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Expulsion of Members of Congress: Legal Authority and Historical Practice

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Summary

The U.S. Constitution expressly grants each house of Congress the power to "punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." Expulsion is the process by which a house of Congress removes one of its Members after the Member has been duly elected and seated. The Supreme Court has considered expulsion to be distinct from *exclusion*, the process by which the House and Senate refuse to seat Members-elect. In so concluding, the Supreme Court has held that exclusion cannot be used as a disciplinary tool, and Congress, accordingly, cannot undertake disciplinary measures on Members until after those Members have taken the oath of office.

The constitutional limits on the power of expulsion are informed by the Expulsion Clause's text, historical background, judicial precedent, and historical practice. Presently, the only explicit standards for expulsion are the supermajority voting requirement and that the individual subject to the expulsion has been formally seated as a Member of that body.

The history of the Expulsion Clause suggests that the expulsion power is broad and confers to each house of Congress significant discretion as to the proper grounds for which a Member may be expelled. Accordingly, courts generally have declined to adjudicate the standards by which expulsions might be considered in the House or Senate. To date, 20 Members of Congress have been expelled: 5 in the House and 15 in the Senate. A large majority of those expulsions were predicated on Members' behavior deemed to be disloyal to the United States at the outset of the Civil War. Nonetheless, the two most recent expulsions followed Members' convictions on public corruption charges.

One significant area of debate is whether a Member can be expelled for behavior arising prior to his or her election. The historical practice in each house of Congress is limited and mixed as to whether such expulsions are appropriate—with debates centered on two general concerns that may be in tension: maintaining the ability of each house of Congress to preserve the integrity of the institution and overriding the will and right of constituents to choose their representatives.

This report discusses the power of each house of Congress to remove a Member, including the historical background of the Clause, the implications of the limited judicial interpretations of the Clause's meaning, and other potential constitutional limitations in the exercise of the expulsion power. The report then analyzes the potential grounds upon which a Member might be expelled, including an overview of past cases resulting in expulsion and a discussion of the potential exercise of the expulsion power for conduct occurring prior to the Member's election or reelection to Congress.

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The U.S. Constitution expressly grants each house of Congress the power to "punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[1] This report discusses the nature of this substantial power, including the historical background of the Expulsion Clause, the implications of the limited judicial interpretations of the Clause's meaning, and other potential constitutional limitations in the exercise of the expulsion power. The report then explores a number of issues of debate as to Congress's power to expel, including whether past practice is legally binding on a given body; which acts may be sufficient to warrant expulsion; and whether acts that occurred prior to the Member's election or reelection to Congress are subject to the expulsion power.

Distinguishing Expulsion and Exclusion

Expulsion is the process[2] by which a house of Congress may remove one of its Members, after the Member has been duly elected and seated.[3] Expulsion, which is expressly provided for in the Expulsion Clause, is often confused with exclusion, which is an implied power of Congress that stems from the Qualifications Clauses for the House and Senate.[4] Exclusion occurs when a body of Congress refuses to seat a Member-elect.[5] Unlike the two-thirds majority requirement of the expulsion power, a body of Congress may exclude a Member-elect with a simple majority.[6]

The Supreme Court has explained that while exclusion and expulsion both bar an individual from holding a seat in Congress, the two actions exist for different purposes and occur at different times. Specifically, in *Powell v. McCormack*, the Court explored the constitutionality of Representative Adam Clayton Powell's exclusion from the House of Representatives.[7] The

[1] U.S. CONST. art. I, § 5, cl. 2 (hereinafter "the Expulsion Clause").

[2] Expulsions generally begin with an investigation by the body's ethics committee, which may follow the introduction of a resolution proposing expulsion. *See* CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE, ch. 25, § 21 (2011). The ethics committees have jurisdiction to investigate the conduct of Members that may be deemed to reflect upon the body of Congress in which they serve. *See* SENATE SELECT COMM. ON ETHICS, 115TH CONG., 1ST SESS., RULES OF PROCEDURE 24 (Comm. Print 2015), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=551b39fc-30ed-4b14-b0d3-1706608a6fcb.

[3] Expulsion, as a form of legislative discipline, exists separate from any individual criminal or civil liability of Members for particular actions. *See United States v. Traficant*, 368 F.3d 646, 649–52 (6th Cir. 2004) ("Because it would thwart the constitutional separation of powers if Congress could shield its members from criminal prosecution by the Executive Branch, we cannot read the Double Jeopardy Clause to include Congress's disciplining its own members." (emphasis omitted)); *United States v. Rose*, 28 F.3d 181, 189–90 (D.C. Cir. 1994) (holding that separation of powers doctrine does not preclude a Member of Congress from being subject to investigation by both legislative and executive authorities). *See also* Punishment by the House of Representatives No Bar to an Indictment to the President of the United States, 2 Op. Att'ys Gen. 655, 655–56 (1834). That is, Members of Congress are subject to both legislative discipline by their respective body as well as potential criminal or civil prosecution of any misconduct that constitutes a violation of federal, state, or local law.

[4] U.S. CONST. art. I., § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

[5] *Powell v. McCormack*, 395 U.S. 486, 492–93 (1969).

[6] *Id.*

[7] *Id.* at 506. Prior to the Court's decision in *Powell*, there are some examples in which Members-elect were expelled, although commentators have observed that such classification may have been used because "no one [had] raised the point that he had not been sworn in." 3 LEWIS DESCHLER, DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES CH. 12, § 13 (1979) (hereinafter "Deschler's Precedents") (citing ASHER C. HINDS, 2 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 1262 (1907) (hereinafter "Hinds' Precedents") and 1 Hinds' Precedents § 476).

impetus for the case was an investigation of expenditures authorized by Representative Powell during the 89th Congress, which concluded that, as chairman of a House committee, Representative Powell had engaged in improper activities, including deceiving House authorities with regard to travel expenses and directing illegal payments to his wife.[8] The House took no formal action on those findings during that Congress but refused to administer the oath of office to Representative Powell at the start of the 90th Congress the following year.[9] Subsequently, a Select Committee, which was appointed at the outset of the 90th Congress to determine Representative Powell's eligibility to be seated as a Member, recommended that Representative Powell be sworn into office as a Member and subsequently disciplined.[10] However, the House rejected that recommendation and instead adopted a resolution that would exclude Representative Powell by a vote of 307 to 116.[11]

Representative Powell sued to be reinstated, and on appeal the Supreme Court held that Representative Powell's exclusion was unconstitutional, explaining that "exclusion and expulsion are not fungible proceedings."[12] While the Court recognized that the Constitution grants broad authority to each of the houses of Congress regarding expulsion and other discipline,[13] it explained that Congress's authority regarding *exclusion* was limited to the enumerated qualifications requirements.[14] Because of the distinct nature of each action, the Court emphasized that the vote to exclude Representative Powell, despite exceeding a two-thirds majority, could not substitute for his expulsion.[15]

Constitutional Understandings of the Expulsion Power

Discerning the constitutional meaning of the Expulsion Clause requires an examination of the text of the Clause, the historical background that undergirds the Clause, the limited judicial decisions that have sought to interpret its text, and a brief evaluation of how the Clause may be subject to limitation by other constitutional principles.[16] In addition, and in light of the discretionary nature of the power, an assessment of House and Senate practice is necessary for a full understanding of the expulsion power.[17]

[8] *Powell*, 395 U.S. at 489–90.

[9] *Id*. at 490.

[10] *Id*. at 492.

[11] *Id*. at 492–93.

[12] *Id*. at 512.

[13] *See United States v. Brewster*, 408 U.S. 501, 519 (1972).

[14] *Powell*, 395 U.S. at 522 ("[T]he 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.").

[15] *Id*. at 510.

[16] *See Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (concluding that "to determine" the meaning of the Constitution, one must "examine[] the Constitution's text and structure, as well as precedent and history bearing on the question.").

[17] *See, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (noting that "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.").

Text of the Constitution

The Expulsion Clause states that "[e]ach House may [. . .] punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[18] Thus, the sole textual standard expressly imposed by the Constitution requires that expulsion of a Member of Congress requires "the Concurrence of two-thirds"—thereby mirroring the supermajority vote threshold by which the Senate may remove officials in the executive and judicial branches of government through the impeachment process.[19] While the Expulsion Clause does not specify the measure of the two-thirds majority, the standard is generally understood to be assessed relative to the number of Members of that body who are present and voting.[20]

Historical Background

Like other constitutional provisions relating to the powers and privileges of the Congress,[21] the origins of the Expulsion Clause lay with the practices of the English Parliament.[22] The English House of Commons historically exercised an inherent authority to expel members by a simple majority vote.[23] That power was viewed as one to be wielded at the body's "absolute discretion" with few recognized limitations, and as a result, it was historically utilized more liberally in England than it has been used in the United States.[24] Moreover, the expulsion power was used in a relatively ad hoc manner with, for example, no established standards governing the type of conduct warranting expulsion.[25] As a result, hundreds of members were expelled from Parliament prior to the turn of the 19th century on grounds ranging from publishing slanderous writings to treason.[26] Early parliamentary expulsions were motivated not only by a desire to preserve the integrity of the legislative process, but also to expel unpopular or dissenting legislators for political or religious reasons.[27]

One contemporary English expulsion case that influenced the members of the U.S. Constitutional Convention was that of John Wilkes.[28] Wilkes was a Member of Parliament who in 1763 criticized the King's peace treaty with France.[29] Wilkes was arrested, expelled from the House of Commons, and fled into exile. He later returned to England and was reelected to Parliament in

[18] U.S. CONST. art. I, § 5, cl. 2.

[19] *See* GERALD T. MCLAUGHLIN, *Congressional Self-Discipline: The Power To Expel, To Exclude and To Punish*, 41 FORDHAM L. REV. 43, 48 n.37 (1972) (citing JAMES C. KIRBY, JR., CONGRESS AND THE PUBLIC TRUST 204 (1st ed. 1970).

[20] 14 Deschler's Precedents ch. 30, § 5.2; WILLIAM BROWN, HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE, ch. 58, § 28 (2011).

[21] *See, e.g.*, U.S. CONST. art. I, § 5, cl. 2 (authorizing each house to "determine the Rules of its Proceedings"); *id.* (authorizing each house to "punish its Members"); *id.* art. I, § 6, cl.1 (providing that "for any speech or Debate" Members "shall not be questioned in any other Place").

[22] For a discussion of the exercise of the expulsion power by the House of Commons, see DORIAN BOWMAN & JUDITH FARRIS BOWMAN, *Article 1, Section 5: Congress' Power to Expel-An Exercise in Self-Restraint*, 29 SYRACUSE L. REV. 1071, 1073–83 (1978).

[23] *See* 1 JOSEPH S. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 837 (Cambridge: Brown, Shattuck & Co. 1833) (hereinafter "STORY"); Benjamin Cassady, *"You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 32 QUINNIPIAC L. REV. 209, 243 (2014).

[24] BOWMAN & BOWMAN, *supra* note 22, at 1083.

[25] *Id.*

[26] *Id.* at 1074.

[27] *Id.* at 1073–78.

[28] Cassady, *supra* note 23, at 222–49.

[29] *See Powell v. McCormack*, 395 U.S. 486, 527 (1969).

1768, only to be convicted of seditious libel and again expelled from the House.[30] Wilkes was repeatedly reelected, but each time Parliament excluded him, prevented him from taking his seat, and ultimately declared him ineligible for reelection.[31] Wilkes was finally permitted to serve following his election in 1774, after which the House of Commons expunged his expulsions and exclusions, acknowledging that it had acted in a manner "'subversive of the rights of the whole body of electors of this kingdom.'"[32]

The English precedents and traditions concerning expulsion were incorporated into the proceedings of the colonial legislatures, where legislators were expelled for an equally wide array of reasons.[33] But the Wilkes case had a "significant impact in the American colonies," and after the Revolution, "few expulsions occurred in the new state legislatures."[34] Indeed, the abuse of the expulsion power by the House of Commons in the Wilkes case likely led to the two predominant constitutional restrictions on each house's authority to judge its membership and discipline its members: constitutionally fixed qualifications for service in the House and Senate and a two-thirds supermajority requirement to expel a Member.[35]

There was, however, no significant debate on the Expulsion Clause at the Constitutional Convention.[36] Some insight, however, can be gleaned from the drafting history. Early draft versions of the Expulsion Clause, first arising from the Convention's Committee of Detail,[37] distinguished between the power to expel and the power to punish members for "disorderly Behaviour."[38] Based on earlier draft versions, it appears that the "disorderly Behaviour" language was entirely separate from, and therefore inapplicable to, the power to expel.[39] It was not until late in the Convention's consideration of the provision that the body approved the two-thirds requirement for expulsion. James Madison recommended the addition, noting that "the right of expulsion was too important to be exercised by a bare majority . . . ."[40] No mention was made at the Convention in regards to the type of misconduct that would warrant expulsion.[41] Accordingly, it appears that the Founders viewed the chief barrier to the expulsion power's abuse as the procedural requirement of the approval of a supermajority of a house of Congress, as opposed to any substantive requirement that defines what sort of conduct warrants expulsion.[42]

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[30] *Id*.

[31] *Id*. at 528.

[32] *Id*. (quoting 22 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1411 (William Cobbett ed., T.C. Hansard 1814)).

[33] BOWMAN & BOWMAN, *supra* note 22, at 1083–85.

[34] *See Powell*, 395 U.S. at 530 (characterizing Wilkes' struggles as a "*cause celebre*" for the colonists); BOWMAN & BOWMAN, *supra* note 22, at 1086.

[35] U.S. CONST. art. I, § 5, cl. 1; *id*. § 5, cl. 2; Cassady, *supra* note 23, at 242–43.

[36] JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 207 (2007).

[37] The Committee of Detail was appointed to draft the Constitution based on previously adopted resolutions.

[38] *See* BOWMAN & BOWMAN, *supra* note 22, at 1087–90.

[39] A draft presented to that committee distinguished between the power to punish and the power to expel: "Each House shall have authority . . . to punish its own Members for disorderly Behavior. Each House may expel a Member, but not a second time for the same Offence." 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 156 (1911).

[40] *Id*. at 254 (remarks of James Madison). Madison's view won out over that of Gouverneur Morris, who was concerned that by imposing a supermajority requirement "a few men from factious motives may keep in a member who ought to be expelled." *Id*.

[41] *See* BOWMAN & BOWMAN, *supra* note 22, at 1072.

[42] *See* 1 STORY *supra* note 23, § 835 (noting that the expulsion power "might be exerted for mere purposes of faction or party, to remove a patriot, or to aid a corrupt measure; and it has therefore been wisely guarded by the restriction, that (continued...)

Judicial Interpretations of the Expulsion Clause

The U.S. Supreme Court and lower federal courts have not decided a case directly bearing on the expulsion of a Member of Congress, although judicial discussions of the expulsion power have developed in dicta.[43] The Supreme Court has stated, for example, that Congress's expulsion power "extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."[44] The Court highlighted that a Member's conduct could be subject to legislative discipline even if "[i]t was not a statutable offence nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government."[45] The Court has also emphasized that the House and Senate may exercise the expulsion power exclusively, such that any prosecution by the executive of related offenses by the Member do not interfere with Congress's power to expel.[46] These relatively few statements suggest a broad view of the expulsion power.

A likely explanation for the lack of judicial precedent directly addressing questions arising under the Expulsion Clause may be found in the political question doctrine, a principle stemming from the Constitution's separation of powers.[47] Courts have declined to decide cases involving "political questions," which are controversies where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[48] In this vein, courts have been cognizant that the expulsion power, as a form of legislative discipline, exists separately from civil or criminal liability and empowers the respective houses of Congress to maintain the integrity and dignity of the legislature itself and its proceedings.[49]

The Supreme Court has reflected this reasoning in some of the cases that have touched on the Expulsion Clause. For example, in 1897, the Court discussed the Expulsion Power in a case of a petitioner convicted of criminal contempt for refusing to answer questions during a congressional investigation of potential misconduct of Members of Congress.[50] The Court acknowledged the broad power to discipline Members held by the houses of Congress and the discretion with which they could exercise that power, ultimately declining to "encroach upon the province of that

there shall be a concurrence of two thirds of the members, to justify an expulsion"). The Expulsion Clause does not, for example, contain explicit substantive limiting language similar to that found in the Constitution's impeachment and removal provisions, which restrict the exercise of that authority to only that conduct which amounts to "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. CONST. art. II, § 4.

[43] *See In re Chapman*, 166 U.S. 661, 669–71 (1897) (discussing expulsion authority of Congress in the context of a petitioner convicted of criminal contempt for refusing to answer questions during a congressional investigation); *Powell v. McCormack*, 395 U.S. 486, 506–11 (1969) (discussing the distinction between the exclusion of Members-elect based on qualifications for office and the expulsion of seated Members based on misconduct).

[44] *In re Chapman*, 166 U.S. at 669–70 (citing 1 STORY *supra* note 23 § 838). One scholar has examined the relationship between the removal authority conferred by the Constitution for purposes of impeachment to the removal authority conferred by the Expulsion Clause, discussing arguments for and against holding the separate branches of government accountable to similar standards of conduct. *See* McLaughlin, *supra* note 19 at 50.

[45] *In re Chapman*, 166 U.S. at 670.

[46] *Burton v. United States*, 202 U.S. 344, 368–70 (1906).

[47] *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

[48] *Id.* at 217.

[49] *See In re Chapman*, 166 U.S. at 668 (noting that the power of houses of Congress to discipline their Members through expulsion or other means constitutes an exercise of their "inherent power of self-protection" that may be used to prevent Members' behavior from "destroy[ing] public confidence in the body").

[50] *Id.* at 664.

body."[51] In another example, the Court recognized that the standards by which expulsion may occur are at the "almost unbridled discretion" of Congress in a criminal case against a Senator involving congressional privileges.[52] The Court further noted that Members who are subject to legislative discipline are "judged by no specifically articulated standards" that are applied by a body "from whose decision there is no established right of review."[53] The Court also discussed justiciability in *Powell v. McCormack*, after determining that the House's attempt to bar a Member's service constituted an exclusion rather than expulsion.[54] The Court generally recognized that the *exclusion* at issue in the case was justiciable because "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."[55] In a concurring opinion, however, Justice William O. Douglas noted that, "if this were an expulsion case I would think that no justiciable controversy would be presented."[56]

There have been no cases in which Members of Congress who were expelled challenged the expulsion decision itself in court. Some Members who have faced disciplinary proceedings under the Expulsion Clause have attempted to challenge the disciplinary measures through judicial review, but the lower courts have consistently declined to consider the claims, citing separation of powers concerns.[57] For example, in *United States v. Traficant*, a Member of the House of Representatives was both convicted by a jury of criminal charges related to his service in Congress and subsequently found by the House Ethics Committee to have violated the House's internal rules of conduct, resulting in his eventual expulsion.[58] The U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) rejected the Member's claim that he could not be punished through both a criminal trial and legislative discipline because of the Fifth Amendment's Double Jeopardy prohibition. According to the Member's argument, "he was twice placed in jeopardy: first, when the House of Representatives initiated hearings that included the possibility of his imprisonment [. . .] and second, after Congress had already expelled him, when the district court ordered his imprisonment."[59] The Sixth Circuit concluded that both branches have distinct authority to punish behavior of Members that can be exercised independent of the other.[60]

Likewise, in *Rangel v. Boehner*, a Member of the House of Representatives who the House had censured (a disciplinary action also authorized under the Expulsion Clause) for various ethical violations sought judicial review of the House's action, alleging procedural improprieties violated House Rules and his due process rights.[61] The court rejected the justiciability of the Member's

[51] *Id.* at 670.

[52] *United States v. Brewster*, 408 U.S. 501, 519 (1972).

[53] *Id.*

[54] *Powell*, 395 U.S. at 516.

[55] *Id.* at 522.

[56] *Id.* at 553 (Douglas, J., concurring) (noting the difference in justiciability of a case of exclusion of a Member-elect compared to a case of expulsion of a Member for misconduct).

[57] *See United States v. Traficant*, 368 F.3d 646, 652 (6th Cir. 2004); *Rangel v. Boehner*, 20 F. Supp. 3d 148, 167–68 (D.D.C. 2013), *aff'd on other grounds*, 785 F.3d 19 (2015) (noting that the district court dismissed the complaint on numerous jurisdictional grounds and recognizing that it needed only to affirm one of those grounds, relying upon the Speech and Debate Clause as "the simplest ground" upon which to affirm).

[58] *Traficant*, 368 F.3d at 648-49.

[59] *Id.* at 649 (citation omitted).

[60] *Id.* at 650–52 (noting Supreme Court precedent recognizing that the Expulsion Clause grants Congress exclusive authority to discipline its members) (citing *Burton v. United States*, 202 U.S. 344, 369 (1906)).

[61] *Rangel*, 785 F.3d at 21–22.

lawsuit.[62] The U.S. District Court for the District of Columbia held that the House's decision to discipline the Member for his conduct was a political question[63] and concluded that such review of Congress's exercise of the discretion afforded it under the Expulsion Clause was "a classic example of a demonstrable textual commitment to another branch of government" that is synonymous with the political question doctrine.[64]

Possible External Constitutional Limitations

Despite the Court's general view that the Expulsion Clause vests each house of Congress with a broad and discretionary power to expel its own Members that federal courts generally will not question, it could be argued that the Constitution imposes other constraints on the use of the expulsion power that could raise justiciable matters.[65]

For example, it could be asserted that judicial review is proper with respect to exercises of the expulsion power that conflict with other provisions of the Constitution. The most prominent argument that has been made is that the expulsion power could conflict with the right of a Member's constituency to choose their own representative. Under Article I, the House "shall be composed of Members *chosen . . . by the People*"[66] and, under the Seventeenth Amendment, the Senate "shall be composed of two Senators from each State, *elected by the people thereof* . . . ."[67] This argument has principally arisen when the House or Senate has considered expelling a Member for misconduct that occurred prior to an election and was known to the Member's constituency when they elected him to office.[68] To exercise the power of expulsion in such a scenario, the body might, in the words of a House Report, "abuse its high prerogative, and [] 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."[69] No court, however, has held that there are external constraints to the expulsion power, and such a view may be in tension with the text and intent of the Clause, which has generally been viewed as vesting broad power in both the House and the Senate.[70]

Questions may also be raised as to whether the exercise of the expulsion power may be limited by other external constitutional restraints, like the Constitution's individual rights provisions. For example, the equal protection component of the Fifth Amendment's Due Process Clause could be viewed to prevent both the House and the Senate from making discriminatory expulsion

[62] *Id.*; *Rangel v. Boehner*, 20 F. Supp. 3d 148, 157 (D.D.C. 2013).

[63] *Rangel*, 20 F. Supp. at 168 (citing *United States v. Ballin*, 144 U.S. 1, 5 (1892)). *See also id.* ("[J]udicial intervention in this context is only 'appropriate where the rights of persons other than members of Congress are jeopardized by Congressional failure to follow its own procedures.'").

[64] *Id.* at 168–69.

[65] The political question doctrine has, at times, given way in light of claims that violations of fundamental rights would otherwise go unresolved without judicial involvement. *See Baker*, 369 U.S. at 229; *Sharon v. Time, Inc.*, 599 F. Supp. 538, 552 (S.D.N.Y. 1984) ("Judicial abstention on political question grounds has similarly been found inappropriate when individual rights in domestic affairs are at stake . . . .").

[66] U.S. CONST. art. I, § 2 (emphasis added).

[67] *Id.* amend. XVII (emphasis added).

[68] *See* H.R. REP. No. 96-351, at 3 (1981) (noting that Member Diggs' counsel argued that the "power to expel . . . conflicted with the right of his constituency").

[69] H.R. REP. NO. 63-570, at 5 (1914).

[70] *See In re Chapman*, 166 U.S. at 669; BOWMAN & BOWMAN, *supra* note 22, at 1089–90; 1 STORY *supra* note 23 § 836.

decisions, such as on the basis of the Member's race.[71] No court has previously considered this precise question, but the Supreme Court has held that other discretionary internal congressional powers are limited by the Constitution's individual rights provisions.[72]

Other arguments could be made for judicial review of certain expulsions—for example a scenario in which a house seats an elected Member and then immediately expels that individual—if the expulsion functioned like an *exclusion* of a Member through the imposition of additional qualifications in violation of the Supreme Court's holding in *Powell*.[73] For example, if the House or Senate immediately expelled a new Member because he had a previous criminal conviction, that action could be seen as adding a non-constitutional qualification for election to Congress, i.e., that a Member not have previously been convicted of a crime. Nonetheless, while it is true that *Powell* prohibits the House or Senate from imposing upon Members additional qualifications beyond those standing qualifications prescribed in the Constitution with respect to exclusion, the opinion also drew a rather formalist distinction between exclusions and expulsions that may cast doubt on this argument.[74] Specifically, the Court rejected the respondent's "attempt to equate exclusion with expulsion," reasoning that "exclusion and expulsion are not fungible proceedings."[75] The *Powell* Court largely deferred to the House in determining what constitutional provision it was proceeding under, holding: The Speaker ruled that House Resolution No. 278 contemplated an exclusion proceeding. We must reject respondents' suggestion that we overrule the Speaker and hold that, although the House manifested an intent to exclude Powell, its action should be tested by whatever standards may govern an expulsion.[76]

If the Court were unwilling to hold that an exclusion was in effect an expulsion, it would seem reasonable to assert that it would be equally unwilling to accept that an expulsion was in effect an exclusion.

Historical Practice Related to Grounds for Expulsion

In light of the scant evidence of the Expulsion Clause's historical basis and the limited judicial precedent in interpreting the Clause, Congress's own treatment of its expulsion power may play an important role in delineating the contours of the Clause. House and Senate practice has interpretive import for two reasons. First, the Supreme Court has suggested that "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[77] Thus, it would seem that as a general matter, Congress's view of the scope of its own expulsion power is an important starting point for the proper interpretation of the

[71] U.S. CONST. amend. V.

[72] In *United States v. Ballin*, the Court held that, while the House's rulemaking power was broad, in exercising that power, the House "may not by its rules ignore constitutional restraints or violate fundamental rights." 144 U.S. 1, 5 (1892). *See also Bond v. Floyd*, 385 U.S. 116, 135 (1966) (holding that an *exclusion* by a state legislature for comments criticizing the Vietnam War violated the First Amendment). The same limit may be applicable to the expulsion power if judicial review is not barred in a given case by the political question doctrine or the Speech or Debate Clause. *See generally* McLaughlin, *supra* note 19, at 50–51.

[73] *Powell v. McCormack*, 395 U.S. 486, 506–12 (1969). In *Powell*, the Court held that judicial review of the Powell exclusion was not barred by the political question doctrine because the Constitution permits the House and Senate to judge only those standing qualifications prescribed in Article I of the Constitution. *Id*. at 550.

[74] *Id*.

[75] *Id*. at 508, 512.

[76] *Id*. at 512.

[77] *United States v. Nixon*, 418 U.S. 683, 703 (1974).

Expulsion Clause.[78] Second, the Supreme Court has often treated historical practice as an "important interpretive factor" in construing constitutional provisions.[79]

However, it should be noted that the extent that practice provides an interpretive gloss on constitutional text often varies depending on whether the practice is "long settled and established."[80] As will be discussed in more detail below, little about the margins of the House and Senate's expulsion power is settled, especially, for example, with regard to the question of whether each house may expel a Member for conduct occurring prior to an intervening election.[81]

While House and Senate practice may not necessarily constitute legal precedent, it nevertheless may establish procedural and parliamentary norms, and—to the extent that a court has the opportunity to evaluate the Clause—may have some influence on how a court construes the reach of the expulsion power.[82] Moreover, even if not legally binding, historical practice may guide both the House and Senate in making their own decisions about how to wield their own authority.[83]

Instances of Expulsion of Members of Congress for Misconduct That Occurred While in Office

Although the expulsion power has been described as broad by the Supreme Court, expulsion cases have been rare.[84] In total, 20 Members of Congress have been actually expelled from their respective bodies—5 in the House[85] and 15 in the Senate.[86] While the grounds for these expulsions may illustrate the potential bases upon which the House or Senate may decide to expel a Member, as historical practice, they are not necessarily the exclusive grounds for expulsion. The grounds upon which the power may be exercised are left to the discretion of the respective bodies of Congress, though legal commentary indicates that the bodies should act judiciously in

[78] *See Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1, 11 (D.D.C. 2013) (interpreting *Nixon* as holding that "each branch of government is empowered to interpret the Constitution in the first instance when defining and performing its own constitutional duties, and that one branch's interpretation of its own powers is due deference from the others.").

[79] *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014). *See also House. Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1259 (2022) (relying on historical legislative practice in rejecting a First Amendment challenge to a censure issued by a local board).

[80] *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

[81] *See* 1 STORY *supra* note 23 § 838 (noting that questions regarding what conduct may be punished and what punishment may be applied "do not appear to have been settled by any authoritative adjudication of either house of [C]ongress"); *see also* Timothy Zick, *The Consent of the Governed: Recall of United States Senators*, 103 DICK. L. REV. 567, 596 (1999) ("There continues to be much confusion concerning the proper boundaries of the power to expel."). Moreover, Congress has, at times, disclaimed that its expulsion decisions have been based on constitutional interpretation. *See infra* note 110.

[82] *Michel v. Anderson*, 817 F. Supp. 126, 147 (D.D.C. 1993) (noting that "although the precedents are not uniform, the history of the House of Representatives supports the conclusion that the House may act unilaterally to fix the role Delegates are to play in the operation of this chamber.").

[83] *See* 1 Deschler's Precedents, vi (noting that "the House has repeatedly recognized the importance of following its precedents").

[84] *See In re Chapman*, 166 U.S. 661, 670 (1897).

[85] U.S. HOUSE OF REPRESENTATIVES, HISTORICAL SUMMARY OF CONDUCT CASES IN THE HOUSE OF REPRESENTATIVES 1798–2004 (2004), https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf.

[86] SENATE HISTORICAL OFFICE, EXPULSION AND CENSURE https://www.cop.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last accessed Dec. 26, 2017).

exercising that power.[87] Expulsion, according to that understanding, is "'in its very nature discretionary, that is, it is impossible to specify beforehand all the causes for which a member ought to be expelled; and, therefore, in the exercise of this power, in each particular case, a legislative body should be governed by the strictest justice.'"[88] Expulsion has not been understood to apply automatically in cases of any particular conduct of Members.[89]

Thus, in light of historical practice, the predominant basis upon which both the House and Senate have exercised their power to expel Members is disloyalty to the United States. In fact, 18 of the 20 expulsions in congressional history were based on the Members' disloyalty to the United States.[90] The earliest expulsion case in 1797 involved a Senator who "concocted a scheme for Indians and frontiersmen to attack Spanish Florida and Louisiana, in order to transfer those territories to Great Britain" for his own financial gain.[91] The Senate special committee that was appointed to investigate the matter recommended expulsion, describing the Senator's conduct as "entirely inconsistent with his public trust," and the full Senate subsequently voted to expel the Member by a vote of 25–1.[92]

The majority of expulsion cases based on disloyalty to the United States—17 of the 18—arose in the context of the secession of the Confederate states during the earliest years of the Civil War.[93] In early 1861, the Senate considered the status of Members representing states that were contemplating secession, ultimately expelling 10 Members in a single vote after the war had begun.[94] In those cases, the Members represented southern states that had seceded from the Union, and the Members had not formally resigned from the Senate. The expulsion resolution cited the Members' failure to appear in the Senate and alleged that the Members "are engaged in said 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."[95] Other examples of Civil War expulsions involved Members who represented states that had not seceded, but who themselves had supported secessionists.[96]

For more than a century following the Civil War expulsions, neither the House nor the Senate expelled a Member. The two most recent expulsions—both Members of the House—concerned a broader range of behavior, beyond disloyalty to the country, for which Congress would expel one

[87] *See* 3 Deschler's Precedents, ch. 12, § 13.

[88] *Id.* (quoting CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA § 625 (2d ed. 1866)).

[89] Legislative discipline for Members who have been convicted of a crime requires the House or Senate to affirmatively act in response to that Member's behavior. *See* 3 Deschler's Precedents, ch. 12, § 13 (noting that Congress normally will wait "to consider expulsion until the judicial processes have been exhausted"). *See also Burton v. United States*, 202 U.S. 344, 369–70 (1906).

[90] U.S. HOUSE OF REPRESENTATIVES, HISTORICAL SUMMARY OF CONDUCT CASES IN THE HOUSE OF REPRESENTATIVES 1798–2004 (2004), https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf; SENATE HISTORICAL OFFICE, EXPULSION AND CENSURE https://www.cop.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last accessed Dec. 26, 2017).

[91] *United States Senate: Election, Expulsion, and Censure Cases* 1793–1990, S. DOC. NO. 103-33, at 13 (1995).

[92] *Id*. at 13–14.

[93] *See generally* SENATE HISTORICAL OFFICE, THE CIVIL WAR SENATE REACTS TO SECESSION, https://www.cop.senate.gov/artandhistory/history/common/expulsion_cases/CivilWar_Expulsion.htm (last accessed Dec. 26, 2017).

[94] S. DOC. NO. 103-33, at 95–98. Prior to the beginning of the Civil War in April 1861, the Senate considered expelling a number of Members representing southern states, but instead only declared those seats to be vacant. *See id*. at 89–90.

[95] *Id*.

[96] *See, e.g.*, *id*. at 102–107.

of its Members. Those expulsions resulted after the Representatives were convicted of criminal charges under various public corruption statutes.[97] In 1980, a Member was expelled following a criminal conviction on charges relating to receiving a payment in return for promising to use official influence on legislation in the so-called ABSCAM[98] investigation.[99] The most recent expulsion occurred in 2002, when the House expelled a Member who had been convicted of various criminal charges relating to his official actions in Congress, including bribery, illegal gratuities, obstruction of justice, defrauding the government, filing false tax returns, and racketeering.[100]

It should be noted that in a number of cases, Members' behavior has drawn public calls for expulsion or preliminary proceedings by the respective house toward potential expulsion, but ultimately resulted in the Member resigning prior to a formal decision to expel.[101] It is unclear how much weight should be given to such cases or what cases appropriately qualify as relevant to consider the expulsion power.[102] To the extent such cases are relevant, Members have resigned facing formal expulsion inquiries or even recommendations for expulsion for conduct during their time in office.[103] In the Senate, one such example occurred in 1995 when the Select Committee on Ethics recommended expelling a Member following its investigation of allegations of sexual misconduct, misuse of official staff, and attempts to interfere with the committee's inquiry.[104] In the House, for example, the Committee on Standards of Official Conduct recommended expelling a Member for conduct violations related to activities that also resulted in the Member's criminal conviction for accepting illegal gratuities, illegal trafficking, and obstruction of justice.[105]

Misconduct Occurring Prior to Election or Reelection as Potential Grounds for Expulsion

As discussed above, the text of the Expulsion Clause, its history, and subsequent historical practice all support a broad, but not unlimited, power in both the House and Senate to expel Members for conduct occurring during a Member's term of office. However, whether the House and Senate have authority to expel a Member for conduct that solely occurred prior to an intervening election appears to be unresolved. House and Senate practice (drawn primarily from committee reports relating to expulsion resolutions that were either not approved or not acted upon by the full body) concerning expulsions for prior misconduct are relatively inconsistent and

[97] H.R. 495, 107th Cong. (2002); H.R. 794, 96th Cong. (1980).

[98] *See* HISTORY: FAMOUS CASES & CRIMINALS, https://www.fbi.gov/history/famous-cases/abscam (last visited Dec. 13, 2017).

[99] *See* H.R. REP. NO. 96-1387, at 1–5 (1980); H.R. 794, 96th Cong. (1980).

[100] *See* H.R. REP. NO. 107-594, at 1–2 (2002); H.R. 495, 107th Cong. (2002); *see also United States v. Traficant*, 368 F.3d 646, 648 (6th Cir. 2004).

[101] The House Rules note an example in which the Speaker of the House advised a Member who was facing disciplinary proceedings that he should resign, but also note that "this is not usual." H.R. DOC. No. 114-192, at 28 (2017). The House did not identify which case it was relying upon in this example.

[102] *Cf.* Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 262 (2017) ("Although courts and government officials commonly employ the historical gloss approach . . . , the contours of the approach are not fully defined. There is no precise metric for knowing what constitutes qualifying practice or how long it must be followed in order to be credited."); Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1105 (2001) ("As a theoretical matter, custom has its own problems. Not least among these are the questions of what counts as the relevant custom, at what level of generality, and for how long.").

[103] *See, e.g.*, S. REP. NO. 104-137 (1995); H.R. REP. NO. 100-506 (1988); H.R. REP. NO. 97-110 (1981).

[104] S. REP. NO. 104-137, at 1–2 (1995).

[105] H.R. REP. NO. 100-506, at 1–2 (1988).

do not appear to establish a clear and constant interpretation of whether prior conduct (i.e., conduct occurring before an intervening election)[106] may form the basis for an expulsion.[107] While the reasoning underlying the House and Senate approach to expulsions for prior misconduct does not appear to be uniform, and thus may have limited value in discerning the meaning of the constitutional power,[108] there is some evidence to suggest that both the House and the Senate have, on occasion, "distrusted their power" to expel for such conduct.[109] While there has been some disagreement over the question, it would appear that when this "distrust" manifests itself through the adoption of a more restrictive interpretation of the expulsion power, it is generally grounded more in considerations of policy than of constitutional authority.[110]

On occasions in which House or Senate action appears to suggest that the body is reticent to expel a Member for conduct that occurred prior to election, the cited justification generally relates to a reluctance to supplant the judgment of the duly elected Member's constituency with that of a supermajority of the body. That justification is strongest when the Member's constituency is fully aware of the prior misconduct, but nevertheless chooses to elect the Member to represent them.[111]

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[106] Both bodies have, at times, distinguished between (1) conduct occurring during a Member's previous term of office and (2) conduct (either private or public) that occurred prior to the Member's first election to Congress. *See e.g.*, S. REP. NO. 77-1010, at 6 (1942); H.R. REP. No. 42-81, at 13 (1872). However, to the extent that the justification for not expelling a Member for conduct that occurred prior to his last election rests on a reluctance to overturn the decision of the voters, this report treats the two groups of prior conduct similarly.

[107] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct, *reprinted in* H.R. REP. NO. 97-110, at 156 (1981); 2 Hinds' Precedents § 1283–89 (discussing precedents dealing with the question of expulsion for conduct "committed before election.").

[108] *See supra* notes 77–83. *But see NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (noting that "this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute").

[109] *See* Rules of the House of Representatives, H.R. DOC. NO. 96-398, at 27 (1981). The House Manual no longer contains this statement. *See* Rules of the House of Representatives, H.R. DOC. No. 114-192, at 28–9 (2017). *See also* H.R. REP. No. 56-85, at 4 (1900) ("Both Houses have many times refused to expel where the guilt of the Member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the Member as such, or because it was committed prior to his election.") Yet, it appears that neither the House or the Senate has previously expelled a Member for conduct that solely occurred prior to the Member's election to Congress. It can, however, be difficult to identify the specific date that misconduct giving rise to an expulsion occurred. For example, there is some ambiguity with regard to the timing of the conduct giving rise to the expulsion of Senator William Blount. However, a subsequent Senate report determined the offending conduct to have occurred after his first election, and also noted that "we have not been able to find a single case of expulsion where the crime or gross impropriety occurred outside of the time of membership." S. REP. No. 77-1010, at 6 (1942). Similarly, the report recommending the expulsion of Senator Waldo Johnson, which was ultimately approved by the Senate, made reference to that fact that "[p]revious to his election to the Senate Mr. Johnson was known in Missouri, as entertaining secession proclivities," but it does not appear that that statement represented the sole grounds for the expulsion. S. REP. No. 37-5 (1862). In the case of Senator Robert Packwood, a Senate Committee recommended expulsion on grounds that included prior misconduct, but the Senator resigned before the full Senate took action on those recommendations. *See* S. REP. No. 104-137, at 9–11 (1995). Similarly, in the House, Raymond Lederer resigned after a committee recommended his expulsion for conduct that occurred prior to his last election. H.R. REP. No. 97-110, at 17 (1981).

[110] *See*, *e.g.*, H.R. REP. NO. 63-570, at 4–5 (1914) (noting the distinction between questions of "power" and questions of "policy" and concluding that, "[a]s a matter of sound policy, this extraordinary prerogative of the House, in our judgment, should be exercised only in extreme cases"); H.R. REP NO. 96-351, at 4–5 (1981) (noting that "power is not to be confused with policy or discretion"); S. REP. NO. 104-137, at 7–8 (1995) (noting that "[t]here have been indications that the Senate, in an expulsion case, might not exercise its disciplinary discretion with regard to conduct in which an individual had engaged before the time he or she had been a member.").

[111] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *reprinted in* H.R. REP. NO. 97-110, at 156–57 (1981) (noting that with regard to expulsion for prior conduct "the issue ultimately is one of Congressional policy, and not Constitutional power"). "Indeed, the House precedents against punishment for prior misconduct have sometimes been characterized as constituting a doctrine of 'forgiveness,' resting on the assumption (continued...)

In short, the body must balance its interest in "assur[ing] the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government,"[112] with a respect for the electoral decisions of the voting public and deference traditionally paid to the popular will and choice of the people.[113] This view is consistent with James Madison's statements in the Federalist Papers that "frequent elections" would be the chief means of ensuring "virtuous" legislators.[114] It also finds support in Justice Joseph Story's early view that although the expulsion power was both necessary and critical to the integrity of each house, exercise of the power was "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 the required approval of a two-thirds majority.[115]

Congress's attempt to balance the interests in preserving the integrity of the House and Senate with the desire to avoid supplanting the will of the people, however interpreted and applied, does not appear to be based on a clear constitutional prescription. This distinction was perhaps best articulated in a frequently cited 1914 House Judiciary Report:

> 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 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.[116]

However, to confirm the ambiguity and uncertainty associated with congressional views on this question, that same report then implicitly suggested that there may be some form of constitutional limit at play. The report noted that to exercise the power of expulsion in a case in which the misconduct was generally known at the time of the Member's election, 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."[117]

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that the electorate, knowing full well of the Member's misconduct, has consciously chosen to forgive those acts and return him to the House." *Id*. at 157.

[112] *Powell v. McCormack*, 395 F.2d 577, 607 (D.C. Cir. 1968) (McGowan, J., concurring).

[113] *See* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (J.B. Lippincott & Co. 1836) (statement of Alexander Hamilton) ("After all, sir, we must submit to this idea, that the true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.").

[114] THE FEDERALIST NO. 57 (James Madison).

[115] 1 STORY *supra* note 23 § 837.

[116] H.R. REP. No. 63-570, at 4–5 (1914) (emphasis added).

[117] *Id.* at 5 (emphasis added).

Expulsion for Prior Misconduct in the House

The question of whether the power to expel extends to misconduct that occurred prior to a Member's election (or reelection) has been explored more thoroughly in the House than in the Senate.[118] As early as 1884, Speaker John G. Carlisle responded to a proposed House investigation of alleged misconduct that occurred prior to a Member's election by stating that "this House has no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected as a member of the House. That has been so frequently decided in the House that it is no longer a matter of dispute."[119] It is not clear whether the Speaker was referencing the expulsion power specifically, or the House's power to discipline its members more generally.

Regardless, there, in fact, has been some divergence of views on whether a Member can be expelled for prior misconduct.[120] The existing interpretations were highlighted in 1872 by the opposing conclusions drawn by two House committees investigating Members Oakes Ames and James Brooks for their role in the Credit Mobilier scandal.[121] The alleged misconduct had occurred "four or five years" prior to being brought to the attention of the House and before the Members had been elected to Congress.[122]

A special committee found that the House had authority to expel a Member for conduct occurring in a prior Congress, and before an intervening election, and recommended that the House exercise that power with respect to Ames and Brooks.[123] The report concluded that the Constitution placed "no qualification [on] the [expulsion] power" and assigned no restriction as to when an offense that warranted expulsion had to occur.[124] The committee interpreted the expulsion power to have no apparent limit, reasoning that although inappropriate, "[i]f two-thirds of the House shall see fit to expel a man . . . without any reason at all . . . they have the power, and there is no remedy except by appeal to the people."[125] The committee also addressed whether the expulsion power authorized the House to override the will of a Member's constituency, who, with full knowledge of the questionable conduct, chose to elect him as their representative:

> The committee have no occasion in this report to discuss the question as to the power or duty of the House in a case where a constituency, with a full knowledge of the objectionable character of a man, have selected him to be to their representative. It is hardly a case to be supposed that any constituency, with a full knowledge that a man had been guilty of an offense involving moral turpitude, would elect him. The majority of the committee are not prepared to concede such a man could be forced upon the House, and would not consider

[118] In addition to the examples discussed below, *Hinds* lists a number of precedents relating to the House's power to expel a Member for prior conduct. 2 Hinds' Precedents §§ 1283–1289. For example, in 1799, the House declined to expel Matthew Lyon for an offense which had been committed while he was a Member of the House but before his last election. 2 Hinds' Precedents § 1284. In 1858, the House laid on the table a committee report concluding that it was "inexpedient" for the House to take action against O.B. Matteson for known misconduct prior to an election. 2 Hinds' Precedents § 1285. In 1876, the House declined to take action against Members William S. King and John G. Schumaker for violations of law committed in a preceding Congress. 2 Hinds' Precedents § 1283.

[119] H.R. REP. NO. 69-30, at 1–2 (1925).

[120] The House and Senate power to discipline their members generally includes the authority to censure, reprimand, fine, or expel. *See* CHAFETZ, *supra* note 36, at 210.

[121] *Compare* H.R. REP. NO. 42-77 (1872), *with* H.R. REP. NO. 42-81 (1872). The Credit Mobilier scandal involved the sale of shares of stock to Members at below market rates. *See* CHAFETZ, *supra* note 36, at 221.

[122] H.R. REP. No. 63-570, at 3 (1914).

[123] H.R. REP. No. 42-77, at XIX (1872).

[124] *Id*. at XIV.

[125] *Id*. at XVII.

> the expulsion of such a man any violation of the rights of the electors, for while the electors have rights that should be respected, the House as a body has rights also that should be protected and preserved.[126]

The House Judiciary Committee reached a different conclusion with respect to Ames and Oakes, however, adopting a much narrower view of the expulsion power.[127] According to the Committee, so long as a Member "does nothing which is disorderly or renders him unfit to be in the House while a member thereof . . . the House has no right or legal constitutional jurisdiction or power to expel the member."[128] In support of this conclusion, the Committee also addressed the right of the Member's constituency, noting:

> This is a Government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them . . . .[129]

Ultimately, the House chose to censure, rather than expel, Ames and Brooks.[130] However, in adopting the censure resolution, the House specifically *refused* to agree to a preamble that asserted that "grave doubts exist as to the rightful exercise by this House of its power to expel a Member for offenses committed by such Member long before his election thereto and not connected with such election."[131]

Other House examples, however, suggest that the House has viewed itself, at times, as lacking the power to expel a Member for misconduct occurring prior to the individual's last election.[132] The House Rules Manual, for example, reflects different interpretations. The Manual previously provided that "both Houses have distrusted their power to punish in such cases," though it no longer makes such a statement.[133] Similarly, a House select committee investigating the possible expulsion of John W. Langley stated in 1925 that "with practical uniformity the precedents in such cases are to the effect that the House will not expel a Member for reprehensible action prior to his election as a Member . . . ."[134] A 1972 House report similarly noted that "[p]recedents, without known exception, hold that the House will not act in any way against a Member for any actions of which his electorate had full knowledge at the time of his election. The committee feels that these precedents are proper and should in no way be altered."[135]

The Supreme Court relied upon these and other House precedents in *Powell*.[136] Although urged by the House to view Powell's exclusion as an expulsion, the Court would not assume that the House would have voted to exclude Powell given that Members had "expressed a belief that such

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[126] *Id.* at XVI–XVII.

[127] H.R. REP. No. 42-81, at 7–13 (1873).

[128] *Id.* at 13.

[129] *Id.* at 8.

[130] H.R. REP. No. 63-570, at 4–5 (1914).

[131] *Id.* at 4 ("The House ignored the recommendations of the Judiciary Committee and punished two of its Members by censure and declined to express doubt as to its power and jurisdiction by refusing to adopt the preamble.").

[132] *See, e.g.*, H.R. REP. No. 56-85, at 4 (1900) ("Both houses have many times refused to expel where . . . [the misconduct] was committed prior to his election."); H.R. REP. No. 94-1477, at 2 (1976) (recommending that a Member not be expelled because a prior conviction did "not relate to his official conduct while a Member of Congress.").

[133] *Compare* Rules of the House of Representatives, H.R. DOC. No. 96-398, at 27 (1981), *with* Rules of the House of Representatives, H.R. DOC. No. 114-192, at 28–29 (2017).

[134] H.R. REP. No. 69-30, at 1–2 (1925).

[135] H.R. REP. No. 92-1039, at 4 (1972).

[136] *Powell*, 395 U.S. at 508–10.

strictures [on expelling a Member for prior conduct] apply to its own power."[137] The Court specifically stated, however, it was not ruling on the House's authority to expel for past misconduct.[138]

Two additional, more recent examples may provide additional insight into the ambiguity of the House's various positions on the reach of the expulsion power. In 1979, a House committee recommended the censure of Charles C. Diggs, Jr., when he was reelected to the House after being convicted of a criminal kickback scheme involving his congressional employees.[139] In discussing the question of the House's authority to punish a Member for known conduct that occurred prior to an election, the Committee noted that "the House has jurisdiction under Article I, Section 5 to inquire into the misconduct of a Member occurring prior to his last election, and under appropriate circumstances, to impose *at least* those disciplinary sanctions that *fall short of expulsion*."[140] Although perhaps questioning whether expulsion can reach prior misconduct, the committee did not conclude that it lacked the power to expel in such a case, instead deeming it "unwise" to "express an opinion on the Constitutional issue of whether the House has the power to expel" for prior misconduct.[141] The report added that "the House cannot overlook entirely the reelection of Rep. Diggs following his conviction and due respect for that decision by his constituents is a proper element in the consideration of this case."[142]

In 1981, a House committee recommended the expulsion of Raymond F. Lederer for misconduct occurring while he was a Member, but prior to his reelection to Congress.[143] A grand jury indicted Lederer in connection with the ABSCAM inquiry before his reelection, but he was not convicted until after the voters of his district had returned him to Congress.[144] As a result of this timing, the Special Counsel to the House Committee on Standards of Official Conduct concluded that "the voters did not have full knowledge of the offenses he committed at the time they reelected him, and there appears to be no constitutional impediment to the Congressional expulsion power under such circumstances."[145]

Expulsion for Prior Misconduct in the Senate

Senate consideration of expulsion for prior misconduct appears to be less developed than in the House.[146] Such limited practice suggests that the Senate does not appear to have a clearly

[137] *Id*. at 510.

[138] *Id.* at 507, n.27.

[139] H.R. REP. No. 96-351, at 3–5 (1979).

[140] *Id*. at 3.

[141] *Id*. at 5.

[142] *Id*.

[143] H.R. REP. No. 97-110, at 16 (1981).

[144] *Id*. at 157.

[145] *Id*. at 145. Lederer resigned before the House took action on the expulsion recommendation.

[146] This lack of precedent may be due to the fact that Senators face elections less frequently (thereby reducing the possibility of misconduct occurring prior to an intervening election) and, prior to adoption of the Seventeenth Amendment, were not directly elected by the people. U.S. CONST. amend. XVII. *But see* 41 CONG. REC. 936 (Jan. 11, 1907) (statement of Sen. Hopkins) (asserting that the William N. Roach case "settled forever the question that the Senate will not undertake to revise the judgment of a State in determining the character of a man whom the State shall select as a United States Senator. The Senate will content itself with what occurs while such Senator is a member of this body.").

established view on whether a Member may be expelled for conduct that occurred prior to the Member's election to the Senate.[147]

In 1807, John Quincy Adams provided an early, broad conception of the Senate's expulsion power, writing in a committee report that "[b]y the letter of the Constitution the power of expelling a Member is given to each of the two Houses of congress, without any limitation other than that which requires a concurrence of two-thirds."[148] The two-thirds requirement was, in the opinion of the committee, "a wise and sufficient guard against the possible abuse of this legislative discretion."[149] At the same time, the report suggested that whether the public was aware of the misconduct was significant in asserting that expulsion was the appropriate remedy when misconduct was "suddenly and unexpectedly revealed to the world."[150]

Other Senate precedents suggest that the timing of the misconduct should be viewed as one of many factors in determining whether expulsion is appropriate. For example, as Senator-elect Arthur R. Gould prepared to take the oath of office after being elected in 1926, allegations were made that he engaged in bribery in connection with a Canadian railroad contract that occurred in 1911—a full 15 years earlier.[151] A Senate committee investigated and recommended that the Senate disregard all charges.[152] In the committee report, a question was raised as to whether, under the circumstances, the Senate had the authority to expel.[153] Although no opinion was expressed by the committee on the "important constitutional questions touching the power of the Senate," the report nevertheless stated that "the expulsion of a Member of the Senate for an offense alleged to have been committed prior to his election must depend upon the peculiar facts and circumstances of the particular case."[154] The full Senate later adopted the committee's recommendation to disregard all charges.

Perhaps the most restrictive view taken by a Senate committee of the Senate's expulsion power occurred not in an expulsion case, but in the exclusion case of Senator William Langer.[155] Shortly after his election to the Senate in 1941, the Senate received allegations of the Senator's participation in a wide variety of misconduct, including a bribery and kickback scheme during his time as a state official.[156] A Senate committee investigated the matter and in its report recommended that Langer be excluded on the grounds that he lacked the required "moral fitness" to be a Senator.[157] The report also discussed the absence of any authority to expel Langer from the

[147] One commentator has described the Senate's power in this area as existing in a "twilight zone of the Senate's jurisdiction." GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 1892 (2d ed. 1960). For a Senate floor debate on the topic, see CONG. GLOBE, 37th Cong., 2d Sess. 968 (1862). In addition to the examples discussed below, *Hinds* lists two precedents relating to the Senate's power to expel a Member for prior conduct. 2 Hinds' Precedents §§ 1288–89. In 1796, the Senate declined to pursue action against Humphrey Marshall for alleged criminal conduct that occurred prior to his election. 2 Hinds' Precedents § 1288. In 1893, the Senate "discussed" its power to take action against William N. Roach who was "charged with a crime alleged to have been committed before his election," but ultimately concluded to take no action. 2 Hinds' Precedents § 1289.

[148] *See* 2 Hinds' Precedents § 1264.

[149] *Id*.

[150] *Id*.

[151] UNITED STATES SENATE: ELECTION, EXPULSION, AND CENSURE CASES 1793–1990, S. DOC. NO. 103-33, at 334–35 (1995).

[152] S. REP. No. 69-1715, at 12 (1927).

[153] *Id*.

[154] *Id*.

[155] S. REP. No. 77-1010, at 9–13 (1942).

[156] UNITED STATES SENATE: ELECTION, EXPULSION, AND CENSURE CASES 1793–1990, S. DOC. NO. 103-33, at 368–70 (1995).

[157] *Id*. at 369.

Senate. "This committee finds," the report concluded, "that expulsion cannot occur unless the offender is a member, at the time when the injury to the Senate insides."[158] The Committee did qualify that blanket conclusion, however, by reserving the Senate's right to expel a Member for *unknown* prior misconduct, ultimately concluding that the Constitution "does not contemplate expulsion for any crime or violation of rules, or Infraction of law, except such as occurred either during membership or was first disclosed during membership to the impairment of the honor of the Senate."[159]

The recommended expulsion of Senator Robert Packwood in 1995 supports the conclusion that the Senate retains the authority to expel a Member for conduct prior to election, at least when the conduct was not previously known and occurred during the Member's previous term in office. In that instance, the Senate Ethics Committee voted unanimously to recommend that the Senate expel Senator Packwood for various allegations, including acts of sexual misconduct stretching back to 1969.[160] Much of the Senator's conduct, however, was not uncovered until after his 1992 reelection.[161]

The Committee report began by articulating a broad expulsion power, acknowledging that the Supreme Court had "implied an unqualified authority of each House of Congress to discipline a Member for misconduct, regardless of the specific timing of the offense."[162] The report also made a distinction between the power of censure and the power to expel, similar to that which was made by the House in the Diggs case, noting that "[h]istorically, neither House of congress has abdicated its ability to punish a Member in the form of censure" for prior misconduct.[163] With regard to expulsion, the report noted only that "[t]here have been indications that the Senate, in an expulsion case, might not exercise its disciplinary discretion with regard to conduct in which an individual had engaged before the time he or she had been a member."[164] For this proposition, the Senate report cited to a single past expulsion case in which the Senate did not act on a specific charge "since it was to have been taken previously to the election" of the Senator.[165]

These House and Senate examples would appear to support the conclusion that both bodies have been "less than consistent" in their views on the expulsion power's application to conduct occurring prior to a Member's last election.[166] However, in either house, the key factors for consideration include whether the Member's constituency had knowledge of the misconduct and whether the misconduct, though taking place before an intervening election, nonetheless occurred during one of the Member's previous terms in office.[167] On the other hand, as previously noted,

[158] S. REP. No. 77-1010, at 6 (1942).

[159] *Id*. at 13, n.4. (emphasis added). Senate votes to both exclude and expel Langer each failed. S. DOC. No. 103-33, at 370 (1995).

[160] S. REP. No. 104-137, at 7–8 (1995).

[161] *Id*. at 1–2.

[162] *Id*. at 39–40.

[163] *Id*. at 40.

[164] *Id*.

[165] *Id*. at n. 65. The Senate Ethics Committee has previously dismissed complaints against Senators at last partly on the ground that the alleged misconduct occurred prior to a "Senate candidacy." *See* Letter from the Senate Committee on Ethics to David Vitter, U.S. Senator (May 8, 2008), https://www.ethics.senate.gov/public/_cache/files/c656cd9f-332f-4cbf-ad0b-82b72f634440/vitter-050808.pdf.

[166] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *reprinted in* H.R. REP. No. 97-110, at 156 (1981).

[167] *See, e.g.*, H.R. REP. No. 42-81, at 7–13 (1872); S. REP. No. 77-1010, at 6–13 (1942).

the exercise of restraint generally does not appear to be grounded in a constitutional restriction, but rather a policy choice based on respect for the democratic system.[168]

Conclusion

Article I Section 5 of the Constitution provides the House and Senate with broad authority to expel their own Members with the concurrence two-thirds of the body. In light of limited judicial interpretations of the Clause and limited and inconsistent House and Senate practice, it is difficult to define precisely the scope of the expulsion power, especially with regard to the nature and timing of conduct that may justify expulsion. Nonetheless, historical practice suggests that the chief and competing concerns that animate debates over the expulsion power are interests in preserving the integrity of a given house versus the interest in preserving the results of a democratic election.

[168] *See supra* note 116.

Appendix. Expulsions in the House and Senate

Table 1. Expulsions in the House of Representatives

Year	Name	Conduct Underlying Expulsion
1861	John B. Clark (MO)	Disloyalty to the Union
1861	John W. Reid (MO)	Disloyalty to the Union
1861	Henry C. Burnett (KY)	Disloyalty to the Union
1980	Michael J. Myers (PA)	Bribery, conspiracy and Travel Act violations
2002	James A. Traficant (OH)	Illegal gratuity, conspiracy, obstruction of justice, defrauding the government, racketeering, and tax evasion violations

Source: U.S. HOUSE OF REPRESENTATIVES, HISTORICAL SUMMARY OF CONDUCT CASES IN THE HOUSE OF REPRESENTATIVES 1798-2004 (2004), https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf.

Table 2. Expulsions in the Senate

Year	Name	Conduct Underlying Expulsion
1797	William Blount (TN)	Disloyalty to the United States
1861	James M. Mason (VA)	Disloyalty to Union
1861	Robert M.T. Hunter (VA)	Disloyalty to Union
1861	Thomas L. Clingman (NC)	Disloyalty to Union
1861	Thomas Bragg (NC)	Disloyalty to Union
1861	James Chesnut, Jr. (SC)	Disloyalty to Union
1861	Alfred O.P. Nicholson (TN)	Disloyalty to Union
1861	William K. Sebastian (AR)	Disloyalty to Union[a]
1861	Charles B. Mitchel (AR)	Disloyalty to Union
1861	John Hemphill (TX)	Disloyalty to Union
1861	Louis T. Wigfall (TX)	Disloyalty to Union
1861	John C. Breckinridge (KY)	Disloyalty to Union
1862	Trusten Polk (MO)	Disloyalty to Union
1862	Waldo P. Johnson (MO)	Disloyalty to Union
1862	Jesse D. Bright (IN)	Disloyalty to Union

Source: UNITED STATES SENATE: ELECTION, EXPULSION, AND CENSURE CASES 1793–1990, S. DOC. No. 103-33 (1995).

a. The Senate posthumously reversed the decision to expel William K. Sebastian in 1877, citing the fact that he "did not engage in confederate politics or military service" unlike the other Senators with whom he was expelled, who "participated actively in the Confederacy as senators, military officers, or diplomats." *Id.* at 98.

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