STANDARDS OF CONDUCT IN NATIONAL ASSEMBLIES: A REVIEW OF THE AMERICAN EXPERIENCE

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It is ironic that just as a more energetic and influential national assembly tends to strengthen democratic governance, it also tends to increase the risk of popular disenchantment with the same. During the 1990s, public exposure to intense and sometimes prolonged legislative debates led some citizens in new democracies of central and eastern Europe to complain that, at a time of great expectations, their assemblies spent too much time talking and too little time acting, especially when there was so much legislative work to be done. The idea that public debate and thorough deliberation were an integral part of governmental decision-making was foreign to their prior experience with their governments.

My focus, however, is not at the institutional level, but at the level of the individual member of a democratic national assembly. Here the irony is that the increasing influence of a national assembly increases the opportunities for, and the likelihood of, members behaving in ways that are illegal, unethical, or corrupt. As the national assembly becomes an increasingly pivotal actor in national governance, both by legislating and by monitoring the implementation of existing laws, it also matters more and more what its individual members say or don't say, what they do or don't do, what questions they ask or don't ask, and so on. As members realize this, they also must recognize the increased leverage they have to reap personal benefits in one form or another from their official positions and official acts. And individuals and groups who might be affected by the assembly's actions recognize the increased incentives they have to curry favor among the members who can help direct and control these actions.

Devising and enforcing acceptable standards of conduct for MPs, therefore, is essential to preserving popular respect and support for national assemblies and, more generally, for democratic institutions of governance. National assemblies are left with a choice between two unpalatable ways of going about these tasks. One option is for a national assembly to take on the tasks itself and for its members to discipline each other. It is not pleasant to sit in judgment on one's colleagues, and that certainly is not why most MPs sought election to the assembly in the first place. They came to represent, legislate, and monitor, and perhaps to enrich and empower themselves, or some combination of the four, but not to act as investigators, judges, and juries. Yet the alternative is just as unsatisfactory, because it involves giving the power to do these things to outsiders—most likely to members of the executive government or the judiciary or some independent commission or commissioner—and thereby put control over the reputation of their institution and the futures of their individual members in the hands of people who do not serve with them and so cannot really understand the pressures and responsibilities that MPs face.

The United States, by and large, has chosen the first option. That Congress has struggled with this responsibility is reflected in the low public esteem for the legislative branch,

as reflected in public opinion polls, and the recurrent cries among voters to "throw the bums out" and the equally recurrent laments among non-voters that elections don't really matter because "they're all crooks anyway." Still, when it comes to judging the conduct of its own members, the U.S. House of Representatives and Senate are empowered and expected to discipline themselves, especially on non-criminal matters. This paper surveys the subject by discussing the constitutional provisions for congressional immunity, the authority of each house to expel its members, its other responses to allegations of criminal wrong-doing, and the discipline that each house may impose for conduct that does not merit expulsion. The paper then summarizes the historical development of ethics-related procedures in both houses of Congress through the end of 2010, including a recent innovation that attempts to strike an acceptable balance between self- and external regulation.

CRIMINAL LIABILITY AND IMMUNITY

In his influential 1776 pamphlet, *Common Sense*, Thomas Paine wrote that, "in America, the law is King. For as in absolute governments the king is law, so in free countries the law ought to be king; and there ought to be no other."[1] This principle has been taken to mean not only that the citizenry should be subject to knowable laws, but also that the government and those serving in it are, to the extent possible, subject to the same laws. Theodore Roosevelt was only one among many who opined that "no man is above the law," an aphorism that has become a platitude in the United States.[2] The President and members of Congress are subject to the same laws as other American citizens, unless and only to the extent that the Constitution or national laws provide otherwise.

With respect to the President (and other executive branch officials, including the Vice President, as well as federal judges), Article I of the Constitution provides that he may be impeached by a majority vote of the House of Representatives, and then convicted and removed from office by a vote of two-thirds of the Senate. Article I continues that "[j]udgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: *but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."*[3]

Thus, the Constitution makes clear that, for executive and judicial officers of the federal government, impeachment and removal are not an alternative to the application of ordinary law, and they do not preclude criminal prosecution. However, the Constitution does not address whether the President, for example, may be indicted, tried, convicted, and imprisoned while still in office. Fortunately, this question has not arisen, though whether a civil suit could proceed

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[1] Quoted in Jethro Lieberman. *A Practical Companion to the Constitution*. Berkeley: University of California Press, 2005; p. 436. The full text of *Common Sense* is available at www.earlyamerica.com/earlyamerica/milestones/ commonsense/text.html.

[2] Roosevelt's State of the Union Address to Congress on December 3, 1901, available at /www.presidency.ucsb.edu/ sou.php.

[3] Emphasis added. The notoriously ambiguous grounds for impeachment are found in Sec. 4 of Art. II: "The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

against a sitting President was at issue in the 1997 case of *Clinton v. Jones*. In that case, a Federal Court of Appeals held, and the Supreme Court agreed, that "the President, like other officials, is subject to the same laws that apply to all citizens, that no case had been found in which an official was granted immunity from suit for his unofficial acts, and that the rationale for official immunity is inapposite where only personal, private conduct by a President is at issue."[4]

As we shall see, Representatives and Senators are not subject to removal from office following impeachment, but this never has implied that, as a general matter, they somehow are above or exempt from the law. In fact, Representatives and Senators have been arrested, tried, and sometimes convicted of criminal offenses, a subject to which I will return below. There is, though, one primary respect in which the Constitution exempts members of Congress from the normal application of U.S. law: "for any speech or debate in either House, they shall not be questioned in any other place" (Article I, Sec. 6, cl. 1).

To promote open deliberation and free debate, this clause prevents Representatives and Senators from being sued for libel or slander, but only for the statements they make during official congressional proceedings, including both plenary sessions and official meetings of congressional committees and subcommittees. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'"[5] "[S]o long as legislators are 'acting in the sphere of legitimate legislative activity,' it appears that they are 'protected not only from the consequence of litigation's results but also from the burden of defending themselves.'"[6] The purpose of what commonly is known as the "Speech or Debate" clause is not only to protect individual Representatives and Senators, but also to protect Congress as a collective institution: "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[7]

However, the protection of the "Speech or Debate" clause is limited:

> The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed

[4] The appeals court also found no basis for requiring that the suit be postponed until after the end of President Clinton's term of office. The Supreme Court further held that "[t]he separation of powers doctrine does not require federal courts to stay all private actions against the President until he leaves office." (*Clinton v. Jones* (95-1853), 520 U.S. 681 (1997)) However, the Court did not address (because it did not need to do so) whether it would sanction a criminal prosecution of a sitting President.

[5] *Powell v. McCormack*, 395 U.S. 486, 502 (1969), quoted in U.S. Senate. *The Constitution of the United States of America, Analysis and Interpretation.* Senate Document No. 92-82, 92nd Congress. Washington, U.S. Government Printing Office, 1973; p. 118. (Hereafter cited as *U.S. Constitution Annotated*, 1973).

[6] *U.S. Constitution Annotated*, 1973, quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (511967), and *Dombrowshi v. Eastland*, 387 U.S. 82, 85 (1967).

[7] *United States v. Brewster,* 408 U.S. 501, 507 (1972), quoted in *U.S. Constitution Annotated*, 1973, p. 117.

> legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[8]

For example, a slanderous statement that is protected when a Representative or Senator makes it during debate in the House or Senate would lose that protection if the member repeats it in a speech or press conference somewhere else. "[T]he clause [does not] protect transmittal of allegedly defamatory material issued in press releases and newsletters by a Senator, as neither was essential to the deliberative process of the Senate."[9] Furthermore, a member cannot invoke the Speech or Debate clause to protect himself or herself against prosecution for accepting a bribe. The Supreme Court has drawn a distinction between "a prosecution that caused an inquiry into legislative acts or the motivation for performance of such acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not",[10] because taking a bribe is not and cannot be a legislative act: "[i]t is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator."[11]

The same clause of the Constitution that contains this "Speech or Debate" protection would seem to offer another, perhaps more important, exemption for Representatives and Senators from the normal operation of the law. The clause states that they 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…." However,

> This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted. It does not apply to service of process in either civil or criminal cases. Nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" is interpreted to withdraw all criminal offenses from the operation of the privilege.[12]

With the limited exception of the protection offered by the "Speech or Debate" clause, therefore, Representatives and Senators enjoy no constitutional immunity from arrest and prosecution for alleged criminal offenses. In this regard, there is a striking contrast between the

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[8] *Gravel v. United States*, 408 U.S. 606, 625 (1972), quoted in *U.S. Constitution Annotated*, 1973, p. 119.
[9] *Hutchinson v. Proxmire,* 443 U.S. 111 (1979), quoted in U.S. House of Representatives*. Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States, 109th Congress*. House Document No. 108-241 of the 108th Congress. Washington, U.S. Government Printing Office, 2005. p. 45. (Hereafter cited as *House Rules and Manual*, 109th Congress.)
[10] *U.S. Constitution Annotated, 1973*, p. 120.
[11] *United States v. Brewster*, U.S. 501, 526, quoted in U*.S. Constitution Annotated*, 1973, p. 120.
[12] *U.S. Constitution Annotated, 1973*, p. 117. See *Williamson v. United States*, 207 U.S. 425 (1908). But perhaps the clause is not entirely obsolete. In 1983, Senator Roger Jepsen of Iowa "was stopped for driving alone in a lane reserved for car pools, and he beat a $35 ticket by claiming congressional immunity." "The Senate: Embattled Heartland Republicans," Time Magazine, October 8, 1984 (available at www.time.com/time/magazine/ article/0,9171,955305-2,00.html. Jepsen, a Republican, ultimately did pay for his foolishness; he was defeated for re-election in November 1984, notwithstanding President Reagan's landslide re-election victory. He may have enjoyed legal immunity, but certainly not political immunity.

U.S. Constitution of the late 18th Century and some other national constitutions that were written or revised at the end of the 20th Century.

To document the democratic development of nations that were re-creating themselves after the collapse of the Soviet Union and Yugoslavia, the International Institute for Democracy published in 1995 a compilation of the official English translations of the constitutions of twelve of these nations, from Estonia in northern Europe to Macedonia in the south.[13]

All but two of the twelve constitutions include provisions that are generally comparable to the American Constitution's "Speech or Debate" clause, and none of them fails to grant some additional form of parliamentary immunity.[14] In fact, eleven of the twelve involve the national assembly as a whole in decisions as to whether one of its members may be arrested or prosecuted. In Bulgaria, a member of its national assembly is immune from arrest or prosecution for anything less than a grave crime, and he or she may be arrested and prosecuted for a grave crime only with the consent of the assembly, unless the member is caught *in flagrante delicto*. In Croatia, a member may not be detained without approval of the chamber in which he or she serves, unless caught in the act of committing a serious crime. In the Czech Republic, if a Deputy or Senator is caught in the act, the chamber in which he or she serves must immediately vote to approve or disapprove his or her detention, and in any case, no Deputy or Senator can be prosecuted without the consent of his or her chamber. In Estonia also, it requires a vote of the assembly to permit a member to be charged with a crime.

In Latvia, a member of the assembly can be arrested or even searched only with its prior approval, unless caught in the act. In the latter case, the assembly then must decide promptly whether to permit the member to remain under arrest. In Lithuania, there is no constitutional exception for members caught *in flagrante delicto*: a member "may not be found criminally responsible, may not be arrested, and may not be subjected to any other restriction of personal freedom without the consent of" the assembly. In Macedonia, prior approval of the assembly is required to arrest a member unless he or she is caught in the act. In Poland, a two-thirds vote of the lower house is required to detain, arrest, or convict one of its members. A Romanian Deputy or Senator may be arrested or prosecuted only with the authorization of the body in which he or she serves, unless caught in the act of committing a crime. In that case, his or her chamber may vote to require his or her release. No Slovak deputy may be prosecuted or held in "pre-trial detention" without the assembly's approval; the assembly also must vote immediately on whether to permit the continued detention of a member arrested while committing a crime. And finally, unless a Slovenian deputy is caught *in flagrante delicto*, he or she may not be arrested or prosecuted without the assembly's consent.[15]

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[13] International Institute for Democracy (ed*.). The rebirth of democracy: 12 constitutions of central and eastern Europe*. Strasbourg, Council of Europe Press, 1995.

[14] Estonia bestows immunity without specifying what is protected, and Hungary allows parliamentary immunity to be defined and governed by statute. In Latvia, Lithuania, and Poland the immunity for speech and debate is qualified.

[15] Other provisions take account of the possibility that the assembly may not be sitting at the time the arrest is sought or made.

Each of these countries had had many years of experience with politicized criminal justice systems, so it should not be surprising that they sought to protect their legislators from being prevented from fulfilling their constitutional duties by unilateral decisions of police or justice officials. On the other hand, just as the powers of detention, arrest, and prosecution can be used for political ends, so too can the parliamentary immunity these constitutions extend be manipulated to insulate criminals from the criminal justice system. Under these constitutions, a party with an assembly majority can protect any and all of its members from arrest and prosecution, no matter what they have or have not done, and criminals may be able to secure their own immunity if they can get themselves elected to their national assembly, by fair means or foul. Although the immunity provisions described here do not constitute a fair sample of international practice, they do indicate that the concept and context of parliamentary immunity is more complex today than it was two hundred years ago.

Finally, several of these constitutions remind us that the purpose of parliamentary immunity should not be only, and perhaps not even primarily, to protect an assembly's individual members. The Macedonian constitution states that "[t]he assembly can decide to invoke immunity for a Representative without his or her request, should it be necessary for the performance of the Representative's office," and the Slovenian constitution likewise authorizes its national assembly "to grant immunity to a deputy notwithstanding that such immunity has not been claimed by him or notwithstanding that he has been found committing a criminal offense" which otherwise would not trigger the requirement for the assembly's consent to his arrest or prosecution. Ultimately, the authority of a national assembly to intervene to protect its members from the criminal process is one way in which the assembly can try to preserve its autonomy and protect itself from coercion or domination by the executive power of the government.

CONGRESSIONAL POWERS AND RESPONSIBILITIES

While the U.S. Constitution, unlike the other national constitutions just cited, does not give the House of Representatives or the Senate any power or responsibility affecting the liability of its members to arrest, prosecution and conviction for criminal offenses, that by no means exempts Congress from responsibility for the conduct of its members.[16]

The Senate decided in 1797, less than a decade after it first convened under the newly-ratified constitution and during the first impeachment trial it conducted, that Representatives and Senators were not subject to the impeachment process. After the House had impeached and the Senate had tried William Blount, then a serving Senator from Tennessee, the Senate found that members of Congress were not "civil officers of the United States" within the meaning of Article 2, Section 4, of the Constitution, providing that "[t]he President, Vice President and all

[16] The U.S. Constitution was written at a time when political parties and partisan differences were just beginning to emerge. It is interesting to speculate whether the document would have included immunity provisions more similar to those just described here if it had been written even little more than a decade later, when the situation had changed radically and allegations of sedition were widespread.

Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[17]

During the Senate's debate on the Blount case, Senators recognized that the decision it ultimately reached did not leave Congress helpless when confronted by a member of either house whom it judged to be guilty of an impeachable offense or any other offense that merited sanction. Under Article I, Section 5, each house is empowered to "determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

The Constitution makes clear, therefore, that the House of Representatives and the Senate have the authority to discipline their own members. The authority of each house in this respect extends only to its own members and not to those of the other house, and each house can act on its own authority only and without the concurrence of the other house or the president being required. The Constitution's explicit grant of authority also carries with it the implicit expectation that the House and Senate each will exercise its disciplinary authority when necessary. In short, it gives Congress not just the power but also the responsibility to discipline itself. If the House or Senate were to say that disciplining its members who engage in unacceptable conduct is a matter for the executive branch or the courts, it would be fair to respond that the Constitution imposes this responsibility on the House and Senate themselves, whatever other actions the other two branches of the federal government may or may not take.

Yet, as we shall see, the two houses of Congress are thought to have met this responsibility unevenly. Representatives and Senators generally have been reluctant to sit in judgment on their colleagues, and they have been less than anxious to accept appointment to the committees that each house has set up to review and make recommendations regarding allegations of conduct meriting disciplinary action. Also, the way in which members of both houses are elected has lent strength to the argument that it is the voters who should evaluate the conduct of the Representatives and Senators they elect. Not only is every member chosen in a single-member district, which may be an entire state or a part of one, it is well understood that a candidate's character, personality, beliefs, skills, and track-record are always important, and sometimes decisive, in deciding elections. Party labels are informative to American voters, but not necessarily determinative. Knowing all this, it always is tempting for members of either house to claim that the conduct of a colleague is best left to his or her constituents to judge, and this argument is particularly compelling regarding Representatives who have to face their electorates every two years.

Still, members of Congress are perfectly well aware that their institution traditionally has been held in low regard, if public opinion polls are to be believed. So they fear that headlines declaring and decrying the misconduct of a colleague, regardless of party, will damage the re-election prospecs of all incumbents, again regardless of party. This is not to say that members are immune to the argument that they must protect the integrity and reputation of the institution

[17] See Asher Hinds. *Hinds' Precedents of the United States House of Representatives*. Washington, Government Printing Office, 1907; v. 3, secs. 2294-2318.

in which they are honored to serve, but to illustrate once again that self-interest rarely is absent from politicians' calculations.

DISCIPLINE THROUGH EXPULSION

Expulsion of a Representative or Senator differs from impeachment and removal of an executive or judicial branch officer in two respects: unlike the impeachment process, expulsion requires action only by the house in which a member serves, and expulsion cannot carry with it a disqualification prohibiting an expelled Representative or Senator from holding any other "Office of honor, Trust or Profit under the United States." In another respect, though, impeachment and expulsion are similar in that the Constitution does not lay out unambiguous grounds for exercising either power.

Scholars and politicians have debated for two centuries exactly what offenses qualify, for purposes of the impeachment process, as "other high Crimes and Misdemeanors," in addition to treason and bribery. The one assertion on which there probably is widespread agreement is that not every crime is an impeachable offense and not every impeachable offense must be a crime. For example, we would not expect Congress to impeach and convict a president for violating the law by making an illegal turn while driving an automobile (a hypothetical example, of course, since presidents do not drive themselves). On the other hand, we would expect that Congress eventually would act to remove a president who had flown off to Vanuatu and made it clear that he had no intention of returning any time soon.

So too with the congressional power to expel its own members. At least the Constitution has something to say about the grounds for impeachment; on appropriate grounds for expulsion, it is completely silent. One of Congress' own legal experts, Jack Maskell of the Congressional Research Service, quotes Justice Joseph Story, one of the Supreme Court's most respected interpreters of the Constitution, as having concluded that "expulsion may be for any misdemeanor, which, though not punishable by any statute, is inconsistent with the trust and duty of" a member of either house.[18] In practice, however, Congress has used its expulsion power sparingly, and then only in cases of disloyalty or criminality.[19]

Since 1789, a total of five Representatives and 15 Senators have been expelled. Of them, 14 of the 15 Senators and three of the five Representatives were expelled in 1861 or 1862 for supporting the Confederacy during the Civil War. Of the remaining three, one was Senator Blount, who was expelled for treasonous conduct after the Senate concluded that it could not convict him on impeachment. Most recently, Rep. Michael Myers was expelled in

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[18] Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives.* Congressional Research Service Report RL-31382. Washington, U.S. Library of Congress, 2005; p. 4.

[19] Expulsion needs to be distinguished from exclusion. In a famous case from the late 1960s, the House voted not to seat (that is, to exclude) Adam Clayton Powell, a Representative who had just been re-elected. In essence, the Supreme Court held, in *Powell v. McCormack,* 395 U.S. 486 (1969), that the House of Representatives could not exclude someone who had been properly elected or re-elected, and who met the three constitutionally-imposed requirements of age, citizenship, and residency. Instead, the House could seat such a person and then vote to expel him or her, even for acts committed before that person's election or most recent re-election.

1980, upon conviction, according to Maskell, "for accepting money in return for [a] promise to use [his] influence in immigration matters," and Rep. James Traficant was expelled in 2002, upon conviction "of conspiracy to commit bribery and to defraud [the] 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."[20]

Of the 20 instances of expulsion, therefore, 18 were on grounds of treason or disloyalty, and the remaining two followed upon conviction for criminal offenses. However, this is not quite the full story. There have been at least seven additional instances in which it is reasonable to expect that Senators would have been expelled if their expulsions had not been forestalled by resignation or death or by a lack of time for the Senate to act. A comparable "Historical Summary of Conduct Cases in the House of Representative" reveals perhaps half a dozen cases in which Representatives resigned before the question of expelling each of them reached the House for a vote.[21]

TAKING ACCOUNT OF ALLEGED CRIMES

Both houses of Congress have been understandably reluctant to act on resolutions to expel members for criminal activity before they have been convicted. Although neither the House or the Senate has a formal *sub judice* rule or well-established convention, members recognize that they would open themselves to public criticism if, by their votes, they seemed to be pre-judging a criminal case that had yet to be decided or worse yet, if they expelled a member who had been accused of a crime but who, after being expelled, was found not guilty.[22] On the other hand, Representatives and Senators also are sensitive to the public impression created by a criminal participating in the making of national policy; they are prepared to extend the presumption of innocence only so far. Perhaps for this reason, in 1975 the House amended its Code of Official Conduct (discussed below) to include a statement urging that a Representative convicted of a serious crime should refrain from voting voluntarily. Clause 10 of the Code of Official Conduct (House Rule XXIII) now reads:[23]

> A Member, Delegate, or Resident Commissioner who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member, and a Member should refrain from voting on any

[20] Maskell*, ibid*. p. 20.
[21] This compilation is too voluminous to include here, even in abbreviated form, and the historical record is too complex for easy summary. The compilation is available at the website of the House of Representatives' Committee on Standards of Official Conduct under the link to "Historical Documents" at http://ethics.house.gov/Pubs.
[22] In one 1988 instance, the House deferred action on an expulsion resolution after a Representative had been convicted in one case but was then on trial in another.
[23] *House Rules and Manual*, 109th Congress, pp. 896-897. "Delegates" refers to the delegates elected to the House from the District of Columbia, U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Marianas. The "Resident Commissioner" is elected to the House from Puerto Rico. The delegates and Resident Commissioner have the rights and privileges of Representatives, except that they may not vote in the House.

> question at a meeting of the House or of the Committee of the Whole House on the state of the Union, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is re-elected to the House after the date of such conviction. [24]

Even this policy, however, is not without its problems. If a Representative refrains from voting, for whatever reason, his or her constituents are denied their full voice in congressional deliberations and decisions. Why should the members of a constituency be penalized in this way when they are not at fault? The next congressional election will come soon, and that may be soon enough for the voters to decide whether to retain a convicted member, should he or she seek re-election. Furthermore, the House only can encourage a convicted member to refrain from voting; there is no constitutional basis for the House refusing to permit him or her to vote. The right to vote in the House is granted by a Representative's constituents, not by his colleagues in Congress, assuming the member was fairly elected and that he or she met the constitutional requirements of office. If the House cannot stomach having a convicted Representative vote on the House floor, its option is to exercise its power to expel.

This argument does not apply with equal force, though, to positions that Representatives hold by virtue of decisions made within the House itself. In particular, committee chairmanships are the gift of the House as a whole, but are made at the recommendation of all the Representatives who are members of whichever party is in the majority. Similarly, subcommittee chairmanships are the gift either of the majority party caucus or conference or the majority party's members on each committee.[25] Removing a Representative, temporarily or permanently, does not deny his or her constituents their equal representation in the House of Representatives. It only withdraws from that Representative the extra power, authority, and prestige that have been bestowed by his or her party.

Since 1980, the House Democrats, who were in the majority from 1955 through 1995, have had an internal party rule providing, in the same or very similar terms, that:

> The chairman or ranking minority member [depending on whether the Democrats are in the majority or the minority] of a standing, select, special or joint committee, or subcommittee thereof, who is indicted for a felony for which a sentence of two or more years imprisonment may be imposed, shall cease to exercise the powers of chairman or ranking minority member and shall step aside in favor of the next senior Democratic Member of the committee or subcommittee concerned….

In 2005, the House Democrats adopted a similar rule by which any of the top six Democratic leaders in the House also is required to step aside temporarily if he or she faces a similar indictment. In 1993, the House Republicans adopted much the same rule governing committee chairmen of its party in anticipation of the 1994 election which gave it control over the appointment of all House committee chairs, and also extended its rule in 2005 to apply to its

[24] There are no comparable provisions in the Senate's standing rules.
[25] The default rule is that committee members of the majority party choose their subcommittee chairmen. However, for several of the most important committees, these choices are made by the full party caucus or conference.

senior House party leaders. In general, the party rules provide for any such suspension to become permanent if the Member involved is convicted of the kind of felony to which the rules refer. If that member is not convicted, however, he or she is to resume his or her committee or party leadership position. The rules of the Senate Republicans similarly state that, "[i]n the event of an indictment for a felony, the chair/ranking member or elected member of the leadership shall step down until the case is resolved. Upon conviction, the chair/ranking member would automatically be replaced."[26]

DISCIPLINE BY CENSURE AND OTHER LESSER PENALTIES

A Representative or Senator who faces a felony indictment would find it difficult to fulfill the various and demanding responsibilities of office, and, if convicted, probably would be precluded from doing so. Furthermore, a member of either house who remains under indictment or who has been convicted would face a steep uphill climb to re-election. In addition, there is no need for the House or Senate to judge the conduct of a convicted colleague; that judgment already has been reached in a court of law, and few Representatives or Senators would be brave or foolish enough to vote against disciplining a convicted felon. Much the same political reasoning would apply to a Member who has been indicted but not yet convicted; the "presumption of innocence" is weak indeed when the person indicted is an elected politician, especially a member of Congress. Allegations of criminality, therefore, are the easy cases which the House or Senate may be called upon to address.

Unethical conduct by Representatives and Senators is outside the purview of the criminal justice system. It is for each house, under its plenary constitutional power to "punish its Members for disorderly Behaviour," to decide what constitutes "disorderly Behaviour" and what to do about it. It would be within the authority of either house to expel a member for some action that, however deplorable, was not criminal. However, the House and Senate have reserved expulsion for those thankfully rare instances in which their members have been convicted in a criminal proceeding, and they have adopted other forms of disciplinary action for non-criminal offenses.

In most cases, discipline has taken the form of a condemnatory statement or resolution approved by vote of the full House or Senate. Especially in recent years, this form of rebuke has allowed each house to calibrate the language it uses to the severity and circumstances of the offending conduct. During the course of congressional history, a total of 21 Representatives have been censured by vote of the House;[27] two others, in the 1870s, resigned before they could be expelled, and they were "condemned," not censured. In 1976, the House "reprimanded" a member instead of censuring him. This was considered a somewhat lesser form of punishment and since then has been meted out to another seven members, giving us a total of 31 Representatives whom the House has disciplined by adopting resolutions

[26] Available at http://src.senate.gov/public/index.cfm?FuseAction=AboutSRC.ConferenceRules. The Senate Democratic Caucus does not publish its rules. See Jack Maskell, *Status of a Member of the House Who Has Been Indicted for or Convicted of a Felony.* Congressional Research Service Report PL33229. Washington, U.S. Library of Congress, 2007.

[27] Most recently in December 2010.

disapproving their conduct.[28] During the same period, nine Senators have received similar rebukes: five were censured, two were condemned, and another two were denounced for reprehensible conduct tending to bring the Senate into dishonor and disrepute.

The Senate Ethics Committee and the House Committee on Standards of Official Conduct, to be discussed below, also have taken it upon themselves to issue their own criticisms of members' conduct. In 2008, for example, the Senate committee issued a "Public Letter of Qualified Admonition," in which it criticized the Senator to whom it was addressed for failing to recognize that an action he had taken had created an "appearance of impropriety that reflected unfavorably upon the Senate." And in 2009, the committee issued a similar letter to a recently-seated Senator, telling him that "you should have known that you were providing incorrect, inconsistent, misleading or incomplete information to the public, the Senate, and those conducting legitimate inquiries into your appointment to the Senate." In neither case did the Committee ask the Senate as a whole to agree to a resolution confirming the committee's conclusions or adding its own collective rebuke.[29]

The House committee also has issued "Letters of Reproval" to Representatives for reasons including "the improper use of campaign accounts for personal loans; for a Member's borrowing of campaign funds for personal use, and a subsequent 'inadequate' disclosure of such transaction; and concerning allegations of sexual harassment of a female employee, and the use of one's office for political campaign activity."[30]

In addition to a formal, public "Letter of Reproval," the Committee has addressed ethical issues before it 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 a recommendation of sanctions to the full House is not made. 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." The Committee also has noted violations of House rules or standards, has "so notified" the Member, and found that no further action by the Committee will be taken."[31]

A cynic may dismiss these self-disciplinary actions as mere slaps on the wrist, and in a sense they are, because they do not, of themselves, have any legal or even institutional consequences. Above all, even a resolution that is adopted by the full House of Representatives or Senate and that censures, condemns, reprimands or denounces one of its members does not remove the offending Representative or Senator from office. However, as the Senate's own website observes, such a resolution "is a formal statement of disapproval…that can have a powerful psychological effect on a member and his/her

[28] Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives,* pp. 19-20.
[29] These letters are available at http://ethics.senate.gov.
[30] Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, p. 17.
[31] Ibid.

relationships in the Senate."[32] The condemnation of Senator Joseph McCarthy in the 1950s largely burst the balloon of "McCarthyism"; he became an increasingly sad and irrelevant figure until he died in office. Thereafter, of the three Senators who were later censured or denounced, two were defeated for re-election and the third chose not to run. The consequences for Representatives have not been as severe. Several survived being censured and were re-elected to the House; one member who was reprimanded in 1990 remains an active and influential Representative today.

In only two cases since World War II were members of either house censured or similarly rebuked for criminal conduct. To get a sense of the other kinds of activities that have drawn disciplinary action by the House of Representatives, here is how Maskell characterizes the conduct involved in ten other cases:[33]

> -receipt of improper gifts; "ghost" employees; improper personal use of campaign funds
> -sexual misconduct with a House page (in two instances)
> -use of office for personal gain; failure to disclose interest in legislation
> -false statement before Standards of Official Conduct Committee investigating Korean influence matter
> -failure to report campaign contributions from Korean lobbyist
> -failure to report campaign contributions; false sworn statement before Standards of Official Conduct investigating Korean influence matter
> -ghost voting (allowing another person to cast his vote); maintaining on his payroll persons not performing official duties commensurate with pay
> -using political influence to fix parking tickets, and to influence probation officers for personal friend
> -allowing a Member-affiliated tax-exempt organization to be used for political purposes;
> -providing inaccurate, and unreliable information to the ethics committee.

In some cases, the offense and its gravity are obvious; House pages, for instance, are third-year secondary school students, and if there is one obvious sin against the procedures of either house, it is allowing one member to cast a vote for another in the House or Senate chamber. In other cases, however, the offense is not so obvious; the House's rules governing gifts and campaign contributions are complicated indeed. The limits on gifts that Representatives may receive, for example, do not apply to "[f]ood refreshments, lodging, transportation, and other benefits resulting from the outside business or employment activities of the Member, Delegate, Resident Commissioner, officer, or employee of the House (or other outside activities that are not connected to his duties as an officeholder), or of his spouse, if such benefits have not been offered or enhanced because of his official position and are customarily provided to others in similar circumstances…."[34]

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[32] http://senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm
[33] Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives,* pp. 19-20.
[34] *House Rules and Manual*, 109th Congress, pp. 915-916.

This rule requires a Representative to know what is "customarily provided to others in similar circumstances" and to divine whether or not he received something, or more of something, "because of his official position." Usually the answers are obvious, but sometimes they are not. And a Representative's situation is complicated by the way in which his 24-hour-a-day job can make it difficult to separate his or her professional and personal activities, and by the need to depend on staff to draft the reports and fill out the forms that he must file to comply with rules such as this. It certainly would be understandable, therefore, if members sometimes respond to situations in which they have to vote on the conduct of their colleagues by whispering to themselves, "there but for the grace of God go I."

EVOLVING MECHANISMS FOR SELF-DISCIPLINE

This may well be one reason for the difficulty and hesitancy that both the House and Senate have demonstrated as they have wrestled with settling on the best organization and procedures for investigating and judging the conduct of their colleagues. On the one hand, the last thing most Representatives and Senators want is an assignment to a committee that is charged with investigating the conduct of other members, and they can only hope that the members who are burdened with this responsibility are judicious and fully sensitive to the uncertainties and complexities that accompany congressional service today. On the other hand, the next-to-last thing that most of them want is to hand over this responsibility to outsiders, to people who either never have stood in their shoes or who left those shoes behind so many years ago that they no longer can remember how they felt and where they pinched.

In 1964, the Senate created a Committee on Standards and Conduct, which in 1977 was renamed the Select Committee on Ethics. The House of Representatives established its Committee on Standards of Official Conduct in 1967. Until then,

> There were no continuing mechanisms for congressional self-discipline. When allegations of misconduct were investigated, the investigation was often conducted by an ad hoc or select committee created for that purpose. Sometimes allegations were considered by the House or Senate without prior committee action. Publicity and the test of reelection were considered the major forms of redress for allegedly unethical behavior in Congress.[35]

Writing in 1966, a political scientist credited "the combination of historical precedent, the fear of partisan motivations, and the requirement of functioning in an atmosphere of mutual respect and cooperation as creating the view through the mid-1960s that Congress was not the forum before which the membership should be disciplined."[36]

What changed? It would be rash to assume that Representatives and Senators became less ethical and more inclined to abuse their offices and even violate the laws. We can never be

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[35] Mildred Amer, *Enforcement of Congressional Rules of Conduct: An Historical Overview*. Congressional Research Service Report RL30764. Washington, U.S. Library of Congress, 2008; p. 2.

[36] Robert S. Getz, *Congressional Ethics: The Conflict of Interest Issue*. Princeton, Van Nostrand & Co., 1966, p. 113. Quoted in Amer, *Enforcement of Congressional Rules of Conduct: An Historical Overview*, p. 3.

sure, however, because before the era of Vietnam and, later, Watergate, Members and reporters alike were much more likely to protect the reputations of errant Representatives and Senators, even when their weaknesses approached being common knowledge in Washington's congressional community. Beginning in the 1960s and continuing thereafter, the attitude of the news media became more investigative and less protective. In the House of Representatives, the case of Representative Adam Clayton Powell, mentioned earlier, was a well-publicized embarrassment, as were allegations against Bobby Baker, once a senior aide and advisor to then Senate Majority Leader Lyndon Johnson.

By creating their respective ethics committees, the members of the House and Senate gave themselves a way of appearing to react promptly and aggressively to public allegations against one of their colleagues. They could, and did, refer such allegations to their committee and then announce that, of course, it would be improper for them to reach any judgment or take any further action until the committee completed its investigation and made its recommendation (by which time months probably would pass and the heat of adverse publicity would cool).

To address the "fear of partisan motivations" to which Professor Getz referred, the House and Senate each took the largely unprecedented action of dividing the membership of its ethics committee equally between the two parties, with a member of the majority party serving as chairman, but without a second, casting, vote to break ties. Thus, neither committee has been able to act on an entirely partisan basis. Also, it undoubtedly has been reassuring to both Representatives and Senators to know that their colleagues never have been clamoring for appointment to their ethics committee. There is no political gain from serving on either of the ethics committees, most of their work is done in private, and it is distasteful to be asked to sit in judgment on one's colleagues, and even more so when he or she is a fellow party member. In fact, congressional party leaders sometimes have had to cajole colleagues to accept a temporary appointment to the House or Senate ethics committee. For example, the Speaker may tell a Member who seeks appointment to a powerful committee, such as the House Committee on Ways and Means, that he or she can expect that appointment only if the Member also agrees to serve on the House Committee on Standards of Official Conduct for one or more terms.

Service on either ethics committee generally is thought to be a thankless job, and an unwelcome distraction from members' primary interests in aiding their constituents and constituencies, addressing the problems of the nation and the world and, in the process, securing their re-election and enhancing their reputations within Congress. Also, ethics committee members often have thought that they could not easily escape the fate of being "damned if you do and damned if you don't." If they dismissed allegations against a Representative or Senator as being baseless, they opened themselves to charges of covering up or turning a blind eye to the misdeeds of their colleague. If, on the other hand, they recommended disciplinary action against a colleague, they could be accused of contributing to public disdain for Congress, and thereby undermining the reputations and jeopardizing the re-election of all members, no matter how individually blameless they might be.

Both committees have eased the burden on their own members as well as on all their colleagues by trying to head off problems before they arise. They do so by providing advisory services to both members and staff. If a Representative, for example, has a question as to the propriety of something he wants to do or has been asked to do, he may seek an advisory opinion which, if favorable, provides a kind of immunity against later criticisms. And the need for such advice is inescapable because the ethics rules of both houses are complicated indeed. The Senate Code of Conduct comprises nine of the Senate's 44 standing rules and covers such subjects as financial disclosure, gifts, outside earned income, conflicts of interest, prohibition of unofficial office accounts, foreign travel, the franking privilege, use of the Senate's radio and TV studios, political fund activity, employment practices, and constituent services. And to supplement and explicate these rules, the Senate Committee on Ethics publishes the *Senate Ethics Manual* which, in 2003, comprised 542 pages.[37]

In similar fashion, the House's standing rules contain elaborate provisions on limitations on use of official funds, limitations on outside earned income and acceptance of gifts, financial disclosure, and disclosure by members and staff of employment negotiations, in addition to Rule XXIII, the House's "Code of Official Conduct." The 2008 edition of the *House Ethics Manual*, compiled and published by the House Committee on Standards of Official Conduct, consumes 456 pages, making it somewhat shorter than its Senate counterpart![38]

Notwithstanding all this detail, there inevitably remains room for uncertainty and doubt, and always the prospect of questions arising that never have arisen before in quite the same way. Consider the first two clauses of the House's official code of conduct:

> 1. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall conduct himself at all times in a manner that shall reflect creditably on the House.
>
> 2. A Member, Delegate, Resident Commissioner, officer, or employee of the House shall adhere to the spirit and the letter of the Rules of the House and to the rules of duly constituted committees thereof.

A Representative can comply with the letter of every rule, requirement, prohibition, and advisory opinion relating to his or her conduct and still wonder how he or she might become entangled in the catch-all requirement to act "in a manner that shall reflect creditably on the House." How is such an open-ended requirement to be interpreted and enforced? How can a Representative or Senator know beyond question that he or she has not strayed, even if inadvertently, away from the side of the angels?

These unanswerable questions gave rise to two concerns about the congressional ethics process, especially in the House of Representatives. One concern was that the Committee on Standards of Official Conduct was charged both with investigating allegations against Representatives and then with recommending whether disciplinary action was called for. The same members of the committee were, it was argued, serving as both prosecutor and judge. When presented with an allegation of misconduct, the committee began a two-stage process.

[37] Its text is available at http://ethics.senate.gov/downloads/pdffiles/manual.pdf.
[38] The full text is available at http://ethics.house.gov/Media/PDF/2008_House_Ethics_Manual.pdf.

First, the committee and its staff investigated the allegation; and second, the same committee then voted whether to recommend disciplinary action to the House or Senate. Even though only the full House or Senate could vote to expel or censure or reprimand, a committee vote to recommend such an action was enough to do permanent damage to a member's reputation and career.

The House—but not the much smaller Senate, where such an innovation would not have been as practical—responded to this concern in 1977 by creating a pool of 20 Representatives who are not members of the Committee on Standards of Official Conduct, but who can be called upon to serve on an investigative subcommittee along with some of the committee's members. Then the investigative subcommittee's recommendations are reviewed and they are approved, amended, or rejected by the ethics committee members who had not served on the investigative subcommittee. Under this arrangement, the committee's two-stage process now involves different members doing the investigating and then doing the adjudicating. As a result, everyone concerned—the House and the public as well as the Representative whose conduct is in question—can have more confidence than before that the Members sitting in judgment against their colleagues in committee are not the same Members who conducted the initial investigations and evaluations of the allegations against them.

OFFICE OF CONGRESSIONAL ETHICS

Nonetheless, complaints persisted that Representatives and Senators should not be asked to investigate or sit in judgment on their colleagues. The ethics process in both houses still required Representatives to judge Representatives and Senators to judge Senators. Could members be trusted to put partisan considerations aside? Could they be trusted to act dispassionately, without showing inappropriate leniency to a colleague who also might be a friend? And could they be expected to give their work on the ethics committee the time and attention it deserves, in light of all their other, and more appealing, responsibilities? Could any system that only involved "insiders" really ever enjoy public confidence, especially when so many Americans apparently hold Congress in such low regard? Many people who found these questions disturbing proposed that outsiders be brought into the process. Doing so could ease the burden on ethics committee members, bring more professional expertise to bear on ethics inquiries and judgments, and infuse more credibility into a system which could no longer be dismissed, rightly or wrongly, as one in which Members protected their own.

This alternative approach, however, might well be unconstitutional. By vesting in each house the authority to "punish its Members," the Constitution arguably vests that authority only in each house of Congress, not in both houses acting together, and not in any non-congressional body. It is certainly arguable, and I think the argument is persuasive, that giving some newly-established body, even one containing a mixture of members and non-members, the authority to discipline members would be an unconstitutional breach of the separation of powers between the legislature and the other branches of government.

What about giving some outside person or body the authority to investigate allegations of misconduct, but then only make recommendations to the House or Senate for disciplinary

action? That approach might avoid constitutional challenges, but it has been unacceptable for at least two reasons.

First, if an independent commissioner or body recommended disciplinary action against a Member, that Member would automatically stand convicted in the media and in public opinion. Instead, it would be the House or Senate that would find itself on trial: whether it would do the obviously right thing and approve the recommendations, or whether it would reject the findings of its own independent expert or experts in order to protect one of its own. And second, many members of both houses undoubtedly would say that they are the only ones qualified to pass judgment on their colleagues, because only they can understand what it means to be a Representative or Senator, and what pressures each of them faces. What may look black or white from the outside can look profoundly gray from the inside. To their way of thinking, there is truth to the adage that you shouldn't judge a man until you've walked a mile in his shoes.

Where is the line to be drawn between zealous advocacy of constituency interests and improper interference in administrative decisions? How can anyone possibly know whether a campaign contribution is given in recognition of a Member's past voting record or as an incentive to influence a future vote? There always are vouchers and other documents for Members to sign, verifying, for example, that expense allowances were spent in accordance with a complex set of regulations, and confirming that staff members have not been engaged in impermissible political or profit-making activities. And almost all members delegate responsibility for preparing these documents to a chief of staff, administrative assistant, or office manager. By the same token, there probably are not many members who actually pay their own bills or even sign all their outgoing mail.

So while in principle every legislator is responsible for everything that is done in his or her name, when is it really fair to destroy a political career over something done or not done without his or her knowledge?

Concerns such as these have weighed heavily against proposals to "contract out" the ethics process, even to the extent that it could be done constitutionally. The Senate and its ethics committee continue to rely on Senators alone. It may be that Senators hold themselves in such high regard that they cannot contemplate letting anyone else sit in judgment on them. The House, however, has seen the virtue of reducing the burden on its ethics committee members if it could do so without relinquishing its control over the disciplinary process.

The result was the creation in March 2008 of an eight-person Office of Congressional Ethics, none of whom can be sitting Members of Congress. Today its eight members comprise three former Representatives of each party, the kind of Democrats whom Republicans respect even when they disagree, and the kind of Republicans whom Democrats respect. The other two seats are held by former legislative and executive branch staff officials with a demonstrated ability to work in a non-partisan manner. All appointments are made by the leader of one party with the concurrence of the other party. In other words, no partisan zealots need apply.

In effect, this Office is charged with acting as a screening filter for the House's Committee on Standards of Official Conduct. The Office is to conduct preliminary inquiries in

response to allegations of wrong-doing, and it is then to report to the committee. Its report may identify the subject of the review, its findings of fact, and the law, rule, or standard of conduct that is at issue. And the Office may inform the committee whether the Office believes the matter requires further review. However, the Office may not convey to the committee any conclusions about the validity of the allegations or the guilt or innocence of the person who was the subject of the investigation. It then is up to the committee to begin the two-stage review process of its own that I described earlier, if the committee decides to do so.

In other words, the House of Representatives has now added a first, preliminary stage to the two-stage process of investigation and adjudication that it already had in place. Presumably, the Office is intended to save committee members from the time and pain involved in reviewing allegations that have no obvious merit. However, the committee's authority remains whole. Only the committee, as before, can make recommendations to the House, and it cannot be boxed in by the Office making a recommendation that would be difficult politically for the committee not to endorse.

This Office of Congressional Ethics is too new for us to evaluate. At the end of 2010, in fact, some House Republican,s who were about to become members of the majority party in January 2011, were reported to be considering how they might limit the Office's authority or whether they should abolish it altogether. Yet the concept it embodies is a plausible way to relieve some of the time demands and political burden of serving on the ethics committee without the committee or the House losing control of the review process in any way. In fact, if and when the Office recommends that an allegation be dropped, the committee should be able to do so without facing its own allegations of partisan bias. On the other hand, creating the Office also must have been intended to enhance the public credibility of the House's disciplinary process and decisions at a time when too many Americans are all too ready to assume the worst about both.