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.[1]

[1] In re Chapman, 166 U.S. 661, 668-669 (1897), citing as authority Justice Joseph Story, COMMENTARIES ON THE CONSTITUION 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, 94th 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.[2] 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.[3]

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.[4] 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.[5] 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.[6] 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).

[2] *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., 1st 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, 35thCong., 1st Sess. (1858), II HINDS' PRECEDENTS section 1285. *See Powell v. McCormack*, 395 U.S. 486, 508-509 (1969).

[3] H. Rept. 570, 63rd Cong., 2d Sess. (1914) (Judiciary Committee), at VI CANNON'S PRECEDENTS, *supra* at section 398.

[4] H. Rept. 94-1477 (1976). *In the Matter of Representative Andrew J. Hinshaw*.

[5] *Id*. at 2, 4.

[6] *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.