

Status of a Member of the House Who Has Been Indicted for or Convicted of a Felony

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Summary

There are no federal statutes or Rules of the House of Representatives that directly affect the status of a Member of Congress who has been indicted for a crime that constitutes a felony. No rights or privileges are forfeited under the Constitution, statutory law, or the Rules of the House merely upon an indictment for an offense, prior to an establishment of guilt under the judicial system. Under House Rules, therefore, an indicted Member may continue to participate in congressional proceedings and considerations. Under the Constitution, a person under indictment is not disqualified from being a Member of or a candidate for re-election to Congress. Internal party rules in the House, however, require an indicted chairman or ranking Member of a House committee, or a member of the House party leadership, to temporarily step aside from his or her leadership or chairmanship position. Additionally, a change in rules by the House requires the House Committee on Ethics to either initiate an inquiry by an investigative subcommittee of that Committee within 30 days of the time any Member of the House has been indicted or otherwise charged with criminal conduct in any state or federal court, or to report to the House the Committee's reasons for not moving forward.

As to a conviction of a crime, Members of Congress do not automatically forfeit their offices upon conviction of a crime that constitutes a felony. No express constitutional disability or "disqualification" from Congress exists for the conviction of a crime, other than under the Fourteenth Amendment for certain treasonous conduct by someone who has taken an oath of office to support the Constitution. Members of the House are, however, instructed by House Rules not to vote in committee or on the House floor once they have been convicted of a crime for which the punishment may be two or more years' imprisonment. Furthermore, under party rules, Members may lose their chairmanships of committees or ranking member status upon conviction of a felony. Conviction of certain crimes may subject—and has subjected in the past—Members of the House to internal legislative disciplinary proceedings, including resolutions of reprimand or censure, as well as expulsion from the House upon approval of two-thirds of the Members. Conviction of certain crimes relating to national security offenses would result in the Member's forfeiture of his or her entire federal pension annuity under the provisions of the so-called "Hiss Act" and, under more recent provisions of law, conviction of particular crimes by Members relating to public corruption will result in the loss of the Member's entire "creditable service" as a Member for purposes of calculating their federal retirement annuities if the conduct underlying the conviction related to one's official duties.

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This report summarizes the potential consequences, with respect to congressional status, that may result when a sitting Member of the House of Representatives is indicted for or is convicted of a felony.

Background

If a sitting Member of Congress is *indicted* for a criminal offense that constitutes a felony, the status and service of that Member is not directly affected by any federal statute or Rule of the House of Representatives. No rights or privileges are forfeited under the Constitution, statutory law, or the Rules of the House merely upon an indictment for an offense, prior to an establishment of guilt under our judicial system. Internal party rules in the House, however, now require an indicted chairman or ranking Member of a House committee, or a member of the House party leadership, to temporarily step aside from his or her leadership or chairmanship position, although the Member's service in Congress would otherwise continue.

Once a Member of the House is *convicted* of a crime that is a felony, certain potential consequences exist relevant to his or her status as a Member of the House. It should be noted that Members of Congress do not automatically forfeit their offices upon conviction of a crime that constitutes a felony. There is no express constitutional disability or "disqualification" from Congress for the conviction of a crime, other than under the Fourteenth Amendment for certain treasonous conduct. Members of the House are, however, instructed by House Rule not to vote in committee or on the House floor once they have been convicted of a crime for which the punishment may be two or more years' imprisonment. Furthermore, under party rules, Members may lose their chairmanships of committees or ranking member status upon conviction of a felony. Conviction of certain crimes may subject—and has subjected in the past—Members of the House to internal legislative disciplinary proceedings, including resolutions of reprimand or censure, as well as expulsion from the House upon approval of two-thirds of the Members. Expulsion of a Member from Congress does not result in the forfeiture or loss of the (former) Member's federal pension, but the Member's conviction of certain crimes may lead to such forfeiture of retirement annuities, or the loss of all of the "creditable service" as a Member that one would have earned towards a federal pension.

Service in Congress: Qualifications for Holding Office

Indictment and/or conviction of a crime that is a felony does not constitutionally disqualify one from being a Member of Congress (nor from being a candidate for a future Congress), unless a Member's conviction is for certain treasonous conduct committed after taking an oath of office to support the Constitution.¹ There are only three qualifications for congressional office, which are set out in the United States Constitution at Article I, Section 2, clause 2, for Representatives (and Article I, Section 3, clause 3 for Senators): age, citizenship, and inhabitancy in the state when elected. These constitutional qualifications are the *exclusive* qualifications for being a Member of Congress, and they may not be altered or added to by Congress or by any state unilaterally.² Once

¹ The Fourteenth Amendment to the Constitution, at Section 3, provides a disqualification for one who, having taken an oath of office to support the Constitution, "engages in insurrection or rebellion against," or aids or abets the enemies of, the United States. This disqualification does not appear to be self-executing with respect to a Member, and would appear to require some act on the part of the House to find and declare a seat vacant on the grounds of such disqualification.

² *Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). See *Powell*, at 537 n.69, discussing Madison's position at the Federal Convention of 1787 that qualifications of the elected "were fundamental articles in a Republican Govt. and ought to be fixed by the (continued...)"

a person meets those constitutional qualifications, that person, if elected, is constitutionally “qualified” to serve in Congress, even if under indictment or a convicted felon.³

Committee Chairmanships and Leadership Positions

Indictment

Although no specific or formal Rule of the House of Representatives exists concerning the status of a Member who has been indicted, the political parties in the House have both adopted internal conference and caucus rules that provide for the temporary loss of one’s position as the chairman or ranking member of a committee, and the temporary loss of one’s leadership position if the Member has been indicted for a felony having a possible sentence of two or more years imprisonment.

The Republican Conference Rules regarding an indicted member of the Republican leadership in the House were adopted on January 3, 2005, and provide, at Rule 26, that “a Member of the leadership shall step aside if indicted for a felony for which a sentence of two or more years imprisonment may be imposed.”⁴ The Republican Conference Rules have also provided since 1993 that the “Chairman of a standing, select, joint or ad hoc committee of the Congress, or any subcommittee thereof, who is indicted for a felony for which a sentence of two or more years imprisonment may be imposed, shall step aside....”⁵

The Rules of the Democratic Caucus have had a similar provision since May of 1980 with regard to committee positions whereby a Democratic Member who is indicted for a felony for which a sentence of two or more years imprisonment may be imposed would “cease to exercise the powers of chairman or ranking minority member and shall step aside....”⁶ In 2005, the Democratic Caucus adopted a provision requiring a member of the Democratic leadership of the House to step aside temporarily when they have been indicted for a felony for which a sentence of two or more years imprisonment may be imposed.⁷

Conviction

The rules of both the Democratic and Republican parties in the House provide that a Member who has been convicted of a felony for which a sentence of two years or more may be imposed (or who has been censured by the House) loses his or her committee chairmanship,⁸ and the

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Constitution.” For a detailed discussion of Member qualifications, see CRS Report R41946, *Qualifications of Members of Congress*, by Jack Maskell.

³ The question of “qualifications” does not, however, foreclose each House of Congress from judging a Member’s fitness for office under the authority of Article I, Section 5, clause 2, to punish a Member in a *disciplinary* proceeding (see discussion of “Congressional Discipline” in this report, below).

⁴ Rules of the House Republican Conference, 113th Congress, November 15, 2012, Rule 26.

⁵ Rules of the House Republican Conference, *supra* at Rule 25.

⁶ See now Rules of the Democratic Caucus, Rule 48 (113th Congress).

⁷ Rules of the Democratic Caucus, Rule 50.

⁸ Rules of the House Democratic Caucus, Rule 49 (113th Congress); Rules of the House Republican Conference, Rule 27 (113th Congress). Because these provisions are party rules, as opposed to Rules of the House, they may be changed by the political parties in the House themselves, without the necessity of the adoption of a formal House resolution, such as a House Rule change would require. *Note* Brown and Johnson, *HOUSE PRACTICE*, Chapter 50, at 826-827 (2003). House Rules are changed by way of adoption of a resolution and may sometimes be effectuated through (continued...)

House Democratic Caucus Rules provide for the removal from a leadership position of any such Member.⁹

Refraining from Voting in Congress After Conviction

Although the office of a Member of Congress is not automatically forfeited upon conviction of a felony, a sitting Member of the House of Representatives convicted of an offense that may result in two or more years imprisonment should, under House Rules XXIII (10), “refrain from participation in the business of each committee of which he is a member, and a Member should refrain from voting” on any question on the floor of the House until his or her presumption of innocence is restored, or until the individual is reelected to Congress. The rule is phrased in advisory, not mandatory, language because the House has raised issues concerning its authority to mandatorily suspend a Member from voting by a process less than an expulsion.¹⁰ Members of the House, however, are explicitly instructed to follow both “the spirit and the letter” of the House Rules,¹¹ and Members are expected to abide by the abstention rule. This instruction was emphasized in a 2002 letter from the House Ethics Committee, then called the Committee on Standards of Official Conduct, to a Member of the House who had been convicted of multiple felony offenses and was awaiting sentencing. The Committee stressed to that Member “in the strongest possible terms that if you violate the clear principles of this provision—that is, for example, by voting in the House—you risk subjecting yourself to action by this Committee, and by the House, in addition to any other disciplinary action that may be initiated in connection with your criminal conviction.”¹²

No comparable provision in House Rules exists regarding a Member who is merely under indictment for an offense.

Congressional Discipline

Indictment

Each House of Congress has the express authority, under Article I, Section 5, clause 2, of the United States Constitution, to punish a Member for “disorderly Behaviour” and, with the concurrence of two-thirds, to expel a Member. Although the breadth of authority and discretion within each House as to the timing, nature, and underlying conduct involved in an internal discipline of a Member is extensive, the traditional practice in Congress, in cases where a Member of Congress has been indicted, has been to wait to impose congressional discipline, such as expulsion or censure, against the Member until the question of guilt has been at least initially resolved through the judicial system.¹³ Members of Congress, it should be noted, like many other

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unanimous consent or by special order.

⁹ Rules of the House Democratic Caucus, Rule 51.

¹⁰ See discussion of suspension concerning “Congressional Discipline” below and DESCHLER’S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES [hereinafter DESCHLER’S PRECEDENTS], Chapter 12, §15, H. Doc. No. 94-661, 94th Cong., 2nd sess., 187 (1976).

¹¹ House Rule XXIII (2).

¹² House Committee on Standards of Official Conduct, “Dear Colleague” letter from the Chairman and Vice Chairman, April 15, 2002.

¹³ See, e.g., VIII CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §2205, concerning Representative Frederick Zihlman of Maryland, indicted December 10, 1929: “Prior to adjudication by the courts, the House took no (continued...)”

individuals, have been indicted and charged with various offenses and then been subsequently exonerated in judicial proceedings. The House has thus been reluctant to remove from Congress individuals who have been lawfully elected as representatives by their constituents, based merely upon charges in an indictment. However, no impediment in law or rule exists for ongoing congressional inquiries concurrent with criminal proceedings (although such actions may complicate some evidentiary issues in subsequent judicial proceedings, and certain internal, concurrent congressional inquiries have in the past been postponed or partially deferred “at the request” of the Department of Justice¹⁴). In a change mandated by the House, the House Ethics Committee is required generally to initiate an inquiry by an investigative subcommittee of that committee whenever a Member of the House has been indicted or otherwise charged with criminal conduct in any state or federal court.¹⁵ The committee is to either empanel the investigative subcommittee within 30 days of the indictment (or other filing of charges), or to report to the House the reasons for not empaneling such an investigative subcommittee, such as, as noted by the sponsor of the provision, if the committee members “do not feel that going forward is appropriate.”¹⁶ The committee rule states,

(2) Not later than 30 days after a Member of the House is indicted or otherwise formally charged with criminal conduct in any Federal, State or local court, the Committee shall either initiate an inquiry upon a majority vote of the members of the Committee or submit a report to the House describing its reasons for not initiating an inquiry and describing the actions, if any, that the Committee has taken in response to the allegations.¹⁷

An attempt to mandatorily *suspend* an indicted Member from voting or participating in congressional proceedings, however, raises several issues. In general, elected Representatives and Senators are not in the same situation as persons appointed to positions in the government with indefinite tenure, nor as private professionals, who might be suspended for a period of time merely upon suspicion or charges being levied, because Members of Congress are directly elected by, answerable to, and personally *represent* the people of their district or state in the Congress.¹⁸ The authority of either House to mandatorily suspend a Member from participation in congressional business has thus been questioned on grounds of both policy and power because such action would, in effect, disenfranchise that Member’s entire constituency, deprive the people of their full constitutional representation in Congress, and would not allow the constituents to replace a Member, such as they could in an expulsion action.¹⁹ In the past, some Members have

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note of criminal proceedings brought against a Member....” Prior to the 1970s the House generally waited until after the final appeal of a criminal conviction, *see* H. Rpt. 1477, 94th Cong., 2nd sess. at 2 (1976): “The Committee [on Standards of Official Conduct] believes that the House of Representatives, when considering an action against a Member who is currently involved in an active, nondilatory criminal proceeding against him ... ordinarily should follow a policy of taking no legislative action until the conviction is finally resolved.” However, in more recent cases, the House has demonstrated that it will take action after a Member’s conviction, but before appeal. *See* discussion in this report, below, of Members who have been convicted.

¹⁴ *See, e.g.*, “Historical Summary of Conduct Cases in the House of Representatives, 1798-2004” Committee on Standards of Official Conduct (November 2004), noting at least four such postponements or deferrals in 1982, 1987, 1988, and 1998.

¹⁵ H.Res. 451, 110th Cong., 1st sess., adopted June 5, 2007. *See* now House Committee on Ethics, Rule 18(e)(2) (2013).

¹⁶ 153 CONG. REC. 14606 (June 5, 2007). (Mr. Hoyer).

¹⁷ House Committee on Ethics, Rule 18(e)(2) (2013).

¹⁸ Some federal courts have referred to a continuing right of the people to representation in Congress. *See, e.g.*, *Jackson v. Ogilvie*, 426 F.2d 1333, 1336 (7th Cir. 1970), *cert. denied*, 400 U.S. 833 (1970).

¹⁹ Although early authorities indicated that the power to suspend a Member from proceedings was an inherent authority “analogous to the right of expulsion” (*see* Cushing, *LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES*, Section 627, p. (continued...))

voluntarily refrained from participating in congressional matters while under indictment,²⁰ but this does not appear to be a common practice in more recent times in the past century.

Conviction

Conviction of a crime may subject—and has subjected in the past—a Member of the House to internal disciplinary action, including a resolution for reprimand or censure of the Member, up to and including an expulsion from Congress upon a two-thirds vote of the Members of the House present and voting. The more recent practice in the House of Representatives has been, in cases of conviction of a Member of crimes that relate to official misconduct, not to wait until all appeals are exhausted, but to recognize the underlying factual findings of a judicial proceeding where guilt of a Member was established, regardless of the potential legal or procedural issues that may be raised and resolved on appeal.²¹ The Rules of the House Ethics Committee specifically provide, in fact, for automatic jurisdiction of the Committee to open an investigation when a Member has been convicted in a federal, state, or local court of a felony.²²

No specific guidelines exist regarding actionable grounds for congressional discipline under the constitutional authority of each House to punish its own Members. Each House of Congress has significant discretion to discipline misconduct that the membership finds to be worthy of censure, reprimand, or expulsion from Congress. When the most severe sanction of expulsion has been employed in the House, however, the conduct has historically involved either disloyalty to the United States or the violation of a criminal law involving the abuse of one's official position, such as bribery.

The House of Representatives has actually expelled only five Members (four Members and one Member-elect) in its history, three of whom were expelled during the Civil War period in 1861 for disloyalty to the Union.²³ The fourth Member of the House to be expelled was Representative Michael J. (Ozzie) Myers, of Pennsylvania, on October 2, 1980, after his bribery conviction for receiving a payment in return for promising to use official influence on immigration bills in the

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251[9th ed. 1874]), substantive arguments and questions have been raised concerning the power of the House or Senate in this regard. *See*, for example, discussion in II HINDS' PRECEDENTS, §1665 (1907) regarding action on Senators Tillman and McLaurin for fighting on the floor of the Senate. *See* also DESCHLER'S PRECEDENTS, Chapter 12, §15, H. Doc. No. 94-661, 94th Cong., 2nd sess., 187 (1976), noting that the "House [has] indicated its more recent view that a Member could not be deprived involuntarily of his right to vote in the House." Mandatory suspension, Members agreed, would "deprive the district, which the Member was elected to represent, of representation...." 121 CONG. REC. 10341, April 16, 1975. As discussed above, however, Members are expected to conform to and abide by the abstention provision after conviction. H. Rpt. 93-616, 93rd Cong., 1st sess., 4 (1973), and "Dear Colleague" letter from House Committee on Standards of Official Conduct, April 15, 2002.

²⁰ VIII CANNON'S PRECEDENTS, at §2205. Although the House took no formal action upon Mr. Zihlman and his status as a Committee Chair, it was noted that "... in compliance with an unwritten rule of the House, Mr. Zihlman refrained from active participation in the proceedings of the House, and the Committee was represented on the floor by the ranking member...."

²¹ *See* discussion in H. Rpt. 96-1387, 96th Cong., 2nd sess., 4-5, *In the Matter of Representative Michael J. Myers* (1980). Note beginning of Committee proceedings in the case of Representative Flood, even after his original trial for bribery ended with a hung jury. H. Rpt. 96-856, 96th Cong., 2nd sess., *In the Matter of Representative Daniel J. Flood* (1980). *See*, generally, out-of-print CRS Report 88-197A, *House Discipline of Members After Conviction But Before Final Appeal*, by Jack Maskell (available from the author).

²² House Committee on Ethics, Rule 14(a)(4), 18(e)(1).

²³ *See* House expulsions of Representative-elect John B. Clark of Missouri (1861), Representative John W. Reid of Missouri (1861), and Representative Henry C. Burnett of Kentucky (1861), for disloyalty to the Union. II HINDS' PRECEDENTS, at §§1261, 1262.

so-called ABSCAM “sting operation” run by the FBI.²⁴ The fifth Member of the House to be expelled was Representative James A. Traficant, Jr., of Ohio, expelled on July 24, 2002, after a 10-count federal conviction for activities concerning the receipt of favors, gifts, and money in return for performing official acts on behalf of the donors and the receipt of salary kickbacks from staff.²⁵

Although the numbers of actual expulsions from the House are low, some Members of the House who have been found to have engaged in serious misconduct were not actually expelled because they chose to resign their seats in Congress (or lost their next election) before any formal action was taken against them by the House. In addition to the actual expulsions in 1980 and 2002, for example, the committees reviewing Member conduct have recommended to the House the expulsion of other Members involved in offenses such as bribery, illegal gratuities, and obstruction of justice who then resigned before the matter was considered by the full House,²⁶ whereas other Members convicted of crimes resigned their seats even before the completion of committee reviews.

In addition to expulsion, the House as an institution may take other disciplinary actions against one of its Members, including censure, reprimand, and a fine. The House of Representatives has taken a broad view of its authority to censure or reprimand its Members for any conduct that the House finds to be reprehensible and/or to reflect discredit on the institution and which is, therefore, worthy of rebuke or condemnation.²⁷ A censure or a reprimand, where the full House adopts by majority vote a formal resolution of disapproval of a Member, may encompass conduct that does not violate any express law or Rule of the House.²⁸

Recall

Concerning a sitting Member of the House (or Senate) who is either *indicted* for or *convicted* of a felony offense, it should be noted that the United States Constitution does not provide for nor authorize the recall of any United States officials, such as United States Senators, Representatives to Congress, or the President or Vice President, and thus no Senator or Representative has ever

²⁴ H. Rpt. 96-1387, 96th Cong., 2nd sess., *In the Matter of Representative Michael J. Myers* (1980); 126 CONG. REC. 28,953 - 28,978 (October 2, 1980). Representative Myers was expelled after conviction for bribery, conspiracy, and violation of the Travel Act.

²⁵ H.Rept. 107-594, 107th Cong., 2nd sess., *In the Matter of Representative James A. Traficant, Jr.* (2002), 148 CONG. REC. 14318-14319 (July 24, 2002). Representative Traficant was expelled after conviction of conspiracy to violate federal bribery laws, receipt of illegal gratuities, obstruction of justice, conspiracy to defraud the United States, filing false income tax returns, and racketeering.

²⁶ Note, e.g., H. Rpt. 97-110, 97th Cong., 1st Sess., *In the Matter of Representative Raymond F. Lederer* (1981) [ABSCAM]; and H. Rpt. 100-506, 100th Cong., 2nd sess., *In the Matter of Representative Mario Biaggi* (1988) [illegal gratuities, obstruction of justice and Travel Act]. Note also case of Rep. B.F. Whittemore, recommended for expulsion by Military Affairs Committee for sale of Military Academy appointments, who subsequently resigned in 1870, and was then censured *in absentia* by House (II HINDS’ PRECEDENTS, §1273); and House censure of John DeWeese after his resignation (also for the sale of Academy appointments), but before committee reported resolution of expulsion (*Id.* §1239). See also expulsion resolutions for bribery and subsequent resignations of Representatives William Gilbert, Frances Edwards, and Orasmus Matteson, in 1857 (II HINDS’ PRECEDENTS, §1275).

²⁷ H. Rpt. 570, 63rd Cong., 2nd sess. (1914); and H. Rpt. 27, 90th Cong., 1st sess., 24-26, 29, *In re Adam Clayton Powell* (1967)(recommending censure).

²⁸ For a more detailed discussion of disciplinary action taken by the House concerning its Members, see CRS Report RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, by Jack Maskell, and House Ethics Committee, “Historical Summary of Conduct Cases in the House of Representatives” (November 2004).

been recalled in the history of the United States.²⁹ Under the Constitution and congressional practice, Members of Congress may have their services ended prior to the normal expiration of their constitutional terms of office by their resignation, death, or by action of the House of Congress in which they sit by way of an expulsion³⁰ or by a finding that a subsequent public office accepted by a Member is “incompatible” with congressional office (and that the Member has thus vacated his seat in Congress).³¹

The recall of Members of Congress was considered during the drafting of the federal Constitution, but no such provisions were included in the final version sent to the states for ratification, and the drafting and ratifying debates indicate a clear understanding and intent of the framers and those who ratified the Constitution that no right or power to recall a Senator or Representative from Congress existed under the Constitution.³² As noted by an academic authority on this subject:

The Constitutional Convention of 1787 considered but eventually rejected resolutions calling for this same type of recall [recall of Senators as provided in the Articles of Confederation]. ... In the end, the idea of placing a recall provision in the Constitution died for lack of support....³³

Although the Supreme Court has not needed to address the subject of recall of Members of Congress directly, other Supreme Court decisions, as well as other judicial and administrative rulings, decisions, and opinions, indicate that (1) the right to remove a Member of Congress before the expiration of his or her constitutionally established term of office resides exclusively in each House of Congress as established in the expulsion clause of the United States Constitution³⁴ and (2) the length and number of the terms of office for federal officials, established and agreed upon by the States in the Constitution creating that federal government, may not be unilaterally changed by an individual state, such as through the enactment of a recall provision or other provision limiting, changing, or cutting short the term of a United States Senator or United States

²⁹ Note more detailed discussion of recall, generally, in CRS Report RL30016, *Recall of Legislators and the Removal of Members of Congress from Office*, by Jack Maskell.

³⁰ U.S. CONST., art. I, §5, cl. 2.

³¹ See discussion in DESCHLER’S PRECEDENTS, Volume 2, Chapter 7, §13 (1977), and VI CANNON’S PRECEDENTS, §65 (1935); note, e.g., U.S. CONST., art. I, §6. Note also “disqualification” provision in the Fourteenth Amendment, Section 3, where one may be “disqualified” from holding congressional office for engaging in insurrection or rebellion against the United States or giving aid or comfort to our enemies after having taken an oath to support the Constitution (see discussion concerning House “exclusions” and disqualifications, presumptively on 14th Amendment grounds, of socialist and pacifist Victor Berger of Wisconsin in 1919, and again in 1920, VI CANNON’S PRECEDENTS, §§56-59; also *Powell v. McCormack*, 395 U.S. 486, 545, n.83 (1969)).

³² I Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 143-144, 172, and II Elliot, *supra*, at 289 (1888); 3 Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, 173 (Appendix A); note also ratifying debate on lack of authority for state recall in the Constitution, in Swan, *The Use of Recall in the United States*, THE INITIATIVE, REFERENDUM AND RECALL, National Municipal League Series, (Munro, editor), at 298, n. 2 (1912).

³³ Thomas E. Cronin, DIRECT DEMOCRACY, THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL, at 129 (Harvard University Press, 1989).

³⁴ *Burton v. United States*, 202 U.S. 344, 369 (1906): “The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers”; note, also Biennial Report and Opinions of the Attorney General of the State of Oregon 313, (April 19, 1935): “[I]t has been uniformly held that jurisdiction to determine the right of a Representative in Congress to a seat is vested exclusively in the House of Representatives ... [and] a Representative in Congress is not subject to recall by the legal voters of the state or district from which he was elected. Should this [state] constitutional amendment be so construed as applying to the recall of a Representative in Congress it would to that extent be inoperative.”

Representative.³⁵ State administrative and judicial rulings have thus consistently found that there exists no right or power for an electorate in that state to “recall” a federal officer such as a United States Representative or Senator.³⁶

Salary

No law or Rule exists providing that a Member of the House who is indicted for or convicted of a crime must forfeit his or her congressional salary. However, a Member of Congress who is convicted of a crime and then *incarcerated*, might be required to forego his or her congressional salary for some period of the incarceration if it results in the Member being absent from the House. The United States Code instructs the Chief Administrative Officer of the House to deduct from a Member’s salary the amount for each day that the Member is absent, except in cases of sickness of the Member or his or her family.³⁷

Election/Re-election

As discussed earlier concerning qualifications to hold the office of Member of Congress, indictment for or conviction of a felony offense is not a constitutional bar for eligibility to be elected or reelected as a Member of Congress, other than a conviction for treasonous conduct after having taken an oath of office, under the “disqualification” provision of the Fourteenth Amendment.³⁸ Additionally, a congressional censure or expulsion does not act as a permanent disability to hold congressional office in the future. A person under indictment or a convicted felon, even one who has also been disciplined by Congress, may run for and, in theory, be reelected to Congress and may not be “excluded” from Congress, but must be seated, if such person meets the three constitutional qualifications for office and has been duly elected.³⁹ Once a

³⁵ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-805 (1995); *Cook v. Gralike*, 531 U.S. 510, 522-523 (2001); Justice Joseph Story, *COMMENTARIES ON THE CONSTITUTION*, Vol. I, §627 (1883). The Supreme Court has expressly found that a state could not have “reserved” the power, under the 10th Amendment, to alter terms of a Member of Congress, because those terms of office (as well as those offices themselves) were established in the U.S. Constitution, and the states thus could never previously have had that power over Member’s terms to “reserve”: “Petitioners’ Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only ‘reserve’ that which existed before. As Justice Story recognized, ‘the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.... No state can say, that it has reserved, what it never possessed.’” *U.S. Term Limits, Inc.*, at 802; see also *Cook v. Gralike*, at 522.

³⁶ As to state courts finding state recall laws not operative as to Members of Congress, see *Walberg v. Lenawee County Board of Election Commissioners*, File No. 07-2694-AW, Order Granting Plaintiff’s Motion for Summary Disposition (Mich. Cir. Ct., November 6, 2007); *Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells, Secretary of State, et al*, 7 A3d 720, 723, 724 (N.J. Supreme Court, November 18, 2010). See also rulings and opinions of state attorneys general: Oregon, *Biennial Report and Opinions of the Attorney General of the State of Oregon* 313 (1935); Nevada, 1978 Op. Att’y Gen. Nev. 14, 1978 Nev. AG LEXIS 7, at 3, 5-6, 7 (June 8, 1978); Kansas, Attorney General Opinion No. 94-35, March 8, 1994; State of Louisiana, Department of Justice, Opinion 09-0051, at 1, 3 (March 2, 2009); North Dakota, Attorney General, Letter Opinion 2010-L-08, at 1, May 13, 2010, confirmed *RECALLND v. Jaegler, Secretary of State*, 792 N.W.2d 511 (N.D. Supreme Court, December 21 2010); Arkansas, Op. Att’y. Gen. Ark. 2010-017, 2010 Ark. AG LEXIS 24, at 9 (March 3, 2010).

³⁷ 2 U.S.C. §39.

³⁸ Certain statutes, for example the federal bribery law (18 U.S.C. §201), purport to have as an express punishment the disability to hold any office of profit or trust under the United States. Such a disqualification by statute, however, was found by the Supreme Court not to disqualify a person from being a Senator or Representative in Congress because the only qualifications and disqualifications for such elective offices are set out exclusively in the United States Constitution, and these constitutional provisions may not be added to or affected by statute. *Burton v. United States*, 202 U.S. 344 (1906).

³⁹ *Powell v. McCormack*, *supra*.

Member is seated, however, that Member may be subject to certain discipline by the House.⁴⁰ If reelected to the House, a Member who has been convicted for an offense that had barred the Member from voting under House Rules (in the previous Congress) would have his or her full voting privileges restored upon re-election.⁴¹

Under the United States Constitution there is no impediment for the people of a district or state to choose an individual who is under indictment, or who is a convicted felon, to represent them in Congress. Furthermore, because the qualifications for elective federal office are established and fixed within the United States Constitution, are the *exclusive* qualifications for congressional office, and may not be altered or added to by the state legislatures except by constitutional amendment, the states may not by statute, or otherwise, bar from the ballot a candidate for federal office because such person is indicted or has been convicted of a felony.⁴² The required qualifications, as well as the disqualifications, to serve in Congress were intentionally kept at a minimum by the framers of the Constitution to allow the people broad discretion to send whom they wish to represent them in Congress.⁴³ That is, the people voting in a district or state, rather than the institutions of Congress, the courts, or the executive, were meant to substantially control their own decisions concerning their representation in the federal legislature.

Pensions

The federal pensions of Members of Congress may be affected when a Member is convicted of certain crimes. This may occur in two general instances: upon the conviction of a crime concerning any of the national security offenses listed in the so-called “Hiss Act,” and upon the conviction of any one of numerous felony offenses relating to public corruption, abuse of one’s official position in the Congress, or campaign finance laws.

Under the so-called “Hiss Act,” Members of Congress (in a similar manner as most other officers and employees of the federal government) forfeit all of their federal retirement annuities for which they had qualified if convicted of a federal crime which relates to disclosure of classified

⁴⁰ Although the *authority* for each House of Congress to discipline by means such as expulsion or censure is not restricted on the face of the Constitution (except for the two-thirds requirement to expel), it has been a general practice and *policy* in Congress not to *expel* a Member for past offenses if the electorate knew of the offenses involved, and still chose to elect or reelect that individual as their representative in Congress. See discussion in *Constitution, Jefferson’s Manual and Rules of the House of Representatives*, §64; H. Rpt. 570, 63rd Cong., 2nd sess. (1914), VI CANNON’S PRECEDENTS §398, 557-558; *Powell v. McCormack*, *supra* at 508; Bowman and Bowman, “Article I, Section 5: Congress’ Power to Expel - An Exercise in Self Restraint,” 29 SYRACUSE LAW REVIEW 1071, 1089-1090 (1978). However, both the House and the Senate have otherwise disciplined a Member even after re-election, such as through *censure*, for past misconduct even if known to the electorate. H. Rpt. 27, 90th Cong., 1st Sess., *supra* at 27.

⁴¹ House Rule XXIII(10).

⁴² States may *not* add qualifications for federal office additional to those established in the Constitution, such as requiring that a congressional candidate not be a felon or indicted for a felony. See, specifically, *State ex rel. Eaton v. Schmal*, 167 N.W. 481 (Sup. Ct. Minn. 1918); *Application of Ferguson*, 294 N.Y.S.2d 174, 176 (Super. Ct. 1968); *Danielson v. Fitzsimmons*, 44 N.W. 2d 484, 486 (Minn. 1950); *In re O’Connor*, 173 Misc. 419, 17 N.Y.S. 2d 758 (S. Ct. 1940). As argued by Hamilton in THE FEDERALIST PAPERS, No. 60: “The qualifications of the persons who may ... be chosen, as has been remarked on other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.” Because the federal Constitution governs qualifications to hold federal office, but the States generally regulate qualifications to vote in those elections (Article I, Sec. 2), there may exist the interesting anomaly of a convicted felon who may run for federal office but could be barred by state law from voting in that election.

⁴³ Hamilton stated that “the true principle of a republic is, that the people should choose whom they please to govern them.” 2 ELIOT’S DEBATES 257. See *Powell v. McCormack*, at 528, 527-536, discussing influence on Framers of England’s “Wilkes case” and the “long and bitter struggle for the right of the British electorate to be represented by men of their own choice.”

information, espionage, sabotage, treason, misprision of treason, rebellion or insurrection, seditious conspiracy, harboring or concealing persons, gathering or transmitting defense information, perjury in relation to those offenses, and other designated offenses relating to secrets and national security offenses against the United States.⁴⁴

Additionally, under provisions of law first enacted in 2007, and then expanded in 2012,⁴⁵ a Member of Congress will lose all “creditable service” as a Member for federal pension (and disability) purposes if that Member is convicted for conduct which constitutes a violation of any one of a number of federal laws concerning public corruption, fraud, and campaign finance regulations. The forfeiture provisions of this law will apply if the criminal misconduct was engaged in while the individual was a Member of Congress (or while the individual was the President, Vice President, or an elected official of a state or local government), and if every element of the offense “directly relates to the performance of the individual’s official duties as a Member, the President, the Vice President, or an elected official of a State or local government.”⁴⁶ The laws within these pension forfeiture provisions include, for example, bribery and illegal gratuities; conflicts of interest; acting as an agent of a foreign principal; false claims; vote buying; unlawful solicitations of political contributions; theft or embezzlement of public funds; false statements or fraud before the federal government; wire fraud, including “honest services” fraud; obstruction of justice; extortion; money laundering; bribery of foreign officials; depositing proceeds from various criminal activities; obstruction of justice or intimidation or harassment of witnesses; an offense under “RICO,” racketeer influenced and corrupt organizations; conspiracy to commit an offense or to defraud the United States to the extent that the conspiracy constitutes an act to commit one of the offenses listed above; conspiracy to violate the post-employment, “revolving door” laws; perjury in relation to the commission of any offense described above; or subornation of perjury in relation to the commission of any offense described above.⁴⁷ As to the loss of one’s federal pension annuity, or the loss of creditable service as a Member for the purposes of the Member’s retirement annuity, the nature and the elements of the offense are controlling; and it does not matter if the individual resigns from office prior to or after indictment or conviction, or if the individual is expelled from Congress.

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⁴⁴ See now 5 U.S.C. §8311 *et seq.*

⁴⁵ P.L. 110-81, the “Honest Leadership and Open Government Act of 2007,” Section 401, as amended by P.L. 112-105, the “Stop Trading on Congressional Knowledge Act” [STOCK Act], Section 15.

⁴⁶ 5 U.S.C. §8411(l)(2)(B) [Federal Employee Retirement System]; 5 U.S.C. §8332(o) [Civil Service Retirement System].

⁴⁷ 5 U.S.C. §8332(o)(2)(B); 5 U.S.C. §8411(l)(2).