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Introduction

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Recent years have not been happy ones for Congress. Our national legislature, eternally a target for sniping, has endured heightened and relentless criticism of almost every aspect of its activities. In response, Congress has seriously investigated its own operations.[1] Some reform has occurred, most prominently the passage of the Congressional Accountability Act, which applies many important regulatory statutes to Congress for the first time.[2] Yet much remains to be done.

As citizens, we ought to ensure that our criticisms of Congress are constructive, lest we damage ourselves. In that spirit, the American Bar Association's Section of Administrative Law and Regulatory Practice created a special Congressional Process Committee to study selected aspects of congressional procedures and to recommend appropriate reforms. The Committee, which I chair, is composed of administrative lawyers who are experienced in legislative practice, or who have worked in Congress. We decided to address selected aspects of congressional structure and procedure for which we believe administrative lawyers possess relevant expertise.

The articles that form this Symposium grew out of that effort. Prepared by a talented group of young lawyers and professors, the articles originated as analytic reports to the Committee, which the Committee used as grist for its deliberations. I must issue a disclaimer: the articles do not represent positions of the Section or of the ABA, which have yet to take formal action on the Committee's recommendations. Nevertheless, I give them my personal testimonial as insightful analyses of important problems that Congress confronts.

Three articles follow. The first, by my colleague Theresa Gabaldon, considers the structure of ethics regulation in Congress. The second, by David Frederick, a counselor to the Inspector General of the Justice Department but a lawyer with Shearman & Sterling when he wrote the article, reviews the process of ethics regulation. The third, by Professor Neal Devins of William & Mary, looks at the methods for resolving congressional-executive information access

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1. *See* ORGANIZATION OF THE CONGRESS: FINAL REPORT OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS, S. REP. No. 215, 103d Cong., 1st Sess. (1993); H.R. REP. No. 413, 103d Cong., 1st Sess. (1993).

2. Pub. L. No. 104-1, 109 Stat. 3 (1995). *See generally* Harold H. Bruff, *That the Laws Shall Bind Equally on All: Congressional and Executive Roles in Applying Laws to Congress*, 48 ARK. L. REV. 105 (1995).

disputes. Each of the three combines analytic rigor with attention to the practical realities of life in Congress. Here is a preview of what they contain.

I. The Structure of Congressional Ethics Regulation

Professor Gabaldon's analysis of the structure of congressional ethics regulation begins with recognition that Article I, section 5, of the Constitution grants each house of Congress power to police the behavior of its members. From a legal standpoint, it is doubtful that the power to impose discipline on members of Congress could be delegated to anyone outside of Congress; from an accountability standpoint, it would be undesirable to do so. Therefore, Congress must self-regulate the ethics of its members. Within the scope of the "Speech or Debate" privilege, it must do so without the aid of executive branch prosecutors and criminal courts. Congress has been actively considering ways to improve its performance of this function.[3]

The nature of ethics regulation in Congress is similar to regulation of attorney ethics by the organized bar. In her article, Professor Gabaldon draws lessons from the regulation of our own profession, while always considering the special institutional nature of Congress. Congressional self-regulation, like that of lawyers, rarely culminates in formal sanctions. She emphasizes, however, that simple disclosure of questionable behavior is a more potent sanction for members of Congress than for lawyers. As recent events in Congress have illustrated, looming disciplinary proceedings can cause resignations or electoral defeats.

Both houses of Congress have ethics codes that combine the strictures of various statutes, such as the Ethics in Government Act of 1978,[4] with rules promulgated by each house. Along with many specific restrictions, the codes of both houses contain broad, "catchall" standards forbidding behavior that would discredit the institution. As Professor Gabaldon explains, Congress has not developed an institutional capacity to review and coordinate its ethics rules continuously. The growing volume of ethics rules increases the likelihood of inadvertent, but politically costly, violations by members. Here, she argues, Congress could profit from the example of the organized bar. The ABA's Model Rules for Professional Conduct, which are about 100 pages long, are the product of an ongoing process that attempts to ensure that attorneys' ethics are governed by an understandable and comprehensive code.[5]

Professor Gabaldon believes that reassessment of congressional ethics rules

3. *See generally* DENNIS F. THOMPSON, ETHICS IN CONGRESS (1995) (arguing for a practical approach to the problems of self-regulation).

4. Pub. L. No. 95-521, 92 Stat. 1824 (1978).

5. ABA Committee on Government Standards (Cynthia R. Farina, Reporter), *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287 (1993). This report considers the overall nature of ethics regulation of public servants and is a helpful guide. The Committee on Government Standards is a multi-section committee assembled under the charge of the ABA Section of Administrative Law and Regulatory Practice. The Committee is funded by the Board of Governors and various sections of the ABA.

would profit from the participation of outsiders. Substantial gaps exist between congressional mores and public perceptions of propriety. For example, members of Congress believe they can separate constituent service efforts from a person's status as a campaign contributor; many citizens do not share this belief. The presence of public members on a body created to review the ethics rules and to recommend appropriate changes would help to ensure that the rules reflect values held by the people. At the same time, as long as the houses retain the responsibility for deciding which rules should actually govern them, their constitutional responsibility for their own discipline would remain intact.

The codification process, she argues, should strive to maximize the specificity of standards of conduct that are to be enforced through the disciplinary system. Existing prohibitions of conduct that discredits the member's house create problems of fair notice to affected members and of insufficient guidance to those who enforce ethics standards. Moreover, the existence of these standards invites abuse of the system by a person's political opponents. On the other hand, retaining catchall standards allows discipline for unforeseen cases, and deters undesirable behavior that skirts specific prohibitions. Congress' strategy, then, could be to retain such standards while lessening reliance on them for most cases. Ethical rules for attorneys have moved away from such formulations as the "appearance of impropriety" toward more specific standards. An effort to codify congressional ethics rules could include special attention to the identification and articulation of behavior that does indeed discredit the institution.

The House Committee on Standards of Official Conduct investigates allegations of misconduct by Representatives and recommends sanctions to the full House. In 1991, the Committee bifurcated its investigatory and adjudicative functions, so that different committee members perform these two tasks. The Committee also has an Office of Advice and Education; reliance on its advice protects a Representative from investigation by the Committee. In the Senate, the Select Committee on Ethics investigates alleged senatorial misconduct and recommends sanctions to the full Senate. It does not employ bifurcation. In 1994, the Senate Ethics Study Commission considered, but failed to recommend, bifurcation.[6] Accordingly, it outlined a structure for bifurcation if the Senate chose to adopt it.

As Professor Gabaldon reveals, substantial criticism surrounds the structure of congressional ethics regulation. Self-regulation in small bodies such as the houses of Congress creates some conflicts of interest and fosters widespread public perception of cozy and ineffective regulation. Service on the committees is also time-consuming and unpleasant for their members. Proposals have arisen to use outsiders to perform some of the preliminary functions of investigating charges and recommending sanctions to the houses of Congress. Most proposals suggest mixed panels to be composed of some sitting members of Congress and some outsiders, who might be former members, retired federal judges, or other

6. SENATE ETHICS STUDY COMM'N, 103D CONG., 2D SESS., RECOMMENDING REVISIONS TO THE PROCEDURES OF THE SENATE SELECT COMM. ON ETHICS (Comm. Print 1994).

distinguished citizens. Both houses have seriously considered using outsiders in the ethics enforcement process.[7]

Professor Gabaldon argues that a mixed system could retain the understanding and empathy that promotes the fairness of self-regulation, while adding a degree of detachment that should increase public confidence in the rigor of inquiries. Moreover, a system that includes independent outsiders should be better able to clear members of suspected misconduct than one composed solely of their colleagues. The scarce time of the members would also be saved to the extent that tasks are shifted to outsiders. As long as the actual imposition of sanctions remains in the hands of members of Congress, there should be no constitutional infirmities in this scheme.

The structure of ethics regulation for lawyers has implications for the congressional system. The states enforce their rules through bifurcated systems in which the disciplinary counsel who initiates charges is separate from the board that hears them. Although Professor Gabaldon believes that the case has not been made for an independent prosecutor within Congress, she believes that some aspects of this scheme are worth adopting. First, the system of bifurcated adjudication that the House has chosen should be extended to the Senate. Administrative lawyers see daily the benefits of separation of the functions of investigation and adjudication in ensuring fairness;[8] those benefits should occur in the congressional context.

Second, Congress should increase its staffing to allow for more effective support functions. The Office of Compliance, recently created by the Congressional Accountability Act,[9] could be charged with separating ethics complaints from administrative ones, furnishing continuing legal education on ethics matters, and providing an expanded advice-giving function. The goal would be to shift ethics enforcement from a punitive to a preventative role to the extent possible. Education and advice are obviously critical to this goal. It is also important to give the staff clear and consistent roles to play. For example, advice-giving and prosecuting should not be performed by the same individuals.

II. The Process for Ethics Enforcement

As David Frederick explains, in the Senate the ethics enforcement process begins when a complaint is filed with the Select Committee on Ethics; the filing is not confidential. A preliminary inquiry follows to determine whether there is reason to believe misconduct has occurred. If so, an initial review determines whether there is "substantial credible evidence" of a violation; if so, a formal

7. The Senate's Ethics Study Commission recommended against the employment of outsiders. *Id.* at 12. The House members of the Joint Committee on the Organization of Congress recommended in favor. ORGANIZATION OF THE CONGRESS: FINAL REPORT OF THE HOUSE MEMBERS OF THE JOINT COMM. ON THE ORGANIZATION OF CONGRESS, H.R. REP. No. 413, 103d Cong., 1st Sess. (1993). To date, neither house has implemented such a process.

8. *See generally* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

9. Pub. L. No. 104-1, 109 Stat. 3 (1995).

investigation follows, resulting in a report stating what occurred and what sanction the Committee recommends.

In the House, separate subcommittees conduct the investigative and adjudicatory phases of the process, and the full Committee on Standards of Official Conduct holds a final sanction hearing to decide what punishment to recommend to the House. The House Committee does not accept complaints concerning events that took place before the third previous Congress. Mr. Frederick considers whether the Senate should adopt a similar limitation rule. He recommends that the Senate retain the flexibility to pursue all charges of misconduct without a formal statute of limitations, while considering fairness to respondents on a case-by-case basis.

In both houses, the multistage process that is intended to ensure fairness to respondents tends, in practice, to produce damaging headlines as each stage passes. The ethics enforcement process is also very time-consuming for both houses, due in part to the efforts of counsel for respondents to litigate fully every issue at each stage. In the House of Representatives, the benefits of bifurcation compensate for this disadvantage; no such advantage obtains in the Senate. Mr. Frederick argues that each of the houses should employ a bifurcated system that authorizes dismissal of unsubstantiated complaints and that consolidates the stages of inquiry to minimize repetition.

After canvassing the nature of competing models of regulatory process, such as the criminal law and attorney self-regulation, Mr. Frederick turns to particular issues of procedure in Congress. He suggests that Congress consider innovative ways to accommodate efficiency and fairness concerns. For example, the Senate Committee recently sought and obtained enforcement of a subpoena for Senator Packwood's diaries.[10] The Committee followed procedures that were designed to protect the respondent's privacy interests while ensuring access to materials needed in the investigation. Hence, the Committee appointed a neutral party to examine the diaries and to separate their contents. Mr. Frederick explains that this case reveals the potential for Fourth and Fifth Amendment issues to arise in ethics investigations. He argues that both houses should respect the constitutional rights of their members who are subject to investigation. Members of Congress, like private citizens who are subpoenaed in congressional investigations, should enjoy the right to the assistance of counsel, and the attorney-client, work product, and spousal privileges. The right to be confronted with and to cross-examine adverse witnesses should also be honored in a manner that is consistent with the privacy interests of the witnesses.

III. Congressional-Executive Information Access Disputes

Professor Neal Devins examines the procedural dilemmas that attend congressional subpoenas against executive branch officials. Recent years have seen

10. Senate Select Comm. on Ethics v. Packwood, 845 F. Supp. 17 (D.D.C. 1994).

several bitterly contested battles over information between the two branches. Professor Devins reviews these case studies in search of lessons to be learned by Congress. He discovers a rich history of informal negotiations between the branches that successfully resolves most, but not all, information demands. When stalemate does occur, court processes are sought.

At present, Congress has two formal techniques for enforcing its subpoenas. One of them, the criminal contempt process, is useless when executive officers, rather than private parties, are involved. Executive branch prosecutors will not initiate criminal proceedings against their colleagues who refuse to provide information to Congress. Nor should they, because subpoenas are resisted only after the president has decided to invoke executive privilege—subordinate officers are merely executing these presidential commands. The other technique, a civil proceeding brought by a house of Congress to enforce its demands, is possessed by the Senate. Yet this authority does not extend to subpoenas against executive officers.[11] The House of Representatives has yet to obtain civil enforcement authority. Thus both houses prefer to rely on informal pressures to force executive disclosures.

Professor Devins reviews the "law" of executive privilege against Congress. The quotation marks reflect the fact that of actual law there is none, merely assertions of power by both branches. In *United States v. Nixon*,[12] the Supreme Court expressly left the issue of executive privilege against Congress open.[13] Ever since, the executive has argued that it has broad authority to refuse congressional demands for information; Congress has rejoined with equally broad claims of authority to compel information. The lower courts have attempted to mediate the squabbles.

It may be surprising that Congress has not sought formal civil subpoena authority against the executive, but Professor Devins persuasively explains that members of Congress believe that informal sanctions, such as threats to reduce appropriations or to reject nominees, are more effective. Yet there is a disadvantage to these informal pressures—they have little or nothing to do with the merits of contests over information. Consequently, informal process threatens to foster inefficiency in government. Professor Devins recommends that Congress obtain and employ civil enforcement authority for subpoenas against the executive. The courts can continue to mediate these contests without vesting absolute control over information in either branch. The goal would be to confine informal negotiations that concern information transfers between the branches to matters relevant to the controversy at hand.

11. 28 U.S.C. § 1365(a) (1988).
12. 418 U.S. 683 (1974).
13. *Id.* at 712 n.19.