

January 3, 2017

The Honorable Paul Ryan  
The Speaker of the U.S. House of Representatives  
United States Capitol  
Washington, D.C. 20515

The Honorable Nancy Pelosi  
The Minority Leader of the U.S. House of Representatives  
United States Capitol  
Washington, D.C. 20515

Dear Speaker Ryan and Minority Leader Pelosi:

We write to express our strong concerns regarding provisions in H. Res. 5 that would authorize the Sergeant-at-Arms of the House of Representatives to unilaterally punish and fine Members of the House for certain alleged infractions without any action by the full House. These provisions were apparently written in response to the House Democrats' protest last year over inaction on gun safety legislation. As constitutional and legal experts with experience in academia, the Federal courts, and Congress, we believe there are significant constitutional and policy problems presented by the proposed new provisions.

If adopted, the new provisions would undermine core constitutional protections under Article I of the Constitution and the Bill of Rights. At a minimum, it would seem that significant and controversial changes of this nature would benefit from the input of legal experts before being considered by the full House of Representatives.

Section 2 of the proposed rules package includes several potentially problematic provisions. Under subsection (a), clause 3 of House Rule II would be amended to provide that the Sergeant-at-Arms "is authorized and directed to impose a fine against a Member . . . for the use of an electronic device for still photography, audio or visual recording or broadcasting . . . ." A fine for the first offense is set at \$500 and fines for second or subsequent offenses are set at \$2,500. A limited appeal of a fine is permitted to the Committee on Ethics, however that appeal process does not provide Members with recourse to a full vote of the House. Subsection (a) would also amend clause 4 of Rule II to require the Chief Administrative Officer to deduct the amount of the fine from the Member's net salary, and amend rule XVII to add a provision providing that a Member, officer or employee of the House may not engage in "disorderly or disruptive conduct in the Chamber," which such conduct is deemed subject to House Ethics Committee review.<sup>1</sup> The amendments also authorize the Speaker to issue further announcements on electronic devices, and the Sergeant-at-Arms, the Committee on Ethics, and the Chief

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<sup>1</sup> Three types of behavior are specified by the amendment to fall within such prohibition -- "intentionally obstructing or impeding the passage of others"; "use of an exhibit to impede, disrupt or disturb the proceedings"; and "denial of legislative instruments to others seeking to engage in legislative proceedings."

Administrative Officer to establish implementing procedures and policies for these rules changes.

The changes would give an administrative officer the power to do what no single Member of Congress could do—act alone to punish and fine another Member. The unprecedented delegation of systematic authority to assess fines to officers of the House – in this case the Sergeant-at-Arms and the Chief Administrative Officer – removes the power from where it belongs: the Members themselves acting as a body. Article I, Section 5 of the Constitution provides that “Each House may . . . punish its Members for disorderly Behavior,” and this power has always been exercised by the full House of Representatives and never delegated to a single Member or administrative officer. The Supreme Court held in *Powell v. McCormack*, 395 U.S. 495 (1969) that this type of constitutional authority cannot be used to abrogate other parts of the Constitution.<sup>2</sup>

The unprecedented delegation of the House punishment power to an administrative officer is designed to restrict activity that is at the core of the First Amendment freedom of speech, and the Members’ rights under the Article I, Section 6 Speech or Debate Clause. The rules would sharply limit the ability of Members to video record proceedings on the House floor, offending the spirit if not the text of these constitutional requirements. In this regard, we would note that federal courts have previously held there is a First Amendment right to video record city council proceedings.<sup>3</sup> The proposed new rules include a number of potentially vague or overbroad terms (*e.g.*, “use of an exhibit to impede” and “denial of legislative instruments”), thereby implicating due process concerns. The fact that the proposed rules were amended late last evening to allow a limited appeal to the Ethics Committee – a Committee equally divided on partisan lines -- does not resolve our constitutional concerns with these changes. This is because we are left with a process whereby an administrative officer of the House has been empowered to fine Members for speech-related activities, and the Member has no recourse under the rules for consideration by the full House.

Nearly 70 years ago in *Tenney v. Brandhove*, the Court quoted the writings of James Wilson to highlight the importance of legislative immunity provided in the Speech or Debate Clause: “In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, **it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.**”<sup>4</sup>

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<sup>2</sup> An additional issue concerns the 27th Amendment which provides “No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.” The proposed House rules amendments could be seen as having the potential effect of reducing Member pay without an intervening election, as the Chief Administrative Officer would be required to automatically deduct the amount of the fine from the Member’s pay.

<sup>3</sup> *See, e.g.*, *Tisdale v. Gravitt*, 51 F. Supp. 3d 1378 (N.D. Ga. 2014).

<sup>4</sup> 341 U.S. 367, 373 (1951) (emphasis added).

We believe the House of Representatives should heed these words and tread very carefully before taking any action that authorizes an administrative officer of the House to punish Members of Congress for expressing themselves and informing the public concerning actions being taken on the House floor.

Thank you for your consideration of these views.

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