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Status of a Senator Who Has Been Indicted for or Convicted of a Felony

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Summary

There are no federal statutes or Rules of the Senate that directly affect the status of a Senator who has been *indicted* for a crime that constitutes a felony. No rights or privileges are forfeited under the Constitution, statutory law, nor the Rules of the Senate upon an indictment. Under the Rules of the Senate, therefore, an indicted Senator may continue to participate in congressional proceedings and considerations. Under the United States Constitution, a person under indictment is not disqualified from being a Member of or a candidate for reelection to Congress. Internal party rules in the Senate may, however, provide for certain steps to be taken by an indicted Senator. For example, the Senate Republican Conference Rules require an indicted chairman or ranking Member of a Senate committee, or a member of the party leadership, to temporarily step aside from his or her leadership or chairmanship position.

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. Unlike Members of the House, Senators are not instructed by internal Senate Rules to refrain from voting in committee or on the Senate floor once they have been convicted of a crime which carries a particular punishment. Internal party rules in the Senate may affect a Senator's position in committees. Under the Senate Republican Conference Rules, for example, Senators 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—Senators to internal legislative disciplinary proceedings, including resolutions of censure, as well as an expulsion from the Senate 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 a number of crimes by Members relating to public corruption, fraud, or campaign finance law will result in the loss of the Member's entire "creditable service" as a Member for purposes of calculating his or her federal retirement annuities if the conduct underlying the conviction related to one's official duties.

This report has been updated from an earlier version, and will be updated in the future as changes to law, congressional rules, or judicial and administrative decisions may warrant.

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This report summarizes the potential consequences, with respect to congressional status, that may result when a sitting Member of the United States Senate is indicted for or is convicted of a felony.[1]

Background

If a sitting United States Senator 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, constitutional provision, or Rule of the Senate. No rights or privileges are forfeited under the Constitution, statutory law, or the Rules of the Senate merely upon an *indictment* for an offense. Internal party rules in the Senate may be relevant, however, and the Senate Republican Conference Rules, for example, have required an indicted chairman or ranking Member of a Senate committee, or a member of the Senate party leadership, to temporarily step aside from his or her leadership or chairmanship position, although the Member's service in Congress would otherwise continue.

It should be noted that Members of Congress do not automatically forfeit their offices even 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 after having taken an oath of office. Under party rules, however, Members may lose their chairmanships of committees or ranking Member status upon conviction of a felony, and this has been expressly provided under the Senate Republican Conference Rules. Conviction of certain crimes may subject Senators to internal legislative disciplinary proceedings, including resolutions of censure, as well as expulsion from the Senate upon approval of two-thirds of the Members. Expulsion of a Member from Congress does not result in the forfeiture or loss of one'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.[2] There are only three qualifications for congressional office and these are set out in the United States Constitution at Article I, Section 3, clause 3 for Senators (and Article I, Section 2, clause 2, for Representatives): 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

[1] For a survey of the status relative to Members of the House, see CRS Report RL33229, *Status of a Member of the House Who Has Been Indicted for or Convicted of a Felony*, by Jack Maskell.

[2] The Fourteenth Amendment, United States 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 Senate to find and declare a seat vacant on the grounds of such disqualification.

unilaterally.[3] Once 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.[4]

Committee Chairmanships and Leadership Positions

No specific or formal Rule of the Senate exists concerning the status of a Senator who has been indicted with respect to chairmanships or ranking Member status on committees of the Senate. However, the political parties in the Senate may adopt internal conference and caucus rules that may affect a Senator's leadership and committee positions and assignments. For example, Senate Republican Conference Rules have provided 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 Senator has been indicted for a felony; and if the Senator is convicted, the replacement of the chair/ranking Member on the committee.[5]

Refraining from Voting in Congress After Conviction

Although Members of the House of Representatives convicted of an offense that may result in two or more years' imprisonment are instructed under House Rule XXIII (10) to "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), there is no comparable provision in the Senate Rules.[6]

[3] 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 Constitutional Convention that qualifications of the elected "were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution." 2 Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 249-250. For a detailed discussion of Member qualifications, see CRS Report R41946, *Qualifications of Members of Congress*, by Jack Maskell.

[4] 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, in a disciplinary proceeding (see discussion of "Congressional Discipline" in this report, below).

[5] Senate Republican Conference Rules, 113th Congress, Revised November 2012, Rule 5, paragraph D: "Indictment or Conviction of Committee Chair/Ranking Member. In the event of an indictment for a felony, the chair/ranking member or elected member of the leadership shall step down until the case is resolved. Upon conviction, the chair/ranking member would automatically be replaced." CRS was unable to identify any equivalent party rule for the Senate Democratic Conference.

[6] It may be noted that even in the House, the applicable Rule is phrased in advisory, not mandatory, language because the institution of the House has raised issues concerning its authority to mandatorily suspend a Member from voting by a process less than an expulsion. See discussion of suspension concerning "Congressional Discipline" below, and DESCHLER'S PRECEDENTS, Chapter 12, § 15, H. Doc. No. 94-661, at 187 (1976).

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 the Senate (and House) as to the timing, nature, and underlying conduct involved in an internal discipline of a Member of that body 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.[7] Members of Congress, like many other individuals, have been indicted and charged with various offenses and then been subsequently exonerated in judicial proceedings. Both the Senate and the House have thus been reluctant to remove from Congress individuals who have been lawfully elected to represent 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 because of arrangements with the Department of Justice).[8]

An attempt to mandatorily *suspend* an indicted or convicted Member from voting or participating in congressional proceedings raises several issues. In general, elected 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 state or district in the Congress. The authority of either house of Congress 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 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 after an expulsion action.[9]

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[7] *See, e.g.*, S.Rept. 97-187, Senate Select Committee on Ethics, at 2 (1981). In the House, note also 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 note of criminal proceedings brought against a Member.... "

[8] S.Rept. 97-187, *supra* at 2: "In order not to interfere with the government's prosecution of the criminal case, to avoid any possible prejudice to the Senator's right to a fair trial and for other reasons, the Committee deferred further action in this matter pending the completion of the criminal trial."

[9] 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. 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, at 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.

Conviction

Conviction of a crime may subject a Member of the Senate to internal disciplinary action, including a resolution for censure of the Member, up to and including an expulsion from Congress upon a two-thirds vote of the Members of the Senate present and voting. The Senate has demonstrated that in cases of conviction of a Member of crimes that relate to official misconduct that the institution need not wait until all the Senator's appeals are exhausted, but that the Senate may independently investigate and adjudicate the underlying factual circumstances involved in the judicial proceedings, regardless of the potential legal or procedural issues that may be raised and resolved on appeal.[10]

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.[11] When the most severe sanction of expulsion has been actually employed in the Senate (and in the House of Representatives), 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.[12] In the United States Senate, 15 Senators have been expelled, 14 during the Civil War period for disloyalty to the Union (one expulsion was later revoked by the Senate),[13] and one Senator was expelled in 1797 for other disloyal conduct.[14] Although the Senate has actually expelled relatively few Members, and none since the Civil War, other Senators, when facing a recommended expulsion for misconduct, have resigned their seat rather than face the potential expulsion action.[15]

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[10] S.Rept. 97-187, *supra* at 10-11. Although the Committee was of the opinion that its unanimous recommendation of expulsion "reflects its strong conviction that its own determination of this matter, and that of the Senate, must be made independently of the jury's verdict" or the outcome of the appeal, because the ruling on the appeal was expected to be handed down shortly, the Committee recommended "that the Senate proceed expeditiously to final disposition of the foregoing resolution only when Judge Pratt has ruled on the aforesaid motions."

[11] The jurisdiction delegated by the Senate to the Senate Select Committee on Ethics, as set out in the Committee Rules, includes investigating and adjudicating complaints, allegations, or information that "any Senator ... has violated a law, the Senate Code of Conduct, or any rule or regulation of the Senate relating to the conduct of any individual in the performance of his or her duty as a Member, ... or has engaged in improper conduct which may reflect upon the Senate." Rules of Procedure, Senate Select Committee on Ethics, Rule 2(a) (January 2015). *See* S.Res.338, 88th Cong., 2d Sess. Sec. 2 (1964), as amended.

[12] See Senate expulsions in S. Doc. 103-33, *United States Senate Election, Expulsion and Censure Cases, 1793-1990*, at pp. 95-108, Cases 36, 38, 39, 40 (1995). It should be noted, however, that the Senate Select Committee on Ethics recommended the expulsion of a Senator in 1995 who was not convicted of any crime, but who was found by the Committee to have abused the authority of his office in making unwanted sexual advances to women, enhancing his personal financial position, and for obstructing and impeding the Committee's investigation. S.Rept. 104-137 (1995).

[13] Senators Mason, Hunter, Clingman, Bragg, Chestnut, Nicholson, Sebastian, Mitchell, Hemphill, and Wigfall (1861), Breckinridge (1861), Bright (1862), Johnson (1862), and Polk (1862). The expulsion order regarding Senator Sebastian was later revoked. *United States Senate Election, Expulsion and Censure Cases, 1793-1990, supra.*

[14] Senator William Blount of Tennessee, July 8, 1797, *United States Senate Election, Expulsion and Censure Cases, 1793-1990, supra* at 13-15, Case 5. The House of Representatives has expelled five Members—three for disloyalty to the Union, and two after conviction of various criminal corruption charges.

[15] For example, the Senate in 1981 considered the expulsion of a Senator recommended by the Senate Select Committee on Ethics (S.Rept. 97-187, *supra*), after the Senator's conviction of bribery, illegal gratuities, conflicts of interest and conspiracy in the so-called ABSCAM influence peddling probe. The Senator resigned prior to final Senate floor consideration. Note Riddick and Fruman, RIDDICK'S SENATE PROCEDURE, S. Doc. No. 101-28, *supra* at 270. Additionally, a Senator resigned in 1995 after the Senate Select Committee on Ethics recommended expulsion in S.Rept. 104-137 (1995).

In addition to expulsion, the Senate as an institution may take other disciplinary actions against one of its Members, including censure or fine. The Senate, like the House of Representatives, has taken a broad view of its authority to censure or otherwise discipline its Members for any conduct that the Senate finds to be reprehensible and/or to reflect discredit on the institution and which is, therefore, worthy of rebuke or condemnation.[16] A censure by the Senate, whereby the full Senate adopts by majority vote a formal resolution of disapproval of a Member, may therefore encompass conduct that does not violate any express state or federal law, nor any specific Rule of the Senate.

The Senate, in a similar manner as the House of Representatives in relation to its Members, has expressed reticence to exercise the power of expulsion (but not censure) for conduct in a prior Congress when a Senator has been elected or reelected to the Senate *after* the Member's conviction, when the electorate knew of the misconduct and still sent the Member to the Senate.[17] The apparent reticence of the Senate or House to expel a Member for past misconduct after the Member has been duly elected or reelected by the qualified electors of a state, with knowledge of the Member's conduct, appears to reflect the deference traditionally paid in U.S. heritage to the popular will and election choice of the people.[18] The authority to expel would thus be used cautiously when the institution of Congress might be seen as usurping or supplanting its own institutional judgment for the judgment of the electorate as to the character or fitness for office of an individual whom the people have chosen to represent them in Congress.[19]

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[16] In S.Rept. 2508, 83d Cong., 2d Sess. 22 (1954), the Senate Select Committee to Study Censure Charges explained: "It seems clear that if a Senator should be guilty of reprehensible conduct unconnected with his official duties and position, but which conduct brings the Senate into disrepute, the Senate has the power to censure."

[17] See discussion in S.Rept. 2508, 83rd Cong., *supra* at 20-23, 30-31, concerning McCarthy censure; and in House, H.Rept. 27, 90th Cong., 1st Sess. 26-27 (1969).

[18] Note Powell v. McCormick, 395 U.S. 486, 508, 509 (1969); Alexander Hamilton, 2 ELIOT'S DEBATES 257; note II HIND'S PRECEDENTS § 1285, p. 850-852, discussion of jurisdiction of House after reelection of Member when the "charges against [the Member] were known to the people of his district before they reelected him."

[19] "Congress has demonstrated a clear reluctance to expel when to do so would impinge ... on the electoral process." Bowman and Bowman, *Article I, Section 5: Congress' Power to Expel - An Exercise in Self-Restraint*, 29 SYRACUSE LAW REVIEW 1071, 1101 (1978). For a discussion of the policy considerations in such a matter, see Report of the House Judiciary Committee, H.Rept. 570, 63rd Cong., 2d Sess., VI CANNON'S PRECEDENTS, § 398, 557-558: "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 mindful 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. To exercise such power in that instance 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. The effect of such a policy would tend not to preserve but to undermine and destroy representative government."

Recall

Concerning a sitting Member of the Senate (or House) 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 been recalled in the history of the United States.[20] 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 expulsion[21] 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).[22]

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 ratifiers of the Constitution that no right or power to recall a Senator or Representative from Congress existed under the Constitution.[23] 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.... [24]

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 Constitution[25]

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[20] *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.

[21] U.S. CONST., art. I, § 5, cl. 2.

[22] *See* discussion in DESCHLER'S PRECEDENTS, *supra*, at Volume 2, Chapter 7, § 13 (1977), and VI CANNON'S PRECEDENTS, *supra at* § 65 (1935); note, *e.g.*, U.S. CONST., art I, § 6. See also 1 HINDS' PRECEDENTS, at pp. 600-601, Senate Judiciary Committee Report of August 2, 1861, recommending the finding of a vacancy, but not acted upon by the Senate.

[23] 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).

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

[25] 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 (continued...)

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 Representative.[26] 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, regardless of the language of a particular state statute.[27]

Salary

No law or Rule exists providing that a Member of the Senate who is indicted for or convicted of a crime must forfeit his or her congressional salary.

Election/Reelection

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.[28] 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

(...continued)

would to that extent be inoperative."

[26] 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.

[27] 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. Atty. 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. Atty. Gen. Ark. 2010-017, 2010 Ark. AG LEXIS 24, at 9 (March 3, 2010).

[28] 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).

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.[29] Once a Member is seated, however, that Member may be subject to certain discipline by the Senate.[30]

Under the United States Constitution there is no impediment for the people of a state (or district in the case of a Representative) 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, they 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, therefore, 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.[31] 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.[32] 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

Officers and employees of the United States, including Members of Congress, do not, upon indictment for any crime, nor upon conviction of every crime that constitutes a felony, forfeit the federal pensions for which they qualify and the retirement income that they have accumulated. However, the federal pensions of Members of Congress *will* be affected 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 several felony offenses relating to public

[29] *Powell v. McCormack, supra.*

[30] 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 or Senator in Congress. *See* discussion in S.Rept. 2508, 83rd Cong., *supra*; VI *Cannon's* §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 reelection, such as through *censure*, for past misconduct even if known to the electorate.

[31] 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). *See* discussion by Alexander 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 U.S. Constitution governs qualifications for 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.

[32] 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" (where a Member of Parliament was continuously "excluded" even though subsequently re-elected by his constituents) and the "long and bitter struggle for the right of the British electorate to be represented by men of their own choice."

corruption, abuse of one's official position in the Congress, fraud, or campaign finance laws if the elements of the offense relate to the official duties of the Member.

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 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.[33]

Additionally, under provisions of law first enacted in 2007, and then expanded in 2012,[34] 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 regulation. 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."[35] 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 and mail 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.[36] 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.

[33] See now 5 U.S.C. § 8311 *et seq*.

[34] 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.

[35] 5 U.S.C. § 8411(l)(2)(B) [Federal Employee Retirement System]; 5 U.S.C. § 8332(o) [Civil Service Retirement System].

[36] 5 U.S.C. § 8332(o)(2)(B); 5 U.S.C. § 8411(l)(2).

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