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The Constitutional Framework for Congress' Ability to Uphold Standards of Member Conduct

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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, 115th Congress. 2d Sess. §672 at 389 (2019)

The Ethics Committee has also issued "letters of reproval" 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 reproval 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, 44th Cong., 1st 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.