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Report for Congress

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

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

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 public office deemed to be "incompatible" with congressional office, the Member has 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 the respective 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 from the United States 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 established in the expulsion clause of the United States Constitution, and (2) the length and number of the terms of office for *federal* officials, established and agreed upon by the States in the Constitution creating that Federal Government, may not be unilaterally changed by an individual State, such as through the enactment of a recall provision or 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 10th Amendment.

Contents

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

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.[1] 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,"[2] or by a finding that a subsequent public office accepted by a Member is "incompatible" with congressional office (and that the Member has thus vacated his seat in Congress).[3] Although considered in the Federal Convention of 1787, there was never a provision adopted in the Constitution for the "recall" of Members of Congress, and thus no Member has ever been recalled in the history of the United States. Individual States have never had the authority, and thus could not have "reserved" such power, to unilaterally change the terms and conditions of service of *federal* officials agreed upon and created in the federal Constitution.[4] This report discusses briefly the manner in which a Member of Congress may be removed from office by "expulsion," and then examines the issue of recall of legislators.

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

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[1] Senators: Seventeenth Amendment, Clause 1; Representatives: Article I, Section 2.

[2] Article I, Section 5, cl. 2.

[3] *See* discussion in *Deschler's Precedents of the United States House of Representatives*, Volume 2, Chapter 7, § 13 (1977), and VI *Cannon's Precedents of the House of Representatives*, § 65 (1935); note, *e.g.*, *United States Constitution*, Article I, Section 6. There is also a "disqualification" provision in the 14th Amendment, Section 3, where a person 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 may 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 14th Amendment grounds, of socialist and pacifist Victor Berger of Wisconsin in 1919, and again in 1920, VI *Cannon's Precedents*, §§56-59; also *Powell v. McCormack*, 395 U.S. 486, 545, n.83 (1969)). Removal of a seated Member on such grounds would still appear to require the specific action of the relevant House of Congress.

[4] *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. I, § 627 (1883).

vote on a resolution agreed to by two-thirds of the membership of the respective body who are present and voting.[5] The United States Constitution expressly provides at Article I, Section 5, clause 2, that: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member."

An expulsion is a process, generally inherent in parliamentary bodies, which is considered to be a self-disciplinary action necessary to protect the integrity of the institution and its proceedings.[6] 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."[7]

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.[8] 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 from the Senate or the House of Representatives is considered 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.[9] In the United States Senate, 15 Senators have been expelled, 14 during the Civil War period for disloyalty to the Union (one

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[5] Brown, *House Practice*, 104th Cong., 2d Sess., "Voting," at p. 908 (1996).

[6] Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States*, Sections 683-684, at 268-269 (Boston 1856); *note* also *Hiss v. Bartlett*, 68 Mass. 468 (1855).

[7] *Powell v. McCormack*, 395 U.S. 486 (1969). *See* also footnote 3, *supra*, as to 14th Amendment disqualification for treasonous conduct.

[8] *See* case of Senator William Blount of Tennessee, expelled on July 8, 1797, and found not subject to impeachment. III *Hinds' Precedents*, §§ 2294-2318 (1907).

[9] 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.R. Rept. 97-110, 97th Cong., 1st Sess. (1981)), and of another Member after conviction for receipt of illegal gratuities, Travel Act violations and obstruction of justice (H. Rept. 100-506, 100th Cong., 2d Sess. (1988)). *See* also Senate Select Committee on Ethics recommendation in S. Rept. 97-187, 97th Cong., 1st Sess. (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, 104th Cong., 1st Sess. (1995).

expulsion was later revoked by the Senate),[10] and one Senator was expelled in 1797 for other disloyal conduct.[11] In the House of Representatives, five Members have been expelled, including three during the Civil War period for disloyalty to the Union.[12] 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.[13] 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.[14]

The authority within the Constitution of each House of Congress to expel one of its own Members is unrestricted on the face of the constitutional language, except as to the requirement for a two-thirds approval. Although such authority appears to be extensive as to the grounds, nature, timing, and the procedure for the expulsion of a Member,[15] *policy* considerations, as opposed to questions of *power* or authority, may have generally restrained the Senate and the House in the exercise of their

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[10] *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. *United States Senate Election, Expulsion and Censure Cases, 1793-1990*, S. Doc. 103-33, 103d Cong., 1st Sess., at pp. 95-108, Cases 36, 38, 39, 40 (1995).

[11] Senator William Blount of Tennessee, July 8, 1797, *United States Senate Election, Expulsion and Censure Cases, 1793-1990, supra* at 13-15, Case 5.

[12] 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, supra* at §§ 1261,1262; *House of Representatives Exclusion, Censure and Expulsion Cases*, Comm. Prt., 93rd Cong. 1st Sess. at 143-144 (1973).

[13] H.R. Rpt. No. 96-1387, 96th Cong., 2d Sess., *In the Matter of Representative Michael J. Myers* (1980), 126 *Congressional Record* 28,978 (October 2, 1980); H.R. Rpt. No. 107-594, 107th Cong., 2d Sess., *In the Matter of Representative James A. Traficant, Jr.* (2002), and H.Res. 495, 107th Cong., 148 *Congressional Record* H5393, July 24, 2002 (daily ed.).

[14] In Senate *see, e.g.*, S. Rept. 97-187, *supra*, (Senator resigned in 1982 prior to final Senate floor consideration, *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 the other 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 abstentia* by the House (II *Hinds' Precedents, supra* at § 1273); and House censure of John DeWeese after his resignation (also for the sale of Academy appointments), but before the committee reported the resolution of expulsion. II *Hinds' Precedents, supra* at § 1239. *See* also expulsion resolutions, 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, supra* at § 1275).

[15] *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).

authority to expel. Such restraint has been particularly evident when the conduct complained of occurred prior to the time the Member was in Congress,[16] or occurred in a prior Congress, when the electorate knew of the conduct and still elected or re-elected the Member.[17] 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.[18] In 1914, the Judiciary Committee of the House detailed various policy considerations in expulsions for past misconduct:

> 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.[19]

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.[20]

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[16] H. Rept. 94-1477, 94th Cong., 2d Sess. 2 (1976), where House Committee on Standards 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."

[17] *Note* discussion in S. Rept. 2508, 83rd Cong., 2d Sess. 20-23, 30-31 (1954), concerning McCarthy censure; and H. Rept. 27, 90th Cong., 1st Sess. 26-27 (1969).

[18] *Powell v. McCormack, supra* at 508, 509; Alexander Hamilton, II *Eliot'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."

[19] Report of the House Judiciary Committee, H. Rept. 570, 63rd Cong., 2d Sess. (1914), VI *Cannon's Precedents of the House of Representatives*, § 398, 557-558.

[20] "Congress has demonstrated a clear reluctance to expel when to do so would impinge ...
(continued...)

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 inherent 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 20th Century.[21]

Constitutional History.

The United States Constitution does *not* provide for nor authorize the recall of United States officials such as United States Senators, Representatives to Congress, or the President or Vice President 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. 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.[22]

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

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[20] (...continued)
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).

[21] 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).

[22] II *Hinds' Precedents, supra* at §§ 813-815; Remick, *The Power of Congress in Respect to Membership and Elections*, Vol. I, pp. 531-532 (1929).

States for ratification.[23] 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 Senators "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 chosen."[24] 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."[25] 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 [recall of Senators by the state legislatures 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.[26]

Judicial Decisions.

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 in each House of Congress as established in the expulsion clause of the United States Constitution, and not in the entire Congress as a whole, nor in the State legislatures through the enactment of recall provisions. In *Burton v. United States*,[27] 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

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[23] The Articles of Confederation of 1777 had contained a provision for recall of United States Senators by the 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 proposed for recall of popularly elected representatives, but this was *not* accepted by the Convention. I Elliot, *Debates on the Adoption of the Federal Constitution*, 143-144, 172 (1888).

[24] 3 Farrand, *Records of the Federal Convention of 1787*, 173 (Appendix A).

[25] II Elliot, *Debates on the Adoption of the Federal Constitution*, 289 (1888); *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," from *The Initiative, Referendum and Recall*, National Municipal League Series, (William Bennett Munro, editor), at p. 298, n.2 (1912).

[26] Thomas E. Cronin, *Direct Democracy, The Politics of Initiative, Referendum, and Recall*, at 129 (Harvard University Press 1989).

[27] 202 U.S. 344 (1906).

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.[28]

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.[29] 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, § 4, cl. 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.[30] 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.[31]

With respect to the Tenth Amendment and the "reserved" authority of the States, the Court clearly explained that determining qualifications and terms for *federal* offices, created within the 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.[32] 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

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[28] 202 U.S. at 369.

[29] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

[30] 514 U.S. at 832-835.

[31] 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)

[32] 514 U.S. at 802.

> the constitution does not delegate to them .... No state can say, that is has reserved, what it never possessed." 1 Story § 627.[33]

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

> 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."[34]

The United States Constitution expressly establishes the exclusive qualifications for congressional office, sets the specific length of terms for Members of the House and for Senators, and places the authority within each House of Congress to judge the elections and qualifications of, and to discipline and remove, its own Members.[35] These provisions of the United States Constitution, with respect to federal officials,[36] 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.[37] Although the language of some State recall laws might be broad enough to include Members of Congress, or might even explicitly include such federal officers, such statutes would not appear to be effective in overriding the provisions of the United States Constitution with regard to terms of office, elections and removal of Members

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[33] 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. Gralike, supra* at 522.

[34] 531 U.S. at 522.

[35] Article I, § 2, cl. 2, and Article I, § 3, cl. 3; Members of the House are to be "chosen every second Year by the People of the several States ...." (Article I, § 2, cl. 1), and Senators are chosen for terms of "six Years" each. Article I, § 3, cl. 1, and Seventeenth Amendment: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ...."; Article I, § 5, clauses 1 and 2.

[36] Members of Congress are *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. 514 U.S. at 803.

[37] *United States Constitution*, Article VI, clause 2. See, for example, with respect to qualifications for candidates to federal office, *Danielson v. Fitzsimmons,* 44 N.W. 484 (Minn. 1950)(state law prohibiting felon 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), (state statute requiring congressional candidates to reside in congressional district found invalid.)

of the United States Congress,[38] and thus, as noted above, no Member of Congress has ever been recalled in the history of the United States.

In interpreting state recall statutes, the Attorney General of Wisconsin did note 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.[39] However, in a specific ruling from a court, a federal court in 1967 dismissed a suit which attempted to compel the Idaho Secretary of State to accept petitions recalling Senator Church of Idaho. In the unreported decision, 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 United States Constitution.[40]

In Oregon, the Attorney General similarly ruled in an opinion on April 19, 1935, 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 United States Constitution and is a federal constitutional officer. The opinion found that such recall provisions would interfere with the Congress' 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."[41]

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[38] *Biennial Report and Opinions of the Attorney General of the State of Oregon* 313, (April 19, 1935): "Should this [state] constitutional amendment be so construed as applying to the recall of a Representative in Congress it would to that extent be inoperative." 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.

[39] 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."

[40] *See New York Times*, October 1, 1967, p. 47, col. 1.

[41] *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 *Congressional Record* 10688-89 (July 3, 1935).

Constitutional Amendment; Pro and Con.

For a recall provision to be enforceable against a Member of Congress, it would appear that a constitutional amendment would need to be adopted by the requisite number of States authorizing such procedure in the United States Constitution. Although there has been some call 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 recall election. It is also argued that complex governmental programs and policies may often need to function and to be evaluated in the long run, over time; but with the threat of immediate recall, Members may be further deterred in supporting long-term plans and programs for the country which may not bring immediate, short-term benefits to constituents.