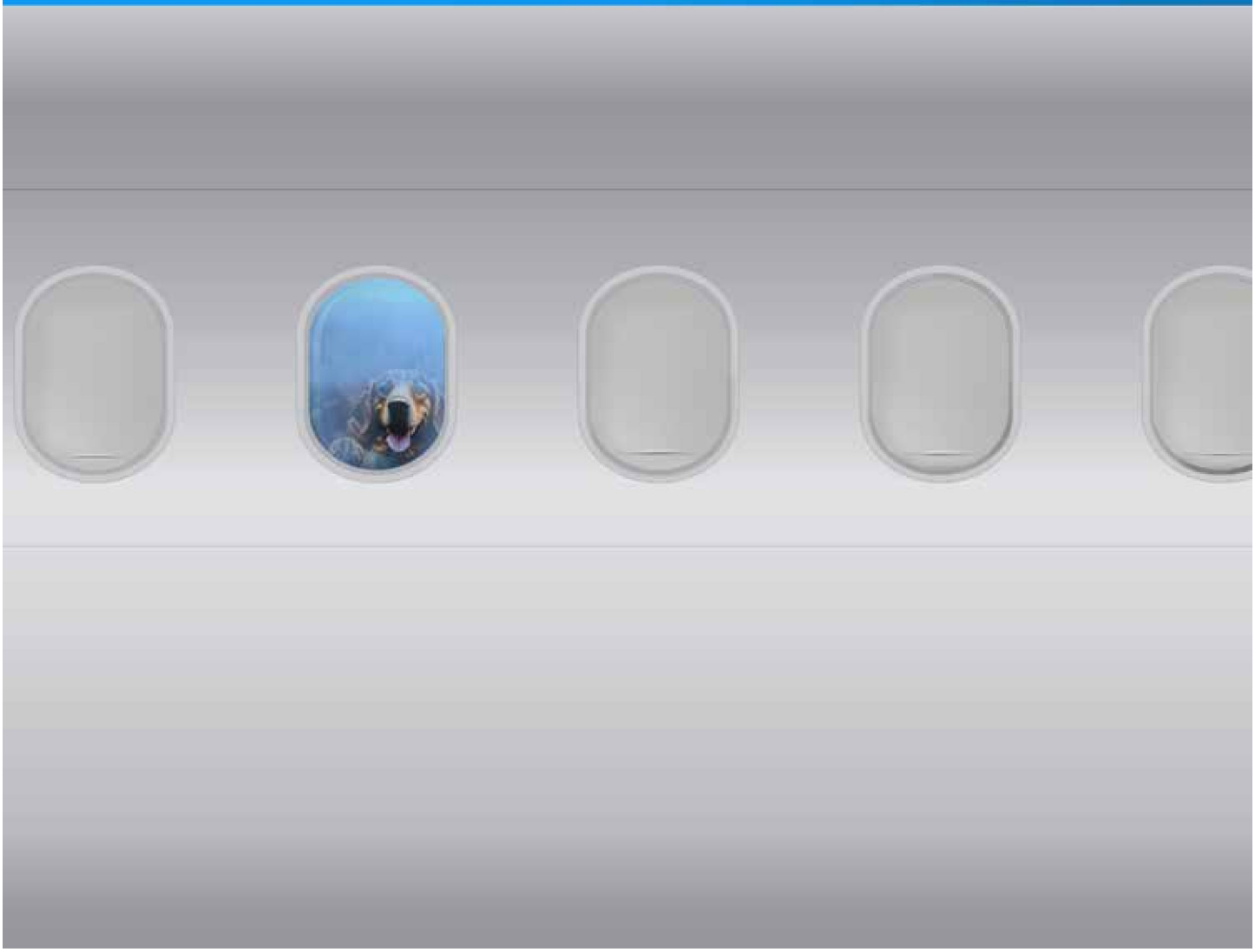
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Flying With Fido: A Brief Survey of Federal Service Animal Law



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Every year it seems that more of us are relying on the benefits of "emotional support" creatures, bringing them into previously animal-free environments. While these companions, four-legged or otherwise, undoubtedly provide great benefits, many are not "service animals" for purposes of federal law. Our author explains the regulations governing animals on airlines and related statutory nuances.

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THE PREROGATIVE TO UNSEAT: REMOVING COUNCILMEMBERS FROM COUNCIL COMMITTEES

By: Stephen K. Postema, City Attorney Ret., Ann Arbor, Michigan and Jennifer A. Richards, Assistant City Attorney, Ann Arbor, Michigan

Most city councilmembers comport themselves in a productive and cooperative manner. Occasionally, however, the city or county attorney will be called upon to evaluate the prospects for redressing unprofessional or unethical behavior by a councilmember. One such action may be to remove the member from a committee post. A thorough understanding of the rules and ramifications is required.

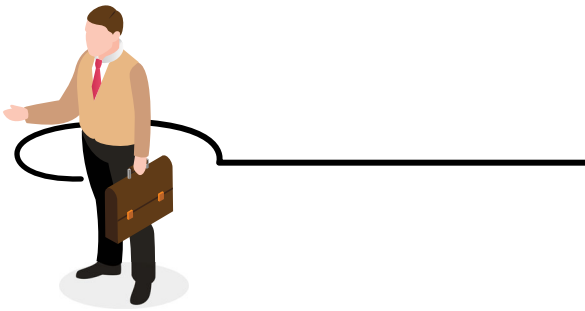
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"WE'RE HIRING, WE JUST NEED YOUR SOCIAL MEDIA LOGINS AND PASSWORDS"

By: Laura S. Burton, Police Attorney, Gastonia, North Carolina

Checking a job applicant's social media activity can provide a wealth of information, potentially revealing troublesome behavior and helping to avoid future problems. But such an inquiry triggers statutory and even constitutional issues, and many jurisdictions prohibit searching through a job seeker's non-public online activity.

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The Prerogative to Unseat: Removing Councilmembers from Council Committees

By: STEPHEN K. POSTEMA, *City Attorney ret., Ann Arbor, Michigan and*
JENNIFER A. RICHARDS, *Assistant City Attorney, Ann Arbor, Michigan*



Introduction

The great ideal of representative democracy ultimately depends on people to govern; and yet the human behavior of elected representatives can be deeply flawed. Improper, unethical, and sanctionable behavior of elected representatives is regularly in the news. This behavior ranges from disruption at local meetings, to behavior harmful to municipal employees or the municipal organization, to illegal or corrupt acts. In fact, a city attorney watching the local government landscape across their state or the country could easily conclude that there is an epidemic of elected representative bad behavior and could only wonder when she will have to deal with this issue in her municipality.

And while Thomas Jefferson said "The government you elect is the government you deserve," it is clear that elected representatives are not content to let elections be the only way to regulate their legislative bodies. From reprimands and censure, to removal from Council committees, to removal from office, municipal bodies regularly attempt to regulate the conduct of their members. City attorneys should be prepared in advance to address these issues, particularly because they come up quickly and legislative bodies will request immediate advice and action.

In 2021, a situation arose in our city, in which the City Council wanted to remove a Councilmember from committees for alleged statements and behavior that were considered inappropriate by the majority of the Council. Further, the City Council wanted the City Attorney's office to prepare a public memo outlining the legal issues involving such a removal, as well as a public memo concerning broader issues of Council self-regulation.

The public memo outlined that the City Council generally had such power. This power derived not only from our city's own Charter and Code but also was inherent under state law. This public memo further outlined that the due process requirements of both the federal and state constitutions were generally not applicable when there is a removal of a Council Member from a committee, board, or commission. In any case, adequate "procedural due process" protections were provided through removal by resolution at a City Council meeting. In addition, removal from such bodies would likely not amount to retaliation under the First Amendment. Finally, legislative immunity would likely protect the Councilmembers from any claim arising from removal from a Committee.

This article will outline[1] some of the relevant issues that would need to be considered when addressing this current and important topic.

Law and Analysis

I. Important Recent Supreme Court Case. After the release of the public memo, the United States Supreme Court issued an opinion on a related matter: the censure of a Board member of a public body. The opinion in *Houston Community College v. Wilson* unanimously upheld the public censure of a board member of a public body that operated community colleges for his violations of by-laws and other "reprehensible conduct."[2] While not involving a legislative body, the framework and principles set forth in the case will likely inform future cases that municipalities will face involving regulation of Councilmember conduct, including removal of Councilmembers from committees.

The Supreme Court found that throughout history, public bodies have used the power of censure. The Supreme Court further found no First Amendment violation because it involved a censure of one member of an elected body by the body itself and the Board's "censure spoke to the conduct of official business, and it was issued by individuals seeking to discharge their public duties."[3] The Court finally recognized that the case did not "involve expulsion, exclusion, or any other form of punishment."[4]

Whether removal of a councilmember from council committees would constitute an impermissible form of punishment is left for future determination

by the Supreme Court, although as set forth below, there is significant current legal authority upholding the right of a legislative body to take such action. Nevertheless, the framework of this First Amendment retaliation case should be kept in mind as the specific legal issues of removal from committees are discussed below.

II. General Removal Principles.
The first issue to be determined is what is the mechanism, if any, set forth by Charter, ordinance, or state law for removal from a Council committee. In other words, are the removal procedures clear? If so, follow them to the letter.

For example, in Ann Arbor, the City Charter and Code of Ordinances provide City Council with the authority to create certain boards and commissions, including the power to appoint members. Specifically, with respect to boards and commissions, City Code sets forth the various boards and commissions and their respective appointing authority which most commonly is the City Council and/or Mayor. The City Code provides that "[t]he appointing authority may remove any member of any board or commission for cause" which is a non-arbitrary reason not otherwise prohibited by law, i.e. not discrimination. This removal provision applies to "all boards and commissions of the City."

If your municipality does not have a specific removal procedure, but you have adopted Robert Rules of Order, there are applicable rules that set forth a process for the removal of "committee members" that likely applies to Council Committees and that likewise affirms the authority to remove a member from a committee.[5]

It is also important to examine whether a City has the inherent power to regulate the conduct of its own members under state law.[6] This inherent power may also include the power to remove individuals, including its own Councilmembers, from boards, commissions, and committees. Again, this power may be recognized by both state[7] and federal[8] law.

III. Due Process Issues.
A Councilmember may also claim due process concerns about their removal from a committee. "Due process violation" is an objection raised often to complain about a result that a councilmember or the public does not like. But

Whether removal of a councilmember from council committees would constitute an impermissible form of punishment is left for future determination by the Supreme Court, although as set forth below, there is significant current legal authority upholding the right of a legislative body to take such action.

removal from committees likely would not result in any due process issues under either the state or federal constitutions.[75] There are two components of due process to consider: (1) procedural due process and (2) substantive due process.

A. Procedural Due Process.
The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[10] "In order to establish a procedural due process claim, a person must show that (1) he had a life, liberty, or property interest protected by the due process clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest."[11]

1. There is Likely No Property or Liberty Interest in an Appointment to a Board, Commission, or Committee.
There is generally no protected property or liberty interest in a City Councilmember's appointment to a board, commission, or committee. "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[12] Similarly, "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word liberty, or it may arise from an expectation or interest created by state laws or policies."[13]

You should review your state law carefully. Michigan law, for example, *does not* confer a property interest in any public office which includes appointments to boards, commissions and committees. Indeed, the United States Sixth Circuit Court of Appeals (which governs Michigan) has held that a member of a city planning commission (who was removed for bad behavior) did not have a property interest in his position on the commission under Michigan law.[14] The court noted that courts have repeatedly held that there is no property interest at all in public office.[15] Accordingly, the court held, a City Councilmember's appointment to a board did not implicate any property interest.

Nor does an appointment to a board, commission or committee implicate a liberty interest. It is well established that an individual has no liberty interest in an elected office.[16]

B. Adequate Due Process Protections.
Even if the Due Process Clause applied to such a removal (which it does not), there is likely adequate due process protection if the removal is done by properly noticed resolution and any removal rules were followed. The basic due process requirement is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." On this basis, the basic removal by Council Resolution voted on at a public meeting provides adequate due process.[18]

C. Substantive Due Process.
Removal from the bodies discussed above also likely would not result in any substantive due process issues. The substantive component of due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."[19] Accordingly, substantive due process claims are generally divided into two categories: (1) deprivations of a particular constitutional guarantee, and (2) actions that "shock the conscience."[20] Neither type of claim is implicated by removal from the boards, commissions, and committees discussed above.

Continued on page 12

1. Removal Does Not Involve the Deprivation of a Fundamental Right.
The substantive due process component protects only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[21] The list of fundamental rights and liberties is "short."[22] The right to an appointment to a commission, board, or committee is not among the "short list" of rights deeply rooted in this nation's history and tradition set forth above, and thus, such appointments and removal from them, do not implicate substantive due process concerns.

2. Removal Does not "Shock the Conscience."
The removal from such a committee appointment likely does not "shock the conscience" so as to violate the substantive due process component. Substantive due process protects against "arbitrary and capricious government action that shocks the conscience and violates the decencies of civilized conduct."[23] "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense."[24] In general, "shock the conscience" claims do not apply to cases that do not involve physical force.[25] Indeed, this standard "sets a high bar" and is difficult to meet.[26]

IV. First Amendment Retaliation.
A final argument that a Councilmember may try to make is that his removal is in retaliation for his exercise of his First Amendment rights. First Amendment violation is another constitutional claim that is bandied about without careful analysis. Importantly, the First Amendment does not necessarily protect against the consequences of speech or behavior. Removal from Council committees, even if in response to speech, would likely not amount to First Amendment retaliation. The *Houston Community College* case discussion above outlined the framework for such retaliation in the context of censure only. However, most federal courts have concluded that legislative bodies may take certain actions in response to member speech, so long as the action does not prevent the member from carrying out their *elected* duties.[27] This is because elected officials are required to endure more action taken in response to their speech than the ordinary citizen.[28]

A final argument that a Councilmember may try to make is that his removal is in retaliation for his exercise of his First Amendment rights. First Amendment violation is another constitutional claim that is bandied about without careful analysis. Importantly, the First Amendment does not necessarily protect against the consequences of speech or behavior.

The removal of elected officials from appointed positions would likely survive constitutional scrutiny, so long as the appointment is not part of the officials' *elected* duties.[29] Removal from commissions or committees would likely not prevent a Councilmember from carrying out their elected duties.[30]

For instance, the Fifth Circuit Court of Appeals found removal of a city council member from a planning organization due to her failure to support the city council's position did not violate the First Amendment.[31] Similarly, the Eleventh Circuit Court of Appeals found that a county commission could remove the plaintiff from an appointed unpaid position as a committee member without violating the First Amendment.[32] To illustrate further, in *Whitener v. McWatters*, a member of a county board of supervisors unsuccessfully sued other board members after they voted to censure him and strip him of his committee assignments in response to his use of abusive language and uncivil behavior toward two board members.[33]

On the other hand, an action that prevents an elected official from carrying out elected duties may violate the First Amendment rights of legislators. Indeed "[i]n order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is regulatory, proscriptive, or compulsory in nature."[34] Courts have found that legislative actions which prevent a legislator's ability to engage in governance or participate in decision-making violate the First Amendment. For example, a federal district court in Kentucky found that a department's vote to censure the plaintiff affected his ability to engage in the department's system of governance because it both denied him participation in departmental decision-making and affected his teaching assignments, thus supporting a retaliation claim.[35] Serving on any particular Council committee is not likely an elected duty, but a careful review of duties of Councilmembers is warranted.

V. Legislative Immunity.
You will also need to advise your Councilmembers about legislative immunity once a Councilmember removed from a committee by legislative action of the body begins to threaten legal action. Councilmembers would likely be entitled to legislative immunity for a resolution removing a Councilmember from a committee. The United States Supreme Court has held that "absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." This immunity extends to local legislators. "[W]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."[38] The question is whether the activity is "an integral part of the deliberative and communicative process by which members participate in committee and those House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house."[39] This includes "written reports presented in that body by its committees, to resolutions offered, which though in writing, must be reproduced in speech, and to the act of voting."[40]

This immunity likely applies to votes of censure or reprimand. For instance, in *Whitener v. McWatters*, as discussed above, a county board of supervisors disciplined one of its members for confronting other members with abusive language in expressing his opinion.[41] Specifically, the board voted to recommend that he "be formally censured for a period of [one year] and that the rules of order be changed to remove him from all standing committees of [the] Board as well as all assignments and appointments to outside committees, commissions, etc."[42] The court concluded that this disciplinary action against one of its members was legislative in nature and thus protected by absolute immunity.[43]

Legislative immunity could also apply to actions that prevent an elected official from carrying out their elected duties including removal from meetings or even removal of a member depending on the circumstances,[44] even though such action is claimed to be a violation of the First Amendment.

For instance, in a disciplinary context instead of a removal from Committee, *Mays v. Fields*, a federal district court in the Eastern District of Michigan applied legislative immunity to city councilmembers of Flint who were involved in the removal and exclusion of a fellow councilmember from various city council meetings.[45] Mays alleged First Amendment violations after he was removed or excluded from several city council meetings for various reasons. But the district court found that his claims were "plainly barred by legislative immunity."[46] The court reasoned that the plaintiff "was removed from council sessions and muted during the Zoom call as a disciplinary measure" and that transcripts of such sessions showed that the actions were "taken because plaintiff was being argumentative and disruptive."[47] The court noted that under the case law it cited, which concerned the legislative power to punish a body's own members and regulate itself, "plaintiff may not sue his fellow councilmembers or those allegedly working in concert with them or at their direction, for taking such disciplinary action against him."[48]

Conclusion

In the absence of a charter or ordinance provision or other law that expressly prescribes a procedure for removal of a Councilmember from a committee or other appointment, the decision to remove likely remains in a City Council's discretion as an inherent power of the Council. However, these issues will continue to play out in the courts as municipal bodies attempt to regulate Councilmember conduct, particularly the interplay between claims of First Amendment retaliation and legislative immunity.

And as a final practical matter, removing a Councilmember from a committee will often not prevent that Councilmember from actually attending the committee meeting. Most likely the Councilmember could still attend and comment at a public committee meeting as a member of the public even after he has been removed as a sitting member.



Stephen K. Postema served as City Attorney in Ann Arbor, Michigan from 2003 to 2022. He has since returned to private practice in Ann Arbor and is also a mediator, Postemamediation.com. He speaks regularly on municipal law issues, including recently at IMLA seminars on Municipal Law Office Succession Planning and on Legal Consequences of Councilmember Bad Behavior.



Jennifer Richards has been an Assistant City Attorney in Ann Arbor since 2020. She handles litigation matters, appellate matters, and transactional work. She was the primary researcher and drafter of the initial draft of the 2021 public memo on this topic.

This article reflects the authors' own views and not necessarily the views of the City of Ann Arbor.

Notes

1. While this article is focused largely on Sixth Circuit precedent, it also includes cases from all circuits on these topics.
2. 142 S.Ct. 1253 (2022)
3. *Id.* at 1264. *See also*, *Id.* at 1261 ("[W]e do not see how the Board's censure could qualify as a materially adverse action consistent with our case law. The censure at issue before us was a form of speech by elected representatives."
4. *Id.* at 1263.
5. Roberts Rules of Order, Section 50:13(a), (b), (c) (d), and (e) and Section 50:14
6. Whitener v. McWatters, 112 F.3d 740 at 744. (4th Cir. 1997) ("Americans at the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly of men. … This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives").
7. Hawkins v. Common Council of City of Grand Rapids, 192 Mich. 276, 283; 158 N.W. 953 (1916) (A municipality's "power to remove their officers is, and was long before the adoption of our Constitution, inherent in municipal corporations." It is important to note that this case stands for the proposition that a city has the power to remove its elected officials from elected office under Michigan law. Thus, it can be inferred that removal from appointment to boards and commissions is a lesser, included inherent power of a city. In *Hawkins,* however, the Court voided the removal of an officer because other procedures were not followed.
8. *See* Blair v. Bethel School Dis*t*, 608 F.3d 540, 542-43 (9th Cir. 2010)(School board's removal of one of its members as their vice president in response to his criticism of superintendent was constitutional—the board had a right to replace the member with someone who they believed represented the majority view of the board); McKinley v. Kaplan, 262 F.3d 1146, 1151-52 (11th Cir. 2001)(county commission's removal of appointed and unpaid committee member was constitutional); Whitener v. McWatters, 112 F.3d at 740 (county board's vote to strip member of committee assignments in response to use of abusive language and uncivil behavior toward board members was within board's power and constitutional).
9. As is the case in many states: "Michigan's due process guarantee is construed no more broadly than the federal

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Councilmember Removal *cont'd from page 13*

guarantee." Syntex Laboratories v. Dep't of Treasury, 233 Mich. App. 286, 292; 590 N.W.2d 612 (1998).
10. U.S. Const. amend. XIV, § 1.
11. Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 611 (6th Cir. 2006).
12. *Id.*
13. Wilkinson v. Austin, 545 U.S. 209, 221 (2005).
14. Kulak v. City of Birmingham, 139 Fed. Appx. 694, 696-97 (6th Cir. 2005).
15. It should also be noted that the Sixth Circuit Court of Appeals specifically rejected the Plaintiff's claim that the Home Rule City Act, MCL 117.5(1)(d) created a property interest in public office *Id.*
16. Taylor v. Becham, 178 U.S. 548, 577-78 (1900*);* Snowden v. Hughes, 321 U.S. 1, 7 (1944); Burks v. Perk, 470 F.2d 163, 165 (1972).
17. Garcia v. Fed. Nat'l Mortg. *Ass'n*, 782 F.2d 736, 741 (6th Cir. 2015).
18. Relatedly, removal of a Councilmember from a committee would not amount to an improper Bill of Attainder. Bills of Attainder are prohibited by Article I, §10 of the Constitution. A Bill of Attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial. Zillich v. Longo, 34 F.3d 359, 362 (6th Cir. 1994). The Bill of Attainder clause is a "safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." There are three essential elements to a Bill of Attainder: "specificity, punishment, and a lack of a judicial trial." *Id.* at 363. But "[t]he Bill of Attainder clause does not outlaw legislative action against a specific legislator. Legislative bodies may censure, suspend, or otherwise discipline a member. They have done so under English and American law for centuries." *Id.*
9. Guertin v. Michigan, 912 F.3d 907, 918 (6th Cir. 2019)
20. Pusey v. City of Youngstown, 11 F.3d 652, 656 (6th Cir. 1993).
21. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).
22. Seal v. Morgan, 299 F.3d 567, 574-75 (6th Cir. 2000).
23. *Guertin*, 912 F.3d at 918.
24. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).
25. *See* Cassady v. Tackett, 938 F.2d 693, 698 (6th Cir. 1991).
26. Range v. Douglas, 763 F.3d 573, 589 (6th Cir. 2014).
27. *See for example* King v. City of New York, 581 F. Supp. 3d 559, 569-571 (2022).
28.Mattox v. City of Forest Park, 183 F.3d 515, 522 (6th Cir. 1999).
29. Rash-Aldridge v. Ramirez, 96 F.3d 117, 119 (5th Cir. 1996); McKinley v. Kaplan, 262 F.3d 1146, 1151-52 (11th Cir. 2001); Whitener v. McWatters, 112 F.3d at 741.
30. A recent case applying *Houston Community College,* in contrast, found that a legislator plausibly stated that he was subject to a "materially adverse action" due to a requirement that he had to provide 12-hour notice of his

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intent to enter the state capitol under his theory of First Amendment retaliation. *See* Boquist v. Courtney, 32 F.4th 764, 782-83 (9th Cir. 2022).
31. Rash-Aldridge v. Ramirez, *supra* at 119.
32. McKinley v. Kaplan, 262 F.3d 1146, 1151-52 (11th Cir. 2001)
33. Whitener v. McWatters, 112 F.3d 740 (4th Cir. 1997). The Fourth Circuit Court of Appeals, after an extensive historical analysis, affirmed the district court's dismissal of the complaint stating:

> Americans at the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly of men. This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives. Further, because citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members. Absent truly exceptional circumstances, it would be strange to hold that such self-policing itself is actionable in a court. *Id.* at 744.

34. Phelan v. Laramie County Community College Bd. of Trustees, 235 F.3d 1243, 1247 (10th Cir. 2000)(quoting Laird v. Tatum, 408 U.S. 1, 11 (1972)).
35. Booher v. Bd. of Regents of N. Kentucky Univ., No. 2:96-cv, 1998 WL 35867183 at *12 (E.D. Ky. July, 1998).
36. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).
37. *Id.* at 49; Smith v. Jefferson Cty. Bd. of Sch. Comm'rs, 641 F.3d 197, 218 (6th Cir. 2011).
38. Canary v. Osborn, 211 F.3d 324, 329 (6th Cir. 2000).
39. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975).
40. Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).
41. 112 F.3d 740, 741 (4th Cir. 1997).
42. *Id.*
43. *Id.* at 744-45.
44. In Gamrat v. McBroom, 822 Fed. Appx. 331, 334-335 (6th Cir. 2020), the Sixth Circuit affirmed the district court's dismissal of due process claims by a former member of the Michigan House of Representatives who was removed on the basis that those who were involved in her removal were entitled to legislative immunity. Significantly, this case did not involve Gamrat's speech and instead was based on her conduct while in office. Gamrat did not assert First Amendment violations. The Court reasoned that "[t]he House's expulsion of Gamrat was legislative activity, regardless of any bad faith, and Gamrat cannot sue the House Defendants for participating in that process." On this basis, removal, if carried out legislatively, could be entitled to absolute legislative immunity.
45. Mays v. Fields, No. 20-cv-12504, 2021 WL 5713693 (E.D. Mich. March 5, 2021) at *1-3.
46. *Id.* at *3
47. *Id.*
48. *Id.*

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