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CONGRESSIONAL SELF-DISCIPLINE: THE POWER TO EXPEL, TO EXCLUDE AND TO PUNISH

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RECENT events have again focused attention on Congress' power to discipline its members for personal misconduct. On April 19, 1972, the House Committee on Standards of Official Conduct[1] recommended that Texas Representative John Dowdy be stripped of his right to vote on the floor of the House or in committee as a result of his conviction for bribery and perjury.[2] On that same day, two Senators argued before the Supreme Court that the Constitution forbids the executive branch from investigating the official conduct of a member of Congress, and delegates all responsibility for punishing members' wrongdoing to each house of Congress.[3] Finally, on June 29, 1972, a Supreme Court majority in *United States v. Brewster*,[4] while holding that a former Senator was not immune to criminal prosecution for accepting a bribe while in office, commented that Congress did not have specifically articulated standards for the discipline of its members,[5] and that in a disciplinary proceeding a member of Congress "is at the mercy of an almost unbridled discretion of the charging body . . . ."[6]

The Constitution provides Congress with three specific powers to discipline its own members: the power to expel, the power to exclude and the power to punish.[7] Congress needs these powers primarily for two reasons. First, both the Senate and the House of Representatives must maintain their own institutional integrity and the "proper functioning of the legislative process."[8] Second, each house possesses certain privileges which guarantee Congress' existence as a separate but equal branch of government. Not the least of these is the privilege which protects a Senator or

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1. See note 22 infra.

2. Wall St. J., April 20, 1972, at 1, col. 3.

When a member of Congress has been indicted for a felony, the House of Representatives and the Senate usually do not take action until after the conclusion of judicial proceedings. R. Getz, Congressional Ethics 90 (1966) [hereinafter cited as Getz].

3. N.Y. Times, April 20, 1972, at 8, col. 1.

4. 408 U.S. 501 (1972).

5. Id. at 519. See In re Chapman, 166 U.S. 661, 669-70 (1897).

6. 408 U.S. at 519.

7. U.S. Const. art. I, § 5. The power to exclude is inferred from the power of each house to judge the qualifications of its members.

8. Special Committee on Congressional Ethics, Association of the Bar of the City of New York, Congress and the Public Trust 202 (1970) [hereinafter cited as Congress and the Public Trust].

Representative from being questioned elsewhere about his acts or speeches in Congress.[9] If a member of Congress is to enjoy such a broad privilege, Congress requires its own in-house disciplinary sanctions to guard against the abuse of that privilege.[10] In effect then, Congress' power of self-discipline is necessitated both by its internal workings and by its relationship with the other branches of the federal government.

At the same time, however, the power of Congress to expel, to exclude or to punish a member is itself limited by the people's right to elect whomever they wish to represent them.[11] Congress' power to discipline its members and the people's right to choose their representatives have collided in the past[12] and will undoubtedly do so again in the future. This article explores one half of that critical tension: Congress' powers of self-discipline. To that end, the article treats each of Congress' disciplinary powers separately to demonstrate that there are definite procedural and substantive rules which limit the exercise of these powers—rules which do approximate those "specifically articulated standards" whose existence the Supreme Court majority in *Brewster* denied.[13]

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9. U.S. Const. art. I, § 6. The privilege protects members of Congress from inquiry into legislative acts or the motivation behind legislative acts. The privilege does not cover all conduct relating to the legislative process. United States v. Brewster, 408 U.S. 501, 516 (1972). For other recent discussions of the congressional privilege, see Gravel v. United States, 408 U.S. 606 (1972); Gravel, Congressional Privilege: The Case of Sen. Gravel, 167 N.Y.L.J., March 31, 1972, at 1, col. 1.

10. "If Congress did not police itself, its Members would be above all law in the areas protected by Congressional immunity, a concept alien to our legal system and never intended by the framers of the Constitution." Congress and the Public Trust, supra note 8, at 203.

A discussion of when Congress has exclusive jurisdiction to punish a member is beyond the scope of this article. Suffice it to say that in the areas protected by Congressional immunity, Congress alone may punish a member. See United States v. Brewster, 408 U.S. 501, 518 (1972). Outside of this area, however, Congress as well as appropriate federal, state or local authorities may discipline a member. Usually Congress will not seek to punish a member until after the conclusion of any judicial proceedings brought against him. Cf. note 2 supra.

The Supreme Court majority in United States v. Brewster remarked that Congress is ill-equipped to investigate, try and punish its members for conduct that is loosely and incidentally related to the legislative process. 408 U.S. at 518.

11. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them. . . .' As Madison pointed out at the [Constitutional] Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." Powell v. McCormack, 395 U.S. 486, 547 (1969) (citation omitted).

12. Adam Clayton Powell was excluded from the 90th Congress but was overwhelmingly re-elected by his constituents. It was not until the 91st Congress two years later, and only after a long court battle, that Powell was finally seated.

13. See notes 5 & 6 supra and accompanying text.

I. EXPULSION

Article I, section 5, clause 2 of the Constitution provides: "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and with the concurrence of two thirds, expel a member."

Once a Senator or Representative has been administered the oath of office and takes his seat, he cannot be required to surrender that seat without a two-thirds vote of the particular house (expulsion).[14] On the other hand, if a member has not been seated, a simple majority of the house can prevent him from taking his seat (exclusion).[15] The seating of a member thus becomes critical because thereafter the member cannot be removed except by expulsion, requiring the concurrence of two-thirds of his colleagues. It is true that certain rights of a seated member may be temporarily suspended by a majority vote as a punishment, but suspension does not deprive a member of his seat.[16] If a house votes to expel or exclude a member, however, the seat thereby becomes vacant and a special election must be held.[17]

Except for the requirement of a two-thirds majority, the Constitution does not explicitly restrict Congress' power to expel. This does not mean, however, that the power of expulsion is untrammelled. Certain limitations, both procedural and substantive, restrict Congress' exercise of this sanction.

A. *Procedural Restraints*

1. Participation in Expulsion Proceedings

In *Powell v. McCormack*,[18] the Supreme Court remarked that a member may as a matter of right address his colleagues and participate fully in the debate on his expulsion, while a member-elect whose exclusion is under consideration apparently does not have the same right.[19] Although a mem-

14. Powell v. McCormack, 395 U.S. 486, 507 n.27 (1969). There may be one exception to this rule, however. See text accompanying notes 60-61 infra.

15. 395 U.S. 486, 507 n.27.

16. For a discussion of suspension, see Hobbs, Comments on Powell v. McCormack, 17 U.C.L.A.L. Rev. 129, 151-52 (1969) [hereinafter cited as Hobbs].

17. U.S. Const. art. I, § 2, cl. 4 provides: "When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies." U.S. Const. amend. XVII, cl. 2 provides that in the case of the Senate the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

18. 395 U.S. 486 (1969).

19. Id. at 510 n.30 (1969). This comment may have greater significance than at first appears. As one commentator remarked: "This also might be interpreted as an indication of

ber-elect may be permitted to speak in his own behalf,[20] a seated Senator or Representative, as an already functioning member of Congress, would seem to have the stronger claim to participate in the debate over his expulsion.

Although not specifically required by rule or court decision, reasonable procedural rights should be extended to a member whose expulsion is being considered: the right to attend with counsel any relevant committee hearings, the right to have witnesses subpoenaed in his defense, the right to have a written statement of the accusations made against him, the right to a transcript of all hearings where testimony is taken and the right to cross-examine his accusers.[21] Since the appropriate committee of the House or Senate will usually investigate the allegations made against the member and recommend a course of action to the full body, it is imperative that these procedural rights be afforded in the committee hearings.[22] To permit the exercise of certain of these rights during a full Senate or House debate on a member's expulsion may be unwieldy.[23] In any event

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a willingness on the part of the Court to pass constitutional judgment on the appropriateness of House procedures. There is, however, a more important implication, namely, that the Court possesses the competence to determine exactly what those procedures are." Hobbs, supra note 16, at 144.

For a discussion of the problems of jurisdiction and justiciability raised by these remarks, see Weckstein, Comments on Powell v. McCormack, 17 U.C.L.A.L. Rev. 73, 77-89 (1969).

20. 1 A. Hinds, Precedents of the House of Representatives of the United States § 474 (1907) [hereinafter cited as Hinds].

21. In the expulsion proceedings brought against him, Senator John Smith of Ohio requested that he be informed specifically of the charges against him, that he be allowed to make a defense against such charges, and have process to compel the attendance of witnesses and the privilege of being heard by counsel. The Senate permitted him to be heard by counsel; the other requests were not granted, however. 2 Hinds, supra note 20, § 1264.

In United States v. Brewster, the Supreme Court expressed the view that the process of disciplining a member in Congress is not without some risk of abuse since "it is not surrounded with the panoply of protective shields that are present in a criminal case." 408 U.S. at 519.

22. In 1964, the Senate established the Select Committee on Standards and Conduct to investigate allegations of improper conduct on the part of Senators. Before recommending any disciplinary action to the full Senate, the Committee must give the individuals concerned due notice and an opportunity for a hearing. S. Res. 338, 88th Cong., 2d Sess. § 2(a)(2) 110 Cong. Rec. 16,939 (1964). Beyond this, there is no requirement that the Committee grant a member being investigated any procedural rights.

In 1968 the House of Representatives established a Committee on Standards of Official Conduct to investigate alleged wrongdoings of its members. Again, the only procedural requirement is for notice and a hearing. H.R. Doc. No. 402, 90th Cong., 2d Sess. § 720, Rule XI (19)(c)(2) (1968).

23. Counsel for Senator John Smith argued before the entire Senate during the debates

Congress should remember that when it expels a member, it effectively acts as a court[24] and should be limited by reasonable due process requirements.[25]

2. Two-Thirds Majority

The most important limitation on Congress' use of the expulsion power is the requirement that two-thirds of the membership of the particular house concur.[26] Although Gouverneur Morris felt that a simple majority should have the power to expel,[27] James Madison urged the view that "expulsion was too important to be exercised by a bare majority of a quorum; and in emergencies . . . [one] faction might be dangerously abused."[28] This is one of several areas in the Constitution where a two-thirds majority is required. By a two-thirds vote of both houses, Congress may remove an incapacitated President,[29] override a Presidential veto[30] or propose a Constitutional amendment.[31] Similarly, a two-thirds vote of the Senate is necessary to impeach a member of the executive or the federal judiciary.[32] All of these areas are of particular importance since they are integral to the scheme of checks and balances under which the three branches of government operate. Expulsion is no less important, not because it involves intragovernmental checks and balances, but because it involves the people's basic right to be represented in Congress by the member of their choice.

over his expulsion (1807). See 2 Hinds, supra note 20, § 1264. A member has been permitted to cross-examine other members during the expulsion debate. Id. § 1643.

24. United States v. Brewster, 408 U.S. 501, 518 (1972).

25. Differing views have been expressed as to whether Congress could expel a member based on evidence that would be inadmissible in court. See the committee report in the expulsion case of John Smith of Ohio (1807) cited in 2 Hinds, supra note 20, § 1264, for the position that ordinarily inadmissible evidence may be considered. For a different position see the remarks of Senator Bayard of Delaware, Id. § 1269.

26. U.S. Const. art. I, § 5, cl. 2.

By analogy to certain Supreme Court decisions, it could be argued that the majority required to expel a member is two-thirds of those present in each house (assuming the presence of a quorum) and not of the entire membership. See National Prohibition Cases, 253 U.S. 350, 386 (1920) (a vote of two-thirds of those members present in each house is sufficient for the adoption of a constitutional amendment); Missouri Pac. Ry. v. Kansas, 248 U.S. 276 (1919) (a Presidential veto might be overridden by a vote of two-thirds of the members present).

27. Records of the Federal Convention of 1784, at 254 (M. Farrand ed. 1937).

28. C. Warren, The Making of the Constitution 424 (1928). See United States v. Brewster, 408 U.S. 501 (1972) ("[I]t would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment"). Id. at 519-20.

29. U.S. Const. amend. XXV, § 4.

30. Id. art. I, § 7, cl. 2.

31. Id. art. V.

32. Id. art. I, § 3, cl. 6.

B. *Substantive Restraints*

In addition to these procedural limitations, are there substantive restraints which limit the expulsion power, or may Congress expel a member for any reason whatever? There are convincing arguments that Congress' power to expel is not unlimited.

1. Prior Misconduct

Both houses of Congress seem to distrust their power to expel a member for misconduct committed either during prior Congresses or before entering Congress.[33] This distrust has been justified in several ways. To those who view expulsion as a power given "to enable each house to exercise its constitutional function of legislation unobstructed,"[34] the remedy is not warranted as long as the member's conduct does not obstruct *this* Congress in its legislative work. To those who claim that the people are the final judge of the conduct of those who represent them, "prior misconduct is pardoned . . . by the electorate."[35] For whatever reasons, Congress will probably not expel a member for prior misconduct, except perhaps in extreme cases.[36]

2. Grounds for Expulsion

The Senate by a two-thirds vote may impeach a member of the executive or a federal judge. The Constitution provides for impeachment for officials of the executive and federal judiciary, but curiously, not for members of Congress. Expulsion, which also requires a two-thirds vote, was doubtlessly intended to be the equivalent punishment for members of Congress.[37] This

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33. Powell v. McCormack, 395 U.S. 486, 508-09 (1969). For cases in the House of Representatives and Senate concerning prior misconduct, see 2 Hinds, supra note 20, §§ 1283-89.

It is not clear to what extent Congress could discipline a former member for misconduct occurring while he was a member. See United States v. Brewster, 408 U.S. 501 (1972). Undoubtedly much would depend on whether the acts of the former member were within the scope of congressional immunity. See note 9 supra.

34. H.R. Rep. No. 815, 44th Cong., 1st Sess. 2 (1876), cited in Powell v. McCormack, 395 U.S. 486, 509 n.29 (1969).

35. Hobbs, supra note 16, at 146.

36. Although it ultimately cleared him of all charges, a Senate committee did investigate alleged prior misconduct by Senator Charles H. Dietrich of Nebraska (1904). It should be noted, however, that Dietrich himself had requested the investigation. Senate Election, Expulsion and Censure Cases from 1789-1960, Sen. Doc. No. 71, 87th Cong., 2d Sess. 98 (1962) [hereinafter cited as Senate Cases].

For a view that the power to expel for prior misconduct is desirable, see Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 684 (1968).

37. See Congress and the Public Trust, supra note 8, at 204. An impeachment proceed-

close identity between impeachment and expulsion should not be forgotten when analyzing substantive restraints on Congress' power to expel.

While the Constitution is silent as to the offenses which would cause a member to be expelled, it does mention offenses for which impeachment is appropriate. Article II, section 4 provides that "[t]he President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." There can be little argument that treason and bribery are proper grounds for impeachment since they are both indictable offenses and involve a breach of the public trust. The meaning of the phrase "other high crimes and misdemeanors," however, is less clear. The use of the word "other" seems to imply that any additional grounds for impeachment should be of the same serious nature as treason and bribery and involve official misconduct. From the constitutional debates, it is evident that the impeachment provisions were aimed at preventing "the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office."[38] Thus, to be impeachable, the conduct in question must either be an indictable offense which involves serious consequences to the United States or, if not an indictable offense, one which involves malicious or corrupt acts in the discharge of official duties, causing great detriment to the United States.[39]

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ing has been brought against only one member of Congress. On July 7, 1797 the House decided to bring impeachment proceedings against William Blount of Tennessee. The charges included a conspiracy to transfer to England property belonging to Spain in Florida and Louisiana, thereby violating America's neutrality, and attempts to foment trouble between certain Indian tribes and the United States. Blount was first expelled from the Senate; then he attacked the jurisdiction of the Senate to try him for impeachment. His claim that he could not be considered a "civil officer" of the United States subject to impeachment was ultimately upheld by the Senate when it dismissed the impeachment proceedings. This result has been considered a precedent for the proposition that members of Congress are not impeachable. See Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 25-26 (1970) [hereinafter cited as Feerick]; Senate Cases, supra note 36, at 3.

On January 28, 1873, the Vice President asked the Senate to form a committee to investigate charges made against his character. The request was opposed because the Vice President was not a member of the Senate who might be expelled, but an officer of Government, who should be proceeded against by impeachment. The Vice President's request to appoint the committee was denied. 2 Hinds, supra note 20, § 1242. In this instance the power to expel was considered the equivalent of impeachment.

See also id. § 1286, citing a House investigation report: "The office of the power of expulsion is so much the same as that of the power to impeach that we think it may be safely assumed that whatever would be a good cause of impeachment would also be a good cause of expulsion."

38. Feerick, supra note 37, at 53.

39. Id. at 54-55 & n.286. Even though Congress may expel a member who commits an

It has been argued, however, that "an impeachable offense is whatever the majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."[40] Such arguments clearly go too far. The Constitution does set limits on what acts may be considered impeachable. An official's private and lawful conduct, outside the scope of his office, cannot be the basis of impeachment since it is not indictable and it does not involve a betrayal of the public trust. Thus, for example, if a federal official has permitted excerpts from his book to be printed near nude photographs and a caricature of the President, he has not committed an impeachable offense.[41]

If an official of the executive or a federal judge may be impeached only for misconduct in office, Senators and Representatives should be expelled only for similar conduct. As with impeachment, intimations that each house of Congress has unlimited power to expel a member for any conduct whatsoever are wrong.[42] Congress should exercise its expulsion power only when a serious indictable offense has been perpetrated or when the particular member of Congress has betrayed the public trust by misconduct in office.

Even without reference to the impeachment provision, however, other constitutional limitations would restrict Congress' exercise of its expulsion power.[43] The right to freedom of speech clearly restricts Congress' power to expel a member for remarks made either in or outside Congress.[44] In

indictable offense involving serious consequences to the United States, there must still be the two-thirds vote to expel. Otherwise Congress, by a simple majority vote, could pass a criminal statute, conviction under which would result in immediate forfeiture of a member's seat. For a discussion of such problems, see Getz, supra note 2, at 91-92.

40. 116 Cong. Rec. 11913 (1970) (Remarks of Congressman Ford).

41. These were some of the numerous charges levelled against Justice William O. Douglas. See id. at 11916 (Remarks of Congressman Ford).

42. See In re Chapman, 166 U.S. 661, 669-70 (1897); Congress and the Public Trust, supra note 8, at 203-204; 2 Hinds, supra note 20, § 1279 (committee report cited therein at 843). Congress has more latitude in punishing a member than in expelling him. See notes 117-20 infra and accompanying text.

43. See Weckstein, Comments on Powell v. McCormack, 17 U.C.L.A.L. Rev. 73, 90 (1969); Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 674-75 (1968).

In discussing the Senate's power to judge the qualifications of its members, the Supreme Court observed that the exercise of this power was "subject only to the restraints imposed by or found in the implications of the Constitution." Barry v. United States ex rel. Cunningham, 279 U.S. 597, 614 (1929).

44. Of course, there are limitations even on a legislator's freedom of speech. If his remarks are treasonable, Congress could rightly expel the member. The "speech and debate" clause immunizes a member from being questioned "in any other place" but not in the House or

Bond v. Floyd,[45] the Supreme Court observed: "The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."[46] Similarly, a member could not be constitutionally expelled for his religious beliefs unless these beliefs were somehow detrimental to the country.[47] Both the due process clause and the equal protection clause would also be relevant in this context. The due process clause would prohibit a house of Congress from expelling a member on grounds that bear "no rational relation to legitimate concerns of the legislature."[48] The equal protection clause would prevent Congress from arbitrarily expelling certain members on grounds of wealth, age, race or profession. Finally, Congress would be prohibited from employing bills of attainder or ex post facto laws in order to expel a member.[49]

C. *Expulsion Cases in the Senate and House of Representatives*

From an analysis of the Senate and House cases, several conclusions can be drawn. First, expulsion is rarely used by either house. No member of either the House or the Senate has been expelled since 1862 and there have been few attempted expulsions in recent decades. Second, whenever the House or the Senate has expelled a member, it has been for treason or dis-

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Senate itself. In 1917 the Minnesota Commission of Public Safety presented a resolution to the Senate "looking to the expulsion of Senator Robert M. La Follette 'as a teacher of disloyalty and sedition, giving aid and comfort to our enemies, and hindering the Government in the conduct of the war,' such petition being based upon a speech of alleged disloyal nature . . . ." The committee investigating this and other charges against Senator La Follette decided that the speech did not merit action by the Senate. Senate Cases, supra note 36, at 110.

Similarly, expulsion resolutions were introduced against two members of the House of Representatives for words alleged to be treasonable (1864). 2 Hinds, supra note 20, §§ 1253-54.

45. 385 U.S. 116 (1966).

46. Id. at 136.

47. In the unsuccessful attempt to expel him (1907), Senator Reed Smoot of Utah was accused of "membership in a religious hierarchy that countenanced and encouraged polygamy and a united church and state contrary to the spirit of the Constitution. . . ." Senate Cases, supra note 36, at 98. Clearly Congress did not consider these beliefs to be so harmful to the United States as to merit expulsion. See also U.S. Const. art. VI, cl. 3, which prohibits any religious test from being required as a qualification to any public office under the United States.

48. Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 674 (1968). In another context, the Supreme Court has remarked: "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights . . . ." United States v. Ballin, 144 U.S. 1, 5 (1892).

49. U.S. Const. art. I, § 9, cl. 3.

loyalty. Even when Congressional committees have proposed a member's expulsion, the offenses alleged have usually involved serious official misconduct. Thus, it seems that in practice the Senate and House have equated the grounds of expulsion with the grounds of impeachment.

1. Senate

In all, twenty-three Senators have been expelled.[50] Twenty-two of the twenty-three cases occurred during the Civil War; the only other instance, that of William Blount of Tennessee, occurred in 1797. It is interesting to note that the basis of expulsion in each case was treason or disloyalty. Blount, for example, was expelled for plotting with the British to seize Spanish Florida and Louisiana and for instigating trouble with the Indians.[51] On February 15, 1862, Jesse D. Bright of Indiana was expelled because he had written a letter to Jefferson Davis introducing a friend who wished "to dispose of what he regards a great improvement in firearms."[52]

Ten other Senators, although not expelled, have been the subject of Senatorial expulsion proceedings.[53] In four of these cases the basis for the attempted expulsion was suspected treason or disloyalty.[54] Accepting bribes or receiving compensation for services rendered before a department of the Government was the charge in five other cases.[55] In the final case, Senator Reed Smoot of Utah was charged with membership in a "religious hier-

50. They are: William Blount of Tennessee (1797), Senate Cases, supra note 36, at 3; Jefferson Davis, Albert G. Brown, Stephen R. Mallory, David L. Yulee, Clement C. Clay, Benjamin Fitzpatrick, Robert Toombs and Judah P. Benjamin (1861), id. at 27; James M. Mason, Robert M. T. Hunter, Thomas L. Clingman, Thomas Bragg, James Chestnut, Jr., A. O. P. Nicholson, William K. Sebastian, Charles C. Mitchel, John Hemphill and Louis T. Wigfall (1861), id. at 28; John C. Breckenridge (1861), id. at 29; Jesse D. Bright (1862), id. at 30; Waldo P. Johnson (1862), id.; Trusten Polk (1862), id. at 31. There is some question whether Senators Davis, Brown, Mallory, Yulee, Clay, Fitzpatrick, Toombs and Benjamin were technically expelled. See id. at 27.

In 1877 the Senate annulled the expulsion of William K. Sebastian. 2 Hinds, supra note 20, § 1243.

51. See note 37 supra.

52. Senate Cases, supra note 36, at 30 n.8.

53. An eleventh Senator, John H. Mitchell of Oregon, was accused of conspiracy to defraud the United States and accepting bribes (1905) but died before the Senate could act. 2 Hinds, supra note 20, § 1278; Getz, supra note 2, at 88.

54. John Smith (1807), Senate Cases, supra note 36, at 4; Lazarus W. Powell (1862), id. at 31; Benjamin Stark (1862), id. at 34; Robert M. La Follette (1917), id. at 110.

The resolution to expel Senator Smith was narrowly defeated and he subsequently resigned. The resolutions to expel Senators Powell and Stark were defeated. Senator La Follette was cleared of all charges and no expulsion vote was taken by the Senate.

55. James F. Simmons (1862), Senate Cases, supra note 36, at 32; James W. Patterson (1873), id. at 52-54; Charles H. Dietrich (1904), id. at 98; Joseph R. Burton (1906), id. at 99; Burton K. Wheeler (1924), id. at 113. In the case of Simmons, the Senate committee which investigated the charges recommended expulsion but Simmons had resigned his seat before the next session of the Senate began. As for Patterson, he was defeated for reelection

archy that countenanced and encouraged polygamy and united church and state contrary to the spirit of the constitution . . . ."[56]

2. House of Representatives

In contrast to the Senate, the House of Representatives has used the power of expulsion rarely. Only three members have been expelled—all on the ground of treason.[57] Various House investigating committees have often recommended expulsion of a member only to have the full House vote censure instead.[58] In these situations, however, the offenses alleged did involve official, rather than private misconduct—namely, bribery or the sale of appointments to military academies.[59]

A word must be said about a number of cases in which a house of Congress has, in effect, "expelled" a seated member by a majority vote, rather than by a two-thirds vote. When a question arises about a member's valid election or eligibility for office, even after his seating, Congress has traditionally treated such a question as one of exclusion rather than one of expulsion. Thus, by a vote of 14 to 12, and after he had sat in Congress for one year, Albert Gallatin's election to the Senate was declared void because he had not been a citizen for nine years as required by the Constitution.[60] Similarly, the House of Representatives found that William Vandever was not entitled to his seat because he had accepted an office incompatible with his position in the House.[61] Although analogous in certain respects to cases of expulsion, these cases are properly treated as exclusions because they involve questions of eligibility for office, which is the focus of Congress' power to exclude.

II. EXCLUSION

Article I, section 5, clause 1 of the Constitution provides: "Each House shall be the judge of the elections, returns and qualifications of its own

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before the Senate could consider the committee report recommending expulsion. Senator Burton resigned before the Senate committee filed a report. Both Senators Dietrich and Wheeler were cleared of the charges brought against them.

56. Senate Cases, supra note 36, at 97-98.

57. They were: John W. Reid and John B. Clark, both of Missouri, and Henry C. Burnett of Kentucky (1861). 2 Hinds, supra note 20, §§ 1261-62. John B. Clark had never taken his seat, however, and was technically excluded by a two-thirds vote rather than expelled.

58. Getz, supra note 2, at 85-87.

59. Id.

60. Senate Cases, supra note 36, at 1. For other instances of "exclusions" of seated Senators, see the cases of James Shields, id. at 14, James Harlan, id. at 21, and John P. Stockton, id. at 38.

61. (1863). 1 Hinds, supra note 20, § 504. It should be noted that the Speaker of the House overruled a point of order objecting to the exclusion resolution on the ground that expulsion was the proper penalty in the case of a seated member. For other cases of House "exclusions" of seated members, see id. §§ 486-87.

Members." Since it may judge the qualifications of its members and the regularity of their elections, Congress may obviously exclude someone not properly elected or not having the requisite qualifications of membership.

Exclusion differs from expulsion in two important procedural respects. First, a prospective member must be excluded, while a member who has taken his seat must be expelled.[62] Second, a prospective member may be excluded by a simple majority, while a seated member must be expelled by a two-thirds vote. Exclusion and expulsion, then, "are not fungible proceedings."[63] As with expulsion, however, there are definite limitations, both procedural and substantive, on Congress' power to exclude.

A. *Procedural Restraints*

Although a member under threat of expulsion may have a more established right to participate in proceedings brought against him, a prospective member should be given the same procedural rights in an exclusion proceeding.[64] The people's right to be represented by whomever they choose should not be treated cavalierly. Before excluding a prospective member, Congress should afford him not only the right to participate fully in the debate but also whatever procedural rights are needed to prepare a proper defense.

B. *Substantive Restraints*

Exclusion is not included in the list of disciplinary powers in Article I, section 5, clause 2 of the Constitution, but rather is implied in the election provision of clause 1. It is incidental "not to Congressional discipline but to the final authority of Congress over the process of its Members' elections."[65] The framers of the Constitution provided for exclusion by a simple

62. See text accompanying notes 60-61 supra.

63. Powell v. McCormack, 395 U.S. 486, 512 (1969).

64. See notes 18-21 supra and accompanying text. Brigham H. Roberts, who was excluded from the 56th Congress for polygamy, was permitted to speak in his own defense (1899). 1 Hinds, supra note 20, § 474. During the committee hearings on his exclusion, Adam Clayton Powell requested that he be given "(1) notice of the charges pending against him, including a bill of particulars as to any accuser; (2) the opportunity to confront any accuser, to attend all committee sessions where evidence was given, and the right to cross-examine all witnesses; (3) public hearings; (4) the right to have the Select Committee issue its process to summon witnesses for his defense; (5) and a transcript of every hearing." The Committee stated that it had given Powell notice of the matters it would investigate, that he and his counsel could attend all hearings and that the committee would call witnesses on Powell's written request and supply a transcript. Hearings on H.R. Res. 1 Before the Select Committee Pursuant to H.R. Res. 1, 90th Cong., 1st Sess. 54-59 (1967). See also Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 675 n.13 (1968).

65. Congress and the Public Trust, supra note 8, at 204.

majority vote,[66] an indication that they considered exclusion a relatively limited power, with limited potential for abuse and political factionalism.[67] The grounds for exclusion specified in the Constitution relate to a member's eligibility for office, and to the validity of his election, rather than to his personal conduct. Congress, however, has not always respected the constitutional limits on its power to exclude.

1. Grounds for Exclusion

Article I of the Constitution mentions three standing qualifications for membership in Congress: age, citizenship and residency. Section 3 of that article provides that "[n]o 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." As for the House of Representatives, Article I, section 2 provides: "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." A fourth constitutional requirement, as noted by the Supreme Court in *Roudebush v. Hartke*[68] is that the member be elected.[69]

In addition to the *qualifications* for Congressional membership listed in the Constitution, it has been argued that the Constitution also lists certain *disqualifications* for membership.[70] Thus, a person is disqualified from membership in Congress if he has been impeached,[71] if he holds any other office under the United States,[72] if he was elected by a state not having a republican form of government,[73] if he refuses to take an oath or affirmation to support the Constitution,[74] or if after taking such an oath to support

66. Prior to 1787, English and colonial antecedents support the conclusion that both expulsion and exclusion could be effected by a majority vote. See Powell v. McCormack, 395 U.S. 486, 536 (1969).

67. See the remarks of James Madison in the text accompanying note 28 supra.

68. 405 U.S. 15 (1972).

69. Id. at n.23. The Supreme Court cites the seventeenth amendment as the source of this requirement for membership in the Senate. The same qualification for House membership could be inferred from article I, section 2, clause 1 of the Constitution.

There seems to be some authority that mental capacity may be implied as a fifth qualification. See 1 Hinds, supra note 20, § 441, (Senate investigation of the sanity of a Senator-elect).

70. Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 J. Pub. L. 103, 111-15 (1968), [hereinafter cited as Dionisopoulos].

71. U.S. Const. art. I, § 3.

72. Id. art. I, § 6.

73. See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

74. U.S. Const. art. VI.

the Constitution, he engages in insurrection or rebellion or gives aid and comfort to the enemy.[75] Although in *Powell*, the Supreme Court refused to rule whether any or all of these disqualifications were in fact negative requirements for membership,[76] there seems to be ample textual evidence to conclude that they were intended to be.[77] Congress has in the past relied on these "disqualifications" in excluding a member-elect. Thus, Representative Vandever was excluded because he accepted another office under the United States;[78] Victor Berger was held not qualified to take his seat in the House of Representatives because he allegedly gave aid and comfort to the enemy after having taken an oath to support the Constitution;[79] and William Fishback and Elisha Baxter of Arkansas were denied Senate seats because at the time no republican government could be reestablished in Arkansas due to the continuation of armed hostilities.[80] Although there seems to have been no case where an elected Senator or Representative had been previously impeached or refused to take the oath to support the Constitution, the credentials of Senator Smoot of Utah were challenged because he allegedly had already taken a religious oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator."[81]

2. Exclusion Generally Does Not Involve Questions of Personal Misconduct

One difference between exclusion and expulsion is readily apparent: the grounds for exclusion should rarely cause a house of Congress to inquire into a prospective member's personal misconduct.[82] Either house of Congress would be hard put to justify a character investigation under the guise of determining proper age, citizenship or residency. Whether an elected

75. Id. amend. XIV, § 3.

76. Powell v. McCormack, 395 U.S. 486, 520 n.41 (1969).

77. See Hobbs, supra note 16, at 147-48.

78. Vandever had become a colonel of the Ninth Regiment Iowa Volunteer Infantry. 1 Hinds, supra note 20, § 504. For a discussion of other instances where accepting other offices disqualified one from being a member of Congress, see Dionisopoulos, supra note 70, at 111-13.

79. (1919). Id. at 115.

80. (1864). Senate Cases, supra note 36, at 35.

81. (1903). Id. at 98.

82. Another difference might involve the evidence needed to prove each type of allegation. Generally, although by no means always, the relevant evidence needed in an exclusion proceeding will be documentary proof of age, citizenship and residency. In expulsion cases, the evidence required will usually be more elaborate, involving testimony of witnesses as in a courtroom. See 1 Hinds, supra note 20, §§ 424-25, for an instance where the House of Representatives permitted "parol evidence to prove the naturalization of a Member who could produce neither the record of the court nor his certificate of naturalization." Id. at § 424.

representative has been previously impeached, holds a second government job or refuses to take the oath of office are likewise questions requiring rather limited inquiry. Even Congress' little-used power to refuse admission to representatives of states not having a republican form of government could not reasonably support an investigation into personal misconduct of these representatives, but only into the governmental structure under which they were chosen. In all of these instances, exclusion is used to enforce the eligibility requirements listed in the Constitution but not to discipline a member-elect for personal misconduct.

There are two exceptions to this rule, however. In determining whether to exclude a member-elect who has not been properly elected or who has given aid and comfort to the enemy in contravention of his oath, Congress may have to judge personal misconduct. On several occasions, Congress, as supreme board of elections, has investigated suspected misconduct of a winning candidate.[83] In the cases of Frank L. Smith of Illinois and William S. Vare of Pennsylvania, the Senate went so far as to refuse them their seats because of the exorbitant amount of money spent in their campaigns.[84] Victor Berger was excluded because his pacifist activities allegedly gave aid and comfort to the enemy in contravention of his oath.[85] In these instances, the power to exclude was used as a disciplinary sanction. It should be noted, however, that these exceptions do have a narrow scope. For instance, in order to exclude a winning candidate for election improprieties, the exclusion must result from misconduct that directly affected the election, such as fraud or bribery.[86] It would be impermissible for Congress to inquire into a candidate's conduct not directly connected with the election.

3. Congress' Power to Require Qualifications for Membership in Addition to Those Listed in the Constitution

In *Powell v. McCormack* the Supreme Court clearly held that neither Congress nor any house thereof can establish qualifications in addition to those already contained in the Constitution.[87] The history of the debates at the Constitutional Convention gives some support to this interpretation. At the Convention, a committee report proposed that Congress should have

83. See, e.g., Senate Cases, supra note 36, at 142-44.

84. (1926). Id. at 119-23.

85. (1919). See Dionisopoulos, supra note 70, at 115.

86. See Senate Cases, supra note 36, at 124. The Senate exonerated Arthur R. Gould of all charges of fraud and stated that "the transaction had no relation to his election to the Senate."

87. 395 U.S. 486, 550 (1969).

Similarly the states may not impose additional qualifications on Congressional eligibility, see 1 Hinds, supra note 20, §§ 413-17.

the power "to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."[88] Gouverneur Morris moved to strike out the words "with regard to property," thus in effect permitting Congress to establish any qualifications it deemed expedient.[89] Madison objected, arguing that if Congress could establish qualifications, "it can by degrees subvert the Constitution . . . by limiting the number capable of being elected. . . . Qualifications founded on artificial distinctions may be devised by the stronger, in order to keep out partisans of a weaker faction."[90] When the issue came to a vote, Madison's position prevailed by a vote of seven states to four. Similarly, the Convention defeated the property qualification by a vote of seven states to three.[91]

In denying Congress the power to establish discretionary qualifications for members, the framers were following earlier state constitutional precedents. Although prior to 1787 state constitutions specified many qualifications for membership in the legislature (such as age, residence, religion, property, etc.) there is "no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution."[92]

Subsequent history also strengthens this conclusion. At least four constitutional amendments have been proposed which would add to the qualifications specified in the Constitution.[93] Clearly if Congress already had the power to set its own qualifications, there would be little reason to attempt to amend the Constitution.

In summary, although in certain limited situations exclusion serves a disciplinary function, exclusion is more an incident of Congress' power as supreme board of elections than of its power as guardian of congressional ethics.

C. *Exclusion Cases in the Senate and the House of Representatives*

Both houses of Congress, but particularly the House, have tended to view exclusion as a wider disciplinary power than a close study of the Constitutional provisions would warrant.

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88. Warren, supra note 28, at 418.

89. Id. at 420.

90. Id.

91. Id. at 421.

92. Id. at 423. For authority that Congress was given unlimited power to fix qualifications by the Constitution, see id. at 423-24 n.1.

93. Id. at 421 n.1. One was to make officers and stockholders of the Bank of the United States ineligible, three were to make government contractors ineligible.

1. Senate

As supreme board of the election of its members, the Senate has properly investigated the election conduct of various Senators-elect. For instance, in 1926, the Senate excluded two Senators-elect for exorbitant campaign expenditures[94] and, in 1946, investigated charges of racism in Theodore Bilbo's successful campaign to be elected Senator from Mississippi.[95]

In another context, the Senate by a majority vote in 1868 refused to permit Phillip F. Thomas of Maryland to take his seat because he had " 'voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States.' "[96] Although there was no evidence of a prior oath, the language of the fourteenth amendment disqualifying one who gives aid and comfort to the enemy in contravention of his oath would probably permit this use of the exclusion power.

There was less justification, however, for the attempted exclusion of Senator William Langer of North Dakota in 1942.[97] By a vote of 13 to 3, the Senate Committee on Privileges and Elections voted to exclude Langer after hearings on charges of moral turpitude embracing kickbacks, acceptance of a bribe, and conversion of proceeds of legal settlements. The full Senate, however, rejected its committee's resolution to exclude. The Constitution does not permit a house to refuse to seat a member for these reasons. Even to allow a Senate committee to assume jurisdiction of such a case was improper.

2. House of Representatives

The House of Representatives' use of the exclusion power has generally been more questionable than the Senate's. Three examples will bear this out. In 1870 Representative B.F. Whitemore, who had resigned when censured by the House for selling appointments to a military academy, was excluded after his reelection in a special election.[98] Brigham Roberts was excluded in 1899 for polygamy,[99] and Adam Clayton Powell was excluded in 1967 for various offenses, including the misuse of public funds and the making of false reports on the expenditures of foreign currency to the Committee on House Administration.[100] In each of these cases, the House unconstitutionally excluded a member-elect for ethical reasons.

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94. See text accompanying note 84 supra.
95. Senate Cases, supra note 36, at 142-44. See also Getz, supra note 2, at 97.
96. Senate Cases, supra note 36, at 40.
97. Id. at 140-41.
98. 1 Hinds, supra note 20, § 464.
99. Id. §§ 474-80.
100. Powell v. McCormack, 395 U.S. 486, 492 (1969). The Powell case was unfortunately

III. PUNISHMENT

Article I, section 5, clause 2 of the Constitution provides: "Each House may . . . punish its Members for disorderly behavior . . . ." Of the three disciplinary powers available to Congress, the power to punish for disorderly behavior is the broadest in scope but the least drastic in effect.

A. *Types of Punishment*

Before proceeding with a discussion of the grounds for punishing a member, the types of permissible punishments should be catalogued.

1. Censure

By far the most common method of Congressional punishment is the censure. Although in form a mere resolution of the particular house reprimanding the member for his misconduct, the censure is not an innocuous sanction, having contributed to subsequent election defeats of various members.[101] In all, twenty-three members of Congress have been censured, fifteen in the House and eight in the Senate.[102]

2. Suspension

Unlike exclusion and expulsion, suspension entails only a temporary loss of floor privileges (including the right to vote) but not a member's seat itself.[103] The only recorded instance of an attempt by the Senate to suspend members occurred in 1902 when Senators McLaurin and Tillman were censured for fighting on the floor of the Senate.[104] Suspension poses some special problems which have undoubtedly limited its use. During the period of suspension, a member's constituents are deprived of the services of their representative without the power to send someone else in his place. Suspension then robs a segment of the population of its right to congressional representation.[105]

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clouded with charges of indiscretions in the Congressman's private life, and with countercharges of racism and discrimination.

101. For example, censure was a contributing factor in the election defeats of Senators Hiram Bingham (1932) and Thomas Dodd (1970).

102. See Getz, supra note 2, at 84-89.

103. See 2 Hinds, supra note 20, § 1665.

104. See id. Recently a House committee recommended that a member be stripped of his voting rights. See text accompanying note 2 supra.

105. The seriousness of suspension was emphasized by a statement made by a President Pro Tempore of the Senate: "The chair desires to say that on Monday last he requested the clerks not to call the names of the two Senators from South Carolina, they being by a resolution of the Senate in contempt of the body. On Tuesday he requested the clerks to read the names in the event there was a roll call. He did this not because he doubted in the least the

3. Imprisonment

It has been argued that "[t]raditional forms of punishment used in criminal law were probably within the contemplation of the framers when they used the term 'punish' . . . ."[106] Although imprisonment has never been used by Congress, the Supreme Court has remarked that in a proper case imprisonment of a member would be a permissible punishment.[107] Since certain activities of a Senator or Representative are insulated from the courts,[108] Congress should have the power to adjudicate and punish criminal violations in these protected areas. Of course, imprisonment of a member would prevent him from carrying out his duties to his constituents and raise problems similar to those discussed under suspension.

4. Fine

Prior to 1969, no member of either the House or the Senate had ever been fined or lost his salary. In the Powell imbroglio, however, the House imposed a $25,000 fine and ordered it paid by monthly salary deductions of $1,150.[109] The power to fine is a traditional penal sanction and reasonably inferable from the power to punish. It may be a particularly appropriate punishment where a member would not be affected by the more traditional vote of censure.

5. Loss of Seniority

The loss of seniority is a severe punishment for a Senator or a Representative. "[Seniority] is more than a means of choosing committee chairmen; it is a means of assigning members to committees, of choosing subcommittee chairmen and conference committee members. It affects the deference shown legislators on the floor, the assignment of office space, even invitations to dinners."[110] Two types of seniority, however, must be distinguished. There is general congressional seniority and party seniority. Only office assignments depend on congressional seniority; party seniority determines committee chairmanships and assignments.[111] Thus when Adam

propriety of the action he took on Monday. He did it because he recognized that it was a grave question, and he preferred to be in a position where, if it again arose, it could be by him submitted to the decision of the Senate and thus relieve the chair from the responsibility." Id.

106. Congress and the Public Trust, supra note 8, at 210.

107. Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1880).

108. See note 9 supra.

109. Powell v. McCormack, 395 U.S. 486, 563 n.7 (1969).

110. G. Goodwin, Jr., The Seniority System in Congress, in Congressional Reform, Problems and Prospects 178-79 (J. Clark ed. 1965).

111. Congress and the Public Trust, supra note 8, at 207 (footnote).

For example, House committee chairmen are chosen in the following manner. Rule 10 of

Clayton Powell was deprived of his seniority by the full House in 1969, what was taken away was his general House seniority.[112] His party seniority and the chairmanship of the House Education and Labor Committee had previously been taken from him by the House Democratic Caucus.[113] Thus, loss of seniority, while a most effective *party* sanction, is a relatively weak *congressional* sanction.

6. Adverse Publicity

Although not a formal punishment voted by the Senate or House, an investigation of a member's conduct is in itself something of a punishment.[114] The adverse publicity attendant upon such an investigation can seriously damage chances for reelection. Whether he had been ultimately censured or not, the mere investigations into Senator Thomas Dodd's conduct undoubtedly prejudiced his chances for reelection.

B. *Procedural Restraints*

1. Punishment as Compared to Expulsion and Exclusion

The critical difference between the power to punish and the power to expel or exclude lies in the very nature of the penalty. Expulsion or exclusion deprives a member of his seat in Congress, while punishment does not. Like exclusion, however, a simple majority may punish; but unlike exclusion, the Constitution does not specify, beyond the use of the term "disorderly behavior," the reasons for which these punishments may be

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the Standing Rules of the House states: "At the commencement of each Congress, the House shall elect as chairman of each standing committee one of the Members thereof . . . ." In actual fact, the House simply ratifies the decisions which have already been made by the Democrats or Republicans in their respective houses. The sole determining factor in that party determination is seniority. See J. Lindsay, The Seniority System, in House Republican Task Force on Congressional Reform and Minority Staffing, We Propose: A Modern Congress 23 (1966).

112. See H.R. Res. 2, 91st Cong., 1st Sess. (1969).

113. Congress and the Public Trust, supra note 8, at 206.

On January 2, 1965 the Democratic caucus of the House of Representatives had denied seniority rights to Representatives John B. Williams of Mississippi and Albert W. Watson of South Carolina "for having campaigned for Senator Barry M. Goldwater, the 1964 Republican candidate for the Presidency." Goodwin, supra note 110, at 180.

This article does not analyze the nature of party sanctions available to either the Democrats or Republicans in Congress. In addition to depriving a member of seniority in the Democratic or Republican ranks, a party could encourage a primary challenge to the member and limit his access to campaign funds distributed by party campaign committees.

114. Both the Senate and the House of Representatives have established their own ethics committees with power to investigate personal misconduct and recommend appropriate action to the full body. See note 22 supra.

imposed. In fact, the Constitution does not even mention the types or forms of punishment which may be employed by Congress.

2. Due Process Considerations

As with exclusion and expulsion, Congress should not mete out punishment, of whatever form, in an arbitrary fashion.[115] An argument can be made that from the point of view of a member's constituents, the grant of procedural rights in a punishment proceeding is at least as important as in an expulsion or exclusion proceeding. In these latter situations, if convicted, a member will be deprived of his seat, thereby giving his constituents an opportunity to choose a new representative. Punishment, however, will not cause the seat to be vacated, but will undoubtedly curtail a member's effectiveness in Congress and thereby his ability to represent his constituents.

C. *Substantive Restraints*

1. Grounds for Punishment: Prior Misconduct

Congress' reluctance to expel a member for prior misconduct has not prevented it from punishing a member for prior offenses,[116] presumably because punishment of a member for past offenses does not seriously invade the privilege of the people to elect their own representatives. It would seem, however, that Congress should punish a member for prior misconduct only if the offense would have been considered "disorderly behavior" at the time committed.

2. Disorderly Behavior

Article I, section 5 of the Constitution permits each house to punish its members for "disorderly behavior." If the framers of the Constitution left the term "disorderly behavior" purposely vague, both the Senate and House have begun to give it meaning in recently enacted codes of ethics.[117] Standing Rule XLIII of the House of Representatives requires, *inter alia*, that a member conduct himself at all times in a manner which shall reflect creditably on the House; to adhere to the spirit and letter of the rules of the House and its committees; to receive no compensation from

115. For John Quincy Adams' demand for the benefit of sixth amendment protection in a censure proceeding, see 2 Hinds, supra note 20, § 1255. For a description of what procedural rights might be warranted, see text accompanying notes 21-25 supra.

116. Getz, supra note 2, at 90. See 2 Hinds, supra note 20, § 1236; note 33 supra.

117. See the Senate and House Ethics Codes, cited in Congress and the Public Trust, supra note 8, appendix D. The impetus for the creation of the Codes of Ethics dates back to the Senate investigation of Robert Baker in 1964. The cases of Senator Thomas Dodd and Congressman Adam Clayton Powell gave additional urgency to the project. For a brief history of the creation of these Codes, see id. at 216-21.

any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress; to accept no gift of substantial value from any person or organization having a direct interest in legislation before the Congress; to accept no honorarium for a speech, writing or other activity in excess of the usual and customary value for such services; and to keep his campaign funds separate from his personal funds.[118] The House Committee on Standards of Official Conduct is empowered to investigate alleged violations of this code "or of any law, rule, regulation, or other standard of conduct applicable to the conduct of [a] Member . . . in the performance of his duties or the discharge of his responsibilities . . . ."[119] After such investigation it may recommend appropriate action to the full House.

The Senate's Select Committee on Standards and Conduct is empowered to receive all "complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as Members of the Senate . . . ."[120] It may also recommend appropriate disciplinary action to the Senate as a whole.[121]

If these codes of ethics signal the beginning of a definition of "disorderly behavior," three things should be noted. First, the rules of both the House and Senate permit punishment of a member for conduct which might reflect badly on the particular house. In the Senate, it is called "improper conduct which may reflect upon the Senate."[122] In the House, it is called conduct which does not reflect creditably on the House of Representatives.[123] Second, each house may punish for violations of law but only if those violations occur *in the performance of a member's official duties*.[124] Presumably unlawful conduct which is not office-related is not punishable unless it may be considered conduct which tends to discredit a particular house. Third, while the House makes the violation of any of its rules punishable as a breach of its code of conduct,[125] the Senate seems to

118. Id. at 268.

119. Rule XI (19), id. at 271.

120. S. Res. 338 § 2(a), 88th Cong., 2d Sess., 110 Cong. Rec. 16939 (1964), cited in Congress and the Public Trust, supra note 8, at 266.

121. Id.

122. Id.

123. Rules of the House of Representatives, Rule XLIII(1), cited in Congress and the Public Trust, supra note 8, at 268.

124. See Congress and the Public Trust, supra note 8, at 228-30.

125. See Rules of the House of Representatives, Rule XI(19), cited in Congress and the Public Trust, supra note 8, at 271.

punish only violations of its rules which are office-related.[126] Realistically, however, it might be difficult for a Senator to argue that a violation of a Senate rule was not by its very nature office-related. A study of the actual instances when Congress has punished a member shows that, while both houses have generally followed these guidelines, the Senate and House have on occasion used this power differently.

D. *Punishment Cases in the Senate and House of Representatives*

1. Senate

In the Senate, punishment for "disorderly behavior" has almost universally been for conduct which, while not unlawful, reflects badly on the Senate or violates its rules. In addition, the proscribed conduct has almost exclusively taken place in the Senate itself or in one of its committees. Thus in the eight cases of senatorial censure, four Senators were punished for fighting on the floor of the Senate,[127] one for revealing confidential information,[128] and one for placing a paid lobbyist on the staff of a subcommittee.[129] The last two Senators to be censured were Senators Joseph McCarthy in 1954, and Thomas Dodd in 1967.

Senator McCarthy was censured on two counts: (a) for his noncooperation with and abuse of the Subcommittee on Privileges and Elections of the Committee on Rules and Administration during a 1952 investigation of his conduct as a Senator and (b) for abuse of the Select Committee to Study Censure.[130] Senator Dodd was censured because his conduct was supposedly contrary to accepted morals, detracted "from the public trust expected of a Senator," and tended "to bring the Senate into dishonor and disrepute."[131] The censure resolution also alleged that he had "[exercised] the influence and power of his office . . . to obtain, and use for his personal benefit, funds from the public through political testimonials and a political campaign. . . ."[132] Dodd represents the only Senator censured for conduct which was not directly connected with the workings of the Senate.

126. See S. Res. 338 § 2(a)(1), 88th Cong., 2d Sess., 110 Cong. Rec. 16939 (1964), cited in Congress and the Public Trust, supra note 8, at 266.

127. Thomas H. Benton of Missouri and Henry S. Foote of Mississippi (1850), Senate Cases, supra note 36, at 15-16; John L. McLaurin and Benjamin R. Tillman of South Carolina (1902), id. at 94-97.

128. Benjamin Tappan of Ohio (1844), id. at 11-13.

129. Hiram Bingham of Connecticut (1929), id. at 125-27.

130. Id. at 152-54.

131. Congress and the Public Trust, supra note 8, at 226.

132. Id. at 226-27.

2. House of Representatives

While the Senate censures for conduct which reflects discredit upon that body, the House has usually censured members for conduct which was both illegal and office-related. Of the fifteen instances of House censures, six cases have involved either bribery or the sale of appointments to military academies.[133] In all of these cases, the House committee investigating the facts voted or would have voted to expel; the full House chose rather to censure.[134] Two Representatives have also been censured for speaking allegedly treasonable words.[135] The House, however, has in some cases censured for conduct which tends to discredit it. These cases have generally involved the use of unparliamentary language;[136] one Representative, however, was censured for having placed an obscene letter in the Congressional Record.[137] As for types of punishment other than censure, the House has fined and stripped one of its members of seniority for allegedly misusing public funds.[138]

IV. Conclusion

From this analysis, it is clear that definite procedural and substantive rules do exist to guide Congress in the exercise of each of its disciplinary powers. Members are in no sense at the "unbridled discretion" of their colleagues. Congress has begun to show increased sensitivity towards criticism of the conduct of its members, and recent instances of alleged misconduct by certain members of Congress may result in Congress' disciplining members more frequently than in the past. Thus the limitations on Congress' power to expel, to exclude and to punish are likely to come under increased scrutiny.

133. See Getz, supra note 2, at 86 (Table I).
134. Id.
135. 2 Hinds, supra note 20, §§ 1253-54.
136. Id. §§ 1246-49, 1251.
137. Getz, supra note 2, at 85.
138. See text accompanying notes 109, 112 supra.