Written by **Paul Galvin** on October 30, 2010

Congressmen Can Be Voted Out of Office, But Not Impeached

Each voter's sole means of determining who serves, or does not serve, in the 112th Congress (2011-2012) is through the election of one member out of 435. Each will have only this one chance — no do-overs. Death, resignation, disqualification, expulsion, and expiration of term are the only routes by which a member leaves Congress, and none is within voter control.

Though some states have enacted recall procedures, these are next to worthless, considering all the required steps, spanning unfriendly time frames, with no assurance of success in the end. Furthermore, all recall hearings are conducted before votaries of the Ruling Class (election commission bureaucrats and judges), each making determinations on the future career path of someone deep inside the RC's inner rings, while the average voter is a mere member of the Country Class.

Bluntly stated: Because firing a member of Congress during his term of office is impossible, the sole means of voter control rests in *not hiring the wrong candidate in the first place — or if he has already been hired, not rehiring him*. Regarding the former, the time-worn adage that "a stitch in time saves nine" has particular relevance. It would have been far, far better for the cause of personal liberty to have prevented the enaction of countless federal overreaches — the 16th Amendment (the income tax), the Federal Reserve, ObamaCare, etc. — than to now try to undo the messes caused by these freedom-depriving acts of Congress. It is obvious that in order to have a better Congress, one that will constrain itself to the enumerated powers of the Constitution, there first must be better members of Congress.

Impeachment is not an exit route for members of Congress. It is applicable only to officers of the United States, and congressmen are not considered for such purposes. Article II, Section 4 of the Constitution declares:

> The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

The legal maxim of *expressio unius est exclusio alterius* — expressly referencing one type ("all civil officers") by operation excludes all others — clearly indicates the exclusion of congressmen from this impeachment provision. This interpretation is supported by Article II Section 2 of the Constitution, which further underscores the contra-distinction of members of Congress from federal officers, setting

members *qua* Congress constitutionally superior to officers. This of course makes perfect sense if the people — and by extension their representatives in Congress — are self-governing sovereigns:

> [The President] shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law [federal law-making being the exclusive province of Congress; Art. I, Section 1]: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Article II, Section 2 states: "The House of Representatives … shall have the sole power of impeachment." The power of impeachment is the right to make an accusation, analogous to a criminal indictment.

Article I, Section 3 explains: "The Senate shall have the sole power to try all impeachments." Trying an impeachment is weighing the evidence of the accusation. If an impeached officer is found guilty, he has no further appeal; the Senate's determination is final.

The principal reasoning for the exemption of congressmen from impeachment lives in an ethereal land. The country's founding era saw the creation of a federal system of divided spheres of governmental powers, each one controlled putatively by the people, who would act as self-governors, managing through consent the manner in which they might be governed, with the operative principle being self-government, not rule by government. (Of course, the Senators were are supposed to represent the states and for that reason were once elected by state legislatures, but the states too derive their power from the consent of the governed — that is, the people of the states.)

In their practice of self-government, the people would choose representatives who would then exercise delegated powers on behalf of the people. Thus, because members of Congress are in the end the representatives of the people — their agents — then Congress is "We the People," and we are Congress. Therefore, because one can neither accuse himself, nor try and convict himself, the impeachment power cannot logically be applied to Congress.

This wasn't always the thinking. Ten years after the signing of the Constitution, the very first impeachment was launched to oust Senator William Blount of Tennessee. In July of 1797 the House voted to impeach him, notwithstanding the fervent arguments that it had no such authority with respect to members of Congress. Within days the Senate also voted to expel Blount, an action well within its power ("Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member" — Article I, Section 5).

In the latter part of 1797, the Senate began its preparations for Blount's impeachment trial, even though the Senator had been expelled from the upper chamber months earlier. However, because the issue of whether a member of Congress could be impeached at all still hung in the air, and because Blount refused to attend in person any aspect leading to his impeachment trial, the Senate allowed the matter to die under its own weight, reasoning that Blount's expulsion had effectively ended his adverse influence on national affairs. (For those wishing to learn more of the Senator's story, see here.)

At this present point in our history, it is settled — albeit without clear citable precedent — that impeachment of members is not viable. Because each house of Congress has the clear authority to discipline and expel its own members, and because of the above-cited constitutional provisions, impeachment has never again been attempted against a member of Congress. All other 19 federal

impeachments (see list found at the end of this reference) have been brought against those who were undeniably federal officers.

Knowing this, how important is each person's vote in electing his member of Congress? To ask the question is to answer it. If a person elected to Congress does not possess the traditional sense of American morality, taking to heart the constitutional oath of office (Art. VI; 5 U.S.C. Section 3331), then that person's character will be as malleable as a sheet of thin lead, molded by the powers that be, with dire consequences for the cause of liberty. Founder John Adams was prescient in assessing the efficacy of paper handcuffs:

> Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.

When such moral and religious character is lacking in a member of Congress — and thus there is no sense of faithfulness to the constitutional oath — the rigged game is on. Here is how it works: First, Congress (whether Democrat- or Republican-controlled) passes a putative "law" that has no constitutional textual authority, thereby neglecting its institutional duty to check-&-balance itself and enact only measures for which there is express constitutional language. Affirmatively-voting members, in passing this measure, disregard their oaths to support the Constitution.

Next, the President, failing in his independent check-&-balance duties to ascertain a law's compliance with the Constitution, and unfaithful to his unique constitutional oath, signs that "law." (Both Democrat and Republican Presidents have been equally guilty: In eight years President George W. Bush vetoed a mere 12 laws, despite numerous clearly unconstitutional enactments; President Obama has vetoed two bills despite the patently unconstitutional actions of the 111th Congress.)

Finally, that new "law" — when tested in the federal courts — is, to the surprise of only the naïve, found to be "constitutional." Why? Because the judiciary, evading its own independent check-&-balance duty, relies on a long-practiced, judicially-created legalistic convenience known as "presumption-of-constitutionality" — an artifice which holds that anything enacted by Congress is presumed constitutional.

Presumption-of-constitutionality is an enormous strategic advantage for the judiciary, as it shifts the burden of proving constitutionality from the government (the proponent) onto the shoulders of citizen-challengers, who are then burdened with the difficult legal standard of disproving the putative law's constitutionality. In all other venues of life, a proposition's proponent bears the burden of proof & persuasion; however, not in the one venue where it really matters. In the federal law-making forum, the greatest measure of control can be exercised over the greatest number of people. This up-ends common sense: When Congress enacts laws, there should be a presumption that people's liberties should prevail, not a presumption that Congress can toy with those liberties as it sees fit. (This is the view of law professor Randy Barnett, among others). The unconstitutional ObamaCare easily comes to mind, and defenders of this pretense at lawmaking have been quick to play the presumption-of-constitutionality trump card against the people, the states' attorneys general, and their respective liberties.

Thus, though Americans have the textual and apparent form of a limited, appropriately checked-&-balanced government, they have not its actual substance — precisely because so many members of Congress disregard their constitutional oath. That blatant disregard, so memorably exemplified earlier this year by Democratic Rep. Phil Hare (Ill.) (here), must ultimately be laid at the feet of the voters for not electing men and women of honest character who are willing to protect the people's freedoms —

willing to take the heat from Ruling Class elitists, by chaining the beast of government.

When voters go to the polls on November 2, may they choose wisely.

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