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Suppuration of Powers: Abscam, Entrapment and the Politics of Expulsion

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SUPPURATION OF POWERS: ABSCAM, ENTRAPMENT AND THE POLITICS OF EXPULSION

HENRY BIGGS¹

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.²

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INTRODUCTION

The recent success of the film *American Hustle* has renewed public curiosity in the events surrounding the Abscam scandal and its subsequent trials. What the movie’s colorful representation does not highlight, however, is the significant legal and constitutional questions raised at subsequent trials, specifically as they relate to the fate of the highest official ensnared by the sting operation, Senator Harrison

¹ Special thanks to the University of Rutgers Special Collections and University Archives as well as Steve Leone for access to and assistance with the Harrison A. Williams, Jr. Papers.

² *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

"Pete" Williams.

The fundamental question this operation raised was whether illegal behavior should go unpunished if illegally induced. Although Justice Brandeis once noted that "[t]he confirmed criminal is as much entitled to redress as his most virtuous fellow citizen,"³ honoring the principle in the Abscam trials would at times rankle. As will be shown, the unsavory characters involved would prove remarkably adept at invoking higher principles for protection, almost taunting the judiciary's commitment to those principles. However, if these bad actors were correct and the proposition that induced their illegal actions was itself illegal, there could only be, gallingly, one legally principled outcome. As Justice Cardozo famously stated: "[t]he criminal is to go free because the constable has blundered."⁴

A slightly more knotty contour to this question would present itself here, however, when some of the Abscam accused would fail to effectively articulate the principle that might best serve their interests. Should it still fall to the principled to save these accused from themselves, ignoring their fallacious or unpersuasive arguments, and invoking for them the uncalled upon principle that may save them? The case of Harrison Williams would offer such a confluence of events. As guilty and reprehensible as any to stand accused, Williams was caught *in flagrante* on video accepting stocks for government influence, one of six Congressional members ultimately convicted under Abscam.⁵ Howlingly condemned in the court of public opinion, conviction in the judicial courts on nine counts of bribery and conspiracy soon followed.⁶ Surely if ever a Senator deserved the highest Senatorial sanction of expulsion it was Williams.

Was there a principle, however, that might help him save his seat? The threat to the doctrine of the separation of powers had promise, for by his expulsion the actions of the Executive Branch would have had a direct effect on the composition of Congress. Williams would, however, fail to effectively articulate the point, instead choosing stubbornly to simply insist that he deserved unqualified exoneration. Given the videotapes of his transgressions, such a position strained all credibility and in turn made it all the more difficult for the Senate to invoke the principle that might have helped him keep his Senate seat.

³ *Id.*

⁴ *People v. Defore*, 242 N.Y. 13, 21 (N.Y. 1926).

⁵ Amanda Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with Its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 325 (2001).

⁶ *United States v. Williams*, 529 F. Supp. 1085, 1090 (E.D.N.Y.1981).

This Article will argue that Williams' best opportunity to retain his seat in the Senate seat was through a separation of powers argument. To that end, in Part II, the origin and controversies of the sting known as Abscam—the investigative scheme which ensnared Williams—will first be detailed. In Part III, the ensuing Abscam-related trials against several elected representatives will be addressed, with particularly close attention being paid to the judicial divide over the issue of entrapment. Here, it will be established that the results of these trials showed that the entrapment defense was unproductive and needed to be abandoned by Williams. In Part IV, the meaning and ramifications of the specific sanctions of censure and expulsion will be explained as well as the arguments that were presented at Williams' Senate Hearings for and against his expulsion.

I. ABCAM

A. ORIGINS

Abscam began inauspiciously in 1978 as an FBI sting for stolen art, a sleepy venture that bore little fruit until it turned its sights on political figures.⁷ The sting itself involved a supposed Arab Sheikh who sought to invest hundreds of millions of dollars in a target's congressional district;⁸ in return, the Sheikh sought legislative favors and offered cash or other value.⁹ The proposition was alluring in that the investment part of the proposition spoke to legitimate civic goals and desires—what was a representative's job after all if it was not promotion of investment in his area? The sheikh's resources, furthermore, seemed limitless, so there seemed to be no upward bound to the possible benefits of the relationship

To obtain this benefit, all the representative needed to do was show some sensitivity to "Arab culture," to understand that for such financial commitments Arab customs required the receipt of some cash and legislative favors as recognition. For the political representative to refuse might be perceived as a slight and jeopardize the representative's chances.¹⁰ Accommodating in this small way would potentially benefit

⁷ United States v. Kelly, 539 F. Supp. 363, 365 (D.D.C. 1982).

⁸ United States v. Jannotti, 673 F.2d 578, 581 (3d Cir. 1982).

⁹ *Id.*

¹⁰ *Id.* at 588. To entice Jannotti, one of the undercover agents described the "Arab perspective" as follows: "... it's at times difficult to understand now, ah, I can appreciate it because I've had both worlds and I can relate, ah, you know, you folks are here, right, they, they think differently, they deal differently, their psychological processes are alien to the way I understand exactly what you're saying. Ok. I'm coming up with something that's going to help the City of Philadelphia. Ah, it would help, as it would help any city. Ah, he does not look on it that way. They do business, differently. They pay the freight up front. They make friends, right, and then when there, there is

the representative's district enormously—surely it was reasonable for the representative to show some measure of flexibility and accept the money?

This irresistible proposition was largely the brainchild of Mel Weinberg, a convicted, serial swindler who had signed on to the project as part of a plea bargain to reduce his prison term.¹¹ Weinberg was familiar with Angelo Errichetti, the Mayor of Camden New Jersey, so Errichetti naturally became one of his first targets. As Errichetti in turn knew Harrison Williams from their shared years on the New Jersey political stage, Errichetti in turn invited Williams to the table.¹²

While Williams agreed to meet with the sheikh and his representatives, he was resistant to the sheikh's proposal of a direct cash payment. Williams was not entirely disinterested in the sheikh's money, however—he offered instead an indirect alternative for his payment. Williams suggested the Sheik invest in companies financed by a venture capital partnership, a partnership that would include Errichetti as well as Williams' long-time attorney and friend Alex Feinberg as partners.¹³ By the sheikh's investment in these ventures, the benefit would indirectly accrue to Williams through stock ownership. The Sheikh agreed and Williams' attorney Feinberg duly created three corporations for this investment group with a hidden 18% ownership for Williams that had a timed vestment requiring disclosure at the end of Williams' Senate term. Two concerns of initial interest for Williams were a titanium mine in Virginia and a processing plant in Georgia.¹⁴

The FBI captured all of Williams' machinations on videotape, and while Williams would try to argue his innocence, the video evidence made his assertions untenable, even absurd. The tapes showed instead a politician that was calculatingly corrupt, cravenly maneuvering to avoid detection by authorities. Williams' criminal participation in this most "tawdry, greedy enterprise" was as clear as the celluloid it was registered on.¹⁵

However, for all of Williams' clear participation, had the constable blundered and acted illegally in its pursuit of Williams? When the FBI

a potential problem then I don't mean, I don't mean a problem that would necessarily close down construction and throw the project out of Philadelphia."

¹¹ Mary Thornton, *Abscam Ex-Prosecutors Assail Middleman's Role*, WASH. POST, June 3, 1982 at A14. Weinberg was indeed committed to the art of swindling. Evidence would later show that while he was working for the FBI, he was actually swindling them.

¹² *Williams*, 529 F. Supp. at 1096.

¹³ *Id.* at 1090.

¹⁴ *Williams*, 529 F. Supp. at 1090.

¹⁵ 128 CONG. REC. 3646 (1982).

had offered him cash, he had clearly said “no.” Rather than accept the “no,” had they instead cajoled and wheedled him into a “yes”? If so, he had a fair case for entrapment, and he would have to be set free.

B. ENTRAPMENT

In 1928, the question as to what constitutes entrapment first became a subject of Supreme Court scrutiny in *Casey v. United States*.¹⁶ Government agents worked out an agreement with a prison inmate to order morphine from a lawyer who was suspected of smuggling drugs for his clients.¹⁷ While the majority deemed the agents’ arranged purchase acceptable, Justice Brandeis vigorously disagreed in dissent. Brandeis warned “[t]he Government may set decoys to entrap criminals, [b]ut it may not provoke or *create a crime* and then punish the criminal, *its creature*.”¹⁸ (Italics added). Under Brandeis’ analysis, the government must limit itself to serving as a passive additional lure to existing crime rather than as an active, coaxing participant in its own wholly self-created crimes. If the government engaged actively in crimes of its own invention, then the criminal would have to be let off the hook.¹⁹

It is important to remember, however, that Brandeis’ opinion was in dissent. Under the majority’s analysis, the government’s misconduct was not entirely dispositive: the target’s predisposition to commit the crime was also to be considered. If the target was deemed likely to commit the crime, then the target could still be found guilty; if the targets seemed instead coerced or lured by the government *against* their predisposition, they would have to be found innocent.

¹⁶ *Casey v. United States*, 276 U.S. 413, 423 (1928).

¹⁷ *Id.* at 416–17.

¹⁸ *Casey v. United States*, 276 U.S. 413, 423 (1928). Noted in Bennett Gershman, “Abscam, the Judiciary, and the Ethics of Entrapment,” 91 *YALE LAW JOURNAL* 1565, 1568 (1981–82).

¹⁹ The nature of the defense was outlined and successfully pled later in *United States v. Sorrells*, 877 F.2d 346 (5th Cir. 1986) and *Sherman v. United States*, 356 U.S. 369, 372 (1968). In *Sherman*, an agent befriended a recovering addict in a rehab clinic and asked him where he could get drugs. Although the addict initially tried to avoid answering, the agent preyed on his emotions, relating his suffering and his own inability to stay free of drugs. In sympathy and against his better inclinations, the target relented and obtained narcotics for the agent. The Court noted that the determining factor was to see whether the accused was “induced” to commit the crime and whether he would have been predisposed otherwise. While it conceded that stealth was a necessary part of police tactics in detecting and ferreting out crime, it noted that a line was crossed when “they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.” *Sherman v. United States*, 356 U.S. 369, 372 (1958). Justice Warren stated further that “[t]he stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations.” *Id.* Chief Justice Warren noted further that “(t)o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.” *Id.*

Judging from these standards, Abscam was difficult to classify. Was Abscam a new crime made out of whole cloth and had the agents been too active, or was it the legitimate outgrowth of other observed international threats of bribery? There were internal documents that suggested it was to some degree a government creation, concocted in significant part by the swindler Weinberg. Furthermore, following the majority standard, it was difficult to classify Williams' predisposition. Did they pursue him because of evidence of prior criminal behavior? Had they cajoled him into agreeing to their offer or had he been eager? These issues would be vigorously debated once Williams and his fellow accused politicians went to trial.

II. THE ABCAM CASES

A. UNITED STATES V. JANNOTTI

One of the first political moths to the Abscam fire was Harry Jannotti, a councilman for the City of Philadelphia.²⁰ The sheikh's representatives offered him substantial investment in the councilman's district but asked that he take \$10,000 in cash to make the Arab enterprise feel more comfortable.²¹ The Sheikh's representative said it was simply "the Arab way of doing business."²² The prospect of rejuvenating several run-down areas in Philadelphia naturally appealed to the Councilman. Easily persuaded by the argument of "Arab custom," Jannotti took the cash and put it in his pocket, saying "we won't even discuss it."²³

At the ensuing trial, the district court sympathized with the temptation offered to the councilman and overturned the guilty verdict of the jury. Jannotti had been led to believe that Philadelphia would not get the benefit of the hotel project if he refused the money.²⁴ The court noted that given "the context of the fiscal crises which beset all large cities . . . and . . . the problems of urban blight and decay, the government inducement . . . was indeed calculated to overwhelm."²⁵ The appellate court disagreed, however, and found Jannotti did have the predisposition, noting he "accepted the money readily, unprotestingly, even casually, without ever once attempting to use [his] consummate political skill to say, as diplomatically as the circumstances required, "Thanks, but no thanks."²⁶

²⁰ United States v. Jannotti, 673 F.2d 578, 598 (3d Cir. 1982).

²¹ *Id.*

²² *Id.* at 602.

²³ *Id.* at 603.

²⁴ *Id.*

²⁵ United States v. Jannotti, 673 F.2d 578, 598 (3d Cir. 1982).

²⁶ *Id.* at 606.

However, Judge Aldisert arguing in dissent found the fundamental nature of Abscam repugnant. As he noted, “[t]he majority opinion reads like a paean to the FBI for its conduct in this case; but as an American citizen and as a federal judge, I find that conduct revolting.”²⁷ Instead, Judge Aldisert agreed with Justice Holmes that in certain cases of government misconduct, it is a “less evil that some criminals should escape than that the government should play an ignoble part.”²⁸ Jannotti was ultimately convicted on all charges.

Although judicially contentious, Jannotti’s cash payment was straightforward. The councilman had been relatively quickly persuaded and had put the money in his pocket. Williams’ actions could be distinguished in that they had taken place over an extended period of time and involved no cash exchange. That the courts had shown a strong disagreement as to the entrapment standard even with Jannotti’s brazen actions was encouraging for Williams. The facts in *United States v. Kelly*, addressed in the next section, would be somewhat less straightforward than Jannotti and prove all the more contentious.

B. UNITED STATES V. KELLY

In *United States v. Kelly*, Abscam agents offered Florida Representative Richard Kelly investment in his district for cash and the promise of government favors. Again, judicial disagreement would surface as to whether Kelly had been entrapped. Kelly’s case was initially dismissed, with the district court issuing a strong rebuke to the government for its outrageous conduct in the matter.²⁹ The district court warned that “the litmus test for temptation” should be one which involves a threshold consistent with one’s ordinary dealings and that anything further “creates a whole new type of crime that would not exist but for the government’s actions.”³⁰ Although the district court used an objective standard in making its decision, it noted that even under the “predisposition” standard Kelly would prevail for he had refused the agents’ offers on several occasions.³¹

In a recurring refrain, the district court also observed that the Abscam sting was unfairly devious in its use of “legal and illegal bait:” a strong *legitimate* attraction of investment coupled with the illegal

²⁷ *Id.* at 612.

²⁸ *Id.*

²⁹ *United States v. Kelly*, 539 F. Supp. 363, 365 (D.D.C. 1982).

³⁰ *Id.* at 374.

³¹ *Id.* at 372 (noting evidence that showed that the agents repeatedly tried to offer him money and that he steadfastly refused the offer, remaining interested only in the legitimate proposed investments that the agents purported might be made available to his city).

component of a bribe.³² This created an additional temptation on the target to bend his ethical standards because of the huge benefit that would legitimately accrue to his constituents.

However, as in *Jannotti*, the appellate court again reversed, holding that there were strong public needs that must be considered as government officials were “not recruited from the seminaries and monasteries across the land.”³³ In view of the goal of keeping public officials honest, the court found that “the FBI’s conduct . . . insofar as it involved Kelly . . . simply did not reach intolerable levels.”³⁴

Again, the courts disagreed as to the standard, but ultimately the result would be conviction. The facts here were more analogous to those of Williams but still could arguably be distinguished. While Kelly, like Williams, initially refused the offer of direct cash payment, he ultimately accepted a direct cash payment.³⁵ Williams, however, had not.

C. UNITED STATES V. WILLIAMS

While *Jannotti* had accepted cash and Myers had accepted cash payment after an initial refusal, Williams’ proposed payment was to be achieved through transactions “more complex and more subtle” than his fellow accused.³⁶ Not only did Williams’ case present complexity in the nature of his benefit, but also simply in terms of time spent, as Williams met with the agents repeatedly.³⁷

As stated earlier, Williams proposed that “Abdul Enterprises” invest in companies under Williams’ umbrella enterprise, creating an indirect benefit to him through his ownership of the underlying stocks

³² *Id.* at 372.

³³ *United States v. Kelly*, 707 F.2d 1460, 1473 (D.C. Cir. 1983).

³⁴ *Id.* at 1474.

³⁵ *United States v. Myers*, 527 F. Supp. 1206, 1225 (E.D.N.Y. 1981). This case was another Abscam case involving a political representative who argued for entrapment. In that case, Judge Pratt would decline to use the objective standard, focusing instead on the predisposition of the defendants. He noted that regardless of the government’s conduct, the defendants “could simply have said ‘no’ to the offer” and avoided criminal liability. In particular, he rejected the contention that the inducements offered by the government were overwhelming, since “[n]o matter how much money is offered to a government official as a bribe or gratuity, he should be punished if he accepts.” *Myers* 527 F. Supp. at 1228. Underlying Pratt’s support of the government’s actions was the great public interest he perceived to be at stake. Official corruption, he noted, posed a danger greater than any foreign enemy: “[T]he government needs to have available the weapons of undercover operations, infiltration of bribery schemes, and “sting” operations such as Abscam in order to expose those officials who are corrupt, to deter others who might be tempted to be corrupt, and perhaps most importantly, to praise by negative example those who are honest and square-dealing.” *Id.* at 1229.

³⁶ *United States v. Williams*, 529 F. Supp. 1085, 1090 (D.C.N.Y.1981).

³⁷ *Id.* at 1091.

and certificates. The legal work and front man would be Williams' lawyer, Alex Feinberg, sometimes referred to as the "bagman" by the United States government.³⁸

At trial, Williams tried to advance the argument that the FBI tapes of these events showed his proposal was a legitimate above-board business transaction. Williams argued further that any inculcating statements on his part were the product of "coaching" by Mel Weinberg. Following Williams' logic, Weinberg had pressed these terms on him and made it impossible for him to say no or speak "his own mind."³⁹

The court was not persuaded, finding that given all of Williams "fine educational background, his long political experience, the heights to which he had risen in the councils of government" it was less than credible for him to then claim that others could "put words in his mouth."⁴⁰ The court suggested that such an argument might be tenable for a person whose livelihood was not grounded in regular public speaking, but for Williams, asserting this diffidence was absurd. The swindler Weinberg would agree, putting it more colorfully in a separate interview:

I don't understand all this entrapment bulls—t from the defense lawyers. Like . . . I'm supposed to have told the Senator what to say in the hotel. He's a United States Senator. Why's he takin' orders from a hood like me? He always coulda said "No." Nobody twisted anybody's arm to take the bread. We said it was there if they wanted it. They knocked each other over tryin' to be first on the bread line.⁴¹

In spite of Williams' strenuous efforts at pleading his innocence, it was difficult for anyone to see beyond the video images of Williams greedily plotting, arranging for the receipt of his stocks and certificates.

At trial, Williams advanced additionally the notion of executive overreaching, contending that he had been singled out by the Executive Branch for his support of Ted Kennedy in the 1980 election rather than for the incumbent, Jimmy Carter.⁴² Williams then altered his argument, stating that he was not so much targeted as subject to "honesty" or investigatory-style tests that were not administered to

³⁸ *Id.* at 1090.

³⁹ *Id.* at 1097.

⁴⁰ *Id.* at 1099.

⁴¹ ROBERT GREENE, *THE STING MAN: INSIDE ABSCAM 185* (Dutton 1981).

⁴² *Williams*, at 1101.

Carter supporters. In short, Williams claimed that he was negatively selected as a result of the justice department officials' failure to inform him that he was under investigation. The court dismissed this claim, finding that it lacked merit. The court made short work of this claim, noting that Williams' framing of the issue was simply not supported by evidence already presented at earlier due process hearings.⁴³

In the end, in terms of his argument for entrapment the court had termed Williams' arguments on the standard an unpersuasive "rehash of the general issue."⁴⁴ To reasonable minds, after the run of Abscam cases where the defense of entrapment had failed, this should have made it clear that to argue it was a losing proposition. Would Williams adjust accordingly therefore in the upcoming Senate hearings? After all, the Senate proceedings offered a new forum with new rules and therefore all the more opportunity to redefine his position. Here, the issue could be couched beyond one man's innocence or guilt and writ large as the Executive Branch riding roughshod over the Legislature. The Senate, furthermore, was in no way bound by judicial decisions, so Williams' failure in court would not be fatal to his chances in the Senate. The highlighting of the Executive authority's overreaching in this new setting would be all the more relevant because it would speak to a potential direct threat to its audience. For Williams' to hold his Senate seat, however, it would be important if he wished to save his seat for him to accentuate the heightened risks to legislative independence of expulsion over censure.

III. THE SENATE HEARINGS

A. THE PROPOSED SANCTIONS

There was little question that Williams would be sanctioned—the question was simply one of degree. The two sanctions offered at Williams' Senate proceeding were expulsion, proposed unanimously by the Senate Ethics Committee, and censure, suggested in a separate resolution by Senator Alan Cranston.⁴⁵ While the two measures were to some degree similar in effect, there were real and symbolic differences as well.

1. EXPULSION

In terms of the sanction of expulsion, historically, there had been fourteen Senators expelled, all Southern, convicted of high treason for

⁴³ *Id.*

⁴⁴ *Williams*, at 1094.

⁴⁵ 128 CONG. REC. 2954, 2998 (1982).

their secession during the Civil War.⁴⁶ In over a century since that time, no other Senator had been expelled. Interestingly, there had been only one member of the House of Representatives to lose his seat outside of that Civil War era: Michael Myers, following his Abscam convictions.⁴⁷ There had been some close calls, but in the end those subsequently under consideration had discretely resigned or not been re-elected.⁴⁸ That meant that the only precedent the Senate had for expulsion was for high treason. Had over a hundred years of precedent established high treason as the only offense meriting expulsion?

A review of original constitutional drafting documents provides little additional insight as to the intended scope of expulsion. The only comment in the original documents on the expulsion clause was a request from James Madison that the vote for expulsion be increased from a pure majority to two-thirds, arguing that ‘the right of expulsion . . . might [otherwise] be dangerously abused.’⁴⁹ Gouverneur Morris, the man charged with drafting the final copy of the Constitution, disagreed, arguing that requiring a two-thirds majority might create its own mischief, “allowing [a] few men from factious motives . . . [to] keep in a member who ought to be expelled.”⁵⁰ Madison’s amendment ultimately carried the day and that is the last comment or clarification the drafters would offer on the expulsion provision.⁵¹

Expulsion has, however, historically not been the only Congressional punitive game in town. Congress has taken advantage additionally of the phrase in the Constitution which provides that it may generally “punish[] its members for disorderly behavior.”⁵² Historically and statistically, Congress has chosen to use this less clearly defined authority to create its own less severe sanctions.⁵³ The only alternative

⁴⁶ *Expulsion and Censure*, United States Senate, http://www.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last visited Apr. 19, 2014).

⁴⁷ *Id.*

⁴⁸ Jack Maskell, Cong. Research Serv., RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* 5 (2013).

⁴⁹ 2 Max Farrand, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 254 (1937).

⁵⁰ *Id.*

⁵¹ *Id.* (The original framers had additional concern over the implications of legislators throwing out representatives who had been duly represented by their people).

Laura Ray *Discipline through Delegation: Solving the Problem of Congressional Housecleaning*, 55 *UNIV. OF PITTSBURGH LAW REVIEW* 389, 392 (1994). (Under original documents, a provision allowed that “[e]ach House may expel a Member, but not a second Time for the same Offence.” The framers worried, however, that if legislators repeatedly expelled a member duly elected by its constituency, they would create the possibility for legislators to subvert the will of the people. The provision of “not a second Time for the same Offence”, however, was ultimately removed, allowing theoretically the possibility for legislators to indeed engage in such subversion.).

⁵² U.S. CONST. art. 1, § 5, cl. 2.

⁵³ Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives* 22 (2013). (Maskell states specifically “[i]n the House of Representatives there

sanction that was seriously under consideration in Williams' case, whose authority is implied from this clause, was that of censure, the parameters of which will be addressed in the following section.

2. CENSURE

Expulsion can be an unnecessarily severe method of achieving a desired end, and even raise constitutional questions of its own.⁵⁴ If someone has committed less than proper conduct, a sanction of some sort is in order, but it may not necessarily be the case that the extreme measure of removal from office is appropriate. Censure offers an effective alternative. It shows Congressional disapproval but leaves the question of removal from office to the offender's constituents.⁵⁵ Furthermore, censure is more politically easy to achieve, requiring a simple majority rather than a two-thirds majority.⁵⁶

In terms of those offenses which have historically qualified for censure, often some level of financial misconduct has been at issue. In 1967 Thomas Dodd of Connecticut was censured for using his office to put campaign funds to personal use.⁵⁷ In 1979 Herman Talmadge of Georgia was censured for accepting reimbursements for expenses he had not incurred and for improperly reporting his campaign expenditures.⁵⁸ In 1990 David Durenberger was censured for shady real estate transactions and conversion of campaign contributions to personal use.⁵⁹ As Williams' offenses were also financial in nature, the sanction of censure did have an arguable precedential application.

While there are other lesser methods of disciplining as well, none of these were proposed on the Senate floor and so fall beyond our

have been 22 "censures" of Members (21 Members and 1 Delegate), including two censures of former Members who, in 1870, had resigned just prior to the House's consideration of expulsion motions against them for selling military academy appointments. While the majority of the censures in the House occurred in the 19th century and concerned issues of decorum, that is, the use of un-parliamentary or insulting language on the floor of the House or acts of violence towards other Members, in more recent years instances of financial misconduct have appeared to have been a major issue." *Id.* at 13.

⁵⁴ 128 CONG. REC. 3448, 3483 (1982). (Senator Heflin noted at the outset of the Senate hearings that concern had been expressed over a possible violation of Article I, Section 3 which provides that the Senate "shall be composed of two Senators from each State.").

⁵⁵ Francis B. Simkins, Pitchfork Ben Tillman, *South Carolinian* 11 (2002). (Only one senator has managed to be re-elected after censure—Benjamin "Pitchfork" Tillman, in 1902 who was censured for assaulting another Senator on the house floor.).

⁵⁶ Jack Maskell, *supra* note 53, at 11.

⁵⁷ *Expulsion and Censure*, United States Senate, http://www.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last visited Apr. 19, 2014).

⁵⁸ *Id.*

⁵⁹ *Id.*

scope here.⁶⁰ The question for Williams was simply one of censure or expulsion. On this new disciplinary stage, Williams needed to understand that the context had changed, that the battle was no longer to prove his innocence but simply to keep his seat.

To that end, Williams needed to re-channel his arguments in terms of the interests of the Senators. To focus specifically on the implication of the dangerous political precedent that might be set by his physical removal from the Senate. If couched appropriately, fellow Senators could see that Williams' guilt on this stage was not the only issue: a decision to vote for his actual removal would potentially encourage the practice of legislative stings as an effective method of manipulating the legislature. It would need to be argued that it did not matter for political purposes if the legislator succeeded in defending himself against these executive tactics—the Executive could likely end careers simply by showing the legislator's questionable behavior. By articulating this

⁶⁰ Although the Senate never seriously considered any of their statutory enactments for Williams, this might also have been an option that would have provided appropriate severity. Statutory enactments are a relatively more recent phenomenon developed by the House to more narrowly proscribe certain conduct. It was not clear, however, if the House had the authority to develop statutory law against itself in this regard. In *Burton v. United States* in 1906, the court addressed just this issue. *See* *Burton v. United States*, 202 U.S. 344, 360 (1906). In that case, there was a statute provided that no Senator or Representative was to receive compensation of any sort for any matter to which the United States was also a party. *See id.* The statute also provided that anyone convicted under the statute forfeited the right to run for political office and provided for a punishment of not more than 2 years in prison. *See id.*

The statute provided specifically: "No Senator, Representative, or Delegate, after his election and during his continuance in office, and no head of a department, or other officer or clerk in the employ of the government, shall receive or agree to receive any compensation whatever, directly or indirectly, for any services rendered, or to be rendered, to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever. Every person offending against this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not more than two years, and fined not more than ten thousand dollars, and shall, moreover, by conviction therefor, [sic] be rendered forever thereafter incapable of holding any office of honor, trust, or profit under the government of the United States." *Id.* (citing Act of June 11, 1864, CH.119, § 1782, 12 STAT. 123, 123 (1864)).

Burton was convicted under the statute for agreeing to receive \$2,500 to use his influence on behalf of a grain company. *Id.* at 360. Burton argued, *inter alia*, that the statute was unconstitutional in that, by removing him from office and not allowing him to run again, the statute interfered "with the legitimate authority of the Senate over its members." *Id.* at 360. The Constitution provided for a Senator to serve a specified number of years and the statute's provisions were voiding these provisions of the Constitution.

The Court was not convinced by these arguments, focusing instead on the power of Congress to "enact such statutes . . . as the public interests required for carrying into effect the powers granted to it." *Id.* at 367. The Court held that Congress possessed "the entire legislative authority of the United States," as provided explicitly in the Constitution and so was free to do as it saw fit to police its own body. *Id.* at 366–67. Turning to the statute in question, the Court held that the statute "can be executed without in any degree impinging upon the rightful authority of the Senate . . ." *Id.* at 367.

effectively, Williams could speak to their own threatened legislative interests, and he might live politically to fight another day. As will be shown in the next section, rather than capitalize on this possibility, Williams would concede on no fronts, continuing to argue for his absolute innocence and to warn, with only limited conviction or precision, of the larger danger to legislative independence, a strategy which would lead to predictable results.

B. THE SENATE HEARINGS

The Senate Ethics Committee, after a careful independent investigation, had unanimously agreed that Williams' conduct was "ethically repugnant" and had recommended his expulsion from the Senate.⁶¹ The introductory remarks at the outset of this hearing were to a great degree perfunctory or limited to addressing or the difficult duty they had to sanction their own.⁶²

1. ROUND ONE: SENATORS WALLOP AND INOUE

The Republican Senator Malcolm Wallop, a member of the Ethics Committee, began by setting forth the findings in Williams' Ethics Committee hearings, detailing the offenses of Williams and recommending his expulsion for the honor and integrity of the Senate.⁶³ Wallop stressed that censure was not an adequate sanction given the degree of Williams' breach of the public trust.⁶⁴ Wallop addressed Williams' contentions of executive overreaching, but only insofar as Williams had argued them. Furthermore, he assured the Senators there would be a full, separate investigation. Wallop did not, however, address the additional significance of Williams' removal from the Senate that expulsion demanded because Williams himself had never made the distinction.

Senator Inouye, representing Williams on the floor, responded to Wallop's review first by stressing precedential historical perspective.⁶⁵ This had some limited promise as a strategy for Williams' cause in that it at least spoke to the Senators' sense of history and tugged at their respect for tradition. Inouye noted that the last time Senators had been expelled was during the Civil War, for high treason.⁶⁶ Clearly, Senator Inouye argued, over a hundred years of history had established treason

⁶¹ 128 CONG. REC. 2976 (1982).

⁶² *Id.* at 2974.

⁶³ *Id.* at 2974–76.

⁶⁴ *Id.* at 2976.

⁶⁵ *Id.* at 2992.

⁶⁶ *Id.* at 2992, 2996.

as the necessary benchmark for expulsion. Williams' conduct, clearly repugnant though it was, did not rise to the level of treason and so merited a lesser sanction. Inouye was more astute than Williams on this front—where Williams conceded nothing, Inouye better gauged his audience and understood that censure was Williams' best available option.

Inouye then did speak to the Senate's interests as a body, addressing the attendant threat of compromised legislative independence. He warned the Government actions "add[ed] up to an encroachment on the independence of the legislative branch which we cannot tolerate if we are to be separate and coequal."⁶⁷ However, Inouye failed to further develop the argument, to frame it in terms of *how* it threatened those coequal powers, and most importantly, how expulsion particularly would signify a heightened legislative compromise, the danger of the additional action of *throwing out* a Senator. Instead, Inouye simply moved on to other concerns and tried to trivialize Williams' actions, asserting that Williams had behaved "as we all might in such a situation."⁶⁸ By only marginally speaking to the dangerous heightened implications of expulsion and failing to commit fully to the principle, Inouye too left the issue obscured for the Senators.

2. ROUND TWO: SENATORS HEFLIN AND WILLIAMS

Inouye's argument was vigorously countered by the Democratic Senator Heflin, a co-chair of the Ethics Committee investigation and also charged with presenting the case against Williams. Heflin commented caustically that if precedent had established treason as the standard, was expulsion therefore *not* to be appropriate for rape or murder, even the murder of a president?⁶⁹ Surely it was never the intention of the Framers that expulsion was to be so narrowly prescribed?⁷⁰

Following Senator Heflin's response it was Williams' turn to personally make his case. From the outset, it was clear that Senator Williams planned to make no concessions. Williams stated: ". . . today, as I stand before . . . my colleagues, I know that I am completely innocent of all crime and impropriety and, therefore, totally confident that I will be fully exonerated" ⁷¹ There would be no admission of guilt on

⁶⁷ *Id.* at 2994.

⁶⁸ *Id.* at 2995.

⁶⁹ *Id.* at 3480, 3483.

⁷⁰ *Id.* at 3646. (Senator Eagleton would more pointedly echo these comments later in the proceedings, asking rhetorically "[i]f nontreasonous behavior be the sole benchmark of fitness to serve in this body, then one must ask how fit is this body in which we serve?")

⁷¹ *Id.* at 3298.

any front, no reframing around a higher principle or appreciating the different significance of his Senate proceeding. Williams would simply argue before the Senate, again, that in spite of all video evidence and all jury findings to the contrary, he was blameless.

a. THE NEW EVIDENCE: WILLIAMS' LINGUISTIC ANALYSIS

To prove his innocence this time, Williams introduced new "linguistic" evidence, conducted by Professor Shuy, a Senior Linguist at the Center for Applied Linguistics at Georgetown. The evidence showed, through a sort of meme-like or phrasal taxonomy, that the agents and Weinberg had verbally and psychologically coached him into agreement,⁷² had intentionally blocked him when he tried to exculpate himself,⁷³ and effectively used peer pressure to obtain his assent.⁷⁴

Much of Shuy's analysis characterized Williams' participation in conversations as passive. Shuy found specifically that in his analysis of six videotapes, Williams introduced topics of conversation a total of 57 times, while the government agents did so over three times as often (174).⁷⁵ Shuy further broke down the types of topics that Williams introduced into four sub-groups: "requests for information," "reporting of facts," "small talk" and "reporting opinions," and he noted that his numbers showed conclusively that Williams did not propose these ventures but was truly an "outsider" to the information and had only passively assented to the proposals of others.⁷⁶

This extensive linguistic analysis led the linguist to conclude that Williams was categorically innocent:

1. Senator Williams did no [sic] agree to use his influence or position to secure Government contracts for the proposed mining venture.
2. Senator Williams did not agree to hide his interest in the proposed mining venture.
3. Senator Williams did not accept a bribe for sponsoring legislation on behalf of the presumed Arab sheik.

⁷² *Id.* at 3323.

⁷³ *Id.* at 3324.

⁷⁴ *Id.* at 3325.

⁷⁵ *Id.* at 3316.

⁷⁶ *Id.* at 3316–17.

4. Senator Williams did not link the sponsoring of legislation on behalf of the presumed sheik to securing a loan from the sheik for the proposed business venture.⁷⁷

This new analysis, commended by Senator Hayakawa of California, a linguist, and another linguist/JD, Mary Gallagher, likely fell on deaf ears.⁷⁸ Senators, realizing that Williams was simply introducing new evidence to argue a point that had been unpersuasive for previous finders of fact, were likely quick to view the evidence as simply old news.

This “new” linguistic strategy tried to do little more than paint the FBI agents as verbal voodooists, who hexed him into agreeing to criminal enterprises.⁷⁹ Senator Wallop would have scant difficulty in rebuttal recognizing that this evidence was little more than thinly disguised retreat.

b. LINGUISTIC EVIDENCE DISMANTLED: SENATOR WALLOP AND HEFLIN IN REBUTTAL

As Williams’ linguistic evidence was little more than an old argument tied up in a new bow, Senators Wallop and Heflin were not challenged in responding. Wallop noted first that Shuy’s analysis consisted of an absurd framework, that “drain[ed] highly incriminating conversations of their content by charting them as numbers in columns with vague headings like ‘Request Information’ and ‘Report Facts’ . . . ”⁸⁰. Such classifications would never answer questions that spoke to motive. For example, as Wallop stated, how could it ever answer why Williams decided to attend so many meetings with these sheikhs, or quite simply

⁷⁷ *Id.* at 3320.

⁷⁸ *Id.* at 3332–33.

⁷⁹ 128 CONG. REC. 3330 (1982). (If the verbal argument was not enough, Williams presented evidence that coercion and entrapment could be seen under a psychological analysis as well. Albert Levitt, a consulting psychologist for Temple Univ Unit of Law and Psychiatry and the Senior Psychologist to the Court of Common Pleas of Philadelphia analyzed the seating arrangements and general situations around the Williams interviews and found them to be reminiscent of the Asch experiments which focused on a group influencing one individual. The Asch Experiment showed that “a majority yielded to the group pressure and went against their perceptions and judgments without other inducements or enticements.” In the Abscam interviews, the agents had set up an atmosphere that was “completely positive” creating no need to disagree. They further introduced a foreign element and led the target to simply believe this was the way “Arabs do business. The target is physically outmanned and outtalked. Levitt concluded that the Abscam targets were placed in a “double bind, i.e., accept the enticing offer to the city and the personal money binding the deal or lose the offer to the city—lose the jobs and the revenue the business would bring in.)

⁸⁰ *Id.* at 3475.

why he had not just said “no”?⁸¹

Senator Heflin would continue this line of reasoning by underscoring the importance of distinguishing between “linguistic games,” that did nothing to detect ethical misbehavior, and Williams’ actual conduct.⁸² Heflin demonstrated the laughable conclusion of Shuy’s linguistic methods which purported to “prove” Williams had no criminal intent.⁸³ Under Shuy’s linguistic framework, Heflin noted, the following hypothetical dialogue would leave “A” free of any wrongdoing:

A. Hello.

B. Good to see you.

B. I brought the money.

B. There’s \$5,000 in cash.

B. You can count it if you wish.

B. All you need to do is vote for “X”.

B. It will be greatly appreciated by all of us.

B. Let me know if we can do business again.

B. Thanks, again.

A. Goodbye.⁸⁴

To maintain that based on such a dialogue “A” had no criminal intent would be patently absurd, but that was the conclusion Shuy’s methodology logically led to. As Heflin put it, the effort by Shuy to show that Williams had been passive through linguistic phrasal classification was irrelevant because at any time he was free to state simply—and should have—that what they were doing was illegal.⁸⁵ Heflin concluded that as Shuy’s classification could never account for intent or motivation, it left the method itself questionable and its results “full of a lot of holes.”⁸⁶

⁸¹ *Id.* at 3475.

⁸² *Id.* at 3626.

⁸³ *Id.* at 3626.

⁸⁴ *Id.* at 3626.

⁸⁵ *Id.* at 3627 (Senator Heflin stated: “it is undeniable that at any point in these proceedings Senator Williams could have said, “Now, look, for the last time I’m telling you I won’t have anything to do with getting Government contracts. That is improper, and probably illegal.”).

⁸⁶ *Id.* at 3630.

Williams' decision to present essentially the same defense, as he had in earlier investigations, made the Senator's decision easy. Following Heflin's response, a parade of senators stepped to the podium and overwhelmingly indicated that they would vote for Williams' expulsion. Even his colleague from New Jersey, Senator Bradley, at some political risk, said he would vote for Williams' expulsion.⁸⁷

Rather than retreat from previous stances and cloak himself in the banner of a higher principle, Williams had decided to try his luck at the roulette, betting on the same number over and over again. Perhaps Williams did deeply and honestly believe in his innocence, so his honor dictated he had to continue to protest his innocence.⁸⁸ Or perhaps Williams could not fully appreciate that censure was his last best chance at saving his seat. Regardless, there was no symbolic principle for the Senate to clearly rally behind because Senator Williams had decided he would not commit to one.

CONCLUSION

On March 11, 1982, recognizing that his arguments had proven unavailing, Williams resigned his Senate seat.⁸⁹ In his farewell address, Williams stated, in what too many might seem ironic, that he decided to resign because he did not wish "to see the Senate bring dishonor to itself by expelling [him]."⁹⁰ Only at the end, when his cause had been lost, did he fully center on the constitutional doctrine of separation of powers, warning that following his hearing "the Senate . . . stands accused and intimidated by another branch of government to whom we may be forever subordinated and subjugated unless we are successful in our resistance."⁹¹ Williams continued also to claim that he had not truly been heard, even though he had been. To that end, at the outset of his Senate Hearing, Senator Wallop had insisted that Williams be "given the benefit of every doubt."⁹² Senator Eagleton had noted further that Williams had been defended by the best and the brightest of the legal field at trial, in his Ethics Committee Hearings and on the Senate floor.⁹³

The truth was, as Senator Inouye reported hearing other Senators

⁸⁷ *Id.* at 3816–17.

⁸⁸ "Closing Remarks" *Harrison Williams Special Collection, Rutgers Library, Box 375, Folder 55.* (Perhaps Williams' final sentences in his resignation speech bespeaks this belief when he stated: "My friends, I am innocent! I swear it! I stake my life on it—my honor!").

⁸⁹ 128 CONG. REC. 4003 (1982).

⁹⁰ *Id.*

⁹¹ "Closing Remarks" *Harrison Williams Special Collection, Rutgers Library, Box 375, Folder 55.*

⁹² 128 CONG. REC. 2954, 2977 (1982).

⁹³ 128 CONG. REC. 3621, 3645 (1982).

say, in confidence, Harrison Williams “blew it.”⁹⁴ He failed to speak to his audience, to capture their attention, and excite their passion under the banner of principle. Senators reportedly stated that “[h]e should not have talked so long,” that “[i]t was rambling,” and that “[w]ith the passage of every minute he was killing himself.”⁹⁵ They confided further that Williams “should have been a bit more humble” and “appeared too arrogant.”⁹⁶ Williams had spoken at length, but not of any higher principle. He only spoke of his own lower order needs for complete vindication. Because he did not speak to the Senate’s interests as a body, he had no real hope of winning them over.⁹⁷

It was Judge Bryant who best articulated the full dangerous precedent set by Abscam—how politically unavailing even a successful defense of entrapment might be for the accused—when he stated in *Kelly* that he was “plagued with the unsettling realization that . . . even if a [legislative representative] successfully invoked the defenses of selective prosecution and/or entrapment, this would be of little solace to him, for he nevertheless [would have] been destroyed as a voice in public affairs.”⁹⁸ Judge Bryant would conclude this observation with the same clarion call against abandoning principle that Justice Brandeis had made so many years earlier, stating “[i]f we condone such a measure, the fall-out might well be intolerable for us all.”⁹⁹ Unfortunately for Williams, he could not articulate that vision as Bryant had and could not capture the fears and imaginations of his colleagues. The price of that failure had been his Senate seat and any chance at political redemption.

⁹⁴ 128 CONG. REC. 3789, 3803 (1982).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* (As Inouye himself later stated, he believed the reason for Williams’ ramblings and obstinate re-litigation was simply that “Pete Williams believes that he is innocent.”).

⁹⁸ *United States v. Kelly*, 539 F. Supp. 363, 377 n.58 (D.D.C. 1982).

⁹⁹ *Id.*

