



# Recall of Legislators and the Removal of Members of Congress from Office

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## Summary

Under the United States Constitution and congressional practice, Members of Congress may have their services ended prior to the normal expiration of their constitutionally established terms of office by their resignation or death, or by action of the house of Congress in which they are a Member by way of an “expulsion,” or by a finding that in accepting a subsequent “incompatible” public office, the Member would be deemed to have vacated his congressional seat.

Under Article I, Section 5, clause 2, of the Constitution, a Member of Congress may be removed from office before the normal expiration of his or her constitutional term by an “expulsion” from the Senate (if a Senator) or from the House of Representatives (if a Representative) upon a formal vote on a resolution agreed to by two-thirds of the Members of that body present and voting. While there are no specific grounds for an expulsion expressed in the Constitution, expulsion actions in both the House and the Senate have generally concerned cases of perceived disloyalty to the United States, or the conviction of a criminal statutory offense which involved abuse of one’s official position. Each house has broad authority as to the grounds, nature, timing, and procedure for an expulsion of a Member. However, *policy* considerations, as opposed to questions of authority, have appeared to restrain the Senate and House in the exercise of expulsion when it might be considered as infringing on the electoral process, such as when the electorate knew of the past misconduct under consideration and still elected or re-elected the Member.

As to removal by recall, the United States Constitution does *not* provide for nor authorize the recall of United States officers such as Senators, Representatives, or the President or Vice President, and thus no Member of Congress has ever been recalled in the history of the United States. The recall of Members was considered during the time of the drafting of the federal Constitution in 1787, but no such provisions were included in the final version sent to the states for ratification, and the specific drafting and ratifying debates indicate an express understanding of the framers and ratifiers that no right or power to recall a Senator or Representative in Congress exists under the Constitution. 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 the weight of other judicial and administrative decisions, rulings, 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 expressly delegated 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 a term limitation for a United States Senator or Representative. Under Supreme Court constitutional interpretation, since individual states never had the original sovereign authority to unilaterally change the terms and conditions of service of *federal* officials agreed to and established in the Constitution, such a power could not be “reserved” under the Tenth Amendment. Even the *dissenters* in the Supreme Court decision on the Tenth Amendment and term limits, who would have found a “reserved” authority in the states regarding “qualifications” of Members of Congress, conceded that the exclusive authority to remove a sitting Member is delegated to each house in the expulsion clause of the Constitution, and that with respect to “a power of recall ... the Framers denied to the States [such power] when they specified the terms of Members of Congress.”

This report has been and will be revised and updated as new decisional material or administrative opinions warrant.

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This report discusses the manner in which a Member of Congress may be removed from office by “expulsion,” and then examines the issue of “recall” of legislators.

The term of office established in the United States Constitution for a United States Senator is six years, and for a Representative in Congress, two years.<sup>1</sup> Under the Constitution and congressional practice, Members of Congress may have their services ended prior to the normal expiration of their constitutional terms of office by their resignation, death, or by action of the house of Congress in which they sit by way of an expulsion,<sup>2</sup> or by a finding that a subsequent public office accepted by a Member is “incompatible” with congressional office and that the Member has consequently vacated his seat in Congress.<sup>3</sup> As noted in the rules and manual of the House of Representatives with respect to the way in which vacancies may be brought about: “Vacancies are caused by death, resignation, declination, withdrawal, or action of the House in declaring a vacancy as existing or causing one by expulsion.”<sup>4</sup>

Although considered in the Federal Convention of 1787, there was never a provision adopted in the United States Constitution for the “recall” of elected federal officials, such as Members of Congress, and thus no Member of the Senate or the House of Representatives has ever been recalled. As noted by the United States Supreme Court, individual states never possessed the original sovereign authority, and thus could not have “reserved” such power under the Tenth Amendment, to unilaterally change the terms, qualifications, and conditions of service of *federal* officials created in the Constitution.<sup>5</sup> Even the dissenting opinion in the *U.S. Term Limits*, Tenth Amendment case conceded that once a Member of Congress is elected and seated in the United States Congress, the states have no authority to cut short the constitutionally established term of office of the Member, and that such sitting Members are beyond the control of the individual states “until the next election.”<sup>6</sup>

## Expulsion

Members of Congress may be involuntarily removed from office before the normal expiration of their constitutional terms by an “expulsion” from the Senate (if a Senator) or from the House of Representatives (if a Representative) upon a formal vote on a resolution agreed to by two-thirds of the membership of the respective body who are present and voting.<sup>7</sup> The United States Constitution expressly provides at Article I, Section 5, clause 2, that: “Each House may determine

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<sup>1</sup> U.S. CONST., art. I, §3, and amend. XVII, cl. 1 (Senators); art. I, §2 (Representatives).

<sup>2</sup> U.S. CONST., art. I, §5, cl. 2.

<sup>3</sup> See discussion in Lewis Deschler, *DESCHLER’S PRECEDENTS OF THE U. S. HOUSE OF REPRESENTATIVES* [DESCHLER’S PRECEDENTS], Ch. 7, §13 (1977), and Clarence Cannon, *CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* [CANNON’S PRECEDENTS], Vol. VI, §65 (1935); note, *e.g.*, U.S. CONST., art. I, §6.

<sup>4</sup> CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, 110<sup>TH</sup> CONGRESS, H.Doc. 109-157, at §17 (2007).

<sup>5</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800-805 (1995); *Cook v. Gralike*, 531 U.S. 510, 522-523 (2001); Justice Joseph Story, *COMMENTARIES ON THE CONSTITUTION*, Vol. II, §§625, 626 (1833, De Capo Press ed. 1970).

<sup>6</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 858, 882, 890 (Thomas, J., dissenting), finding that “a person who has been seated in Congress can be removed only if two-thirds of the Members of his House vote to expel him, §5, cl. 2,” and that by establishing specific terms of office for Congress, the “framers denied to the States” the “power of recall” of Members.

<sup>7</sup> Brown and Johnson, *HOUSE PRACTICE*, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess., Ch. 58, “Voting,” at §28, pp. 935-936 (2003).

the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.”

An expulsion is different from an “exclusion.” An “exclusion” is not a disciplinary matter against a current Member, but rather a decision not to seat a Member-elect, by a simple majority vote of the House or Senate, upon a finding that the Member-elect is not entitled to a seat either because of a failure to meet the constitutional qualifications for office (age, citizenship and inhabitancy in the State), or that the Member-elect was not “duly elected.”<sup>8</sup>

Members of Congress are not removed by way of an “impeachment” procedure in the legislature, as are executive and judicial officers, but are subject to the more simplified legislative process of expulsion.<sup>9</sup> A removal through an impeachment requires the action of both houses of Congress—impeachment in the House and trial and conviction in the Senate; while an expulsion is accomplished merely by the House or Senate acting alone concerning one of its own Members, and without the constitutional requirement of trial and conviction.

An expulsion is a process, considered inherent in parliamentary bodies, which is characterized as a self-disciplinary action necessary to protect the integrity of the institution and its proceedings.<sup>10</sup> An expulsion from the Senate or the House of Representatives is the most severe form of congressional self-discipline. While there are no specific grounds for an expulsion expressed in the Constitution, expulsion actions in both the House and the Senate have generally concerned cases of perceived disloyalty to the United States Government, or the conviction of a criminal statutory offense which involved abuse of one’s official position.<sup>11</sup> In the United States Senate, 15 Senators have been expelled, 14 during the Civil War period for disloyalty to the Union (one expulsion was later revoked by the Senate),<sup>12</sup> and one Senator was expelled in 1797 for other disloyal conduct.<sup>13</sup> In the House of Representatives, five Members have been expelled, including

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<sup>8</sup> *Powell v. McCormack*, 395 U.S. 486 (1969). There is also a “disqualification” provision in the 14<sup>th</sup> Amendment, §3, where one may be “disqualified” from holding congressional office for engaging in insurrection or rebellion against the United States or giving aid or comfort to our enemies after having taken an oath to support the Constitution. This provision might be used to “exclude,” that is, not to seat a person elected to Congress for failing to meet the qualifications (*see* discussion concerning House “exclusions” and disqualifications, presumptively on 14<sup>th</sup> Amendment grounds, of socialist and pacifist Victor Berger of Wisconsin in 1919, and again in 1920, VI CANNON’S PRECEDENTS, §§56-59; also *Powell*, 395 U.S. at 545, n.83). Disqualification of a Member on such grounds would still appear to require the specific action of the relevant house of Congress.

<sup>9</sup> See case of Senator William Blount (Tenn.), expelled July 8, 1797, found not subject to impeachment. Asher Hinds, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES [HINDS’ PRECEDENTS], Vol. III, §§2294-2318 (1907).

<sup>10</sup> Cushing, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES, Sections 683-684, at pp. 268-269 (Boston 1856); *note* also *Hiss v. Bartlett*, 68 Mass. 468 (1855).

<sup>11</sup> In addition to actual expulsions, note House Committee on Standards of Official Conduct’s recommendations for expulsion of a Member for bribery in “Abscam” matter (H.Rept. 97-110 (1981)), and of another Member after conviction for receipt of illegal gratuities, Travel Act violations and obstruction of justice (H.Rept. 100-506 (1988)). See also Senate Select Committee on Ethics recommendation in S.Rept. 97-187 (1981), after Senator’s conviction in “Abscam” matter. It should be noted, however, that the Senate Select Committee on Ethics recommended the expulsion of a Senator in 1995 who was not convicted of any crime, but who was found by the Committee to have abused the authority of his office in making unwanted sexual advances to women, enhancing his personal financial position, and for obstructing and impeding the Committee’s investigation. S.Rept. 104-137 (1995).

<sup>12</sup> Note expulsions of Senators Mason, Hunter, Clingman, Bragg, Chestnut, Nicholson, Sebastian, Mitchell, Hemphill, and Wigfall (1861), Breckinridge (1861), Bright (1862), Johnson (1862), and Polk (1862). The expulsion order regarding Senator Sebastian was later revoked. Butler and Wolff, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES, 1793-1990, S. Doc. 103-33, at pp. 95-108, Cases 36, 38, 39, 40 (1995).

<sup>13</sup> Senator William Blount of Tennessee, July 8, 1797. UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES, 1793-1990, *supra* at 13-15, Case 5.

three during the Civil War period for disloyalty to the Union.<sup>14</sup> Two other House Members have been expelled, one in 1980 after conviction of conspiracy and bribery in office, and the other Member in 2002 after conviction for conspiracy to commit bribery, receiving illegal gratuities, fraud against the Government in receiving “kickbacks” from staff, and obstruction of justice.<sup>15</sup> Although actual expulsions from Congress are fairly rare, it should be noted that several Members of Congress have chosen to resign from office rather than face what was apparently perceived as an inevitable congressional expulsion.<sup>16</sup>

Except as to the requirement for a two-thirds approval, the authority of each house of Congress to expel one of its own Members is unrestricted by the language of the Constitution. Although such authority appears to be extensive as to the grounds, nature, timing, and the procedure for the expulsion of a Member,<sup>17</sup> *policy* considerations, as opposed to questions of *power* or authority, may have generally restrained the Senate and the House in the exercise of their authority to expel. Such restraint has been particularly evident when the conduct complained of occurred prior to the time the Member was in Congress,<sup>18</sup> or occurred in a prior Congress, when the electorate knew of the conduct and still elected or re-elected the Member.<sup>19</sup> The apparent reticence of the Senate or House to expel a Member for past misconduct after the Member has been duly elected or re-elected by the electorate, with knowledge of the Member’s conduct, appears to reflect in some part the deference traditionally paid in our heritage to the popular will and election choice of the people.<sup>20</sup> In 1914, the Judiciary Committee of the House detailed various policy considerations in expulsions for past misconduct:

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<sup>14</sup> Representative-elect John B. Clark of Missouri (1861), Representative John W. Reid of Missouri (1861), and Representative Henry C. Burnett of Kentucky (1861). II HINDS’ PRECEDENTS, §§1261,1262; Joint Comm. on Congressional Operations, HOUSE OF REPRESENTATIVES EXCLUSION, CENSURE AND EXPULSION CASES FROM 1789 TO 1973, Comm. Prt., 93<sup>rd</sup> Cong., at 143-144 (1973).

<sup>15</sup> H.Rept. 96-1387 (1980), *In the Matter of Representative Michael J. Myers* (1980), 126 CONG. REC. 28,978 (October 2, 1980); H.Rept. 107-594, 107<sup>th</sup> Cong., *In the Matter of Representative James A. Traficant, Jr.* (2002), and H.Res. 495, 107<sup>th</sup> Cong., 148 CONG. REC. 14318-14319 (July 24, 2002).

<sup>16</sup> In Senate, *see, e.g.*, S.Rept. 97-187, *supra* (Senator resigned in 1982 prior to final Senate floor consideration, Riddick and Frumin, RIDDICK’S SENATE PROCEDURE, S. Doc. 101-28, at 270 (1992)); and 1995 resignation of Senator after Committee recommendation of expulsion in S.Rept. 104-137, *supra*. In the House, note resignations of two Representatives, one in 1981 and one in 1988 after Committee recommendations of expulsion in H.Rept. 97-110, *supra*, and H.Rept. 100-506, *supra*; 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, §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, §1239. *See also* expulsion resolutions, reported from an *ad hoc* committee, for bribery, and subsequent resignations during House consideration of resolutions, by Representatives William Gilbert, Frances Edwards, and Orasmus Matteson, in 1857 (II HINDS’ PRECEDENTS, §1275).

<sup>17</sup> *In re Chapman*, 166 U.S. 661, 669-670 (1897); *United States v. Brewster*, 408 U.S. 501, 519 (1972); Story, COMMENTARIES ON THE CONSTITUTION, Vol. II, §836 (1883).

<sup>18</sup> H.Rept. 94-1477, at 2 (1976), where House Committee on Standards of Official Conduct recommended against expulsion since Member’s conviction “while reflecting on his moral turpitude, does not relate to his official conduct while a Member of Congress.”

<sup>19</sup> *Note* discussion in S.Rept. 2508, 83<sup>rd</sup> Cong., at 20-23, 30-31 (1954), concerning McCarthy censure; and H.Rept. 27, 90<sup>th</sup> Cong., at 26-27 (1969).

<sup>20</sup> *Powell v. McCormack*, *supra* at 508, 509; Alexander Hamilton, II Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION [ELLIOT’S DEBATES] 257; note II HINDS’ PRECEDENTS §1285, p. 850-852, discussion of jurisdiction of House after re-election of Member when the “charges against [the Member] were known to the people of his district before they reelected him.”

In the judgment of your committee, the power of the House to expel or punish by censure a Member for misconduct occurring before his election or in a preceding or former Congress is sustained by the practice of the House, sanctioned by reason and sound policy and in extreme cases is absolutely essential to enable the House to exclude from its deliberations and councils notoriously corrupt men, who have unexpectedly and suddenly dishonored themselves ....

But in considering this question and in arriving at the conclusions we have reached, we would not have you unmindful of the fact that we have been dealing with the question merely as one of power, and it should not be confused with the question of policy also involved. As a matter of sound policy, this extraordinary prerogative of the House, in our judgment, should be exercised only in extreme cases and always with great caution and after due circumspection, and should be invoked with greatest caution where the acts of misconduct complained of had become public previous to and were generally known at the time of the Member's election. To exercise such power in that instance the House might abuse its high prerogative, and in our opinion might exceed the just limitations of its constitutional authority by seeking to substitute its standards and ideals for the standards and ideals of the constituency of the Member who had deliberately chosen him to be their Representative. The effect of such a policy would tend not to preserve but to undermine and destroy representative government.<sup>21</sup>

The authority to expel has thus been used cautiously, particularly when the institution of Congress might be seen as usurping or supplanting its own institutional judgment for that of the electorate as to the character or fitness for office of someone the people have chosen to represent them in Congress.<sup>22</sup>

## Recall

In some states, state legislators and other state or local elected officials may be removed from office before the expiration of their established terms not only by action of the legislature itself through an expulsion (or for executive officers, through an "impeachment" and conviction by the legislature), but also by the voters through a "recall" election procedure. While an expulsion is an internal authority of legislative bodies incident to their general powers over their own proceedings and Members, recall is a special process outside of the legislature itself, exercised by the people through a special election. Recall provisions for state or local officers became popular in the "progressive movement," particularly in the western and plains states, in the early part of the 20<sup>th</sup> Century.<sup>23</sup>

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<sup>21</sup> H.Rept. 570, 63<sup>rd</sup> Cong., 2d Sess. (1914), Report of the House Judiciary Committee, VI CANNON'S PRECEDENTS, §398, 557-558.

<sup>22</sup> "Congress has demonstrated a clear reluctance to expel when to do so would impinge ... on the electoral process." Bowman and Bowman, *Article I, Section 5: Congress' Power to Expel—An Exercise in Self-Restraint*, 29 SYRACUSE LAW REVIEW 1071, 1101 (1978).

<sup>23</sup> G. Theodore Mitau, STATE AND LOCAL GOVERNMENT, POLITICS AND PROCESSES, 90 -93 (Charles Scribner's Sons 1966); Comment, *The Use and Abuse of Recall: A Proposal for Legislative Recall Reform*, 67 NEBRASKA LAW REVIEW 617, 621-625 (1988).

## Constitutional History

The United States Constitution does *not* provide for or authorize the recall of United States officials such as United States Senators, Representatives to Congress, or the President or Vice President of the United States, and thus no United States Senator or Member of the House of Representatives has ever been recalled in the history of the United States.<sup>24</sup> As early as 1807, a Senate committee examining the question of the Senate's duty and broad authority to expel a Member, noted that such duty devolves to the Senate not only because of the express constitutional grant of authority, but also as a practical matter because the Constitution does not allow for a "recall" of elected Members of Congress by the people or the state. The committee noted specifically that the Constitution had set out numerous provisions, qualifications, and requirements for Members of Congress to prevent conflicts of interest and to assure a certain degree of fealty to constituents, but did not give a Member's constituency the authority to recall such a Member:

The spirit of the Constitution is, perhaps, in no respect more remarkable than in the solicitude which it has manifested to secure the purity of the Legislature by that of the elements of its composition .... Yet, in the midst of all this anxious providence of legislative virtue, it has not authorized the constituent body to recall in any case its representative.<sup>25</sup>

The recall of United States Senators or Representatives had been considered during the time of the drafting of the federal Constitution, but recall provisions were rejected and were not included in the final version of the Constitution sent to the states for ratification.<sup>26</sup> The ratifying process in the states evidences debate over this lack of inclusion of a recall provision. Luther Martin of Maryland, for example, in an address delivered to the Maryland legislature, criticized the proposed Constitution because the Members of Congress "are to *pay themselves*, out of the treasury of the United States; and are not liable to be *recalled* during the period for which they are

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<sup>24</sup> One historian, using the term "recall" in an apparent ironic, or at least a non-legal sense, has reported on the alleged "recall" of Senator John Quincy Adams of Massachusetts by the state legislature in 1808. Worthington C. Ford, "The Recall of John Quincy Adams in 1808," *Proceedings of the Massachusetts Historical Society* 45 (October 1911-June 1912) 354-375. However, in fact, the newly elected Massachusetts legislature, with a new majority of Federalists angered over Adams' support of President Jefferson and his Republican policies, voted "to elect a Senator of the United States to take my place after the ensuing 3d of March," that is, at the end of the current term of Senator Adams. *Id.* at 364, citing Adams, *NEW ENGLAND FEDERALISM*, at 202. Not being satisfied with merely choosing his successor, the legislature proceeded to "instruct" their Senators to vote a particular way, "instructions which Adams could not fulfil (*sic*) without sacrificing his opinions and self-respect." *Id.* at 364. It was this attempted "instruction," along with the obvious lack of confidence evidenced in electing a different successor for the next term, which led to Adams' resignation from the Senate on June 8. Adams expressly recognized, however, the absence of the authority of a constituent body to recall or to instruct a United States Senator: "The Senate of the United States is a branch of the legislature; and each Senator is a representative, not of a single State, but of the whole Union. His vote is not the vote of his State, but his own individually; and his constituents have not even the power of recalling him, nor of controlling his constitutional action by their instructions." Ford, *supra* at 363, quoting Adams, *NEW ENGLAND FEDERALISM*, at 195.

<sup>25</sup> II HINDS' PRECEDENTS, §1264, p. 818, citing the report of the *ad hoc* committee appointed to examine the question of expulsion of Senator John Smith of Ohio, December 31, 1807; see also Remick, *THE POWER OF CONGRESS IN RESPECT TO MEMBERSHIP AND ELECTIONS*, Vol. I, pp. 531-532 (1929).

<sup>26</sup> The Articles of Confederation of 1777 had contained a provision for recall of delegates by state legislatures. Section V stated that the state legislatures would have "a power reserved in each state to recall its delegates, or any of them, at any time within the year and to send others in their stead ...." At the Constitutional Convention at Philadelphia, "Randolph's Propositions" of May 29, 1787, *i.e.*, the "Virginia Plan," proposed for recall of popularly elected representatives, but this was rejected by the Convention. I Farrand, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 20, 210, 217 (1911).

chosen.”<sup>27</sup> In New York, an amendment was defeated in the 1788 ratifying convention which would have allowed the state legislatures to “recall their Senators ... and elect others in their stead.”<sup>28</sup> In the ratifying debates in Virginia, George Mason commented: “The Senators are chosen for six years. They are not recallable for those six years, and are re-eligible at the end of the six years. .... They cannot be recalled in all that time for any misconduct.”<sup>29</sup>

This history indicates an understanding of the framers and ratifiers of the Constitution that no right or power to recall a Senator or Representative from the United States Congress existed under the Constitution as ratified. As noted by an academic authority on the mechanisms of “direct democracy”:

The Constitutional Convention of 1787 considered but eventually rejected resolutions calling for this same type of recall [as provided in the Articles of Confederation]. ... In the end, the idea of placing a recall provision in the Constitution died for lack of support—at least from those participating in the ratifying conventions. The framers and the ratifiers were consciously seeking to remedy what they viewed as the defects of the Articles of Confederation and some of their state constitutions, and for many of them this meant retreating from an excess of democracy.<sup>30</sup>

Another constitutional scholar explained that the formation of the United States government as a distinct, sovereign entity was unlike the former confederation, and the former Continental Congress created by the Articles of Confederation where the colonial legislatures selected the delegates for the state/colony and could “instruct and recall them,” such as a sovereign state could do with its ambassador to another country or to a multinational entity. Once the Union was formed in 1788 upon the ratification by the 9<sup>th</sup> state, it became clear that Members of Congress were no longer merely “ambassadors” from states coming together by treaty or confederation—and who thus could be recalled by their constituent entities—but rather were new officers of the newly formed national government, that is, officers of the United States.<sup>31</sup>

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<sup>27</sup> 3 Farrand, *RECORDS OF THE FEDERAL CONVENTION OF 1787*, (Appendix A), at 194. (Emphasis in original).

<sup>28</sup> II ELLIOT’S DEBATES 289; *note* also discussion of state ratifying debate on lack of authority for state recall in the federal Constitution, in Herbert S. Swan, *The Use of Recall in the United States*, THE INITIATIVE, REFERENDUM AND RECALL, National Municipal League Series, (William Bennett Munro, editor), at p. 298, n.2 (1912).

<sup>29</sup> Rutland (editor), *THE PAPERS OF GEORGE MASON, 1725-1792* (16 June 1788, Papers 3:1078) (1970), as cited in Kirkland and Lerner, *THE FOUNDERS’ CONSTITUTION*, Vol. II, at 293 (1988).

<sup>30</sup> Thomas E. Cronin, *DIRECT DEMOCRACY, THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL*, at 129 (Harvard University Press 1989).

<sup>31</sup> Akil Amar, *THE CONSTITUTION, A BIOGRAPHY*, at 41 (Random House 2005). This concept was also expressed by the Supreme Court, finding that Members of Congress “are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single national Government” (*U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)), and was a point agreed upon even by the dissent in *U.S. Term Limits*, as Justice Thomas explained in the dissent: “The Framers may well have thought that state power over salary, like state power to recall, would be inconsistent with the notion that Congress was a national legislature once it assembled.” 514 U.S. at 890 (Thomas, J. dissenting).

## Judicial Decisions

### Supreme Court Jurisprudence

Although the Supreme Court has not needed to directly address the subject of recall of Members of Congress, other judicial decisions indicate that the right to remove a Member of Congress before the expiration of his or her constitutionally established term of office is one which resides within each house of Congress as expressly delegated in the expulsion clause of the United States Constitution, and not in the entire Congress as a whole (through the adoption of legislation), nor in the state legislatures through the enactment of recall provisions. In *Burton v. United States*,<sup>32</sup> the Supreme Court ruled that a provision of federal law which on its face purported to make one convicted of bribery “ineligible” to be a United States Senator, could *not* act as a forfeiture of a Senator’s office, since the only way to remove a Member under the Constitution was by the Senate exercising its authority over its own Members:

The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers.<sup>33</sup>

The concept that the states do not, individually, possess the authority to change the terms or qualifications for *federal* officers agreed upon by the states in the United States Constitution, has been confirmed by the Supreme Court in modern case law.<sup>34</sup> The Supreme Court found in *U.S. Term Limits, Inc. v. Thornton*, that the authority of the individual states over the elections of federal officials under Article I, Section 4, clause 1, is *not* a broad authority for an individual state to *substantively change* the qualifications, length, or number of terms of federal officials established within the United States Constitution.<sup>35</sup> The Court in *U.S. Terms Limits, Inc.* noted that the states do retain significant sovereign authority in many areas, but that the states transferred and delegated certain powers and authority to the national government within the instrument creating that entity, the Constitution. With respect to powers in relation to the federal, national government, and any powers deriving exclusively from and because of the existence of that national government, the states must look to the United States Constitution for grants or delegation of authority to them.<sup>36</sup>

Even the dissenting opinion in the *U.S. Term Limits* case, which would have found a “reserved” power of the individual states with respect to term limits and additional “qualifications” of Members of Congress, distinguished such arguable authority regarding the “selection of Members” from any authority of a state to affect the term of a Member of Congress once a Member is sworn and seated in the United States Congress. As explained in Justice Thomas’ dissent, an individual state does not possess the authority to effectuate a recall to cut short the

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<sup>32</sup> 202 U.S. 344 (1906).

<sup>33</sup> 202 U.S. at 369.

<sup>34</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>35</sup> 514 U.S. at 832-835.

<sup>36</sup> 514 U.S. at 800-802. The Court stated: “As we have frequently noted, ‘[t]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers* and transferred those powers to the Federal Government.’ *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 549 (1985); ... see also *New York v. United States*, 505 U.S. 144, 155-156 (1992).” 514 U.S. at 801-802. (Emphasis in original).

term of a sitting Member of the United States Congress, and such Member is beyond the reach of the people of the state “until the next election”:

In keeping with the complexity of our federal system, once the representatives chosen by the people of each State assemble in Congress, they form a national body and are beyond the control of the individual States until the next election.<sup>37</sup>

The dissent in the *Term Limits* case thus conceded that, regardless of their view of the authority of each state in setting qualifications or conditions on the “selection of Members of Congress” under the Tenth Amendment, once a Member of Congress is seated, such a Member is *not* subject to recall, and the only way to remove that Member prior to the expiration of his term is expressly delegated to that Member’s house of Congress in the expulsion clause of Article I, Section 5. As again explained by Justice Thomas, even if a state wishes to “punish one of its Senators ... for his vote on some bill ... The Senator would still be able to serve out his term; the Constitution provides for Senators to be chosen for 6-year terms ... and a person who has been seated in Congress can be removed only if two-thirds of the Members of his House vote to expel him, §5, cl. 2.”<sup>38</sup> The dissent explained that an individual state could not “slash” or threaten to slash the salary of a Member of Congress if the state disagreed with the action of the Member since “such a power would approximate a power of recall, which the Framers denied to the States when they specified the terms of Members of Congress. The Framers may well have thought that state power over salary, like state power to recall, would be inconsistent with the notion that Congress was a national legislature once it assembled.”<sup>39</sup>

## **Tenth Amendment**

As to the Tenth Amendment and the “reserved” authority of the states, the United States Supreme Court has clearly explained that determining qualifications and terms for *federal* offices, created within the United States Constitution, were “not part of the original powers of sovereignty that the Tenth Amendment reserved to the States,” and thus whatever authority states have over the terms, qualifications, and elections of *federal* officers must be a “delegated” authority from the Constitution.<sup>40</sup> Such authority could not be a “reserved” power of the states, since the states could not “reserve” a power it did not have as part of its original sovereign authority, that is, a power relative to something which did not exist before its creation in the Constitution:

Petitioners’ Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only “reserve” that which existed before. As Justice Story recognized, “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them .... No state can say, that it has reserved, what it never possessed.” 1 Story §627.<sup>41</sup>

Re-emphasizing this meaning of the Tenth Amendment’s “reserved” authority *vis-a-vis* federal officials, the Court later explained in *Cook v. Gralick*:

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<sup>37</sup> 514 U.S. at 858 (Thomas, J., dissenting).

<sup>38</sup> 514 U.S. at 881-882 (Thomas, J., dissenting).

<sup>39</sup> 514 U.S. at 890 (Thomas, J., dissenting).

<sup>40</sup> 514 U.S. at 802.

<sup>41</sup> 514 U.S. at 802. “[A]s the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself.” 514 U.S. at 805; *Cook v. Gralick*, 531 U.S. at 522.

The federal offices at stake “aris[e] from the Constitution itself.” ... Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power “had to be delegated to, rather than reserved by, the States.”<sup>42</sup>

Members of Congress are clearly *federal* officials, not state officers, and owe their existence and authority solely to the federal Constitution. As explained by the Supreme Court:

In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is ‘an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, not controllable by, the states ....’ 1 Story §627. Representatives and Senators are as much officers of the entire union as is the President.<sup>43</sup>

As noted in the previous section, even the dissenting Justices in the *U.S. Term Limits* case, who would have found under the Tenth Amendment a “reserved” authority in the states with respect to the “qualifications” of Members of Congress, explicitly conceded that no such authority exists in the states to “recall, which the Framers denied to the States when they specified the terms of Members of Congress.”<sup>44</sup>

The United States Constitution establishes the exclusive qualifications for congressional office, sets the specific length of terms for Members of the House and for Senators, and expressly delegates to each house of Congress the authority to judge the elections and qualifications of, and to discipline and to remove its own Members.<sup>45</sup> These provisions of the United States Constitution, with respect to federal officials, have supremacy over state laws and provisions, and state laws in conflict with such constitutional provisions have been found by the courts in the past to be invalid.<sup>46</sup> Although the language of some state recall laws might be broad enough to include Members of Congress, or might even explicitly include federal officers, it does not appear under existing precedents and standards expressed by the Supreme Court that such statutes could be effective in altering the constitutionally established term of office of a Member of the United States Congress by allowing a Member to be removed from office through a state “recall” procedure.<sup>47</sup>

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<sup>42</sup> 531 U.S. at 522.

<sup>43</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 803.

<sup>44</sup> *U.S. Term Limits, Inc.*, 514 U.S. at 890 (Thomas, J., dissenting), see also 514 U.S. at 858, 882.

<sup>45</sup> U.S. CONST., art. I, §2, cl. 2, and art. I, §3, cl. 3. Members of the House are to be “chosen every second Year by the People of the several States ....” (art. I, §2, cl. 1), and Senators are chosen for terms of “six Years” each. art. I, §3, cl. 1, and amendment XVII: “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ....”). As to judging elections and qualifications, and the authority to remove Members before their terms expire, see art. I, §5, cl. 1 and 2.

<sup>46</sup> U.S. CONST., art. VI, cl. 2. See, for example, with respect to qualifications for candidates to federal office: *Danielson v. Fitzsimmons*, 44 N.W. 484 (Minn. 1950); *Application of Ferguson*, 294 N.Y.S.2d 174, 176 (Super. Ct. 1968) (state laws prohibiting felons from running for congressional office found invalid); *Ekwall v. Stadelman*, 30 P. 2d 1037 (Ore. 1934); *Shub v. Simpson*, 196 Md. 177, 76 A.2d 332, *appeal dismissed*, 340 U.S. 881 (1958); *Hellmann v. Collier*, 141 A.2d 908, 911 (Md. 1958); *Exon v. Tiemann*, 279 F. Supp. 609, 613 (Neb. 1968); *State ex rel. Chavez v. Evans*, 446 P.2d 445, 448 (N.M. 1968) (state statutes requiring congressional candidates to reside in congressional district found invalid); *Dillon v. Fiorina*, 340 F. Supp. 729, 731 (N.M. 1972); *Campbell v. Davidson*, 233 F.3d 1229 (10<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 973 (2000); *Schaefer v. Townsend*, 215 F.3d 1031 (9<sup>th</sup> Cir. 2000), *cert. denied*, *Jones v. Schaefer*, 532 U.S. 904 (2000) (state laws establishing durational residency requirements for congressional candidates found invalid).

<sup>47</sup> “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.” *Biennial Report and Opinions of the Attorney General of the State of* (continued...)

## **Administrative and Judicial Decisions on State Recall Laws**

State attorneys general, as well as state judicial bodies, when considering the merits of the issue of a proposed recall of a Member of Congress under state provisions have consistently found that such recall is neither provided for, permitted by, nor is it consistent with the provisions of the U.S. Constitution. The attorney general of Oregon in 1935, for example, ruled that the state's recall provisions could not apply to a Member of Congress who is not actually a state official, but who holds his office pursuant to the U.S. Constitution and is a federal constitutional officer. The opinion found that such recall provisions would interfere with the Congress's exclusive constitutional authority over the elections and qualifications of its own Members, noting that the "jurisdiction to determine the right of a representative in Congress to a seat is vested exclusively in the House of Representatives ... [and] a Representative in Congress is not subject to recall by the legal voters of the state or district from which he was elected."<sup>48</sup>

In Nevada, in 1978, an attorney general opinion found that "there is no provision in [the U.S. Constitution] for the removal of federal legislative officers prior to the end of their terms other than Article I, Section 5," and "[t]herefore, only the United States Senate or the House of Representatives can remove its own Members prior to the end of the terms for which they were elected, pursuant to Article I, Section 5." In so concluding, the attorney general ruled that a recall petition could not be filed for "federal legislative officers, such as United States Senators" under the Nevada provision authorizing recall for "Every public officer in the State of Nevada."<sup>49</sup>

In 1994, the attorney general of Kansas, finding that "Members of congress are neither state officers nor local officers" as defined by Kansas statutes, and finding that the U.S. Constitution "reserves to the houses of congress" the authority to punish and remove from office their own Members by way of expulsion, provided a formal opinion that U.S. Representatives and Senators could not be "recalled" under state provisions.<sup>50</sup> Referencing the expulsion clause in the Constitution in answering "10<sup>th</sup> Amendment" arguments that states have the "reserved" authority to cut short the term of a Member of the U.S. Congress, the attorney general found:

As such power has been delegated to the federal government by the United States constitution, the United States constitution does not provide for any reservation of authority to the states to remove from office congressional officeholders.<sup>51</sup>

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(...continued)

*Oregon* 313, (April 19, 1935). If a recall election for a Member of Congress were actually held under a state provision, it is most likely that the ultimate effect would be "advisory" only, having perhaps significant political, but not legal, import. It may be noted that in Arizona, the state law allows a candidate for United States Senator or Representative in Congress to sign a "pledge" to resign from office if he or she loses a recall election under state recall procedures. ARIZ. REV. STATS. §§19-221, 222. If the candidate signs the pledge or files an alternative statement that he or she will not be bound by a recall, such statement is given by the secretary of state "to the public press when made." Notwithstanding such pledge, a legal action to enforce a promise to voluntarily resign elective federal office may prove problematic, although a refusal to honor such promise could obviously have significant political impact for an elected official.

<sup>48</sup> *Biennial Report and Opinions of the Attorney General of the State of Oregon* 313 (1935). See also opinion and brief of Senator Walter George, then Chairman of the Senate Committee on Privileges and Elections, reaching the same conclusion as to the lack of constitutional authority of a state to terminate or cut short by recall the constitutionally established term of a United States Senator or Representative, 79 CONG. REC. 10688-89 (July 3, 1935).

<sup>49</sup> 1978 Op. Att'y Gen. Nev. 14, 1978 Nev. AG LEXIS 7, at 3, 5-6, 7 (June 8, 1978).

<sup>50</sup> Kansas, Attorney General Opinion No. 94-35, March 8, 1994.

<sup>51</sup> *Id.* at 3.

In a similar manner, the attorney general of Louisiana ruled in 2009 that a Member of Congress representing the people of a congressional district in Louisiana could not be recalled under Louisiana law. The attorney general found that the “Constitution does not provide for, nor does it authorize, the recall of United States officials,” that the power to remove a Member of Congress before the expiration of the Member’s term is expressly delegated in the “United States Constitution to the respective House of Congress ...,” and thus “the United States Constitution does not provide for any reservation of authority to the States to remove from office congressional officeholders.”<sup>52</sup> The opinion further found that Members of Congress are federal officials, and are not state officers, and thus are not subject to the state law on recall of state public officials.

The attorney general of North Dakota ruled in 2010, in an opinion upheld by the North Dakota supreme court, that “neither the Constitution nor laws of the State of North Dakota allow for the recall of a congressional officer, specifically a United States Senator.”<sup>53</sup> Also in 2010, the attorney general of Arkansas advised that a proposed recall amendment “as it applies to Members of Congress is unconstitutional because a state statute cannot alter the terms or qualifications for Members of Congress.”<sup>54</sup>

It may be noted that in one instance in the 1970s an attorney general of a state declined to find that a state administrative agency is barred from accepting a recall petition directed at a Member of Congress. In interpreting a state recall statute, the attorney general of Wisconsin noted in an opinion on May 3, 1979, that an *administrative* agency, the state election board, upon presentation of a valid petition to recall a Member of Congress under the Wisconsin constitution, had no authority, in itself, to adjudicate and reject such petition without a ruling from a court.<sup>55</sup>

When such matters have on rare occasions generated a ruling from a court, however, the courts which have decided the issue have thus far found that state recall laws are ineffective to override and substitute for the provisions of the U.S. Constitution concerning the terms of and removal of federal officials such as Members of Congress. A federal court in 1967, for example, dismissed a suit which attempted to compel the Idaho secretary of state to accept petitions recalling Senator Frank Church of Idaho. In the unreported judicial ruling, the court found that Senators are not subject to state recall statutes, and that such a state provision is inconsistent with the provisions of the U.S. Constitution.<sup>56</sup>

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<sup>52</sup> State of Louisiana, Department of Justice, Opinion 09-0051, at 1, 3 (March 2, 2009).

<sup>53</sup> North Dakota, Attorney General, Letter Opinion 2010-L-08, at 1, May 13, 2010. The attorney general’s opinion was confirmed by the Supreme Court of North Dakota in *RECALLND v. Jaegler, Secretary of State*, 792 N.W.2d 511 (N.D. Supreme Court, December 21 2010).

<sup>54</sup> Op. Att’y. Gen. Ark. 2010-017, 2010 Ark. AG LEXIS 24, at 9 (March 3, 2010). The attorney general noted in this opinion that “this office will not address the constitutionality of proposed measures in the context of a ballot title review unless the measure is ‘clearly contrary to law.’” *Id.* at 3.

<sup>55</sup> 68 Opinions of the Attorney General 140, 146, 148 (Wisconsin 1979): “In the foregoing discussion I have attempted neither a resolution nor a comprehensive analysis of the constitutional issue. Enough has been said, however, to show that the question of constitutionality is one that is arguable and open to debate. The Wisconsin Supreme Court has provided guidance to administrative bodies called upon to perform their ministerial duties under circumstances raising doubts as to the constitutional validity of the result. ... Accordingly, in the event petitions for the recall of a United States senator are presented to the Elections Board, you should proceed to carry put your responsibilities ... unless and until directed otherwise by a court of law.”

<sup>56</sup> *U.S. Judge Rejects Plea Asking Recall of Senator Church*, N.Y. TIMES, October 1, 1967, at p. 47, col. 1; *Recall Barred*, WASH. POST, September 30, 1967, at A5.

Similarly, in 2007, a state court in Michigan dismissed a petition effort to recall a Member of Congress under that state's recall statute. Although an administrative entity had earlier approved the language of the recall petition, and despite the express language of the state law, the court granted an injunction against the continuation of the recall effort, finding "that pursuant to the text of Article I of the United States Constitution and by operation of the Supremacy Clause of the United States Constitution, the recall provisions under Michigan law are ineffective to recall a Member of Congress."<sup>57</sup>

In New Jersey, an intermediate appellate state court in 2010 refrained from ruling on the constitutionality of that state's recall provision, and refused to enjoin a recall effort against a sitting United States Senator, since the recall effort had not at that time garnered sufficient signatures to invoke an election under state law, and thus the court found that the matter was not yet ripe for adjudication.<sup>58</sup> On appeal, the supreme court of New Jersey, however, in a detailed and scholarly opinion, found that in "examining the text of the Federal Constitution, relevant historical materials, and principles of our nation's democratic system ... the Federal Constitution does not permit recall," and thus the New Jersey recall law "and the State Constitution which authorizes the recall of U.S. Senators are unconstitutional ...."<sup>59</sup>

## **Constitutional Amendment; Pro and Con**

From U.S. Supreme Court rulings and explanations regarding terms and qualifications of Members of Congress, as well as from several state judicial rulings and attorneys general opinions, it would appear that for a recall provision to be enforceable against a Member of Congress a constitutional amendment authorizing such a recall procedure would need to be adopted by the requisite number of states. Although there have been some calls for a constitutional amendment authorizing national "referenda" or "initiatives," there has not been significant movement for a national recall provision.

Supporters of recall provisions see this mechanism as a device to assure regular and close oversight of elected public officials, and to make elected officials more continuously, rather than periodically, responsible and responsive to the will and desires of the electorate. With recall procedures available, it is argued, there is no need for the electorate to tolerate an incompetent, corrupt, and/or unresponsive official until that official's term is over.

Those who oppose recall note that recall petitions generally need only a relatively small minority of the electorate to force a recall election of an official. With the threat of a recall election ever present, it is argued that an official may be deterred from, and penalized for, taking strong and clear political positions that could offend even a small, but vociferous and active political group. It is contended that such small special interest or "single-issue" groups might effectively stymie an official by constantly occupying the official with the potential need to campaign and run in a

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<sup>57</sup> *Walberg v. Lenawee County Board of Election Commissioners*, File No. 07-2694-AW, Order Granting Plaintiff's Motion for Summary Disposition, at 2 (Mich. Cir. Ct., November 6, 2007).

<sup>58</sup> *Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells, Secretary of State, et al.*, 995 A.2d 1109 (N.J. Superior Court, Appellate Division, March 16, 2010).

<sup>59</sup> *Committee to Recall Robert Menendez from the Office of U.S. Senator v. Wells, Secretary of State, et al.*, 7 A3d 720, 723, 724 (N.J. Supreme Court, November 18, 2010). The court noted: "In sum, our review of the constitutional text, history, and structure of the democratic system reveals that the Federal Constitution does not permit recall." 7 A.3d at 743, 744.

recall election. It is also argued that complex governmental programs and policies may often need to function and to be evaluated over time; but with the threat of immediate recall, Members may be deterred in supporting long-term plans and programs for the country which may not bring immediate, short-term benefits to constituents.

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