Punishing Disorderly Behavior in Congress:
The First Century
An Introductory Essay
By Don Wolfensberger
For the Congress Project Seminar
"Congressional Ethics Enforcement:
Is Congress Fulfilling Its Constitutional Role?"
Tuesday, January 16, 2006

> *The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue, the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.*
>
> --James Madison
> *The Federalist Papers*, No. 57

James Madison, the chief draftsman of the Constitution, agonized publicly and perpetually about the foibles, frailties, and failings of man and how they could be reconciled with the concept of self-government. In addition to the lines cited above, Madison gave us the famous lines in Federalist No. 51 to the effect that if men were angels we wouldn't need government, and if we were governed by angels, we wouldn't need both internal and external controls on it. "In framing a government which is to be administered by men over men," he continued, "the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Madison's solution for achieving internal control over government was our intricate system of checks and balances and separated powers (though critics like Woodrow Wilson would later complain that the Madisonian system was far too constraining for effective governance). Nevertheless, Madison considered these "auxiliary precautions" essential to preventing too much power accreting in one place: "Ambition must be made to counteract ambition."

Even within Congress the two houses would serve as a check on each other. And within each house internal controls were needed to keep Members virtuous and to protect the integrity and reputation of the institution. This would be done through a system of

rules and processes for disciplining Members. Congress's early development of self-protection mechanisms is instructive in telling us about the nature of perceived threats to the institution and how well Congress dealt with them.

Constitutional Meanings

The Framers of the Constitution understood this need for internal preservation and protection when they provided in Article I, section 5 that, "Each House may determine its rules of proceeding, punish its Members for disorderly behavior, and, with the concurrence of two-thirds, expel a Member." Section 6 gave senators and representatives privilege from arrest, except in cases of treason, felony and breach of the peace, while attending a session, and a privilege against be questioned in any other place for any speech or debate in either House. These privileges did not, however, exempt Members from being punished by their peers for misconduct. Indeed, as one commentary puts it, "…this speech or debate immunity provides a cogent and practical reason for the countervailing authority and responsibility within the Constitution for congressional self-discipline and the necessity for internal enforcement of legislative standards of conduct."[1]

Alexander Hamilton, in *Federalist* No. 59, expressed "the plain proposition" that, "every government ought to contain in itself the means of its own preservation." While he was speaking specifically in that instance about the power of Congress to regulate elections, the maxim applies with equal force to the power of Congress to make rules for its internal preservation and the discipline of Members who threaten the institution's reputation and credibility by their misconduct.

It is not clear from the debates on the Constitution exactly what the Framers had in mind in using the term, "disorderly behavior." The only debate that occurred on the provision was over the vote required to expel a Member. The draft reported by the Committee of Detail on August 6, 1787, provided that "Each House may determine the rules of its proceedings; may punish its members for disorderly behavior; and may expel a member." On August 10, Delegate James Madison moved to amend the provision to provide for a two-thirds vote to expel (instead of the implicit majority vote), observing that "the right of expulsion was too important to be exercised by a bare majority of a quorum and, in emergencies of faction, might be dangerously abused." That motion carried, 10 states to 0, with Pennsylvania divided.[2]

A 1993 House-Senate, bipartisan committee on congressional reform noted in its final report that the practice of internal discipline in a legislature derives from the British Parliament's experience of having to protect its independence and privileges from undue influence or intimidation by the executive:

> In parliamentary practice, the House of Commons has had the right to discipline or "punish its own Members for disorderly conduct" and for other contempts or breaches of the privileges of the House. This authority was concurrent with that of punishing contempt by those who are not Members, and sought to protect the integrity of the legislative institution, and its privileges and functions.[3]

The connection between disorderly behavior and contempt is made clear in the following definition: "Contempt is a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."[4]

When the first Congress convened in 1789, one of the first orders of business for each House was the adoption of their rules and orders of proceeding. The first two rules adopted by the House on April 7 dealt with the "duty of the Speaker," and "Decorum and Debate." Rule I provides in part that the Speaker "shall preserve decorum and order." Rule II provides in part that if a Member "in speaking or otherwise" transgresses the rules, the Speaker or any Member may call the offending Member to order, in which case the Member immediately sits down unless allowed to explain. If appealed to, the House decides the case. If decided in favor of the Member "he shall be at liberty to proceed; if otherwise, and the case require it, he shall be liable to the censure of the House." The same rule also bars Members from voting in conflict situations: "No Member shall vote on any question in the event of which he is immediately and particularly interested…."[5]

On April 16, 1789, the Senate adopted a much briefer rule than the House rule on decorum and debate. It did not include in its rules the prohibition on voting in conflict of interest situations.[6] Thomas Jefferson helped fill-in the gaps in the perfunctory rules adopted by the Senate in the First Congress. As Vice President and thus President of the Senate, Jefferson drafted his own *Manual of Parliamentary Practice for the Use of the Senate of the United States* between 1797 and 1801. Drawing primarily on the precedents of the British House of Commons, Jefferson's parliamentary primer provides

a detailed account of proper and improper behavior and legislative process. Drawing on the British precedents on potential conflicts, Jefferson wrote, "Where the private interests of a Member are concerned in a bill or question he is to withdraw. And where such an interest has appeared, his voice has been disallowed….In a case so contrary, not only to the laws of decency, but to the fundamental principle of the social compact, which denies to any man to be a judge in his own cause, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to."[7]

Some examples from section 17 of Jefferson's Manual on "Order in Debate," follow: "No one is to speak impertinently or beside the question, superfluously, or tediously….No person is to use indecent language against the proceedings of the House….nor to digress from the matter to fall upon the person…by speaking reviling, nipping, or unmannerly words against a particular member….No one is to disturb another in his speech by hissing, coughing, spitting…speaking or whispering to another." Jefferson even had advice for boring speakers: "Nevertheless, if a member finds that it is not the inclination of the House to hear him, and that by conversation or any other noise they endeavor to drown his voice, it is his most prudent way to submit to the pleasure of the House and sit down…."[8]

Jefferson even offers his readers citations from Grey's "Debates in the House of Commons," for "instances of assaults and affrays..and the proceedings thereon." Whenever warm words, or an assault, have passed between members, the house, for the protection of their members, requires them to declare in their places not to prosecute any quarrel or orders them to attend to the Speaker who is to accommodate their differences…and they are put under restraint if they refuse, or until they do."[9]

Some Early Cases

The above quote is the lead section in the chapter on "Punishment of Members for Contempt," in *Hinds' Precedents of the U.S. House of Representatives* covering roughly the first century of House proceedings.[10] While Jefferson's admonitions from British precedents against "hissing, coughing, spitting" usually evoke chuckles, the first precedent to appear in *Hinds*' relating to punishment of Members actually involved an instance in late January 1798 when one member spat on another over a perceived insult and was nearly expelled. A resolution was immediately drafted and called-up in the

House that read simply, "Resolved, That Matthew Lyon, a Member of this House, for a violent attack and gross indecency committed upon the person of Roger Griswold, another Member, in the presence of this House, while sitting, be, for this disorderly behavior, expelled therefrom."

The resolution was referred to a Committee on Privileges by a vote of 49 to 44, with instructions to inquire into the matter and report. The House also adopted another resolution that considered it "a high breach of privilege if either of the Members shall enter into any personal contest until a decision of the House shall be had thereron." On February 1, Congressman Lyon submitted a letter of apology for his actions. The letter was referred to the Committee on Privileges. When the Committee reported back on February 5 a trial commenced at the bar of the House and witnesses were called. On February 12 the House rejected the expulsion resolution and a resolution of censure (both on 52-42 votes). Three days later Griswold took his revenge. Quoting from the precedent:

> On February 15, after prayers, while the Speaker was in the chair and before the Journal was read, Mr. Griswold assaulted Mr. Lyon with a stout cane, the latter being seated, writing. Mr. Lyon got the tongs from the fireplace, and there was an affray, which was with difficulty stopped. The House was so excited that it adjourned presently, no notice being taken of the affair. The next day a resolution was introduced to expel both Members. Then an order was passed that both Messrs. Lyon and Griswold be required to pledge themselves to keep the peace during the session. This they did before the Speaker. The motion to expel was referred to the Committee on Privileges.

The Committee reported back on February 20 with the recommendation that the resolutions of expulsion be disagreed to. The House adopted the report and then rejected a motion that the Members be censured.[11]

While the early published precedents of the House are not necessarily representative of the types of cases considered by the body, it is fair to assume that some effort was made by the Parliamentarian to give as much variety as possible in the examples used. In looking at the chapters in *Hinds' Precedents* on "Punishment and Expulsion of Members" (Chapter XLII) and "Punishment of Members for Contempt" (Chapter LII) it becomes clear that most of the punishments meted out to Members before

the Civil War concerned the disruption of House proceedings by disorderly words or fisticuffs.

The preceding chapter in *Hinds'* (Chapter LI) deals more generally with "The Power to Punish for Contempt." This includes an early instance in which non-members were punished for being in contempt of Congress attempting to bribe Members. The first section begins with a citation from *Jefferson's Manual* describing this early instance of attempted bribery:

> In December, 1795, the House of Representatives committed two persons of the name of Randall and Whitney for attempting to corrupt the integrity of certain Members, which they considered a contempt and breach of the privileges of the House; and the facts being provided, Whitney was detained in confinement a fortnight, and Randall three weeks, and was reprimanded by the Speaker.[12]

The details of the incident are spelled out in five succeeding sections of *Hinds'*. On December 28, 1795, three Members rose from their seats and informed the House that Robert Randall had made "certain overtures to obtain their several support in this House to a memorial intended to be presented by the said Randall, on behalf of himself and others, for the grant of a tract of land containing 18,000 or 20,000 acres bordering on Lakes Erie, Michigan, and Huron." For their support the Members were promised to receive "a consideration of emoluments in lands or money…."

Another Member informed the House that he had also been offered a bribe by Charles Whitney, an associate of Randall's. Since this was the first contempt case of its kind in the Congress, the Committee on Privileges was charged with reporting on "a mode of proceeding." In the interim, the two persons charged were taken into custody by the Sergeant at Arms and held subject to further direction of the House. A trial was eventually held at the bar of the House. Randall was found guilty of being in contempt of the House and was reprimanded by the Speaker on January 5, 1796. He was eventually released from imprisonment on January 12. Whitney was discharged from custody on grounds that his bribery target was a Member-elect who had not yet taken his seat, and that the attempt occurred away from the seat of government.[13]

Corruption in Congress

House precedents do not reflect any charges of Members being investigated or punished for accepting bribes until the middle of the 19th Century. That is not because Congress was peopled by angels prior to that time. Standards were much looser then than today. Members were still citizen legislators who had fulltime outside careers which sometimes conflicted with their legislative duties. For instance, in 1933 Senator Daniel Webster, while on retainer to the Bank of the United States, argued vigorously to protect the it against President Andrew Jackson's attempt to dismantle it. "If it is wished that my relation to the Bank should be continued," Webster wrote to the Bank's president, Nicholas Biddle, "it may be well to send me the usual retainers." Webster was paid $32,000 for his efforts--no small sum in those days.[14]

It wasn't until 1853 that Congress enacted the first statute making it illegal to bribe a Member of Congress.[15] The first charge cited in the precedents of a Member being charged with accepting a bribe occurred in January 1857 when Representative William H. Kelsey of New York called up a resolution in the House citing published reports that several House Members "have entered into corrupt combinations for purposes of passing and of preventing the passage of certain measures now pending before Congress." Kelsey's resolution went on to call for a select committee to be appointed by the Speaker to investigate the charges. The resolution was adopted and the committee appointed. It reported back a month later with resolutions recommending the expulsion of four Members. Three of the accused subsequently resigned their seats before the expulsion resolutions could be voted. The fourth Member was exonerated for lack of sufficient evidence.[16]

The next incident of alleged bribe-taking by a Member mentioned in House precedents occurred in 1870. A resolution reported from the House Military Affairs Committee condemned the action of Representative Roderick R. Butler of Tennessee in nominating to the Military Academy at West Point someone who was not a constituent, and "in subsequently receiving money from the father of said cadet for political purposes in Tennessee, as an unauthorized and dangerous practice." The minority views of four committee members recommended a substitute resolution expelling Butler from the House. The substitute was adopted by majority vote, but fell short on final adoption of

the required two-thirds vote for expulsion. Another resolution was then offered and adopted, similar to the original but with the addition of the words, "…and is hereby censured."[17]

The biggest scandal to rock the government in the 1870s involved the Credit Mobilier corporation, a joint stock company controlled by the Union Pacific Railroad Company. On December 2, 1872, Speaker James G. Blaine of Maine turned the gavel over to Minority Leader Samuel Cox of New York and went to the well of the House to raise a question of privilege regarding published reports that he and other Members had accepted bribes in the form of Union Pacific Railroad stock. The Speaker offered a resolution calling for a five-member select committee to investigate the charges. Although 18 Members reportedly received the bribes in the form of stock from Rep. Oakes Ames of Massachusetts, the committee reported back resolutions recommending the expulsion of just two Members, Ames and James Brooks of New York. The question arose as to whether the House could punish the Members for actions taken five years earlier, prior to their election to the current Congress. The committee concluded that punishment was proper since the offense was not known to the Members' constituents prior to their election. The Judiciary Committee, issuing a separate report, took issue with the finding that the House could punish for an offense that took place in a previous Congress. Substitute resolutions were subsequently offered and adopted, condemning the actions of the two members.[18]

All told, in the 1800s there were 28 censure resolutions brought in the House, of which 18 were adopted. Six of the 18 censures adopted were for corruption charges—one in 1858 and the other seven in the 1870s. The other censures related to insults, assaults, or disorderly words or papers. In the 20th Century, only five censure resolutions have been adopted by the House, while eight reprimands have been voted—all since 1978. The Senate, by contrast, has only imposed seven censures in its entire history.[19]

Congress had earlier attempted to put corruption convictions on automatic pilot by enacting a statute in 1864 that provided that any senator or representative convicted of illegally receiving compensation for services rendered in connection with a claim, contract or other proceeding before a government agency would "be rendered forever thereafter incapable of holding any office…under the government of the United States."

In 1906, in the case of Senator Joseph R. Burton of Kansas, who had been convicted of bribery, the Supreme Court found the statute unconstitutional on grounds it circumvented the Senate's expulsion requirement. The Senate subsequently asked its Committee on Privileges to report on the options available. Before it could do so, however, Burton resigned his seat. [20]

The Senate did expel 14 Southern senators for supporting the rebellion during the Civil War—the first such expulsions since one in 1797. The House of Representatives expelled three Southern House Members for the same reason during the Civil War. Since then only one House Member has been expelled, Rep. Michael Myers of Pennsylvania (1980), and no senators. Most Members convicted of a crime resign before they can be expelled.

Conclusions

It is clear from the first century of the U.S. Congress that Congress did not exercise its power to punish Members either arbitrarily or frequently. Both houses had a great deal of deference to and confidence in the wisdom of the voters to deal with Members of bad character or behavior. At the same time, the two houses were sensitive to conduct that reflected poorly on the Congress or that disrupted the integrity of its proceedings, and acted when necessary to punish those responsible. It was not until the latter half of the 19th Century that more attention was paid by Congress to charges of corruption.

Until the latter half of the 20th Century, most of the charges were referred either to the Committee on Privileges, a standing committee of jurisdiction, or a select committee to investigate the matter. It was not until 1964, in the wake of the scandal surrounding Senate Democratic Majority Secretary Bobby Baker, that the Senate created the first standing committee on ethics (called the Committee on Standards and Conduct). In 1967 the House followed suit with its own Committee on Standards of Official Conduct in response to alleged misconduct by Representative Adam Clayton Powell, Jr. of New York.

Congress has periodically tightened its ethics codes and procedures for dealing with misconduct ever since. In addition to very detailed ethics statutes, rules. and regulations, House Members, officers and employees are held in their Code of Official

Conduct to a higher, more general standard of conducting themselves, "at all times, in a manner that shall reflect creditably on the House."

Thus, while Members may be technically in compliance with specific ethics rules, they may still be vulnerable to charges that their actions have brought discredit on the House. This has occasioned more internal punishments meted out by the Standards Committee such as "letters of reproval," which presumably are distinguishable from the more formal kinds of discipline, punishment, or sanctions that must, under the Constitution, be imposed by the House.[21] In the final analysis, though, the House may always consider a resolution of punishment (or investigation) as a matter of high constitutional privilege regardless of whether it has been recommended by or referred to the Standards Committee.

It is clear that as the responsibilities of government became much greater in scope at the outset of the 20th Century, as Members careers in Congress became more professional and fulltime, and as the number of interests lobbying Congress proliferated, the potential situations for conflict and corruption grew. Moreover, as government became more transparent and subject to greater scrutiny by the media, the likelihood of exposing what heretofore may have been hidden grew proportionately. In the last half century or so, hardly a year passes without some substantial scandal being uncovered in the Executive or Legislative branches. Ironically, government officials are probably more honest and scrupulous in their dealings than their predecessors due to higher ethical standards and public expectations, as well as the danger and damages that can occur of one is caught engaging in unethical or unlawful activities.

In an era of "gotcha politics," the "politics of personal destruction," and the "criminalization of politics," allegations of misconduct are often recklessly tossed about to the peril not only of the Member or candidate being targeted, but to the ongoing detriment of the institution of Congress which must constantly defend and protect itself against the corrosive effects of perceived corruption. This puts tremendous burdens on the committees designated by the House and Senate to police the conduct of Members. It is unimaginable that the Framers of the Constitution could have anticipated the 24/7 ethics wars that have raged on Capitol Hill over the last few decades, let alone begun to grasp how Congress was expected to deal with the multiplicity of charges being leveled

from every quarter. Perhaps only Madison, that perpetual worry-wart over the fate of a government being entrusted to fallible men, could look back from today and marvel at how this 218 year old experiment has survived, and could face the future with more confidence and optimism than those of us stuck in the present can muster. Somehow the external and internal controls he envisioned have enabled us to muddle forward, however haltingly.

Endnotes

[1] "Enforcement of Ethical Standards in Congress," in, "Organization of the Congress: The Final Report of the Joint Committee on the Organization of Congress," December, 1993 (H. Rept. 103-413, Vol. II), 123-129.

[2] "Debates in the Federal Convention of 1787 as reported by James Madison," in *Documents Illustrative of the Formation of the Union of the American States* (Washington: Government Printing Office, 1927), 474, 515.

[3] The Final Report of the Joint Committee on the Organization of Congress (1993). The report's footnotes in this paragraph reference T. Erskine May's *The Law, Privileges and Usage of Parliament* (17th edition, 1964), at 89, 102-108, 109-149.

[4] Edward M. Dangel, *Contempt* sec. 1, at 2 (1939), cited in *Black's Law Dictionary*, Bryan A. Garner, ed. (St. Paul, Minn.: West Group, 1999), 313.

[5] *History of the Proceedings and Debates of the House of Representatives of the United States, at the First Session of the First Congress*, Begun at the City of New York, March 4, 1789, Tuesday, April 7, 1789, 102-106.

[6] *Senate Journal*, April 16, 1789, 13.

[7] Thomas Jefferson, *A Manual of Parliamentary Practice* (Washington: Government Printing Office, 1993; first edition, 1801), 31.

[8] Ibid, 25-28.

[9] Ibid, 29.

[10] Asher Hinds, *Hinds' Precedents of the U.S. House of Representatives* (Washington: Government Printing Office, 1907), Volume II, sec. 1641.

[11] Ibid, secs. 1642-43.

[12] Ibid, sec. 1597.

[13] Ibid, secs. 1599-1603.

[14] Norman J. Ornstein, "Ethics and Corruption in Congress," *The Encyclopedia of the United States Congress*, Donald C. Bacon, Roger H. Davidson, and Morton Keller, editors (New York: Simon & Schuster, 1995), Volume II, 775.

[15] Dennis F. Thompson, *Ethics in Cngress: From Individual to Institutional Corruption* (Washington: The Brookings Institution, 1995), 2.

[16] *Hinds*', Volume 2, sec. 1275.

[17] Ibid, sec. 1274.

[18] Ibid, sec. 1286.

[19] *Congressional Ethics* (Washington: Congressional Quarterly, Inc., 1980, 2nd edition), 162, 165; and Jack Maskell, "Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives," CRS Report for Congress (RL31382, April 16, 2002, Appendix.

[20] *Congressional Ethics*, 148.

[21] Maskell, 18-20.