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Sexual Misconduct and Congressional Self-Governance

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Over the past year, a number of prominent politicians (including President Donald Trump) have been publicly accused of serious sexual misconduct and abuse of power. The question therefore has arisen: Can these politicians either be barred from taking office or removed from office on the basis of these accusations?

There is only way to remove a sitting president: impeachment by the House of Representatives and conviction by the Senate. But the topic of impeaching and removing a president warrants its own column. This column will instead focus on what Congress may do when its members and members-elect face charges of wrongdoing.

Such charges have recently been made against Roy Moore, Al Franken and John Conyers. Moore is the Republican nominee for an open Alabama Senate seat. Franken is a Democratic senator from Minnesota. Conyers is a Democratic member of the House of Representatives from Michigan. All three have been accused of sexual misconduct and, in Moore’s case, sexual assault against a child. Conyers has also been accused of misusing congressional funds to settle sexual harassment claims.

Moore has been urged to withdraw from his Senate race; Franken and Conyers have been urged to resign from Congress. At the time of this
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writing, none has done so, although Franken has apologized for inappropriate conduct and called for a Senate Ethics Committee investigation into the charges against him. Also, the House Ethics Committee has announced that it will investigate Conyers.

So what if anything can Congress do? Let's start with the relevant provisions of the Constitution's text. Article one, section five, clause one states: "Each House of Congress shall be the Judge of the Elections, Returns and Qualifications of its own Members." And article one, section five, clause two provides: "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."

The first of these provisions might seem to invite the Senate to reject Moore as "unqualified," should he be elected. But no action was taken against Powell during the 89th Congress. When the 90th Congress met to organize in January 1967, House leaders barred Powell from taking the oath of office. The House then voted to exclude Powell as "unqualified" and notified the governor of New York that Powell's former seat was vacant.

Powell and several of his constituents sued House Speaker John McCormack and other House leaders, and the case went to the Supreme Court. The defendant House leaders argued, among other things, that the Constitution assigned to Congress sole responsibility for judging the qualifications of its members, and that the court should treat the issue as a "political question" not suitable for judicial resolution. But the Court disagreed.

Relying on records of debates during the Constitutional Convention, commentary from the ratification period, and early congressional applications of its article one, section five powers, the court held that Congress may exclude a member-elect as "unqualified" only if it concludes that the member does not meet one of the standing qualifications specified in the Constitution: age (25 for the House; 30 for the Senate); citizenship (for seven years for the House; for nine years for the Senate); and that the member-elect be an inhabitant of the represented state.

Expulsion is a different matter. As noted above, the Constitution expressly contemplates "punishment" for "disorderly Behaviour." But it says nothing about the grounds for expulsion. Thus, if we are to be guided only by the Constitution's text, Congress's power to expel would seem to be unlimited.

Historically, however, Congress has exercised the expulsion power infrequently. There have been only 20 congressional expulsions, and most were for disloyalty during the Civil War. Because expulsion runs the risk of being seen by the voters as overriding the will of the voters, many members of Congress have expressed the view that expulsion should be based only on behavior that occurs after a member's most recent election. But this view is not universally shared, and many others have opined that expulsion could be appropriate in circumstances where the misconduct was unknown to the voters at the time of election.

That said, most agree that expulsion of a member for conduct that was known to the voters at the time of election would raise serious concerns. Such an expulsion would be seen by many as inconsistent with the idea that sovereignty in our system lies with "We the People," and not those elected to represent us.

If precedent holds, Roy Moore will be seated and will serve if he is elected to the United States Senate. But precedent does not always hold, and the fact that the allegations against Moore became public only after he won a closely contested Republican primary adds an interesting wrinkle to this situation. At the time of election, Franken and John Conyers, on the other hand, could be expelled on a vote of two-thirds of their colleagues if the investigations into their behavior reveal serious misconduct—and in particular serious misconduct committed since they were most recently elected to office.

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