Overcoming the Conflict of Interest in Congressional Ethics*

Dennis F. Thompson

Harvard University

Prepared for the Panel on "Congressional Ethics Enforcement"

Woodrow Wilson International Center, Washington, D.C., January 16, 2007

~

You have members sitting in judgment of other members with whom they have to work day by day. . . . There is a kind of innate conflict of interest when members of the Ethics Committee are called upon to judge their colleagues. [1]

In this testimony before the Joint Committee on the Organization of Congress Representative Lee Hamilton clearly articulated the conflict of interest at the heart of efforts to enforce legislative ethics. The Constitution assigns Congress the responsibility for disciplining its own members. Yet principles of legislative ethics cast suspicion on any process in which members discipline themselves. How can ethics committees claim to judge an individual conflict of interest when they themselves stand in a position of institutional conflict of interest? The chief constitutional instrument for enforcing ethics seems itself to be ethically compromised.

The Deficiencies of Self-Discipline

"No one should be the judge in his own cause."[2] This maxim has guided judges of controversies and makers of constitutions since ancient times. It expresses fundamental values of due process and limited government, providing the foundation for the separation of powers, judicial review, and federalism in the U.S. Constitution. It is the principle that the authors of the *Federalist Papers* invoke at critical junctures in their arguments for the Constitution. Both James Madison and Alexander Hamilton apply the principle to institutions—the states, Congress, the federal government as a whole—not only or mainly to individuals. Madison commented, "no man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time."[3]

In what sense is the Senate or the House a party to the cause when it judges the case of an indi-

---

* Revised and abridged from Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington: Brookings, 1995).

1. *Ethics Process: Testimony of Hon. Louis Stokes, Hon. James Hansen, and a Panel of Academic Experts*, Hearing before the Joint Committee on the Organization of Congress, 103 Cong. 1 sess. (Government Printing Office, February 1993), pp. 7-8. Rep. Hamilton remarked that in making this comment he was only "being a bit of a Devil's advocate." See also the comments of the majority and minority leaders announcing the establishment of the Senate Ethics Study Commission: "there is an inherent difficulty in the current system of Senators judging their colleagues" ("Senate Leaders Announce Ethics Study Commission," press release, U. S. Senate, Office of the Majority Leader, March 4, 1993).

2. "Nemo esse judex in sua causa potest," is usually attributed to Publilius Syrus (sometimes called Publius). See *Sentences de Publilius Syrus*, translated by Jules Chenu (Paris: C.L.F. Pancoucke, 1835), p. 555.

3. *The Federalist Papers*, Clinton Rossiter, ed. (New American Library, 1961), no. 10, p. 179. Also see Alexander Hamilton, no. 80, pp. 475-81.

vidual member charged with an ethics violation? Although the chamber is not literally on trial in any particular case, its interest is closely connected to the fate of the individual member. The perspectives of the judges and the judged are not so distinct as they are in a judicial trial or even in disciplinary hearings such as those conducted in some other professions. The distinction between judge and a party to the cause in a legislative institution is blurred in three ways, all of which tend to bias the judgment and corrupt the integrity of both the members and the institution. These effects operate in cases of individual corruption, but they become even more potent in cases of institutional corruption.[4]

The first way in which the distribution breaks down is the result of collegial interdependence. More than officials in most other institutions (even in the other branches of government) and more than members of most other professions, members of Congress depend on one another to do their job. They have worked together in the past and they must work together in the future. The obligations, loyalties, and civilities that are necessary, even admirable, in these circumstances make it difficult to judge colleagues objectively or to act on the judgments even when objectively made. Furthermore, the less that a charge seems to resemble individual corruption, the harder it is for colleagues to come to a severe judgment even if it is warranted. The member implicated in institutional corruption, showing no obvious signs of a guilty mind or unusually selfish motives, is seen as simply doing what the job requires or at least permits. Under such circumstances the sympathy of colleagues is maximized and their capacity for objectivity minimized. The circumstances are not favorable for the principle of independence, which calls for judgment on the merits.

The attitude of "we are going to protect our own" can produce bias against members as well as in favor of them. "Protecting our own" when the "own" are members of one's party or faction may lead not only to defending guilty members but also to attacking innocent ones. In an interdependent and partisan legislature, ethics charges can become a political weapon, setting off a cycle of accusation.[5] In the succession of charges and countercharges that followed the judgment against Speaker James Wright, both judges and those they were to judge found themselves the objects of charges.

A second way members are judging themselves when they judge their colleagues refers to the institution itself and poses special difficulties for the principle of fairness. In many cases a key question is whether an accused member's conduct has departed from the norms of the institution. The conduct of the members who are judging can thus become an issue when the accused member claims that what he has done is no different from what other members have done. It is not fair to single him out. This was a familiar plea in the case of the Keating Five. Although this plea could not be sustained, it put other members, including members of the ethics committee, in the awkward position of having to defend themselves. Their ability to do so directly affected the judgments they could make about their accused colleagues. Unless the committee members could show how their own conduct differed, they would either have had to acknowledge their own guilt or declare their colleagues innocent.

4. For the distinction between individual and institutional corrupti~on, see Thompson, *Ethics in Congress*, pp. 7-8, 169-70, 172-73.

5. Thompson, *Ethics in Congress*, pp. 47-48.

Even when committees stand firm, their members may find themselves devoting as much attention to defending their own actions as to investigating the misconduct of an accused member. The committee and its procedures become the issue. During the fall of 1993 the entire Senate spent two full days on the case of Senator Packwood.[6] The debate ignored the charges of sexual harassment and intimidation of witnesses that had been raised against him. The only subject was Packwood's challenge to the subpoena for his diary that the ethics committee had issued as part of its investigation of the charges. The substantive business of the chamber ceased while senators seriously debated a claim of privacy that, if made by an ordinary citizen, no court would take seriously.[7]

The third way the positions of the judges and the judged converge in congressional ethics affects the principle of accountability. Members who are judging their colleagues know that they themselves will be judged by the public. The political pressures that build during the disposition of ethics cases are potent, often more potent than judicious. In the Keating Five case, Vice Chair Warren Rudman believed that "the public had decided [for] the guillotine at dawn on the Capitol grounds. That was the atmosphere in which the Ethics Committee was operating. . . . Capital punishment would be just about right."[8] Some members also thought that some of their colleagues may have been too sensitive to public opinion because they were facing reelection in November.[9]

To avoid these kinds of pressure, the committee can conduct its investigation in private, as it did in the case against D'Amato, which occupied its attention at almost the same time as the case of the Keating Five. The committee held no public hearings on the charges against D'Amato and did not release transcripts or summaries of the testimony. At the conclusion of the investigation it issued a brief report that provided scarcely any account of the events in question. The committee thereby insulated itself from improper public pressure, but at the price of excluding proper public concern and arousing greater public suspicion. The conclusion and the process continued to be the subject of public criticism long after the committee reached its conclusion.[10]

Because of the political nature of a legislature, it is difficult, and not even desirable, for members to act purely as judges, focusing only on the case at hand. Legislators have obligations that judges do not have. They must take seriously the reactions of constituents and consider the effects of their deci-

6. See *Congressional Record*, daily ed., November 1, 1993, pp. S14725-S14738, and November 2, 1993, pp. S14778-S14832.

7. Richard Bryan, chair of the ethics committee, said in the debate that Packwood's claim implied that there should be "two standards in America, one for 250 million ordinary citizens minus 100, and that separate standards be established for the 100 of us who are privileged to serve as members of this institution" (*Congressional Record*, daily ed., November 2, 1993, p. S14789).

8. *Recommending Revisions to the Procedures of the Senate Select Committee on Ethics*, Hearings, Committee Print, Senate Ethics Study Commission, 103 Cong. 1 sess. (Government Printing Office, June 1993), p. 61.

9. Author's interviews with two members of the committee, April 1994.

10. See, for example, the editorial comment in *Roll Call*: "questions linger about the Senator's conduct and the quality of the Ethics probe" ("The D'Amato Files," *Roll Call*, May 12, 1994, p. 4). There may have been justification for withholding the transcript while the criminal investigation of D'Amato was continuing, but the committee resisted appeals to make it public long after the investigation had concluded.

sions on the health of democratic political institutions, including Congress itself. Ethics committees must determine whether a member has conducted himself or herself "in a manner which shall reflect creditably on the House," or has avoided "improper conduct which may reflect upon the Senate."[11] In judging colleagues the committees must assess not only their institutional norms and practices but also public confidence in those norms and practices. Balancing the scales of justice in these circumstance would try the skill of Solomon.

Because of all these factors, when a legislative body investigates, charges, and disciplines a member, it is not observing the principle that one should not judge in one's own cause. It is not in the best position to reach an impartial judgment on the merits, treat members with fairness, and maintain public confidence in the process.

Similar considerations have persuaded most other professions to move away from self-regulation.[12] The profession that has most successfully resisted outside regulation of its ethics is journalism. It typically wards off evil by waving the First Amendment before its attackers. Compared with most other professions, journalism also has few institutional mechanisms for enforcing ethical standards. Journalists, like legislators, think they can regulate themselves well enough and indeed see no need for much regulation of any kind. It is ironic that the only professionals who affirm their right to self-regulation as strongly as legislators do are also those whose ethics many legislators most distrust.

During the hearings of the Senate Ethics Study Commission, Senator Thomas Daschle observed: "We wouldn't stand for doctors or lawyers or insurance agents or any others forming a group with which to discipline themselves and accepting that as the sole determinant as to whether or not someone is appropriately within his bounds."[13] He asked why are senators different? The question is germane, and more difficult to answer than is usually assumed.

Letting Voters Decide

The most prominent difference between legislators and members of other professions is that legislators have to run for office. They must defend their performance in public and at regular intervals let voters judge its success. Because of this electoral connection, they are more directly accountable than other professionals who exercise power over other people. They can be trusted to run their own disciplinary procedures, it is said, because they are subject to the most fatal form of discipline of all for a politician—loss of office. "You are not your brother's keeper," one House member said. "He is answerable to the people in his district just as you are."[14]

Disclosure

Because legislators stand for election, some question why any further accountability is necessary at all. "We ought to disclose what we do," Senator J. Bennett Johnston suggested during the debate on the gift

11. House rule XLIII in William Holmes Brown, *Rules of the House of Representatives*, 103 Cong. (GPO, 1993); and Senate resolution 338 as amended, 99 Cong. 2 sess. (1964), in Senate Committee on Rules and Administration, *Senate Manual* (GPO, 1981).

12. See Thompson, *Ethics in Congress*, pp. 135-36.

13. *Recommending Revisions*, Hearings, p. 59.

14. Edmund Beard and Stephen Horn, *Congressional Ethics: The View from the House* (Brookings, 1975), p. 66. See also *Investigation of Senator Alan Cranston together with Additional Views*, Committee Print, Senate Select Committee on Ethics, 102 Cong. 1 sess. p. 10.

ban, "and let the voters decide."[15] Others have proposed that Congress should replace its elaborate regulations on conflict of interest, acceptance of gifts, and allowable outside income with a simple set of rules requiring only disclosure of financial interests.[16] Ethics committees would make sure that members disclose what the rules required, but only voters would decide whether members were guilty of any ethical improprieties.

This approach is deficient in principle and practice. As a matter of principle it relies on a mistaken view of democratic representation. It assumes that the constituents in one district or one state should have the exclusive authority over the conduct of the representative from that district or state. This kind of representative system may be appropriate for a transient convention, what Edmund Burke called a "congress of ambassadors from different and hostile interests."[17] But it is hardly adequate for a permanent legislature, a congress of members who can pursue their different interests only if they preserve their common interest in the integrity of the institution. A true legislature cannot leave the ethical fate of the whole body to the mercy of a few members and their constituents.

Because legislative ethics provides the preconditions for all legislative action, citizens rightly take an interest in the ethical conduct of all members, not only that of their own representatives. In this respect their concern about ethical conduct differs from their interest in any particular piece of legislation. Even on delegate conceptions of democratic representation, constituents in any state or district may quite properly instruct their representative to seek, through procedures of the representative assembly, standards to govern the ethical conduct of all representatives. That is part of the rationale for the disciplinary authority of the ethics committees and ultimately for Congress's constitutional power of expulsion. That is also why letting members disclose and voters decide is in principle not sufficient.

In practice in the current system, disclosure serves only a limited function.[18] Each year members and high-level staff are required to file an elaborate report listing virtually all their own and their spouses' financial holdings and indicating the range of value (for example, "greater than $1,000, but not more than $2,500).[19] Because the forms do not correspond to any familiar pattern such as an income tax return, members and the public often find them confusing. Furthermore, although ethics committee staff usually examine the forms and notify members of discrepancies, there is no independent audit, not even a review of the kind conducted by the Office of Government Ethics for executive branch officials who are subject to essentially the same requirements.

---

15. *Congressional Record*, daily ed., May 4, 1994, p. S5157.

16. One of the earliest such proposals was offered by Senator Lowell Weicker: S. resolution 109, cited in *Congressional Ethics: History, Facts, and Controversy*, 2d ed. (1980), p. 57.

17. *Burke's Politics: Selected Writings and Speeches of Edmund Burke on Reform, Revolution, and War*, Ross Hoffman and Paul Levack, eds. (Knopf, 1959), p. 116.

18. One of the most balanced brief discussions is Joel L. Fleishman, "The Disclosure Model and its Limitations," in *Hastings Center Report*, Special Supplement: Revising the United States Senate Code of Ethics (February 1981), pp. 15-17.

19. Ethics in Government Act of 1978, as amended, 5 USC appendix 6, 101-11, incorporated into House and Senate rules. These provisions are among the most impenetrable of any ethics rules. The *Ethics Manual for Members, Officers, and Employees of the U.S. House of Representatives*, 102 Cong. 2 sess. (GPO, April 1992), p. 153-80 [hereafter *House Ethics Manual*], provides a helpful guide to their rationale and scope. See pp. 153-180.

It is therefore impossible to know whether the tougher penalties adopted in 1989 (doubling the maximum civil fine to $10,000 for violating disclosure rules) has improved compliance.

Members who have been caught violating only disclosure rules rarely suffer any serious sanctions from their colleagues, let alone voters. In the period of some of the most active committee activity (1977-1992), only three of the sixteen cases involving disclosure violations considered by the committees involved no other charges.[20] Of the seven cases in which a committee decided to impose a sanction, only one did not involve other charges. Only two of those sanctioned were defeated for re-election.[21]

Like mail fraud and income tax evasion, disclosure offenses are sometimes used to reinforce charges that investigators regard as more serious but for which they have less conclusive evidence. In the only case in which a sanction was imposed after a member was charged with only a disclosure violation, the House reprimanded George Hansen in 1984 for failing to disclose loans and profits received under suspicious circumstances, but only after he had been convicted of federal felony and sentenced to prison.[22]

Another deficiency of disclosure is that it does not cover at all some conduct that raises serious ethical questions. It cannot satisfy legitimate concerns about the jobs that members take after they leave office, the province of post-employment rules. Disclosure here simply comes too late. For some other misconduct, such as conflict-of-interest violations, disclosure reveals too little. These violations often come to light only after careful investigation of complex financial relationships. Neither voters nor reporters are usually in a position to conduct such investigations.

What is disclosed is generally not used effectively. Stories on the financial resources of members are rarely presented in a way that would best help voters make balanced judgments about the ethics of members. The press is often most interested in who the wealthiest members are, how much their spouses make, or who takes the most expensive trips paid by corporations.[23] A few reporters try to show connections between political action committee contributions and legislative committee memberships, but given the ambiguity of those connections, the stories can usually do no more than raise suspicions. This effect points to yet another limitation of disclosure. By itself, disclosure may merely further undermine confidence in government, causing citizens to suspect the motives of legislators but providing no constructive ways to restore trust. Disclosing a possible conflict of interest merely reveals a problem without providing any guidance for resolving it.

If the limitations of disclosure were more fully appreciated, both members and citizens might come to expect less from it. They would not only be

20. Senator Edward Brooke (1979) and Representatives George Hansen (1984) and Geraldine Ferraro (1984).

21. The seven were John McFall (1978), Edward Royball (1978), Charles Wilson (1978), Herman Talmadge (1979), George Hansen (1984) (disclosure only), David Durenberger (1990), and Mark Hatfield (1991). Although Hatfield was ultimately rebuked for disclosure violations only, the original charges included acceptance of gifts and favors from individuals with an interest in legislation. Talmadge and Hansen were defeated for reelection.

22. *Congressional Ethics* (1992), p. 42. See *In the Matter of Representative George V. Hansen*, Committee Print, House Committee on Standards of Official Conduct, 98 Cong. 2 sess. (GPO, July 1984).

23. See, for example, Helen Dewar and Eric Pianin, "Senators Heed Constituents on Lifestyle," *Washington Post*, June 15, 1994, p. A8.

less tempted to rely on it exclusively, but they might also be more inclined to look for ways to combine it more effectively with other forms of enforcement. For example, the ethics committees could regularly review the financial activity of members, identify potential problems, and recommend measures to correct them. They would publicize information only if members failed to correct the problems. Committees could ask for much more information than is now disclosed, but most members would have to make much less public. As always, leaks would be a risk, but both ethics committees have unusually good records in protecting confidential information. Furthermore, the information could be targeted more specifically to the problems that particular members may have. More relevant than the range of amounts of members' holdings is their history of relationships and patterns of investments. In particular, ethics committees could request more specific information about members' holdings that might be affected by the committees on which they serve, especially those they chair.

The Electoral Verdict

In practice the current system of enforcement consists of two decisions: a finding by Congress and a subsequent verdict by the electorate.[24] Colleagues declare a judgment and voters deliver the final verdict. When voters have the last word, what do they say?

The most systematic study of the effects of charges of corruption on voting behavior in more than one election found that accused candidates suffered a loss of 6 to 11 percent from their expected vote in reelection races.[25] A significant number of accused candidates lost the primary or resigned rather than risk defeat in the general election. (The study covered all races in which a candidate's alleged corruption was an important issue, not only races in which a candidate had been charged or had a sanction imposed by an ethics committee.) Although voters evidently do not ignore corruption, they do not protest unequivocally against it at the polls. More than 60 percent of all those accused won reelection. Of the accused candidates who reached the general election, nearly three-quarters prevailed.[26] The voters most likely to vote against the accused candidates may be those least likely to have the classic characteristics of good citizenship: strong issue orientation, party identification, active participation, and commitment to the democratic rules of the game.[27] If this is so, relying on the electoral verdict puts the health of the democratic process in the hands of the least reliable citizens.

Neither do electoral judgments discriminate among types of corruption in a way that satisfactorily tracks their effects on the democratic process. Individual corruption is punished much more se-

24. Expulsion is so rare in modern times that it has little practical effect even as a threat. Only one member, Michael J. "Ozzie " Meyers, has been expelled in this century; Harrison Williams, John Jenrette, Raymond Lederer, and Mario Biaggi resigned under the threat of expulsion. All had been convicted of criminal charges before the ethics committees were willing to act; the charges against all except Biaggi resulted from the ABSCAM operation.

25. John G. Peters and Susan Welch, "The Effects of Charges of Corruption on Voting Behavior in Congressional Elections," *American Political Science Review*, vol. 74 (September 1980), pp. 703, 706. This study covered eighty-one candidates in five House elections from 1968 to 1978 and controlled for election effect, prior partisan vote, terms served, and incumbency.

26. Peters and Welch, "Effects of Charges of Corruption," p. 702.

27. Peters and Welch, p. 706.

verely than offenses involving institutional corruption. Campaign and conflict-of-interest violations produced losses on the order of 1 percent of the expected vote, while bribery charges led to losses of about 12 percent. Members charged with morals offenses suffered the most: they lost more than 20 percent of their expected vote.[28]

When voters choose their representatives, they may understandably take into account factors other than ethics. They are often willing to forgive lapses in ethical behavior if the member looks after constituents. As one of D'Amato's supporters observed, "Here [on the streets of Island Park, Long Island]—this is where I know Al D'Amato. He's been here when he had to be here. The rest of it—that's stuff that happens in Washington."[29] For others, a representative's party or position on policy issues weighs more heavily in their decision than any charge of corruption.[30] Voters do not necessarily think that party or policy matters more than honesty; they may discount the corruption simply because, unless a case goes to trial, they usually do not have enough information to assess the validity of the charges. Most of the charges investigated by ethics committees remain confidential, and even those that result in investigations and sanctions do not include public hearings like those held in the cases of Durenberger and the Keating Five. Finally, even with full information and discerning judgment, voters have only one sentence they can impose: the political equivalent of capital punishment.

The considerations that explain why voters should not be blamed also underscore why the ethics process should not rely mainly on the electoral verdict as it currently operates. Voters have, of course, the final word in any democratic system, but before they give that word the process should provide more and better information than it does now.

Letting Courts Decide

During hearings on the organization of Congress, Senator Richard Lugar surprised some of his colleagues by suggesting that "one solution to the ethics committee problem is not to have one." Persons who file complaints could be told to "see the local court system or State court or the Federal court, and let them try your case." Other members have from time to time made the same proposal. Its attractions are plain. The legal process has the permanent expertise to investigate the complaints effectively and the procedures to adjudicate them fairly. As a legislature, Congress has neither. Although the ethics committees have hired outside counsel more than a dozen times since 1978 and codified their own procedures (some forty pages for each chamber), the "perception of many of our trials here," Lugar observed, is that "we're amateurs flailing about."[31] The perception does not do justice to the professional competence that the staffs (and some members) of both ethics committees have demonstrated over the years, but it does reflect an institutional fact: because the congressional ethics process stands closer

28. Peters and Welch, p. 705.

29. Craig Wolff, "D'Amato's Hometown Disdains Inquiry," *New York Times*, August 3, 1991, p. 22.

30. Compare Peters and Welch, p. 698: "If . . . a voter likes a particular candidate's political party or stand on important issues, the voter may discount any corruption charge leveled against the candidate and vote for him (or her) anyway. This discounting is particularly easy to do when the charges of corruption have not been proven." (p. 698).

31. *Ethics Process*, p. 15.

to the political process, it is not likely to be as orderly and stable as legal proceedings.

To some extent Lugar's proposal has already been put into practice. Many of the most serious charges against members are prosecuted in the criminal justice system. The ethics committees have often declined to take any action on cases that involve members who are indicted or convicted for offenses committed while in office.[32] In some cases, such as those of Harrison Williams or Mario Biaggi, the courts have provided the only sanction because members resign before Congress can act. Why then not let the courts take over all the cases involving corruption charges against members?

Cases involving general offenses are better left to the criminal court system.[33] Ethics committees are increasingly postponing action until courts reach a judgment or at least prosecutors conclude their investigation. A case like that of Durenberger, in which Congress acts before the courts, is now less common than one like that of Representative Dan Rostenkowsi, in which the ethics committee declines to act until the courts conclude their work. In practice, the ethics process is moving toward Lugar's proposed solution, or at least toward the moderate version he also suggested: violations of ordinary law should go to the courts, and violations of "higher standards" should be heard by the committees.[34]

Although the courts can in this way play an important role in some ethics enforcement, they are not an appropriate tribunal for many charges against members and should not be the sole or final tribunal for any ethics charge. Because the aims and methods of the criminal process and the ethics process differ in principle, the two must remain distinct in practice. In simplest terms, the ethics process seeks to determine whether a member's conduct has harmed the institution; the criminal process judges whether a citizen has harmed society. In this respect the ethics rules and committees, as two experienced members once observed, are "like the professional standards and the disciplinary board of a medical or bar association." They explained: "just as the question for such a board is professional integrity and performance as prescribed by the standards, so the question for the committee is [congressional] integrity and performance as prescribed by the Code."[35]

The punishments imposed by the ethics process are also more limited in scope than those imposed by criminal law. An ethics sanction does not deprive a citizen of life or liberty. The criminal courts can do both, and can also deny a member the right to hold public office again[36] In the colloquy with Richard Lugar, Lee Hamilton emphasized yet another difference: "the standards for serving in Congress ought to be higher than whether or not you

32. Examples include: J. Herbert Burke (1978), Frank M. Clark (1978), Otto E. Passman (1979), Nick Galifianakis (1979), Claude Leach (1980), Richard Kelly (1980), Jon Hinson (1981), James Traficant (1983), Nick Joe Rahall (1984), Bobbi Fiedler (1984), Mario Biaggi (1988), Floyd Flake (1991), Joseph McDade (1992), Kay Bailey Hutchison (1993). Because some of these members were acquitted, the failure take any action should not be taken to imply any laxity on the part of the committees.

33. Thompson, *Ethics in Congress*, pp. 52-55.

34. *Ethics Process*, p. 16.

35. Lee Hamilton and H. Richardson Preyer, "Additional Views" in *Korean Influence Investigation, Report*, Committee Print, Committee on Standards of Official Conduct, 95 Cong. 2 sess. (GPO, December 1978), pp. 124.

36. See, for example, the criminal statues that apply to members: 18 USC 415, 417, 420.

have committed a felony."[37] Whether or not they are higher, many are different. Ordinary citizens do not have to disclose their personal finances to the public, and most are not subject to restrictions on gifts they can accept. Even more significant for the purposes of legislative ethics is the whole range of offenses that produce institutional corruption, such as giving special help to big campaign contributors or putting improper pressure on federal regulators. The reason most of these offenses are not crimes is not that only legislators can commit them but that they involve ambiguous conduct, difficult to define in advance and awkward to condemn after the fact. This kind of conduct lacks the corrupt motive that criminal prosecution usually requires.

Because some of the offenses differ, so should some of the procedures. When disciplining members, Congress and its ethics committees are not bound to observe the procedural protections of the criminal process. Accused members do not by right have access to all the testimony and evidence gathered by the committees (although committees often make much of it available). More significantly, the standards of proof, especially in the earlier and usually most critical phase of an inquiry, require much less than a conclusion beyond reasonable doubt. Only "substantial credible evidence" is necessary to impose some sanctions and to initiate a formal investigation. The Committees may even legitimately pursue a case against a member who has been justly acquitted in court on the same charge.

Strengthening the Ethics Committees

During cross-examination in the Keating Five hearings, Bank Board Chair Edwin Gray was asked why, if he thought the conduct of the senators was unethical, did he not report it to the ethics committee. "You want the real answer?" he responded. Vice Chair Rudman assured him, "We always want the real answer to everything, Mr. Gray." So Gray continued: "Fine. The real answer is, I didn't know there was a Senate Ethics Committee, with all due respect to you gentlemen."[38]

If the ethics committees are to gain the respect that they should be due, they will need to make some major changes. Although both elections and courts serve as important tribunals for the enforcement of the standards of conduct for legislators, neither can substitute for Congress itself. Ethics committees are here to stay, and Congress must look for ways to make their procedures better fulfill the principles of legislative ethics.[39] The most important reform would establish a new outside commission, as described later. But even without this commission, a number of changes could improve the way the committees conduct their business. Even with such a commission, the other changes could help the committees do their job better. In either case the committees would still play a major role in enforcing ethics standards because Congress retains final authority for imposing ethics sanctions on its own members. To recognize the deficiencies of self-discipline is not to call for the abolition of the ethics committees.

37. *Ethics Process,* p. 16.

38. *Preliminary Inquiry into Allegations Regarding Senators Cranston, DeConcini, Glenn, McCain, and Riegle, and Lincoln Savings and Loan*, Hearings before the Senate Select Committee on Ethics, 101 Cong. 2 sess. (GPO, 1991), p. 86.

39. For a statement and explanation of the principles, see Thompson, *Ethics in Congress,* pp. 19-24.

Partisanship and Prejudgment

Partisanship is the first fear that comes to members' minds when the independence of the ethics process is challenged. The Senate created a strictly bipartisan committee in 1964, partly in response to the partisan disputes over the investigation of Bobby Baker, the secretary of the majority, who was later convicted of criminal charges involving the misuse of his office and campaign contributions. The House followed suit in 1967 after the controversial case of Adam Clayton Powell, who was "excluded" by the House but was later reinstated by the Supreme Court. To avoid partisanship, the ethics committees have an equal number of members from each party, the only congressional committees to have such balanced representation. The members chosen for service have usually been known as moderates and have until recently been less partisan than their colleagues. Members rarely volunteer for service on these committees.

For many years, the public decisions that the committees have reached generally did not seem to be partisan.[40] The final votes were almost always unanimous and dissenting opinions were rare. The committees have imposed sanctions on more Democrats than Republicans in the 1980s and early 90s, even though the Democrats controlled Congress during most of this period. On average Democrats made up two-thirds of Congress but four-fifths of the total of members who received sanctions.[41] There is no reason to believe that Democrats are more corrupt than their higher rate of sanction implies. Rather, it appears that the offenses they are more likely to commit are those most likely to receive more severe sanctions. Democrats are more often charged with bribery and related offenses; Republicans are more often accused of conflicts of interest.[42]

Some members with long experience on the Senate committee say that during the Keating Five case partisanship intruded into their proceedings for the first time. In the early 1990s most of the members of the House committee were new, as were the chair and ranking member, and the tone of these meetings started to become more partisan, according to staff and former members.[43] As comity deteriorates in Congress, the committees cannot expect to escape its effects.[44] To the extent that they are creatures of Congress, the committees will partake of the characteristics of Congress. The bipartisan spirit began to erode in the 1990s, and by the 108th and 109th Congresses was conspicuously absent.

A different threat to the independent judgment of the committees comes from the structure of the process itself. The committee that decides whether there is sufficient evidence to go forward with a case is the same committee that decides whether the accused member is guilty and should be sanctioned. It is as if the prosecutor, grand jury, jury, and judge were combined in a single body. Commit-

40. During the long reign of Louis Stokes (chair) and James Hansen (ranking member for part of the time) on the House committee, it was generally agreed, as these two members later testified, that they "never had a case that was decided on a partisan basis" (*Ethics Process*, p. 8).

41. From 1978 to 1992 in the House, 4 Democrats of 260 and 1 Republican of 174 on the average received sanctions every two years. In the Senate 1.75 Democrats of 51.5 and 1.25 Republicans of 48.5 on the average received sanctions every four years. Based on data in Thompson, *Ethics in Congress*, appendix; and Noyer, "Catalog of Congressional Ethics Cases."

42. Peters and Welch, p. 703.

43. Author's interviews, April-May 1994.

44. Eric M. Uslaner, *The Decline of Comity in Congress* (University of Michigan Press, 1993), esp. pp. 21-43.

tee members themselves have said that it is difficult under these circumstances to avoid prejudging a case.[45] For the accused member and for the public, the preliminary judgment is often regarded as the final judgment.[46]

To mitigate this problem, investigation should be more clearly separated from adjudication.[47] Investigation should include the power to make a preliminary finding (for example, whether there is substantial credible evidence that a violation of standards has occurred). Different members with different staffs should serve on bodies performing each function, and some continuity of membership should be maintained. Even if no other changes were made, the separation of these functions would improve on the present process, especially in the Senate.

Another protection of independent judgment is the power to appoint a special counsel. Under the present system in which only members judge members, the counsel is essential. Special counsel should be appointed not only in unusually time-consuming or complicated cases in which the committees lack resources or staff to conduct an adequate inquiry, but also in cases in which citizens have special reason to doubt that members could judge their colleagues, notably in those that have strong partisan overtones or that include allegations of institutional corruption.

In any two-step process the appointment of a special counsel should be required in the investigatory phase unless there is a compelling reason to the contrary.[48] In the first phase the counsel would act primarily as a fact finder and legal adviser. The counsel should also normally continue in the adjudicatory phase, but the role here would be that of an advocate for the committee's conclusion reached in the first phase.

Fairness to Members

Another purpose of separating investigation and adjudication is to enhance the fairness of the process. Other changes may also be necessary to ensure that accused members are treated fairly. Fairness does not require that members be granted the same rights an ordinary citizen would receive in the criminal process. They should not expect the same kinds of rights of privacy, for example. Nor should members demand greater rights than other citizens: like an ordinary citizen in a criminal proceeding, a senator must comply with a subpoena for his diary.[49] But

45. Senator Warren Rudman citing Senator Howell Heflin and Representative Robert Livingston. *Recommending Revisions*, Hearings, pp. 48-49, 235-36.

46. To avoid these difficulties, House committee rules now provide that the preliminary inquiry be conducted by a subcommittee and the final adjudication be settled by the rest of the committee [House Committee on Standards of Official Conduct, *Rules*, 103 Cong. (GPO, March 1993), pp. 12-13]. But some observers question whether it overcomes the problems of prejudgment. The committee chair and ranking member serve ex officio on the subcommittee, and the same staff serves both the subcommittee and the full committee.

47. The term *bifurcate* is commonly used to describe the change to a two-step process (See *Recommending Revisions*, Hearings, pp. 47, 220; and *Recommending Revisions*, Report, pp. 21-22). Although the future of the republic may not hang on this point, the term is misleading and should not be used to describe this process. Bifurcation denotes a process that divides into two tracks that go in different directions. All the proposals for so-called bifurcation actually recommend a process in which one step or phase follows the other. This would be more accurately described as a process of separated powers or functions, or more simply as a two-step process.

48. The Senate tended to follow this procedure at least in the past [See Senate Select Committee on Ethics, *Rules of Procedure*, rev. ed. (GPO, February 1993), rule 16 (b)(3).]

49. See Chair Richard Bryan's comment on Bob Packwood's claim quoted in note 6 from *Congressional Record*, daily ed., November 2, 1993, p. S14789.

fairness does call for some basic procedural protections for the sake of members as well as the public interest in the rights of all public officials. The current rules of both committees grant certain rights to accused members, but the rights are not complete and their exercise is wholly subject to the discretion of the committees.[50] The full Senate and House should guarantee members some basic protections (including for example opportunity to see (in an appropriate form) the evidence available to the committee and the opportunity to be heard by, and to bring further evidence to the attention of, the committee).

Probably the most disturbing unfair treatment that comes from the effects of a false charge. The mere making of a charge, whether it has merit or not, is sometimes enough to damage a member's reputation and career. Even if the member is exonerated, the damage often has been done. The charge can cause serious damage to the institution as well. One of the most egregious cases—the one most often mentioned by members in interviews—was the charge in 1982 by two former pages that some thirty members had had sexual relations with pages. After a yearlong investigation, a special counsel concluded that the original charges had no foundation.[51] Many of the members who had been falsely accused believe that far more people noticed the accusation than the vindication.[52] (In the course of investigation the special counsel did discover two other cases of improper sexual relations with pages. The members involved, who had not been named in the original accusations, were censured by the House.[53]) The memory of this experience may well have influenced House leaders and staff much later in 2006 as they heard, and failed to take seriously, allegations that Representative Mark Foley was making improper advances toward pages.

In the current system the principal protection against false charges is the requirement that anyone who submits a complaint to the committee must swear to its truth and satisfy several other substantial requirements.[54] In 1997, the House voted to change its own rules to forbid any outside group or citizen from filing a complaint. The Senate still permits outside complaints, but has not pursued many in recent years. The strategy seems to be to keep the threshold for making complaints high in the hope of discouraging unfair charges. One staff member acknowledges that "we have made it more difficult for ordinary citizens to file a complaint."[55] If that is the aim, it is misguided. The threshold fails to block some ill-founded charges that the committee should not consider and may suppress some well-grounded ones that it should consider seriously.

50. *Rules of Procedure*, pp. 22-23; and William Holmes Brown, *Rules of the House of Representatives* (GPO, 1993), House committee, *Rules*, pp. 42-43.

51. Steven V. Roberts, "Ethics Panel Says 2 Congressmen Had Sexual Relations with Pages," *New York Times*, July 15, 1983, p. A1.

52. Also see the comment of James Hansen, ranking member of the ethics committee at the time, *Ethics Process*, pp. 23-24.

53. Special Counsel Joseph A. Califano and the committee recommended that the two members, Daniel B. Crane and Gerry E. Studds, be reprimanded, but the House decided after debate to impose the more severe sanction, Congressional Ethics (1992), pp. 39-41. See also *Report of the Committee on Standards of Official Conduct on the Inquiry under House Resolution 12*, Committee Print, House Committee on Standards of Official Conduct, 98 Cong. 1 sess. (GPO, July 1983).

54. Brown, *Rules of the House*, pp. 20-21; and *Senate Rules of Procedure*, pp. 16-17.

55. Author's interview, February 1994.

Formal complaints are not the only the basis for starting an investigation. The committees find it impossible to ignore some serious charges made in the press or in public forums, whether or not any formal complaints are filed.[56] In general, barriers to bringing complaints should be kept low for several reasons. First, public confidence in the process will be undermined if citizens think that complaints are dismissed for technical reasons or that one has to be a lawyer to get the attention of an ethics committee. Second, if the barrier is high, valid charges may escape investigation. Formal requirements do not reliably separate valid or serious from invalid or trivial charges. An anonymous submission of documents could turn out to be more substantial than a sworn complaint as the basis of a serious charge. Neither should committees have to wait for a complaint from any individual: some of the offenses most damaging to Congress have no identifiable victims.

A low threshold may actually better protect members. Although it permits more spurious complaints to be presented, it provides a more effective way of resolving them. If a complaint is rejected for technical reasons, citizens continue to harbor suspicions. Complaints thus rejected do not usually die; they fester in the press. The lower threshold also makes the initiation of action by a committee more common and therefore less damaging. A higher threshold gives any complaint that meets it greater legitimacy.

Rather than raising the threshold, Congress should consider raising the cost of making false charges. The committees, or preferably a semi-independent commission, could issue a formal criticism of members who deliberately or negligently make false charges. In some cases committees could impose more serious sanctions on such members. Although the First Amendment prevents Congress from sanctioning private citizens or members of the press for making false charges, it does not prevent ethics committees from criticizing them. It is of course often controversial whether a charge is false or frivolous, but in flagrant cases there should be enough agreement to make sanctions credible.

Fairness is a matter not only of the rights but also of the obligations of members. A duty of fair play, doing one's part to make the institution work, imposes institutional responsibilities on all members.[57] They are responsible for accepting unpleasant assignments (such as service on the ethics committees), for trying to improve the institution rather than just attacking it, and for calling colleagues to account for misconduct. Failure to take responsibility for collective problems poses serious dangers to the capacity of the institution to function and contributes to the erosion of public confidence in it. If as each member looks only after his or her political fortunes, no one is left to look after the institution's ethical integrity.

---

56. In the past, committees have begun an inquiry simply on the basis of a report in the press, as the House committee did in the case of Fernand St. Germain [*Congressional Ethics* (1992), p. 76]. One of the two complaints that the House committee officially cited as the reason for initiating the investigation of Speaker Wright came from press reports. See *Report of the Special Outside Counsel in the Matter of Speaker James C. Wright Jr.,* House Committee on Standards of Official Conduct, 101 Cong. 2 sess. (GPO, February 1989), p. 1.After considering proposals to limit further the steps necessary to trigger an investigation, the Senate Ethics Study Commission decided that the committee should continue to "evaluate information from all sources about possible improper conduct" (*Recommending Revisions,* Report, p. 5).

57. For a thoughtful discussion of collegial responsibility from the perspective of a political scientist who has served in Congress since 1987, see David E. Price, *The Congressional Experience: A View from the Hill* (Boulder, Colo.: Westview Press, 1992), esp. pp. 137-53.

It is neither realistic nor fair to expect any individual member to fulfill these institutional obligations in the absence of some reasonable assurance that other members will do the same. The logic of collective action, much studied by social scientists, shows why. If a collective good such as institutional integrity is being provided, then any individual can benefit from it without contributing to it. The member can be a free rider. If a collective good is not being provided, it is not in the interest of any individual to contribute to it, not only because the contribution may not make enough difference, but also because making the contribution may work to the individual's disadvantage. Members who spend more time than others do on institutional chores have less time for electoral pursuits. Also, defending Congress when colleagues and challengers are all attacking it is not usually a winning strategy. Relying on voluntary contributions to the collective good is therefore not likely to be sufficient. Members may need some further encouragement—some "selective incentives"—if they are to take their institutional responsibilities seriously.

It is bound to be difficult to implement reforms that would institutionalize such incentives in Congress. The same logic that makes the incentives necessary also makes their institutionalization less likely. It is not usually in the interest of individual members to devote themselves to carrying out this kind of reform. Nor is it easy to find incentives powerful enough to overcome the political pressures working in the opposite direction. Nevertheless, some members are dedicated to making the institution work better and are prepared to take political risks to do so. They may provide the leadership necessary to undertake reforms of this kind. Although many failures of institutional responsibility are probably beyond the reach of internal discipline, some are not. For a start the chambers could establish a rule, once proposed by the House ethics committee but never adopted, that would require any member and employee who becomes aware of any ethics violation to report it in writing to an ethics committee.[58] Some other changes could also help: for example, denying members certain committee assignments or eliminating procedural devices that invite abuses.[59]

The incentives need not be only punitive. A more positive approach is worth considering, at least as a supplement. Members should look for ways to balance the almost wholly negative character of ethics enforcement so that it would depend more on reward. Jeremy Bentham, that diligent theorist of legislatures, noted long ago that reward serves better to produce "acts of the positive stamp" and is more likely to be self-enforcing because officials have an incentive to bring forward the necessary evidence.[60] We should care as much about honoring faithful legislators as condemning felonious ones. For example, some independent body might be authorized to formally recognize members who have exceptional records in fulfilling their institutional responsibilities. The body would have to guard against the natural tendency to pass out so many of these awards that they would come to mean little. But if judiciously selected and effectively presented, they could serve not only to recognize the contributions of individuals but might also eventually improve the reputation of the institution.

---

58. *Korean Influence Investigation*, Committee Print, p. 7.

59. Thompson, *Ethics in Congress*, pp. 72-76.

60. Jeremy Bentham, *The Rationale of Reward* (London: Robert Heward, 1830), pp. 21, 43.

Accountability to the Public

In a legislature that is the most open in the world, the ethics committees are relatively closed. The Senate committee has rarely held public hearings on charges and the House even less often.[61] The rules of procedure of both committees contain many provisions to prevent unauthorized disclosure but few to ensure legitimate publicity. The largest part of the committees' work takes place without any public record at all. Members, often only the chair and vice chair (or ranking member), deal with most of the complaints and conduct preliminary reviews when necessary. The staff spends most of its time giving advice to members, only a small part of which ever becomes part of the record in the form of advisory opinions. Several former staff members with long experience in providing such advice said that they were often told not to be so hard on members and to tell them "how to do what they want to do." The kind of common law that develops under these conditions of confidentiality, one staffer said, is "parochial and permissive."[62]

The committees have the power to convene executive sessions at any time. In the House the committee is required to make public only a brief statement of an alleged violation and any written response from the accused member once a formal inquiry has begun. In the Senate the reports of staff and special counsel are treated as confidential.[63] The special counsel's report in the Keating Five case became public only because one of the committee members made it part of his own report. Some other members even brought charges against him for leaking a confidential document. When the committees do issue public reports, they are often too brief to be informative. From reading only the Senate committee's report on the D'Amato case, even well-informed observers would have difficulty in discovering what conduct led to the charges, let alone why the committee thought the conduct did not violate any standards.[64] Although critics later raised questions about D'Amato's testimony, the committee never released the transcripts of the hearings.[65]

Some of this secrecy is understandable. It not only protects the rights of members and witnesses, it also encourages citizens to bring forward complaints and enables committees to investigate them effectively and objectively. If a semi-independent commission took over the early phases of the process, perhaps confidentiality would be more acceptable. But in conjunction with the problem of members judging members, secrecy undermines public confidence. It tilts the balance too far against accountability.

If the present structure of the ethics process is not changed, the ethics committees should be re-

61. Public hearings in the Senate were held on the cases of the Keating Five (1990-91), David Durenberger (1990), Harrison Williams (1981), Herman Talmadge (1979), and the Korean Influence affair (1978). In the House public hearings were held for the cases of Austin Murphy (1987), James Weaver (1986), and the Korean Influence affair (1977). The House issued more extensive public reports on more cases during this period than the Senate did.

62. Author's interviews, February 1994.

63. Brown, *Rules of the House*, pp. 26-27; and Senate, *Rules of Procedure*, p. 21.

64. Senate Select Committee on Ethics, "Statement of the Committee Regarding Senator D'Amato," August 2, 1991.

65. The *New York Observer* obtained excerpts of D'Amato's testimony from sources it declined to name. See Joe Conason, "Exclusive: '91 Ethics Testimony Reveals D'Amato Flubbed His Lines," *New York Observer*, April 25, 1994, pp. 1, 11.

quired to make public the content of all complaints and their disposition. If the complaint is dismissed, reasons should be given. Committees should issue a full report at the end of any investigation and at the conclusion of any adjudication. If a special counsel is appointed at any stage, he or she should be required to prepare a report, which should also be made public at an appropriate time. The need for accountability and public confidence outweighs any increased burden of work and any risk of harm from leaked reports. Furthermore, if citizens knew that a full report will be made public at some stage, they could more easily accept the fact that some of the proceedings would be kept confidential in the earlier stages.

The ultimate instrument of accountability inside Congress is the power to discipline members; yet the range of sanctions available to the ethics committees and the chamber as a whole is limited. Because expulsion is rarely used, public criticism ranging from censure to reproval is the principal mode of discipline. (Fines have occasionally been imposed, as in the Durenberger case.) In the Senate the absence of a set of fixed terms of criticism has led the attorneys of accused members, evidently armed with thesauruses, to negotiate for the mildest possible language. Senators Talmadge and Durenberger preferred to be "denounced" rather than "censured," and the ethics committee complied. The proliferation of terms—confusing to members as well as to the public—has probably contributed to suspicions about the fairness and openness of the process.

Committees themselves should take more responsibility to clarify the meaning of the sanction in each case they decide. In addition to specifying the level of severity and the rule or standard that was violated, a formal judgment by a committee could describe the kind of injury to individuals or the kind of damage to the institution. Measures could also be taken to give the committee (or at least the chamber as a whole) more authority over what can be one of the most potent sanctions: the loss of positions of power within Congress (chairmanships, ranking memberships, and seniority). The Senate committee can only recommend such sanctions to party conferences, which have almost never imposed any such discipline.[66] In the House since 1980 the Democratic Caucus has required members who are indicted in the criminal process to step down from chairmanships. Republicans have been more reluctant to discipline members under such circumstances. The party refused to remove Joseph McDade from his position as ranking member of the Appropriations Committee long after he had been indicted in 1992 on charges of bribery.[67] In 2005, to protect the Majority Leader Tom DeLay, the House Republican conference rescinded the rule that requires members who are indicted to resign from leadership positions. The rule was reinstated only after widespread public criticism.

Because the party organizations in Congress have not acted as vigorously as they should, these party rules should become part of the chambers' rules, and ethics committees should be given the authority to impose sanctions. The positions from which members would be removed are properly considered offices of the institution, not the private property of the parties or individual members. All citizens and therefore all members have a legitimate interest in making sure that those who hold these

66. *Recommending Revisions*, Report, p. 17.

67. For a critical comment, see "Selective Ethics," *New York Times*, August 4, 1993, p. A18.

positions live up to the ethical standards of the institution. [68]

The Need for an Ethics Commission

No matter how much the ethics committees are strengthened and their procedures improved, the institutional conflict of interest inherent in members judging members remains. Most other professions and most other institutions have come to appreciate that self-regulation of ethics is not adequate and have accepted at least a modest measure of outside discipline. Congress should do the same.

Proposals to establish an independent body that would supplement and partially replace the functions of the ethics committees are not popular in Congress. In 1994 the Senate Ethics Study Commission considered and rejected all proposals that would involve outsiders in the process.[69] Nevertheless, support for them is growing. Members in both houses have introduced resolutions.[70] In the 109th Congress, ten bills were introduced; in the Senate an amendment to establish an office of public integrity secured 30 votes.[71] Many state legislatures have set up independent ethics commissions, many of which regulate conduct of legislators as well as campaign practices and lobbyists.[72] Some city councils have set up similar commissions.

The advantages of delegating some authority to a relatively independent body should be clear. They mirror the deficiencies of self-regulation discussed earlier. An outside body would be likely to reach more objective, independent judgments. It could more credibly protect members' rights and enforce institutional obligations without regard to political or personal loyalties. It would provide more effective accountability and help restore the confidence of the public in the ethics process. An additional advantage that should appeal to all members: an outside body would reduce the time that any member would have to spend on the chores of ethics regulation.

The need for an outside body is especially important in cases of institutional corruption. Here the institutional conflict of interest is at its most severe. When members judge other members for conduct that is part of the job they all do together, the perspectives of the judge and the judged converge most closely. The conduct at issue cannot be separated from the norms and practices of the institution, and the judgment in the case implicates all who are governed by those norms and practices. The political fate of the judges and the judged is also joined together. Even if they are of different parties, they face similar political pressures. When the institution is implicated in the corruption, some of those who

68. The Senate Ethics Study Commission took a small step in this direction:see *Recommending Revisions*, Report, pp. 17-18.

69. *Recommending Revisions*, Report, p. 2.

70. H. Res. 43, 103 Cong. (1993) and H. Res. 465, 102 Cong. (1992); S. Res. 190, 102 Cong. (1991); S. Res. 221, 102 Cong. (1991); S. Res. 327, 102 Cong. (1992); and H. Res 526, 100 Cong. (1988). For one of the earliest versions of such a proposal see *Revising the Senate Code of Official Conduct*, Hearings before the Senate Select Committee on Ethics, 96 Cong. 2 sess. (GPO, November 1981), pp. 75ff; and Dennis F. Thompson, "The Ethics of Representation," in *Hastings Center Report*, pp. 13-14. A comprehensive list of proposals has been compiled by Professor Denis St. Martin of the University of Montreal: "Liste des propositions législatives pour un mécanisme indépendant de régulation de l'éthique au Congrès américain (1951-2006)."

71. Amendment to S. 2349, not agreed to by yea-nay vote, 30-67, March 28, 2006.

72. Imogene Akins, ed. *State Yellow Book*, (Monitor Publishing, 1993) p. 935.

judge the corruption therefore should come from outside the institution.

There are many different ways of involving nonmembers in the process, and some are more likely than others to achieve the needed improvements. In general, the better methods keep the roles of the members and nonmembers separate. They should also be consistent with a two-step process of investigation and adjudication and with the principles of legislative ethics. Here is one version of an enforcement process that meets these criteria.

A Model for an Ethics Commission

Two bodies in each chamber would be responsible for enforcing standards of ethics in Congress: an ethics committee resembling the present body and a semi-independent ethics commission. (A possible variation would establish a single commission for both chambers.) The commissions would investigate charges against members to determine whether there is substantial, credible evidence that a violation of the chamber's ethics rules has occurred. The proceedings of the commissions would not normally be public, but they would publicly report their findings to their respective ethics committees. The commissions' membership, budget, and the standards it enforces would all be under the control of ethics committees or each chamber as a whole.

Each commission would consist of seven distinguished citizens with a knowledge of legislative ethics and congressional practice. Three would be appointed by the majority leader or Speaker and three by the minority leader of each chamber. The seventh who would serve as chair, would be chosen by the other six from a list of three proposed by the ethics committee of the relevant chamber (with a random procedure for breaking ties). Commission members would serve six-year, staggered terms. No sitting members, family or business associates of members, lobbyists, or others with close current connections to Congress could serve.

The number of former members who might serve should probably be limited, perhaps to a maximum of two, although few former members would probably meet criteria set out above and would be willing to serve. No more than one or two members would probably needed to make sure that the commissions are adequately informed about the customs and practices of congressional life. More would be likely to dominate the process, as professionals typically do on ethics committees and disciplinary boards that include lay representation. And it is important to keep this part of the process as independent as possible, primarily to inspire public confidence. Also, the more independent the commissions are, the more acceptable the confidentiality of the proceedings is likely to be. With relatively independent commissions, confidentiality could be consistent with accountability and promote fairness and independence at the same time.

In addition to investigating cases, the commissions could also take over the advisory and educational functions now exercised by the ethics committees. They could also oversee the audit of the financial disclosure reports. The staffs of the commissions would operate more like a congressional service such as the Congressional Budget Office. The aim would be to develop a professional staff as independent as possible from the partisan divisions and collegial pressures of the Senate and House. The commissions would also be well placed to review not only individual conduct but also institutional practices and make recommendations for institutional reforms.

The Role of the Ethics Committees

Under this proposal the composition of the ethics committees would not necessarily change, but their functions would be significantly modified. They would hear and decide cases only after the commission had determined that a violation had occurred. They would then make a final judgment or a recommendation to the full chamber. If the work of the commission and its report were as through and fair as it should be, a committee's task would be much simpler than it is now. Many cases could probably be settled without any hearings, and in those that could not, the hearings would probably be much shorter.

It is true that in cases in which a committee disagreed with a commission's finding, the committee could feel forced to conduct extensive hearings itself. But these hearings would not likely be any longer than those in the present system or those in any of the other proposed systems, and on this plan they would be less frequent. The committees would still have the final authority on any changes in the standards, although the recommendations could come from the commissions and their staffs.

Simplifying the tasks of the ethics committees in this way would make many of the questions that critics have raised about the present system less urgent. There would be no need to expand the number of members. More senior members might be persuaded to serve. Rotating terms (which reduce continuity) would be less necessary. There would be no problems about the status of nonmembers on a congressional committee. Other tensions in the present system, such as the conflict between confidentiality and accountability, would also be reduced.

Objections to Ethics Commissions

But would this proposal ease the problems of the ethics committees only to create greater problems for the new commissions? Some critics argue that assigning any significant part of the ethics process to outsiders would be an abdication of congressional responsibility.[73] The constitutional provision granting Congress the authority to determine rules and punish members (Article I, § 2) implies that only members should discipline other members for ethics violations. Any attempt to dilute that authority, it is argued, would be irresponsible and perhaps unconstitutional.

This objection has some force, and ultimately provides the main reason Congress should not create a completely independent agency or commission to enforce ethical standards. Congress must have the final authority for disciplining its members. This seems a reasonable inference from the Constitution, and a necessity given the limitations of alternative tribunals. Neither voters nor judges can do the job alone. It is therefore not likely that any single body could.

But the objection does not go as far as the critics think. That Congress must have final authority does not mean that it must have continuous control of the process. In the first place, the constitutional provision does not literally prohibit the delegation of this authority. It says only that Congress "may" determine rules and punish its members, not "shall," the term used in some other clauses to express nondiscretionary standards. In addition, no authoritative court decision has interpreted this clause in a way that would prevent Congress from

73. For example, *Recommending Revisions*, Report, p. 12; and *Recommending Revisions*, Hearings, p. 59.

establishing an outside body for enforcing ethics rules. One of the few cases bearing on the clause points in the opposite direction.[74]

Virtually all the proposals under consideration leave to Congress the power of appointing members to the outside body and the authority to make the final judgment in any particular case. The proposals differ chiefly in how much of the process prior to final judgment (investigation, hearing, formal charge) they would assign to the outside body. Within this range of alternatives, considerations of political prudence and administrative convenience may reasonably play a role in designing the proper procedure.

If Congress delegated some authority to the ethics commissions described here, it would not be abdicating responsibility but fulfilling it. Congress would be demonstrating confidence in itself by entrusting part of the process of enforcing ethics rules to citizens who would be more independent than any member could be, not by virtue of their character but of simply their status: they would not be judges in their own cause. The logic of the proposal to establish the commissions is very much in the spirit of other principles inherent in the constitution. It is a constitutional principle that seeks to separate as far as possible the judges and parties to a cause.

A second common objection to proposals that would establish ethics commissions is that outsiders are not likely to know enough about Congress and its customary practices and are not likely to appreciate the pressures under which members work.[75] It is true that the composition of the proposed commissions favors independence and objectivity over knowledge and sympathy. It is also true that the members of an outside commission should understand well the practices and pressures of life in Congress. However, there is no reason that commission members, especially respected citizens who have followed Congress from the outside for many years, could not learn what they need to know about life inside the institution.

Virtually no one making the objection that outsiders do not know enough ever provides a specific example of knowledge about Congress that could not be conveyed to at least some nonmembers. Pressed in interviews to give such an example, most responded along the lines of "I can't think of anything specific, more a general feeling about the institution. Maybe I will think of something as we go along. Only one of the members interviewed offered specific example: "an outsider might not appreciate how important it is for members to challenge abuses by the bureaucrats in the executive branch."[76]

The implications of the general objection, if taken seriously, are more far-reaching than may be recognized. If outsiders (even the well-informed citizens that all these proposals assume would be appointed) lack the necessary insight into the legislative service to serve responsibly on a commission,

74. *Vander Jagt* v. *O'Neill*, 524 F. Supp. 519 (D.D.C. 1981), *aff'd*. 699 F.2d 1166, (D.C. Cir. 1982), *cert. denied* 464 U.S. 823 (1983). A careful legal analysis of the constitutional issue by Stanley M. Brand, former counsel to the House, concludes: "nothing in the text of the Constitution or the jurisprudence interpreting the separation of powers …offers any basis for asserting that Congress lacks the power to …[create] an outside independent body to investigate ethical breaches and recommend appropriate discipline… " ("Power of the House and Senate to Create Independent Ethics Commission," February 7, 2006).

75. *Recommending Revisions*, Report, p. 12.

76. Author's interview with former leading members of an ethics committee, February and March 1994.

the prospects of the public's learning to trust the decisions of any ethics committee are even more bleak than they are now. To the extent that no one but insiders can truly understand the customs and practices of Congress, one of the chief purposes of legislative ethics—maintaining public confidence—could never be fulfilled. Legislators could not be held accountable for ethics of the institution as a whole.

A third objection to these commissions is that their members would not be accountable in the way that members of Congress are and therefore would be less likely to make sure that any decision they made could withstand public scrutiny.[77] This would be more troublesome if the commissions were made up of former members or others with close ties to Congress. A commission might then seem to be just a device for letting those with nothing to lose electorally take the political heat. But for truly independent citizens of character and discretion, the absence of electoral accountability would leave room to take public opinion into account to the extent that it is well informed and unbiased. They would have less inclination and less need to respond to political pressures created by special interests or irresponsible media. There is no reason to assume that such citizens are not available or would not serve. Regulatory commissions, special counsels, presidential panels, and many other such bodies attract distinguished and highly competent citizens to government service. Surely Congress can expect no less.

These objections may tell against more extreme proposals that would transfer entirely some of Congress's authority for disciplining its members to a completely independent body. But the objections are not fatal to more moderate proposals that, like the model outlined here, leave Congress with the final authority for enforcing its standards of ethics. Such proposals avoid the vices of not only the more extreme proposals for reform but also the more familiar practices of the current system. A properly designed and adequately staffed outside body could begin to overcome the "innate conflict of interest when members of the Ethics Committee are called upon to judge their colleagues."[78]

Ethics in Congress deserves greater attention not because members are more corrupt (they are not), not because citizens are more distrustful (they are), but because the institution itself continually poses new ethical challenges. The complexity of the institutional environment in which members of Congress work invites more calls for accountability and creates new occasions for corruption. As the circumstances of potential corruption change, so too must the institutions of actual enforcement.

77. "A number of possible outsiders, like former Members, would have their own potential conflicts of interest, without the public accountability that results from presently holding government office" (*Recommending Revisions*, Report, p. 12).

78. Lee H. Hamilton, in *Ethics Process*, pp. 7-8.