



# The Constitutionality of Censuring the President

March 12, 2018

House Democrats have [introduced](#) a resolution that, if approved by the House, would formally “censure and condemn” President Trump for disparaging comments on immigration issues he allegedly made during a meeting with Members of Congress. This is the [second](#) presidential “censure” resolution introduced in the House this Congress. While each house of Congress has authority to [discipline](#) its own Members through censure, [congressional censure of the President](#) is rare. For that reason, there seems to be a [recurring question](#) as to whether Congress has the constitutional authority to adopt such a measure at all. As discussed below, it would appear that Congress may censure the President through a simple (one chamber) or concurrent (two chamber) resolution, or other non-binding measure, so long as the censure does not carry with it any legal consequence. This Sidebar will discuss examples of congressional censure of the President before addressing its constitutional validity.

While *Black’s Law Dictionary* defines censure as “an official reprimand or condemnation...,” in practice, there is no clear rule for determining the legislative actions that may qualify as a “censure” of the President. Viewed broadly, censure of the President could include any legislative measure formally adopted by the House or Senate that expresses that body’s disagreement with specific presidential conduct. Using this definition, the first congressional censure of the President seemingly occurred in 1834 after President [Andrew Jackson](#) removed his Treasury Secretary for refusing to withdraw government deposits from the Bank of the United States. The approved Senate resolution stated that President Jackson had “assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both.” The Jackson resolution was subject to some debate, and three years later—once the President’s supporters regained control of the Senate—the resolution was officially expunged from the Senate Journal. Similarly, in 1842, the House adopted a committee report that contained language criticizing President [John Tyler’s](#) use of the veto, accusing him of a “gross abuse of constitutional power” by which he had “assumed...the whole legislative power to himself...” Other possible examples of presidential censure under this definition are discussed [here](#).

Viewed narrowly, however, censure may be limited to those instances in which a house of Congress adopts a resolution not only stating its disagreement with presidential conduct, but also announcing that it finds the conduct worthy of an explicit and official reprimand. Using this definition, the only previously approved presidential censure appears to have occurred in 1860 when the House adopted a resolution stating that [President James Buchanan](#) deserved the “reproof of this House” for awarding federal contracts

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Foreword by Alan S. Frumin

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to party loyalists. If adopted, the proposed censure of President Trump appears to fall into this category, as it would [expressly](#) “censure and condemn” the President.

Although historical practice can be [informative](#) in interpreting the powers of the branches, the fact that the House or Senate has previously censured the President does not necessarily make that act constitutional. The general arguments [against](#) Congress’s authority to censure the President, which have been made both inside and outside of Congress, can generally be reduced to three principal assertions. Neither argument, however, appears to prohibit the approval of a non-binding censure resolution, however defined.

***Argument: There is no explicit constitutional authorization for censure.***

It is true that the Constitution does not specifically provide Congress with the authority to censure the President. But Congress wields a number of [implied](#) powers. For example, the Constitution does not explicitly authorize Congress to engage in oversight, conduct hearings, issue subpoenas, or hold witnesses in contempt, but the Supreme Court has nonetheless affirmed that such authority exists. At least in some instances then, the absence of authority does not necessarily equate to a proscription. Moreover, because typical censure resolutions are non-binding expressions of opinion that do not alter legal rights, it is not clear that any constitutional authorization is strictly necessary. Both the House and Senate [routinely](#) pass resolutions expressing the “sense” or viewpoint of the body, without express authority to do so.

***Argument: Impeachment is the exclusive means by which Congress can punish an executive branch official.***

It has been argued that [impeachment](#) is the exclusive means by which the Constitution permits either house of Congress to punish an executive branch official. For example, President Jackson [argued](#) in opposition to his censure that “[i]t is only in the exercise of its judicial powers, when sitting as a court for the trial of impeachments, that the Senate is expressly authorized and necessarily required to consider and decide upon the conduct of the President or any other public officer.” This argument appears to misconstrue the role of impeachment and its relationship to censure. Impeachment is “exclusive” in two ways, neither of which appear to implicate censure. First, impeachment is the exclusive means by which Congress may [remove](#) an executive branch official. Second, in exercising the impeachment power, Congress may impose no additional “[judgment](#)” (or punishment) beyond removal from office and/or disqualification from holding future office. While censure may sometimes be viewed as an alternative to impeachment, it is entirely separate from that constitutional process. Censure is not an attempt to remove an official, and it is not a “judgment” resulting from an impeachment proceeding. Thus, it does not appear that the impeachment provisions should be read as prohibiting the use of censure resolutions.

***Argument: A censure resolution violates the Bill of Attainder Clause.***

Finally, it has also been argued that presidential censure violates the Constitution’s prohibition on bills of attainder. The Supreme Court has generally described the [Bill of Attainder Clause](#) (Clause) as prohibiting legislatively imposed “punishment” on an identifiable individual or group. The primary question appears to be whether a nonbinding censure qualifies as a prohibited form of legislative “bill” that imposes “punishment.”

A “bill” in the [procedural](#) and [constitutional](#) sense is the legislative vehicle used by the House and Senate to enact laws. All bills must comply with the [constitutional](#) lawmaking process, meaning the measure must be approved by both the House and the Senate and sent to the President for his signature or veto before taking effect. Simple resolutions and concurrent resolutions (as opposed to joint resolutions) are not bills, and need not comply with the constitutional process. The Supreme Court appears to concur with this understanding of “bill” in the Clause, concluding in *Nixon v. GSA* that a bill of attainder is “a law” imposing legislative punishment on an identifiable individual. To the contrary, proponents of the position that the Clause applies to a variety of legislative vehicles, including resolutions, may point to a passage from *United States v. Lovett* in which the Supreme Court suggested that the Clause applies to all

“legislative acts, no matter what their form...” However, *Lovett* was a case involving a congressional attempt to limit the use of federal funds to pay the salaries of specific federal employees. Rather than expanding the scope of the Clause beyond laws to cover other legislative vehicles, the cited passage appears to have been made in order to suggest that the Clause covers both substantive legislation and enacted appropriations. The Court has at times viewed the lawmaking power broadly, for example, [holding](#) that a congressional investigation “is not a law,” but is “nevertheless...part of lawmaking.” More recently, however, “legislative acts” have been [viewed](#) as those that “alter legal rights and obligations,” which a simple or concurrent resolution does not, and indeed cannot, do. Therefore, it would appear that a censure in the form of a one house resolution, concurrent resolution, or report language may not qualify as either a “bill” or a “law,” as it would not be presented to the President, and in the case of a one house resolution or report, would not be passed by both houses of Congress.

Even assuming for argument that the Clause covers such resolutions, it does not appear that a censure resolution could be viewed as imposing “punishment,” since it lacks legal force and generally announces only the view or opinion of one house of Congress. Non-tangible harm, such as the reputational injury that might result from a public censure by the House or Senate, is not the type of harm generally viewed as punishment for purposes of the Clause. Instead, the Court has described historically prohibited forms of punishment under the Clause as imprisonment, banishment, confiscation of property, or barring participation in specific employment. It may be argued, however, that a concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*, which suggested that “the classic bill of attainder was a *condemnation* by the legislature....” supports a conclusion that a mere reprimand could constitute punishment. That statement, however, was dicta, and made during a discussion in which the concurring Justice made the seemingly sweeping claim that the Clause should be read to prohibit not only acts by the legislature, but also by the Executive. Yet, there are limited examples in which the judiciary, in the absence of more traditional forms of punishment, has [applied](#) a “functional” or “motivational” approach to determine whether an act imposes punishment. Under these more flexible tests, it would seem an argument could be made that a resolution that explicitly reprimands or condemns the President is likely intended to punish. But under either test, the [Court](#) has not found a violation of the Clause when the law “can be said to further nonpunitive legislative purposes.” It would appear that even when a resolution contains language of an explicit reprimand, the body may be able to articulate a legitimate reason for the censure, such as ensuring that the body’s position is known or to dissuade the President from engaging in similar conduct in the future.

The bill of attainder analysis may change, however, depending on the legislative vehicle and actual consequence of any given censure measure. If, for example, Congress was able to enact a law or joint resolution that censured the President while also imposing some additional tangible punishment—[such as a fine](#)—that measure may qualify as a “bill” that imposes “punishment” in violation of the Clause.

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