, though its report did lead the Democratic Caucus to remove Powell from his chairmanship prior to the 90th Congress.[18]

On January 10, 1967, the opening day of the 90th Congress, a resolution was adopted sending the Powell matter to a special committee appointed by the Speaker, and denying Powell his seat, though not his salary, until the committee completed its investigation.[19] The committee's report, issued in late February, concluded that Powell should be seated, though he should also be censured, fined, and divested of seniority, and also noted that if Powell were excluded or expelled, it would raise constitutional issues which the Supreme

[15] Ibid., 6-8.

[16] In fact, Powell claimed that the various litigation that James instigated against him raised important constitutional questions under the congressional immunities clause, though the Supreme Court denied certiorari to his claim in 1965. See Weeks, 7-8, and Powell v. James, 379 U.S. 966 (1965).

[17] Weeks, 8-11.

[18] Ibid., 19-32.

[19] Ibid., 44-46.

Court would have the right to review.[20] However, the committee's proposal was rejected by the full House on March 1, which then proceeded by a vote of 307-116 to exclude Powell.[21]

One aspect of the House debate that is particularly interesting is the complete absence of consideration of the Supreme Court's decision in *Bond v. Floyd*,[22] which was decided on December 5, 1966--less than three months before Congress voted to exclude Powell.[23] The case arose over the Georgia House of Representatives' decision not to give the oath of office to Julian Bond, a civil rights activist who had previously worked with the Student Non-Violent Coordinating Committee, due to statements he had made against the war in Vietnam. The state argued that Bond could not sincerely abide by the oath to uphold the state and federal constitutions in light of his statements opposing the war. In an opinion written by Chief Justice Warren, the Court unanimously ruled that "the oath gives it [the state of Georgia] no interest in limiting its legislators' capacity to discuss their views of local or national policy. The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."[24] While the *Bond* case did raise different issues than the circumstances surrounding Adam Clayton Powell, one could argue that the Georgia House's finding not to seat Bond could be considered an extra-constitutional requirement imposed by the legislature, which could indicate the Court's willingness to decide in Powell's favor if the case were to reach that level.

Powell quickly challenged the House's action in court, the first time that an exclusion by the House of Representatives had been challenged in court. On April 7, Judge George L. Hart, Jr., of the district court for the District of Columbia, dismissed Powell's complaint without consideration of the merits on separation of powers grounds.[25] On February 28, 1968, the three-judge court of appeals for the District of Columbia likewise rejected Powell's complaint in three separate opinions, on differing grounds. Judge Warren E. Burger ruled that the case was nonjusticiable on the fourth of the six criteria enunciated by Brennan in *Baker*, that of "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."[26] Judge Carl McGowan ruled that there was no imperative exigency for judicial inquiry, while Judge

[20] Ibid., 77-79.

[21] Ibid., 94, 101.

[22] 385 U.S. 116 (1966).

[23] Powell's attorneys did attempt to draw the attention of the special committee charged with investigating whether to seat Powell, but there is no indication that the decision was considered. See Weeks, 61-62.

[24] 385 U.S. at 135-36.

[25] Weeks, 122.

[26] 369 U.S. at 217.

Harold Leventhal ruled that even if the procedure used to exclude Powell might have been improper, the court should decline to entertain an action based on a procedural defect.[27]

On November 18, 1968, some six weeks after the 90th Congress had adjourned and after Powell had been reelected, the Supreme Court granted certiorari on *Powell v. McCormack*. This vote indicated that at least four justices had felt that there were special and important reasons for review and that the issues raised were of sufficient public importance to merit their consideration. At issue is the timing of the Court's decision. The Court had waited almost six months since the petition was first filed, yet in another six weeks the court would know whether Powell would be seated by the 91st Congress. There seemed to be a strong possibility that he would be sworn in, and he had indicated his willingness to take his seat even if denied his seniority. The most impelling question, his right to sit in Congress, would in all likelihood be settled, so the Court could have easily avoided the issues posed by the case. The Court's action tended to suggest that it welcomed the opportunity to deal with the merits of the case, for, if after hearing argument, it were to rule that the case was not justiciable because of the separation of powers doctrine, it could have achieved the same effect simply by allowing the lower court decision to stand. The case presented the court with the opportunity to deal with the merits of the case--the constitutionality of the exclusion--without risking a direct confrontation with Congress.[28]

The scheduling of the case would seem to indicate that Warren wanted the *Powell* case dealt with as soon as possible. One practical reason for this could be the status of his retirement. His intention to retire had been announced in June, 1968, with no fixed date set for the retirement. President Johnson nominated Associate Justice Abe Fortas to succeed Warren, but the nomination had become bogged down in the Senate due to allegations of political cronyism due to Fortas' close relationship with Johnson, as well as allegations of financial impropriety due to Fortas' acceptance of $15,000 for a series of law school seminars at American University in Washington. The Senate filibustered Fortas' nomination, and in October Fortas asked that it be withdrawn. After Nixon's election in November, Warren agreed to finish the Court's term before Nixon appointed his successor.[29]

Thus, one could surmise that Warren felt some urgency to resolve *Powell* before the end of the term. Of particular interest with regard to *Powell* and Warren's retirement was Nixon's selection of Warren E. Burger, the Court of Appeals Judge who had ruled against Powell, as Warren's successor. Warren allegedly predicted Burger's nomination in advance.[30] Warren had originally scheduled the case for argument in February, 1969, but

[27] Weeks, 146-152.

[28] Ibid., 162-63.

[29] G. Edward White, *Earl Warren: A Public Life* (New York: Oxford University Press, 1982), 307-313.

[30] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979), 11.

all of the other justices, except William O. Douglas, wanted the case delayed at least until March, and Harlan and Fortas wanted to postpone indefinitely. Warren finally agreed to schedule the case for April with the understanding that it must be argued then.[31]

In oral arguments before the Court on April 21, 1969, the justices grilled Bruce Bromley, the attorney representing the House of Representatives, when he argued that, due to the speech and debate clause, an excluded Congressman could not have judicial remedy even if the Congress' action was clearly unconstitutional, and that the case was moot due to the end of the 90th Congress and Powell's seating in the 91st Congress, calling Powell's claim for back salary "completely *de minimis*."[32] Bromley was harangued continually by the justices in the oral arguments, with even the conservative Justice Harlan, who might have been expected to disagree on separation-of-powers grounds, acknowledging that the counsel for the House's "basic argument is simply untenable."[33]

On June 16, 1969, Chief Justice Warren delivered his majority opinion in *Powell v. McCormack*,[34] which determined that Powell was "entitled to a declaratory judgment that he was unlawfully excluded from the 90th Congress."[35]

Counsel for the House of Representatives had based their arguments on five points, which Warren refuted point by point. Those arguments were: that the case was moot since the 90th Congress had ended and Powell was seated in the 91st Congress; the Speech or Debate clause precluded judicial review; the power to exclude is supported by the expulsion power of Article 1, section 5, clause 2; the Court lacked subject matter jurisdiction over the litigation; and that the litigation was not justiciable since it involved a political question.[36]

Attorneys for the House argued that, due to the end of the 90th Congress, Powell's subsequent seating in the 91st Congress, and the House of Representatives' status as not being a continuing body, the case was moot. Powell's attorneys responded that three issues still existed that made the it a "case or controversy" within the meaning of Article 3, section 2:[37] that Powell was unconstitutionally deprived of his seniority, that the resolution of the

[31] Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court--A Judicial Biography*, unabridged ed. (New York: New York University Press, 1983), 758.

[32] Weeks, 179-188.

[33] Schwartz, 759.

[34] 395 U.S. 486 (1969).

[35] Ibid. at 489.

[36] Ibid. at 486-87.

[37] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. . . ."

91st Congress fining Powell $25,000 is a continuance of allegedly unconstitutional exclusion,[38] and that Powell should be entitled to the salary withheld after his exclusion from the 90th Congress. Warren's decision stated that Powell's claim for salary remained viable and that it was not necessary to rule on whether the other points were moot.[39]

Attorneys for the House also argued that the 1926 decision *Alejandrino v. Quezon*[40] had rendered Powell's salary claim moot. Alejandrino was an appointed Senator of the Philippine Islands, which at that time was an American colony. He was suspended by the Philippine Senate for one year and denied all privileges of the office. By the time the case reached the Supreme Court, the suspension had expired and the Court dismissed the claim as moot. The court characterized Alejandrino's salary claims as incidental and said that since he did not set out who the official or set of officials was against whom the mandamus should be issued, the entire case was dismissed as moot. Attorneys for the House had argued that since Powell's salary claims were also incidental, *Powell* should likewise be dismissed as moot. Warren's opinion disagreed, however, noting that the difference between Alejandrino's claims and Powell's was that Powell's complaint directly named the person responsible for the payment of congressional salaries and asked for mandamus and an injunction against that person.[41] Furthermore, Powell had requested declaratory relief, a form not available at the time of *Alejandrino*.[42]

Attorneys for the House had further argued against the use of *Bond* as a precedent. They had argued first that the mootness of Powell's primary claim, that of being seated in the House, had made his secondary claim, his claim for back salary, not worthy of judicial consideration. Warren's opinion cited *Bond* as rejecting the theory that the mootness of the primary claim necessarily made the secondary claims moot. Attorneys for the House had argued that the differences between *Bond* and the present controversy--namely, that Powell had, unlike Bond, been seated by the time the case reached the Court, and that the legislative session in question for Powell had, unlike Bond, ended—were such that *Bond* should not be used as a precedent. Warren's opinion noted, however, that the attorneys had not adequately stated why *Bond* should not be used as a precedent, since in that case they had likewise relied on the salary claim to hold that the case was not moot.[43]

Attorneys for both sides argued that previous Court decisions on the Speech or Debate

[38] H. R. Res. No. 2, 91st Cong., 1st Sess., 115 Cong. Rec. H21 (daily ed., January 3, 1969).

[39] 395 U.S. at 495-96.

[40] 271 U.S. 528 (1926).

[41] 395 U.S. at 497-498.

[42] See Ibid. at 499, n. 12, for a discussion of how federal courts were not empowered to make declaratory judgments until 1934.

[43] Ibid. at 499-500. It was on mootness grounds that Justice Stewart dissented in the case. See Ibid. at 559-573.

clause of the Constitution provided support for their positions.[44] One issue raised was whether those who participated in the exclusion of Powell were acting in the sphere of legislative activity. If so, since Powell was seeking neither damages nor criminal prosecution, then did this lift the bar of the clause. Also, if a lawsuit may not be maintained against a Congressman, then are those who merely work for the House protected by the clause. Warren's opinion found it to necessary to deal with only the last of these three issues. The court had articulated as early as 1881 in *Kilbourn v. Thompson*[45] that, although action may be barred against Congressmen due to Article 1, section 6, legislative employees who participate in unconstitutional activities are responsible for their acts. Further, simply because House employees are acting pursuant to express orders of that body does not bar judicial review of the underlying legislative decision. Thus, Warren ruled that Powell's petition would be dismissed against the named Congressman, but the complaint against the House Clerk, Doorkeeper, and Sergeant-at-Arms could be continued.[46]

The next issue argued by attorneys for the House was that the vote to exclude Powell should be construed as an expulsion under Article 1, section 5, clause 2 of the constitution. They asserted that the House can expel a member for any reason whatsoever, and that since the vote by which Powell was denied his seat resulted in over a two-thirds majority, it should be regarded as an expulsion. Warren's opinion ruled that the actions of Speaker of the House John McCormack in the course of the debate clearly indicated that a simply majority would be all that was needed to deny Powell his seat, and that the fact that the vote happened to be over two-thirds was irrelevant. "Had the amendment been . . . to expel Powell, a two-thirds vote would have been constitutionally required. The Speaker ruled that the House was voting to exclude Powell, and we will not speculate what the result might have been if Powell had been seated and expulsion proceedings subsequently instituted."[47] Warren went on to note that the difference between exclusion and expulsion was substantial, since the House had countless times previously refused to discipline a member for conduct in a prior Congress, a precedent that it failed to follow in Powell's circumstances. Finally, he noted that, based on what Congressional support existed for the committee's report recommending a fine, censure, and loss of seniority, it was unlikely that a two-third majority could have been mustered to expel Powell if McCormack had made it explicitly clear that it was a vote of expulsion.[48]

Warren then proceeded in the opinion to the issue of jurisdiction, stating that, unlike the District Court's opinion, the courts did have subject matter jurisdiction over the action.

[44] Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); and Kilbourn v. Thompson, 103 U.S. 168 (1881).

[45] 103 U.S. 168 (1881).

[46] 395 U.S. at 501-506

[47] Ibid. at 508.

[48] Ibid. at 506-512.

Warren stated that the case is one arising under the Constitution within the meaning of Article 3, since petitioners' claims "will be sustained if the Constitution . . . [is] given one construction and will be defeated if it [is] given another," in the language of the standard opinion on the issue in the 1946 case *Bell v. Hood*.[49]

Finally, Warren's opinion tackled the issue of justiciability. Counsel for the House argued that it was impossible for a federal court to mold effective relief. Warren responded that since Powell sought only a declaratory judgment, the case in terms of the general criteria of justiciability, the case was justiciable.[50]

The more specific justiciability issue associated with the "political question" doctrine was much more complicated. The House claimed that Article 1, section 5 gave the House a "textually demonstrable constitutional commitment," as per the guidelines established in *Baker*, to determine Powell's qualifications, and therefore the case was nonjusticiable. Powell's attorneys argued, and the Court agreed, "that the Constitution provides that an elected representative may be denied his seat only if the House finds he does not meet one of the standing qualification expressly prescribed by the Constitution."[51] Warren wrote that whether there is a "'textually demonstrable constitutional commitment of the issue to a co-ordinate political department' of government and what is the scope of such commitment are questions we must resolve for the first time in this case."[52] After all, the Court had also ruled in *Baker* that it was expressly the Court's responsibility to decide such a "delicate exercise in constitutional interpretation."[53]

Warren's opinion then goes into a lengthy analysis of the historical precedents involved in the ability of a legislature to exclude a member. Attorneys for the House had insisted the qualifications set forth in the Constitution were not were not meant to limit legislative power to exclude or expel at will, but merely to establish certain incompacities which could only be overcome with an Amendment to the Constitution. This was because the ability of a legislature to judge the qualifications of its members was commonly accepted by 1787. Powell's attorneys, however, cited the Constitutional debates as well as the writings of Hamilton and Madison to argue that it was not the framers' intent to empower the legislature to set additional qualifications than those in Article 1, section 5. The Court ultimately accepted Powell's arguments, noting that powers cited by the House's attorneys had been renounced by the British House of Commons and at least one state legislature by 1787.[54]

[49] 327 U.S. 678 (1946). Quote from 327 U.S. at 685. Analysis of Warren's opinion from 395 U.S. at 512-514.

[50] 395 U.S. at 516-518.

[51] Ibid. at 520.

[52] Ibid. at 521.

[53] Ibid. at 518-521. Quote from 369 U.S. at 211.

[54] 395 U.S. at 521-549.

Thus, Warren's opinion concluded that "the House was without power to exclude him from its membership."[55] The Court ordered that the issue of Powell's back pay be remanded to the District Court, though only the employees of the House rather than the Congressmen would remain in the suit.[56]

Warren described the *Powell* case in some detail in his memoirs. Though much of what Warren says there is similar to what can be found in the opinion, there are some aspects that are particularly unique. Warren makes it clear that he has no sympathy for Powell, calling him "flamboyant, abrasive, and insolent." Yet Warren more forcefully points out that, compared with the House's own precedents, its punishment of Powell was extremely severe, and that it was possibly due to racial considerations.

> Although other members of Congress have been charged with corruption in the courts and even convicted and sentenced to imprisonment, the House traditionally has permitted them to go unscathed as congressmen, even to the extent of permitting them to retain committee chairmanships and control vital legislation.[57]

Warren biographer Bernard Schwartz provides further evidence that Warren intensely disliked Powell, even though he believed that the facts of the case required a decision in his favor.

> Warren was personally appalled by Powell's misconduct. He considered the flamboyant Congressman a disgrace both to his race and his office. But the law, as he saw it, was clear. Congress had asserted an unreviewable power to deny an elected Congressman his seat, even though he met all the qualifications for membership listed in the Constitution.[58]

Warren has been quoted elsewhere on the *Powell* case that "it was perfectly clear. There was no other way to decide it. Anybody could see that."[59]

The *Powell* opinion is typical of Warren's judicial thought and jurisprudence in several ways. First, like many of the important decisions of the Warren Court, it epitomizes Warren's skill at consensus building. This skill, of course, is most obvious in *Brown v. Board*

[55] Ibid. at 550.

[56] Ibid. at 550.

[57] Chief Justice Earl Warren, *The Memoirs of Earl Warren* (Garden City, NY: Doubleday & Company, Inc., 1977), 317-318.

[58] Schwartz, 757-758.

[59] Woodward and Armstrong, 25.

of Education.[60] In *Powell*, at the time that Warren agreed to delay the hearing of the case until April, one of Warren's reasons for doing so was that no majority existed on the case. Yet by the time the 7-1 decision was handed down in June, all of the brethren, including Justice Stewart, who dissented on mootness, agreed with Warren's basic approach. Justice Fortas said that he had worked out a theory by which the House's action was a legal expulsion, but agreed to go along; Justice Harlan refused to take the separation-of-powers grounds that many expected him to take; and Justice Black was finally persuaded to sign on after Warren removed language about the relationship between declaratory judgments and injunctions, which the court was expecting to address in the near future.[61] Thus, there is no denying that Warren exhibited a great deal of influence on the other justices to come to what he perceived to be the obvious decision.

Another characteristic of Warren's legal opinions, and that of his Court, is that it put him once again squarely into a "political thicket." The editors of the *UCLA Law Review* wrote shortly after the *Powell* decision, "that it frequently decided cases which other Courts might well have avoided was a hallmark of the Warren Court. *Powell v. McCormack* was such a case." While most observers considered the controversy dead, "the Chief Justice caught everyone by surprise and thrust the Supreme Court smack dab into the middle of the proverbial political thicket."[62]

A third characteristic of Warren seen in *Powell* is his empowering of the Supreme Court. In this case it was done by further strengthening the scope of judicial review and further weakening of the "political questions" doctrine. Archibald Cox wrote a year prior to the *Powell* decision that:

> . . . prior to 1960, however, the Court had rarely been concerned with the electoral or legislative process. During the 1960's the Warren Court turned the corner. The justices have now ruled, in constitutional terms, upon eligibility to vote, the apportionment of representatives, and even a State legislature's refusal to seat a successful candidate for office.[63]

Furthermore, to Cox it seemed clear that "a majority of the present justices conceive it to be one of the self-conscious functions of constitutional adjudication to secure at least

[60] 347 U.S. 483 (1954).

[61] Schwartz, 758-760. Though Fortas participated in oral arguments, by the time the decision was handed down, he had resigned due to ethical considerations over money he had received from (and eventually returned to) Louis Wolfson, a financier convicted of securities violations. Hence the 7-1 majority. The cases Black referred to were decided by the court in Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971).

[62] "For the Record", *UCLA Law Review* 17 (November 1969): ix.

[63] Archibald Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (Cambridge: Harvard University Press, 1968), 114.

some of the basic democratic elements in the political process." Cox also noted that it was speculative to see how far the trend would carry, but that the litigation involving Adam Clayton Powell could provide a clue.[64] After the *Powell* decision, scholars debated the implications of the decision in terms of judicial review and the "political questions" doctrine. Some speculated that there were no decisions that Congress or the President could make that were insulated from judicial review, since *Powell* gave the Court an almost limitless review power to interpret the Constitution.[65] Other scholars have cited *Powell* and later cases to show how the Court has "repudiated the notion that the principle of separation of powers is nonjusticiable. Although . . . the political question doctrine was [not] entirely gone, its significance was small and declining. . . ."[66] To many, it was the political question doctrine, not judicial review, that was in jeopardy, as there might not be any constitutional issue to which the *Powell* Court's reasoning would not apply.[67]

Another characteristic of Warren's legal thought present in *Powell* that can be traced to *Brown* is his utter disregard for the concept of enforcement. One biographer of Warren wrote that "the question of enforcement had never troubled him. From the *Brown* desegregation decision to the Reapportionment Cases, he had always felt that the Justices' duty was only to decide the cases before them as they thought the Constitution required."[68] When one of his law clerks questioned him about enforcement in a case involving the Army, citing Andrew Jackson's famous challenge to Justice Marshall to let him enforce his law, Warren retorted, "if they don't do this, they've destroyed the whole republic, and they aren't going to do that. So you don't even have to worry about whether they are going to do it or not--*they're going to do it*!"[69] Ultimately, however, in this case Warren was wrong; despite the continued litigation, Powell never did receive his back pay.[70]

A final characteristic of Warren's judicial thought that is clearly evident in *Powell* is how Warren elevates morality to a higher role in Supreme Court decision-making and reduces the role of technical proficiency. Warren did not have an expressed judicial axiom beyond the acute and consistent query, "Is it fair?"[71] Yet Warren's sense of judicial fairness and morality is perhaps the most overriding characteristic of his decisions. For Warren,

[64] Ibid.

[65] White, *Earl Warren*, 314.

[66] Robert F. Nagel, "Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine", *The University of Chicago Law Review* 56 (Spring 1989): 649-650.

[67] Ibid., 647.

[68] Schwartz, 759.

[69] Schwartz, 759. Emphasis is Schwartz's.

[70] Weeks, 241.

[71] Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon & Schuster, 1997), 531.

"convictions controlled the technical details; details never controlled convictions."[72] One can hardly argue that the *Powell* opinion was technically proficient, as it seemed to raise more questions than it answered. In fact, it symbolized a frequent criticism of Warren's thought of stating a clear principle in one case and taking it back in a subsequent case.[73] Many observers at the time perceived that *Powell* violated the criteria of nonjusticability as stated in *Baker*.

The *Powell* decision was announced just one week prior to Warren's handing the Chief Justiceship over to Warren Burger, and, as one scholar has described it, the decision served as Warren's "final civics lesson."[74] The lesson is not atypical in Warren's judicial thought, as it further empowered the Court's ability to address constitutional questions, provided further evidence of Warren's consensus building skills, and embroiled the Court in a "political thicket" where it had become increasingly comfortable. Yet the decision had some of Warren's typical "defects" as well, in that it was virtually unenforceable, and its technical blemishes raised as many if not more questions than it answered. The decision has not lived in the infamy of some of Warren's more famous opinions, such as *Brown*, *Reynolds v. Sims*,[75] and *Miranda v. Arizona*.[76] Yet it is likely as typical, or more typical, than any of them.

Regardless of whatever criticism may yet exist of Warren, it does seem apparent that liberal historians have and will continue to take a liking to him. A contemporary of Warren and his Court wrote that he was convinced that the Court "was in keeping with the mainstream of American history--a bit progressive but also moderate, a bit humane but not sentimental, a bit idealistic but seldom doctrinaire, and in the long run essentially pragmatic--in short, in keeping with the true genius of our institutions."[77] Warren's critics would likely take issue with this idea, but a more recent biographer described Warren in a way that even his critics would have to concede. "Any estimate of Warren's career will mark him as one of the seminal figures not only of his own time, but of the years that followed his death. . . ."[78]

[72] White, "Earl Warren's Influence", 47.

[73] Ibid., 39.

[74] White, *Earl Warren*, 314.

[75] 377 U.S. 533 (1964).

[76] 384 U.S. 436 (1966).

[77] Cox, 133-134.

[78] Cray, 531.