

South Dakota Newspapers
"We the People"
January 4, 2023

"Powell v. McCormack: Confining Congress to the
Constitution"

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Congressman-Elect Ron Santos's (R-NY) sweeping distortions of his personal and professional biography have triggered nationwide calls for the House of Representatives to prevent him from assuming his seat in the 118th Congress. Americans have recoiled from his many false claims, including that he is Jewish and that his grandparents fled Nazi persecution, that he is a graduate of Baruch College and that he worked for Goldman Sachs and Citigroup.

The rising demands to block him from Congress raise anew a question of monumental importance for our nation: Does Congress have the authority to refuse to seat a duly elected candidate for reasons other than the constitutionally enumerated qualifications of age, residency and citizenship?

The answer is no. In 1969, in *Powell v. McCormack*, a case that resurrected fundamental constitutional conflicts between England and Colonial America two centuries before, the Supreme Court held that the House lacks authority to prevent elected candidates from assuming a seat, unless they fail to meet the standing qualifications stated in Article 1, section 5 of the Constitution: 25 years old, a citizen of the United States for seven years and a resident of the state in which they are elected.

The landmark case of *Powell v. McCormack* featured a flamboyant Congressman from Harlem, Adam Clayton Powell, who was reelected in 1966 to a House seat that he had held since 1942. After Powell's victory, and on

the eve of his becoming Chair of the House Labor and Education Committee, allegations arose about his improper use of congressional funds. A select investigative committee concluded that Powell met the requisite constitutional qualifications but recommended a fine and denial of the chairmanship as penalties for his improprieties. The House ignored the recommendation and voted, 307-116, to exclude him from the 90th Congress and declared his seat vacant.

Rep. Powell sued the Speaker of the House, John McCormack, contending that Congress could not lawfully exclude duly elected candidates who met the standing qualifications enumerated in the Constitution. Meanwhile, the House invoked as authority Article 1, section 5: "Each house shall be the judge of the Elections, Returns and Qualifications of its own members." While the suit was underway, Powell was reelected to the 91st Congress but was fined and stripped of his seniority and chairmanship.

The House contended that the Court could not review its decision to deny Powell his congressional seat since the "Qualifications Clause" in Article 1, section 5, represented a non-justiciable "political question," that is, a "textually demonstrable commitment of the issue to a coordinate branch of government."

The Supreme Court, in an 8-1 opinion authored by Chief Justice Earl Warren, held that the Political Question Doctrine did not block the Court from determining whether Congress had "added" an additional qualification to hold office beyond age, citizenship and residence. The Court ruled that the House had done precisely that in determining that Rep. Powell's improprieties justified exclusion from the body. The Court's prohibition on congressional addition of constitutional powers, a principle that applies to all

three branches of government, dates to Marbury v. Madison in 1803 and has been reaffirmed numerous times.

Congress, however, is not powerless to punish its members for improprieties. Indeed, it may "expel" members for misconduct. Article 1, section 5, clause 2 provides that each house may punish its members for rules violations and, "with the Concurrence of two thirds, expel a Member." Rep. Powell was not expelled and served in the House until 1971.

The issue of excluding a lawfully elected candidate from the House renewed fears harbored by the colonists in the runup to the American Revolution. The issue, as it was framed, involved the fundamental issue of the right of the people to choose their representatives, that is, the question of who should decide who would speak for the people in their own branch of the legislature.

The concern was registered in various ways including, most prominently: "No taxation without representation" and "tyranny begins where frequent elections end." Alexander Hamilton observed that a fundamental principle of our democracy is "that the people should choose whom they please to govern them." In the Constitutional Convention, James Madison declared that this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself.

The founders' fears, as Madison pointed out, were drawn straight from the records of the John Wilkes Affair in 1768. For the colonists, Wilkes was not merely a hero, but a living symbol that what was happening to him could happen to them. In a word, Wilkes opposed the insidious acts passed by Congress that threatened the colonists' liberties: the Stamp Act, acts designed to weaken constitutional protections, the seizure of private property and, among

others, the deployment of officials who enforced warrantless searches of homes and businesses.

When Wilkes was again elected to the House of Commons and then for a second, third and fourth time denied his seat by powerful and corrupt agents, the colonists watched with dismay as the fundamental right to choose one's representatives was eviscerated by a power-hungry government. Wilkes declared the constitution was being torn up by its roots. By the winter of 1769, prescient colonists understood that "the fate of Wilkes and America must stand or fall together."