

June 2, 2017

Omar Ashmawy
Staff Director and Chief Counsel
Office of Congressional Ethics
425 3rd St. SW
Washington, DC 20024

RE: Request for Investigation into Conduct of Rep. Gregory R. Gianforte (R-MT)

Dear Mr. Ashmawy:

PEN America, Free Press Action Fund, Reporters Without Borders and the Society of Professional Journalists respectfully request that the Office of Congressional Ethics (“OCE”) investigate whether Rep. Greg Gianforte (R-MT) violated House Rule 23 by assaulting Ben Jacobs, a reporter for *The Guardian*, and by issuing a false statement shortly after the assault that was immediately contradicted by eyewitness testimony and an audio recording of the incident.

Rep. Gianforte is currently under indictment for a violation of Mont. Code Ann. 45-5-201, a misdemeanor punishable by up to six months in jail or a \$500 dollar fine, or both. He was charged on May 24, the night before his election victory in Montana.

In a separate letter sent today to the House Committee on Ethics, we have noted the committee’s obligation, pursuant to House Ethics Committee Rule 18(e)(2), to initiate an investigation into Rep. Gianforte, or explain why it has not done so in a report to the full House. The Committee must either vote to initiate an investigation within 30 days of a member being charged with any crime, or detail any other action the committee has taken in response to the charges.

Factual Background

On March 1, 2017, Montana’s at-large Representative, Ryan Zinke, resigned his seat following his confirmation as Secretary of the Interior. Montana Gov. Steve Bullock set a special election to fill the seat for May 25, 2017.

On May 24, 2017, the day before Montana’s special election, the Gallatin County Sheriff’s Office responded shortly after 5 p.m. to a complaint at Gianforte’s campaign headquarters in Bozeman.¹ The initial 911 report read: “RP STATES HE WAS JUST ASSAULTED BY GREG GIANFORTE. STATES THAT GREG BODY SLAMMED HIM AND KNOCKED HIS ARM RP HAS A RECORDING OF THE INCIDENT ON HIS

¹ Chronicle Staff, *Gianforte Charged with Election-Eve Assault*, Bozeman Daily Chron., May 24, 2017, available at http://www.bozemandailychronicle.com/news/politics/reporter-alleges-greg-gianforte-body-slammed-him-in-bozeman/article_9df533bb-9919-51aa-8d0d-5d5cb4e48923.html.

PHONE. STATES IT HAPPENED AT THE CAMPAIGN HEADQUARTERS BUT DOESN'T KNOW THE ADDRESS. RP IS A REPORTER AND HE ASKED GREG ABOUT HIS HEALTHCARE PLAN AND HE 'BODY SLAMMED HIM.'"²

The reporter in question was Jacobs, who was covering the campaign for *The Guardian*. At 4:06 p.m., Bozeman time, Jacobs tweeted "Greg Gianforte just body slammed me and broke my glasses."³

Following the 911 call, the Gianforte campaign released this statement:

BOZEMAN, Mont. – "Tonight, as Greg was giving a separate interview in a private office, The Guardian's Ben Jacobs entered the office without permission, aggressively shoved a recorder in Greg's face, and began asking badgering questions. Jacobs was asked to leave. After asking Jacobs to lower the recorder, Jacobs declined. Greg then attempted to grab the phone that was pushed in his face. Jacobs grabbed Greg's wrist, and spun away from Greg, pushing them both the ground. It's unfortunate that this aggressive behavior from a liberal journalist created this scene at our campaign volunteer BBQ." –Shane Scanlon, spokesperson for Greg for Montana.⁴

The campaign's account was swiftly contradicted by a recording of the altercation, taken by Jacobs, and by the eyewitness report of a Fox News crew that was setting up for an interview in the office where the assault occurred.

The relevant part of the recording, as transcribed by the Atlantic, is as follows:

JACOBS: . . . the CBO score. Because, you know, you were waiting to make your decision about health care until you saw the bill and it just came out . . .

GIANFORTE: Yeah, we'll talk to you about that later.

JACOBS: Yeah, but there's not going to be time. I'm just curious—

² Press Release, Ofc. of the Sheriff/Coroner, Gallatin, MT, Update on Assault Investigation (May 24, 2017), available at <http://www.gallatinmedia.org/?p=4732> (punctuation added).

³ @Bencjacobs, Twitter.com, May 24, 2017 16:06 (MT), available at <https://twitter.com/Bencjacobs/status/867517225820966912>.

⁴ @wabermes, Twitter.com, May 24, 2017 17:43 (MT), available at <https://twitter.com/wabermes/status/867541538460585984>.

GIANFORTE: Okay, speak with Shane, please.

[loud scuffling noises, an even louder crash, repeated thumping]

GIANFORTE: [shouting] I'm sick and tired of you guys!

JACOBS: Jesus chri—!

GIANFORTE: The last guy that came in here, you did the same thing!
Get the hell out of here!

JACOBS: Jesus!

GIANFORTE: Get the hell of out of here! The last guy did the same
thing! You with The Guardian?

JACOBS: Yes! And you just broke my glasses.

GIANFORTE: The last guy did the same damn thing.

JACOBS: You just body-slammed me and broke my glasses.⁵

A Fox News Channel crew was in the office when the incident occurred. According to the firsthand report by Alicia Acuna, a Denver-based general assignment reporter, Acuna and her team were setting up for an interview with Gianforte in an office at Gianforte's campaign headquarters.⁶ Shortly before the Fox News interview was to begin, Jacobs entered the office and asked Gianforte about the Congressional Budget Office report on the American Health Care Act. As Acuna recounts, Gianforte told Jacobs he would speak to him later, and then told him to speak to his spokesperson.

"At that point," Acuna said, "Gianforte grabbed Jacobs by the neck with both hands and slammed him into the ground behind him."⁷ The Fox crew "watched in disbelief as Gianforte then began punching the reporter. As Gianforte moved on top of Jacobs, he began yelling something to the effect of, 'I'm sick and tired of this!' Jacobs scrambled to his knees and said something about his glasses being broken. . . . To

⁵ Adrienne LaFrance, *A Transcript of the Greg Gianforte 'Body-Slam' Audio*, The Atlantic, May 25, 2017, <https://www.theatlantic.com/technology/archive/2017/05/a-transcript-of-the-greg-gianforte-body-slam-audio/528102/>.

⁶ Alicia Acuna, *Greg Gianforte: Fox News Team Witnesses GOP House Candidate 'Body Slam' Reporter*, Fox News, May 24, 2017, <http://www.foxnews.com/politics/2017/05/24/greg-gianforte-fox-news-team-witnesses-gop-house-candidate-body-slam-reporter.html>.

⁷ *Id.*

be clear, at no point did any of us who witnessed this assault see Jacobs show any form of physical aggression toward Gianforte.”⁸

Following an investigation into the incident, the Gallatin County Sheriff’s Office determined there was probable cause to issue a citation to Gianforte for misdemeanor assault. According to the Sheriff’s Office, the injuries sustained by Jacobs did not rise to the level of felony assault under Montana law.⁹ Felony or aggravated assault requires “serious” bodily injury or the apprehension of same.¹⁰

On May 25, 2017, Rep. Gianforte won the special election. He must appear in court by June 7 to answer the charge. He has not yet been sworn into office, as Congress is in recess until June 6 and Montana is not expected to formally certify the election until June 15, 2017.¹¹

Violations of House Rule 23

House Rule 23, clause 1, states that “A Member, Delegate, Resident Commissioner, officer, or employee of the House shall conduct himself at all times in a manner that shall reflect creditably on the House.” Clause 1 is the “most comprehensive provision” and was drafted to “have a deterrent effect against improper conduct and at the same time be capable of enforcement if violated.”¹² The clause was intended to retain “the ability to deal with any given act or accumulation of acts which, in the judgment of the committee, are severe enough to reflect discredit on the Congress.”¹³

During its discussion of clause 1, the House Ethics Manual also refers to House Resolution 451, which requires the House Ethics Committee to either empanel an investigative subcommittee or explain why it has not within 30 days of a member being charged with any crime, misdemeanor or felony.¹⁴ The House Ethics Manual makes clear that the House Ethics Committee has “historically viewed clause 1 as encompassing violations of law and abuses of one’s official position.”¹⁵

⁸ *Id.*

⁹ *Update on Assault Investigation, supra note 2.*

¹⁰ Mont. Code Ann. § 45-5-202 (2017). “Serious” bodily harm requires harm that creates “a substantial risk of death,” “serious permanent disfigurement,” the “protracted loss or impairment of the function or process of a bodily member or organ,” or, at the time of the injury, harm that causes a reasonable risk of same. Mont. Code Ann. § 45-2-101(66) (2017).

¹¹ Bobby Caina Calvan & Nicholas Riccardi, *Next for Montana’s New Congressman: Day in Court, Then DC*, Assoc. Press, May 26, 2017.

¹² House Comm. on Standards of Official Conduct, House Ethics Manual 13 (2008).

¹³ *Id.*

¹⁴ *Id.* at 13-14. That resolution was codified as Rule 18(e)(2) of the House Ethics Committee Rules.

¹⁵ *Id.* at 16.

Additionally, Rule 23, clause 2, provides that members must also “adhere to the spirit and the letter of the Rules of the House,” which provides an independent “basis for congressional discipline.”¹⁶ The standard was intended to “provide the House the means to deal with infractions that rise to trouble it without burdening it with defining specific charges that would be difficult to state with precision.”¹⁷ The effect of the standard is to bar both direct *and* indirect violations of the rules, and it suggests that the House Ethics Rules should be read broadly.¹⁸

In our letter to the House Ethics Committee, sent on the same date as this complaint to the OCE, we cite clause 2 as also strongly suggesting that disciplinary action should be taken against Rep. Gianforte.¹⁹

Precedent for discipline in the Gianforte case is scant, but only because criminal physical assaults by members of Congress are historically rare, and virtually unheard of in the modern era (with only minor exceptions, noted below, which do not involve an assault of this severity).

In arguably the most famous case, the “caning” of Sen. Charles Sumner on the Senate floor in 1856, the assailant, Rep. Preston Brooks, resigned after an expulsion resolution against him failed.²⁰ Two members who assisted in the assault faced votes of formal censure; the vote against Rep. Lawrence M. Keitt passed.²¹ Likewise, Rep. Lovell H. Rousseau from Kentucky was censured for his assault on Rep. Josiah B. Grinnell in 1866.²²

In recent memory, there are very few incidents involving violent acts by members of Congress, and certainly none involving a documented assault, let alone a documented assault against a member of the press. In August 2007, then-Rep. Bob Filner was charged with assault and battery in Virginia after entering the employee-only area of the baggage claim office at Dulles Airport and refusing to leave.²³

¹⁶ *Id.* at 16-17.

¹⁷ *Id.* at 17.

¹⁸ *Id.*

¹⁹ Letter from PEN America to Chairwoman Brooks and Ranking Member Deutch, House Committee on Ethics (May 30, 2017).

²⁰ House Comm. on Standards of Official Conduct, Historical Summary of Conduct Cases in the House of Representatives 4 (2004).

²¹ *Id.*

²² *Id.*

²³ Paul Kane, *House Ethics Committee Opens Probe into Filner’s Airport Altercation*, Wash. Post, Sept. 19, 2007, available at http://voices.washingtonpost.com/capitol-briefing/2007/09/house_ethics_opens_probe_into.html.

Filner ultimately entered an Alford plea to misdemeanor trespassing. Following an investigation, the House Ethics Committee terminated the inquiry but found Filner had exercised poor judgment.²⁴

Also relevant may be a referral from the OCE regarding an incident where former Rep. Michael G. Grimm threatened a reporter following the 2014 State of the Union address.²⁵ In the incident, NY1 reporter Michael Scotto asked Grimm about an ongoing investigation into his fundraising. Grimm refused to answer and, while the camera was still rolling, threatened to throw Scotto off the balcony on which they were standing, and to “tear him in half.”²⁶ Notably, the OCE referred these specific allegations against Grimm to the House Committee on Ethics, though the committee deferred consideration following a request from the Department of Justice, as is usual practice.

Conclusion

In short, clauses 1 and 2 of House Rule 23 respectively require members to behave “at all times” in a manner that reflects creditably on the House of Representatives, and to abide by the spirit and the letter of the House Rules. Based on past precedent, physical assaults by members of Congress clearly do not reflect “creditably” on the House.

Further, we would submit that Rep. Gianforte’s assault of reporter Ben Jacobs is even more troubling as a matter of law, House rules and, indeed, democratic norms, given that the “body slam” came in response to a question by Jacobs to Gianforte on a matter clearly in the public interest. We therefore respectfully urge the OCE to conduct its own investigation of the Gianforte matter, and to refer the case to the House Ethics Committee for investigation.

Thank you in advance for your consideration, and we look forward to your response. Please do not hesitate to contact Gabe Rottman, PEN America’s Washington Director, at grottman@pen.org or 202-808-3514, with any questions. He can be reached by mail at 1015 15th St. NW, 6th Floor, Washington, D.C. 20005.

²⁴ House Comm. on Standards of Official Conduct, Summary of Activities 110th Cong. 18-19 (2009), available at http://ethics.house.gov/sites/ethics.house.gov/files/documents/Summary_of_Activities_110th_Congress.pdf.

²⁵ House Comm. on Ethics, Summary of Activities 113th Cong. 16 (2015), available at <http://ethics.house.gov/sites/ethics.house.gov/files/Summary%20of%20Activities%20113th%20Congress.pdf>.

²⁶ Sarah Wheaton & Marc Santora, *After ‘I’ll Break You in Half,’ Grimm Apologizes*, N.Y. Times, Jan. 29, 2014, <https://www.nytimes.com/2014/01/30/nyregion/rep-michael-grimm-threat-ny1-reporter.html>.

Sincerely,

Suzanne Nossel, Executive Director
Gabriel Rottman, Washington Director
PEN America

Craig Aaron, President and CEO
Matt Wood, Policy Director
Sandy Fulton, Government Relations Manager
Free Press Action Fund

Delphine Halgand, USA Director
Margaux Ewen, Advocacy and
Communications Director
Reporters Without Borders

Lynn Walsh, National President
Society of Professional Journalists

cc: President Donald J. Trump
Rep. Susan W. Brooks, Chairwoman, House Committee on Ethics
Rep. Ted Deutch, Ranking Member, House Committee on Ethics

Encls.