

THE CONSTITUTIONAL FRAMEWORK FOR  
CONGRESS'S ABILITY TO UPHOLD STANDARDS  
OF MEMBER CONDUCT

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL  
RIGHTS, AND CIVIL LIBERTIES  
OF THE  
COMMITTEE ON THE JUDICIARY  
U.S. HOUSE OF REPRESENTATIVES  
ONE HUNDRED SEVENTEENTH CONGRESS  
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# THE CONSTITUTIONAL FRAMEWORK FOR CONGRESS'S ABILITY TO UPHOLD STANDARDS OF MEMBER CONDUCT

Thursday, March 11, 2021

U.S. HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,  
AND CIVIL LIBERTIES

COMMITTEE ON THE JUDICIARY

*Washington, DC*

The Subcommittee met, pursuant to call, at 2:17 p.m., via Webex, Hon. Steve Cohen [Chair of the Subcommittee] presiding.

*Present:* Representatives Cohen, Nadler, Raskin, Ross, Johnson of Georgia, Garcia, Bush, Jackson Lee, Johnson of Louisiana, Jordan, McClintock, Roy, and Fischbach.

*Staff Present:* David Greengrass, Senior Counsel; John Doty, Senior Advisor; Madeline Strasser, Chief Clerk; Moh Sharma, Member Services and Outreach Advisor; Jordan Dashow, Professional Staff Member; Cierra Fontenot, Staff Assistant; John Williams, Parliamentarian; James Park, Chief Counsel, Constitution, Civil Rights, and Civil Liberties; Will Emmons, Professional Staff Member, Constitution, Civil Rights, and Civil Liberties; Matt Morgan, Counsel, Constitution, Civil Rights, and Civil Liberties; Katy Rother, Minority Deputy General Counsel and Parliamentarian; James Lesinski, Minority Counsel; and Kiley Bidelman, Minority Clerk.

Mr. COHEN. The Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time.

I welcome everyone to today's hearing on The Constitutional Framework for Congress's Ability to Uphold Standards of Member Conduct.

Before we begin, I would like to remind Members that we have established an email address and distribution list dedicated to circulating exhibits, motions, or other written materials that Members might want to offer as part of our hearing today. If you would like to [audio malfunction].

Ms. FISCHBACH. Excuse me, Mr. Chair. We can't see you.

Mr. COHEN. Beyond my control. I don't know.

Do we have to be seen to be heard?

Ms. FISCHBACH. Well, I believe we have to be seen to have an official meeting.

Mr. COHEN. Ms. Fischbach—

VOICE. I can see him.

Ms. FISCHBACH. Now he is back, but then he goes away.

Mr. COHEN. Maybe it is your—

Mr. JOHNSON of Louisiana. No, it is all of us, Mr. Chair.

TMr. COHEN. Mr. Maskell, can you hear me? You can see me.

Mr. Wallner, can you see me? Mr. Wallner—

Ms. FISCHBACH. Sir, I can see you now, but when you were talking earlier. I just wanted to make sure.

Mr. COHEN. Thank you.

Mr. JOHNSON of Louisiana. Your camera is going in and out. That is the problem.

Mr. COHEN. If you would like to submit materials, please send them to *judiciarydocs@mail.house.gov* and we will distribute them to Members and staff as quickly as we can.

I will now recognize myself for an opening statement.

I am fully cognizant of the emotionally fraught context in which we hold today's hearing on the constitutional framework for Congress' ability to uphold standards for Member conduct. Events over the last few months have put Members of Congress on edge, and the emotional repercussions of these events continue to ripple through the House of Representatives.

To be absolutely clear, my hope in holding this hearing is not to increase the tension inside the people's House, an institution that we all proudly serve in. Rather, I hope this hearing will serve as a productive exercise in educating ourselves and the public about the scope of Congress' authority to maintain discipline within its own ranks, as informed by relevant precedents and policy considerations.

Let me clear up what this hearing is not about. We are not here to adjudicate allegations about potential wrongdoing against specific colleagues, nor are we here to speculate about what punishments could be meted out against any of our colleagues, nor are we here to pass judgment on who does or does not meet minimum qualifications for office, which is also, constitutionally speaking, not a question of Member discipline. These questions are outside of the jurisdiction of the Subcommittee.

Article I, section 5, clause 2 of the Constitution provides that each house of Congress may determine the rules of its proceedings, punish its Members for disorderly behavior, and with the concurrence of two-thirds, expel a Member.

Beyond this short provision, the Constitution contains few textual limitations on the substance of each house's authority to punish Members for misconduct or to protect the institutional legitimacy and dignity of the House.

In theory, other parts of the Constitution, like, for example, the Equal Protection Clause, may Act as an additional limitation on Congress' exercise of authority to discipline Members, though that proposition has not been tested and is rather theoretical.

Beyond that limitation, the Constitution seems to leave the meaning of, quote, "disorderly behavior," unquote, to each of the houses to define themselves.

In light of the Constitution's limited textual guidance, we must turn to constitutional history, relevant precedent, and any lessons we may be able to draw from this information to guide any future decisions about Members' discipline.

Luckily for us, we have an outstanding panel of experts to help outline and elucidate this information for us.

I will use this opportunity to note two things about precedent. With respect to expulsions of House Members, there are only five instances when the House has expelled Members. Three of those instances occurred—

Mr. JOHNSON of Georgia. I can no longer hear the Chair at this point. I can see him, but I can't hear him.

Ms. GARCIA. This is Garcia. I can't hear the Chair either.

Mr. Chair, we cannot hear you, sir.

Chair NADLER. I cannot hear him either.

Ms. GARCIA. He is still talking away.

They are going to make a motion to adjourn.

Mr. COHEN. Does anybody understand "sounds like"? Doesn't work.

Hello. Hello. Hello.

Mr. JOHNSON of Louisiana. We suddenly have you back now.

Mr. COHEN. I have got sound on.

Mr. JOHNSON of Louisiana. We can hear you now. We can see you now. We couldn't for the last—

Mr. COHEN. I can't hear you. You are going in and out.

Well, can you hear me now? You can hear me, now? Okay.

Mr. JOHNSON of Georgia. Yeah, I can hear you now, but I can't see you.

Mr. COHEN. Well, great.

Mr. JOHNSON of Georgia. We can hear you, but we can't see you.

Ms. GARCIA. This is Garcia. I can neither hear or see you, but I don't know you are talking.

Mr. COHEN. The Senate has expelled 15 Members, with 14 of those expulsions occurring during the Civil War, again because Members either represented seceding States or otherwise supported the Confederacy.

Can you hear that?

Mr. JOHNSON of Georgia. Yes. But, we still can't—

Ms. GARCIA. We still cannot see you.

Mr. JOHNSON of Georgia. We can't see you.

Mr. COHEN. Well, I have got a blue tie and a blue coat.

I would also note that both the House and Senate took action shy of expulsion against other Members, stemming from their actions during the Civil War.

I am almost finished.

I would like to make a note about exclusions. That is a different situation.

Mr. JOHNSON of Georgia. Well, now, Mr. Chair of the Full Committee has requested that you suspend while they work on the problem.

Mr. COHEN. Sure.

It has been suggested that I recognize Mr. Johnson for an opening statement. Can people see Mr. Johnson? Can people hear Mr. Johnson?

Mr. Johnson, you have the floor, the honorable gentleman from Shreveport, Louisiana.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair. I will try. I hope the audio and the video will work. Somebody stop me if it doesn't.

Look, I am just going to be honest. We want to approach this hearing in good faith, and I hope that our suspicions about it are wrong. I really do. I appreciate what you said in the opening that we could hear that you don't want to increase the tension around here. Some of the things that have happened, just very, very honestly, in the last day or two have not met that standard.

A letter today was issued by the three Republican Members of the Committee on House Administration to Chair Lofgren. That is Ranking Member Davis and Representatives Loudermilk and Steil. I wanted to read you just an excerpt from that letter. It is addressed to Chair Lofgren, dated today.

It begins, "It has been over two months since the U.S. Capitol was attacked. Our Committee has held no hearings, and there are none scheduled. This is unacceptable," they write in the letter. "Given our commitment"—

Ms. GARCIA. Mr. Johnson? Mr. Johnson?

Mr. JOHNSON of Louisiana. Yes?

Ms. GARCIA. I am sorry, sir, but there is a lot of static. I cannot hear you clearly.

Ms. JOHNSON of Louisiana. Is it static on my line, or is that someone else's line?

Ms. GARCIA. I am not techie enough to know. I just hear a lot of static. It may only be me. I am just having a hard time hearing you.

Mr. JOHNSON of Louisiana. Let me soldier on, and we will see if it gets any better. I think it may be all our bandwidth here on the Hill today. I don't know what is going on.

I was reading this excerpt from a letter that the Republicans sent to Chair Lofgren today. They say that, "The Committee has held no hearings yet. There are none scheduled, and it is unacceptable."

They say, "Given our Committee's primary jurisdiction over the entities responsible for preparing the Capitol for January 6 and maintaining it after, we should be the ones leading on a review and no other committees and not your personal office," they say to Chair Lofgren.

"But while the Committee has taken no action since January 6, your personal office has managed to review the social media of 147 Republicans and then released a nearly 2,000-page report insinuating that our colleagues, who we serve and work with every day, were somehow complicit in an attack against our Capitol. These are the same colleagues we were with on the House floor on January 6 as rioters entered the Capitol and tried to break through the doors of the House Chamber."

They continue, "This report and its conclusions are not only wrong, but they are also offensive to your colleagues. It is also a questionable use of your Members' Representational Allowance."

"As the Chair of the Committee which is responsible for overseeing the rules governing the use of the MRA, you more than any-

one else should know that the handbook is clear when it states, quote, 'The MRA may only be used for official and representational expenses,' unquote. Using your personal office resources to investigate other Members cannot be considered to be related to your representational duties to your district."

They continue, "This report also contains concerning language and content that is inconsistent with the Communications Standards Commission regulation regarding the rules on decorum and civility.

"Additionally, there is a longstanding prohibition on official websites directly linking or referring to websites created or operated by a campaign or any campaign-related entity. Your report, posted on your official personal office website, directly links to the campaign accounts of 75 candidates."

It goes on. What Ranking Member Davis and Congressmen Loudermilk and Steil were saying is that this is a Rubicon that is being crossed here. It is an unprecedented event that we are seeing.

I just want to say that many of us regard this as a new low for the United States Congress, and I say that with great regret.

Look, our Democratic colleagues seem to us to have chosen to weaponize everything here and now we are going to do it with the House Rules. How can we draw any other conclusion based on this?

First, H.R. 1 is rammed through the Congress, and that forces hardworking American taxpayers to fund political campaigns with their treasure. Now, we are going to use precious taxpayer dollars to fund political opposition research on our own colleagues in the House.

This is not a place we need to be going. It is a brazen, outrageous abuse of power, and it is contributing to the destruction of this institution.

Look, Representative Lofgren's report is an attempt to criminalize politics and silence Members who dare to speak. They are doing this, she is doing this, I guess the party is doing this, by some decision, by the attempted use of fear and intimidation and misinformation. That can't work. We can't allow that. That is not who we are as Americans.

Representative Lofgren and other Democrats refuse to acknowledge that they engaged, by the way, in the same exact behavior that they accuse Republicans of using to, quote, "threaten our democracy," unquote. Remember, the Democrats have objected to the counting of electoral votes after every Presidential election won by a Republican this century.

I will close with this. Look, I hope, as I said at the outset, that we are wrong about this, where all this is leading. We shouldn't need a hearing today, we shouldn't need a reminder to acknowledge that for more than 225 years the House and the Senate have used the authority of article 1 of the Constitution to police conduct of our respective Members. For over 50 years the House has had a standing Committee charged with exercising this authority.

The Ethics Committee and the House Rules are in place to ensure, of course, that we all conduct ourselves according to the maxim that, quote, "public office is a public trust," as it says in our manual that we all have a copy.

We all agree the House ought to enforce those Rules fairly and vigorously, but we also have to agree that it should never be done in a vindictive manner. Most of all, these Rules never should be used for political purposes or to try to censor or silence the other side. This is what this looks like today.

Using the House Rules in this manner demeans the Congress as an institution. It amounts not only to silencing the targeted Member, of course, but also the constituents that that Member represents in our representative form of government and a constitutional Republic with our democratic principles.

I hope we are wrong about this, about this Committee hearing, about where this dangerous new Democratic strategy is leading. If it is not, I am going to say we are all in real trouble.

I yield back.

Chair NADLER. Is Mr. Cohen on the line?

Mr. COHEN. Yes. Can you hear me?

Chair NADLER. Yes.

Mr. COHEN. Good. Well, I couldn't hear Mr. Johnson really well. I presume he just said that he understood what I said, and we are all here in a kumbaya mood. Is that correct?

Mr. JOHNSON of Louisiana. Something like that.

Mr. COHEN. I heard something like that.

Mr. Nadler, Chair of the Full Committee, is recognized for 5 minutes.

Chair NADLER. Thank you, Mr. Chair.

Today's hearing on the nature and scope of Congress' authority to discipline its Membership is an important one. It is also not the first time the Judiciary Committee has examined Congress' authority in this area.

At least as far back as 1914, when the Committee produced a report on this matter in relation to a select Committee investigation into an alleged bribery scheme, the Committee has served to inform Members and the public about the constitutional undermining of the House's disciplinary authority over its Membership.

Just like today, Members then considered the scope of Congress' disciplinary authority. Without a doubt our Witnesses will note that this has been a perennial institutional debate since our Nation's founding.

One broad principle Members and Witnesses likely agree on, though, is that Congress' authority to discipline its Membership is very broad. Under article I, section 5, clause 2, each house of Congress can discipline any of its Members for, quote, "disorderly behavior," unquote, a term that the Constitution leaves undefined.

Indeed, the only explicit textual limitation on this power is the procedural requirement that any expulsion of a sitting Member requires a two-thirds vote of the Chamber.

Under that same provision, each house has the power to make Rules governing its own proceedings, and thus each has the authority to devise disciplinary measures short of expulsion, such as censure or the levying of fines.

Another likely area of agreement is that this broad authority is not understood solely as the mere power to punish individuals for misconduct. It is also a basis for protecting and ensuring the dignity, integrity, and legitimacy of congressional proceedings.



Simply put, the Constitution provides each house of Congress the authority to hold Members accountable for misconduct so that each has the means to protect the public's faith and esteem in this institution.

This authority is the basis for each house to ensure the continued functioning of its proceedings, particularly under the gravest national circumstances.

There have only been five expulsions in the history of the House of Representatives, with three of them occurring in 1861 at the onset of the Civil War.

Given how central this authority is to the operation of Congress as a coordinate branch, the Supreme Court, with only a few notable exceptions, has largely left it to Congress to determine the constitutional limits of its authority to discipline its Membership.

Thus, like other constitutional matters vested solely within Congress' purview, past precedent and historical practice have played a large role in shaping each Chamber's understanding of the limits of its authority, informed each Chamber's exercise of that authority, and contributed to the evolution of modern disciplinary practices.

Today's hearing is an opportunity for Members to hear from and ask questions of a panel of excellent Witnesses who can educate us on the constitutional origins and limitations on Congress' authority to discipline Members and what general policy principles may have evolved regarding the House of Representative's exercise of that authority over the past few centuries.

Distinct from these questions regarding constitutional authority and policy is the question of how the House should exercise its power in individual cases, theoretical or otherwise.

That is not the subject of today's hearing. As Chair Cohen explained, we are here today to discuss and understand the constitutional principles and historical precedents that inform the House's disciplinary authority and policies. We are not here to apply them to any individual or circumstance.

I thank the Witnesses for appearing today, and I look forward to their testimony.

I yield back the balance of my time.

Mr. JORDAN. Mr. Chair, I couldn't hear you. I don't know if you are recognizing me or not.

Ms. GARCIA. Mr. Chair, I cannot hear you. This is Garcia.

Chair NADLER. I will recognize—if Mr. Cohen can't hear people, I will recognize Mr. Jordan for an opening statement.

Mr. JORDAN. Thank you, Mr. Chair.

Mr. Chair, we had a short 1-minute video we would like to share, but it looks like that we are not able to do that. Is there a reason?

Chair NADLER. I am not aware of any reason.

Mr. JORDAN. It is not letting us hit the "share." That is not open for us to use. Does Mr. Cohen know?

Our staff just told me that Mr. Cohen's staff has not given us access to share the video. Is that accurate?

Chair NADLER. We will have to check on that.

Mr. JORDAN. Okay.

Mr. COHEN. Can anybody hear me?

Chair NADLER. I can hear you.

Mr. COHEN. Good. I switched machines. I am on a new machine. So, we are back, and I think we are okay.

Mr. JORDAN. We are still not okay because we wanted to share a video.

Mr. COHEN. I would love to see a video. I love videos. I don't know anything about any permission being asked or not asked or anything else.

Mr. JORDAN. We are not able to show it, Mr. Chair. I mean, we would like to.

Mr. COHEN. What is the video? Give me an idea.

Mr. JORDAN. It is a video of people objecting on January 6, 2017, to the counting of the electors when President Trump won on January 6, 2017.

Mr. COHEN. I have no idea. I don't know anything about that. The fact, that is not really particularly—I don't mean to be argumentative or anything, Mr. Jordan, but that is not relevant. We are not going into anything that happened with any of that stuff.

Mr. JORDAN. The Chair of the House Administration Committee just released a 2,000-page report going after 140—

Mr. COHEN. That is not part of this hearing.

Mr. JORDAN. —not part of this hearing, you got to be kidding me, 140-some Republicans?

Chair NADLER. That is the House Administration Committee, not us.

Mr. COHEN. That is not part of this hearing and I don't really know—

Mr. JORDAN. She is a Member of the Judiciary Committee.

Mr. COHEN. She is not a Member of this Subcommittee, as you well know.

Mr. JORDAN. She is a Member of the Judiciary Committee.

Mr. COHEN. So? So what? That doesn't mean she is not a Member of the Subcommittee.

Mr. JORDAN. Well, Ranking Member Johnson just read a letter talking about this very issue. This is entirely relevant. That report comes out a few days ago and you have this hearing this week. Just coincidence?

Chair NADLER. Let me suggest, if some technical difficulty is preventing that video, why don't you just describe the video, so we understand it and let's proceed.

Mr. JORDAN. I will read my statement.

President Biden campaigned on a promise of unity. Democrats in the House, like Chair Lofgren, are putting together reports that attack Republicans, over 140 Republicans.

Mr. JOHNSON of Georgia. Mr. Jordan, we can't—

Mr. JORDAN. Let's be clear. Chair Lofgren's report is a 2,000-page—

Mr. JOHNSON of Georgia. Mr. Jordan, we can't see you, now. Has your camera gone out?

Mr. JOHNSON of Louisiana. I can see him fine.

Mr. JOHNSON of Georgia. I can't see him, and I can't see anybody other than myself now. I see Mr. Jordan has just popped back on.

Mr. JORDAN. I mean, this took us 30 minutes to get onto the—it was such a mess. This is a comedy of errors, this whole hearing.

Democrats in the House like Chair Lofgren are putting together reports that attack Republicans. Chair Lofgren's report is a 2,000-page political opposition dossier put together at taxpayer expense. Think about that, taxpayer dollars used to target fellow Members of the United States Congress.

Chair Cohen went on television and accused—without evidence—Congressman Boebert of helping criminals storm the Capitol—without a bit of evidence. Other Democrats have filed frivolous resolutions to censure or expel Republican Members.

Mr. COHEN. Mr. Jordan, would you yield for a minute?

Mr. JORDAN. So much for unity.

Be happy to yield to Chair.

Mr. COHEN. Thank you.

This has never been made clear. All I said on television is I saw Ms. Boebert going with a group of people in the tunnel. I then said, I didn't see anybody involved in the insurrection. I also said this very well may have just been the historical record of her getting sworn in for the first time and people wanted to—

Mr. JORDAN. Come on. Come on.

Mr. COHEN. Go to CNN, Jim. Go to CNN and you will see that.

Mr. JORDAN. How about I read your—

Mr. COHEN. That is what I said.

Mr. JORDAN. How about I read your quote? "She is not on the home team. She was with the visitors." How about that quote?

Mr. COHEN. She is not on the home team. When you tweet "1776," you are not on the home team. That doesn't have anything to do with her leading the insurrectionists. I said she specifically could have just been going up there for a celebration.

Mr. JORDAN. You know what you did, Mr. Chair?

Mr. COHEN. Yeah, I know what I did—

Mr. JORDAN. Other Democrats have filed frivolous resolutions to censure or expel Republican Members.

Mr. COHEN. Go on with your calumny.

Mr. JORDAN. So much for unity.

Was it my time, or are you just going to run the whole thing? Is it my time?

Mr. COHEN. It is your time, but you continue with your calumny.

Mr. JORDAN. Excuse me. I didn't hear what you said. Continue with what?

Mr. COHEN. Your calumny.

Mr. JORDAN. Oh. Well, I will continue with presenting the truth.

These same Democrats spent 4 years accusing President Trump of colluding with Russia, allegations we knew at the time were false and now the whole country knows are completely false.

Nineteen minutes, Mr. Chair, 19 minutes into President Trump's term The Washington Post ran a headline, quote, "The campaign to impeach President Trump has begun." President Trump wasn't even done with his inaugural address, and you guys were working with the media to impeach him.

Of course, the video I wanted to play talks about what happened on January 6. I will tell what you I will do. I will read from it. I will read from the Congressional Record.

*Congressional Record, House of Representatives, Washington, Friday, January 6, 2017:*

Mr. MCGOVERN. Mr. President, I object to the certificate from the State of Alabama.

Mr. RASKIN, State of Florida, he objected, too.

Ms. JAYAPAL. Mr. President, I object to the certificate from the State of Georgia.

Ms. LEE. Mr. President, I object to the State of Michigan.

Ms. JACKSON LEE, Mississippi. Mr. President, I object.

Mr. GRIJALVA. Mr. President, I object to the certificate from the State of North Carolina.

Ms. JACKSON LEE. Mr. President, I object to the State of North Carolina.

Ms. JACKSON LEE. I object to the votes from South Carolina.

Ms. JACKSON LEE. Mr. President, I object to the votes from Wisconsin.

Ms. WATERS. The State of Wyoming.

Is there one United States Senator who will join me in this letter of objection?

So, Democrats, think about this, January 6, 2017, Chair of the rules Committee can object to Alabama, a State President Trump won by 30 points.

Mr. COHEN. Hello?

Mr. JORDAN. You should probably mute though, Mr. Chair, while I am talking. Again, one more comedy of errors in this Committee hearing.

Mr. Raskin, the lead impeachment manager, can object to Florida in 2017, and Maxine Waters, Chair of the House Financial Services Committee, can object to Wyoming, a State that President Trump won by 40 points.

Somehow, Republicans, Mr. Chair, aren't allowed to object to Pennsylvania? Aren't allowed to object to Pennsylvania where they changed the law unconstitutionally in three different ways? Pennsylvania law says the election ends at 8 o'clock on Tuesday. The partisan supreme court went around the legislature, said, no, it is going to end on Friday?

State election law says, oh, for mail-in ballots there has to be signature verification. Secretary of state, partisan secretary of state, said, no, we are not going to do that, not going to do that.

For 2.6 million ballots they didn't follow the law because some elected Democrat, not the legislature, decided that? I can't object to Pennsylvania, but Democrats are allowed to on January 6, 2017, object to Wyoming and Alabama? You have got to be kidding me.

For 4 years there was no letup in trying to overturn the 2016 election. In fact, here is what Hillary Clinton said last fall. Just last fall, fall of 2020, she said last fall the election was stolen and she called President Trump illegitimate, 4 years after he was elected.

Somehow, when Republicans object, when Republicans object on January 6, 2021, to unconstitutional changes made in key swing States, somehow that warrants a 2,000-page political dossier by the

Chair of the House Administration Committee? Now, you are going to have a hearing on this subject?

Maybe we would be better served, Mr. Chair, if the full Judiciary Committee would have a hearing, just any hearing. Why don't we have a hearing on the border crisis? We all know there is a crisis down there. For goodness sakes, you are putting migrant kids in NASA facilities. Can't have a hearing on that.

Can't have a hearing on cancel culture, the attack on the First Amendment. This is the Judiciary Committee, the Committee that is supposed to be in charge of protecting the Bill of Rights, the Constitution, and free speech rights. Can't have a hearing on cancel culture, but we are going to have a hearing in this Subcommittee on a report by the Chair of the House Administration Committee that targets Republicans.

It is wrong. It is time the Judiciary Committee did its job and focused on the issues that matter to the American people, like the border crisis and like the cancel culture attack on the First Amendment.

With that, I would yield back.

Mr. COHEN. We welcome our Witnesses and thank them for participating in today's hearing. I will now recognize each of the Witnesses and after each introduction will recognize that Witness for his or her oral testimony.

Your written testimony will be entered into the record in its entirety. Accordingly, we ask that you summarize your testimony to 5 minutes. In the absence of a timing light, I will note orally when 5 minutes have elapsed and bang my gavel, my gavel. There will be also a timer on your screen. So, be please be mindful of it.

Before proceeding with testimony, I would like to remind all our Witnesses that you have a legal obligation to provide truthful testimony and answers to this Subcommittee, that any false statement you may make today may subject you to prosecution under section 1001 of title 18 United States Code.

Our first Witness is Mr. Jack Maskell. Mr. Maskell worked as a legislative attorney in the American Law Division of the Congressional Research Service for more than 40 years where he provided nonpartisan legal advice, analysis, and assistance to Members of the Congress, Congressional Committees, and staff on legislation and legislative matters, such as governmental ethics laws and regulations, conflict of interest laws, and congressional discipline of Members. He is the author of the original House Ethics Manual in 1976.

He received his J.D. from American University Washington College of Law and a bachelor of business Administration and economics from the UMass Amherst.

Mr. Maskell, you are recognized for 5 minutes, sir.

#### **STATEMENT OF JACK MASKELL**

Mr. MASKELL. Thank you, Mr. Chair.

Mr. Chair, Madam Vice Chair, and Members of the Subcommittee, thank you for the invitation to address you on this subject today.

When analyzing congressional authority to take certain actions, some of the more difficult questions may involve concepts of im-

plied authority from the Constitution or even inherent authority of legislative institutions generally. That is not the case here.

Concerning Member conduct, there is a direct and express authority in the Constitution for each house to address and, if need be, to discipline their Members regarding their conduct.

In imposing conduct standards and discipline, the House operates through its rulemaking powers, and these powers are set out together in the same clause of the Constitution. The authority was adapted from British parliamentary practice, as well as the experience of the colonial legislatures.

Legislative and constitutional scholars have emphasized that the underlying justification for this power is to protect the integrity and dignity of the legislature and its proceedings and not merely to punish an individual.

As noted in Deschler's Precedents, internal disciplinary action is, quote, "rooted in the judgment of the House as to what was necessary or appropriate for it to do to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government."

For these reasons, the authority of the House to discipline its own Members has been applied and interpreted broadly to a wide range of conduct wherever it may occur, which the institution of the House believes is warranted. That is, in the end, the actual standard for House discipline, that the House may discipline those who it believes have breached its privileges or decorum or have damaged its integrity or reputation.

In practice, the House has employed several disciplines or punishments, including expulsion, censure, reprimand, and fine. I will briefly talk about expulsion and censure.

An expulsion, of course, involves the removal of a seated Member by a two-thirds majority of those present and voting.

At the outset, an expulsion needs to be distinguished from an exclusion. An exclusion, as was made clear by the Supreme Court in *Powell v. McCormack*, is not a disciplinary exercise. Rather, an exclusion by a mere majority vote involves a different constitutional authority for each house to, quote, "judge the Elections, Returns, and Qualifications of its own Members."

Generally, a Member may be excluded or prevented from taking the oath of office in his or her seat if the House finds that the Member elected was either not duly elected or has failed to meet the qualifications expressly designated in the Constitution.

Now, although I have been talking about the power to expel or discipline, the House has recognized that there are other considerations in the policy or practice in doing so.

Constitutional and legislative experts have agreed that, while it is necessary to expel for gross misconduct that has disgraced the House, that unjustly or inappropriately expelling a Member who has been duly elected by his or her constituents would be subversive of the rights of the people and at odds with the foundational principle of representational democracy.

So, the power to expel has been exercised cautiously and in a circumscribed manner, and it has been reserved for the most serious offenses and misconduct. As Chair said, in fact, only five Members of the House have ever been expelled, three for disloyalty to the

Union during the time of the Civil War and two more recently for violations of criminal laws relating to the abuse of one's congressional position and power.

Now, that number may seem very small, but it should be noted that a number of Members who were facing probable expulsion had the good graces to resign from the House rather than put the House and themselves through that ordeal.

As to censure, censure is a formal vote by a majority of Members present and voting on a resolution disapproving a Member's conduct, generally with the additional requirement that the Member stand in the well of the House Chamber to receive a verbal rebuke and reading of the censure resolution by the Speaker.

There have been 23 censures of Members—22 Members and one Delegate actually—for conduct ranging from unparliamentary, insulting language on the floor to financial misconduct.

Concerning the general grounds for censure, a select Committee in the House in 1967 explained: Censure of a Member has been deemed appropriate in cases of a breach of the privileges of the House.

There are two classes of privilege, one affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings, and the other affecting the rights, reputation, and conduct of Members individually.

Thank you very much.

[The statement of Mr. Maskell follows:]

House Committee on the Judiciary,  
Subcommittee on the Constitution, Civil  
Rights, and Civil Liberties

Representative Steve Cohen, Chair  
Representative Deborah Ross, Vice Chair  
Representative Mike Johnson, Ranking Member

**Written Submission of Jack Maskell, Esq., for the Subcommittee Hearing on  
“The Constitutional Framework for Congress’s Ability to Uphold Standards  
of Member Conduct.”  
March 11, 2021**

The primary substance of my written submission for the Subcommittee is attached as a copy of a report that I authored in 2016 for the Congressional Research Service, Library of Congress, entitled “Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives.” Although it was written five years ago, the substance of the material -- particularly the discussion of the constitutional authority of the House to exercise the titled actions -- remains relevant.

In submitting this written document, I would like to take the opportunity to expand on or clarify a point made in the report which concerns a particular precedent relevant to the question of the practice of the House to discipline for past misconduct.

**Discipline for Past Misconduct and the Hinshaw Precedent**

The report notes the nearly unbridled discretion set out in the actual text of the Constitution, at Article I, Section 5, clause 2, 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.” Legislative, legal, and constitutional scholars have commented since the earliest days of our nation on the breadth of this language in the Constitution and the absence of specific language limiting the disciplinary power of each House, other than the requirement of a two-thirds majority to expel a Member.<sup>1</sup>

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<sup>1</sup> In re Chapman, 166 U.S. 661, 668-669 (1897), citing as authority Justice Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Vol. II, sec. 835-836 (Boston 1883); DESCHLER’S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H. Doc. 94-661, 94<sup>th</sup> Cong., 2d Sess., Vol. 3, Ch. 12, section 12, p. 174; H. Rept. 570, 63rd Cong., 2d Sess. (1914) (Judiciary Committee), at VI CANNON’S PRECEDENTS OF THE HOUSE



Although the language granting this *power* is broad, the exercise of that authority by the House with respect particularly to expulsion – as a matter of *policy* – has been more circumscribed and carefully applied. Historically, there had been a split of opinion within the House itself as to whether the House will or may expel for past misconduct.<sup>2</sup> In more recent congressional practice it would appear to be more accurate to say that such a restraint has arisen from a questioning by the House of the wisdom of such a policy, rather than a formal recognition of an absence of constitutional power to expel for past misconduct.<sup>3</sup>

One of the more recent precedents often cited as authority for the proposition that the House will refrain from expulsion (but not necessarily from censure) for conduct pre-dating the current Congress or pre-dating the time when one was elected to Congress is the matter of Representative Andrew Hinshaw.<sup>4</sup> In that matter the House Ethics Committee (then called the Committee on Standards of Official Conduct) recommended against House action because of a general policy of deferring action against a Member until judicial proceedings are final when there is “an active, nondilatory, criminal proceeding against” the Member.<sup>5</sup> The Committee, however, emphasized that it must “consider each case on the facts alone” as to whether a statutory violation also implicates a “breach of official conduct” such that the House should take immediate action rather than defer until appeals have been taken.<sup>6</sup> The underlying subject of the activities of Representative Hinshaw concerned conduct before the time of his election as a Representative (when he was a state official), and thus did not involve official congressional misconduct. Additionally, Mr. Hinshaw lost his primary election for re-election to Congress, and thus by the time his

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OF REPRESENTATIVES, section 398, p. 558; Brown, HOUSE PRACTICE, GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE, 104th Cong., 2d Sess. “Misconduct; Sanctions,” at 581-582 (1996). See also Bowman and Bowman, *Article I, Section 5: Congress’ Power to Expel – An Exercise in Self Restraint*, 29 SYRACUSE LAW REVIEW 1071, 1089-1090 (1978).

<sup>2</sup> Note conflicting opinions of two House committees in the *Credit Mobilier* investigations on the discipline of Representatives Ames and Brooks in the 42nd Congress, H.Rept. 77, 42nd Cong., 3rd Sess. (1872) and H.Rept. 82, 42d Cong., 3rd Sess. (1872). The House specifically refused, however, to accept a preamble to the substitute resolution for censure expressly questioning its authority to expel for past misconduct. See Committee Print, *House of Representatives Exclusion, Censure and Expulsion Cases from 1789 to 1973*, 93rd Cong., 1st Sess. 125 (1973); note also majority and minority opinions in expulsion cases of William S. King and John Schumaker, H.Rept. 815, 44th Cong., 1<sup>st</sup> Sess. (1876), II HINDS’ PRECEDENTS PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES, at section 1283, and in expulsion case of Orsamus B. Matteson, H.Rept. 179, 35th Cong., 1st Sess. (1858), II HINDS’ PRECEDENTS section 1285. See *Powell v. McCormack*, 395 U.S. 486, 508-509 (1969).

<sup>3</sup> H. Rept. 570, 63rd Cong., 2d Sess. (1914) (Judiciary Committee), at VI CANNON’S PRECEDENTS, *supra* at section 398.

<sup>4</sup> H. Rept. 94-1477 (1976). *In the Matter of Representative Andrew J. Hinshaw*.

<sup>5</sup> *Id.* at 2, 4.

<sup>6</sup> *Id.* at 4.

appeal would be final, Mr. Hinshaw would no longer be a Member of House. The Committee therefore recommended against approval of the expulsion resolution.

Mr. COHEN. Thank you, sir.

Our next Witness is Josh Chafetz. Mr. Chafetz is a professor of law at Georgetown University Law Center. His research focuses on structural constitutional law, American and British constitutional history, legislation and legislative procedure, American political development, and the intersection of law and politics.

His second book, "Congress's Constitution: Legislative Authority and the Separation of Powers," contained a chapter about Congress' internal disciplinary powers.

Prior to joining the faculty at Georgetown, he served on the faculty at Cornell Law for 12 years. He earned his J.D. and his B.A. from Yale University. He also holds a doctorate in politics from Oxford University where he was a Rhodes Scholar. He served as a law clerk to the Honorable Guido Calabresi of the United States Court of Appeals for the Second Circuit.

Professor Chafetz, you are now recognized for 5 minutes.

#### **STATEMENT OF JOSH CHAFETZ**

Mr. CHAFETZ. Thank you very much, Chair Cohen, Ranking Member Johnson, and distinguished Members of the Subcommittee. Thank you for the opportunity to testify today regarding the constitutional bases, history, and scope of the congressional Chambers' power to discipline their own Members.

This power is an important one, not simply because it facilitates the Chambers' ability to do their business on a day-to-day basis, but more fundamentally because it allows them to fulfill their central role in our constitutional order.

As with so many of the powers and privileges of Congress, the power to discipline Members has its origins in English parliamentary practice. Importantly, the House of Commons began exercising this power at precisely the moment it was coming into its own as an institution that could check and counterbalance the Crown.

Beginning in the middle of the 16th century, the House started to insist that it and not royal officials or royal courts was the proper body to police the conduct of its Members.

As its conflict with the Crown heated up during the Stuart reign, the power was used vigilantly to protect the authority of the House of Commons. Members whose conduct subverted parliamentary power in the service of royal power found themselves expelled on multiple occasions.

In 1716, Members were expelled for aiding the previous year's Jacobite rebellion, an insurrection that sought to restore the Stuarts to the throne and undermine parliamentary gains made in the Glorious Revolution and its aftermath.

The power was also capable of being used in ways that harmed the institution and its claim to public legitimacy, as the 1763 proceedings surrounding John Wilkes demonstrated. Wilkes was expelled from Parliament for a publication criticizing the government of the day. Even after winning four successive elections, the House continued to refuse to seat him until 1774.

Eighteenth century American colonists were deeply familiar both with the history of 17th century parliamentary opposition to the Stuart Crown and with the more recent Wilkes saga.

They took from these events the lessons that legislative discipline was important, but also that it could be dangerously abused to undermine the representative character of the legislature, a concern that was heightened if Members were expelled multiple times for the same offense or expelled for conduct that was known to their constituents before they were elected.

After relatively limited debate, the Constitutional Convention chose to give each Chamber the power to discipline its own Members. To forestall what James Madison described as the potential for dangerous abuse during emergencies of faction, expulsion would require a two-thirds vote. The convention considered but chose not to include a prohibition on re-expulsion for the same conduct.

Early practice under the Constitution makes clear that, while the two-thirds bar was indeed effective at preventing factional expulsions, it also allowed minority factions to prevent discipline that was perhaps warranted.

The vast bulk of congressional expulsions in American history are, as others have noted, associated with the Civil War, both Members from seceding States and Members from Union States who aided the Confederacy.

Because of the difficulty of expulsion, starting in the early 19th century both houses began making use of censure, which could be done by a bare majority. Nineteenth century political culture often saw Members who had been censured resign and then seek reelection as a way of demonstrating that their conduct had the support of their constituents. Mindful of the lessons of Wilkes, those Members were regularly reelected.

It wasn't until the 20th century that criminal prosecution became a central mechanism of regulating Member conduct, and the beginnings of criminal prosecution of Members came with not implausible claims that the Members were being persecuted for their opposition to parts of President Teddy Roosevelt's agenda.

Nevertheless, across the 20th century, criminal law became increasingly prominent as a means of enforcing congressional ethics and congressional discipline, with cameral discipline largely coming in either after criminal proceedings had wrapped up or for matters deemed too minor to rise to the level of criminality.

The one prominent 20th century exception to this was the 1954 Senate censure of Joseph McCarthy, an incident that was widely perceived as redounding to the credit and benefit of the Senate as an institution.

So, let me close with just a couple of big picture takeaways from this history.

First, the power to discipline Members is both broad and, substantively, relatively unencumbered. It is for the Chambers themselves to develop their law on what constitutes disorderly behavior, and they should, in my view, do so with an eye towards both maintaining and strengthening the constitutional order writ large and Congress' central role in it. The primary constraints on the power are not substantive, but procedural.

Expulsion, which poses the greatest potential threat to democratic governance, requires a two-thirds supermajority. All forms of discipline are subject to a Wilkes-derived principle that conduct

known to the constituents prior to election should generally not be punished.

That said, the Framers chose not to encode this as a Rule within constitutional text and it is better understood as a strong but not dispositive argument.

Second, and following on from the first point, the cameral disciplinary power is a means of promoting the House's institutional power. To the extent that primary responsibility for regulating Members' conduct is outsourced to the executive and the judiciary, then those institutions not only have a tool with which to influence Members, they also have a powerful argument for public support and public trust as against Congress.

If other institutions are regularly seen to clean up Congress' messes, then the public will receive the lesson that Congress is corrupt, while those other institutions are paragons of rectitude. Congress would do better, in my view, to show the public it can keep its own houses in order.

Thank you.

[The statement of Mr. Chafetz follows:]

“The Constitutional Framework for Congress’s Ability to Uphold Standards of Member Conduct”

Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee

Thursday, March 11, 2021, 2:00 PM

**Testimony of Josh Chafetz**  
**Professor of Law, Georgetown University Law Center**

Chairman Cohen, Ranking Member Johnson, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to testify today regarding the constitutional bases, history, and scope of the congressional chambers’ powers to discipline their own members. My name is Josh Chafetz, and I am a Professor of Law at Georgetown University Law Center and an Affiliated Faculty Member of both the Government Department and the McCourt School of Public Policy at Georgetown. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics. Much of my testimony today will draw on research conducted for my book, *Congress’s Constitution: Legislative Authority and the Separation of Powers*, published in 2017 by Yale University Press, and I have appended a chapter from that book to this testimony.

**CONSTITUTIONAL AUTHORITY**

The constitutional text authorizing the congressional chambers to discipline their members is Article I, sec. 5, cl. 2: “Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.” It is noteworthy that the punishment provisions are tightly linked to the Rules of Proceedings Clause: Keeping order in the chambers was understood to be inextricably linked to the houses’ broader power to structure their own business.

**HISTORICAL DEVELOPMENT**

This constitutional text was not drafted on a blank slate. Instead, it reflected hard-won experience under the British Crown and the colonial legislative systems. The English Parliament’s origins were as an advisory body to the Monarch;<sup>1</sup> it was therefore understood to be one element among many of *royal* government.<sup>2</sup> As a result, disciplining misbehavior among members of Parliament was initially understood as an appropriate function of Crown officials.

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<sup>1</sup> See J.R. MADDICOTT, *THE ORIGINS OF THE ENGLISH PARLIAMENT, 924-1327*, at 1 (2010); CHARLES HOWARD MCLWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* 16-17 (1910).

<sup>2</sup> Josh Chafetz, “*In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation*”: *Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 *YALE J.L. & HUMAN.* 181, 183-84 (2013).

However, as Parliament began to come into its own as a power in the English state, one capable of not simply advising the Crown but pushing back against it and shaping policy, it also began to assume greater control over its internal affairs, including its power to punish its members. This shift can be traced to the mid-Tudor period, roughly the middle of the sixteenth century.<sup>3</sup>

Indeed, we first see the House of Commons exercising its internal disciplinary powers in 1549 against a member who spoke insultingly of the eleven-year-old King Edward VI. The House had the member arrested and held in the Tower of London for over five weeks until he apologized and was released. This is an interesting transitional moment: although the House was exercising its disciplinary power to protect the honor of the Monarch, it insisted on doing so itself, rather than allowing Crown officials to punish a member.<sup>4</sup> Indeed, for the next six decades, although the House was jealous to maintain control over the disciplining of its own members, it generally did so in the service of causes congenial to the Crown.<sup>5</sup>

This began to change as the House of Commons came into increasing conflict with the Stuart monarchs.<sup>6</sup> Beginning in the 1620s, the House punished several members for being too sympathetic toward the Crown.<sup>7</sup> In the same period, it also began using cameral discipline in the service of what we would today understand as enforcing members' ethical obligations, including punishing members for taking bribes and for witness tampering.<sup>8</sup>

There are three features of this early history worth emphasizing. First, the House of Commons was developing its own law governing the ethical standards of its members. This included, for instance, important and protracted debates over the line between (permissible) patronage and (impermissible) bribery, as well as questions about whether a member could be expelled for extra-parliamentary activities. Second, the House was especially vigilant in using its disciplinary powers to protect its institutional power. Members whose behavior undermined Parliament vis-à-vis the Crown were expelled from the House on several occasions.<sup>9</sup> And third, the House was insistent on maintaining its disciplinary power itself. To allow the Crown to police the behavior of members of Parliament would itself threaten to make the legislature subservient to the Monarch.

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<sup>3</sup> *Id.* at 186-87.

<sup>4</sup> JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 232-33 (2017).

<sup>5</sup> *Id.* at 233-34. This is consistent with the traditional view that the House was "very submissive" toward the late-Tudor Monarchs. F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 242 (H.A.L. Fisher ed., Cambridge Univ. Press 1963); *see also* ALAN CROMARTIE, THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450-1642, at 92, 98 (2006); WALLACE NOTESTEIN, THE WINNING OF THE INITIATIVE BY THE HOUSE OF COMMONS 13 (1926); LAWRENCE STONE, THE CAUSES OF THE ENGLISH REVOLUTION, 1529-1642, at 59 (rev. ed. 2002).

<sup>6</sup> As I have argued elsewhere, the "submissive" attitude of Parliament toward late-Tudor Monarchs on matters of policy, *see supra* note 5, masked an increasing assertiveness on matters of procedure, which in turn would allow parliamentary pushback toward early-Stuart Monarchs on matters of policy. *See generally* Chafetz, *supra* note 2.

<sup>7</sup> CHAFETZ, *supra* note 4, at 234-35.

<sup>8</sup> *Id.* at 235-37.

<sup>9</sup> This was most prominent in the expulsions in the 1620s for abusing royal patents. *See id.* at 235.

Although concerns about royal domination of Parliament waned in the aftermath of the Glorious Revolution and the rise of ministerial responsibility to Parliament in the first decades of the eighteenth century,<sup>10</sup> the House continued to keep a jealous eye on its power. In 1716, three members were expelled for supporting or participating in the 1715 Jacobite rebellion, which sought to restore the Stuarts to the throne and thereby threatened to roll back the gains made by Parliament.<sup>11</sup> Again, we see the disciplinary power being used with an eye toward protecting institutional power. The House also remained active in policing the ethics of its members across the eighteenth century.<sup>12</sup>

Perhaps the most famous use of the power in eighteenth-century Britain was in the case of John Wilkes.<sup>13</sup> In 1763, Wilkes, then a member of Parliament for the borough of Aylesbury, published the *North Briton* No. 45, attacking the foreign policy of the Tory Prime Minister, the Earl of Bute. The government was not amused, accusing Wilkes of seditious libel. The ransacking of Wilkes's house on a general warrant and his subsequent victories in two trespass suits became a paradigm case for the constitutionalization of a prohibition on unreasonable searches and seizures, embodied in our Fourth Amendment.<sup>14</sup> For our purposes, more important is that Wilkes was expelled from Parliament in 1764 (while in self-imposed exile in Paris) for the publication. After he returned from Paris in 1768, he stood for reelection to Parliament and won the most votes, but the House refused to seat him and called for a new election. He won that one, too—indeed, he won four times, and on the fourth occasion, the House simply seated his opponent. The public rallied increasingly behind Wilkes, and when he was elected again in 1774, he was finally seated. After eight more years of efforts, he succeeded in having all records of his case expunged from the House of Commons Journals “as being subversive of the rights of the whole body of electors of this kingdom.”<sup>15</sup> The Wilkes saga was well-known in the American colonies, where “Wilkes and Liberty!” served as a rallying cry for those who saw in him a fellow antagonist of the government in London.<sup>16</sup>

But the colonists did not take from the Wilkes controversy the lesson that legislative discipline was itself problematic. Indeed, colonial American legislatures were quick to discipline their members for offenses ranging from absenteeism to unparliamentary conduct.<sup>17</sup> Even Patrick Henry's famous 1765 maiden speech in the Virginia House of Burgesses, in which he suggested that George III might “profit by [the] example” of Julius Caesar and Charles I, was followed by a less-famous “beg[ging] the speaker and the house[']s pardon” for his unparliamentary language,<sup>18</sup> lest he be subject to punishment by the house.

<sup>10</sup> See *id.* at 89-92.

<sup>11</sup> *Id.* at 238.

<sup>12</sup> *Id.* at 237-38.

<sup>13</sup> See generally ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY (2006).

<sup>14</sup> See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994).

<sup>15</sup> See CHAFETZ, *supra* note 4, at 238-39; JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 155-58 (2007).

<sup>16</sup> See Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 WM. & MARY Q. (3d ser.) 373 (1963). The Revolutionary-era American interest in Wilkes is perhaps best captured by the “Wilkes Fund Controversy” in South Carolina beginning in 1769. See CHAFETZ, *supra* note 4, at 53-54; Jack P. Greene, *Bridge to Revolution: The Wilkes Fund Controversy in South Carolina, 1769-1775*, 29 J. SOUTHERN HIST. 19 (1963).

<sup>17</sup> See MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 184-90 (1943).

<sup>18</sup> See *Journal of a French Traveler in the Colonies, 1765, I*, 26 AM. HIST. REV. 726, 745 (1921).



Instead, the lesson the American colonists seem to have taken from the Wilkes controversy was twofold. First, a member should generally not be expelled multiple times for the same offense. If the member was reelected by his constituents with full knowledge of the conduct that got him expelled, that reelection should be understood as a democratically superior judgment that the conduct was not, in fact, disqualifying. On this point, it is instructive that, of the five early republican state constitutions that explicitly mentioned a power of expulsion, four prohibited either a second expulsion for the same offense or an expulsion for any reason known to the member's constituents at the time of election.<sup>19</sup> (The other state legislatures very likely understood themselves to have a power to discipline their members arising from their general power to control their proceedings.<sup>20</sup>) The second lesson that the Americans took from the Wilkes case was that expulsion could be dangerously abused to allow a legislative majority to entrench itself in power.<sup>21</sup>

Both points arose in the Constitutional Convention itself. A draft from the Committee of Detail provided that "Each House shall have Authority ... to punish its own Members for disorderly Behaviour. Each House may expel a Member, but not a second Time for the same Offence."<sup>22</sup> But by the time the Committee reported to the full Convention, the language had been pared back: "Each House ... may punish its members for disorderly behavior; and may expel a member."<sup>23</sup> When it came up for debate, James Madison raised a Wilkes-inflected concern: he "observed that the right of expulsion ... was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused. He moved that 'with the concurrence of 2/3' might be inserted between may & expel." With very little additional debate, both Madison's amendment and the underlying provision secured the assent of the Convention.<sup>24</sup> We thus see the Constitutional Convention aware of both of the main takeaways of the Wilkes controversy, but choosing to encode only one of them in constitutional text.

One of the first congressional disciplinary cases raised both concerns. Owing to backlash against the Citizen Genêt affair, Federalist Humphrey Marshall won a Senate seat in Democratic Republican-dominated Kentucky in 1795. The state's Democratic Republican governor and House delegation asked the Senate to investigate charges (leveled by two Democratic Republican judges) that Marshall had committed perjury in a lawsuit a year and a half before being elected to the Senate. Marshall requested that a Senate committee be impaneled to investigate to clear his name; the committee concluded both that Marshall had done nothing wrong and that it lacked jurisdiction over matters that occurred before the member was elected and having nothing to do

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<sup>19</sup> CHAFETZ, *supra* note 4, at 239–40.

<sup>20</sup> *See id.* at 240.

<sup>21</sup> As Edmund Burke (then a Whig member of Parliament representing the borough of Wendover) put it in defending Wilkes, "The House of Commons can never be a control on other parts of government, unless they are controlled themselves by their constituents; and unless these constituents possess some right in the choice of that House, which it is not in the power of that House to take away." Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770), in 1 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 435, 503 (3d ed., Boston, Little, Brown 1869).

<sup>22</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 156 (Max Farrand ed., rev. ed. 1966).

<sup>23</sup> *Id.* at 180.

<sup>24</sup> *Id.* at 254.

with his official duties. The full Senate accepted the committee's conclusions on a straight party-line vote.<sup>25</sup>

Of course, there were also early instances of misconduct that was recognized as such across party lines. Senator William Blount was expelled by a vote of 25-1 when it was discovered in 1797 that he had been promoting a scheme to help the British and Native American tribes seize Spanish Florida and Louisiana.<sup>26</sup> But even in the early days of the Republic, serious charges often failed to clear the two-thirds bar for expulsion: In 1798, a motion to expel Democratic Republican Representative Matthew Lyon for spitting in the face of Federalist Representative Roger Griswold failed to clear the supermajority bar,<sup>27</sup> and in 1808, a motion to expel Senator John Smith for participating in Aaron Burr's conspiracy to set himself up as ruler of a new nation carved out of the Louisiana Territory came up one vote short when every Federalist in the chamber voted against it.<sup>28</sup> In the mid-nineteenth century, sectional differences manifested in physical violence between members with some regularity,<sup>29</sup> and yet on no occasion was a brawling or dueling member expelled, even when one House member killed another in a duel.<sup>30</sup>

It thus quickly became clear that the Constitution's two-thirds threshold did not just prevent the majority from unwarrantedly ridding itself of minority members; it also allowed a minority faction to shield a member who truly did engage in serious misconduct, especially if that misconduct was in the service of factional, rather than purely personal, goals. Fortunately, the Constitution also contemplates punishments short of expulsion, and those are not subject to the two-thirds bar. In 1810, Federalist Senator Timothy Pickering became the first member of Congress to be censured by his chamber after he violated a Senate rule by reading aloud a confidential document in open session.<sup>31</sup> The House first censured a member in 1832 for using unparliamentary language toward the Speaker.<sup>32</sup> In 1842, Representative Joshua Giddings was censured for introducing a series of resolutions approving of the revolt of enslaved persons on the ship *Creole*, which had been carrying them from Richmond to New Orleans. Giddings's resolutions violated the House's infamous "gag rule," which prohibited the receipt of anti-slavery petitions. Giddings resigned his seat after being censured, was immediately reelected by his Ohio constituents, and took his seat again.<sup>33</sup> Indeed, in the nineteenth century it was not at all uncommon to see censured members resign and seek reelection, as a means of demonstrating that their conduct, while criticized by their colleagues, nevertheless had the support of their constituents.<sup>34</sup>

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<sup>25</sup> CHAFETZ, *supra* note 4, at 241-42.

<sup>26</sup> *Id.* at 242. Blount was also impeached by the House, but the Senate dismissed the impeachment on the grounds that members of Congress were not "civil Officers of the United States," U.S. Const., art. II, sec. 4. No member of Congress has been impeached since. CHAFETZ, *supra* note 4, at 148-49, 242.

<sup>27</sup> CHAFETZ, *supra* note 4, at 242-43.

<sup>28</sup> *Id.* at 243.

<sup>29</sup> See generally JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* (2018).

<sup>30</sup> CHAFETZ, *supra* note 4, at 244-45.

<sup>31</sup> *Id.* at 243-44.

<sup>32</sup> *Id.* at 244.

<sup>33</sup> *Id.* at 245.

<sup>34</sup> To take one other example, after Representative Preston Brooks, assisted by Representatives Laurence Keitt and Henry Edmundson, caned Senator Charles Sumner on the Senate floor, a motion to expel Brooks failed.

The outbreak of the Civil War brought the issue of cameral discipline front and center. In the House, two members and one member-elect were expelled for fighting for the Confederacy;<sup>35</sup> in the Senate, six seats of members whose states had seceded were declared vacant, while another ten members were explicitly expelled.<sup>36</sup> The Senate also expelled four members from non-seceding states for either fighting for or supporting the Confederacy.<sup>37</sup> The chambers were not indiscriminate, however: the Senate defeated attempts to expel two members for being insufficiently pro-war. In the House, attempts to expel two members for advocating recognition of the Confederacy failed, but both were declared “unworthy Member[s]” and censured.<sup>38</sup>

Cameral discipline was also increasingly used in the mid-nineteenth century to address corruption. In 1857, for instance, three House members resigned after a select committee recommended that they be expelled for offering and taking bribes. The ringleader, Orsamus Matteson, was censured even after he resigned—but he then ran for reelection, won, and was seated.<sup>39</sup> Both the *Crédit Mobilier* scandal and the Pacific Mail Steamship Line scandal occasioned extensive congressional investigations, but led to no expulsions. Two Representatives were, however, censured in connection with the former.<sup>40</sup>

Importantly, throughout this period, cameral discipline was the sole method of policing the ethics of members of Congress. I am unaware of any member who was indicted for conduct tied to his behavior as a member before 1875, and I am unaware of any member convicted for such behavior until 1904.<sup>41</sup> Until the twentieth century, the chambers’ power to discipline their members was understood to be exclusive, so as to prevent executive and judicial meddling in the affairs of Congress. And, indeed, in the first two prosecutions of members under the criminal law, accusations that the prosecutions were politically motivated loomed large.<sup>42</sup>

As the use of criminal law to police members’ behavior grew in the twentieth century, the houses’ use of their own disciplinary powers increasingly took a back seat. It gradually became the norm for the chambers to wait on the criminal process before beginning internal disciplinary proceedings, thus ensuring that the executive branch and the courts took primary responsibility for policing members’ conduct.<sup>43</sup> As an indication of how far this advanced, there were no disciplinary proceedings at all in the House between 1926 and 1967, and none in the Senate between 1929 and 1951—even though a number of members were indicted and convicted during

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Keitt was censured, but neither Brooks nor Edmundson was. Brooks and Keitt resigned their seats; both were reelected and seated. *Id.*

<sup>35</sup> The reason the number wasn’t higher in the House is that the seceding states did not send members to the Thirty-Seventh Congress, and controversies over members purportedly returned by seceding states were settled via the House’s separate power to judge the elections, returns, and qualifications of its members, U.S. Const. art. I, sec. 5, cl. 1. CHAFETZ, *supra* note 4, at 246; CHAFETZ, *supra* note 15, at 181-89.

<sup>36</sup> CHAFETZ, *supra* note 4, at 246.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 248-49.

<sup>40</sup> *Id.* at 249-50.

<sup>41</sup> *Id.* at 250-51.

<sup>42</sup> *Id.* at 251-52.

<sup>43</sup> *Id.* at 256-57.

this period.<sup>44</sup> Although both chambers returned to the ethics field following these hiatuses, including by creating the Ethics Committees and promulgating formal codes of ethics in the mid-1960s,<sup>45</sup> they have continued to treat criminal prosecutions as the main means of dealing with serious ethical violations by members, often invoking cameral discipline only after criminal proceedings had wrapped up (in those rare cases where the members involved did not resign first) or for matters failing to rise to the notice of the criminal law.<sup>46</sup> Perhaps not coincidentally, during this period when much of the work of disciplining members has been outsourced to the executive, those matters that do give rise to internal discipline have increasingly made use of fines and other monetary assessments.<sup>47</sup>

One final important use of congressional discipline is worth noting. In 1954, in the aftermath of the Army-McCarthy hearings, the Senate censured Joseph McCarthy. The censure was nominally for his abuse of two Senate committees that had investigated his conduct in successive Congresses, but it was clear that it represented a broader rejection of his conduct as a senator.<sup>48</sup> This rejection was both perceived and celebrated in the press—the *Washington Post*, for instance, called it a “vindication of the Senate’s honor.”<sup>49</sup>

#### CONTEMPORARY CONCERNS

While the primary purpose of my testimony has been to provide a sense of the constitutional basis and historical development of the authority of each house of Congress to discipline its members, I would like to close with two thoughts about the power as it exists today.

First, the power to discipline members is both broad and substantively relatively unencumbered. The Constitution does not specify what constitutes “disorderly Behaviour,” and the historical development suggests only a few limited constraints. The Wilkes case highlighted for the Founding generation the dangers of allowing a majority to use the disciplinary powers to rid itself of its ideological opponents, but the Constitution’s solution to this problem was not to specify substantive limits on punishable conduct, but rather to create a high procedural bar—a two-thirds vote—for the most aggressive form of discipline, expulsion.

Also responsive to the Wilkes case, the Constitutional Convention considered a bar on re-expulsion for the same offense but rejected it. Both houses have been sensitive to the underlying concern, repeatedly seating members who had resigned under threat of expulsion or after censure but then been reelected, on the grounds that the reelection demonstrates a democratically powerful reaffirmation of constituent support for the member. Nevertheless, the Convention’s rejection of a specific prohibition on re-expulsion might suggest that there are certain highly unusual situations in which expulsion for conduct known to constituents before election might nonetheless be expellable. One outlier district may be full of people who approve, say, of their

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<sup>44</sup> *Id.* at 257.

<sup>45</sup> *See id.*

<sup>46</sup> *See id.* at 257-64.

<sup>47</sup> *See* Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, CRS Report for Cong. No. RL31382, at 13-15 (2016).

<sup>48</sup> *Id.* at 264-65; Josh Chafetz, *Congressional Overspeech*, 89 *FORDHAM L. REV.* 529, 581-96 (2020).

<sup>49</sup> Editorial, *Judgment of the Senate*, *WASH. POST*, Dec. 3, 1954, at 20.

member offering bribes to site a federal building in their district, but that does not mean that the chamber should be stuck with a briber in its membership.

Importantly, as well, expulsion is not the only form of punishment contemplated by the Constitution. As we have seen, censure<sup>50</sup> has been in use since the early-nineteenth century, and in recent years the use of fines and other monetary assessments has become an increasingly prominent form of discipline, as well. Moreover, the stripping of committee assignments—although perhaps better located under the houses’ power to structure the rules of their proceedings rather than under their disciplinary power—can also be understood as an important tool of member discipline. These punishments do not require a two-thirds vote.

While the chambers should of course be careful in what they deem “disorderly Behaviour”—just because the two-thirds bar does not apply does not mean that anything goes—they should also understand that it is within their discretion to make that determination, and punishable offenses need not be spelled out in advance. This is not the domain of the criminal law. Behavior that corrupts or disrupts the chamber, in the view of its members, should be understood as disorderly and therefore punishable. So too should behavior that undermines the constitutional role of the chamber vis-à-vis the other branches, or that undermines the constitutional order itself. We have seen cameral discipline used this way in the Anglo-American tradition from the expulsion of the Jacobite sympathizers in 1716 to the expulsion of Confederates in 1861 to the censure of Joseph McCarthy in 1954.

Second, and related, the disciplinary power is a means of not only institutional self-protection, but also institutional empowerment. It is not a coincidence that the House of Commons began taking responsibility for its members’ conduct at the same moment at which it began asserting itself as an independent power in the English state. To allow the executive and the judiciary to be the primary engines policing member conduct is to surrender power in two distinct ways. Most immediately, it gives the president and the judges a lever with which to control member conduct, and to the extent that the other branches are operating at cross-purposes to Congress, that lever can be used to advance their interests against Congress’s. Longer term, giving the other branches responsibility for cleaning up Congress’s messes means that the public will come to trust the other branches more—to see them as the organs of rectitude and responsible stewardship of the public trust, while Congress is increasingly seen as hopelessly corrupt and incapable of keeping its own houses in order.

But Congress *is* capable of disciplining itself. It has the constitutional tools to do so and a historical tradition of using them, under the right circumstances. It should strongly consider reclaiming for itself the mantle of primary enforcer of member standards of conduct. Doing so would be in both the institutional interests of the chambers and in the public interest.

Thank you.

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<sup>50</sup> I use “censure” to include “reprimands,” as well. The two terms have often been used synonymously, although in recent years the latter may have come to connote a slightly lesser degree of disapproval. See Maskell, *supra* note 47, at 12-13.

Mr. COHEN. Thank you, sir, Mr. Chafetz.

Now, we will have James Wallner. Mr. Wallner is a resident senior fellow in governance at the R Street Institute. He researches and writes about Congress, the separation of powers, legislative procedure, and the Federal policy process. He also serves as a professorial lecturer at the Department of Government at AU, American University, a fellow at the AU Center for Congressional and Presidential Studies.

He received his master and doctorate degrees in politics from Catholic University of America and bachelor's in political science from Georgia, University thereof. He holds a master's degree in international and European politics from the University of Edinburgh, Scotland.

Mr. Wallner, you are recognized for 5 minutes.

#### **STATEMENT OF JAMES WALLNER**

Mr. WALLNER. Chair Cohen, Ranking Member Johnson, Members of the Subcommittee, thank you for the opportunity to testify about Congress' power under the constitution to discipline its Members. It is an honor to appear before you today, and I look forward to your questions.

It is important to acknowledge at the outset of my remarks that the Committee is considering the extent of Congress' power to discipline its Members just weeks after a violent mob attacked and ransacked the Capitol. Like most Americans, I was shocked, appalled, and saddened by that tragic event.

We cannot go back in time, regrettably, to change what happened that day, but we are able to learn from it. I believe that the most important lesson that that event can teach us is that it is better to resolve our disagreements via debate, deliberation, and compromise instead of through force, violence, and intimidation.

I believe that this context matters, given recent calls for Congress to discipline Members who objected to Arizona's and Pennsylvania's electoral results when the House and Senate gathered in joint session on the day of the attack to count the votes for President and Vice President.

Proponents of taking disciplinary action against those Members appear to believe that they aided and abetted the Capitol attack by using procedures authorized by the House and Senate. Specifically, the Members used procedures authorized by the Electoral Count Act of 1887 to adjudicate their concerns about two States' electoral results in the 2020 Presidential election.

Of course, Congress has the power to discipline its Members, both today and in the past, for using the procedures authorized by law. The question, however, is whether it should use that power in specific instances.

Whatever one's views are on the details of this specific case, I believe more generally that disciplining Members for using authorized procedures to participate in the legislative process on behalf of their constituents undermines that process and makes it harder for Congress' Members to debate, to deliberate, and to compromise as envisioned in the Constitution.

Disciplining Members for using authorized Rules to adjudicate their concerns on the House and Senate floors reinforces the status

quo and it makes it harder for those opposed it to, people like the civil rights activists of the 1950s and 1960s, Members of the women's suffrage movement, and abolitionists, to change public policy inside Congress.

Of course, the Constitution empowers Congress to discipline its Members. My fellow Witnesses have discussed that in great detail. The Rules and Expulsion Clause empowers the House and Senate to expel Members. Significantly, the clause does not define the appropriate grounds for expulsion. It instead raises the number of votes required to expel a Member to a two-thirds majority.

Delegates to the 1787 Federal Convention that crafted the Constitution set this higher threshold to expel Members because they wanted to make it harder for majority factions in the House and Senate to use the power to silence their political opponents.

For example, James Madison worried during the delegates' debate on this question that the expulsion power would be, quote, "dangerously abused," end quote, by majority factions if the threshold was not set at a two-thirds majority.

The Constitution empowers Congress to discipline its Members to protect the integrity of the legislative process and to safeguard Congress' role as a crucible of legitimate political conflict.

Congress has used this power to protect the space inside the House and Senate where Americans' elected representatives gather to participate in the activity of self-government on their behalf.

Constitutional provisions like the Privilege from Arrest and Speech and Debate Clauses suggest that the activity of Members inside Congress is important.

Self-government is what happens when Americans with different views come together in those institutional spaces to debate, to deliberate, and to compromise.

Because Americans with different views participate in the Act of self-government on the basis of equality, their political activity in places like the House and Senate inevitably generates disagreement or political conflict.

That is why Rules and legislative procedures are essential to making Congress work. They make it possible for Members to compromise when they disagree with one another.

Standards are important to protecting the integrity of the legislative process. They facilitate debate, deliberation, and compromise only when they are adhered to voluntarily by all Members. Such adherence requires that Members know how those standards will be enforced in advance.

Standards and Rules are vital to what Congress does because its Members can compensate for the difficulties inherent in self-government by preserving their ability to make and keep promises.

When Members cannot know with certainty the outcomes of their actions, the ability to make and keep promises in the forms of rules and norms, according to the political theorist Hannah Arendt, "creates islands of predictability" and "goalposts of reliability" in politics.

In other words, rules make it possible for Members to form expectations about how Congress will operate in the future. That, in turn, makes it easier for those Members to settle for suboptimal outcomes, to compromise, in the present.

Disciplining Members for using the rules to achieve their goals undermines the ability of those rules to serve this role and it makes enforcing the rules arbitrary. It also complicates Members' ability—

Mr. COHEN. Mr. Wallner?

Mr. WALLNER. Yes, sir?

Mr. COHEN. We have a 5-minute rule and you are kind of gone. So, if you can wrap up real quick, I appreciate it.

Mr. WALLNER. Absolutely.

Well, I would just say that Congress, I believe, should refrain from using its constitutional power to discipline its Members for following the rules and it should instead focus its effort on changing those rules moving forward. The ability of its Members to debate, deliberate, and compromise ultimately depends upon it.

[The statement of Mr. Wallner follows:]



James Wallner  
R Street Institute

Testimony

“The Constitutional Framework for Congress’s Ability to Uphold Standards of Member Conduct”

Subcommittee on the Constitution, Civil Rights, and Civil Liberties  
Committee on the Judiciary

House of Representatives

March 11, 2021

Chairman Cohen, Ranking Member Johnson, Members of the Subcommittee,

Thank you for the opportunity to testify about Congress’s power under the Constitution to discipline its members. It is an honor to appear before you today. And I look forward to your questions.

#### INTRODUCTION

It is important to acknowledge at the outset of my remarks that the committee is considering the extent of Congress’s power to discipline its members just weeks after a violent mob attacked and ransacked the Capitol. Like most Americans, I was shocked, appalled, and saddened by that tragic event.

We cannot go back in time, regrettably, to change what happened that day. But we are able to learn from it. And I believe that the most important lesson that the event can teach us is that it is better to resolve our disagreements via debate, deliberation, and compromise instead of through force, violence, and intimidation.

I believe that this context matters given recent calls for Congress to discipline members who objected to Arizona’s and Pennsylvania’s electoral results when the House and Senate gathered in joint session on the day of the attack to count the votes for president and vice president.<sup>1</sup> Proponents of taking disciplinary action against those members appear to believe that they aided and abetted the Capitol attack by using procedures authorized by the House and Senate.

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<sup>1</sup> The Constitution requires that Congress count the electoral votes for president and vice president in joint session. Specifically, it stipulates, “The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President.” U.S. Const. art. II, § 1, cl. 3.

The individuals at the center of the current debate over Congress's ability to discipline its members used procedures authorized by the Electoral Count Act of 1887 (Public Law 49-90) to adjudicate their concerns about Arizona's and Pennsylvania's electoral votes. Among its provisions, the Electoral Count Act of 1887 directs the vice president to "call for objections" to the states' electoral votes as they are read and counted in joint session. Members of Congress who object must do so in writing. That is, they must "state clearly and concisely, and without argument, the ground" on which they base their objections. Two members (one from the House and one from the Senate) must sign an objection to a state's electoral votes. In the event that the required number of members object to a state's electoral votes, the House and Senate meet separately to weigh the merits of the objection and to determine whether it should stand.

The Electoral Count Act also establishes special procedures to govern debate in the House and Senate over whether the objection that prompted the separate meetings should stand. Specifically, the law caps debate in each chamber at no more than two hours. It also prohibits members from speaking more than once on the question and limits members' speeches to five minutes. After two hours - or when no member seeks recognition to speak - the chambers vote on whether to sustain the objection or to reject it. Both the House and Senate must vote separately to sustain the objection for it to stand. If one chamber votes to sustain the objection and the other chamber does not, Congress counts the electoral votes.

Of course, Congress has the power to discipline its members for using the procedures authorized by the Electoral Count Act of 1887 to adjudicate their concerns about the 2020 elections on the House floor. The question, however, is whether it should use that power.

Notwithstanding the details of this specific case, I believe that disciplining members for using authorized procedures to participate in the legislative process undermines that process and makes it harder for Congress's members to debate, deliberate, and compromise as envisioned in the Constitution. Penalizing members for acting in ways that do not violate specific rules also reinforces the status quo and makes it harder for those opposed to it - people like the civil rights activists of the 1950s and 1960s, members of the women's suffrage movement, and abolitionists - to change public policy inside Congress.

#### THE CONSTITUTION

The Constitution empowers Congress to discipline its members (or prospective members) in three ways. First, its Qualifications and Quorum clause allows a majority in the House and Senate to block candidates from taking their seats after an election if the members believe that the candidate in question does not meet the Constitution's eligibility requirements. The scope of this power, however, is limited to the membership qualifications enumerated in Article I of the Constitution.<sup>2</sup>

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<sup>2</sup> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business." U.S. Const. art. I, § 5, cl. 3. Alexander Hamilton notes in *Federalist 60* that "the qualifications of the persons who may choose or be chosen...are defined and fixed in the Constitution; and are unalterable by the legislature." The Supreme Court similarly ruled in *United States v. Powell*, "The Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." *United States v. Powell*, 379 U.S. 48 (1964).

Second the Constitution's Rules and Expulsion clause gives the House and Senate plenary power over the rules of their proceedings. Majorities in both chambers have used their power to adopt, among other things, standards of official conduct. The Constitution's plenary grant of power also empowers House and Senate majorities to censure, reprimand, or fine their members when they violate those standards or otherwise engage in "disorderly behavior."<sup>3</sup>

The Constitution also limits the scope of Congress's rule-making power. In the 1892 case, *United States v. Ballin*, the Supreme Court conceded that House and Senate majorities are free to adopt rules. But the Court also acknowledged that Congress's power to adopt rules to regulate its proceedings is not unlimited. Justice David Brewer pointed out that while "the Constitution empowers each house to determine its rules of proceedings," the House and Senate cannot, by their rules, "ignore constitutional restraints or violate fundamental rights."<sup>4</sup>

Finally, the Rules and Expulsion clause empowers the House and Senate to expel members. However, the clause does not define the appropriate grounds for expulsion. It instead raises the number of votes required to expel a member to a two-thirds majority. Delegates to the 1787 Federal Convention that crafted the Constitution set a higher threshold to expel members because they wanted to make it harder for majority factions in the House and Senate to use the power to silence their political opponents. For example, James Madison worried during the delegates' debate on this question that the expulsion power would be "dangerously abused" by majority factions if the threshold was not set at a two-thirds majority.<sup>5</sup>

#### A CRUCIBLE OF CONFLICT

The Constitution empowers Congress to discipline its members to protect the integrity of the legislative process and to safeguard Congress's role as a crucible of legitimate political conflict by protecting the space inside the House and Senate where Americans' elected representatives gather to participate in the activity of self-government on their behalf. Constitutional provisions like the Privilege from Arrest and Speech and Debate clauses suggest that the activity of members inside Congress is important.<sup>6</sup>

If self-government is an activity in which citizens or their representatives participate, then it requires a shared space, or venue, in which that activity can occur. In classical Athens, that shared space was denoted by the *polis*. In Rome, it was called the *res publica*. In America, the

<sup>3</sup> Article I, section 5, clause 2. "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." U.S. Const. art. I, § 5, cl. 2. See also, "Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives," *Congressional Research Service* (June 27, 2016).

<sup>4</sup> *United States v. Ballin*, 144 U.S. 1 (1892).

<sup>5</sup> *Records of the Federal Convention of 1787*, Max Farrand, ed. Vol. II (New Haven: Yale University Press, 1911), 254.

<sup>6</sup> The Privilege from Arrest clause stipulates, "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." The Speech and Debate clause stipulates that members "shall not be questioned in any other Place" for their "Speech or Debate in either House." U.S. Const. art. I, § 6, cl. 1.

institutional venues established by the Constitution - places like the House and Senate – create the space where self-government happens.

Human plurality makes the Constitution's institutional venues essential to self-government. For example, members of Congress need a venue where they can make collective decisions because they are all equal. Members are equal in the sense that they each represent separate and distinct constituencies. Moreover, no two individual members can be considered the same in any respect other than the fact that they are both unique, each possessing their own abilities, characteristics, interests, hopes, and fears. Consequently, adjudicating their disagreements inside Congress is the only way that members can form a greater understanding of reality in the round. And it is that understanding that makes compromise possible.

Self-government is what happens when Americans with different views come together to debate, deliberate, and compromise in a shared space governed by rules. And because Americans with different views participate in the act of self-government on the basis of equality, their political activity in places like the House and Senate inevitably generates disagreement, or political conflict. That is why rules and legislative procedures are essential to making Congress work. They make it possible for members to compromise when they disagree with one another.

While conflict is inherent in the legislative process, members of legislatures have throughout history have tried to find a substitute for the legislative process that does away with the unpleasant realities of self-government altogether. However, all such attempts eventually end in the transformation of politics into something else entirely. This is because taking steps to assert control over the act of self-government, to make its outcomes predictable, and to shield citizens and their elected representatives from the consequences of their actions implies imposing a standard on the legislative process from outside that process, which itself requires restricting legislators' ability to participate in it. Such standards can serve to facilitate debate, deliberation, and compromise only when they are imposed on all members equally and in advance.

#### THE ROLE OF RULES

Rules are vital to what Congress does because its members can compensate for the problems inherent in self-government by preserving their faculties of forgiving one another and making and keeping promises. When members cannot know with certainty the outcomes of their actions, the ability to forgive is vital. Without it, they are locked in a chain reaction process of action and reaction, unable to break free from the original deed that set it in motion. Similarly, the ability to make and keep promises in the form of rules and norms, according to the political theorist Hannah Arendt, creates "islands of predictability" and "goalposts of reliability" in politics.<sup>7</sup> In other words, they make it possible for members to form expectations about how politics will be conducted in the future. That, in turn, makes it easier for members to settle for suboptimal outcomes (i.e., to compromise) in the present.

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<sup>7</sup> Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958), 237.

Disciplining members for following the rules undermines their ability to serve this role and it makes enforcing the rules arbitrary. It also complicates members' ability to form expectations about how those rules will be implemented in the future.

#### POLITICS AS PRODUCTION

While the Constitution understands self-government to be an activity in which citizens, or their elected representatives, participate to make collective decisions, Americans today generally understand what happens inside the House and Senate as a production process. That is, they see the House and Senate as factories and their members as workers on an assembly line where they execute their assigned roles instead of participating in a particular practice at a distinct place and time.

Viewing the Congress in these terms changes how we think about the practice in which its members are engaged. That is, we no longer understand them to be participating in an activity on our behalf - the acts of debating, deliberating, and compromise that are essential to lawmaking. Members become, in our minds, craftsmen who apply technical knowledge to make policy widgets. Like all production processes, members' work follows an existing blueprint that is designed by someone else in another place and time.

The problem with this view is that no one person or factory foreman can control Congress and its members. Consequently, outcomes in the Senate (and House) cannot be known in advance. Instead, they are determined by members participating in an activity that takes place, for the most part, inside Congress using authorized rules and procedures as leverage to participate in negotiations with one another. Congress passes legislation in this process as a result of the decisions individual members make over the course of a debate as they act and react to one another.

Understanding Congress in terms of a factory undermines the rules members need to make this process work. Viewing the legislative process as a means to a higher-end (or policy widget) functionalizes it. And it renders political conflict inside the House and Senate something against which Congress must be insulated.

It is easier for members to rationalize departures from the rules when doing so is believed to be necessary to achieve their ends and to condemn such departures by their opponents when they are not. It is also easier for members to rationalize disciplining their political opponents when they follow the rules to achieve their goals. When coupled with the rising toxicity of our current politics, members' tendency to disregard the rules when doing so helps them, to call for their strict enforcement when it does not, and to discipline their opponents for following the rules, exacerbates Congress's present dysfunction and makes it harder for the House and Senate to operate as envisioned by the Constitution.

#### POLITICAL CONFLICT VS. VIOLENT CONFLICT

Calls to discipline members for following the rules in the past instead of changing the rules moving forward highlights a pervasive view in politics at present that political conflict makes it

harder for Congress to debate, deliberate, and compromise. This view is premised on a sliding-scale understanding of disagreement in which political conflict is located at one end of the continuum and violent conflict is at the other end. It assumes that too much political conflict eventually leads to violence.

But politics and violence are two different ways to resolve disagreements in society. Violence occurs when people reject politics and turn to force and intimidation to adjudicate those disagreements. In contrast, politics happens when people opt for debate, deliberation, and compromise to resolve their differences.

The activity of individual members of Congress inevitably generates conflict in the House and Senate spaces where they persuade, bargain, negotiate, and compromise with one another. That makes conflict between members an inescapable, and essential, part of the practice that constitutes legislative politics. To wall-off congressional deliberations from that conflict- may make it easier for members to negotiate deals- thereby increasing Congress's legislative productivity in the short term- but doing so also undermines its overall lawmaking capacity over time. This is because insulating Congress from political conflict makes it harder for people opposed to the status quo to change it.

A sliding-scale understanding of conflict makes it harder to acknowledge that disagreeing in Congress can drive members to compromise with one another in the absence of consensus. The effort required for different members to prevail in such contests using procedure as leverage inside institutional spaces like the House and Senate also means that a genuine desire for compromise is not a precondition for achieving a deal. Instead, the dynamics of legislative politics organically produce a deal that legislators support as long as they want to win. The practice does so by regularly bringing legislators who want to prevail in a debate into conflict with one another over the course of that debate in a shared space governed by rules. Perhaps most important, the contested nature of legislative politics also serves to reconcile the losers in a debate to its outcome.

#### CONCLUSION

Congress is not merely a medium of mechanistic transmission through which forces exogenous to the House and Senate determine outcomes. Rather, the debates and confrontations in which members participate inside the House and Senate as the process unfolds represent them acting at cross-purposes to prevail over one another. Over the course of a debate on a controversial issue (e.g., civil rights), members are reconciled to a single outcome because the dynamic nature of legislative politics generates new options that make a compromise possible where none was previously (e.g., the Civil Rights Act of 1964).

To appreciate that conflict is not antithetical to compromise and is instead a necessary precondition for the emergence of compromise agreements whenever members disagree requires that we first acknowledge the adverbial nature of self-government and the importance of rules to making it work. Conflict facilitates compromise because it entails effort on the part of members. And increasing the effort required of members to prevail in a debate imposes costs on them. Those costs accumulate and, in the process, create the space where negotiation and bargaining

can occur. It is that bargaining process that makes compromise possible in the first place.

For these reasons, Congress should refrain from using its constitutional power to discipline its members for following the rules and should instead focus on changing those rules moving forward. The ability of its members to debate, deliberate, and compromise depends on it.

Thank you.

Mr. COHEN. Thank you, sir. I appreciate your being a Witness, and I appreciate your testimony.

Our final Witness is Stan Brand. Mr. Brand is a partner in the Brand Woodard law firm. He serves as Distinguished Fellow in Law and Government at Penn State University's Dickinson School of Law.

From 1976 to 1983, he served as general counsel to the U.S. House of Representatives under the august Speaker Thomas P. "Tip" O'Neill, where he was the House's chief legal officer responsible for representing the House, its Members, officers, and employees in connection with legal procedures and litigation arising from the conduct of their official activities.

In private practice he has represented numerous individuals and organizations investigated by or called to testify before Congress.

Mr. Brand holds a J.D. from Georgetown University Law Center and a B.A. from Franklin & Marshall.

You are recognized for 5 minutes, sir.

#### STATEMENT OF STANLEY M. BRAND

Mr. BRAND. Thank you for inviting me to address this important topic, Mr. Chair. It is nice to be back in the House, even just as a Witness, even virtually.

I am a creature of the House of Representatives, having served as the first litigating House counsel under Speaker Tip O'Neill. It was during his tenure that I represented the House in defense of its constitutional authority at all levels of the Federal judiciary, including before the Supreme Court.

These cases, far-reaching and precedent-setting, involved challenges to the House chaplaincy, the legislative veto, subpoenas to the executive branch involving claims of Presidential privileges, and the legislative immunity of Members and officers of the House in civil and criminal cases, and the latter's intersection with the self-disciplinary power that is the subject of today's hearing.

What I learned in the course of those representations was the dearth of judicial understanding of and appreciation for the House's unique and expansive authority to discipline its Members.

As I explain in more detail in my written statement, that is why I requested and the Speaker granted my request to enter the case of *United States v. Helstoski* in the Supreme Court, to disabuse the Supreme Court of its notion, as articulated in *Brewster*, that the process of disciplining a Member is subject to the risk of abuse if not bounded by procedural safeguards or standards and is within the unbridled discretion of the House.

Our amicus brief argued that the House's process, while not exactly equivalent to a judicial trial, was attended by the rudiments of due process and detailed rules of procedure, which seemed to at least earn tacit acknowledgment in its *Helstoski* decision a decade later.

To sustain a robust self-disciplinary process free from judicial intervention, I believe the House must be sensitive to what the courts could construe as limits on its power.

This does not mean the House should shrink from its obligation to police its Members. As I explain in my written statement, to prevent what I believe has been overreaching by the Department of



Justice in pursuit of its enforcement of criminal statutes, the House must have a credible enforcement process to allay judicial, indeed public concern that Members who violate its ethical rules will not be held accountable.

The proper place to determine the applicability of House rules governing Members' conduct is in the House. Although it is almost 40 years since I left the House, and I have been on the defense side of the table, as it were, in over three dozen ethics proceedings in the House and Senate, I continue to advocate for the disciplinary power of the House.

I filed an amicus brief in support of the certiorari petitions, for example, in *Aaron J. Schock v. United States*, seeking review of the Seventh Circuit rulings dismissing challenges to an indictment against former Congressman Schock based on the rulemaking Clause and the Speech or Debate Clause, which, in my view, pose serious threats to the independence of the Congress.

I filed an amicus brief supporting certiorari in the criminal case of *Richard Renzi v. United States* because the indictment charged the performance of legislative acts, in that case pre-legislative investigations and fact-finding, which I believe contravene the Speech or Debate Clause.

In both cases I argued that the proper forum for consideration of these alleged offenses was in the House, not before the judiciary. I pointed both to the Office of Congressional Ethics and the House Ethics Committee as the responsible offices for vindicating the House's self-disciplinary process for legislative misconduct.

I continue to believe in that principle, and I welcome your questions in this matter.

Thank you.

[The statement of Mr. Brand follows:]

**BRAND | WOODWARD**  
Attorneys at Law

Written Testimony of Stanley M. Brand, Esq.

The Constitutional Framework for Congress' Ability  
to Uphold Standards of Member Conduct  
on  
March 11, 2021

Submitted to  
U.S. House of Representatives  
Committee on the Judiciary Subcommittee on the  
Constitution, Civil Rights, and Civil Liberties

The constitutional source of the House's disciplinary power over its members' conduct is contained in Article I, § 5 of the Constitution: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

There are no other express textual limits on its power to expel. In addition, the House may determine the rules of its proceedings, U.S. Const. art. I, § 5, cl. 2, and under this provision it has promulgated extensive rules governing the conduct of its members and procedures for adjudicating allegations of misconduct. See House Rule XXIII (establishing a "Code of Official Conduct"); see also House Rule XI, cl. 3(a)(2) (authorizing House Ethics Committee to investigate and try alleged violations of the Code of Official Conduct or of a law, rule, regulation or other standard of conduct applicable to members, delegates, Resident Commissioners, officers or employees of the House). Finally, the constitutional speech or debate clause provides that Members "shall not be questioned in any other Place," in performing legislative functions, U.S. Const. art. I, § 6, cl. 1, which includes more than literal speech or debate, but also "inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States v. Brewster*, 408 U.S. 501, 525 (1972).

The clause is more than a mere evidentiary privilege for "its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government," *United States v. Helstoski*, 442 U.S. 477, 491 (1979), and to "free the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator." *Gravel v. United States*, 408 U.S. 606, 618 (1972). And the privilege cannot be waived absent "an explicit and unequivocal expression." *Helstoski*, 442 U.S. at 493. The Supreme Court has approvingly cited an early case from the Supreme Judicial Court of Massachusetts declaring that the privilege may be asserted by a member "even against the declared will of the house." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), cited in *Helstoski*, 442 U.S. at 493. In this sense, the self-disciplinary power of Art. I, §5 and the speech or debate clause of Art. I, §6, read in *pari materia* comprise a jurisdictional allocation to the House as the only body that can investigate, charge, and try a certain species of member misconduct that occurs within the "legitimate legislative sphere." *McSurely v. McClellan*, 553 F.2d 1277, 1295 (D.C. Cir. 1976) (*en banc*); see also *United States v. Brewster*, 408 U.S. 501 (1972) ("The speech or debate clause is an allocation of power. It authorizes Congress to call offending Members to account in their appropriate houses. (White, J., dissenting)).

The House has only exercised its power to expel five times – three times for various offenses related to members' service for the confederacy – and two after members were convicted in federal court for accepting bribes and in the performance of their duties. Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 115-177, 115th Cong. 2d Sess. §65 at 31 (2019). The matter of expulsion and the misconduct for which it may be exercised seems firmly within the discretion of the House. *Burton v. United States*, 202 U.S. 344, 369 (1906) (a Senator having been convicted under a statute rendering him incapable of holding any office under the government of the United

States does not compel the Senate to expel him or to *ipso facto* operate to vacate his seat). Like the Senate's "sole Power to try all Impeachments," U.S. Const. art. I, § 3, cl. 6, there are no "identifiable textual limits" on the power to expel, *Walter L. Nixon v. United States*, 506 U.S. 224, 238 (1995), although there may be implied limits emanating from other constitutional provisions. See *Powell v. McCormack*, 395 U.S. 486, 539-540 (1969) (the Art. I, §5 power conferred on each House to "be the judge of the elections, returns and qualifications of its own Members" is limited to the "fixed" standing qualifications of age, residency, and citizenship specified in Art. I, § 2).

Neither does the Constitution define the scope of "disorderly behavior" in Art. I, § 5, but because expulsion requires a super majority it may be instructive to reference the impeachment clause in Art. I, § 2, cl. 5, which specifies the offense for which impeachment may be imposed: "Treason, Bribery, or other high Crimes and Misdemeanors." As mentioned, the five previous expulsions from the House have all involved either treason or bribery. While it has been asserted that "an impeachable offense is whatever a majority of the House of representatives considers [it] to be at a given moment in history," 116 Cong. Rec. 11913 (1970) (remarks of Congressman Ford regarding charges relating to Justice William O. Douglas), the House has never adopted such a broad and unfettered basis for impeachment.

Also by express terms in Art. I, § 5, cl. 2, the House has the power to impose lesser punishments than expulsion, including censure, reprimand, suspension from certain privileges of membership, fines and possibly even imprisonment. See *Kilbourn v. Thompson*, 103 U.S. 168, 189-90 (1880) ("we see no reason to doubt that this punishment may in a proper case be imprisonment"). The powers of the House to imprison a Member for misconduct was an issue in the *Helstoski* case. By the time the case reached the Supreme Court, Congressman Helstoski had been defeated in his re-election because of his criminal indictment. I briefed and argued the case as *amici* for Speaker O'Neill in the Supreme Court and asserted that indeed, the House could discipline a former member for conduct occurring while an incumbent largely to counter the Department of Justice's position that the interpretation we were urging on the Court relating to applicability of the Speech or Debate Clause immunity to Helstoski's legislative acts would not leave his conduct unremedied – i.e., the House could assert jurisdiction over alleged violations of bribery because the House was "the place" where such conduct could be questioned. The Court did not squarely decide the issue of punishment of former members, but in a footnote addressing dissenting Justice Stevens's concern that the Court's decision would allow Members to effectively immunize themselves simply by placing references to legislative acts in their communications rendering them inadmissible, the majority stated: "nothing in our holding today . . . immunizes a Member from punishment by the House . . . by disciplinary action including expulsion from the Member's seat." *Helstoski*, 442 U.S. at 489 n.7.

The House has never sought to impose imprisonment under its constitutional power to punish members and the House Ethics Committee has generally determined to allow ethics

investigations to lapse upon the retirement or defeat of a Member involved in a pending matter. *See* Staff of House Comm. On Standards of Official Conduct, 100th Cong., 1st Sess., Report in the Matter of Representative William H. Boner (Comm. Print 1987) (while the Committee has not issued reports in cases where Members were terminated through resignation, retirement or electoral defeat, issues relating to conduct of the inquiry warrant public disclosure).

Included within the range of punishments the House has imposed censure; which is inflicted by the Speaker of the House by reading the charges with the Member in the well of the House, 2A Hinds Precedents of the House of Representatives § 1259 (1907), and the words are entered in the Journal. *Id.* § 1281. A lesser form of punishment is the reprimand, which is debated on the floor as a privileged matter and noted on by the House. *See, e.g.*, Korean Influence Investigation, Report By the Comm. On Standards on Official Conduct, H.R. Rep. No. 95-1917, 95th Cong. 2d Sess. (1978). The House has also imposed fines in connection with other punishment imposed on Members for misuse of appropriated funds. *See* Mary Russell, "House Votes to Censure Rep. Riggs," Wash Post. (Aug 1, 1979) (Rep. Diggs ordered to execute and deliver to the House an interest-bearing promissory note for \$40,031.66 made payable to the U.S. Treasury).

There is also a House Rule that a Member convicted by a court of record for a crime for which a sentence of two or more years imprisonment may be imposed "should refrain from voting on any question at a meeting of the House . . . unless or until judicial or executive proceedings result in reinstatement of the presumption of the innocence of such Member or until the Member is reelected to the House after the date of such conviction." House Rule XXIII, ¶ 10. While the terms of the Rule are precatory, there is always the possibility that a member invoking Rule IX could put the issue of a Member's conduct before the House as a matter of privilege. Depriving a member of the right to vote could be construed as a constructive expulsion and would implicate the constitutional infirmities relied upon by the House to exclude Rep. Powell. *See* Constitution, Jefferson's Manual, and Rules of the House of Representatives, H.R. Doc. No. 115-177, 115<sup>th</sup> Congress. 2d Sess. §672 at 389 (2019)

The Ethics Committee has also issued "letters of reproof" under House Rule XI(3)(a), which is not subject to action by the full House and is used for lesser infractions not deemed to merit approval by the full House. Letters of reproof have been issued for violations of House gift rules, misuse of official funds for political purposes and improper conversion of campaign funds for personal use. *See generally* Congressional Research Service, Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives at 19-26 (June 27, 2016).

I also would like to further address a specific issue raised by the Subcommittee staff in its inquiry of my interest in testifying at today's hearing: the significance of the landmark decision in *Powell v. McCormack*, 345 U.S. 486 (1969). While the *Powell* case involves an

exclusion not an expulsion case, in my view the implications of the decision clearly impact an analysis of what limits may be applicable to the power of the House to expel.

*First*, there is language in the opinion that suggests there may be limits on that power. “Since we conclude that Powell was excluded from the 90th Congress, we express no view on what limitations may exist on Congress’ power to expel or otherwise punish a member once he has been seated.” 395 U.S. at 507 n.27. While the Supreme Court often uses such language to make clear what it is not deciding, lest anyone misconstrue the reach of a decision beyond the confines of its specific facts, it also leaves the Court room to interpret a future set of facts distinguishable from the case at bar.

*Second*, the Supreme Court’s canvass of the history of the Art. I §2 power to judge the qualifications of its members suggest, but does not hold, that there is a heavy presumption in favor of the inviolability of the choice of the electorate as against the power of the House to punish for conduct occurring prior to election, especially where the electorate is aware of the conduct forming the basis for discipline. *Powell* contains a lengthy historical recitation of this principal, going all the way to back to the famous *Wilke’s* case in Parliament in 1782. The Court referred to English practice for the proposition that by the adoption of the Constitutional Convention parliamentary precedent established that “the law of the land had regulated the qualifications of members to serve in parliament, and . . . provided he was not disqualified by any of those known laws. . . . They are not occasional but fixed.” 395 U.S. at 534 n.65 (*quoting* 16 Parl. Hist. Eng. 589-590 (1769) (quotations omitted)).

And the Court also cited with approval a House precedent involving the proposed expulsion of two Members: Art. I, § 5 “cannot vest in Congress a jurisdiction to try a member for an offense committed before his election; for such offense a member, like any other citizen, is amenable to the courts alone.” 395 U.S. at 509 n.29 (*quoting* H.R. Rep. No. 815, 44<sup>th</sup> Cong., 1<sup>st</sup> Sess., 2 (1876)). This is because, as the Court noted, and as explained by Hamilton prior to the New York ratification convention: “The true principle of a republic is, that the people should choose whom they please to govern them. . . . This great source of free government, popular election, should be perfectly pure, and the most unbridled liberty allowed.” 395 U.S. at 540-41 (*citing* 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876) (quotations omitted)).

This principle has been given greater weight by the House itself in the previously mentioned Code of Official Conduct of Rule XXIII, ¶ 10, which admonishes Members to refrain from voting upon conviction by a court of record for a crime for which a sentence of two or more years imprisonment “until the Member is re-elected to the House after the date of such conviction.” This seems to recognize the primacy of the electorate in choosing even a convicted felon to represent them, at least when the electorate is fully aware of the conduct at issue. Indeed, when I served as House counsel, Rep. Caldwell Butler (R-VA) moved a privileged resolution to expel Rep. Charles Diggs (D-MI), based on his conviction for mail fraud and false statements after his re-election in the Democratic primary by a

large margin. The House voted to table the motion after a debate that included discussion of whether the House should expel a Member who had been re-nominated in his Party's primary by a constituency fully aware of his conviction and the facts surrounding it. I explored this issue in an op-ed in *Politico* titled, "Why the Law Might Not Allow the Senate to Expel Roy Moore" (Nov. 22, 2017), and argued that *Powell* might foreclose expelling Moore, were he elected, based on the history of Art. I, § 2 power of the Supreme Court canvassed in *Powell*.

There are two other landmark cases I would commend to the subcommittee, as well, in assessing what the limits of the expulsion power might be: *United States v. Brewster*, 408 U.S. 501 (1972), and *Bond v. Floyd*, 385 U.S. 116 (1966).

In *Brewster*, the Court was faced with the question of whether the Speech or Debate Clause prevented an indictment and trial on bribery charges related to the Senator's actions on postal rate legislation. The petitioner asserted that the Clause should completely immunize a Member for the performance of official duties related to the legislative acts charged in the indictment. In buttressing that claim, he rebutted the arguments that extending the speech or debate clause more broadly to acts related to his legislative activity would immunize him from any accountability by pointing to the disciplinary power of the Senate to review and punish the conduct in the indictment. In a lengthy discussion of the Art. I, § 5 power, the Court disparaged Congress' exercise of self-discipline, concluding Congress was "ill-equipped to investigate, try, and punish its Members;" and that the process is subject to "countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case;" "an accused Member is judged by no specifically articulated standards and is at the mercy of an almost unbridled discretion of the charging body that functions at once as the accuser, prosecutor, judge, and jury from whose decision there is no established right of review . . . without the safeguards provided by the Constitution." *Brewster*, 408 U.S. at 519. The Court also cast doubt on the ability of Congress to reach the conduct since it was brought to light after his defeat. *Id.* It was this dismissive, and frankly uninformed, language in *Brewster* that compelled me to advise the Speaker that we needed to intervene in the *Helstoski* case when it reached the Court to allay these misconceptions about the self-disciplinary power lest they spawn further progeny. And the brief I filed and argued articulate that even in 1979, the self-disciplinary procedures in the House was attended by the rudiments of due process: right to counsel, right to a trial and cross-examination, a heightened standard of proof—preponderance of the evidence, House Comm. On Standards of Official Conduct, 95th Cong., 1st Sess., Manual of Offenses and Procedures, Korean Influence Investigation 40 (Comm. Print 1977), written rules governing its procedures (including well pleaded complaints, motions for lack of jurisdiction) and a voluminous evidentiary record. See Brief of Amici Curiae of House Speaker Thomas P. O'Neill, Jr., Speaker, et. al., *United States v. Helstoski*, 442 U.S. 477 (1979). Since that time the House has added additional protections for respondents, including bifurcation of the investigative and trial phases, a statute of limitations, and other substantive rights. I would like to think it was the Speaker's brief that at least partially

persuaded the majority to include footnote seven in the opinion, recognizing the House's self-discipline power with no mention of the Supreme Court's assessment in *Brewster*. In addition, as the Court's Opinion in *Helstoski* came after Helstoski had left office, there is at least a reasonable inference that the Court again retreated from its prior disparagement of the self-disciplinary process as a credible alternative to criminal prosecution.

My point here is simple: the House needs to be aware of the potentiality of adverse judicial rulings when it pushes the outer boundaries of its constitutional powers. In the *Powell* case itself, the House proceeded on the mistaken view that it could exclude Powell by a simple majority and was insulated from judicial review by the Speech or Debate clause, the political question doctrine and the alleged mootness of a case due to Powell's subsequent re-election and seating by the 91st Congress. Prudential considerations as well as textual analysis, counsels caution in this area particularly after *Powell* and its reliance on parliamentary and historical evidence to parse the Art. I, § 2 and Art. I, § 5 constitutional provisions.

Finally, I mention *Bond v Floyd*, 385 U.S. 116 (1966), to emphasize the limits on the House's disciplinary power. Julian Bond, an African American civil rights activist, was elected to the Georgia House of Representatives and while a staff member of the Student Nonviolent Coordinating Committee issued anti-war statements against the government's conduct of the war in Vietnam and the Selective Service laws. The Georgia House refused to seat him, finding that his statements aided the enemy, violated the Selective Service Laws and were inconsistent with a legislator's mandatory oath to support the Constitution (even though Bond was willing to take the oath freely). He brought suit alleging the action deprived him of his first amendment rights and were racially motivated. He was re-elected while his appeal to the Supreme Court was pending and elected again in 1966, despite his refusal to recant his statements. The Court held that the legislature was not authorized to test the sincerity with which a duly elected legislator meets the requirements of swearing an oath to the Federal and State Constitutions. 385 U.S. at 132. The Court also held that Bond's statements did not violate the Selective Service statute's prohibition on counseling against draft registration for military service. *Id.*, at 133-134. And consistent with the First amendment a state may not limit a legislator's capacity to express views on local or National policy. *Id.*, at 136 (*quoting New York Times v Sullivan*, 376 U.S. 254, 270 (1964)). Based on *Bond*, the House's authority to expel or exclude for controversial or even inflammatory speech, but which do not rise to the level of incitement to riot or other federal offenses, may be quite limited.



Mr. COHEN. Thank you, Mr. Brand.

We will now proceed under the 5-minute rule with questions, and I will take the first 5 minutes here as a prerogative.

For Mr. Maskell or Mr. Chafetz, much of the House's disciplinary practice is guided by precedent. What general principles or policies, if any, have evolved over time regarding the exercise of the House's disciplinary authority?

Mr. Maskell, do you want to take the first?

Mr. MASKELL. Yes, sure.

Mr. Chair, that is a good question. Stan Brand mentioned the fact that there are entire rules that the House Ethics Committee has adopted that sets in motion procedures that would satisfy most arguments of due process.

So, over the course of the number of years, although some courts and some people in Congress have thought that it could be a procedure just quickly on the floor without much due process, respect for that process has come about over the years.

We now have these detailed procedures. When, for example, an expulsion resolution is referred to the Committee, we have all the due process questions and procedures.

Mr. COHEN. Thank you, sir.

Mr. Chafetz, do you want to add anything to that?

Mr. CHAFETZ. I think he basically covered it. I would just add that from the earliest days of Congress these questions have arisen. Whenever there have been, especially expulsion proceedings, there has always been a concern to have some sort of adequate procedure to protect the Members.

You can understand why, right? These are Members using discipline against their own colleagues. It is not surprising that they would have a sense that they want to be fair, if for no other reason than a "there but for the grace of God go I" kind of feeling.

Mr. COHEN. Thank you, sir.

Mr. Brand or Mr. Maskell, what is the significance of the Supreme Court decision in *Powell v. McCormack*—I guess Speaker McCormack—to Congress' power to discipline its Membership? Did the case in any way alter the way Congress considers questions of Member discipline?

Mr. Brand, do you want to take a shot at that and explain *Powell* to us?

Mr. BRAND. Yes, sir.

*Powell*, of course, is an exclusion case. In the course of interpreting the standing qualifications of office—age, citizenship, and residency—I think the Court cast some doubt on the Congress' ability to exclude a Member—or to discipline, at least, expel a Member who had been re-elected by his constituents in the interim.

That is a case where the Constitution in other sections provided a textual limit, at least in the Court's view, on what the power of the Congress would be.

The other Witnesses have pointed out, the Expulsion Clause by itself has no express textual limits, but the old saying in law school is hard cases make bad law. The Supreme Court is always capable of taking jurisdiction over a matter where it thinks the Congress could have arguably exceeded its authority.

So, I think Powell is a warning light. It is not an express limitation, but the historical treatment of the power of the Congress to exclude in that case I think has to be looked at.

I would associate myself with Professor Chafetz's written statement on the history of all of this, because it is incredibly important to understand how we got to the position we did in the Constitution. He has outlined the background in Parliament for all of this.

Mr. COHEN. Thank you, sir.

Professor Chafetz, in the Constitutional Convention, which I am sure you have read about, was congressional discipline discussed and how it should work? Were there any points of contention or concerns if there was any discussion?

Mr. CHAFETZ. So, it was discussed, although it was discussed relatively briefly.

So, I mention in my written testimony that you get this initial draft in the Committee of Detail that gives each house of Congress the authority to punish its own Members for disorderly behavior and says each house can expel, but not a second time for the same offense. Then the next draft we get, with no explanation, they just drop but not a second time for the same offense.

This is all before it comes to the floor of the Convention. On the floor of the Convention, James Madison says, well, we have to worry about what he calls emergency of faction, situations in which—he didn't want to use the word "party," "partisan," but factional differences would run so high that a majority faction might expel minority Members.

So, he says, to guard against this, we should put in a two-thirds supermajority requirement for expulsion. The Committee adopts that basically without much debate, and that is it. They are done with it.

Overall, it was uncontroversial, and Madison made that sort of crucial intervention right at the end.

Mr. COHEN. Thank you, Professor Chafetz.

My 5 minutes are up, and I now recognize Mr. Johnson for 5 minutes.

Mr. JOHNSON of Louisiana. Thank you, Mr. Chair.

I want to ask Mr. Wallner—I appreciate all our Witnesses. I appreciate your historical insights, and it is important to us.

I think that I just want to say at the outset here, I know I can speak for the Republicans on the Committee, we recognize and appreciate this history. We revere the House Rules and the rules of decorum and civility and everything else that we are bound by here.

The question is, though—I would ask this to Mr. Wallner—let me read an excerpt really quick from your written report to us and ask you about that.

You said, on page 5, quote: "When coupled with the rising toxicity of our current politics, Members' tendency to disregard the rules when doing so helps them, to call for their strict enforcement when it does not, and to discipline their opponents for following the rules exacerbates Congress' present dysfunction and makes it harder for the House and Senate to operate as envisioned by the Constitution," unquote.

I certainly agree with that sentiment, but I wonder if you could unpack that for us a little bit more, Mr. Wallner, and tell us what harm might come by the House Rules being used in a new way as kind of a political weapon.

Mr. WALLNER. Thank you for the question.

The whole point of the House is to adjudicate disagreement between its Members. The rules are leverage that allow Members to participate in that process. They are what allows Members and gives them a voice to represent their constituents. Out of that struggle comes compromise.

I don't think we fully appreciate that. We don't understand that today, I believe, because we see Congress as a giant factory, and we think your job is to build widgets according to some blueprint that has been designed elsewhere.

When you have that view of Congress, all of a sudden the rules are very concerning if they allow your opponents to win. We see politics as a means to an end, not a practice in which we participate.

So, when you go down this road, it becomes very, very hard to get back, because you have adopted this view of politics as a production-oriented activity.

Therefore, I have no need to listen to you if I disagree with you, and I will ignore the rules if they give you a voice, but I will demand that those rules be enforced when they give me a voice. I am not a hypocrite for doing so, because we have two different outcomes.

I think that is exactly where we are. That is where our colleagues are, your colleagues are on the other side of Capitol Hill in the Senate right now with regard to the filibuster and the nuclear option, for instance. It is good one day and bad the other.

I think this really speaks to the problem of our politics. Today, if we can't adjudicate our disagreements in Congress, then where else are we supposed to do it? That is the problem that I think we need to grapple with.

Mr. JOHNSON of Louisiana. No, I think you said that very well.

I am going to speak to all the Witnesses today and all of my colleagues on this Committee. One thing that I think we could all agree with is that there has been, as you said, toxicity here on Capitol Hill. There is an increase in tension.

I appreciate what Chair Cohen said at the outset of this hearing. We don't want to increase the tension. We can't afford to do that because we have an escalation now. It is almost like the Cold War. It is mutually assured destruction by both sides.

We see that developing at a rapid pace, and many of us are deeply concerned about how we ever put this genie back in the bottle. The only way to de-escalate it, I would say with due respect to my Chair and my colleagues, is for us to not engage in this "gotcha" kind of politics, just as you just said.

The idea that a Member in leadership would use their official office and MRA resources to review the correspondence of nearly 150 of her colleagues to produce a 2,000-page report where she effectively insinuates that those Members are complicit in a crime is in no way a de-escalation. It is sparking a political war at the worst possible time.

Both sides are guilty of this, right? There is enough of that to go around.

I guess the question is—maybe I will start with you, Mr. Wallner, and any Witnesses who want to weigh in on this. How do we possibly use the rules and Act in an appropriate manner to de-escalate things around here? I would love to hear your insights on that.

Mr. WALLNER. Well, the first thing is to be committed to the rules even when they don't necessarily benefit you. Congressman Jordan mentioned earlier the Democrats in the past who had objected to electoral counts during the counting of the votes for Vice President and President.

Sometimes Members use rules to do things that you find unpleasant or that you find unhelpful. The point is that you can argue against them, but if you weaponize those rules and you call into question their ability to use those rules instead of saying, "Maybe we should change the rules in general for everybody," then I think that is the general direction we need to head in.

If we instead say, "We are going to attack the rules instead," we are going to drag down those rules into the fray and we are going to make it impossible for Congress to serve as that Crucible of Conflict that the Framers designed it for.

Mr. JOHNSON of Louisiana. Unfortunately, I am out of time. I yield back. I appreciate all the Witnesses for your time today.

Mr. COHEN. Thank you, Mr. Johnson.

I now recognize Chair of the Full Committee, Mr. Nadler, for 5 minutes.

Chair NADLER. Thank you very much.

I must say that, unlike a lot of different hearings, I found all the Witnesses entirely reasonable today.

Let me ask, Professor Chafetz, in your written testimony you noted that the rulemaking Clause and the Expulsion Clause's inclusion in the same section of the Constitution is likely not incidental.

What is the relationship between these two powers? How does the rulemaking Clause inform the scope of the Expulsion Clause?

Mr. CHAFETZ. So, the rulemaking Clause is in some sense seems modest from its text, but it is hugely influential. The Rulemaking Clause basically allows each Chamber of Congress to give itself its own Constitution, to create its own rules and structure its own deliberations.

Then the punishment clauses basically come in and say: If some of your Members are going against those rules you have created or are undermining the institution, then the Chamber can do something about it. It doesn't have to be sort of stuck with Members who are undermining the structure that it itself is empowered to create.

So, they go together hand-in glove, and they are tremendously important for the power of the Chambers.

Chair NADLER. Well, thank you.

Mr. Maskell, Congress' authority to discipline its Members is generally understood to be quite broad. What constitutional constraints exist on Congress' ability to discipline its Members?

Mr. WALLNER. Well, we are not really sure, because the courts haven't really restrained it specifically or directly.

In *Powell v. McCormack*, the majority opinion did note that Congress has questioned its power to expel after reelection, after a Member is reelected.

However, in that same opinion, in a concurring opinion, Justice Douglas said, if this were an expulsion case we wouldn't be here today. That is, because it is textually committed to Congress to deal with an expulsion.

So, we haven't really seen it yet. Most of the restraints have been self-restraint and the Congress and the House and the Senate itself questioning its policy to do so, because they don't want to substitute its judgment for the judgment of the electorate.

So, if the electorate knew about conduct and still elected the Member, they have—the House and Senate have generally refrained from expulsion in those cases, as a matter of policy.

Chair NADLER. Well, thank you.

Mr. Brand, first, let me say it is good to see you again.

Let me ask you, can Congress impose discipline on a Member separate from any judicially imposed criminal punishment for criminal conduct that occurred while in office?

Mr. BRAND. Yes. In fact, in 1984, shortly after I left the House, former Congressman George V. Hansen was convicted of certain felonies regarding his financial disclosure. He was convicted.

The House Ethics Committee at that time had a rule that said any Member who is convicted of an offense that carries a penalty of 2 or more years automatically gets that same conduct reviewed by the Standards Committee, albeit under a different standard of proof, not beyond a reasonable doubt but preponderance of the evidence.

In fact, I was hired as outside counsel, and subsequently the House determined to reprimand Congressman Hansen for that conduct.

So, yeah, it is a parallel system, and it is independent from the criminal justice system.

I would point out just for the memory of Congressman Hansen that his conviction was reversed, pursuant to a coram nobis petition, after the Supreme Court overturned the decision under which he had been convicted.

If I could, I would just like to try to give Congressman Johnson some comfort, if I can, and point out that the House Ethics Committee, I believe, is the only Committee in the House which is evenly divided between Democrats and Republicans. In my 40 years of experience, that has acted—some people say critically—as a check on the Committee acting in a partisan way, because to get a proceeding concluded or to bring a proceeding, you have to have somebody from the opposite party agree to move forward.

Chair NADLER. Thank you.

Let me ask Mr. Wallner, just comment on what the other Witnesses have said and where you disagree with them, if you do.

Mr. WALLNER. I would just point out that the Supreme Court said in the 1892 case *United States v. Ballin* that the power to determine Congress' own rules of procedures is unlimited, to the ex-

tent that it doesn't violate other explicit constitutional provisions. So, there are certain limits on that, from the Court's perspective.

I would also just point out that Congress—and I would encourage you and your colleagues not to adopt a Supreme Court-centric or legalistic view of this power.

As James Madison said in 1834, as the legislative executive in judicial departments are coordinate and equally balanced to support the Constitution, it follows that each must, in the exercise of its functions, be guided by the text of the Constitution, according to its own interpretation of it.

Congress does not work for the Supreme Court. Congress gets to interpret its powers under the Constitution as it sees fit as well. So, I would encourage you to think independently about that instead of looking to the courts and adopting an overly legalistic attitude towards what you are and are not allowed to do.

Chair NADLER. Thank you very much. I wasn't aware that Madison was still alive in 1834, but apparently.

In any event, thank you very much. I yield back.

Mr. COHEN. Thank you, Mr. Chair.

I would now like to recognize Mr. Jordan for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chair.

Mr. Wallner, are Democrats weaponizing the rules?

Mr. WALLNER. If Democrats are going to punish Members for using rules, then it appears that they are weaponizing the rules, yes.

Mr. JORDAN. Well, let me give you some examples.

The Democrats have taken away the one amendment that the minority party has historically had in the House, the motion to recommit. So, it is one last chance you get, as the minority party, to amend legislation that has passed, and they have taken that away from Republicans this Congress.

Is that a weaponization of the rules?

Mr. WALLNER. So, I would respectfully disagree. Whether or not that is a good idea, obviously, that is a departure, a very significant departure from the norm and it clamps down on debate and deliberation in the House. It is still setting rules and using its power under the Constitution to set those rules, and we can debate whether or not they are right or wrong.

By punishing Members for following rules, that is a whole separate order of issues that I think should concern all Members, Republican, and Democrat alike.

Mr. JORDAN. Well, let's go with that question then.

Is it appropriate to kick someone off their Committee assignments for things they said prior to coming to Congress when that person has been duly elected by the constituents in their district?

Mr. WALLNER. So, this is a question that has been debated throughout Congress' history.

I would point out that the House has the power to determine its Committee assignments. It does begin to start to look like a slippery slope when you start to penalize Members for things that they did prior to their service simply because you don't like what they did.

The question is, are you going to use your power on that Committee to somehow undermine the Congress or disrupt the fabric

of the Republic, or this simply a way to signal to one's constituents that you are strong on these issues by punishing some Member who is unrelated to you and your constituency?

Mr. JORDAN. How about bypassing the Committee process, do you think that is a good idea? It may be allowed by the rules. Do you think that is a good idea?

Mr. WALLNER. To the extent that the Committees help Congress to develop good, informative solutions to the problems we face, no, it does not appear to be a good idea.

Mr. JORDAN. I mean, the last 2 weeks Democrats have radically changed election law. They have radically changed police law. Today they voted on two pieces of legislation that radically change gun law. None of those pieces of legislation went through the Committee.

Frankly, all of them were supposed to actually come through our Committee, the Judiciary Committee, at least—well, two of them—three of them all the way that we had sole jurisdiction. On one bill, we had partial jurisdiction. None of them came through our Committee.

Next week they are going to pass two immigration bills that give amnesty to illegals, and those aren't going through Committee either.

Do you think that is healthy for the process and for this overall environment in Congress?

Mr. WALLNER. In the House, no, because the Members of the House participate in Committees. That is where you do your work, unlike the Senate, where most of it happens on the floor.

To the extent that the majority is bypassing Committees specifically to avoid allowing Members to participate in that process, that is something that is unhelpful overall to the health of our Republic and the Constitution and the House under it.

Mr. JORDAN. Are you concerned about what I would call the ultimate rule change, this phenomenon we now see in America called cancel culture? I would say, we are talking about rules, that is like the ultimate rule change in the First Amendment.

Are you concerned about what you are seeing? Well, let's do a specific example. We had two Democrat Members of Congress write a letter to the carriers of certain television networks asking them to consider pulling off FOX News, Newsmax, and One America News, from their platform.

Do you think that is healthy?

Mr. WALLNER. I do not. I am very concerned.

I have strong policy views about things, but I am very concerned about any effort, Republican or Democrat, to silence one's opponents, because in politics you reveal yourself and you take positions and you participate by speaking out and by acting.

That is what the First amendment is all about. There are associational rights that allow us and empower us to participate in politics. That is what makes us—

Mr. JORDAN. I would never, Mr. Wallner, I would never write a letter asking carriers to take down CNN and MSNBC, because I disagree with most of what they say on those programs—or those networks. I would never do that. My guess is you wouldn't either, would you?

Mr. WALLNER. No, sir.

Mr. JORDAN. No, because the First Amendment.

So, I think this is a fundamental question for us to deal with. Do you have a functioning First amendment when only one side is allowed to speak? That seems to be, unfortunately, where the Democrats are heading.

Do you have free speech when only the left decides what can be said? That is where we are headed. As evidenced by that, again, we had two Democrat Members of Congress specifically inquire.

I should read from that letter. They actually said they wanted to know, AT&T, how many people, before the election, how many of your subscribers actually were watching FOX News, Newsmax, and One America News.

Now, if that is not chilling, Members of the government asking a carrier how many of the people who subscribe to your network were actually watching these two programs that they were encouraging to be taken off the platform.

I think that is frightening, frankly. The idea that we haven't discussed this or had a hearing on this is even more concerning.

Do you agree?

Mr. WALLNER. Yes, sir, and especially in the House. Setting aside the First Amendment, look, abolitionists, there were fights over the Gag Rule prior to the Civil War, say you can't even bring up slavery.

When you can't, as a Member of the House, raise issues that your constituents and you feel are important, then I am not sure what you are doing there. The institution, I am not sure what it is doing there either.

The House isn't a factory. It is a place where people go to debate, to argue, to disagree, and to compromise.

Mr. JORDAN. Make your best argument, get your best hold, have the debate, and shake hands when it is over. I thought that is what the First amendment was all about. I thought the House Judiciary Committee was supposed to be the Committee that defended that right.

Instead, we have far too many people encouraging—

Mr. COHEN. Mr. Jordan, your time is up.

Mr. JORDAN. —encouraging the cancel culture.

Mr. COHEN. Your time is up, Mr. Jordan.

Mr. JORDAN. Thank you, Mr. Chair.

Mr. COHEN. You are welcome, sir.

I next recognize Mr. Raskin for 5 minutes.

Mr. RASKIN. Mr. Chair, thank you very much.

I want to agree with Mr. Johnson about the toxicity of the present political culture in Congress. I thank him for his comments.

I think that it almost indisputably began on January 6, with the first violent insurrection and mob attack against Congress in the history of the United States, incited by President Trump in an effort to overthrow the results of the 2020 Presidential election.

So, I want to respond to today's waterfall of counterfeit outrage and indignation. I have to thank Mr. Jordan for pointing out the obvious, that Members of both political parties have historically raised objections in the electoral college certification process, but



only one President, with Members of his party in tow, has incited a violent mob to attack Congress during the actual execution of its electoral college duties in the counting of the electors.

So, I wish he had been able to show his video, because it would have demonstrated people getting up, in my case for perhaps 15 seconds, making a totally peaceful, nonviolent objection, not in any way inciting a violent mob to try to overthrow the peaceful transfer of power in America. It is shameful that we even have to point this out, but equating the two is absurd.

Mr. Jordan continually said that he doesn't have the right to object. They get to object, but he can't object and so on. That is absurd. Has he been punished in any way for the objections that he made? Has there been a single Republican Member of the House that has been punished, admonished, censured, or reprimanded in any way for making objection? Not at all.

What we are talking about is a violent attack on the Congress of the United States. One would have hoped, in Madisonian fashion, that all of us would have stood up for our institution rather than sticking, in a cult-like fashion, with our political party and a President who essentially incited a mob attack on us, on the lives of our people and his own Vice President, as they chanted, "Traitor, traitor, traitor," and, "Hang Mike Pence, hang Mike Pence."

Mr. Jordan talks about cancel culture, which is fascinating to me. Of course, Donald Trump tried to cancel out the entire election and cancel out our lives in the process. Five people were killed during the January 6 attacks as they sent mobs out to look for Vice President Pence, to look for Nancy Pelosi.

Lindsey Graham said afterwards: They could have had a bomb. We all could have died.

Doesn't anybody have any sense of democratic self-respect about our own institution? Perhaps cancel culture doesn't apply to our lives and our workplace and our government.

All right, let's say it just applies to speech. Let me introduce you to someone named Liz Cheney, who happens to be the Chair of the House Republican Conference, who had the courage and the patriotism to stand up and to say that Donald Trump had solicited the mob, he assembled the mob, he incited the mob, he lit the match that led to the attack on Congress, none of it would have happened without him.

Now, you might agree with it, you might disagree with it, whatever. What did they do? Well, Mr. Jordan and his friends tried to overthrow her. They tried to cancel out her leadership and to overturn her leadership in the House Republican Conference.

Now, fortunately, that was too much cancel culture for the other Members of the caucus, and they rejected that on a two-to-one vote. They have gone ahead to try to get her political party in Wyoming to cancel her out by censuring her.

They did the same thing to Senator Cassidy in Louisiana. They did the same thing to Senator Burr in North Carolina. All over the country, they are trying to censure them for doing their jobs and upholding their oath of office.

You talk to me about cancel culture? You invented cancel culture. This right-wing cancel culture has run amok as they try to turn a political party, a once great political party, into a religious cult

where everyone has to follow the cult of personality around Donald Trump.

Here is what Donald Trump did. He canceled out Chris Krebs, the Director of Cybersecurity, for pushing back against lies that the election was stolen. He urged people to cancel HBO because Bill Maher was mean to him. What a snowflake.

He urged people to cancel their subscription to New York magazine because of a mean tweet that was sent out by an editor. He called for Charles Krauthammer to be fired because he was critical of Donald Trump. He said Megyn Kelly should be boycotted because she was too negative towards him.

He called for the firing of every NFL player in the league who didn't stand for the National Anthem, because he didn't agree with their exercise of their First amendment rights. Then he claimed the right to pull the broadcast licenses of NBC and CNN and so on.

I haven't heard Mr. Jordan talk about any of that. You talk about cancel culture? You invented cancel culture, and you continue to stand by while they try to cancel out the voices of anybody in the Republican Party who disagrees with Donald Trump.

I yield back.

Mr. JOHNSON of Louisiana. Mr. Chair.

Mr. COHEN. Thank you, Mr. Raskin. I appreciate your 5 minutes.

Next recognized is Mr. McClintock—

Mr. JOHNSON of Louisiana. Mr. Chair, I have to ask that those words be taken down. The name calling of the former President obviously violates the rules, ironically on a day when we are talking about the importance of decorum and the rules. I love my friend Jamie Raskin, but he went over the line, and I think that those comments need to be stricken from the record.

Mr. COHEN. Is that a motion?

Mr. JOHNSON of Louisiana. That is a motion.

Mr. RASKIN. Mr. Chair, if I stated something false about the private citizen, who asserts he is a private citizen, Mr. Trump, which is why he didn't come and testify in his impeachment trial in the Senate, if I stated something false, I would retract it.

Mr. Johnson, did I misstate something about what he had done?

Mr. JOHNSON of Louisiana. Oh, I don't know. You called the former President a snowflake and you implied lots of other nefarious things about your colleagues, but we will let the rest of that fly. But, snowflake—

Mr. RASKIN. Okay, I will withdraw the snowflake comment and keep that to myself if you don't want to hear that today. I withdraw that.

Mr. JOHNSON of Louisiana. I am just saying that you just demonstrated exactly what it is that we are talking about here today, Jamie. We have got to—

Mr. RASKIN. Well, Mr. Johnson, wait a second. I was responding to Mr. Jordan. I didn't hear you correct him on any of the things he said. He laid into us and accused us of cancel culture. I turned it around, reverse Uno, as my nephew Boman would say, okay?

He accused us of cancel culture, and I am saying that his caucus and his approach is all about cancel culture.

Mr. COHEN. The Chair is going to interrupt here, and we are going to recognize Mr. McClintock, who is next in the order.

Mr. McClintock, you are recognized for 5 minutes.

Is Mr. McClintock with us?

If he is not, we will move to Mr. Roy, and he is recognized for 5 minutes.

Mr. ROY. Well, thank you, Chair.

Mr. COHEN. You are welcome.

Mr. ROY. I have a few questions for Mr. Wallner.

Mr. Wallner, would you agree with me—and I ask you to keep your answer reasonably short so we can through it, because I only have 5 minutes—but would you agree with me that the purpose and structure of the Constitution is set up for Congress to be able to represent our constituents, get together, vote, debate, amend, and that it should be a purpose where the body is reflecting people and that the rules that are put in place are made to make the body function better?

Mr. WALLNER. Yes.

Mr. ROY. Do you believe that the rules that we are talking about here, where we are talking about targeting Members and going after Members—in either direction, by the way—is something that, generally speaking, is making the body function better?

Mr. WALLNER. No.

Mr. ROY. Are you aware that I have had a number of engagements on the floor in colloquy with the majority leader, Mr. Hoyer, about restoring regular order and have made statements along those lines about amending, debating?

Is the gentleman also aware—or is the Witness also aware that we have not had an amendment offered in Open Rule for 5 years this coming May, under both Republican and Democrat leadership?

Mr. WALLNER. I am not aware of the specifics, but that doesn't surprise me.

Mr. ROY. Is it better to focus our energies on what is going on inside the body and commentary inside the body versus commentary on social media and outside the body when it comes to setting up our rules, in your opinion?

Mr. WALLNER. Well, inside and outside are permeable. People who are opposed to the status quo and the establishment, if you will, have no choice but to go outside of the body to try to get more leverage and to try to then play an outside game and ultimately prevail inside the body. This is how we got civil rights reform. This is not a left or a right thing.

I think the rules should be focused on how do you facilitate Member participation in the process. That is the important thing. They need to be consistent; they need to be spelled out in advance, and they need to be adhered to voluntarily by everyone.

Mr. ROY. Do you think that what we are talking about here is the power—what we are talking about, although it has been all over the place—the power of Congress to set the rules for its own body? Nobody debates here we can set our rules.

In terms of our constitutional framework, in my opinion, it is not about as much the power of Congress to do it than it is the wisdom to do it.

In other words, if we are setting our rules to target each other's speech, to go after Members for speech and debate and engagement outside or inside the body, is that not flying in the face of the very

purpose of Congress? Forget about the power to do it. Is it wise to do it?

Mr. WALLNER. I don't believe so. I believe that everyone in this hearing appears to agree that Congress can pretty much do whatever it wants in this area with regard to its rules, setting aside maybe one or two few limitations.

The question is, as I said in my testimony, whether or not it makes sense for Congress to do so. To answer that question, I would encourage you and your colleagues to take a step back and try to think more fully about what it is that Congress is supposed to do.

When you do that, I think you see the real dangers that are presented when Congress begins to weaponize the rules and use them to silence Members inside the body.

Mr. ROY. Is the Witness—Mr. Wallner, are you aware that I was a Member who did not object to the seating of electors on January 6?

Mr. WALLNER. I was.

Mr. ROY. With all due respect to my colleague from Maryland, Mr. Raskin, who used the phrase "counterfeit outrage," I also did not support impeachment. I had a number of conversations with my friend from Maryland about why I did not support impeachment, and it was very much about the targeting of free speech and the targeting of language that was used in speeches and the danger, in my view, of going down that road.

If you are saying something like, "We should take the fight to the Capitol," okay, and that somehow that means that that is a problem, I have said language like that all the time. Take the fight to your State legislatures on election reform, for example.

Do you agree with me that it is dangerous for us, with respect to speech and debate and free speech, to target language that Members of this body and/or in the White House are using along those lines?

Mr. WALLNER. I believe it is very dangerous. I believe that it is—some may say it is a slippery slope argument. I do not think that is the case. We can go all the way back to the first expulsion, the first impeachment, the time of the Alien and Sedition Acts.

There is a long history in this country of factious majorities, to use Madison's language, to penalize and try to silence their political opponents by using the rules. I think that is something that we have gotten away from in this country for good reason, and I think that we should continue to strive in that direction.

Mr. ROY. Mr. Chair, I know my time is up. I would just ask indulgence for maybe 20 more seconds.

I would just offer that as one who did not object, that I could say, in response to my friend Mr. Raskin from Maryland, I have heard and seen a number of my colleagues on the other side of the aisle approach me, saying: Will you work with us on bills, because we are not going to work with those 140 Members who objected?

I am just saying to the body here, this is not good for the body. This is not good for us to engage that way. When my friend from Maryland, Mr. Raskin, objected in 2017, when Ms. Waters from California objected in 2005 and 2017, I think, as well.

In any event, my point only, Mr. Chair, is I know you are saying this is about a bigger question beyond January 6, but, in truth, we know it is not, as this whole conversation is suggesting.

I would just suggest if we police each other's speech, we are getting away from our purpose. We never debate on the floor. We never offer amendments on the floor. Let's debate. Let's fight it out, a little bit like we are doing here, but let's do it on the floor. Let's engage on these issues.

I appreciate the indulgence of Chair.

Mr. COHEN. You are welcome, Mr. Roy. If we debated like you debated, all would be hunky-dory.

I recognize Mr. Henry Calvin Johnson.

Mr. JOHNSON of Georgia. Thank you, Mr. Chair.

My dear colleagues, no reasonable person can in good faith compare what happened on January 6, 2017, with what happened on January 6, 2021, when the President of the United States of America, aided and abetted by Members of Congress, incited an insurrection that resulted in an armed assault on the United States Congress that resulted in the deaths of six people, including two Capitol Hill police officers.

On January 6, 2021, many of us here today personally experienced just how fragile our democracy is. Yet, here we sit today, some of us acting as if what happened on January 6, 2021, never happened, after all of the chaos and the damage and the injuries and the tragedy.

We came so close to losing our democracy that day. Article I, section 5 was written just for this moment. By holding this hearing, we are taking a step away from the chaos and towards accountability, a step towards restoring and further protecting the integrity of Congress, because we have seen just how fragile our democracy is. I look forward to exploring the constitutional framework of Congress' ability to discipline its Members.

That brings me to my question.

Mr. Wallner, I understand from your testimony that it is not appropriate for Congress to exercise its authority to discipline a Member of Congress for following the rules which allow that Member to object to the certification of a State's electoral college votes. If we did that, it would be wrong, would it not?

Mr. WALLNER. I believe that punishing Members for following the rules and using the rules is not a good idea for making the housework.

Mr. JOHNSON of Georgia. Well, let me ask you this question. Do you believe that Congress has the authority to discipline a Member should it be shown that that Member, along with one or more other persons in any State or territory or in any place subject to the jurisdiction of the United States, conspired to overthrow, put down, or destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority thereof, or by force prevent, hinder, or delay the execution of any law of the United States of America, by force to take, seize, or possess any property of the United States, contrary to the authority thereof?

If it were shown that a Member of Congress were guilty of that conduct that I just described, would it not be within the wise use

of authority for Congress to discipline a Member and expel that Member for such conduct?

Mr. WALLNER. Congress can expel a Member for any reason it so chooses.

Mr. JOHNSON of Georgia. No, I am asking for the conduct that I just described. Do you think it would be wise and appropriate for Congress to expel a Member shown to have engaged in—what I did was pretty much read to you the law on seditious conspiracy, which is a crime under 18 U.S.C. 2384.

Mr. WALLNER. There are plenty of precedents of the House using its power to expel Members who are engaged in rebellious activity.

Mr. JOHNSON of Georgia. Well, now, my question just requires a yes-or-no answer.

Would it be wise and appropriate for Congress to expel a Member who was found to have violated the provisions of section 2384 of the United States Code, the Criminal Code?

Mr. WALLNER. If the people who found that are a factious majority in the House and they believe that offering a motion or otherwise following the rules constitutes that, then I think that would be unwise.

If, on the other hand—

Mr. JOHNSON of Georgia. Well, no, no, no, no. That is different than following the rules, sir, and you know exactly that it is. Following the rules is different than violating a criminal statute.

If a person violates a criminal statute, namely engaging in a seditious conspiracy, and he is a Member, he or she is a Member of Congress, are you telling me and you expect us to believe that you would not see Congress having the authority to expel such a Member?

Mr. WALLNER. My point relates to the rules, and I am not sure how following the rules would constitute that.

Mr. JOHNSON of Georgia. No, no, no, I am not asking you about the rules. I am asking you about criminal misconduct committed by a Member of Congress. You can't bring yourself to say Congress should expel that Member?

Mr. COHEN. We are running out of time.

Mr. WALLNER. If a Member breaks the rules, violates the rules, or otherwise engages in treason, then certainly. If the Member follows the rules, then I am not sure how that equates with treason, and I am not sure how one can punish that Member without damaging the fabric of the House of Representatives.

Mr. COHEN. Mr. Wallner, I appreciate your responses.

Mr. JOHNSON of Georgia. You are acting like what happened on January 6, 2021, never happened.

Mr. COHEN. Mr. Johnson, our time is up for this question. I appreciate you. I don't want to get in—anyway, the time is up, and I appreciate your questions, and I appreciate where you are coming from.

Mr. JOHNSON of Georgia. Thank you.

Mr. COHEN. You are welcome, sir.

Ms. Fischbach, are you with us?

Ms. FISCHBACH. Yes, I am here. Can you hear me?

Mr. COHEN. I can hear you, I can see you, and I am not a cat. You are recognized for 5 minutes.

Ms. FISCHBACH. Did you get that joke?

Mr. COHEN. Yeah, I did.

Ms. FISCHBACH. Thank you, Mr. Chair.

I am very proud to be a new Member of Congress, and I am proud and humbled to represent my constituents of my district. I really am troubled by the majority's continued partisan attacks.

My colleague, Mr. Johnson from Louisiana, mentioned the increasing toxicity that is going on. My colleague from Ohio pointed out that many of the Democrats that are still here have in the past voted on electoral college objections.

Now, that vote is being used for partisan attacks. It is the kind of partisan attacks that will do nothing for unity. It does nothing to move our country forward. It does absolutely nothing to help the citizens that we represent.

So, I am very, very troubled by what is going on with the partisan attacks on a vote that we took.

Mr. Chair, I don't have any questions. I just wanted to make sure that I made that statement. I will yield back my time.

Mr. COHEN. Thank you, Ms. Fischbach. You are appreciated for your time, and glad to have you as a Member.

Next, I believe is—Ms. Garcia may not be with us. So, if Ms. Garcia is not with us, which I don't think she is, the gentlelady from St. Louis, Ms. Bush, is recognized for 5 minutes.

Ms. BUSH. Thank you so much. St. Louis and I thank you, Chair, for convening this hearing. We appreciate you.

I came to Congress committed to one goal: To do the absolute most for everyone in St. Louis, starting with those who have the least.

I intend to legislate in defense of Black lives and create a legislative path for liberating everyday people, who are the backbone of this country.

It dawned on me very early on that not all Members are united in doing the people's work within the people's House, that, in fact, many are here to distract, detract, and disrupt our ability to do the work our communities elected us to do.

This is a job. This Chamber is our workplace. When we ran for our respective seats, we knew that this job, what it would require. We knew that we would be heading to DC to deliver, not to wander the halls and do whatever it is that we wanted to.

Like other jobs, we are expected to follow the rules. We are expected to engage in passionate debate. We are expected to legislate. That is our mandate, and that is also our job.

In all the jobs I have held—and trust me, I have held more than a few—we are expected to treat one another with dignity and respect. We are expected to protect one another and not risk the lives of our colleagues by ignoring life-saving rules to wear masks during a deadly pandemic or by disregarding the metal detectors that are in place to secure the safety of our building and our bodies.

These are the rules of the House. It seems to me that some Members of Congress perhaps may have never held a job before. If they had, they would certainly understand that disregarding rules of conduct will result in consequences, that their behaviors are a reflection of the people they represent.

In fact, when we hire our own staff, we make clear that what they say publicly, how they conduct themselves inside and outside of Chambers, in our offices, reflects on our individual offices.

Mr. Maskell, based on past precedent, is there any advice you can give us to help us evaluate when rhetoric crosses the line from strident to damaging the House's credibility and/or puts our lives in danger?

That I speak from personally when the words that have come from certain Congress Members have actually had death threats come into my office.

So, can you please share that with us?

Mr. MASKELL. Well, I will give it a try, ma'am.

Certainly, passionate debate that you mentioned should be protected and encouraged. People should have the passion to express their convictions.

However, to lower the temperature of disagreement, the House has historically required civil discourse and has censured overly inflammatory and personally insulting rhetoric on the floor. I think that kind of draws the line as far as the rhetoric on the floor goes. That is what has happened in the past.

So, the House should not look to punish speech, and punish passionate speech, or punish someone for their ideas, but it should try to encourage civil discourse, absolutely.

Ms. BUSH. Thank you, Professor.

Mr. Chafetz, why is it important to understand that the House's disciplinary power is broad and encompasses more than the power to punish?

Mr. CHAFETZ. Well, it is important because, that is something that I sort of said in response to an earlier question, it really is a necessary concomitant of the House's power to structure its own proceedings.

For the House to be able to do its business, it has to be able to get out of the way of those who would stop it from doing its business. So, it has to be able to maintain order in the Chamber.

I think even more broadly than that, it has to be able to maintain the constitutional order that actually makes it the House of Representatives in the first place as opposed to just a meeting of a bunch of people, and it has to be able to maintain its own place within that constitutional order.

So, it has the authority to use its disciplinary power to remove things that threaten both the constitutional order itself and its place within the constitutional order. It is absolutely essential that it have that power.

Ms. BUSH. Thank you.

To be clear, this is not about punishment. This is about integrity. This is about protecting the dignity of the House in which we all work so we can advocate and legislate on behalf of the communities that sent us here.

This is about credibility. This institution derives its legitimacy from our conduct. It is us, from our ability to engage respectfully and to assent to the demands of the American people. If we will not do that, then this is not the place for those folks.

Thank you, and I yield back.



Mr. COHEN. Thank you, Ms. Bush. I appreciate your being on the Committee.

Mr. Owens of Utah is recognized for 5 minutes.

Is Mr. Owens not with us? If he is not, is Mr. McClintock here? If not, Ms. Jackson Lee is here, and I recognize her for 5 minutes.

She needs to unmute and start the camera. Am I wrong, is Ms. Jackson Lee not with us? Not here. I think she is not here.

If she is not here, I think we have concluded the hearing. Let me get an idea here of who is still here.

Mr. JOHNSON of Louisiana. You got Johnson.

Mr. RASKIN. You got Raskin.

Mr. Chair, could I say something to Mr. Johnson?

Mr. COHEN. Before you do, Mr. Raskin, I want to say this. I did make an inquiry. It is no longer—when you are the President, just like when you are a Jet, you are a President all the way. When you leave office on January 20, you no longer are excluded from having anything said about you in Committee or on the floor.

While we couldn't say the truth about the President when he was President, now the truth can roll down like waters from Jericho or whatever it is.

With that, Mr. Raskin, you are recognized.

Mr. Raskin, I can't hear you.

Mr. RASKIN. I wanted to thank Mr. Johnson, who I have always had a ton of respect for, for the tenor and the substance of his comments today.

If that was all we were getting, I would not have taken my time to defend us against the attack about cancel culture and somehow that we are hypocrites for having participated in nonviolent parliamentary process before.

I was not responding to him. I tried to salute him for what he said, because I do think we need to drain the toxicity out of the conversation. I hope that all of us can encourage all of the Members to be working together.

Obviously, we are going to disagree about stuff. This week, we disagreed about the \$1.9 trillion COVID rescue package. We disagreed about the universal criminal background check. Fine. Let's have the passionate debate about that.

The constant denunciation of other people as being illegitimate or attributing false positions to them, I can't count the number of times they are saying that we want to defund the police when there is not a Member of Congress who has ever advanced a defund the police proposal or embraced one.

So, that just gets us mad. Then we have got to turn around and we got to talk about the fact that our colleagues are lying about us. So, that does elevate the toxic quotient in our politics.

So, if we can stick to the issues and as much as possible get to revive those basic chords of affection that Lincoln talked about. There are a lot of the Republicans like Mr. Johnson who are just wonderful people. I think that, despite all our differences, we can work together as Americans to move the ball forward.

Thank you, Mr. Chair, for allowing me to say that.

Mr. COHEN. You are welcome, sir.

Mr. Johnson, do you want to respond, or do you yield?

Mr. JOHNSON of Louisiana. I will salute my friend and yield. I agree with that sentiment. I wish all sides could put the weapons down.

The honest truth is, gentlemen, we are in a new era in our politics, and I know our Witnesses acknowledge that, because we have a 24-hour news cycle and social media and all the different factors. So, it is incumbent upon to us live up to the dignity of our office as well as we can. So, thank you.

I yield back.

Mr. COHEN. Thank you, Mr. Johnson.

Did somebody else seek recognition or say something?

Ms. FISCHBACH. Mr. Chair, it is Michelle Fischbach.

Mr. COHEN. Yes, ma'am.

Ms. FISCHBACH. Really truly, I don't want to mess up the hearing, but I just want to say how much I appreciated your "West Side Story" reference.

Mr. COHEN. Thank you. Thank you, ma'am. Thank you very much.

This concludes today's hearing.

I do want to make this point clear. This hearing was for the purpose of getting the rules set, and I think our Witnesses did a great job. There was good substance offered and the Witnesses did a great job. So, I want to thank all of our Witnesses for appearing today. They all held themselves as they should have.

If I in any way didn't hold myself in responding to some things that were said that weren't true about me, I apologize. I shouldn't have done that. As Chair, I need to hold myself above such things. You get tired at some point of having continued things said which are false.

With that, I thank the Witnesses.

Without objection, all Members will have 5 legislative days to submit additional questions for the Witnesses or additional materials for the record.

With that, I take out my Louisville Slugger souvenir bat and declare the meeting adjourned.

[Whereupon, at 4:06 p.m., the Subcommittee was adjourned.]

## **APPENDIX**

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## **Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives**

**Jack Maskell**  
Legislative Attorney

June 27, 2016

Congressional Research Service

7-5700

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## Summary

The House of Representatives—in the same manner as the United States Senate—is expressly authorized within the United States Constitution (Article I, Section 5, clause 2) to discipline or “punish” its own Members. This authority of the House to discipline a Member for “disorderly Behaviour” is in addition to any criminal or civil liability that a Member of the House may incur for particular misconduct, and is used not merely to punish an individual Member, but to protect the institutional integrity of the House of Representatives, its proceedings, and its reputation.

The House may discipline its Members without the necessity of Senate concurrence. The most common forms of discipline in the House are now “expulsion,” “censure,” or “reprimand,” although the House may also discipline its Members in other ways, including fine or monetary restitution, loss of seniority, and suspension or loss of certain privileges. In addition to such sanctions imposed by the full House of Representatives, the standing committee in the House which deals with ethics and official conduct matters, the House Committee on Ethics—formerly called the Committee on Standards of Official Conduct—is authorized by House Rules to issue a formal “Letter of Reproval” for misconduct which does not rise to the level of consideration or sanction by the entire House of Representatives. Additionally, the Committee on Ethics has also expressed its disapproval of certain conduct in informal letters and communications to Members.

The House may generally discipline its Members for violations of statutory law, including crimes; for violations of internal congressional rules; or for any conduct which the House of Representatives finds has reflected discredit upon the institution. Each house of Congress has disciplined its own Members for conduct which has not necessarily violated any specific rule or law, but which was found to breach its privileges, demonstrate contempt for the institution, or reflect discredit on the House or Senate.

When the most severe sanction of expulsion has been employed in the House, the underlying conduct deemed to have merited removal from office has historically involved either disloyalty to the United States, or the violation of a criminal law involving the abuse of one’s official position, such as bribery. The House of Representatives has actually expelled only five Members in its history, but a number of Members, facing likely congressional discipline for misconduct, have resigned from Congress or have been defeated in an election prior to any formal House action.

A “censure” is a formal, majority vote in the House on a resolution disapproving a Member’s conduct, generally with the additional requirement that the Member stand at the “well” of the House chamber to receive a verbal rebuke and reading of the resolution by the Speaker. Twenty-three Members of the House have been censured for various forms of misconduct, including (in the 19<sup>th</sup> century) insulting or other unparliamentary language on the floor or assaults on other Members, as well as, more recently, financial improprieties.

A “reprimand” in the House involves a lesser level of disapproval of the conduct of a Member than that of a “censure,” but also involves a formal vote by the entire House. Ten House Members have been “reprimanded” for a range of misconduct, including failure to disclose personal interests in official matters; misrepresentations to investigating committees; failure to report campaign contributions; conversion of campaign contributions to personal use; ghost voting and payroll improprieties; the misuse of one’s political influence in administrative matters to help a personal associate; providing inaccurate, incomplete, and unreliable information to the investigating committee; for a breach of decorum in a joint session; and the misuse of official resources by compelling congressional staff to work on political campaigns.

This report has been updated from earlier versions and will be revised as events and changes in Rules or laws may warrant.

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Each house of the United States Congress is expressly authorized within the Constitution to “punish” its own Members for misconduct. In imposing legislative discipline against its Members, the House operates through its rulemaking powers,<sup>1</sup> and the express provision for legislative discipline is set out along with Congress’s rulemaking authority in Article I, Section 5, clause 2, of the Constitution:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

The underlying justification for legislative discipline has traditionally been to protect the integrity and dignity of the legislature and its proceedings, rather than merely to punish an individual;<sup>2</sup> and such internal legislative process is *additional* to any potential criminal or civil liability that a Member might incur for any particular misconduct.<sup>3</sup> Members of Congress, like any other persons in the United States, are subject generally to outside law enforcement and criminal prosecution if their misconduct constitutes a violation of federal, state, or local criminal law. Unlike members of the legislatures or parliaments of many foreign nations, there is *no* general immunity from all criminal prosecution for Members of the United States Congress during their tenure in office. Rather, Members of Congress have a fairly narrow (although complete) immunity from outside prosecution for “Speech or Debate” in either house of Congress.<sup>4</sup>

Members of the House of Representatives are subject to internal, congressional discipline for any conduct which the institution of the House believes warrants such discipline. The express constitutional authority drafted by the framers of the Constitution was drawn from the British parliamentary practice, as well as from our own colonial legislative experience, and reflects the principle and understanding that although the qualifications of Members of Congress were intentionally kept to a minimum to allow the voters the broadest discretion in sending whomever they please to represent them in Congress,<sup>5</sup> the institution of the House has the right to discipline

<sup>1</sup> DESCHLER’S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, H. Doc. 94-661, 94<sup>th</sup> Cong., 2d Sess., Volume 3, Ch. 12, §12, p. 168 (1979); Justice Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Vol. II, §835 (Boston 1883).

<sup>2</sup> Cushing, THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES, pp.250-251, 257-259, 268-270 (Boston 1874). Internal disciplinary action is “rooted in the judgment of the House as to what was necessary or appropriate for it to do to assure the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government.” DESCHLER’S PRECEDENTS, *supra* at 174, citing *Powell v. McCormack*, 395 F.2d 577, McGowan concurring, at 607 (D.C.Cir. 1968), *rev’d on other grounds*, 395 U.S. 486 (1969); Story, *supra* at §835. *Note* British Parliamentary practice: “The practice of expulsion is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership.” Erskine May, LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT, at 105 (London 1964).

<sup>3</sup> House ethics action does not foreclose a criminal prosecution on the same matter. *United States v. Rose*, 28 F.3d 181, 189-190 (D.C.Cir. 1994); 2 Op. Atty. Gen. 655 (1834); *United States v. Traficant*, 368 F.3d 646 (6<sup>th</sup> Cir. 2004), *cert. denied*, 543 U.S. 1055 (2005).

<sup>4</sup> Under the “Speech or Debate” clause of the Constitution (Article I, Section 6, cl. 1), Members of Congress may not be questioned outside of Congress “for any Speech or Debate in either House,” that is, they are immune from criminal or civil proceedings only for their official conduct or activities which are deemed to be “an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings.” *Gravel v. United States*, 408 U.S. 606, 625 (1972). The constitutional bar to the “Arrest” of Members during their attendance of, or “going to and returning from” a session of Congress for other than a felony or “Breach of the Peace” (Article I, Section 6, cl. 1), is an “obsolete” provision which applies only to arrests in civil suits, common in the 18<sup>th</sup> century, but does not apply to criminal arrests. *Williamson v. United States*, 207 U.S. 425, 446 (1908); *Long v. Ansell*, 293 U.S. 76 (1934); *Gravel*, *supra* at 614; DESCHLER’S PRECEDENTS, *supra* at Ch. 12, §3.1; *see* discussion in THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION, S. Doc. 103-6, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess., at 127 (1996). Contrary to popular myth and misunderstanding, Members of Congress are *not* constitutionally immune from arrest for traffic violations under this clause.

<sup>5</sup> Alexander Hamilton, II ELIOT’S DEBATES 257; *note* also James Madison, 2 Farrand, RECORDS OF THE FEDERAL (continued...)

those who breach its privileges or decorum, or who damage its integrity or reputation, even to the extent of expelling from Congress a duly elected Member.<sup>6</sup>

Internal, congressional discipline of a Member may take several forms. The most common forms of discipline in the House of Representatives are now “expulsion,” “censure,” or “reprimand,” although the House may also discipline its Members in other ways, including fine or monetary assessment, loss of seniority, or loss of certain privileges.<sup>7</sup> An “expulsion” is a removal of a Member from the House of Representatives by a two-thirds vote of the House. A “censure” or a “reprimand” is a legislative procedure where the full House, by majority vote on a simple resolution, expresses a formal disapproval of the conduct of a Member. In addition to these punishments or disciplines by the entire House of Representatives, the House Committee on Ethics—formerly called the Committee on Standards of Official Conduct—is authorized to issue, on its own accord, a “Letter of Reprimand” to a Member when that committee disapproves of conduct but makes no recommendation for legislative sanctions to the full House of Representatives. The committee has also from time to time expressed its disapproval of particular conduct in informal letters and other communications to Members.

There is no precise listing or description in the Rules of the House of Representatives of the specific types of misconduct or ethical improprieties which might subject a Member to the various potential disciplines. The Rules adopted by the House Committee on Ethics provide simply that:

With respect to the sanctions that the Committee may recommend, reprimand is appropriate for serious violations, censure is appropriate for more serious violations, and expulsion of a Member or dismissal of an officer or employee is appropriate for the most serious violations. A recommendation of a fine is appropriate in a case in which it is likely that the violation was committed to secure a personal financial benefit; and a recommendation of a denial or limitation of a right, power, privilege, or immunity of a Member is appropriate when the violation bears upon the exercise or holding of such right, power, privilege, or immunity.<sup>8</sup>

The House may discipline its Members for violations of statutory law, including crimes; for violations of internal congressional rules; or for any conduct which the House of Representatives finds has reflected discredit upon the institution.<sup>9</sup> Each house of Congress has disciplined its own Members for conduct which has not necessarily violated any specific rule or law, but which was found to breach its privileges, demonstrate contempt for the institution, or which was found to discredit the House or Senate.<sup>10</sup> When the most severe sanction of expulsion has been employed

(...continued)

CONVENTION OF 1787, 249-250, and THE FEDERALIST PAPERS, No. 57; *Powell v. McCormack*, 395 U.S. 486, 508, 509, 531 (1969).

<sup>6</sup> See footnote 2, *supra*; Story, *supra* at §§835-836. Note also Senator John Quincy Adams’ arguments in 1807 on Senate’s authority to expel a Member even after reelection, II HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §1264, p. 817 (1907).

<sup>7</sup> Rules of the House Committee on Ethics, Rule 24(e) (February 5, 2013, 113<sup>th</sup> Congress); DESCHLER’S PRECEDENTS, *supra* at Ch. 12, §12.

<sup>8</sup> House Committee on Ethics, Rule 24(g).

<sup>9</sup> In re Chapman, 166 U.S. 661, 669-670 (1897); H. Rept. 570, 63<sup>rd</sup> Cong., 2d Sess. (1914) (Judiciary Committee), at VI CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §398, p. 558; Brown, HOUSE PRACTICE, GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE, 104<sup>th</sup> Cong., 2d Sess. “Misconduct; Sanctions,” at 581-582 (1996). Note authority of Committee on Ethics, Rules of the House of Representatives, Rule XI, para. 3(a)(2), and Code of Official Conduct, Rule XXIII(1).

<sup>10</sup> See the **Appendix** for a listing of House disciplinary actions.



or recommended in the House, however, the conduct has historically involved either disloyalty to the United States Government, or the violation of a criminal law involving the abuse of one's official position, such as bribery.

## Expulsion

Expulsion is the form of action by which the House of Representatives, after a Member has taken the oath of office, removes that Representative from membership in the body by a vote of two-thirds of the Members present and voting.<sup>11</sup> An expulsion is considered a disciplinary matter and a matter of self-protection of the integrity of the institution and its proceedings, and as such is substantively and procedurally different from an "exclusion," which denies a Member-elect his or her seat by a simple *majority* vote of the body, prior to the Member-elect being seated (or after being seated "without prejudice" pending investigation and resolution of the matter), because of failure of the Member-elect to meet the constitutional qualifications for office (i.e., age, citizenship and inhabitancy in the state from which elected), or because of a failure to have been "duly elected"; an "exclusion" is now understood *not* to be a disciplinary procedure.<sup>12</sup> A Member is "expelled" by a two-thirds vote, however, precisely for issues of misconduct, and expulsion is generally taken against a Member after the Member has been sworn into office.

Members of the United States Congress are not removed by way of an "impeachment" procedure in the legislature, as are executive and judicial officers, but are subject to the more simplified and expedited legislative process of expulsion.<sup>13</sup> A removal through an impeachment, it should be noted, requires the action of both houses of Congress—impeachment in the House and trial and conviction in the Senate. An expulsion, however, is accomplished merely by the House or Senate acting alone concerning one of its own Members, without the consent or action of the other body, and without the constitutional requirement of trial and conviction.<sup>14</sup>

## Grounds for Expulsion

There is no limitation apparent on the face of the Constitution, nor in the deliberations of the Framers, on the authority to expel a Member of Congress, other than the two-thirds vote requirement. One study of the expulsion clause summarized the Framers' intent as follows:

[From] the history of Article I, Section 5, clause 2, and in particular its course in the Committee of Detail, it is clear that the Framers ... did not intend to impose any limitation on Congressional power to determine what conduct warranted expulsion.... Nor do the debates in the Convention suggest any desire to impose any other substantive restrictions on the expulsion power.<sup>15</sup>

Justice Joseph Story similarly concluded that it would be "difficult to draw a clear line of distinction between the right to inflict the punishment of expulsion, and any other punishment upon a member, founded on the time, place, or nature of the offense," and that "expulsion may be

<sup>11</sup> Brown, *supra*, "Voting," at p. 908: "A two-thirds vote ordinarily means two-thirds of those voting, a quorum being present, and not two-thirds of the entire membership."

<sup>12</sup> Powell v. McCormack, 395 U.S. 486, 522 (1969). DESCHLER'S PRECEDENTS, *supra* at Ch. 12, §12, p. 169, n. 21.

<sup>13</sup> See case of Senator William Blount of Tennessee, expelled on July 8, 1797; and found not subject to impeachment. III HINDS' PRECEDENTS, *supra* at §§2294-2318.

<sup>14</sup> II HINDS' PRECEDENTS, *supra* at §1275.

<sup>15</sup> Bowman and Bowman, *Article I, Section 5: Congress' Power to Expel - An Exercise in Self Restraint*, 29 SYRACUSE LAW REVIEW 1071, 1089-1090 (1978).

for any misdemeanor, which, though not punishable by any statute, is inconsistent with the trust and duty of” a Member.<sup>16</sup>

The Supreme Court of the United States, citing Justice Story’s historic treatise on the Constitution, found an expansive authority and discretion within each house of Congress concerning the grounds for expulsion. In *In re Chapman*, the Supreme Court noted the Senate expulsion case of Senator William Blount<sup>17</sup> as supporting the constitutional authority of either house of Congress to punish a Member for conduct which in the judgment of the body “is inconsistent with the trust and duty of a member” even if such conduct was “not a statutable offense nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government.”<sup>18</sup> While each house of Congress has broad authority as to the grounds for an expulsion, this disciplinary action is generally understood to be reserved only for the “most serious violations.”<sup>19</sup> As noted above, expulsions in the House (and in the Senate) have traditionally involved conduct which implicated disloyalty to the Union, or the commission of a crime involving the abuse of one’s office or authority.

## Precedents and Practice

The House of Representatives has actually expelled only five Members (four Members and one Member-elect) in its history, three of whom were expelled during the Civil War period in 1861 for disloyalty to the Union.<sup>20</sup> The fourth Member of the House to be expelled was Representative Michael J. (Ozzie) Myers, of Pennsylvania, on October 2, 1980, after his bribery conviction for receiving a payment in return for promising to use official influence on immigration bills in the so-called ABSCAM “sting operation” run by the FBI.<sup>21</sup> The fifth and last Member of the House to be expelled was Representative James A. Traficant, Jr., of Ohio, who was expelled on July 24, 2002, after his 10-count federal conviction for activities concerning the receipt of favors, gifts and money in return for performing official acts on behalf of the donors, and the receipt of salary kickbacks from staff.<sup>22</sup>

The numbers of actual expulsions from the House may be small because some Members of the House who have been found to have engaged in serious misconduct have chosen to resign (or have lost an election) before any formal action could be taken against them by the House. Thus, the House committees investigating allegations of misconduct have from time to time expressly recommended the expulsion of a Member, who then resigned before the expulsion vote could be taken by the full body.<sup>23</sup> Additionally, several other Members of the House who might have been

<sup>16</sup> Story, *supra* at §836.

<sup>17</sup> II HINDS’ PRECEDENTS, *supra* at §1263. See footnote 12, *supra*.

<sup>18</sup> 166 U.S. 661, 669-670 (1897).

<sup>19</sup> House Committee on Ethics, Rule 24(g).

<sup>20</sup> See House expulsions of Representative-elect John B. Clark of Missouri (1861), Representative John W. Reid of Missouri (1861), and Representative Henry C. Burnett of Kentucky (1861), for disloyalty to the Union. II HINDS’ PRECEDENTS, *supra* at §§1261, 1262.

<sup>21</sup> H.Rept. 96-1387 (1980), *In the Matter of Representative Michael J. Myers*, 126 CONG. REC. 28,978 (October 2, 1980). Representative Myers was expelled after conviction for bribery, conspiracy and violation of the Travel Act.

<sup>22</sup> H.Rept. 107-594 (2002), *In the Matter of Representative James A. Traficant, Jr.*, 148 CONG. REC. 14318-14319 (July 24, 2002). Representative Traficant was expelled after conviction of conspiracy to violate federal bribery laws, receipt of illegal gratuities, obstruction of justice, conspiracy to defraud the United States, filing false income tax returns, and racketeering.

<sup>23</sup> Note, e.g., H.Rept. 97-110 (1981), *In the Matter of Representative Raymond F. Lederer*, and House Committee on Standards recommendation of expulsion for bribery; and H.Rept. 100-506 (1988), *In the Matter of Representative* (continued...)

subject to expulsion or other legislative discipline because of misconduct either resigned *before* any committee recommendation was made,<sup>24</sup> or, soon after their misconduct became known, lost their next election (either the primary or the general election) before congressional action was completed.<sup>25</sup> The defeat at the polls of Members who had engaged in misconduct was precisely the principal “ethics” oversight planned by the framers of the Constitution, who looked to the necessity of reelection to be the most efficient method of regulating Representatives’ conduct. James Madison explained in the *Federalist Papers* that despite all the precautions taken by structural separation of powers in the government, or by the institution of the Congress or the law, the best control of Members’ conduct would be their “habitual recollection of their dependence on the people” through the necessity “of frequent elections.”<sup>26</sup>

Although the authority and power of each house of Congress to expel appears to be within the broad discretion of the institution, *policy* considerations, as opposed to questions of *power*, have generally restrained the House in exercising the authority to expel a Member when the conduct complained of occurred prior to the time the individual was elected to Congress,<sup>27</sup> or occurred in a prior Congress when the electorate knew of the conduct but still reelected the Member. This restraint has been characterized in *dicta* by the Supreme Court as the House’s “distrusting” its own “power” to expel for past misconduct.<sup>28</sup> While there has, in fact, in the past been some

(...continued)

Mario Biaggi, recommendation of expulsion after conviction for illegal gratuities, Travel Act violations, and obstruction of justice. *Note* case of Rep. B.F. Whittemore, recommended for expulsion by Military Affairs Committee for sale of Military Academy appointments, who subsequently resigned in 1870, and who was then censured *in absentia* by the House (II HINDS’ PRECEDENTS, *supra* at §1273); and House censure of John DeWeese after his resignation (also for the sale of Academy appointments), but before the committee reported the resolution of expulsion. II HINDS’ PRECEDENTS, *supra* at §1239. *See also* expulsion resolutions, reported from an *ad hoc* committee, for bribery, and subsequent resignations during House consideration of resolutions, by Representatives William Gilbert, Frances Edwards, and Orasmus Matteson, in 1857 (II HINDS’ PRECEDENTS, *supra* at §1275).

<sup>24</sup> H.Rept. 96-1537, at 10-11 (1980), *In the Matter of Representative John W. Jenrette, Jr.*; H.Rept. 104-886, at 19 (1997), *Summary of Activities, One Hundred Fourth Congress* (concerning Representative Mel Reynolds); H.Rept. 101-995, at 10-11 (1990), *Summary of Activities, One Hundred First Congress* (concerning Representative Donald E. Lukens), and at 12-13 (concerning Representative Robert Garcia); H.Rept. 96-856, (1980), *In the Matter of Representative Daniel J. Flood* (1980); H.Rept. 109-744 (2007), *Summary of Activities, One Hundred Ninth Congress* (concerning Representative Robert Ney), and at 17-18 (concerning representative Tom DeLay). Representative Randy “Duke” Cunningham resigned from the House on December 1, 2005, after pleading guilty to a criminal conspiracy to commit bribery and tax evasion. Since no recommendations were made by the committee regarding these Members, it cannot be said with certainty what, if any, discipline would have been recommended by the committee, or approved by the House.

<sup>25</sup> The House Committee on Ethics (formerly the Committee on Standards of Official Conduct) has found that since it will “lose jurisdiction” over a Member who has been defeated in an election, proceedings which could not be completed prior to the January end-of-term be suspended. *Note*, for example, H.Rept. 110-938, at 18 (2009), *Summary of Activities, One Hundred Tenth Congress* (concerning Representative William Jefferson); H.Rept. 105-848, at 14 (1999), *Summary of Activities, One Hundred Fifth Congress* (concerning Representative Jay C. Kim); H.Rept. 104-886, *supra* at 21 (concerning Representative Barbara-Rose Collins); *see also* H.Rept. 100-1125, at 17 (1989), *Summary of Activities, One Hundredth Congress* (concerning Rep. Patrick L. Swindall); H.Rept. 95-1818, at 3 (1978), *Summary of Activities, Ninety-Fifth Congress* (concerning Rep. Joshua Eilberg).

<sup>26</sup> Madison. THE FEDERALIST PAPERS, No. 57: “All these sanctions, however, would be found very insufficient without the restraint of frequent elections ... as to support in the members an habitual recollection of their dependence on the people.”

<sup>27</sup> DESCHLER’S PRECEDENTS, *supra* at Ch. 12, §13, p. 176. *See* H.Rept. 94-1477, at 2 (1976), *In the Matter of Representative Andrew J. Hinshaw*, where the House Committee on Standards of Official Conduct recommended against expulsion of a Member, since the Member’s conviction “while reflecting on his moral turpitude, does not relate to his official conduct while a Member of Congress.”

<sup>28</sup> The Court in *Powell v. McCormack*, *supra*, in distinguishing the exclusion of Powell from an expulsion, noted that the House has “distrusted” its right to expel Members for prior conduct after they have been reelected (395 U.S. at (continued...))

division of opinion on the subject of the House's constitutional "authority" or "right" to do so,<sup>29</sup> in modern congressional practice it would appear to be more accurate to say that such restraint has arisen from a questioning by the House of the wisdom of such a *policy*, rather than a formal recognition of an absence of constitutional *power* to expel for past misconduct.

The reticence of the House to expel a Member for past misconduct after the Member has been reelected by his or her constituents, with knowledge of the Member's conduct, appears to reflect the deference traditionally paid in our heritage to the popular will and election choice of the people.<sup>30</sup> Justice Story, while noting the necessity of expulsion of one who "disgrace[d] the house by the grossness of his conduct," noted that such power of the institution of the House to expel a duly elected representative of the people is "at the same time so subversive of the rights of the people," as to require that it be used sparingly and to be "wisely guarded" by a two-thirds requirement.<sup>31</sup> Similarly, Cushing noted that the power to expel "should be governed by the strictest justice," since in expelling a duly elected Member without just cause, "a power of control would thus be assumed by the representative body over the constituent, wholly inconsistent with the freedom of election."<sup>32</sup>

The distinction between the "power" of the House to expel, and the judicious use of that power as a "policy" of the House, was cogently explained in a House Judiciary Committee report in 1914:

In the judgment of your committee, the power of the House to expel or punish by censure a Member for misconduct occurring before his election or in a preceding or former Congress is sustained by the practice of the House, sanctioned by reason and sound policy and in extreme cases is absolutely essential to enable the House to exclude from its deliberations and councils notoriously corrupt men, who have unexpectedly and suddenly dishonored themselves and betrayed the public by acts and conduct rendering them unworthy of the high position of honor and trust reposed in them. ...

But in considering this question and in arriving at the conclusions we have reached, we would not have you unmindful of the fact that we have been dealing with the question merely as one of *power*, and it should not be confused with the question of *policy* also involved. As a matter of sound policy, this extraordinary prerogative of the House, in our judgment, should be exercised only in extreme cases and always with great caution and

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508), and that congressional precedents have shown that "the House will not expel a member for misconduct committed during an earlier Congress." 395 U.S. at 509, noting expulsion case of John W. Langley, H.Rept. 30, 69<sup>th</sup> Cong., 1<sup>st</sup> Sess., 1-2 (1925). The Court noted specifically, however, that it was not ruling on Congress's authority to expel for past misconduct (395 U.S. at 507, n. 27; 510, n.30), and, in fact, Justice Douglas, in his concurrence noted specifically that "if this were an expulsion case I would think that no justiciable controversy were presented" (395 U.S. at 553), since Douglas agreed with Senator Murdock of Utah in a 1940 exclusion case that each House may "expel anyone it designates by a two-thirds vote." 395 U.S. at 558-559.

<sup>29</sup> Note conflicting opinions of two House committees in the *Credit Mobilier* investigations on the discipline of Representatives Ames and Brooks in the 42<sup>nd</sup> Congress, H.Rept. 77, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. (1872) and H.Rept. 82, 42<sup>nd</sup> Cong., 3<sup>rd</sup> Sess. (1872). The House specifically refused, however, to accept a preamble to the substitute resolution for censure expressly questioning its authority to expel for past misconduct. See Committee Print, *House of Representatives Exclusion, Censure and Expulsion Cases from 1789 to 1973*, 93<sup>rd</sup> Cong., 1<sup>st</sup> Sess. 125 (1973); note also majority and minority opinions in expulsion cases of William S. King and John Schumaker, H.Rept. 815, 44<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1876), II HINDS' PRECEDENTS, *supra* at §1283, and in expulsion case of Orsamus B. Matteson, H.Rept. 179, 35<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1858), II HINDS' PRECEDENTS §1285.

<sup>30</sup> See footnote 5, *supra*. Note also discussion of the infamous Wilkes case in England, shortly before the time of the drafting of the United States Constitution. *Powell v. McCormack*, *supra* at 532-535; May, *supra* at 107.

<sup>31</sup> Story, *supra* at §835.

<sup>32</sup> Cushing, *supra* at §625; DESCHLER'S PRECEDENTS, *supra* at Ch. 12, §13, p. 175.



after due circumspection, and should be invoked with greatest caution where the acts of misconduct complained of had become public previous to and were generally known at the time of the Member's election. To exercise such power in that instance the House might abuse its high prerogative, and in our opinion might exceed the just limitations of its constitutional authority by seeking to substitute its standards and ideals for the standards and ideals of the constituency of the member who had deliberately chosen him to be their Representative. The effect of such a policy would tend not to preserve but to undermine and destroy representative government.<sup>33</sup>

The power to expel is thus used cautiously when the institution of Congress might be seen as usurping or supplanting its own institutional judgment for the judgment of the electorate as to the character or fitness for office of an individual whom the people have chosen to represent them in Congress.<sup>34</sup> As noted, the principal manner of dealing with ethical improprieties or misconduct of a Representative was intended by the Framers to be, and has historically been, reliance upon the voters to keep their Members "virtuous" through the "restraint of frequent elections."<sup>35</sup>

### Consequences of Expulsion

Expulsion from the House of Representatives carries with it no further "automatic" penalties or disabilities beyond removal from Congress. Although the constitutions of some states provide that members expelled from their state legislatures are ineligible to be reelected to that legislature, no such disability was included in the United States Constitution for Members of Congress. An individual who has been expelled from Congress is *not* ineligible to run again for that seat, or for another position in Congress. The three qualifications for congressional office—age, citizenship, and inhabitancy in the state—are established and fixed in the United States Constitution; are the *exclusive* qualifications to congressional office; and may not be added to or altered by Congress via a statute or internal congressional rule, or by a state unilaterally.<sup>36</sup> A Member who has been expelled from Congress and subsequently reelected may, therefore, not be "excluded" from being seated in Congress based merely on the past misconduct and subsequent congressional discipline.<sup>37</sup> Although in theory, a previously expelled Member reelected to Congress could, after having been seated, be expelled by a two-thirds vote for misconduct, even past misconduct, both the House and the Senate have not, as discussed above, as a practice expelled a Member for past misconduct when the electorate knew of the conduct and still elected or reelected the Member.

A Member who has been expelled from the House does not lose his or her federal government pension automatically by virtue of the expulsion. Rather, federal government pensions earned, vested, or accumulated by officers and employees, including Members of Congress, are forfeited under the so-called "Hiss Act" upon the conviction of certain federal offenses that relate to espionage, treason, or other specific national security offenses.<sup>38</sup> Additionally, Members of

<sup>33</sup> H.Rept. 570, 63<sup>rd</sup> Cong., 2d Sess. (1914), at VI, CANNON'S PRECEDENTS, *supra* at §398. Emphasis added.

<sup>34</sup> "Congress has demonstrated a clear reluctance to expel when to do so would impinge ... on the electoral process." Bowman and Bowman, *supra* at 1101.

<sup>35</sup> Madison, THE FEDERALIST PAPERS, No. 57.

<sup>36</sup> *Powell v. McCormack*, *supra*; U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); *Cook v. Gralik*, 531 U.S. 510 (2001).

<sup>37</sup> See *Powell v. McCormack*, *supra* at 522, 547-550, 537 n. 69. Note discussion by the Court (at 527-536) of the Wilkes case concerning English parliamentary practice at the time of the Constitution's drafting. If, however, there is alleged disloyalty to the Union, after having taken an oath of office to defend the Constitution, the disqualification provision of the Fourteenth Amendment may come into play. See pre-*Powell*, House of Representatives case of Victor Berger, excluded even after reelection. VI CANNON'S PRECEDENTS, §§56, 58, 59.

<sup>38</sup> See now 5 U.S.C. §8311 *et seq.* The President is not covered by the retirement laws applicable to other officers and (continued...)

Congress convicted of any one of a number of criminal offenses relating to public corruption, campaign finance laws, or fraud, when such conduct occurs during and relates to their public service, will lose credit for all of their years of congressional service that would have otherwise accrued toward a federal pension.<sup>39</sup>

## Procedure

The Supreme Court has also recognized a very broad discretion and authority in each house of Congress to discipline its Members under its own chosen *procedural* standards, generally without an established right to judicial review. The act of disciplining Members is carried out through the rulemaking authority of the House. The Supreme Court, in describing the congressional disciplinary process in *United States v. Brewster*, has noted in *dicta*:

The process of disciplining a Member in the Congress ... is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards, and is at the mercy of an almost unbridled discretion of the charging body ... from whose decision there is no established right of review.<sup>40</sup>

Currently in the House of Representatives, a resolution to expel a Member would usually be referred to the House Committee on Ethics, the standing committee in the House with jurisdiction over congressional conduct and ethics, although such a resolution is considered to raise a question of the “privileges” of the House, and could be called up as a privileged resolution with notice by its sponsor according to House Rules.<sup>41</sup> The House Committee on Ethics is also authorized to receive “complaints” concerning a Member’s conduct from any other Member of the House (or from outside of the House when certified by a Member),<sup>42</sup> may initiate on its own accord an investigation of a Member,<sup>43</sup> and may also be instructed by a resolution adopted by the House of Representatives to investigate a particular matter or Member. Under House Rule changes adopted in 2008, the House established an independent Office of Congressional Ethics for the House of Representatives, made up of non-Members of the House, which may initiate inquiries into allegations of misconduct by Members and staff, and may then refer matters to the standing House Committee on Ethics for further investigation and disciplinary recommendations.<sup>44</sup> The committee may, when such matters have come before it, proceed to “investigate” the allegations

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employees of the federal government, and forfeiture of retired pay applies in case of impeachment, conviction, and removal of the President. See P.L. 85-745, as amended, 3 U.S.C. §102, note.

<sup>39</sup> P.L. 110-81, the “Honest Leadership and Open Government Act,” Sections 401(a) and 401(b), and P.L. 112-105, the “STOCK Act,” Section 15, amending 5 U.S.C. §8332 (CSRS) and 5 U.S.C. §8411 (FERS).

<sup>40</sup> 408 U.S. 501, 519 (1972). Matters “textually committed” to Congress in the Constitution, such as rules for internal proceedings, might not generally be subject to judicial review unless another, express provision of the Constitution is violated. *Note, e.g., Nixon v. United States*, 506 U.S. 224, 228-229, 236-238 (1993); *United States v. Ballin*, 144 U.S. 1, 5 (1892); *Powell v. McCormack*, *supra* at 519, and 553 (Douglas, J. concurring).

<sup>41</sup> House Rule IX. DESCHLER’S PRECEDENTS, *supra*, Ch. 12, §13, at 176-177; Brown, *supra*, “Misconduct,” §21. *Note* also H.Rept. 94-1477, at 6 (1976), *In the Matter of Representative Andrew J. Hinshaw*. Prior to 1968 when the standing ethics committee, then called the Committee on Standards of Official Conduct, was created, such resolutions were referred to either *ad hoc* select committees, or to standing committees with other jurisdiction, such as Judiciary.

<sup>42</sup> House Rule XI, para. 3(b)(2).

<sup>43</sup> House Rule XI, para. 3(b)(2); House Committee on Ethics, Rules 14(a)(3), 15.

<sup>44</sup> H.Res. 895, 110<sup>th</sup> Congress. See CRS Report R40760, *House Office of Congressional Ethics: History, Authority, and Procedures*, by Jacob R. Straus.

either under the authority of the chairman and ranking Member,<sup>45</sup> or when an investigative subcommittee is empaneled.<sup>46</sup>

Although it was a common practice in the past to wait until all appeals were exhausted in a criminal conviction of a Member before the House would proceed on a matter concerning that Member,<sup>47</sup> the more modern practice is for the House to take cognizance of the underlying *factual* findings regarding the conduct that was the basis for the Member's conviction, regardless of the potential *legal* or procedural issues which might be resolved on appeal.<sup>48</sup> The rules of the House Committee on Ethics specifically provide, in fact, for automatic jurisdiction of the committee when a Member has been convicted in a federal, state, or local court of a felony.<sup>49</sup> Moreover, in one instance, a committee disciplinary proceeding concerning a Member who had been indicted for bribery was begun after the Member's trial, even though the trial ended in a hung jury, and before a second trial was to commence.<sup>50</sup>

The current Rules of the House of Representatives authorize the House Committee on Ethics to investigate allegations of violations of "any law, rule, regulation, or other standard of conduct applicable to the conduct of such Member ... in the performance of his duties or the discharge of his responsibilities," and after such investigation the committee is to "report to the House its finding of fact and recommendations, if any...."<sup>51</sup> The committee has promulgated detailed procedural rules to implement fairness in the disciplinary process, specifically providing the requirements of notice, the specification of charges, and opportunities for the charged Member to be heard and to examine witnesses and evidence. After proceedings by an investigatory subcommittee, the taking of evidence, and an adjudicatory hearing, if the Member is found by the majority of the committee members to have committed the specific offenses charged, the full committee will then consider the appropriate discipline.<sup>52</sup> If the committee finds that expulsion is warranted, a recommendation for such discipline is made in a report to the full House of Representatives; after debate, the recommendation may be accepted, modified, or rejected by the House.

<sup>45</sup> House Committee on Ethics, Rule 18 (a).

<sup>46</sup> "The Committee's investigations are conducted either pursuant to authorization by the Chairman and Ranking Member, under Committee Rule 18(a), or pursuant to a vote by the Committee to empanel an Investigative Subcommittee (ISC). Most investigations are conducted pursuant to Committee Rule 18(a). Even those investigations that ultimately result in the formation of an ISC usually begin as Committee Rule 18(a) investigations." H.Rept. 113-727, at 11-12 (2015), Committee on Ethics, *Summary of Activities One Hundred Thirteenth Congress*.

<sup>47</sup> DESCHLER'S PRECEDENTS, *supra*, Ch. 12, §13, at 176.

<sup>48</sup> Note discussion in H.Rept. 96-1387, *supra* at 4-5; see also, generally, CRS Rpt. 88-197A, "House Discipline of Members After Conviction But Before Final Appeal," March 1, 1988 (archived). A Member convicted of a felony for which the penalty may be two years or more imprisonment, "should refrain" from voting on the floor or in committee until his or her presumption of innocence is restored. House Rule XXIII (10).

<sup>49</sup> House Committee on Ethics, Rule 14(a)(4), 18(e).

<sup>50</sup> H.Rept. 96-856 (1980), *In the Matter of Representative Daniel J. Flood* (1980).

<sup>51</sup> House Rule XI, cl. 3(a)(2).

<sup>52</sup> Investigations subcommittees are four Members of the House, and may be made up of committee Members, as well as Members of the House not on the committee who are appointed at the beginning of the Congress as a reserve "pool" available to be on investigations subcommittees if needed. Adjudications are held before a panel of the committee who did *not* serve on the investigations subcommittee, and if any charges drafted by the investigations subcommittee are proven before the adjudications panel, a "sanctions" hearing to determine the sanctions to be recommended to the House is conducted before the full membership of the Ethics Committee. House Rule X, cl. 5(a)(3) and (4), XI, cl. 3(b)(1)(B)(i), Rules of the Committee on Ethics, *supra*.

## Censure

The term “censure,” unlike the term “expel,” does not appear in the Constitution, although the authority is derived from the same clause—Article I, Section 5, clause 2, concerning the authority of each house of Congress to “punish its Members for disorderly Behaviour.” Censure, reprimand, or admonition are traditional ways in which parliamentary bodies have disciplined their members and maintained order and dignity in their proceedings.<sup>53</sup> In the House of Representatives, a “censure” is a formal vote by the majority of Members present and voting on a resolution disapproving a Member’s conduct, generally with the additional requirement that the Member stand at the “well” of the House chamber to receive a verbal rebuke and reading of the censure resolution by the Speaker of the House.

## Grounds

The Constitution, in providing that either house of Congress may “expel” a Member by a two-thirds majority, does not specify the reasons for such expulsion, but does in that same provision state that either house of Congress may punish its Members for “disorderly Behaviour.” Some early commentators believed that the authority to “punish” a Member by way of censure or some other condemnation was thus expressly limited, unlike expulsion, to cases concerning “disorderly” or unruly behavior or conduct in Congress, that is, conduct which disrupts the institution.<sup>54</sup> The authority to discipline by way of censure, reprimand, or other such rebuke, however, has come to be recognized and accepted in congressional practice as extending to cases of “misconduct,” even outside of Congress, which the House finds to be reprehensible, and/or to reflect discredit on the institution, and therefore, worthy of condemnation or rebuke.

The House of Representatives has taken a broad view of its authority to discipline its Members. In the 63<sup>rd</sup> Congress, for example, the House Judiciary Committee described the power of the House to punish for disorderly behavior as a power which is “full and plenary and may be enforced by summary proceedings. It is discretionary in character ... restricted by no limitation except in case of expulsion the requirement of the concurrence of a two-thirds vote.”<sup>55</sup> Similarly, in its report on a Member, a House Select Committee in 1967 stated:

Censure of a Member has been deemed appropriate in cases of a breach of the privileges of the House. There are two classes of privilege, the one, affecting the rights of the House collectively, its safety, dignity, and the integrity of its proceedings; and the other, affecting the rights, reputation, and conduct of Members, individually.

Most cases of censure have involved the use of unparliamentary language, assaults upon a Member or insults to the House by introductions of offensive resolutions, but in five cases in the House and one in the Senate [as of 1967] censure was based on corrupt acts by a Member, and in another Senate case censure was based upon noncooperation with and abuse of Senate committees.

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<sup>53</sup> May, *THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT*, *supra* at 103; BLACK’S LAW DICTIONARY, at 224, 6<sup>th</sup> Edition (1990), defines “censure” as: “The formal resolution of a legislative, administrative, or other body reprimanding a person, normally one of its own members, for specified conduct.”

<sup>54</sup> Note, for example, discussion in Bowman and Bowman, *supra* at 1089 - 1091, citing Rawle, *VIEW OF THE CONSTITUTION OF UNITED STATES* 46-47 (2<sup>nd</sup> ed. 1829).

<sup>55</sup> H.Rept. 570, 63<sup>rd</sup> Cong., 2d Sess. (1914).



This discretionary power to punish for disorderly behavior is vested by the Constitution in the House of Representatives and its exercise is appropriate where a Member has been guilty of misconduct relating to his official duties, noncooperation with committees of this House, or nonofficial acts of a kind likely to bring this House into disrepute.<sup>56</sup>

Although the House has stated and demonstrated in precedents its reticence to *expel* a Member for misconduct in a previous Congress which was known to the electorate, the House has had no similar compunction nor has it exercised similar restraint in expressing a formal “censure” of such past misconduct. Thus, a House Select Committee in the 90<sup>th</sup> Congress noted that “the right to *censure* a Member for such prior acts is supported by clear precedent in both Houses of Congress....”<sup>57</sup> In more recent years the House has adopted in its Rules a “statute of limitations” on actions, restricting the Ethics Committee from investigating alleged violations of conduct standards when such violations go back more than the last three Congresses, “unless the Committee determines that the alleged violation is directly related to an alleged violation that occurred in a more recent Congress.”<sup>58</sup>

## Precedents

In the House of Representatives, there have been 23 “censures” of Members (22 Members and 1 Delegate), including two censures of *former* Members who, in 1870, had resigned just prior to the House’s consideration of expulsion motions against those Members for selling military academy appointments.<sup>59</sup> While the majority of the censures in the House occurred in the 19<sup>th</sup> century and concerned issues of decorum, that is, the use of unparliamentary or insulting language on the floor of the House or acts of violence toward other Members, in more recent years instances of financial misconduct appear to have been a major issue.<sup>60</sup> House Members have been censured for various conduct, including insulting or other unparliamentary language on the floor; assaulting another Member; supporting recognition of the Confederacy; the selling of military academy appointments; bribery; and in more recent years, for payroll fraud where inflated staff salaries were used to pay a Member’s personal expenses;<sup>61</sup> receipt of improper gifts and improper use of campaign funds;<sup>62</sup> sexual misconduct with House pages;<sup>63</sup> and financial improprieties

<sup>56</sup> H.Rept. 27, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 24-26, 29 (1967), *In re Adam Clayton Powell*. The Select Committee recommended to the House in the 90<sup>th</sup> Congress to seat Mr. Powell, and then censure him. The House rejected that recommendation, and voted to “exclude” Powell, which was ultimately found unconstitutional by the Supreme Court in *Powell v. McCormack*, *supra*, because the House’s exclusion went beyond judging the three qualifications for office or the election of the Member-elect. Representative Powell was reelected to and then seated in the 91<sup>st</sup> Congress, but was fined and had his seniority reduced by the House (H.Res. 2, 115 CONG. REC. 29, 34 (January 3, 1969)).

<sup>57</sup> H.Rept. 27, *supra* at 27; see also censure of Representatives Ames and Brooks in the “Credit Mobilier” bribery matter (1872), for conduct that took place at least five years before their election to the House, and about which the electorate apparently knew, II HINDS’ PRECEDENTS, *supra* at §1286; DESCHLER’S PRECEDENTS, *supra* at Ch. 12, §16, pp. 194-195; and H.Rept. 96-351, at 3-5 (1979), *In the Matter of Representative Charles C. Diggs, Jr.*

<sup>58</sup> House Rule XI, cl. 3(b)(3).

<sup>59</sup> See censures of Representatives Whittemore and DeWeese, II HINDS’ PRECEDENTS, *supra* at §§1273, 1239.

<sup>60</sup> See **Appendix**; also, House Committee on Standards of Official Conduct, “Historical Summary of Conduct Cases in the House of Representatives” (November 2004); *House of Representatives Exclusion, Censure and Expulsion Case from 1789 to 1973*, *supra*; and Maskell, “Discipline of Members,” in THE ENCYCLOPEDIA OF THE UNITED STATES CONGRESS, 641-646 (Simon and Schuster 1993).

<sup>61</sup> H. Rept. 96-351, *In the Matter Representative Charles C. Diggs, Jr.* (1979); 125 CONG. REC. 21584-21592 (July 31, 1979).

<sup>62</sup> H. Rept. 96-930, *In the Matter of Representative Charles H. Wilson* (1980), H.Res. 660, 96<sup>th</sup> Cong., 126 CONG. REC. 13801-13820 (June 10, 1980).

<sup>63</sup> H. Rept. 98-295, *In the Matter of Representative Gerry E. Studds* (1983), 129 CONG. REC. 20030-20037 (July 20, (continued...))

regarding the use of official letterhead to solicit private donations, impermissible use of rent-controlled facilities for one's campaign, and failure to file accurate financial disclosure reports and federal tax returns.<sup>64</sup>

## Consequences of Censure

There is no specific disqualification or express consequence provided in the House Rules after a Member has been "censured." The political ignominy of being formally and publicly admonished and deprecated by one's colleagues, however, has led some Members of Congress who face a potential censure or other formal House discipline for certain misconduct to resign before any official recommendation or other action is taken.<sup>65</sup>

While there are no House Rules regarding the consequences of a "censure," the two political parties in the House themselves have adopted their own internal party rules which, in recent years, have generally barred from certain leadership positions, including the chairmanship of committees and subcommittees, those Members who have been censured during that Congress. Political party rules of the parties in the House may be changed by the particular party caucus or conference itself according to its own rules.

## Reprimand

Prior to the 1970s in the House of Representatives, although there were some inconsistencies,<sup>66</sup> the terms "reprimand" and "censure" were often considered synonymous and used together in a resolution. In 1921, for example, a resolution adopted by the House instructed the Speaker to summon Representative Blanton of Texas "to the bar of the House and deliver to him its reprimand and censure."<sup>67</sup>

The more formalized distinction in the House whereby it is considered that a "reprimand" expressly involves a lesser level of disapproval of the conduct of a Member than that of a "censure," and is thus a less severe rebuke by the institution,<sup>68</sup> is of relatively recent origin. The term "reprimand" was used to explicitly indicate a less severe rebuke by the House in 1976 in the reprimand of a Member for his failure to disclose certain personal interests in official matters, and for the apparent use of his office to further his own personal financial interests.<sup>69</sup> Procedurally in

(...continued)

1983); and H. Rept. 98-296, *In the Matter of Representative Daniel B. Crane* (1983), 129 CONG. REC. 20021-20030 (JULY 20, 1983).

<sup>64</sup> H. Rept. 111-661, *In the Matter of Representative Charles B. Rangel* (2010), H. Res. 1737, 111<sup>th</sup> Cong., 156 CONG. REC. H7891-H7899 (daily ed. December 2, 2010).

<sup>65</sup> See footnote 24 *supra*. Other Members have also lost their next election before any House action is completed. See footnote 25 *supra*. As noted, since no recommendation is made by the committees investigating these matters, it cannot be said with certainty what, if any, discipline would have been recommended by the committees, or approved by the House.

<sup>66</sup> *NOTE II HINDS' PRECEDENTS, supra* at §1257 (47<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1882)); *II HINDS' PRECEDENTS, supra* at §1666 (39<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1866)).

<sup>67</sup> *VI CANNON'S PRECEDENTS, supra* at §236 (67<sup>th</sup> Cong., 1<sup>st</sup> Sess.).

<sup>68</sup> *DESCHLER'S PRECEDENTS, supra* at Ch. 12, §16, p. 196 ("a somewhat lesser punitive measure than censure"); see also Cushing, *supra* at pp. 266-269, for historical context. See now House Committee on Ethics, *supra* at Rule 24(g).

<sup>69</sup> H. Rept. 94-1364 (1976), *In the Matter of Representative Robert L.F. Sikes*. No recommendation for punishment was made for an "obvious and significant conflict of interest" – a significant ownership interest in land directly impacted by legislation the Member sponsored, since the "events occurred approximately 15 years ago and ... appear to have been (continued...)

the House, a “censure” resolution will generally involve a verbal admonition, such as a reading of the resolution, to be administered by the Speaker of the House to the Member at the bar of the House. In the case of a “reprimand,” however, the resolution is merely adopted by a vote of the House with the Member “standing in his place,” or is merely implemented by the adoption of the committee’s report.<sup>70</sup>

Ten House Members have been “reprimanded” by the full House for a range of misconduct, including failure to disclose certain personal interests in official matters and using one’s office to further one’s personal gains; misrepresentations to investigating committees; failure to report campaign contributions; conversion of campaign contributions to personal use and false statements before the investigating committee; false statements on financial disclosure forms; ghost voting and maintaining persons on the official payroll not performing official duties commensurate with pay; the misuse of one’s political influence in administrative matters to help a personal associate; the failure to ensure that a Member-affiliated tax-exempt organization was not improperly involved in partisan politics, and for providing inaccurate, incomplete, and unreliable information to the investigating committee; and the misuse of official resources by compelling congressional staff to work on political campaigns.<sup>71</sup> In 2009, the House of Representatives adopted a resolution of disapproval by a formal vote (and which thus would be considered to be a “reprimand” by the entire body of the House), stating that the House “disapproves” of the behavior of a Member “interrupting” the President’s remarks to the House and Senate, which the House found to be “a breach of decorum” that “degraded the proceedings of the joint session.”<sup>72</sup>

When the House Committee on Ethics makes a report recommending to the House a “censure” or a “reprimand,” it may also include in that report a recommendation for an additional action such as a fine, a restitution or payment of funds, or recommendations for the loss of seniority or privileges, when such actions are deemed appropriate.

## Fines; Monetary Assessments

In addition to more traditional disciplines of censure, reprimand, or expulsion, the House of Representatives as an institution has the authority to levy a fine against a Member of the House concerning a disciplinary matter. This authority appears to be incidental to the express constitutional grant of power to the House to determine the rules of its proceedings and to punish its Members for misconduct. *Deschler’s Precedents* states expressly that under the constitutional authority of the House at Article I, Section 5, clause 2: “A fine may be levied by the House against a Member pursuant to its constitutional authority to punish its Members.”<sup>73</sup> The House Committee on Ethics notes expressly in its Committee Rules that sanctions that it may recommend to the House concerning a Member may include expulsion; censure; reprimand; denial or limitation of any right, privilege, or immunity of the Member; or a “fine.”<sup>74</sup> The authority for each house of Congress to fine one of its own Members was recognized by the

(...continued)

known to [his] constituency....” *Id.* at 4-5.

<sup>70</sup> DESCHLER’S PRECEDENTS, *supra* at Ch. 12, §16, p. 196.

<sup>71</sup> See **Appendix**.

<sup>72</sup> H.Res. 744, 111<sup>th</sup> Congress, adopted by the House, September 15, 2009, 155 CONG. REC. H9529-H9534 (daily ed.). The matter was raised by another Member as a privileged resolution.

<sup>73</sup> DESCHLER’S PRECEDENTS, *supra* at Ch. 12, §17, p. 203. Note, Cushing, *supra* at §675.

<sup>74</sup> House Committee on Ethics, Rule 24(e)(4).

Supreme Court in *dicta* in *Kilbourn v. Thompson*,<sup>75</sup> where the Court noted that “either House” of Congress has “the power of punishment ... by fine or imprisonment,” relating to areas where Congress has been expressly granted authority, such as where the “Constitution expressly empowers each House to punish its own Members for disorderly behavior.”<sup>76</sup>

Fines for disciplinary purposes in the House, as well as in the Senate,<sup>77</sup> have been relatively infrequent occurrences.<sup>78</sup> The precedents in the House have demonstrated that the House fined a Member in 1969 the sum of \$25,000 to be repaid by automatically withdrawing a certain amount regularly from his pay, for various conduct offenses, including the misuse of official committee appropriations, payroll, and expenses.<sup>79</sup> A Member of the House who was censured in 1979 was required to “make restitution of substantial amounts by which he was unjustly enriched,” that is, the Member was expressly ordered within the resolution of censure to pay to the House a specific amount by executing an interest-bearing demand promissory note for \$40,031.66, made payable to the Treasury of the United States.<sup>80</sup> A Member of the House who was officially “reprimanded” by the House in 2012 for misuse of official resources in compelling official congressional staff to work on political campaigns was also “fined” \$10,000 as part of the reprimand.<sup>81</sup> The Ethics Committee issued a “Letter of Reproval” to a Member in June 2014 regarding improper gifts and misuse of campaign funds, and the committee directed the Member to “repay the full amount of the improper gifts and the improperly used campaign funds” in the amount of \$59,063.<sup>82</sup>

At other times the House pursuant to disciplinary actions required certain monetary assessments of Members of Congress which were not expressly or necessarily characterized as “fines.” A Member of Congress, pursuant to a formal “reprimand,” was required to make restitution to the District of Columbia of certain monies and fines, concerning which he had improperly used his influence to have “fixed” or reduced.<sup>83</sup> In 1997, a monetary assessment or penalty, which was not characterized by the committee as a “fine,” was imposed upon the Speaker of the House to pay “for some of the costs” of an ethics investigation which resulted in the reprimand of the Speaker.<sup>84</sup>

<sup>75</sup> 103 U.S. 168 (1880).

<sup>76</sup> 103 U.S. at 189, 190. There is no known case of a congressional imprisonment of a Member in the history of Congress. See discussion in *United States v. Traficant*, 368 F.3d 646, 651 (6<sup>th</sup> Cir. 2004): “Congress has not done so, even once, dating back to the year 1787.”

<sup>77</sup> In the Senate, in a 1990 disciplinary matter in which a Senator was “denounced” by the full Senate, for example, the Senator was ordered to “reimburse” the Senate a specified amount in connection with questionable expense reimbursements received from the Senate, and “to pay to charities with which he has no affiliation” an amount equal to that which was considered as “excess honoraria” over and above that which the Senator was permitted to accept. S. Rept. 101-382, at 14-15 (1990).

<sup>78</sup> Studies have noted that prior to 1969, no Members of the House had ever been fined for disciplinary reasons. McLaughlin, “Congressional Self-Discipline: The Power to Expel, Exclude and to Punish,” 41 *FORDHAM L.R.* 43, 61 (Oct. 1972). There had in the 1800’s been a few instances noted in precedents where the House authorized fines for absences, or as a condition for discharge. Note, *IV HINDS’ PRECEDENTS*, *supra* at §§3011-3014.

<sup>79</sup> H. Res. 2, 91<sup>st</sup> Cong., 1<sup>st</sup> Sess., *In the Matter of Representative Adam Clayton Powell* (1969), note DESCHLER’S *PRECEDENTS*, *supra* at Ch. 12, §17, pp. 203-204. The Sergeant at Arms was directed to deduct \$1,150 a month from the Member’s salary.

<sup>80</sup> H.Rept. 96-351, at 20 (1979), *In the Matter of Representative Charles Diggs, Jr.*

<sup>81</sup> H.Rept. 112-642 (2012), *In the Matter of Allegations Relating to Representative Laura Richardson*; see adoption of Committee Report and House reprimand, at 158 *CONG. REC.* H5635- H3639 (daily ed. August 2, 2012).

<sup>82</sup> H.Rept. 113-487, at 4 (2014), *In the Matter of Allegations Relating to Representative Don Young*.

<sup>83</sup> H.Rept. 101-610, (1990), *In the Matter of Representative Barney Frank*.

<sup>84</sup> H.Rept. 105-1, at 3 (1997), *In the Matter of Representative Newt Gingrich*.

The “fines” and/or monetary assessments ordered in the disciplinary cases appear to involve the repayment or restitution of funds misused or wrongfully received, as opposed to fines merely or strictly for “punishment” purposes and not necessarily connected to the wrongful conduct. This is consistent with the current guidance in the House Committee on Ethics Rules concerning the recommendation of a “fine,” which the committee notes “is appropriate in a case in which it is likely that the violation was committed to secure a personal financial benefit.”<sup>85</sup> There does not appear to be, however, a constitutional or institutional *requirement* for such fines to be so connected with unjust enrichments or misuse of funds; and the Committee on Ethics has noted in its Rules that the guidance concerning fines and other sanctions recommended to the House “sets forth general guidelines and does not limit the authority of the Committee to recommend other sanctions.”<sup>86</sup>

## Suspension

Although a temporary “suspension” is traditionally listed as one of the possible disciplinary actions that a legislative body may take against one of its members,<sup>87</sup> the House of Representatives has in recent years questioned its authority to disqualify or mandatorily suspend a Member by a simple majority vote.<sup>88</sup> Such a “suspension” would most likely involve a prohibition on a Member of the House from voting on or working on legislative or representational matters for a particular time. Although not addressing a “suspension” specifically, the House has generally considered a decision of a Member not to vote on a matter as within the discretionary purview of the Member individually under House Rule III(1), even when a legislative matter may involve possible conflicting personal interests. As noted by the House, its authority to require a Member to disqualify himself or herself from voting has traditionally been questioned, and such “recusal” has therefore been traditionally left to the discretion of the Member. *Jefferson’s Manual and Rules of the House of Representatives*, at §658, states:

[T]he weight of authority also favors the idea that there is no authority in the House to deprive a Member of the right to vote (V, 5937, 5952, 5959, 5966, 5967; VIII, 3072). In one or two early instances the Speaker has decided that because of a personal interest, a Member should not vote (V, 5955, 5958); but on all other occasions and in the later practice the Speaker has held that the Member himself and not the Chair should determine this question (V, 5950, 5951; VIII, 3071; Speaker Albert, Dec. 2, 1975, p. 38135; Speaker O’Neill, Mar. 1, 1979, p. 3748), and the Speaker has denied his own power to deprive a Member of the constitutional right to vote (V, 5956; Speaker Albert, Dec. 2, 1975, p. 38135; Speaker O’Neill, Mar. 1, 1979, p. 3748).<sup>89</sup>

As to refraining from voting and committee work specifically, the House of Representatives in the 94<sup>th</sup> Congress adopted a rule which stated a sense of the House that Members who have been convicted of a crime for which a sentence of two or more years may be imposed “should refrain from participation in the business of each committee of which he is then a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole

<sup>85</sup> House Committee on Ethics, Rule 24(g).

<sup>86</sup> *Id.*

<sup>87</sup> Cushing, *supra*, at Section 627, p. 251.

<sup>88</sup> JEFFERSON’S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, §658. DESCHLER’S PRECEDENTS, *supra* at Ch. 12, §15, p. 187.

<sup>89</sup> Citations are to volumes of HINDS’ AND CANNON’S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, and to the relevant sections.



House ...” until there has been a judicial or administrative reinstatement of his or her presumption of innocence, or until the Member is reelected.<sup>90</sup> The supporters of the provision noted that the rule was worded in a *discretionary* manner because, they believed that if the provisions were mandatory, then “it would have been unconstitutional [because] [i]t would have deprived the district, which the Member was elected to represent, of representation....”<sup>91</sup>

Although the Rule on refraining from voting is couched in what can be considered advisory terms of guidance to Members, the Rules of the House also provide, in the Code of Official Conduct, that Members of the House “shall adhere to the spirit and the letter of the Rules of the House.”<sup>92</sup> Members are thus expected to conform to and abide by the abstention provision.<sup>93</sup>

## Letters of Reproval and Other Committee Actions

In the House of Representatives, a “Letter of Reproval” is an administrative action of the House Committee on Ethics, authorized under the Rules of the House of Representatives “to establish or enforce standards of official conduct for members, officers, and employees of the House.”<sup>94</sup> The issuance of a Letter of Reproval by the committee is made public, as it is issued as part of a public report from the committee to the House on an “investigation” that the House Committee on Ethics has undertaken.<sup>95</sup>

A Letter of Reproval may be sent by the Committee on Ethics on its own accord by majority vote of the committee, without any approval or action by the full House of Representatives.<sup>96</sup> As such, a Letter of Reproval is clearly distinguishable from legislative “discipline,” “punishment,” or “sanctions” that the full House may invoke against a Member, such as censure, reprimand, fine, or expulsion.<sup>97</sup> It appears that a Letter of Reproval is intended to be an action by the committee which is an alternative to the recommendation of sanctions to the House, and is an action which is used for infractions of Rules or standards which, because of the nature of the infractions or because of mitigating circumstances, do not rise to the level of requiring action by the full House of Representatives. The Rules of the Committee on Ethics provide, after setting out procedures

<sup>90</sup> See now, House Rule XXIII (10); *note* H.Rept. 93-616, (1973).

<sup>91</sup> 121 CONG. REC. 10341, April 16, 1975, colloquy between Representatives Robert Eckhardt and John J. Flynt of Texas.

<sup>92</sup> House Rule XXIII(2); *note* comments on passage of abstention rule by Representatives Edwards and Drinan, 121 CONG. REC., *supra* at 10343-10345, and discussion in DESCHLER’S PRECEDENTS, Ch. 12, §15 (1977).

<sup>93</sup> The committee in 1993 noted in its report that although there is no “specific enforcement capability” expressed in the proposed rule, “any Member subject to its provisions at the time of the resolution’s adoption, or thereafter, who violates the clear principles it expresses, will do so at the risk of subjecting himself to the introduction of a privileged resolution relating to his conduct....” H.Rept. 93-616, *supra* at 4. *Note*, Washington Post, “Under Colleagues’ Pressure, Biaggi Refrains from Voting,” October 22, 1987. See also House Committee on Standards of Official Conduct, “Dear Colleague” letter from the Chairman and Vice Chairman, April 15, 2002, warning Member convicted of felony violations that “by voting in the House – you risk subjecting yourself to action by this Committee, and by the House, in addition to any other disciplinary action that may be initiated in connection with your criminal conviction.”

<sup>94</sup> House Rule XI, para. 3(a)(1).

<sup>95</sup> House Rule XI, para. 3(a)(1) provides that a “letter of reproof or other administrative action of the committee pursuant to an investigation ... shall only be issued ... as part of a report required” under subparagraph (2) of the Rule. Subparagraph (2) states that the Committee on Ethics “shall report to the House its findings of fact and recommendations, if any, upon the final disposition of any such investigation, and such action as the committee may deem appropriate in the circumstances.” House Rule XI, para. 3(a)(2).

<sup>96</sup> House Rule XI, para. 3(a)(1); House Committee on Ethics, Rule 24(c).

<sup>97</sup> A Letter of Reproval is not one of the “sanctions” recommended to the House, listed in the Committee Rules at Rule 24(c).

when “a majority of the Committee does not vote in favor of the recommendation that the House of Representatives take action,” that “[T]he Committee may also, by majority vote, adopt a motion to issue a Letter of Reproval or take other appropriate Committee action.”<sup>98</sup> The committee may issue such Letter “[i]f the Committee determines a Letter of Reproval constitutes sufficient action....”<sup>99</sup> The committee procedural rules appear to indicate that such a “Letter of Reproval” may be sent only after an investigatory subcommittee has issued a Statement of Alleged Violations, at least one count of which has been proved by an adjudicatory subcommittee, and upon completion of a sanction hearing.<sup>100</sup>

A Letter of Reproval was characterized by the ethics committee in the House—then known as the House Committee on Standards of Official Conduct—as a “rebuke of a Member’s conduct issued by a body of that Member’s peers acting, as the Committee on Standards of Official Conduct, on behalf of the House of Representatives.”<sup>101</sup> The House Ethics Committee has issued Letters of Reproval for the improper use of campaign accounts for personal loans;<sup>102</sup> for a Member’s borrowing of campaign funds for personal use, and a subsequent “inadequate” disclosure of such transaction;<sup>103</sup> and concerning allegations of sexual harassment of a female employee, and the use of one’s office for political campaign activity.<sup>104</sup> In October 2000, after a lengthy investigation of a Member, the committee issued a Letter of Reproval for actions for which the Member was found to have “brought discredit to the House of Representatives,” including a relationship with a former chief of staff which gave the appearance that official decisions might have been improperly affected, violations of the House gift rule, misuse of official congressional resources, misuse of official congressional staff for campaign purposes, and the appearance that certain expenditures of the Member’s campaign committee were not for bona fide campaign or political purposes.<sup>105</sup> In June 2001, the committee issued a Letter of Reproval to a Member for the improper expenditure of campaign funds to benefit businesses in which the Member and his family had a personal stake, and for the improper conversion of campaign funds to personal uses.<sup>106</sup>

In 2014 the Ethics Committee issued Letters of Reproval regarding the conduct of three different Members of the House. One Letter of Reproval involved interference (by communicating with a

<sup>98</sup> House Committee on Ethics, Rule 24(c).

<sup>99</sup> House Committee on Ethics, Rule 24(d).

<sup>100</sup> House Committee on Ethics, Rule 24(b), (c) and (d). See also Committee Rule 26(b), waiver of procedural steps by respondent.

<sup>101</sup> H.Rept. 106-979, at 3J, (2000), *In the Matter of Representative E.G. “Bud” Shuster*.

<sup>102</sup> H.Rept. 100-382, at 5, 6, (1987), *In the Matter of Representative Richard H. Stallings*. The committee recommended against sanctions by the full House because of several “mitigating” factors, including “no evidence of improper intent” of the Member either to conceal the activity or to violate the provisions of the Rule as the loans were fully reported on required disclosures, and the voluntary “corrective action” on the Member’s own initiative once the Member became aware of the violations.

<sup>103</sup> H.Rept. 100-526, (1988), *In the Matter of Representative Charles G. Rose III*. The committee cited “mitigating circumstances which prevent these violations from rising to the level of a recommendation of sanction to the full House,” and commended the “positive action taken” by the Member. *Id.* at 26.

<sup>104</sup> H.Rept. 101-293, (1989), *In the Matter of Representative Jim Bates*. The committee initiated a Preliminary Inquiry and the Member waived his rights to a Statement of Alleged Violations and a disciplinary hearing. The committee noted that since the Member had taken steps to assure no repeat of the offending conduct, was being directed to specifically issue apologies to the affected employees, and that since any inappropriate campaign activities were “sporadic” and not on-going, that “the better course is to formally and publicly reprove” the Member. *Id.* at 13-14.

<sup>105</sup> H.Rept. 106-979, at 3D-3E (2000), *In the Matter of Representative E.G. “Bud” Shuster*.

<sup>106</sup> H.Rept. 107-130, (2001), *In the Matter of Representative Earl F. Hilliard*.

potential material witness) with the committee's investigation of allegations that a Member's official staff had been directed to perform campaign activities on behalf of the Member.<sup>107</sup> Another Member received a Letter of Reproval for actions which "did not reflect creditably on the House" involving official assistance to a business institution in which the Member had just recently made a significant financial investment.<sup>108</sup> The third Letter of Reproval in 2014 involved a Member's conduct in receiving improper and prohibited gifts, improperly using campaign funds for personal use, and failing to disclose gifts on the Member's financial disclosure report as required under the Ethics in Government Act.<sup>109</sup>

In addition to a formal, public "Letter of Reproval," the committee has addressed ethical issues concerning allegations of misconduct by Members by way of "other appropriate Committee action," upon agreement of a majority of the committee, when an investigation is undertaken by a subcommittee but the recommendation of sanctions to the full House is not made.<sup>110</sup> Such actions by the full committee have included writing a letter to a Member concerning "necessary corrective action" that should be taken by the Member, or by noting "poor judgment" and the creation of an "appearance of impropriety."<sup>111</sup> The committee has also noted violations of House Rules or standards, has "so notified" the Member, and announced that no further action by the committee will be taken.<sup>112</sup> In 1990, the committee made a public report concerning a Member's behavior, noting that the "Committee clearly disapproves" of the Member's conduct.<sup>113</sup> In 2004, after an investigation by an investigatory subcommittee, the full committee issued a report which "will serve as a public admonishment by the Committee" of three Members.<sup>114</sup> Similarly, in 2006, the committee made public a report from its investigative subcommittee finding that a Member's actions with regard to the release of recordings of intercepted telephone conversations of other Members "were not consistent with the spirit of the Committee's rules."<sup>115</sup> The committee issued "a public admonishment" of a Member in 2010 for accepting gifts of travel in violation of the House gifts rule, and required the Member to "repay the costs of the trips to the respective entities that paid for his travel."<sup>116</sup> In 2012, the Ethics Committee reported that it "agrees with the findings and conclusions of the Investigative Subcommittee" concerning a violation of House Rules by a Member "improperly using her official position for her beneficial interest by permitting her office to take official action specifically on behalf of her husband's medical

<sup>107</sup> H.Rept. 113-665 (2014), *In the Matter of Allegations Relating to Representative Judy Chu*.

<sup>108</sup> H.Rept. 113-664 (2014), *In the Matter of Allegations Relating to Representative Phil Gingrey*.

<sup>109</sup> H.Rept. 113-487 (2014), *In the Matter of Allegations Relating to Representative Don Young*.

<sup>110</sup> House Committee on Ethics, Rule 24(c).

<sup>111</sup> See H.Rept. 101-995, at 8 (1990), *Summary of Activities, One Hundred First Congress*; H.Rept. 106-1044, at 11-12 (2001).

<sup>112</sup> H.Rept. 104-401, at 2, 4-5 (1995), *Inquiry Into Various Complaints Filed Against Representative Newt Gingrich*.

<sup>113</sup> H.Rept. 101-397, at 2, 14 (1990), *In the Matter of Representative Gus Savage*.

<sup>114</sup> H.Rept. 108-722, at 2 (2004), "Investigation of Allegations Related to Voting on the Medicare Prescription Drug, Improvement, and Modernization Act of 2003," concerning allegations of trading votes on a Medicare measure in return for political support of a Member's relative.

<sup>115</sup> The committee made public the report on December 8, 2006 (109<sup>th</sup> Cong., 2d Sess.). See H.Rept. 109-744, at 15-16 (2007). The committee also issued a press release concerning a misdemeanor assault charge against a Member toward an airline employee, noting that the investigative subcommittee found that the Member "demonstrated poor judgment," and that such conduct "implicated the reputation of the House of Representatives." H.Rept. 110-938, at 189 (2007).

<sup>116</sup> House Committee on Standards of Official Conduct, Report, "Investigation into Officially Connected Travel of House Members to Attend the Carib News Foundation Multi-National Business Conferences in 2007 and 2008," at p. V (February 25, 2010).



practice.”<sup>117</sup> Specifically, the report from the investigative subcommittee “recommends that the Committee issue this Report, and that this Report serve as a reproof” of the Member.<sup>118</sup>

The Ethics Committee in the House has characterized past actions such as these generally by stating that the committee “has publicly admonished several other Members for their conduct.”<sup>119</sup> Such informal notifications, public reports, public admonishments, or letters for corrective action thus may be distinguished from those instances when the committee “formally and publicly reproofed” a Member by way of a formal “Letter of Reproof,”<sup>120</sup> although it may be argued that these other committee actions are to some degree comparable since they are all “administrative action[s]” taken by the committee itself “pursuant to an investigation” that had been conducted by an investigative subcommittee of the Committee on Ethics.<sup>121</sup>

The committee has also sent a so-called “letter of admonition” to a Member against whom a complaint was filed by another Member of the House,<sup>122</sup> which was apparently different from, and was not technically, a “Letter of Reproof” or even any other “administrative” action “pursuant to an investigation” by an investigatory subcommittee of the committee.<sup>123</sup> The “letter of admonition” in this case was a method of disposing of a complaint by the committee upon the recommendation of the chairman and ranking minority Member of the committee for a “resolution of the complaint by a letter to the Member ... against whom the complaint is made,”<sup>124</sup> without moving forward with a subcommittee investigation.

<sup>117</sup> Report Adopted by the Committee on Ethics, December 20, 2012, 112<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 1.

<sup>118</sup> Report, *supra* at p. 51.

<sup>119</sup> HOUSE ETHICS MANUAL, 110<sup>th</sup> Cong., 2d Sess., at 12 (2008).

<sup>120</sup> Compare committee descriptions at H.Rept. 101-995, *supra* at 8, and 9; note HOUSE ETHICS MANUAL, *supra* at 11.

<sup>121</sup> As noted, House Rules provide that a “letter of reproof or other administrative action of the Committee” may be invoked “pursuant to an investigation.” House Rule XI, para. 3(a)(1); Committee Rule 24(c), (d). These other actions, however, do not necessarily require the adoption or proof of a Statement of Alleged Violations. *See*, for example, Committee Rule 19(g).

<sup>122</sup> *See* Statement of the Committee on Standards of Official Conduct, October 6, 2004; Memorandum to the Members of the Committee, from the Chairman and Ranking Minority Member, “Recommendations for disposition of the complaint filed against Representative DeLay,” and “Dear Colleague” letter to Members, October 6, 2004.

<sup>123</sup> As noted, a “Letter of Reproof” or other committee action would appear to come only after an investigative subcommittee had been convened and had issued a report to the full Committee on Ethics. A Letter of Reproof could follow when a Statement of Alleged Violations is adopted and proved or admitted, and the full committee had then decided by majority vote to “adopt a motion to issue a Letter of Reproof” as sufficient action in lieu of House action (House Committee on Ethics, Rule 24(b), (c)), while other administrative action could apparently be provided by the committee pursuant to an investigation.

<sup>124</sup> House Committee on Ethics, Rule 16(b), (c).

## Appendix. Disciplinary Actions Taken by the Full House Against a Member

**Table A-1. Censure**

Date	Member of Congress	Conduct
1. July 11, 1832	William Stanberry (OH)	Insulting the Speaker of the House.
2. Mar. 22, 1842	Joshua R. Giddings (OH)	Resolution introduced by Member relating to delicate international negotiations deemed “incendiary.”
3. July 15, 1856	Lawrence M. Keitt (SC)	Assisting in assault on a Member.
4. April 9, 1864	Benjamin G. Harris (MD)	Treasonous conduct in opposing subjugation of the South.
5. April 14, 1864	Alexander Long (OH)	Supporting recognition of the Confederacy.
6. May 14, 1866	John W. Chanler (NY)	Insulting the House by introduction of resolution containing unparliamentary language.
7. July 24, 1866	Lovell H. Rousseau (KY)	Assault of another Member.
8. Jan. 26, 1867	John W. Hunter (NY)	Unparliamentary language.
9. Jan. 15, 1868	Fernando Wood (NY)	Unparliamentary language.
10. Feb. 14, 1869	Edward D. Holbrook (ID)	Unparliamentary language.
11. Feb. 24, 1870	Benjamin Whittemore (SC)	Selling military academy appointments (Member had resigned before expulsion, and was “condemned” by House).
12. Mar. 1, 1870	John T. DeWeese (SC)	Selling military academy appointments (Member had resigned before expulsion, and was “condemned” by House).
13. Mar. 16, 1870	Roderick R. Butler (TN)	Accepting money for “political purposes” in return for Academy appointment.
14. Feb. 27, 1873	Oakes Ames (MA)	Bribery in “Credit Mobilier” case. (Conduct prior to election to House.)
15. Feb. 27, 1873	James Brooks (NY)	Bribery in “Credit Mobilier” case. (Conduct prior to election to House.)
16. Feb. 4, 1875	John Y. Brown (KY)	Unparliamentary language.
17. May 17, 1890	William D. Bynum (IN)	Unparliamentary language.
18. Oct. 27, 1921	Thomas L. Blanton (TX)	Unparliamentary language.
19. July 31, 1979	Charles C. Diggs (MI)	Payroll fraud, 18 U.S.C. §1001 conviction.
20. June 6, 1980	Charles H. Wilson (CA)	Receipt of improper gifts; “ghost” employees; improper personal use of campaign funds.
21. July 20, 1983	Gerry E. Studds (MA)	Sexual misconduct with House page.
22. July 20, 1983	Daniel B. Crane (IL)	Sexual misconduct with House page.
23. Dec. 2, 2010	Charles B. Rangel (NY)	Misuse of congressional letterhead for fundraising; impermissible use of rent-controlled facility for campaign headquarters; inaccurate financial disclosure reports and federal tax returns.

**Table A-2. Reprimand**

Date	Member of Congress	Conduct
1. July 29, 1976	Robert L.F. Sikes (FL)	Use of office for personal gain; failure to disclose interest in legislation.
2. Oct. 13, 1978	Charles H. Wilson (CA)	False statement before Standards of Official Conduct Committee investigating Korean influence matter.
3. Oct. 13, 1978	John J. McFall (CA)	Failure to report campaign contributions from Korean lobbyist.
4. Oct. 13, 1978	Edward J. Roybal (CA)	Failure to report campaign contributions; false sworn statement before Standards of Official Conduct Committee investigating Korean influence matter.
5. July 31, 1984	George V. Hansen (ID)	False statements on financial disclosure form; conviction under 18 U.S.C. §1001 for such false statements.
6. Dec. 18, 1987	Austin J. Murphy (PA)	Ghost voting (allowing another person to cast his vote); maintaining on his payroll persons not performing official duties commensurate with pay.
7. July 26, 1990	Barney Frank (MA)	Using political influence to fix parking tickets and influence probation officers for personal friend.
8. Jan. 21, 1997	Newt Gingrich (GA)	Allowing a Member-affiliated tax-exempt organization to be used for political purposes; providing inaccurate and unreliable information to the ethics committee.
9. Sept. 15, 2009	Joe Wilson (SC)	Interrupting the President's remarks to a joint session of the House and Senate which was found to be a "breach of decorum and degraded the proceedings of the joint session."
10. Aug. 2, 2012	Laura Richardson (CA)	Compelling official congressional staff to work on political campaign.

**Table A-3. Expulsion**

Date	Member of Congress	Conduct
1. July 13, 1861	John B. Clark (MO)	Disloyalty to the Union—taking up arms against the United States.
2. Dec. 2, 1861	John W. Reid (MO)	Disloyalty to the Union—taking up arms against the United States.
3. Dec. 3, 1861	Henry C. Burnett (KY)	Disloyalty to the Union—taking up arms against the United States.
4. Oct. 2, 1980	Michael J. Myers (PA)	Bribery conviction for accepting money in return for promise to use influence in immigration matters.
5. July 24, 2002	James A. Traficant (OH)	Conviction of conspiracy to commit bribery and to defraud U.S., receipt of illegal gratuities, obstruction of justice, filing false tax returns, and racketeering, in connection with receipt of favors and money in return for official acts; and receipt of salary kickbacks from staff.

**Source:** Congressional Research Service files; House Committee on Standards of Official Conduct, "Historical Summary of Conduct Cases in the House of Representatives" (November 2004).

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# Congress's Constitution

LEGISLATIVE AUTHORITY AND  
THE SEPARATION OF POWERS

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## Internal Discipline

WITH GREAT POWER, OF COURSE, comes great responsibility.<sup>1</sup> Accordingly, provisions like the Speech or Debate Clause that empower the houses and members of Congress should be read *in pari materia* with a provision that encourages them to exercise that power responsibly: the authority granted to each house to “punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>2</sup> Self-policing is often viewed as a duty of legislatures (one that they may carry out more or less assiduously). But it can also be a source of soft power: when exercised responsibly, it can build or restore public trust in the institution, thus enhancing its ability to engage successfully in the public sphere.<sup>3</sup>

### Historical Development

As with many of the legislative powers discussed in the preceding chapters, it was around the mid-sixteenth century that Parliament began taking responsibility for disciplining its own members. On January 21, 1549—the same day that the House of Commons passed the Act of Uniformity, establishing the Book of Common Prayer as the form of worship in England<sup>4</sup>—John Story spoke out against the Book. Story, who was both a well-regarded civil-law scholar and a notoriously difficult person,<sup>5</sup> paraphrased Ecclesiastes on the House floor: “Wo unto thee, O England, when thy king is a child.”<sup>6</sup> The king at the time was the eleven-year-old Edward VI. As soon as Story made those remarks, the House ordered him arrested by its sergeant and held incommunicado;<sup>7</sup> three days later,

it sent him to the Tower.<sup>8</sup> He remained there for more than five weeks, until he apologized and the House released him.<sup>9</sup> Importantly, even though Story's insult had been directed at the king (or perhaps more precisely, at the king's uncle, the Duke of Somerset, the Protector), it was the House itself that both punished and released him; indeed, the House's resolution releasing Story even purported to assert authority over the Crown, "requir[ing] the King's Majesty to forgive him his Offences in this Case towards his Majesty and his Council."<sup>10</sup>

A number of early cases of parliamentary discipline likewise dealt with positions taken or words spoken or written by members. In 1581, Arthur Hall became the first member to be expelled from the House of Commons,<sup>11</sup> when he was held in contempt for publishing a book containing "Matter of Infamy of sundry good particular Members of the House, and of the whole State of the House in general; and also of the Power and Authority of this House."<sup>12</sup> When Hall was brought to the bar of the House, the *Journals* noted, he did not behave "in such humble and lowly wise, as the State of One in that Place to be charged and accused requireth."<sup>13</sup> For his contempt, he was not only expelled; he was also imprisoned in the Tower for more than seven weeks and fined five hundred marks.<sup>14</sup>

Just a few years later, cameral discipline was once again a hot issue. William Parry, who had spent parts of the 1570s and 1580s as a government agent on the Continent, spying on English Catholics in exile, was elected to the House of Commons from Queensborough in Kent in 1584. His dealings with Continental Catholics were convoluted, and there is a high likelihood that he was a double, and perhaps a triple, agent.<sup>15</sup> Shortly after taking his seat, Parry was the only member of either house to speak against the Bill Against Jesuits, Seminary Priests, and Such Like Disobedient Subjects,<sup>16</sup> the gist of which is apparent from its title. Parry declared the act to be "full of blood, danger, despair and terrour or dread to the English Subjects of this Realm," and he intimated that its passage was motivated by the desire of members of both houses to acquire the property of exiled priests and other Catholics. He further insisted that he would explain his reasons only to the queen herself, not to the House.<sup>17</sup> The House ordered him into the sergeant's custody; the following day, he was brought to the bar of the House, where he knelt and acknowledged that he had "very undutifully misbehaved himself, and had rashly and unadvisedly uttered those Speeches he used, and was with all his heart very sorry for it," blaming his inexperience and unfamiliarity with parliamentary procedures for the lapse

(and promising that “if ever after he should give any just cause of offence again to this House or any Member thereof, he would then never after crave any more favour of them”).<sup>18</sup> The House, after some debate, readmitted him.<sup>19</sup> Alas, the harmony was not to last: Parry was found in February 1585 to be plotting the assassination of the queen.<sup>20</sup> The House immediately expelled him and petitioned the queen (even before his trial began) for permission to make a law “for his Execution after his Conviction, as may be thought fittest for his so extraordinary and most horrible kind of Treason.”<sup>21</sup> No such law was passed, and after Parry’s conviction, he was hanged, drawn, and quartered—the usual punishment for treason.<sup>22</sup>

This tradition of using internal discipline to punish members for unpopular positions (especially when intemperately expressed) certainly continued through the seventeenth century. In a 1607 debate over a possible union with Scotland, Christopher Pigott, a member from Buckinghamshire, “entered into By-matter of Invective against the *Scotts* and the *Scottish* Nation, using many Words of Scandal and Obloquy.”<sup>23</sup> This did not sit well with James I, only recently arrived from Scotland, who communicated his displeasure to the House. After substantial debate, in which it was “resolutely” resolved that “he might not in this Case be punished by any other means,” he was expelled and committed to the Tower,<sup>24</sup> where he remained for twelve days.<sup>25</sup> It is worth noting that, even while acceding to royal wishes that Pigott be punished, the House first insisted on vindicating its speech or debate privilege that he not be punished anywhere else. We can thus see this first Parliament of the Stuart reign using its disciplinary power to carefully position itself vis-à-vis the Crown: it punished Pigott for his enmity toward James but also went out of its way to insist (with James as the clearly intended audience) that *only* it could punish Pigott for his words on the floor.

As opposition to James increased over the next two decades, the particular sentiments for which a member might get into trouble began to shift: in 1621, Thomas Sheppard was expelled for his vehement opposition to a bill for keeping the Sabbath, in which he referred to the member who introduced the bill as “a perturber of the peace, and a Puritan.”<sup>26</sup> The Puritans and their friends in the House were not amused, with John Pym leading the charge in his first recorded speech, and Edward Coke chiming in with points both theological (“Whatsoever hindereth the observation of the sanctification of the Sabbath is against the scripture”) and procedural (expressing his desire “to have such birds crushed in



the shell; for, if it be permitted to speak against such as prefer [that is, introduce] bills, we should have none preferred").<sup>27</sup> Likewise, at the end of the century, four members were expelled for being insufficiently anti-Catholic: Edward Sackville was expelled (and briefly committed to the Tower) in 1679 for (correctly, as it turned out) denying the existence of the Popish Plot and calling Titus Oates "a lying rogue,"<sup>28</sup> and three others were expelled in 1680 for being too sympathetic toward the Duke of York (the future James II).<sup>29</sup>

But the seventeenth century also saw a broadening of the uses of parliamentary discipline. Three expulsions in 1621 mark this phenomenon. John Bennet was expelled for taking bribes and excessive fees in his simultaneous role as a judge in prerogative courts;<sup>30</sup> Robert Lloyd was expelled for zealously exercising and promoting his royal patent for the engrossing of wills;<sup>31</sup> and Giles Mompesson was expelled after he had fled to France while under arrest by the House for his use and abuse of royal patents.<sup>32</sup> These expulsions actually partake of two distinct trends: first, they mark the beginning of expulsions for conduct that was not undertaken as part of the members' parliamentary duties, and, second, they mark the beginning of a turn toward something like modern ethical standards. As to the first, although Bennet, Lloyd, and Mompesson were all clearly punished for activities taking place outside their parliamentary duties, the ties to parliamentary concerns are actually closer than they appear at first glance, especially in the cases of Lloyd and Mompesson. As we saw in previous chapters, Parliament in the 1620s was increasingly concerned that the Stuart kings sought to rule without it. The granting of patents was a source of revenue for the Crown independent of parliamentary taxation; patents were therefore a threat to parliamentary power, which partially explains why Parliament was so diligent in attacking their abuse. Patentees were, in some sense, undermining Parliament as an institution, so it is not entirely surprising that the House of Commons objected to some of the most egregious patentees sitting as its members. Still, the expulsions of Bennet, Lloyd, and Mompesson came to serve as precedent for the proposition that one could be expelled for conduct "external" to Parliament.<sup>33</sup>

Perhaps more importantly, they represent the beginning of the practice of the House of Commons' taking responsibility for the ethical standards of its own members. In 1628, while the House was looking into the participation of Edmund Sawyer, one of its members, in the drawing up of a new book of rates, Sawyer went to the home of a witness and told him that, since the House would

not examine him under oath, “he should not need to speak of any thing which had passed between them.” For witness tampering, Sawyer was expelled, sent to the Tower, and declared “unworthy ever to serve as a Member of this House.”<sup>34</sup> After the Restoration, the House even began—cautiously, of course—navigating the line between (unacceptable) bribery and (acceptable) patronage in relation to parliamentary duties. In 1667, John Ashburnham was expelled for receiving £500 “from the *French Merchants*” (who were, in fact, English merchants seeking a license to import prohibited French wines).<sup>35</sup> In an illustration of how fuzzy the ethical lines between patronage and bribery remained, Ashburnham’s defenders asserted that he took the money “not . . . as a member of the House of Commons but as a Courtier.”<sup>36</sup> The House didn’t buy it, and he was expelled. A little more than a decade later, when contemplating the expulsion of Thomas Wancklyn for selling parliamentary protections,<sup>37</sup> Henry Coventry remarked of Ashburnham: “There was no law against his taking that bribe. . . . He was a worthy Gentleman, and yet you expelled him the House. He was no Judge, and you judged that taking a bribe.”<sup>38</sup> Coventry, at least, perceived the disapproval of bribery to be a judicial standard that had been, perhaps improperly, imported into the legislative realm. In the end, though, Wancklyn too was expelled.<sup>39</sup>

Three bribery cases in 1695 brought the issue squarely to the forefront of the House’s attention. First, Henry Guy, a member of the Tory inner circle responsible for managing the court’s business in the Commons, was sent to the Tower in mid-February for accepting a bribe from the officers of a certain army regiment, in exchange for help in passing a bill securing back pay for the regiment.<sup>40</sup> A vote to expel Guy narrowly failed two months later,<sup>41</sup> but he remained in the Tower until the end of the parliamentary session in early May.<sup>42</sup> Simultaneously, some members were increasingly concerned that the City of London and the East India Company were both using their considerable financial resources to advance legislation that they favored.<sup>43</sup> While Guy was in the Tower, John Trevor, the Speaker of the House, was expelled for taking a thousand guineas from the City in order to aid the passage of the 1694 Orphans Act, which resulted in a much-needed infusion of money into the City’s coffers.<sup>44</sup> Ten days later, John Hungerford was expelled for receiving a (mere) twenty-guinea bribe from the City for the same purpose.<sup>45</sup> The House clearly perceived bribery to be a significant enough problem in mid-1695 that, the day before it was prorogued (thus releasing Guy from the Tower), it resolved that “the Offer

of any Money, or other Advantage, to any Member of Parliament, for the promoting of any Matter whatsoever, depending, or to be transacted, in Parliament, is a high Crime and Misdemeanor, and tends to the Subversion of the *English* Constitution.”<sup>46</sup>

As we saw in chapter 4, the beginning of the eighteenth century marked the rise of responsible government, with the leadership of the party with a parliamentary majority increasingly determining state policy. As a result, there was little benefit in bribing a member who did not also hold some office of state. Many eighteenth-century cases of parliamentary discipline, therefore, dealt with members who had received bribes in their capacities as such officers. To take just a few examples, Richard Jones, the Earl of Ranelagh (an Irish title which neither entitled him to sit in the House of Lords nor disqualified him from the House of Commons), was expelled from the House in 1703 for “misappl[ying] several sums of the public money” in his role as paymaster-general of the army;<sup>47</sup> and Robert Walpole was expelled and sent to the Tower in 1712 for allegedly orchestrating a kickback scheme for army foraging contracts when he was secretary of war.<sup>48</sup> Walpole had been a key player in the Whig government that was ousted by the Tories (with Queen Anne’s support) in 1710, and his expulsion and imprisonment were seen as partisan in their motivation. His imprisonment made him a celebrity, and he was reelected the following year and held his seat for nearly three decades more, including two decades as prime minister.<sup>49</sup> Even as the transition to responsible government was proceeding, some backbenchers did continue to get caught up in parliamentary scandals: in 1721, for instance, seven members were expelled (one even after he had attempted to resign) for their roles in improprieties related to the South Sea Company. Of the seven, five were disqualified from future public service; six were heavily fined; and two were sent to the Tower.<sup>50</sup>

But parliamentary discipline maintained a broader scope than just bribery or abuse of office. In 1675, John Fagg, a member of the House of Commons, was the defendant in a lawsuit. In the normal course of appeals, the suit came before the House of Lords; the lower house believed that it was a breach of privilege for any of its members to be made to answer before the upper. Fagg appeared in the Lords to defend himself, leading his own house to have him arrested and sent to the Tower for breach of privilege.<sup>51</sup> Two days later, Fagg apologized and was released.<sup>52</sup> In 1707, John Asgill was expelled from the House for blasphemy, for arguing in a pamphlet that true Christians could be “translated” into

eternal life without the necessity of dying first.<sup>53</sup> And in 1716, three members were expelled for participating in or supporting the Jacobite rebellion of the previous year.<sup>54</sup> Parliamentary discipline thus continued to be used for a wide variety of purposes, including speech that the House disdained (Asgill), actions that might damage the House's standing vis-à-vis other institutions (Fagg), or supporting a pretender to the throne (the Jacobites).

Undoubtedly the most prominent use of parliamentary discipline in the eighteenth century concerned John Wilkes, the notorious troublemaker whom we met briefly in chapter 3's discussion of the Wilkes Fund Controversy. Wilkes had incensed both the Tory prime minister, the Earl of Bute, and his patron, George III, with his attacks on Crown policy in the *North Briton No. 45* in 1763.<sup>55</sup> Wilkes was arrested and his house ransacked on a general warrant, and he was charged with seditious libel; he was subsequently released from the Tower after asserting the parliamentary privilege against arrest, and he won two trespass suits arising out of the search of his home. He soon became a folk hero, with "Wilkes and Liberty!" serving as a rallying cry for many, especially in London—and in the American colonies.<sup>56</sup> After Samuel Martin, an ally of Bute's whom Wilkes had also attacked in print, referred to Wilkes as "a coward, and a malignant scoundrel" in debate on the floor of the House of Commons, Wilkes challenged him to a duel.<sup>57</sup> Injured in the resulting duel, Wilkes fled to Paris. The House ordered him to attend upon it; when he sent his regrets from Paris, he was held in contempt.<sup>58</sup> He was then, in January 1764, expelled by the House for having published the *North Briton No. 45*, which the House concluded was "a false, scandalous, and seditious libel, containing expressions of the most unexampled insolence and contumely towards his Majesty, the grossest aspersions upon both Houses of Parliament, and the most audacious defiance of the authority of the whole legislature; and most manifestly tending to alienate the affections of the people from his Majesty, to withdraw them from their obedience to the laws of the realm, and to excite them to traitorous insurrections against his Majesty's government."<sup>59</sup> After returning from France in 1768, Wilkes stood for election to Parliament from Middlesex, and he received the most votes for the seat. But the House declared him ineligible for membership and refused to seat him, instead issuing a writ for a new election. Wilkes got the most votes in that election, and in the subsequent two reruns as well. After the fourth round of voting, the House simply seated his opponent.<sup>60</sup> As his conflicts with the House (and the Crown) grew, so too did his popularity, with Burke

concluding that Wilkes “is the object of persecution. . . . [H]e is pursued . . . for his unconquerable firmness, for his resolute, indefatigable, strenuous resistance against oppression.”<sup>61</sup> Finally, in 1774, when Wilkes was again returned for Middlesex (and after sixty thousand people had petitioned on his behalf), he was seated.<sup>62</sup> And, after moving the resolution every year for eight years, in 1782 he finally succeeded in having the records of his repeated exclusions expunged from the House’s *Journals*, “as being subversive of the rights of the whole body of electors of this kingdom” to have their choice of representative respected.<sup>63</sup>

As we have already seen with the Wilkes Fund Controversy, the Wilkes saga was followed avidly in the colonies, where he was seen as a fellow struggler against an oppressive ministry.<sup>64</sup> But the colonists did not take from Wilkes the lesson that parliamentary discipline was inherently problematic. After all, as Mary Patterson Clarke has noted, the power of the colonial assemblies to discipline their members was sufficiently pervasive that it was “more or less assumed” to exist everywhere, although a number of colonies also made it explicit in one way or another.<sup>65</sup> Moreover, this assumption did not lie dormant: colonial assemblies “over and over again” disciplined their members for offenses ranging from absenteeism to “scandalous” papers to unparliamentary conduct, and the assemblies’ power to do so went largely unquestioned.<sup>66</sup> Indeed, as Clarke pointed out, the famous 1765 speech in which Patrick Henry suggested that George III might “profit by [the] example” of Caesar and Charles I, who had their Brutus and Cromwell, respectively,<sup>67</sup> was immediately followed by Henry’s begging the pardon of the Speaker and the House.<sup>68</sup> Even the hotheaded Henry recognized that his language had been unparliamentary and might subject him to cameral discipline.<sup>69</sup> And punishments by the assembly chambers frequently involved not only expulsion but also refusing to seat expelled members who had been reelected.<sup>70</sup>

But it should not be thought that the Wilkes case did not make a significant mark on American legislative procedure. Of the five early republican state constitutions that explicitly mentioned a power of expulsion, four prohibited either a second expulsion for the same offense or an expulsion for any reason that was known to the member’s constituents at the time of his election,<sup>71</sup> and, given the prominence of the Wilkes affair in the colonial constitutional imagination only a decade earlier, it seems highly likely that these provisions were written with his case in mind.<sup>72</sup> Moreover, the provision in the fifth instance—that of South Carolina in 1776—makes it clear that the power of disciplining

members was understood to be one of the privileges that Anglo-American legislative houses were assumed to possess even in the absence of such provisions: the two legislative houses “shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly, but the [upper house] shall have no power of expelling their own members.”<sup>73</sup> This made sense, because the membership of the upper house was chosen by the lower house;<sup>74</sup> when, two years later, the state’s new constitution created an elected upper house, the prohibition on its expelling its own members was dropped.<sup>75</sup> The provision that the houses would enjoy “all other privileges” that their colonial ancestors had enjoyed clearly, at least in the case of South Carolina, included a power to expel. And a number of other states included general provisions protecting the privileges of their legislative houses and/or allowing those houses to determine the rules of their own proceedings.<sup>76</sup> These provisions almost certainly would have sufficed to empower the legislative houses to make use of disciplinary powers up to and including expulsion. Moreover, unlike members of the British Parliament, whose terms could last as long as seven years under the 1716 Septennial Act,<sup>77</sup> members of the Revolutionary state legislatures served extremely short terms,<sup>78</sup> which may have made recourse to expulsion seem unnecessary. After all—and especially if an intervening election washed away most punishable offenses—the voters would have their say soon enough.

At the Constitutional Convention, the delegates clearly had the state constitutional provisions regarding expulsion in mind. An early draft out of the Committee of Detail gave the “house of delegates . . . power over its own members” but also contained a question for further discussion: “quaere. how far the right of expulsion may be proper.”<sup>79</sup> In a subsequent draft, the committee came to a tentative conclusion: “Each House shall have Authority . . . to punish its own Members for disorderly Behaviour. Each House may expel a Member, but not a second Time for the same Offence.”<sup>80</sup> The provision had become less detailed, however, by the time the committee reported to the full convention: “Each House . . . may punish its members for disorderly behaviour; and may expel a member.”<sup>81</sup> When it came up for debate, Madison “observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused. He moved that ‘with the concurrence of 2/3’ might be inserted between may & expel.”<sup>82</sup> With very little subsequent debate, Madison’s proposed addition passed

overwhelmingly, and the provision, thus amended, passed as well.<sup>83</sup> Without any further debate in the Philadelphia Convention, the state ratifying conventions, or the press,<sup>84</sup> the provision assumed its final form: “Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”<sup>85</sup>

Two influential early commentators made brief mention of the provision for legislative discipline. In his 1791 *Lectures on Law*, James Wilson tied the houses’ disciplinary powers to their free-speech privilege: “When it is mentioned, that the members shall not be questioned in any *other* place; the implication is strong, that, for their speeches in either house, they may be questioned and censured by that house, in which they are spoken. Besides; each house . . . has an express power given it to ‘punish its members for disorderly behavior.’”<sup>86</sup> Wilson went on to note that one of the available punishments was expulsion, but that the federal Constitution, unlike the constitution of his home state of Pennsylvania, did not explicitly prohibit reexpulsion for the same offense.<sup>87</sup> Joseph Story, in his 1833 *Commentaries on the Constitution*, tied the disciplinary power, not to the free-speech privilege, but rather to the power of each house to determine its own rules of proceeding (which is discussed in the next chapter): “[T]he power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behaviour, or disobedience to those rules.”<sup>88</sup> Moreover, for those situations in which a member is “so lost to all sense of dignity and duty, as to disgrace the house by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamour,” expulsion is available as a last resort.<sup>89</sup> The two-thirds requirement for expulsion serves to ensure that the power—“so summary, and at the same time so subversive of the rights of the people”—could not be “exerted for mere purposes of faction or party, to remove a patriot, or to aid a corrupt measure.”<sup>90</sup>

As Story suggested, Madison had been prescient about faction: almost as soon as partisan conflict began to emerge under the Constitution, so too did issues of congressional discipline. In 1795, backlash against the Citizen Genêt affair allowed Federalist Humphrey Marshall (who was both the first cousin and the brother-in-law of future chief justice John Marshall) to win a Senate seat in Republican-dominated Kentucky. Unhappy with the results, Kentucky’s governor and House delegation in 1796 asked the Senate to investigate charges by two Republican judges that Marshall had committed perjury in a lawsuit eighteen months before being elected to the Senate. At Marshall’s request, the

matter was referred to a committee, which reported that no evidence had been presented to the Senate that showed any fault on Marshall's part. In addition, the committee concluded that the Senate had no jurisdiction over matters occurring before a member was elected and having nothing to do with his congressional service. The full chamber agreed with its committee on a straight party-line vote.<sup>91</sup>

Of course, clear instances of misconduct could swamp partisan considerations. In 1797, President Adams transmitted to Congress evidence that Senator William Blount, a Republican from Tennessee, was promoting a scheme to help the British and Native American tribes seize Spanish Florida and Louisiana. The select committee impaneled by the Senate to investigate recommended that he be expelled. The following day, the Senate received an impeachment of Blount from the House, and the day after that, the Senate expelled Blount by a vote of twenty-five to one. Although Blount promised he would remain in town for his impeachment trial, he in fact hightailed it back to Tennessee. The Senate sent its sergeant-at-arms after him, but Blount's home-state supporters dissuaded the sergeant from attempting to take him back to Philadelphia. In January 1799, the Senate concluded that Blount was not an impeachable officer, and there has never been any attempt since to impeach a member of Congress.<sup>92</sup> Discipline by one's own house, rather than impeachment, which has a role for both, has thus been the sole mechanism of congressional control over members' behavior.

In January 1798, while the House was selecting managers for the Blount impeachment, Roger Griswold, a Federalist from Connecticut, and Matthew Lyon, a Republican from Vermont, began arguing. Griswold referred to allegations that Lyon had behaved in a cowardly manner during the Revolutionary War; Lyon responded by spitting in Griswold's face. While a committee was considering what to do about this, the House passed a resolution declaring that it would "consider it a high breach of privilege if either of the Members shall enter into any personal contest until a decision of the House shall be had thereon."<sup>93</sup> A vote to expel Lyon garnered a majority but fell short of two-thirds. Shortly thereafter, Griswold attacked Lyon with a cane on the floor of the House; Lyon grabbed the tongs from the fireplace and fought back. While a motion to expel both men was pending before a committee, they pledged themselves before the Speaker to keep the peace. The committee then recommended against expelling them, and the House concurred.<sup>94</sup> As we saw in the previous chapter, Lyon again narrowly escaped expulsion the next year, following his



Sedition Act conviction. In addition to the free-speech arguments noted in the previous chapter, several of Lyon's defenders suggested that, since his conviction had been public knowledge prior to his most recent election to the House, it would be inappropriate to expel him for it.<sup>95</sup> Although there was once again a majority to expel Lyon, it was a smaller majority than there had been to expel him for spitting at Griswold, and, in any case, far short of two-thirds.

The difficulty of meeting the two-thirds threshold was again on display in 1807–1808, when Senator John Smith, a Republican from Ohio, was implicated in Aaron Burr's treason conspiracy. Burr had allegedly sought to carve an independent nation, which he would rule, out of the newly acquired Louisiana territory. The ensuing trial was presided over by John Marshall riding circuit, with President Jefferson micromanaging the prosecution from afar. Burr was acquitted after Marshall issued a ruling excluding much of the government's evidence.<sup>96</sup> The charges against Smith, who had been indicted for providing supplies to Burr, were dropped after Burr's acquittal. Nevertheless, Samuel Maclay introduced a resolution calling for his expulsion, and John Quincy Adams authored the select committee report, which began by noting that, the verdict in the Burr trial notwithstanding, the existence of the Burr Conspiracy was "established by . . . a mass of concurring and mutually corroborative testimony"; moreover, the report stated, participation in the conspiracy should be incompatible with service in the Senate.<sup>97</sup> The report was at pains to differentiate expulsion proceedings from criminal ones: whereas the latter err on the side of acquitting the guilty, the presumption flips for the former: "It is not better that ten traitors should be members of this Senate than that one innocent man should suffer expulsion."<sup>98</sup> The committee also submitted to the Senate evidence that Smith was indeed part of the conspiracy. After extensive debate, including allowing Smith to be heard by counsel (Francis Scott Key, as it turned out), the final Senate vote was nineteen to ten for expulsion—one vote short of the requisite two-thirds. Republicans were split, and no Federalist voted to expel.<sup>99</sup> (Adams, who had been kicked out of the Federalist Party the previous year for his support of various Jeffersonian policies, did vote to expel.) Two weeks later, Smith resigned his seat.<sup>100</sup>

Expulsion, however, was not the only option available to the houses, and lesser punishments did not have to clear the two-thirds bar. Thus, in 1810, Massachusetts Federalist Timothy Pickering violated a Senate rule by reading a confidential document aloud in public session. On the motion of Republican

Henry Clay, the Senate passed a resolution declaring that Pickering had “committed a violation of the rules of this body,” thus making Pickering the first member of Congress to be censured by his chamber.<sup>101</sup> The House followed suit, censuring its first member in 1832. William Stanbery, while criticizing a ruling from the chair, said: “[T]he eyes of the Speaker are too frequently turned from the chair you occupy toward the White House.”<sup>102</sup> For his unparliamentary language, Stanbery was censured by his colleagues.<sup>103</sup>

Members could also take advantage of disciplinary procedures as a way of clearing their name. In 1835, President Jackson was nearly assassinated while attending a funeral in the House chamber. Although the attempted assassin was clearly mentally ill, reactions to the attempt were immediately and divisively partisan.<sup>104</sup> Rumors soon began circulating that Senator George Poindexter, a former Jackson ally who had a dramatic falling out with the president, had engineered the attack—and Jackson indicated that he found the rumors plausible. Poindexter requested that the Senate impanel a committee to investigate him and expel him if the charges were found to be accurate. After taking extensive testimony, the select committee concluded that the charges were baseless, and the full chamber unanimously exonerated Poindexter.<sup>105</sup> This official cameral determination of Poindexter’s innocence played publicly to Jackson’s opponents, “as the entire affair seemed to offer additional proof of the incompetence and corruption of the Jackson administration.”<sup>106</sup>

These partisan tensions would become increasingly violent as sectional rivalry grew in intensity through the middle of the nineteenth century. Between 1838 and 1856, the chambers (especially the House) began small-scale dress rehearsals for the Civil War, with at least ten violent physical altercations between members. Seven of these conflicts pitted a Democrat against a Whig (or a Unionist or Opposition Party member, between the collapse of the Whigs and the rise of the Republicans).<sup>107</sup> These included the 1838 killing of Democratic representative Jonathan Cilley by Whig representative William Graves in a duel<sup>108</sup> and the infamous 1856 caning of Opposition Party senator Charles Sumner by Democratic representative Preston Brooks, aided by fellow Democrats Laurence Keitt and Henry Edmundson, in retribution for Sumner’s “Crime against Kansas” speech on the Senate floor.<sup>109</sup> And at least one of the intraparty fights was clearly sectional: after Missouri Democratic senator Thomas Hart Benton said on the floor in 1850 that “the country has been alarmed without reason and against reason; . . . there is no design in the

Congress of the United States to encroach upon the rights of the South, nor to aggress upon the South,” his Democratic colleague from Mississippi Henry Foote called it “a direct attack upon myself, and others with whom I am proud to stand associated.” Benton then approached Foote, who responded by drawing and cocking a loaded pistol.<sup>110</sup>

Of these ten physical altercations, no punishment at all was meted out in nine (including the fatal Graves-Cilley duel, which led to the enactment of an anti-dueling law for the District of Columbia in 1839<sup>111</sup> but never resulted in any punishment for Graves). An expulsion resolution against Brooks for the attack on Sumner failed, but Keitt was censured by the House (a censure resolution against Edmundson also failed). Brooks and Keitt then resigned their seats, and both were immediately reelected and seated.<sup>112</sup> In the Benton-Foote imbroglio, the special committee, which recommended that no action be taken against either senator, laid blame at the feet of the entire Senate, which, “for some time past, and, until very recently, departed in its practice from the strict rules of order in debate, and tolerated [personal verbal attacks], which were increasing in frequency and violence.”<sup>113</sup>

One member who was punished by the House during this period was Joshua Giddings, an Ohio Whig and staunch abolitionist. In violation of the House’s “gag rule,” a cameral rule adopted in 1840 providing that the House would refuse to receive any petition seeking the abolition of slavery or of the interstate slave trade,<sup>114</sup> Giddings offered a series of resolutions in 1842 approving of the slave revolt on the ship *Creole*, which had been carrying its human cargo from Richmond to New Orleans, and declaring that the “persons on board the said ship, in resuming their natural rights of personal liberty, violated no law of the United States, incurred no legal penalty, and are justly liable to no punishment.”<sup>115</sup> A resolution, authored by Virginia Whig John Botts, was then passed declaring Giddings’s conduct in offering the resolutions “altogether unwarranted and unwarrantable, and deserving the severe condemnation of the people of this country, and of this body in particular.”<sup>116</sup> The day after receiving this censure, Giddings resigned his seat. He was immediately reelected and took his seat again.<sup>117</sup> In that same session, John Quincy Adams pressed the limits of the gag rule by presenting a petition from constituents calling for the peaceful dissolution of the Union, on the grounds that “a vast proportion of the resources of one section of the Union is annually drained to sustain the views and course of another section without any adequate return.”<sup>118</sup> Several resolutions were

offered censuring Adams; after much debate, the whole matter was tabled.<sup>119</sup> In 1844, Adams succeeded in having the gag rule repealed.<sup>120</sup>

The Civil War itself naturally led to a number of disciplinary cases. In the House, because of the biennial election schedule, many Southern states simply did not return any members for the Thirty-seventh Congress, and what controversies there were (as, for instance, when Unionists in seceding states held their own elections and sent members to Washington) were settled through the chamber's power to judge the elections, returns, and qualifications of members.<sup>121</sup> The border states, however, presented the expulsion problem squarely: two House members (one from Missouri and one from Kentucky) were expelled from the Thirty-seventh Congress for "having taken up arms against" and being "in open rebellion against" the federal government; one other member-elect from Missouri was expelled for the same reason.<sup>122</sup> The Senate, of course, had to deal with a number of members from seceding states whose terms had not expired. After some debate as to how to deal with the announced "withdrawals" of a number of members, the new Republican-dominated Senate declared six seats vacant (including that previously held by Jefferson Davis) when it met in special session in March 1861.<sup>123</sup> After Fort Sumter, the language hardened: when the Senate expelled ten more members from seceding states that July, it declared that they were "engaged in [a] conspiracy for the destruction of the Union and Government, or, with full knowledge of such conspiracy, have failed to advise the Government of its progress or aid in its suppression," and it explicitly used the word "expelled."<sup>124</sup> Over the next year, the Senate expelled four members from non-seceding states as well, because of their support of the Confederacy: John Breckinridge of Kentucky (formerly vice president under Buchanan) was declared a "traitor" and expelled after becoming a general in the Confederate Army; both Missouri senators were expelled after backing the secessionist forces in their state; and Jesse Bright of Indiana was expelled for writing a letter of introduction to "His Excellency Jefferson Davis, President of the Confederation of States," on behalf of a Texas arms dealer.<sup>125</sup> But the chamber was not indiscriminate: attempts to expel Benjamin Stark of Oregon and Lazarus Powell of Kentucky (both Democrats) for their insufficiently pro-war views both failed.<sup>126</sup> Likewise, attempts to expel Democrats Alexander Long of Ohio and Benjamin Harris of Maryland from the House failed, and both were instead declared "unworthy Member[s]" and censured for their speeches advocating recognition of the Confederacy.<sup>127</sup>

Unsurprisingly, the contentiousness of the Civil War spilled over into the Reconstruction Congresses. In May 1866, Democratic Representative John Chanler of New York was censured for introducing a resolution lauding President Johnson's vetoes of the "wicked and revolutionary acts of a few malignant and mischievous men"—that is, the Reconstruction bills passed by the Republican-dominated Congress.<sup>128</sup> The following month, Representative Lovell Rousseau of Kentucky—who had been a Union general during the war and was a self-described "Andrew Johnson man"<sup>129</sup>—gave a long speech chastising the Republican majority for foot-dragging in readmitting the Southern states.<sup>130</sup> In the course of the speech, he referred derisively to "some northern non-combatants, stay-at-home patriots."<sup>131</sup> In response, Josiah Grinnell, a Republican from Iowa, described Rousseau as "assum[ing] the air of a certain bird that has a more than usual extremity of tail, wanting in the other extremity," and asked, "[H]is military record, who has read it? In what volume of history is it found?"<sup>132</sup> Three days later, Rousseau attacked Grinnell with a cane on the portico of the Capitol.<sup>133</sup> The committee appointed to look into the matter recommended that Rousseau be expelled for the assault and that Grinnell be censured for improperly imputing cowardice to Rousseau.<sup>134</sup> The motion to expel Rousseau failed to garner the necessary two-thirds supermajority, and the motion to censure Grinnell was then tabled. A subsequent motion to censure Rousseau passed; Rousseau resigned but was censured at the bar nonetheless.<sup>135</sup> He was then reelected to fill his own vacancy.<sup>136</sup> Over the next decade, several other Democrats were censured for unparliamentary language in opposition to Reconstruction measures.<sup>137</sup> As the sectional conflict receded, the use of discipline for unparliamentary language or brawling dissipated, although it did not completely die out.<sup>138</sup> Indeed, a 1902 brawl between Senators John McLaurin and Benjamin Tillman, both Democrats from South Carolina, triggered by the debate over Philippine annexation, led to both men being censured and to a change in Senate rules governing decorum. Thenceforth, it was a violation of cameral rules to impute to a colleague "any conduct or motive unworthy or unbecoming a Senator" or to "refer offensively to any State of the Union."<sup>139</sup>

Of course, issues surrounding the Civil War and Reconstruction were not the only matters for which members of Congress faced discipline in the mid-nineteenth century. For instance, in 1844, Senator Benjamin Tappan of Ohio, like Senator Pickering three decades earlier, was censured for publicly releasing secret information—in this case, a message from President Tyler describing the

terms of an annexation agreement with Texas.<sup>140</sup> The issue that would come to dominate congressional discipline in postbellum America, however, was corruption. Although federal statutes regulated corruption by officers and employees of the other branches from the earliest days of the Republic,<sup>141</sup> it was not until the middle of the nineteenth century that a law regulating the conduct of members of Congress was passed. An 1853 statute both forbade members of Congress to receive pay for prosecuting any claim against the United States and forbade them to receive anything of value that was given with intent to influence their vote or decision on any matter before them (or potentially before them) in their official capacity. Punishment for both offenses involved fines and imprisonment; punishment for receiving a bribe also involved disqualification from holding “any office of honor, trust, or profit, under the United States” in the future.<sup>142</sup> An 1862 law expanded the scope of the antibribery provision, no longer requiring that the compensation be given with “intent to influence [the member’s] vote or decision,” but now encompassing also compensation accepted for “attention to, [or] services, action, vote, or decision [on],” any actual or potential matter pending before Congress, as well as “procuring, or aiding to procure, any contract, office, or place, from the government of the United States or any department thereof, or from any officer of the United States, for any person or persons whatsoever.”<sup>143</sup> And an 1864 law tightened the prohibition on lobbying by legislators, forbidding compensation for any services rendered “in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever.”<sup>144</sup> No further statutes regulating corruption by members of Congress were passed for nearly a century.<sup>145</sup>

But the paucity of criminal provisions did not mean that the chambers themselves were inattentive to corruption. In 1857, a House select committee recommended that four members be expelled for various acts of corruption, ranging from agreeing to support various bills in exchange for bribes to attempting to bribe other members to support bills.<sup>146</sup> The worst of the bunch was Orsamus Matteson of New York, who not only recommended that the president of a railroad company bribe a number of members (to the tune of \$100,000 total) to secure the passage of a bill but also stated that twenty to thirty members of the House had agreed with one another not to vote for any bill granting money or

lands unless they were all bribed to do so.<sup>147</sup> The committee reported that it could find no evidence of such a widespread conspiracy, but it noted that it was in the interests of certain people (“broker[s] in congressional corruption”) to spread such rumors, which were then disseminated by a sensationalizing press (whose members were “particularly anxious to be the first in giving to the public some piece of ‘startling intelligence’ or ‘astounding development’”).<sup>148</sup> The committee also reported out a bill that would have banned any lobbying for compensation<sup>149</sup>—which, perhaps needless to say, failed to pass. The recommended expulsions, however, had more traction: the House found insufficient evidence to proceed against William Welch of Connecticut, but the other three, including Matteson, all resigned while the expulsion resolutions were pending.<sup>150</sup> Even after his resignation, however, the House passed two resolutions censuring Matteson and declaring him “unworthy to be a Member” of the chamber.<sup>151</sup> Matteson (but not the other two resigners) ran for and was reelected to his seat; after some debate as to whether he should be expelled for his previous offense, a select committee decided that expulsion would be “inexpedient,” and he was seated.<sup>152</sup> None of the four members ever faced criminal proceedings. Similarly, in 1862, Senator James Simmons, a Republican from Rhode Island, resigned while facing an expulsion resolution for using his influence to secure a war contract for two rifle manufacturers in exchange for a promised \$50,000. Simmons’s case led to the passage of the 1862 law described above, but Simmons, too, faced no judicial proceeding after leaving office.<sup>153</sup> And in 1870, three representatives were censured for taking money in exchange for appointments to the academies at West Point and Annapolis (two of the three were censured even after they had resigned),<sup>154</sup> but no action was taken against them in the courts.

The great scandals of the Gilded Age were also handled altogether internally. The *Crédit Mobilier* scandal centered on Representative Oakes Ames, a Republican from Massachusetts who was also an officer of *Crédit Mobilier*, a dummy construction company designed to skim off profits from government grants to build the Union Pacific Railroad. Ames distributed shares of the company to fellow members of Congress at below-market-value prices, in exchange for votes that would keep the money flowing into the Union Pacific coffers.<sup>155</sup> The stock had been handed out in 1867, but the gifts did not come to light until the *New York Sun* broke the story in 1872. A number of members of both houses (as well as Treasury Secretary George Boutwell and Vice Presidents

Schuyler Colfax and Henry Wilson) were implicated, but most were exonerated by the congressional committees set up to investigate. (Many of these members had made negligible profits and had returned the stock when the scandal became public.)<sup>156</sup> However, the House committee recommended the expulsion of both Ames and James Brooks, a Democrat from New York.<sup>157</sup> The committee majority was not troubled by the fact that the gifts had been received before the election of the investigating Congress, since they had theretofore remained secret, and thus the members' reelections could not be regarded as approbation or forgiveness on the part of their constituents.<sup>158</sup> The House Judiciary Committee, however, came to the opposite conclusion, arguing that members could never be punished by the House for actions prior to their most recent election.<sup>159</sup> In the end, the chamber split the difference, "absolutely condemn[ing]" the behavior of Ames and Brooks but not expelling either.<sup>160</sup> The Congress ended shortly thereafter, and both men passed away within months of their censure.<sup>161</sup> In the Senate, the select committee recommended the expulsion of James Patterson, Republican of New Hampshire, and the censure of James Harlan, Republican of Iowa, but their terms expired before any action was taken.<sup>162</sup> No formal action was taken against any other senators, although Vice President Colfax was so thoroughly implicated and disgraced that his career was effectively ended.<sup>163</sup>

The other major congressional scandal of the Gilded Age involved the payment of bribes by the Pacific Mail Steamship Line in 1872 in a (successful) attempt to increase its annual subsidy from Congress for carrying mail. The scandal began to come to light in late 1874, and the House Ways and Means Committee investigation of it ran right up to the end of the Forty-third Congress in March 1875. The committee issued a report noting that William King, who had been the postmaster of the House in the Forty-third Congress (thus putting him in a uniquely good position to distribute bribes) and had been elected as a Republican from Minnesota to be a member of the Forty-fourth Congress, and John Schumaker, a Democrat from New York, had obstructed its investigation. The committee recommended both that the evidence it had collected be laid before the new House when it convened and also that it be sent to the federal district attorney for Washington, D.C.<sup>164</sup> Both men were indicted in 1875,<sup>165</sup> although apparently never prosecuted. Meanwhile, the House Judiciary Committee of the Forty-fourth Congress reported that it had no jurisdiction over offenses in previous Congresses, and the matter was apparently left to lie there.<sup>166</sup>



Schumaker may have been the first person indicted for conduct directly tied to his behavior as a member (as opposed to, say, Matthew Lyon or John Smith, who were indicted for what was understood to be extracurricular activity), but it would still be three decades before a member would be convicted for such behavior. In 1904, Senator Joseph Burton, a Republican from Kansas, became the first member of Congress to be convicted of a crime stemming from his legislative service. He had taken money for interceding with postal officials regarding an ongoing mail-fraud investigation, thereby violating the 1864 statute forbidding members to receive compensation for services rendered before governmental agencies.<sup>167</sup> In appealing his conviction to the Supreme Court, he argued that the statute was unconstitutional insofar as it interfered with the disciplinary powers of his house; the Court, per Justice Harlan, disagreed, noting that the Senate still had all of its disciplinary powers intact.<sup>168</sup> The Senate, which had held expulsion proceedings in abeyance while Burton's appeals were pending, ordered its Committee on Privileges and Elections to resume consideration of the matter after the Supreme Court's decision; Burton short-circuited the issue by resigning.<sup>169</sup> He then served five months in prison, at the end of which he was welcomed back to his Kansas hometown with a celebration that the *New York Times* described as being "in the nature of a triumphal procession."<sup>170</sup> The night of his return, Burton gave a speech to a sold-out auditorium seating nine hundred people (with proceeds going to support the local library), in which he excoriated his fellow Republican President Theodore Roosevelt. Burton insisted that Roosevelt had persecuted him because he had stood up for the domestic beet sugar industry and opposed Roosevelt's attempts to lower the tariffs on Cuban cane sugar, which Burton portrayed as having been undertaken at the behest of the powerful Sugar Trust.<sup>171</sup> In Burton's words, "I mortally offended Roosevelt. . . . Roosevelt never forgave me." Burton claimed that Roosevelt had told Kansas's other senator, Chester Long (also a Republican), "I may indict Senator Burton." His political disagreements with Roosevelt, Burton claimed, were "why I was first struck down; why I was hounded for years for a crime I never committed; why all the vast energy of the Government was brought against me; . . . why every crime that can surround a court of justice was committed to hunt me to death."<sup>172</sup>

The second conviction of a senator, under the same statute, led to similar accusations. John Mitchell, Republican of Oregon, was convicted in 1905 of violating the 1864 statute by receiving money to intercede with the General

Land Office (headed by fellow Oregonian Binger Hermann) on behalf of the key players in the Oregon Land Frauds scandal. He died while the case was on appeal, and while he remained a member of the Senate.<sup>173</sup> Although the press largely considered the verdict to be just, there were dissenters. The *Salem Capital Journal*, for instance, evinced “profound sympathy” for Mitchell: “For two years the Government secret service men have followed on his trail and pursued the methods of the Russian spies and detectives. . . . The *Journal* does not believe in the methods that are being employed by the Government. . . . It believes the jurors are terrorized by the press and the Government.”<sup>174</sup> Friends of Mitchell’s would assert that the prosecution was payback from President Roosevelt for Mitchell’s insistence that the InterOceanic Canal Committee, which he chaired, not be rushed in its consideration of the Panama Canal (Mitchell had supported a Nicaraguan route). As one friend put it, Roosevelt had “concluded to get Senator Mitchell out of the way—no matter how.” From this vantage, the appointment of a special prosecutor in the Oregon Land Frauds case was not an assurance of independence from local patronage networks but rather an assurance that the prosecution would be handled by a “generalissimo,” aided by a “gang of jury-fixing detectives,” who, at the behest of the president, assembled a “packed jury, everyone of whom was for years a bitter political enemy of Senator Mitchell, and thereby ma[de] sure of a verdict of guilty.”<sup>175</sup> Likewise, the fact that the trial was presided over by a California-based district judge sitting by designation, after the only Oregon-based federal district judge (who had been seen as reluctant to go after Mitchell) had died, was viewed as a form of fixing the trial.<sup>176</sup>

In contrast to the alleged use of prosecution to sully the reputations of members, some members continued actively seeking internal investigations as a way of clearing their own names. In 1904, Senator Charles Dietrich, a Republican from Nebraska, submitted a resolution asking that a committee be appointed to investigate allegations that he had behaved corruptly as governor of Nebraska (allegations on which he had been indicted, but the charges had subsequently been dismissed).<sup>177</sup> In approving the resolution, the Senate appeared to take the position that it could investigate matters occurring before a member was elected; the select committee impaneled to investigate reported that there was no basis to the allegations.<sup>178</sup> As illustrated by the headline in the next day’s *Washington Post*—“Dietrich Free From Guilt”—he received the public exoneration that he sought.<sup>179</sup>

Several issues are particularly salient in the history of the congressional disciplinary power traced thus far. First, partisanship has clearly been important—although by no means determinative—in who got punished and how. Second, members who believed themselves to be innocent of wrongdoing have sometimes actively sought investigations as a means of clearing their names. Third, members whose behavior subjected them to the disciplinary procedures of their houses have often resigned before the houses could act. These resignations fall into two broad categories: some members have slunk away, effectively admitting guilt but largely avoiding the official judgment of their peers, while others have resigned and then stood for reelection, effectively taking their case to the people. Finally, prosecution in the courts for violations of congressional ethical standards is a relatively late development, and its early uses were marked by accusations of political payback and interbranch meddling. Each of these issues in one way or another makes salient the functioning of congressional discipline in the public sphere.

### Congressional Discipline and Congressional Ethics

One of the most prominent trends in the development of the congressional disciplinary power is its increasing use for what we would today call “ethics” matters—that is, attempts to prevent members from being influenced by factors that are believed to corrupt their judgment.<sup>180</sup> Studies have consistently shown that involvement in a publicized scandal harms a member’s reelection chances.<sup>181</sup> Recent work has also indicated that the effects of scandals cut a wider swath, decreasing trust in government generally,<sup>182</sup> as well as harming all candidates from the party most closely identified with the scandal.<sup>183</sup> Importantly, studies have also found that scandals cause more negative public evaluations of Congress as an institution.<sup>184</sup>

How politicians *respond* to these scandals can be quite important in shaping the subsequent public reaction. (Indeed, in some cases their response will determine whether certain actions get publicly coded as “scandals” at all.) Between 2004 and 2006, there was a steadily increasing drumbeat of news about the lavish gifts that lobbyist Jack Abramoff had provided to certain members of Congress in exchange for their support on issues important to his clients. Even though the scandal implicated members of both parties, Democrats made concerted efforts to publicize Republicans’ roles in the scandal and to make

ethics reform a central plank of their 2006 midterm elections platform. As a result of this successful engagement in the public sphere, they forced Republicans to “own” the Abramoff scandal, with one study finding that voters punished Republican incumbents who received money from Abramoff but not Democratic incumbents.<sup>185</sup> Another study of the same election found that Republicans were harmed by the Mark Foley scandal (as a member, he had sent sexually suggestive messages to underage House pages). The study speculated that the incident harmed the party as a whole because “evidence surfaced to implicate a substantial number of party members of sheltering Mark Foley for political gain.”<sup>186</sup> Scandals, then, have the potential to cause a significant amount of collateral damage—particularly if the public perceives the scandalous behavior to have been tolerated or facilitated by other members. As we saw in chapter 1, institutional trust is a significant source of institutional power; insofar as scandals damage public trust in Congress as an institution—as the studies cited above strongly suggest that they do—then they are damaging to congressional power as well. It is thus in the collective, institutional interests of the houses of Congress for their members to “[e]ngag[e] in fewer scandals.”<sup>187</sup>

But, of course, this presents a collective action problem: the benefits of remaining largely scandal free are diffuse and can be undermined by just a few members. By contrast, the benefits of engaging in scandalous behavior (at least, in the period before it becomes publicly known) accrue entirely and immediately to the individual. What is needed, then, is a coordinating mechanism, whereby the chamber as an institution can enforce cooperation with a no-scandal norm and thereby ensure that it receives the institutional benefits that come with being (relatively) scandal free. Properly structured and properly functioning, the congressional disciplinary power can serve as such a mechanism.

This mechanism would, at the very least, have to involve the houses’ taking primary responsibility for policing the ethics of their members. As we have seen, this was the case for quite some time. The House of Commons was long jealous of its exclusive ability to police its members; indeed, the law courts did not have jurisdiction over members of Parliament accused of bribery until 2010.<sup>188</sup> In America, as we have seen, no member was indicted for conduct related to service as a member until John Schumaker in 1875, and no one was convicted until Joseph Burton in 1904. Moreover, the first two members convicted—Burton and John Mitchell the following year—both asserted, persuasively to many, that their prosecution was political payback from

President Roosevelt. Regardless of the truth of those assertions, they point to two important concerns with the other branches' policing of members' ethics: first, there is the possibility that the president and the courts will use that authority as a means of influencing legislators, and, second, even if they are not in fact doing so, they are likely to be accused of it, making it harder to figure out who has acted improperly.

But even (or perhaps especially) where there is no plausible claim of improper interbranch meddling, greater involvement of the other branches in congressional ethics has significant soft-power implications. When congressional ethics violations are prosecuted by the executive and adjudicated by the courts, those branches get to play the heroes as they ferret out corruption by powerful actors in the name of the public interest. Meanwhile, congressional enforcement is relegated to the status of an also-ran, coming either after the other branches have acted or when the issue is too minor to warrant their attention. The message sent to the public is that Congress protects its own, handing out slaps on the wrist at most, and that only the executive and the courts can be trusted to keep politics clean. And to the extent that this lesson is internalized by the public, it fosters a narrative that Congress is *institutionally* corrupt. To the extent that only the executive and the judiciary act to root out corruption, the public will come to see them as trustworthy and Congress as untrustworthy. In refusing to clean up its own messes, then, Congress sacrifices its soft power.

This is precisely what has happened in recent decades. Beginning with the convictions of Burton and Mitchell in the first decade of the twentieth century, primary responsibility for ethics enforcement began steadily shifting away from the houses and into the executive and the courts. This transition was not immediate; for instance, when allegations surfaced in 1913 that the National Association of Manufacturers had bribed a number of members of Congress, the House appointed a special committee to investigate. The committee exonerated all but one of the accused members; it recommended that Representative James McDermott, Democrat of Illinois, be censured, although McDermott resigned before the House could vote on the resolution.<sup>189</sup> McDermott was subsequently reelected to his seat, and he was never indicted. In 1929, the Senate censured Hiram Bingham, a Republican from Connecticut, for placing on his Senate staff a lobbyist who was simultaneously being paid by the Manufacturers' Association of Connecticut.<sup>190</sup> And members convinced of their innocence continued for some time to seek vindication through cameral disciplinary processes. Senator

Burton Wheeler, Democrat of Montana, had been harshly critical of Attorney General Harry Daugherty's failure to prosecute officials involved in the Teapot Dome scandal, leading to Daugherty's resignation in March 1924. The next month, Wheeler learned that he had been indicted by a Montana grand jury for violating the 1864 law prohibiting members of Congress from representing paying clients before federal agencies. Wheeler insisted that he was being framed as a matter of political payback from the Justice Department, and he asked for a Senate investigation. The special committee appointed to investigate, consisting of three Republicans and two Democrats, voted four to one (with South Dakota Republican Thomas Sterling in the minority) to exonerate Wheeler, finding that he had handled only state litigation for a client while a senator-elect. The Senate overwhelmingly agreed with the committee, and the following year the Montana jury acquitted Wheeler as well.<sup>191</sup>

But this proactive congressional role was already in decline when Wheeler sought exoneration from his colleagues. That same year, it came to the House's attention that a grand jury in Illinois had reported to the court that it had evidence involving the payment of money to two members of Congress. The House resolved to ask the attorney general to name the members and specify the charge against them, but the attorney general refused. Meanwhile, the two members (John Langley of Kentucky and Frederick Zihlman of Maryland, both Republicans) were identified in the press and took to the House floor to deny the charges. Rather than continue to press the attorney general or proceed on its own, the House simply requested that the attorney general proceed with the case expeditiously. Both members were subsequently indicted, and Langley was convicted of using his influence with federal officials as part of a conspiracy to violate the Prohibition Act. Even after his conviction, he remained in the House (although he took no part in any official business) until all of his appeals were exhausted. Only then did he resign, the House never having taken any action against him; Zihlman was acquitted and remained in the House.<sup>192</sup>

It is certainly a long way from John Quincy Adams's claim in 1807–1808 that the Senate could expel John Smith for participation in the Burr conspiracy even after the court case against him had been dropped to the House's determination in 1924 that a convicted member would simply be held in limbo until all of his appeals were exhausted. The predictable consequence was that members who had engaged in serious improprieties often did not face any proceedings at all in their chambers. Thus, Harry Rowbottom of Indiana was sentenced to a

year in Leavenworth in 1931 for taking bribes from people seeking postal appointments,<sup>193</sup> but, because Rowbottom lost his seat in the 1930 election, one searches the *Congressional Record* and committee reports in vain for any mention whatsoever of his illicit behavior. Indeed, there were no disciplinary proceedings at all (not even ones resulting in no action being taken) in the House between 1926 and 1967 and none in the Senate between 1929 and 1951,<sup>194</sup> and yet a substantial number of members were indicted and convicted during this period.<sup>195</sup>

Congress was not wholly silent on the ethics of its members during this period: in 1958, prompted by an influence-peddling scandal in the Eisenhower administration, the two houses adopted a one-page “Code of Ethics for Government Service” that applied to its own members as well as other government officials and employees.<sup>196</sup> As the Senate committee report accompanying it noted, the code “creates no new law; imposes no penalties; identifies no new type of crime; and establishes no legal restraints on anyone. It does, however, etch out a charter of conduct against which those in public service may measure their own actions and upon which they may be judged by those whom they serve.”<sup>197</sup> In 1962, Congress, for the first time in a century, updated the bribery, unlawful gratuity, and conflict-of-interest laws as they applied to members, giving them the form that they largely retain today.<sup>198</sup> In 1964 and 1966, the Senate and House, respectively, created standing Ethics Committees for the first time.<sup>199</sup> And in 1968, both chambers, at the behest of their new Ethics Committees, adopted formal ethics codes.<sup>200</sup> But it had still been decades since either chamber had actually pursued any member for ethical violations. This was the context in which muckrakers Drew Pearson and Jack Anderson, in their 1968 book *The Case against Congress*, wrote that “Washington’s neoclassic temples of government shelter petty thieves and bold brigands—the political Pharisees of modern America.”<sup>201</sup>

Exhibit A for Pearson and Anderson was Senator Thomas Dodd, Democrat of Connecticut,<sup>202</sup> who became the subject of the first investigation by the Senate Ethics Committee in 1966–1967.<sup>203</sup> The committee found that Dodd had used campaign funds for personal expenses, and it recommended censure. Although there was widespread agreement that Dodd had not broken any laws, the Senate voted ninety-two to five to censure him.<sup>204</sup> The *New York Times* the next day applauded the Senate’s performance of this “necessary, if disagreeable, public service” and noted that members of the Ethics Committee “ha[d]

earned respect for a difficult job well done.”<sup>205</sup> In particular, the *Times* noted that, “[e]ven though they are not explicitly forbidden in any code or statute book, there are some things that a man in public life knows he should not do,” and it voiced its approval of the Senate’s decision to punish Dodd for doing them, while simultaneously recommending the adoption of such a code.<sup>206</sup> The paper also noted that, despite the fact that the censure imposed no additional punishment, Dodd “is now finished as a useful member of the body. . . . No member can hope to survive such condemnation of his peers, and although Mr. Dodd has said he will run again, it is doubtful whether the Connecticut Democrats will let him.”<sup>207</sup> Indeed, Dodd was denied the Democratic nomination in 1970; he then ran as an independent and finished third.<sup>208</sup>

The House also returned to the ethics field in 1966–1967 with the Adam Clayton Powell case. Powell, a Democrat from New York, had faced widespread accusations of financial improprieties and other misconduct during the Eighty-ninth Congress (1965–1967). (It should be noted that Powell was an African American and a civil rights leader, and, while he was likely guilty of misconduct, it is also undoubtedly true that some of his antagonists were motivated by racism.) At the opening of the Ninetieth Congress in 1967, a resolution was introduced to appoint a special committee to consider whether Powell was entitled to his seat.<sup>209</sup> The committee recommended that Powell be censured, fined, and stripped of seniority, but when the committee’s proposed resolution came to the floor, it was amended to exclude Powell from membership in the Ninetieth Congress, and the amended resolution passed by an overwhelming vote of 307 to 116.<sup>210</sup> Importantly, this was done, not as an exercise of the House’s power to expel, but rather as an exercise of its power to judge the qualifications of a member, which it decides by simple majority vote.<sup>211</sup> In the 1969 case *Powell v. McCormack*, the Supreme Court, per Chief Justice Earl Warren, held that the House had acted improperly because the ability to judge qualifications (and therefore to exclude from the body anyone lacking the requisite qualifications) was limited to those qualifications spelled out in the Constitution itself—in short, that the House could not circumvent the supermajority requirement for expulsion by purporting to exclude instead.<sup>212</sup> The Court also held that the fact that the exclusion vote passed the two-thirds bar was immaterial; it would not read an exclusion vote as a constructive expulsion vote.<sup>213</sup> Regardless, the damage to Powell was done: although he was reelected to the Ninetieth Congress (to fill the vacancy caused by his own exclusion), he did not seek to be sworn in; he was



then elected to the Ninety-first Congress while his case was pending, but he lost the 1970 Democratic primary to Charlie Rangel, who had challenged Powell's long absences (and, implicitly, the cause for them) from the Capitol.<sup>214</sup>

But the houses' return to the ethics field in the late 1960s came too late to prevent the courts from stepping up and reaping the public relations benefits of serving as the primary ethics enforcers. The Supreme Court initially expressed some reticence to involve itself in such matters: in the 1966 *United States v. Johnson* case, the Court held that the Speech or Debate Clause barred the government from introducing evidence about why former representative Thomas Johnson had made a floor speech—a holding that made it rather difficult for the government to prove that he made the speech because he had been bribed.<sup>215</sup> But the Court quickly changed course, holding in *United States v. Brewster* in 1972 that evidence that former senator Daniel Brewster had solicited and received bribes in exchange for his vote on postage-rate legislation was admissible. Chief Justice Burger, for the Court, wrote that “[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator.”<sup>216</sup> Accordingly, evidence of bribe taking was not barred by the Speech or Debate Clause. In dissent, Justice White (joined by two colleagues) argued that this was not a job for the judiciary: “The Speech or Debate Clause does not immunize corrupt Congressmen. It reserves the power to discipline in the Houses of Congress. I would insist that those Houses develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process.”<sup>217</sup> But White's call has not been heeded—since *Brewster*, although the courts have recognized that the Speech or Debate Clause imposes some limits on admissible evidence in such cases,<sup>218</sup> they have nevertheless been broadly willing to treat criminal proceedings as the primary forum for enforcement of congressional ethics.<sup>219</sup>

The houses have largely accepted this role for the courts. Consider a resolution reported out by the House Ethics Committee in 1972: it expressed the sense of the House that a member who had been convicted of a crime that carried a sentence of at least two years' imprisonment should refrain from participating in committee or floor business until either the conviction was overturned or the member was reelected.<sup>220</sup> The report accompanying the proposed resolution noted that it was the Ethics Committee's stated position to take a back seat on ethics enforcement: “[W]here an allegation involves a possible violation of statutory law, and the

committee is assured that the charges are known to and are being expeditiously acted upon by the appropriate authorities, the policy has been to defer action until the judicial proceedings have run their course.”<sup>221</sup> (The proposed resolution failed to pass in 1972, but a nearly identical resolution passed in 1975.)<sup>222</sup> This, of course, is precisely the opposite of Justice White’s argument that the houses should develop their own procedures for dealing with corruption; instead, the House Ethics Committee explicitly declared the executive branch and the courts to be the “appropriate authorities” to deal with congressional corruption.

It will come as little surprise, then, that in recent major ethics scandals the other branches have routinely acted first, with action by the chambers themselves coming later, if at all. Consider the “Abscam” scandal, which played out from 1978 to 1982. It began as an FBI sting operation designed to ensnare forgers and art thieves and subsequently, based on information from informants, expanded to include political corruption. It culminated with undercover agents, posing as Arab sheiks, attempting to bribe legislators. In 1980, the media reported that the FBI had video evidence of seven members of Congress—six House members and one senator, all Democrats except Representative Richard Kelly of Florida—agreeing to accept bribes in exchange for various favors, ranging from introducing special immigration bills to steering government contracts.<sup>223</sup> All seven were indicted in 1980 and convicted between 1980 and 1982, but only one ever faced discipline from his house. Four of the seven were defeated in reelection bids in November 1980, “in large part because of Abscam.”<sup>224</sup> Representative Raymond Lederer of Pennsylvania won his reelection bid in 1980 while under indictment and was convicted in January 1981. After the House Ethics Committee recommended expulsion in April, Lederer resigned.<sup>225</sup> Likewise, Senator Harrison Williams of New Jersey was convicted in May 1981; the Ethics Committee recommended expulsion in August; and he resigned in March 1982, once it became apparent that the Senate would vote to expel him.<sup>226</sup> Only Representative Michael Myers of Pennsylvania was actually disciplined by his chamber—he was expelled a month after being convicted on bribery charges.<sup>227</sup>

Nor is Abscam an outlier. Indeed, the only member of Congress to have been expelled since Myers is Representative James Traficant, Democrat of Ohio, who was expelled in 2002 after he had been convicted on ten counts of bribery, racketeering, and corruption.<sup>228</sup> Other members charged with or even convicted of crimes have been allowed to resign or have lost their seats with no formal action by the House.<sup>229</sup> For instance, Representative Mario Biaggi, Democrat

from New York (and a former New York City police officer), was convicted in two separate corruption trials in 1987 and 1988, one of which carried a thirty-month prison sentence and the other of which carried an eight-year sentence. He resigned in 1988, as colleagues were preparing to expel him.<sup>230</sup> In 1994, powerful Illinois Democrat Dan Rostenkowski was indicted on seventeen counts, including misuse of official funds and obstruction of justice. At the request of the Justice Department, the House Ethics Committee deferred proceedings;<sup>231</sup> Rostenkowski lost his seat in the 1994 Republican wave, and he pled guilty to two counts of mail fraud in 1996.<sup>232</sup> The same pattern holds for Duke Cunningham, Republican of California, who resigned from the House in 2005 and was sentenced to more than eight years in prison for accepting millions in bribes,<sup>233</sup> and for the two House members (Bob Ney, Republican of Ohio, and Tom DeLay, Republican of Texas) convicted in the Jack Abramoff scandal in 2006–2007;<sup>234</sup> none of them was subject to any sort of formal cameral discipline. Similarly, Representative William Jefferson, Democrat of Louisiana, was indicted in 2007 on sixteen corruption charges—the evidence against him included \$90,000 in cash that was found stuffed in frozen-food containers in his home freezer. He lost his reelection bid in 2008 and was convicted on eleven counts in 2009.<sup>235</sup> Again, the Ethics Committee held its own investigation in abeyance while the criminal investigation was ongoing.<sup>236</sup> The pattern largely holds even for scandals that do not give rise to criminal charges: in the 1989–1991 “Keating Five” Senate scandal, although the Ethics Committee found that all five senators involved (four Democrats and one Republican) were guilty of at least “poor judgment” in intervening with regulators on behalf of a savings and loan, the worst punishment handed out was a “reprimand” to Senator Alan Cranston (three of the five, including Cranston, retired at the end of their term). The lack of any more severe punishments led to significant public criticism.<sup>237</sup> Likewise, although the House took no formal action against any of the members who had overdrawn their accounts in the 1991–1992 House banking scandal, Republican leaders pressured Democratic Speaker Tom Foley to ensure that the names of the members who had overdrawn their accounts were made public. Subsequently, a huge number of House members either retired or lost their seats in the 1992 elections, at least in part due to the scandal.<sup>238</sup>

Insofar as trust in Congress as an institution is significantly affected by how Congress *reacts* to ethics violations—and I have argued above that it is—this pattern is a problem for the institution. The chambers have so thoroughly ceded

the ethics-policing role to the other two branches that they are willing to allow members to remain in the chamber for years after they have been indicted on serious ethical violations—indeed, in some cases even after they have been convicted, while the convictions are on appeal. Only members who have the poor manners to refuse to resign once their convictions have become final seem to face discipline from their chambers. Indeed, the ethics committees even hold fact-finding in abeyance while criminal proceedings play out. The inevitable appearance is that Congress has almost no interest in policing its members; only the executive and the courts appear to have the will to keep politics clean. To the extent that this lesson is received by the public, it furthers the narrative that Congress is *institutionally* corrupt, which, in turn, decreases public trust in Congress, while increasing trust in the executive and the courts. In failing to keep its own houses in order, Congress sacrifices its soft power.

Of course, it is understandable why many members are reluctant to pursue their colleagues. Some might have good reason to fear that the scrutiny would subsequently be turned on them; others may simply feel uncomfortable investigating and punishing their colleagues and friends. Still, incentives cut the other way, too: from Theodore Roosevelt to Newt Gingrich, politicians have made national reputations as corruption fighters. And, of course, there are always partisan motivations to bring the misdeeds of one's political opponents to light. So, what institutional reforms might make the houses more likely to pursue wrongdoing vigorously, which would, in turn, redound to the institution's benefit?

In 2008, the House took a tentative step in that direction, creating the Office of Congressional Ethics (OCE), an internal entity charged with reviewing allegations of misconduct and recommending action to the House Ethics Committee.<sup>239</sup> The OCE's board is made up of nonmembers, with an equal number appointed by the Speaker and the minority leader. Lobbyists and officers and employees of the federal government are prohibited from serving as OCE board members.<sup>240</sup> The OCE receives complaints from the public and also takes notice of press reports and other sources of information about potential wrongdoing; if two board members agree that there is a reasonable basis to proceed, it can then open a thirty-day preliminary review into allegations of misconduct. At the end of the preliminary review, if at least three board members find probable cause to believe that there has been a violation, then the investigation proceeds to a second-phase review. Whether the investigation proceeds to a second-phase review or not, the OCE must notify both the Ethics Committee and the individual under inves-

tigation of its decision. If the investigation does proceed, then the OCE has forty-five days (extendable for an additional fourteen days) to conduct the second-phase investigation, at the end of which it must transmit its findings and recommendation to the Ethics Committee.<sup>241</sup>

The Ethics Committee remains responsible for making any recommendations to the full House. But it must act on any recommendations received from the OCE within forty-five days. At the end of forty-five days, the committee must publicly release both its own actions and the OCE report and findings, unless the chair and ranking member jointly agree, or a majority of the committee votes, to withhold the information for an additional forty-five days. However, if the committee agrees with an OCE recommendation to dismiss the complaint, or if the committee dismisses it when the OCE left the case unresolved, then the committee need not (although it can) make a public disclosure. A deadlocked committee results in the disclosure of the OCE report and findings. And at the end of each Congress any theretofore undisclosed OCE reports are released.<sup>242</sup>

The structure of the OCE is important. Unlike the Ethics Committees, it receives complaints from nonmembers, so someone with knowledge of wrongdoing need not get the attention of a member in order to begin the ethics process. Moreover, any time the OCE recommends further inquiry by the Ethics Committee, that recommendation will become public. Even though all final decisions are made by the Ethics Committee and then by the full House, the knowledge that an OCE recommendation of further inquiry must be publicly released will necessarily put pressure on the Ethics Committee either to recommend disciplinary action or to have a very good reason why such action is not necessary. At the same time, since any disciplinary action will, in fact, be taken by the House itself, the institutional benefits of keeping one's own house in order will accrue to the chamber. Given these institutional features, it is unsurprising that the OCE has received highly favorable reviews, both in the press and from the public-watchdog groups that pressed for its creation.<sup>243</sup> A report for Public Citizen found that the OCE had "unquestionably . . . helped boost the case record of the Ethics Committee" in punishing wrongdoing.<sup>244</sup> Moreover, the office has sufficient public cachet that a surprise move by the Republican majority to eliminate it at the opening of the 115th Congress in January 2017 sparked substantial backlash and was hastily abandoned.

The OCE is unquestionably a move in the right direction, but its structure could be improved still further.<sup>245</sup> First, and most basically, the OCE exists only for the House; attempts to create a similar institution in the Senate have failed

to gain traction so far. Insofar as the office works well in the House, an analogue would likely work well in the Senate.<sup>246</sup> Second, the OCE currently lacks subpoena power, and one of the most frequent recommendations is that it be given that power.<sup>247</sup> Third, the public-disclosure requirements could be strengthened: any investigation making it to second-phase review should be disclosed, even where the OCE recommends dismissal and the Ethics Committee concurs. The requirement that it make it to second-phase review would serve to weed out the most frivolous complaints, and the expanded disclosure would demonstrate, at the very least, that all complaints are taken seriously.

Finally, both the OCE and the Ethics Committees lack jurisdiction over former members.<sup>248</sup> As a result, members frequently resign (or simply run out the clock and do not seek reelection) and thereby escape any discipline from their chambers. The forcing of resignations is not trivial—indeed, we have seen that one outcome of a vigorous cameral disciplinary process has long been that the wrongdoer slinks away in shame. In many cases, this will suffice to show that the house has effectively policed itself. In still other cases, resignation has been used as a means of submitting members' conduct to their constituents—when a member resigns and immediately seeks reelection, the people can decide whether his conduct makes him unworthy to be a member or not.<sup>249</sup> But there may well be certain cases in which allowing a member to slink quietly away is insufficient. I have argued elsewhere that the House has the authority to refuse to accept the resignations of members and that it might wish to do so in circumstances in which it wants to send a message by expelling them instead.<sup>250</sup> But even if it chooses not to go that far (and in the case of the Senate, from which resignations are explicitly contemplated in the Constitution's text), the chambers could still censure or (using their contempt powers) even imprison former members who had violated ethical rules and then resigned to escape cameral punishment.

### Congressional Discipline and Cameral Order

Cameral discipline is not only appropriate for what we would today call ethics violations; it is also an important means of preventing members from unilaterally hijacking or otherwise disrupting the proceedings of their chamber. Recall, in this regard, that Joseph Story treated the disciplinary power as necessary to give effect to the houses' rule-making powers. For an instance of this sort of use of the houses' disciplinary powers, consider the Senate's censure of

Joseph McCarthy in the aftermath of the 1954 Army-McCarthy hearings. After Ralph Flanders, Republican of Vermont, introduced a censure resolution (declaring a broad swath of McCarthy's conduct "unbecoming a Member of the United States Senate, . . . contrary to senatorial traditions, and tend[ing] to bring the Senate into disrepute"),<sup>251</sup> the Senate impaneled a special committee, composed of three Democrats and three Republicans, all of them éminences grises of the chamber, and chaired by Republican Arthur Watkins of Utah. The committee reviewed more than forty allegations of misconduct by McCarthy<sup>252</sup> and ultimately boiled them down to thirteen allegations, grouped into five general categories. These categories ranged from his noncooperation with and contempt of a subcommittee that had investigated him in the previous Congress for misconduct,<sup>253</sup> to his improper use of classified information,<sup>254</sup> to his "abuses of colleagues in the Senate."<sup>255</sup> After taking substantial amounts of testimony and issuing detailed findings, the committee reported mere days after the 1954 midterm elections, which swung control of both houses to the Democrats, a result partially attributable to public disgust with McCarthy.<sup>256</sup> The Watkins Committee report concluded that two of the five categories of charges justified censure: those dealing with contempt of the previous investigation and those dealing with his abuse of Army General Ralph Zwicker when Zwicker testified before McCarthy's Permanent Subcommittee on Investigations.<sup>257</sup> When the resolution came to the Senate floor, the charge relating to Zwicker was dropped and replaced with a charge that McCarthy had abused the Watkins Committee itself. By a vote of sixty-seven to twenty-two, the Senate censured McCarthy for his abuse of the two committees in two successive Congresses.<sup>258</sup>

The next day, the *New York Times* editorialized that, in voting overwhelmingly to censure McCarthy, "the Senate of the United States has done much to redeem itself in the eyes of the American people and to give new assurance of its faithfulness to the principles of orderly democratic government and individual liberty under law."<sup>259</sup> The *Washington Post* declared the censure "a vindication of the Senate's honor."<sup>260</sup> Writing the following year, anti-McCarthyite journalist Alan Barth celebrated the Watkins Committee hearings as "in almost every important respect the antithesis of the procedure followed" by McCarthy himself in conducting Permanent Subcommittee on Investigations hearings.<sup>261</sup> The Senate's censure "reflected a sense of honor on the part of the Senate, and a revived regard for that honor. It revealed a recognition, too long suppressed, that the Senate as an institution is the inheritor and the trustee of a great

tradition. . . . ‘The honor of the Senate’ may be undefined and undefinable, but it is nonetheless real; and it was essentially for the violation of this honor, rather than for any breach of specific rules, that McCarthy was at last called to account. The Senate’s action bespoke an awareness of the moral obligation that inescapably accompanies authority.”<sup>262</sup> The censure effectively ended McCarthy’s political prominence, with his attempts at provocation increasingly ignored. Within three years, he drank himself to death.<sup>263</sup>

The McCarthy censure was publicly effective in large part because of the bipartisan nature of both the Watkins Committee and the final Senate vote. Contrast this with the 2009 “resolution of disapproval” passed against South Carolina Representative Joe Wilson, a Republican, for shouting “You lie!” at President Obama while the president was addressing a joint session of Congress.<sup>264</sup> The House was under Democratic control at the time, and, although the resolution of disapproval was intended to be a milder measure than a censure, only seven Republicans voted in favor of the resolution (and twelve Democrats voted against). Press reports described the vote as “largely party-line,”<sup>265</sup> and there was no widespread editorializing in support of the chamber’s action. Indeed, the whole incident raised Wilson’s profile in his party, making him a highly sought-after fundraiser for fellow Republicans.<sup>266</sup> He was handily reelected in 2010.

Maintaining public trust on an institutional level requires that the houses combat—and be seen to combat—abuses in their midst. This is true both for ethical violations, like bribery, and for significant violations of cameral order and decorum. The houses have at times used their disciplinary powers over their members in ways that enhance their soft power with the public. But far too frequently, they have failed to do so, and in recent decades, in particular, they have far too readily ceded this form of soft power to the other branches. Still, recent developments like the House’s creation of the Office of Congressional Ethics offer some hope that the chambers will begin to take more advantage of this means of building public trust.



200. *Id.* at 133.
201. Jefferson, *supra* note 84, at 322.
202. For arguments along similar lines, see Chafetz, *supra* note 2, at 91–92, 98–105; Michael L. Shenkman, *Talking about Speech or Debate: Revisiting Legislative Immunity*, 32 Yale L. & Pol’y Rev. 351, 384–98 (2014).
203. Open Letter from 47 Senators to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015), *available at* <https://s3.amazonaws.com/s3.documentcloud.org/documents/1683798/the-letter-senate-republicans-addressed-to-the.pdf>.
204. *Id.*
205. Statement by the Vice President on the March 9 Letter from Republican Senators to the Islamic Republic of Iran (Mar. 9, 2015), *available at* <https://www.whitehouse.gov/the-press-office/2015/03/09/statement-vice-president-march-9-letter-republican-senators-islamic-repu>.
206. See Editorial, *Un-Patriot Games: GOP Senators’ Letter to Iran is a Treacherous Betrayal of the U.S. Constitutional System*, N.Y. Daily News, Mar. 10, 2015, <http://www.nydailynews.com/opinion/editorial-un-patriot-games-article-1.2143378>.
207. See Peter Spiro, *GOP Iran Letter Might Be Unconstitutional. Is It Also Criminal?*, Opinio Juris, Mar. 9, 2015, <http://opiniojuris.org/2015/03/09/gop-iran-letter-might-be-unconstitutional-is-it-also-criminal/>.
208. Logan Act, ch. 1, 1 Stat. 613 (1799), codified as amended at 18 U.S.C. § 953.
209. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).
210. *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att’y Gen. 484, 486–87 (1940).
211. Legal Authorities Supporting the Activities of the National Security Agency Described by the President, 2006 WL 6179901, at \*7, \*15, \*28 (O.L.C. Jan. 19, 2006).
212. 299 U.S. 304 (1936). For a more recent example, see *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).
213. See, e.g., Louis Fisher, *The Law: Presidential Inherent Power: The “Sole Organ” Doctrine*, 37 Pres. Stud. Q. 139 (2007); Michael P. Van Alstine, *Taking Care of John Marshall’s Political Ghost*, 53 St. Louis U. L.J. 93 (2008).
214. See Sarah H. Cleveland, *Crosby and the ‘One-Voice’ Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975, 984–89 (2001).

## Chapter 7. Internal Discipline

1. Cf. Stan Lee et al., *Amazing Fantasy No. 15*, at 11 (1962), *reprinted in* 1 *The Essential Spider-Man* (2004) (“[W]ith great power there must also come—great responsibility!”).
2. U.S. Const. art. I, § 5, cl. 2.
3. My argument here may be viewed as a loose congressional analogue to the claims that some administrative law scholars have made about the ways in which “executive self-binding” can, in the long run, enhance presidential power. See Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 137–50 (2010); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 573–77 (2013).

4. 2 & 3 Edw. 6, c. 1 (1549). On the House's passage, see 1 H.C. Jour. 6 (Jan. 21, 1549).
5. See 3 S. T. Bindoff, *The House of Commons, 1509–1558*, at 386–87 (1982).
6. 2 Gilbert Burnet, *The History of the Reformation of the Church of England* 517–18 (Nicholas Pocock ed., Oxford, Clarendon Press rev. ed. 1865); see also Ecclesiastes 10:16.
7. 1 H.C. Jour. 6 (Jan. 21, 1549).
8. *Id.* (Jan. 24, 1549).
9. *Id.* at 9 (Mar. 2, 1549).
10. *Id.*
11. On his status as the first expellee, see 2 P. W. Hasler, *The House of Commons, 1558–1603*, at 241 (1981).
12. 1 H.C. Jour. 125 (Feb. 14, 1581). For more details about the contents of the book, see *id.* at 122 (Feb. 4, 1581).
13. *Id.* at 125 (Feb. 14, 1581).
14. *Id.* at 125–26 (Feb. 14, 1581); 2 Hasler, *supra* note 11, at 241.
15. For as much detail as can be sussed out of the available sources, see 3 Hasler, *supra* note 11, at 180–84.
16. 1 William Cobbett, *Parliamentary History of England* 822–23 (London, Hansard 1806); Simonds D'Ewes, *The Journals of All the Parliaments During the Reign of Queen Elizabeth* 340 (Paul Bowes ed., London, Starkey 1682). For the act itself, see 27 Eliz., c. 2 (1584).
17. D'Ewes, *supra* note 16, at 340–41.
18. *Id.* at 342.
19. *Id.*
20. See 3 Hasler, *supra* note 11, at 183.
21. D'Ewes, *supra* note 16, at 352, 355.
22. 3 Hasler, *supra* note 11, at 184.
23. 1 H.C. Jour. 333 (Feb. 13, 1607).
24. *Id.* at 335–36 (Feb. 16, 1607).
25. *Id.* at 344 (Feb. 28, 1607) (ordering Pigott to be freed from the Tower but not readmitted to the House).
26. 1 Cobbett, *supra* note 16, at 1190.
27. *Id.* at 1191–92.
28. 9 H.C. Jour. 576 (Mar. 25, 1679); *id.* at 581 (Apr. 1, 1679); 4 Cobbett, *supra* note 16, at 1118.
29. See 4 Cobbett, *supra* note 16, at 1174–75 (noting the exclusions of Robert Cann for denying the existence of the Popish Plot and asserting the existence of a Presbyterian Plot and of Francis Wythens for petitioning against the summoning of the Exclusion Bill Parliament); *id.* at 1233–34 (noting the expulsion of Robert Peyton for associating with York).
30. 1 H.C. Jour. 586–88 (Apr. 23, 1621).
31. *Id.* at 565–67 (Mar. 21, 1621).
32. *Id.* at 535–36 (Mar. 3, 1621).
33. See 1 Andrew Thrush & John P. Ferris, *The House of Commons, 1604–1629*, at 62 (2010).

34. 1 H.C. Jour. 917 (June 21, 1628).
35. 9 H.C. Jour. 24 (Nov. 22, 1667); 1 Basil Duke Henning, *The House of Commons, 1660–1690*, at 552–53 (1983).
36. *The Diary of John Milward* 132 (Caroline Robbins ed., 1938).
37. Freedom from civil arrest is one of the traditional privileges of Parliament, and that privilege extended to members' servants until 1770. A "protection" was a document issued by a member—usually sold—claiming another person as his servant, and thus offering that person immunity from civil arrest. The sale of protections was a problem for the House throughout the seventeenth and eighteenth centuries. See Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* 124–30 (2007).
38. 5 Anchtell Grey, *Debates of the House of Commons* 53–54 (London, Henry, Cave & Emonson 1763).
39. 9 H.C. Jour. 430–31 (Feb. 1, 1678).
40. 11 *id.* at 236 (Feb. 16, 1695); 4 Eveline Cruickshanks, Stuart Handley & D. W. Hayton, *The House of Commons, 1690–1715*, at 127–28 (2002).
41. 11 H.C. Jour. 307 (Apr. 17, 1695).
42. *Id.* at 333 (May 3, 1695) (proroguing Parliament); 4 Cruickshanks et al., *supra* note 40, at 128–29 (noting that Guy remained in the Tower until the end of the session).
43. See 5 Cruickshanks et al., *supra* note 40, at 685.
44. For the expulsion, see 11 H.C. Jour. 274 (Mar. 16, 1695). For the Orphans Act, see 5 & 6 W. & M., c. 10 (1694). For a brief description of the act, see Francis Sheppard, *London: A History* 141–42 (1998).
45. 11 H.C. Jour. 283 (Mar. 26, 1695).
46. *Id.* at 331 (May 2, 1695).
47. 6 Cobbett, *supra* note 16, at 126.
48. *Id.* at 1067–68.
49. See 5 Cruickshanks et al., *supra* note 40, at 780–84.
50. See 1 Romney Sedgwick, *The House of Commons, 1715–1754*, at 409, 534–35, 541–42 (1970) (John Aislabie, George Caswall, and Robert Chaplin); 2 *id.* at 20, 171–72, 409–10, 499 (Francis Eyles, Theodore Janssen, Jacob Sawbridge, and Thomas Vernon).
51. The incident is recounted in more detail in Chafetz, *supra* note 37, at 30–31.
52. 9 H.C. Jour. 352 (June 3, 1675).
53. 6 Cobbett, *supra* note 16, at 600–601.
54. 1 Sedgwick, *supra* note 50, at 531 (John Carnegie); 2 *id.* at 45–46, 371–72 (Thomas Forster and Lewis Pryse).
55. The discussion of Wilkes that follows relies on Chafetz, *supra* note 37, at 155–58.
56. See Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 Wm. & Mary Q. (3d ser.) 373 (1963).
57. 15 Cobbett, *supra* note 16, at 1356–57 n.\*; 3 Lewis Namier & John Brooke, *The House of Commons, 1754–1790*, at 116 (1964).
58. 15 Cobbett, *supra* note 16, at 1388–91.
59. *Id.* at 1393.
60. Chafetz, *supra* note 37, at 157.

61. Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770), in 1 *The Works of the Right Honorable Edmund Burke* 433, 501 (Boston, Little, Brown 3d ed. 1869).
62. See Chafetz, *supra* note 37, at 158.
63. 22 Cobbett, *supra* note 16, at 1407–11.
64. See generally Maier, *supra* note 56.
65. Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 184 (1943).
66. *Id.* at 185–90.
67. As often related, the quotation is “Caesar had his Brutus—Charles the first his Cromwell, and George the third . . . may profit by their example. If *this* be treason, make the most of it.” *Yale Book of Quotations* 355 (Fred R. Shapiro ed., 2006). A likely more accurate rendition was discovered in the 1920s. *Journal of a French Traveler in the Colonies, 1765, I*, 26 *Am. Hist. Rev.* 726, 745 (1921) [hereinafter *Journal of a French Traveler*]. On the importance of the assassinations of Caesar and Charles I for the founding generation generally, see Josh Chafetz, *Impeachment and Assassination*, 95 *Minn. L. Rev.* 347, 347–88 (2010).
68. *Journal of a French Traveler*, *supra* note 67, at 745 (Henry “said that if he had affronted the speaker, or the house, he was ready to ask pardon, and he would shew his loyalty to his majesty King G. the third, at the Expence of the last Drop of his blood, . . . [and] again, if he said any thing wrong, he begged the speaker and the houses pardon.”).
69. See Clarke, *supra* note 65, at 191–94.
70. See *id.* at 194–96.
71. Del. Const. of 1776, art. 5 (prohibiting reexpulsion for the same offense); Md. Const. of 1776, art. 10 (same); Penn. Const. of 1776, Frame of Gov’t, § 9 (same); Vt. Const. of 1786, ch. 2, § 9 (prohibiting expulsion for “causes known to their constituents antecedent to their election”).
72. Peter Hoffer has recently insisted that the Wilkes case “was not seen as a legal precedent for any of the revolutionary acts and died with the death of the imperial connection.” Indeed, if anything, the Wilkes case would have been considered “a negative precedent, for the state constitutional writers and the delegates to the federal constitutional convention regarded the Parliament of the 1760’s as thoroughly corrupt—bought and paid for by the crown.” Peter Charles Hoffer, *The Pleasures and Perils of Presentism: A Meditation on History and Law*, 33 *Quinnipiac L. Rev.* 1, 2–3 (2014). But, of course, that’s precisely why the colonists were so interested in Wilkes—as Maier demonstrated, they viewed Wilkes as a fellow struggler against the thoroughly corrupt Parliament and ministry. See Maier, *supra* note 56. Wilkes’s constituents’ struggle to be represented by the person of their choice in Parliament mirrored the colonists’, and it seems highly implausible that a group of people so thoroughly invested in Wilkes in the 1760s, as Maier has shown, would have forgotten him—and yet still written constitutional provisions embodying the principle for which he had fought—the following decade. Hoffer’s standard of proof—a “smoking gun” or it didn’t happen!, Hoffer, *supra*, at 5—is simply too strict. Wilkes had foregrounded the issue of repeated expulsions and exclusions being used to thwart the will of the people, and the issue clearly remained salient for Americans of the early Republican period. Of course, it would be a mistake to assume too much familiarity—the exact twists and turns of the Wilkes struggle were

likely not on the Americans' minds. But it is equally mistaken to assume too little familiarity.

73. S.C. Const. of 1776, art. 7.
74. *Id.* art. 2.
75. S.C. Const. of 1778, arts. 12, 16.
76. For general legislative privilege protections in addition to the two South Carolina provisions mentioned above, see Mass. Const. of 1780, pt. 2, ch. 1, § 3, art. 11; N.Y. Const. of 1777, art. 9. For rules-of-proceedings provisions, see Del. Const. of 1776, art. 5; Ga. Const. of 1777, art. 7; Mass. Const. of 1780, pt. 2, ch. 1, § 2, art. 7; *id.* § 3, art. 10; N.H. Const. of 1784, pt. 2, Senate, para. 12; *id.* House of Representatives, para. 12; Va. Const. of 1776, para. 4.
77. 1 Geo. 1, stat. 2, c. 38 (1716).
78. See Akhil Reed Amar, *America's Constitution: A Biography* 75 (2005) (noting that, under their Revolutionary constitutions, “[t]wo states held elections for the lower house twice a year, ten others ran annual elections, and only one—South Carolina—gave lower-house members two-year terms. Although several state upper houses featured multiyear terms, none exceeded five years.”); see also Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 241–43 (Rita & Robert Kimber trans., Rowman & Littlefield, expanded ed. 2001) (1973) (describing the brief legislative terms in the Revolutionary state constitutions).
79. 2 *The Records of the Federal Convention of 1787*, at 140 (Max Farrand ed., rev. ed. 1966).
80. *Id.* at 156. The first sentence quoted originally ended with “punish its own Members.” The committee added “for disorderly and indecent Behavior.” It then crossed out “and indecent.” Textual notations of these insertions and deletions have been omitted from the quotation above.
81. *Id.* at 180.
82. *Id.* at 254.
83. *Id.*
84. See Chafetz, *supra* note 37, at 208.
85. U.S. Const. art. I, § 5, cl. 2.
86. James Wilson, *Lectures on Law, Part Two: Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department* (1791), in 1 *The Works of James Wilson* 399, 421 (Robert Green McCloskey ed., 1967).
87. *Id.*
88. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835, at 298 (Boston, Hilliard, Gray 1833).
89. *Id.*
90. *Id.*
91. See 5 Annals of Cong. 58–60 (Mar. 22, 1796); Anne M. Butler & Wendy Wolff, *United States Senate Election, Expulsion and Censure Cases, 1793–1990*, at 8–9 (1995); 2 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 1288, at 858–60 (1907); Harry M. Ward, *Marshall, Humphrey*, Am. Nat'l Biog. (2000), <http://www.anb.org/articles/03/03-00306.html>.

92. See 7 Annals of Cong. 33–45 (July 3–10, 1797); 8 *id.* at 2245–2416 (Dec. 17, 1798–Jan. 14, 1799); Butler & Wolff, *supra* note 91, at 13–15; Chafetz, *supra* note 37, at 218.
93. 2 Hinds, *supra* note 91, § 1642, at 1115. See also Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* 173–75 (2001).
94. See 2 Hinds, *supra* note 91, §§ 1642–43, at 1114–16; Chafetz, *supra* note 37, at 214; David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 263–65 (1997); Freeman, *supra* note 93, at 173–75.
95. See Chafetz, *supra* note 37, at 221; 2 Hinds, *supra* note 91, § 1284, at 850.
96. United States v. Burr, 25 F. Cas. 55, 159–81 (1807).
97. 2 Hinds, *supra* note 91, § 1264, at 816.
98. *Id.* at 818.
99. *Id.* at 821–22; 17 Annals of Cong. 164–324 (Mar. 15–Apr. 9, 1808).
100. 17 Annals of Cong. 324 n.\* (Apr. 25, 1808).
101. 22 *id.* at 65–83 (Dec. 31, 1810–Jan. 2, 1811); Butler & Wolff, *supra* note 91, at 26–28.
102. 2 Hinds, *supra* note 91, § 1248, at 799.
103. *Id.* at 799–801.
104. See generally Richard C. Rohrs, *Partisan Politics and the Attempted Assassination of Andrew Jackson*, 1 J. Early Repub. 149 (1981).
105. Butler & Wolff, *supra* note 91, at 38–39.
106. Rohrs, *supra* note 104, at 159.
107. 2 Hinds, *supra* note 91, § 1644, at 1116–19 (Jonathan Cilley (D) and William Graves (W) in 1838); *id.* § 1648, at 1121–22 (John Bell (W) and Hopkins Turney (D) in 1838); *id.* § 1649, at 1122–23 (Rice Garland (W) and Jesse Bynum (D) in 1840); *id.* § 1651, at 1125–26 (George Rathbun (D) and John White (W) in 1844); *id.* § 1652, at 1126–27 (Albert Brown (D) and John Wilcox (Unionist) in 1852); *id.* § 1621, at 1090–94 (Preston Brooks (D), Laurence Keitt (D), and Henry Edmundson (D) against Charles Sumner (Opposition) in 1856); *id.* § 1645, at 1119–20 (Fayette McMullen (D) and Amos Granger (Opposition) in 1856). The three intraparty fights are *id.* § 1650, at 1123–24 (Henry Wise (W) and Edward Stanly (W) in 1841); *id.* § 1647, at 1120–21 (Hugh Haralson (D) and George Jones (D) in 1848); Butler & Wolff, *supra* note 91, at 57–59 (Thomas Benton (D) and Henry Foote (D) in 1850).
108. See Chafetz, *supra* note 37, at 214–15.
109. See *id.* at 215–16; 2 Hinds, *supra* note 91, §§ 1621–23, at 1090–96.
110. Cong. Globe, 31st Cong., 1st Sess. 1480 (July 30, 1850).
111. Anti-Dueling Law, ch. 30, 5 Stat. 318 (1839).
112. 2 Hinds, *supra* note 91, §§ 1621, 1211–12, at 1093–94, 779.
113. Cong. Globe, 31st Cong., 1st Sess. 1480 (July 30, 1850).
114. See David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861*, at 21–23 (2005).
115. Cong. Globe, 27th Cong., 2d Sess. 342 (Mar. 21, 1842).
116. *Id.* at 345–46 (Mar. 22, 1842).
117. 2 Hinds, *supra* note 91, § 1256, at 808.
118. Cong. Globe, 27th Cong., 2d Sess. 168 (Jan. 25, 1842).
119. 2 Hinds, *supra* note 91, § 1255, at 805–07.
120. Currie, *supra* note 114, at 22.

121. *See* Chafetz, *supra* note 37, at 181–89.
122. 2 Hinds, *supra* note 91, §§ 1261–62, at 812–13.
123. *See* Butler & Wolff, *supra* note 91, at 89–91.
124. *Id.* at 97.
125. *Id.* at 102–08.
126. *Id.* at 109–14.
127. 2 Hinds, *supra* note 91, §§ 1253–54, at 803–05.
128. Cong. Globe, 39th Cong., 1st Sess. 2572–75 (May 14, 1866).
129. *Id.* at 3092 (June 11, 1866).
130. *Id.* at 3090–95.
131. *Id.* at 3094.
132. *Id.* at 3096.
133. *Id.* at 3818–19 (July 14, 1866).
134. *Id.*
135. 2 Hinds, *supra* note 91, § 1656, at 1134–35.
136. Cong. Globe, 39th Cong., 2d Sess. 5 (Dec. 3, 1866).
137. *See, e.g.,* 2 Hinds, *supra* note 91, § 1249, at 801 (John Hunter in 1867); *id.* § 1247, at 798–99 (Fernando Wood in 1868); *id.* § 1251, at 802 (John Brown in 1875).
138. *See, e.g., id.* § 1259, at 810–12 (Rep. William Bynum censured in 1890 for calling a fellow member “a liar and a perjurer”).
139. Butler & Wolff, *supra* note 91, at 269–71.
140. *See id.* at 47–48.
141. *See* Duties Act, ch. 5, § 35, 1 Stat. 29, 46–47 (1789) (bribing a customs officer); Crimes Act, ch. 9, § 21, 1 Stat. 112, 117 (1790) (bribing a judge); Crimes Act, ch. 65, §§ 12, 16, 24, 4 Stat. 115, 118–19, 122 (1825) (extortion by an “officer of the United States,” embezzlement by an employee of the Bank of the United States, theft by an employee of the mint).
142. An Act to Prevent Frauds Upon the Treasury, ch. 81, §§ 3, 6, 10 Stat. 170, 170–71 (1853); *see* Butler & Wolff, *supra* note 91, at xxvi (noting that this was the first statute “specifically govern[ing] the behavior of members of Congress”).
143. An Act to Prevent Members of Congress and Officers of Government of the United States from taking Consideration, ch. 180, 12 Stat. 577 (1862).
144. An Act Relating to Members of Congress, Heads of Departments, and Other Officers of Government, ch. 119, 13 Stat. 123 (1864).
145. *See* Butler & Wolff, *supra* note 91, at xxvi (noting that the next statute governing the conduct of members of Congress was passed in 1958).
146. *Alleged Corrupt Combinations of Members of Congress*, H.R. Rep. No. 34-243, at 3–26 (1857) (reporting the findings against, and recommending the expulsion of: William Gilbert of New York, William Welch of Connecticut, Francis Edwards of New York, and Orsamus Matteson of New York).
147. *Id.* at 24, 26.
148. *Id.* at 32.
149. *Id.* at 38a.
150. 2 Hinds, *supra* note 91, § 1275, at 835–36.
151. *Id.*

152. *See* Chafetz, *supra* note 37, at 221.
153. *See* Butler & Wolff, *supra* note 91, at 115–16.
154. 2 Hinds, *supra* note 91, §§ 1239, 1273–74, at 796, 829–33 (noting the censures of John Deweese of North Carolina (even after his resignation), B. F. Whittemore of South Carolina (also after resigning), and Roderick Butler of Tennessee).
155. *See* Robert V. Remini, *The House: The History of the House of Representatives* 219–21 (2006).
156. *Id.* at 221; *see also* Butler & Wolff, *supra* note 91, at 189–95.
157. 2 Hinds, *supra* note 91, § 1286, at 852–53.
158. *Id.* at 853–54.
159. *Id.* at 855–56.
160. *Id.* at 857. Remini mistakes the voting sequence and therefore erroneously suggests that the censure votes were tinged with partisanship, with many more voting to censure the Democrat Brooks than the Republican Ames. *See* Remini, *supra* note 155, at 221. In fact, Ames was censured by a larger margin than Brooks. *See* 2 Hinds, *supra* note 91, § 1286, at 857; Cong. Globe, 42d Cong., 3d Sess. 1832–33 (Feb. 27, 1873).
161. *See* Remini, *supra* note 155, at 221.
162. Butler & Wolff, *supra* note 91, at 189–95.
163. *Id.* at 194.
164. 2 Hinds, *supra* note 91, § 1283, at 848–49.
165. *See The Indictment of Congressman Schumaker*, Brooklyn Daily Eagle, Mar. 31, 1875, at 2.
166. 2 Hinds, *supra* note 91, § 1283, at 849–50.
167. Butler & Wolff, *supra* note 91, at 275–76.
168. *Burton v. United States*, 202 U.S. 344, 366–69 (1906).
169. Butler & Wolff, *supra* note 91, at 276.
170. *Roosevelt Plotted to Ruin Me—Burton*, N.Y. Times, Mar. 24, 1907, at 16.
171. *Id.*
172. *Id.*
173. *See generally* John Messing, *Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903–1910*, 35 Pac. Hist. Rev. 35, 40–57 (1966); Jerry A. O’Callaghan, *Senator Mitchell and the Oregon Land Frauds, 1905*, 21 Pac. Hist. Rev. 255 (1952).
174. Reprinted in *The Verdict in the Mitchell Case*, Morning Oregonian (Portland), July 7, 1905, at 8.
175. William H. Galvani, *Recollections of J. F. Stevens and Senator Mitchell*, 44 Or. Hist. Q. 313, 320–21 (1943).
176. *Id.* at 321 (suggesting that the administration believed that Judge DeHaven “could be more easily managed by [Roosevelt’s] generalissimo”); *see also* Messing, *supra* note 173, at 51 (noting that Judge Bellinger, the recently deceased District of Oregon judge, had been “reluctant to tackle the prominent citizens of Oregon”).
177. Butler & Wolff, *supra* note 91, at 277.
178. *Charges Affecting the Hon. Charles H. Dietrich*, S. Rep. No. 58-2152, at i–vii (1904).



179. *Dietrich Free From Guilt*, Wash. Post, Apr. 15, 1904, at 4; *see also Dietrich Exonerated by Fellow-Senators*, N.Y. Times, Apr. 15, 1904, at 9.
180. For two insightful recent treatments of the concept of corruption, see Zephyr Teachout, *Corruption in America* (2014), and Laura S. Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (2013).
181. *See, e.g.*, Alan I. Abramowitz, *Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections*, 53 J. Pol. Sci. 34, 42 (1991); Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 Am. Pol. Sci. Rev. 385, 392, 397 (1988); Scott J. Basinger, *Scandals and Congressional Elections in the Post-Watergate Era*, 66 Pol. Res. Q. 385 (2013); Harold D. Clarke et al., *More Time with My Money: Leaving the House and Going Home in 1992 and 1994*, 52 Pol. Res. Q. 67 (1999); Carolyn L. Funk, *The Impact of Scandal on Candidate Evaluations: An Experimental Test of the Role of Candidate Traits*, 18 Pol. Behav. 1 (1996); Gary C. Jacobson & Michael A. Dimock, *Checking Out: The Effects of Bank Overdrafts on the 1992 House Elections*, 38 Am. J. Pol. Sci. 601 (1994); Rodrigo Praino et al., *The Lingering Effect of Scandals in Congressional Elections: Incumbents, Challengers, and Voters*, 94 Soc. Sci. Q. 1045 (2013); *see also* Eric Lipton, *Ethics in Play, Voters Oust Incumbents under Inquiry*, N.Y. Times, Nov. 9, 2012, at A20 (noting how many members under ethical scrutiny lost reelection bids in 2012).
182. *See, e.g.*, Marc J. Hetherington, *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism* 16, 65 (2005); Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government: A Time Series Analysis*, 64 Pub. Op. Q. 239, 251, 254 (2000).
183. Two recent articles agree that scandals significantly harmed congressional Republicans in the 2006 midterm elections, although they disagree as to whether the relevant scandal was the Abramoff corruption scandal or the Foley sex scandal. *Contrast* Samuel J. Best et al., *Owning Valence Issues: The Impact of a “Culture of Corruption” on the 2006 Midterm Elections*, 40 Cong. & Presidency 129 (2013), *with* Michael D. Cobb & Andrew J. Taylor, *Paging Congressional Democrats: It Was the Immorality, Stupid*, 47 PS: Pol. Sci. & Pol. 351 (2014).
184. John R. Hibbing & Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes Toward American Political Institutions* 70–71, 96–97 (1995); Shaun Bowler & Jeffrey A. Karp, *Politicians, Scandals, and Trust in Government*, 26 Pol. Behav. 271, 278–80 (2004).
185. Best et al., *supra* note 183.
186. Cobb & Taylor, *supra* note 183, at 354.
187. Bowler & Karp, *supra* note 184, at 284.
188. *See* Bribery Act, 2010, c. 23, § 12(8). For the treatment of bribery up until the passage of that act, *see* *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 254–56 (Malcolm Jack ed., 24th ed. 2011). *See also* Yvonne Tew, *No Longer a Privileged Few: Expense Claims, Prosecution, and Parliamentary Privilege*, 70 Cambridge L.J. 282 (2011).
189. 6 Clarence Cannon, *Cannon’s Precedents of the House of Representatives of the United States* §§ 396–98, at 551–60 (1935).

190. Butler & Wolff, *supra* note 91, at 336–38.
191. *Id.* at 309–10; *Senator Burton K. Wheeler*, S. Rep. No. 68-537 (1924).
192. 6 Cannon, *supra* note 189, §§ 238, 402–03, at 405–07, 573–77.
193. *See Rowbottom Guilty in Postal Job Sales*, N.Y. Times, Apr. 16, 1931, at 52.
194. For the House, see Staff of H.R. Comm. on Standards of Official Conduct, *Historical Summary of Conduct Cases in the House of Representatives, 1798–2004*, at 11 (2004), available at [https://ethics.house.gov/sites/ethics.house.gov/files/Historical\\_Chart\\_Final\\_Version%20in%20Word\\_0.pdf](https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf); for the Senate, see Butler & Wolff, *supra* note 91, at 452.
195. *See Indictments—A Grand Congressional Tradition Since 1798*, L.A. Times, June 5, 1994, at M2 [hereinafter *Indictments*].
196. H.R. Con. Res. 175, 85th Cong. (1958); on the impetus for the code, see Richard Allan Baker, *The History of Congressional Ethics*, in *Representation and Responsibility: Exploring Legislative Ethics* 3, 23–24 (Bruce Jennings & Daniel Callahan eds., 1985).
197. *Code of Ethics for Government Service*, S. Rep. No. 85-1812, at 1 (1958).
198. Bribery Act, Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified as amended at 18 U.S.C. §§ 201–27).
199. 110 Cong. Rec. 16939–40 (July 24, 1964) (establishing the Senate Select Committee on Standards and Conduct); 112 Cong. Rec. 27713–30 (Oct. 19, 1966) (establishing the House Select Committee on Standards and Conduct).
200. *See Baker, supra* note 196, at 25–26.
201. Drew Pearson & Jack Anderson, *The Case against Congress* 11 (1968).
202. *See id.* at 27–97.
203. Butler & Wolff, *supra* note 91, at 413.
204. *Id.* at 414–17.
205. *Censure for Mr. Dodd*, N.Y. Times, June 24, 1967, at 28.
206. *Beyond the Dodd Case*, N.Y. Times, June 25, 1967, at 8E.
207. *Dodd Verdict: 'Dishonor and Disrepute,'* N.Y. Times, June 25, 1967, at 2E.
208. Butler & Wolff, *supra* note 91, at 418.
209. *See* Staff of the Joint Comm. on Cong. Operations, 93d Cong., *House of Representatives Exclusion, Censure and Expulsion Cases from 1789 to 1973*, at 93–94, 104–05 (Comm. Print 1973).
210. *Id.* at 106–09.
211. *See* U.S. Const. art. I, § 5, cl. 1 (making each house “the Judge of the Elections, Returns and Qualifications of its own Members”). I have discussed the houses’ power to judge the elections, returns, and qualifications of their members at length in Chafetz, *supra* note 37, at 162–92.
212. 395 U.S. 486 (1969).
213. *Id.* at 506–12.
214. *See* Lawrence Van Gelder, *New York Congressman on the Move: Charles Bernard Rangel*, N.Y. Times, Dec. 12, 1974, at 38.
215. 383 U.S. 169 (1966).
216. 408 U.S. 501, 526 (1972).
217. *Id.* at 563 (White, J., dissenting).
218. *See, e.g., United States v. Helstoski*, 442 U.S. 477 (1979) (holding that the government could not introduce evidence of past legislative acts in a bribery case); *United States v.*

- Rayburn House Office Bldg. Room 2113, 497 F.3d 654 (D.C. Cir. 2007) (holding that a search of a member's files in his congressional office violated the Speech or Debate Clause and required the return of privileged legislative materials); *In re Grand Jury Subpoenas*, 571 F.3d 1200 (D.C. Cir. 2009) (holding that statements made by a member to the Ethics Committee could not be subpoenaed).
219. *See, e.g.*, *United States v. Renzi*, 769 F.3d 731 (9th Cir. 2014); *United States v. Renzi*, 651 F.3d 1012 (9th Cir. 2011); *United States v. Jefferson*, 546 F.3d 300 (4th Cir. 2008); *United States v. Williams*, 644 F.2d 950 (2d Cir. 1981); *United States v. Murphy*, 642 F.2d 699 (2d Cir. 1980); *United States v. Myers*, 635 F.2d 932 (2d Cir. 1980).
220. H.R. Res. 933, 92d Cong. (1972).
221. *Sense of the House of Representatives with Respect to Actions by Members Convicted of Certain Crimes*, H.R. Rep. No. 92-1039, at 2 (1972).
222. 121 Cong. Rec. 10339–45 (Apr. 16, 1975).
223. Julian E. Zelizer, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences, 1948–2000*, at 200–202 (2004).
224. *Id.* at 204.
225. *Id.*; *In the Matter of Representative Raymond F. Lederer*, H.R. Rep. No. 97-110 (1981).
226. Butler & Wolff, *supra* note 91, at 434–37.
227. Martin Tolchin, *Myers Is Ousted from the House in Abscam Case*, N.Y. Times, Oct. 3, 1980, at A1.
228. Alison Mitchell, *House Votes, with Lone Dissent from Condit, to Expel Traficant from Ranks*, N.Y. Times, July 25, 2002, at A13.
229. *See Indictments*, *supra* note 195 (listing the members indicted and the outcome of their cases up to 1994).
230. Robert D. McFadden, *Mario Biaggi, 97, Official Undone by Scandals, Dies*, N.Y. Times, June 26, 2015, at A25.
231. *See* Staff of the H.R. Comm. on Standards of Official Conduct, *Summary of Activities*, H.R. Rep. No. 103-873, at 8 (1994).
232. Keith Schneider, *Dan Rostenkowski, 82, Powerful Congressman Touched by Scandal, Is Dead*, N.Y. Times, Aug. 12, 2010, at A29.
233. Randal C. Archibold, *Ex-Congressman Gets 8-Year Term in Bribery Case*, N.Y. Times, Mar. 4, 2006, at A1.
234. Carl Hulse, *DeLay is Quitting Race and House, Officials Report*, N.Y. Times, Apr. 4, 2006, at A1; Philip Shenon, *Ex-Congressman Is Sentenced to 2½ Years in Abramoff Case*, N.Y. Times, Jan. 20, 2007, at A8.
235. David Stout, *U.S. Jury Convicts Ex-Lawmaker of Bribery*, N.Y. Times, Aug. 6, 2009, at A14.
236. *See* Staff of the H.R. Comm. on Standards of Official Conduct, *Summary of Activities*, H.R. Rep. No. 110-938, at 17–18 (2009).
237. Zelizer, *supra* note 223, at 243.
238. *See* Remini, *supra* note 155, at 479–82; Zelizer, *supra* note 223, at 243–44; Clarke et al., *supra* note 181, at 80–82; Jacobson & Dimock, *supra* note 181, at 605–19.
239. H.R. Res. 895, 110th Cong. § 1 (2007).
240. Jacob R. Straus, *House Office of Congressional Ethics: History, Authority, and Procedures*, CRS Report for Cong. No. R40760, at 12, 14 (2015).

241. *Id.* at 18–20.
242. *Id.* at 21.
243. See, e.g., Editorial, *An Ethics Watchdog Survives*, Wash. Post, Dec. 30, 2010, at A14; Eric Lipton, *House Ethics Office Gains, Dismissals Aside*, N.Y. Times, Mar. 23, 2010, at A18; Craig Holman & Victoria Hall-Palerm, Pub. Citizen, *The Case for Independent Ethics Agencies: The Office of Congressional Ethics Six Years Later, and a History of Failed Senate Accountability* (2014).
244. Holman & Hall-Palerm, *supra* note 243, at 7.
245. Shortly before the OCE came into being, I proposed a similar body. While the OCE does indeed incorporate many of the features I recommended, in cases where the two diverge, I continue to believe that the institutional structure I proposed was preferable. See Josh Chafetz, *Cleaning House: Congressional Commissioners for Standards*, 117 Yale L.J. 165 (2007); see also Josh Chafetz, *Politician, Police Thyself*, N.Y. Times, Dec. 2, 2006, at A15.
246. See Holman & Hall-Palerm, *supra* note 243, at 9–14.
247. See *id.* at 14.
248. Straus, *supra* note 240, at 20.
249. Indeed, I have suggested this course of action in the case of a member whose conduct was slimy, but perhaps not so slimy as to be disqualifying. See Josh Chafetz, *Run, Anthony, Run*, Slate, June 15, 2011, [http://www.slate.com/articles/news\\_and\\_politics/politics/2011/06/run\\_anthony\\_run.html](http://www.slate.com/articles/news_and_politics/politics/2011/06/run_anthony_run.html).
250. Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177 (2008).
251. 100 Cong. Rec. 12729 (July 30, 1954).
252. *Report of the Select Committee to Study Censure Charges*, S. Rep. No. 83-2508, at 2 (1954) [hereinafter *Report*].
253. See *id.* at 5–31; for a description of the earlier investigation, see Butler & Wolff, *supra* note 91, at 394–98.
254. See *Report*, *supra* note 252, at 39–45.
255. See *id.* at 45–46.
256. See Neil MacNeil & Richard A. Baker, *The American Senate: An Insider's History* 257 (2013); Thomas C. Reeves, *The Life and Times of Joe McCarthy* 654 (1982).
257. See *Report*, *supra* note 252, at 47–61, 67–68.
258. Butler & Wolff, *supra* note 91, at 406.
259. Editorial, *Censure*, N.Y. Times, Dec. 3, 1954, at 26.
260. Editorial, *Judgment of the Senate*, Wash. Post, Dec. 3, 1954, at 20.
261. Alan Barth, *Government by Investigation* 210 (1955).
262. *Id.* at 216.
263. MacNeil & Baker, *supra* note 256, at 257; Reeves, *supra* note 256, at 671.
264. H.R. Res. 744, 111th Cong. (2009).
265. Paul Kane, *House Votes to Rebuke Wilson for Interruption*, Wash. Post, Sept. 16, 2009, at A8; see also Carl Hulse, *House Formally Rebukes Wilson for Shouting 'You Lie'*, N.Y. Times, Sept. 16, 2009, at A14 (“mainly party line”).
266. See Assoc. Press, *No Lie, Wilson Is Now a GOP Star*, L.A. Times, Sept. 26, 2009, at 16.

**Congress of the United States**  
Washington, DC 20515

March 4, 2021

Chairman Cohen,

As your Subcommittee prepares to hold its hearing next week on “The Constitutional Framework for Congress’s Ability to Uphold Standards of Member Conduct” in the House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties, I want to share with you and the Subcommittee this document and request that you enter it into the hearing record:  
<https://lofgren.house.gov/socialreview>.

I asked my staff to do a quick review of public social media posts of Members who voted to overturn the 2020 presidential election. The statements compiled in this document, which are readily available in the public arena, may be useful part of any consideration of Congress’ constitutional prerogatives and responsibilities.

I know that you share my deep concerns about not only President Trump, but of our elected colleagues whose conduct may have threatened our democratic government by aiding, abetting, and/or inciting the insurrection on January 6<sup>th</sup>. I appreciate your Subcommittee’s dutiful attention to the seriousness of the Constitutional question(s) at hand.

Sincerely,



Zoe Lofgren  
Member of Congress

CC: Chairman Jerrold Nadler  
House Judiciary Committee

A report entitled, "Social Media Review: Members of the U.S. House of Representatives who Voted to Overturn the 2020 Presidential Election," Social Media Review, submitted by the Honorable Zoe Lofgren, a Member of the Committee on the Judiciary from the State of California available at the following link:

*<https://housedocs.house.gov/lofgren/SocialMediaReview8.pdf>*.

