

CRS Report for Congress

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Status of a Member of the House Who Has Been Convicted of a Felony

Jack Maskell
Legislative Attorney
American Law Division

Summary

Members of Congress do not automatically “forfeit” their offices upon conviction of a crime which constitutes a felony. There is no constitutional disability or disqualification from Congress for conviction of a crime, other than for certain treasonous conduct. Members of the House are, however, instructed not to vote in committee or on the House floor once they have been convicted of a crime the punishment for which may be two or more years imprisonment. Furthermore, under party rules, Members may lose their chairmanships of committees or ranking member status upon conviction of a felony. Conviction of certain crimes may, and has in the past, subjected Members of the House to internal legislative disciplinary proceedings, including resolutions of “reprimand” and “censure,” as well as “expulsion” from the House upon approval of two-thirds of the Members. Neither expulsion nor conviction of a crime (unless it were for certain national security offenses) would lead to the forfeiture of a Member’s federal pension.

This report provides a brief overview of the potential consequences, with respect to a Member's congressional status, that may follow when a sitting Member of the House of Representatives is convicted of or pleads guilty to a crime which is a felony offense.

Service in Congress by a Convicted Felon: Qualifications for Holding Office. Conviction of a felony crime does not constitutionally “disqualify” one from being a Member of Congress, nor from being a candidate for a future Congress, unless that conviction is for certain treasonous conduct.¹ There are three, and only three qualifications for congressional office set out in the United States Constitution at Article I, Section 2, clause 2 for Representatives (and Article I, Section 3, clause 3 for Senators):

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

age, citizenship, and inhabitancy in the State when elected. These qualifications for office established within the Constitution are the *exclusive* qualifications to be a Member of Congress, and may not be altered or added to by Congress or by any State unilaterally.² Once a person meets those constitutional qualifications, that person, if elected, is constitutionally “qualified” to serve in Congress, even if a convicted felon.

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.³ The people voting in a district or State, rather than the institutions of Congress, the courts, or the executive, were meant to control their own decisions concerning their representation in the federal legislature.

Refraining from Voting in Congress. Although the office of a Member of Congress is not automatically forfeited upon conviction of a felony, a sitting Member of the House of Representatives convicted of an offense which has a possible penalty of two or more years imprisonment should, under House Rules XXIII (10), “refrain from participation in the business of each committee of which he is a member, and a Member should refrain from voting” on any question on the floor of the House until his or her presumption of innocence is restored, or until the individual is reelected to Congress. The Rule is phrased in advisory and not mandatory language because the House has raised issues concerning its authority to mandatorily “suspend” a Member from voting by a process less than an expulsion.⁴ Members of the House, however, are explicitly instructed to follow both “the spirit and the letter” of the House Rules (Rule XXIII (2)), and Members are expected to abide by the abstention rule.

Committee Chairmanships. In addition to the House Rule instructing Members convicted of certain crimes to refrain from House committee and floor participation, the rules of the Democratic and Republican parties in the House of Representatives have generally provided that a Member who has been convicted of a felony for which a sentence of two years or more may be imposed (or who has been censured by the House) loses his or her committee chairmanship. *See*, for example, Preamble and Rules of the House

² *Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001). *Note Powell, supra*, 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* 249-250.

³ 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, supra* at 528, 527-536, discussing influence on Framers of England’s “Wilkes case” and the “long and bitter struggle for the right of the British electorate to be represented by men of their own choice.”

⁴ Although early authorities indicated that the power to suspend a Member was an inherent authority “analogous to the right of expulsion” (*see Cushing, Law and Practice of Legislative Assemblies*, Section 627, at 251 (9th ed. 1874)), substantive issues have been raised concerning the power of the House to do this by a simple majority. *See, Deschler's Precedents*, Chapter 12, § 15, H. Doc. No. 94-661, 94th Cong., 2d Sess. 187 (1976), noting that the “House [has] indicated its more recent view that a Member could not be deprived involuntarily of his right to vote in the House.” Mandatory suspension, Members agreed, would “deprive the district, which the Member was elected to represent, of representation” *See 121 Cong. Rec.* 10341, April 16, 1975.

Democratic Caucus, Rule 51 (1997); Rules of the House Republican Conference, Rule 27 (1997).

Congressional Discipline. Conviction of a crime may subject, and has in the past subjected, a Member of the House to internal disciplinary action, including a resolution for “reprimand” or “censure” of the Member, up to and including an “expulsion” from Congress upon a two-thirds vote of the Members of the House present and voting. Each House of Congress has the express authority, under Article I, Section 5, clause 2 of the Constitution to punish a Member for “disorderly Behaviour,” and with the concurrence of two-thirds, to expel a Member. The more recent practice in the House of Representatives has been, in cases of conviction of a Member of crimes which relate to official misconduct, not to wait until all appeals are exhausted, but to take cognizance of the underlying *factual* findings of a judicial proceeding where guilt of a Member was established, regardless of the potential *legal* or procedural issues which may be raised and resolved on appeal.⁵ The Rules of the House Committee on Standards of Official Conduct, the House’s standing “ethics” committee, specifically provide, in fact, for automatic jurisdiction of the Committee when a Member has been convicted in a Federal, State, or local court of a felony.⁶

There are no specific guidelines as to what are 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 for misconduct which the membership finds to be worthy of censure, reprimand, or expulsion from Congress. When the most severe sanction of expulsion has been employed in the House, however, the conduct has historically involved either disloyalty to the United States, or the violation of a criminal law involving the abuse of one's official position, such as bribery.

The House of Representatives has actually expelled only four Members (three Members and one Member-elect) in its history, three of whom were expelled during the Civil War period in 1861 for disloyalty to the Union.⁷ The fourth Member of the House to be expelled was Representative Michael J. (Ozzie) Myers, of Pennsylvania, on October 2, 1980, after his bribery conviction for receiving a payment in return for promising to use official influence on immigration bills in the so-called ABSCAM “sting operation” run by the FBI.⁸ While the numbers of actual expulsions from the House are low, some Members

⁵ See discussion in H.R. Rpt. No. 96-1387, 96th Cong. 2d Sess. 4-5, *In the Matter of Representative Michael J. Myers* (1980). Note beginning of Committee proceedings in the case of Representative Flood, even after his original trial for bribery ended with a hung jury. H.R. Rpt. No. 96-856, 96th Cong., 2d Sess. *In the Matter of Representative Daniel J. Flood* (1980). See, generally, CRS Report No. 88-197A, “House Discipline of Members After Conviction But Before Final Appeal,” March 1, 1988 (archived).

⁶ Rules of the Committee on Standards of Official Conduct, Rule 15(d), 19(e).

⁷ See House expulsions of Representative-elect John B. Clark of Missouri (1861), Representative John W. Reid of Missouri (1861), and Representative Henry C. Burnett of Kentucky (1861), for disloyalty to the Union. II *Hinds’ Precedents*, *supra* at §§ 1261, 1262.

⁸ H.R. Rpt. No. 96-1387, 96th Cong., 2d Sess., *In the Matter of Representative Michael J. Myers* (1980); 126 *Congressional Record* 28,953 - 28,978 (October 2, 1980). Representative Myers was
(continued...)

of the House who have been found to have engaged in serious misconduct are not actually expelled because they chose to resign their seats in Congress (or have lost an imminent election), before any formal action is taken against them by the House. In addition to the actual expulsion of Myers in 1980, the committees reviewing Member conduct have recommended to the House the expulsion of other Members involved in such offenses as bribery, illegal gratuities and obstruction of justice, who then resigned before the matter was considered by the full House,⁹ while other Members convicted of crimes resigned their seats even before the completion of committee reviews.

The House of Representatives has taken a broad view of its authority to “censure” or “reprimand” its Members for any conduct which the House finds to be reprehensible, and/or to reflect discredit on the institution, and which is, therefore, worthy of rebuke or condemnation.¹⁰ A censure or a reprimand, where the full House adopts by majority vote a formal resolution of disapproval of a Member, may encompass conduct which does not violate any express law or Rule of the House. In the more recent past, conviction of a crime relating to the misuse of one’s congressional office, including false statements to the United States in a payroll scheme where inflated staff salaries were used to pay private expenses of the Member, has resulted in a “censure” of the Member of the House,¹¹ while a conviction for fraud and false statements with respect to one’s financial disclosure report resulted in a “reprimand.”¹²

Salary. A Member of Congress who is convicted of a crime, and who is then incarcerated, may be required to forego his or her congressional salary for some period of the incarceration. Provisions of the United States Code instruct the Chief Administrative

⁸ (...continued)

expelled after conviction for bribery, conspiracy and violation of the Travel Act.

⁹ Note, e.g., H.R. Rpt. 97-110, 97th Cong., 1st Sess., *In the Matter of Representative Raymond F. Lederer* (1981), and House Committee on Standards recommendation of expulsion for bribery in ABSCAM investigation; and H.R. Rpt. No. 100-506, 100th Cong., 2d Sess., *In the Matter of Representative Mario Biaggi* (1988), convicted of receiving illegal gratuities, obstruction of justice and Travel Act violations. Note also case of Rep. B.F. Whittemore, recommended for expulsion by Military Affairs Committee for sale of Military Academy appointments, who subsequently resigned in 1870, and who was then censured *in absentia* by the House (II *Hinds’ Precedents*, *supra* at § 1273); and House censure of John DeWeese after his resignation (also for the sale of Academy appointments), but before the committee reported the resolution of expulsion. II *Hinds’ Precedents*, *supra* at § 1239. See also expulsion resolutions for bribery, and subsequent resignations of Representatives William Gilbert, Frances Edwards, and Orasmus Matteson, in 1857 (II *Hinds’ Precedents*, *supra* at § 1275).

¹⁰ H.R. Rpt. No. 570, 63rd Cong., 2d Sess. (1914); and H.R. Rpt. No. 27, 90th Cong., 1st Sess., 24-26, 29, *In re Adam Clayton Powell* (1967)(recommending censure).

¹¹ H.R. Rpt. No. 96-351, 96th Cong., 1st Sess., *In the Matter of Representative Charles Diggs, Jr.* (1979), see H. Res. 378 (post-conviction censure).

¹² H.R. Rpt. No. 98-891, 89th Cong., 2d Sess., *In the Matter of Representative George V. Hansen* (1984). Member’s conviction on this charge was eventually rescinded upon Supreme Court decision in a later case, regarding applicability to Congress of the underlying statute.

Officer of the House to deduct from a Member's salary the amount for each day that the Member is absent, except in cases of sickness of the Member or his or her family.¹³

Recall. The United States Constitution does *not* provide for nor authorize the recall of 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. 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.¹⁴ Although the Supreme Court has not needed to directly address the subject of recall of Members of Congress, 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 is one which resides exclusively in each House of Congress as established in the expulsion clause of the United States Constitution, 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 the term of a United States Senator or Representative.¹⁵

Re-election. As discussed above concerning qualifications to hold office, conviction of a felony offense is not a constitutional bar to election or re-election, nor is congressional censure or expulsion a permanent disability to hold congressional office in the future. A convicted felon who has also been disciplined by Congress may run for and, in theory, be re-elected to Congress, and may not be "excluded" from Congress if such person meets the constitutional qualifications for office and had been duly elected.¹⁶ Once a Member is seated, however, that Member may be subject to discipline by the House. Although the *authority* for each House of Congress to discipline by means such as

¹³ 2 U.S.C. § 39.

¹⁴ 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); *see* Cronin, *Direct Democracy, The Politics of Initiative, Referendum, and Recall*, at 129 (Harvard University Press 1989).

¹⁵ *Burton v. United States*, 202 U.S. 344, 369 (1906); *U.S. Term Limits, Inc. v. Thornton*, *supra* at 800-802 (under 10th Amendment States can not "reserve" a power which the States never possessed); *Cook v. Gralike*, 531 U.S. 510 (2001); *note, e.g., Biennial Report and Opinions of the Attorney General of the State of Oregon* 313, (April 19, 1935): "Should this [state] constitutional amendment be so construed as applying to the recall of a Representative in Congress it would to that extent be inoperative."

¹⁶ *Powell v. McCormack*, *supra*. While the Constitution governs qualifications to hold federal office, the States generally regulate qualifications to vote in those elections (Article I, Sec. 2), and thus a convicted felon may run for federal office, but might be barred by State law from voting in that election.

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 that individual as their representative in Congress.¹⁷ However, both the House and the Senate have otherwise disciplined a Member even after re-election, such as through *censure*, for past misconduct even if known to the electorate.¹⁸

Pensions. Officers and employees of the United States, including Members of Congress, do not, upon conviction of every crime or felony, forfeit the federal pensions for which they qualify and the retirement income that they have accumulated, except if the officer or employee is convicted of a crime which relates to espionage, treason or other national security offenses against the United States expressly designated in the so-called "Hiss Act."¹⁹ A person convicted of a crime may generally be subject to incarceration and a monetary fine, and in the case of a federal official, such as a Member of Congress, may be liable in an action to recover sums of monies improperly received under a theory of "constructive trust."²⁰ There is at this time no additional penalty imposed, such as forfeiture of one's retirement income, over and above relevant fines, restitution and imprisonment relating to the specific offenses involved. As to forfeiture of federal pensions for federal officers and employees, the nature of the offense is controlling, and it does not appear to matter if the individual resigns from office prior to or after indictment or conviction, or is expelled from Congress, or in the case of federal executive officers (other than the President),²¹ if the officer is impeached and removed.

¹⁷ See discussion in *Constitution, Jefferson's Manual and Rules of the House of Representatives*, § 64; H.R. Rpt. No. 570, 63rd Cong., 2d Sess. (1914), 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).

¹⁸ H.R. Rpt. No. 27, 90th Cong., 1st Sess., *supra* at 27.

¹⁹ See now 5 U.S.C. § 8311 *et seq.* The provisions of this law concerning forfeiture of pensions apply at 5 U.S.C. § 8312 to convictions for such offenses as, for example, harboring or concealing persons; gathering or transmitting defense information; disclosure of classified information; espionage; sabotage; treason; rebellion or insurrection; seditious conspiracy; perjury in relation to those offenses; and other offenses relating to secrets and national security.

²⁰ See *United States v. Podell*, 572 F.2d 31 (2d Cir. 1978).

²¹ 3 U.S.C. 102, note, P.L. 85-745, as amended.