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That the Laws Shall Bind Equally on All:
Congressional and Executive Roles in
Applying Laws to Congress

Harold H. Bruff*

It was probably from [their] view of the encroaching character of privilege, that the framers of our constitution, in their care to provide that the laws shall bind equally on all, and especially that those who make them shall not exempt themselves from their operation, have only privileged "Senators and Representatives" themselves from . . . "being questioned in any other place for any speech or debate in either House."

Jefferson's Manual of Parliamentary Practice.¹

This formulation of [the legislative privilege] was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.

Justice Harlan, in United States v. Johnson.²

To Jefferson, composing his parliamentary manual to relieve the boredom of his vice-presidential duties, the constitutional privilege that is accorded legislators seemed a potential tool of congressional aggrandizement. Hence, its

careful delineation would serve the overall balance of power upon which our system rests. A narrow constitutional privilege, ensuring that in most instances "the laws shall bind equally on all," would also buttress a corollary principle not found in the text of the Constitution, that the lawmakers "shall not exempt themselves" from the laws they enact.

Yet the modern Supreme Court understands that the privilege serves another central postulate of our system by preserving the autonomy of the legislature. In seventeenth century England, that autonomy had been won at the cost of much blood and the crowns of two kings. Without it, a balance of power among coordinate branches could not exist.

A current controversy surrounding the application of law to Congress requires us to confront the conflict between these values. Separation of powers problems often involve powerful opposing claims, such as the need to prevent a branch's aggrandizement versus the need to preserve its autonomy. For reasons that will appear, I attempt to accommodate these values rather than to declare one of them supreme.

Jefferson notwithstanding, Congress has sometimes exempted itself from the coverage of laws that govern the public. In recent years, this practice has encountered increasing criticism. Congress eventually felt compelled to respond comprehensively to the criticism. The first legislation enacted by the 104th Congress was the Congressional Accountability Act, which applies a group of major federal statutes to Congress and its instrumentalities. The Act

passed just as this article went to press. Most of the discussion that follows here concerns the landscape that immediately preceded its passage. For two reasons, however, most of the analysis remains pertinent. First, I explore the body of law into which the Act now fits. Second, the Act responds, successfully I believe, to the constitutional concerns that I advance below about its initial formulations. I have added a brief section at the end of the article that summarizes the Act and explains its relationship to what had gone before.

When Congress applies laws to itself, it sometimes employs the executive and judicial branches to enforce them, as it does for ordinary citizens. Applying these techniques to Congress, however, may threaten interference with Congress' own constitutional responsibilities. Alternatively, Congress sometimes forms legislative branch enforcement entities that resemble executive and judicial structures. In this case, Congress may be revealing the "encroaching character" of self-defined privileges from the usual strictures of law enforcement.

I begin by summarizing Congress' current practices in subjecting its members to some statutes, exempting them from others, and applying modified versions of a third group to the members through internal congressional rules. The complexity of this landscape suggests a return to first principles. Therefore, I outline the benefits and costs of applying laws to Congress. Some of the considerations have constitutional stature; others sound in policy. To guide the constitutional analysis, I classify congressional activities into constitutional, quasi-constitutional, and proprietary functions. I then review existing strictures that bind congressmen as they engage in each of these functions. I conclude that Congress may continue to rely on a combination of internal enforcement processes, ordinary criminal prosecutions, and private tort suits to police its constitutional and quasi-constitutional activities. For proprietary matters, however, serious constitutional doubts surround Congress'

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6. I mean this term in its gender-neutral sense, to include the increasing number of women in Congress.
enforcement of statutory obligations through its own agents. Here I recommend the formation of an independent regulatory commission in order to bind Congress to law without granting the executive a weapon for vitiating congressional autonomy.

I. THE CURRENT AMENABILITY OF CONGRESS TO LAW

An accurate perspective on Congress' practice of exempting itself from statutes requires recognition of the many instances in which legal norms do apply to members of Congress. There are five categories of such norms. They are enforced by a diverse and uncoordinated group of actors: congressional colleagues, federal prosecutors, federal or state executive agency personnel, private plaintiffs, and congressional employees.

First, Congress sometimes disciplines its members pursuant to its internal codes of ethics, which implement the constitutional power of the two houses to control their own proceedings and to punish or expel their members. Congress can punish behavior that violates ordinary criminal or civil statutes, although it is not so limited. The ethics codes contain special strictures that do not apply to anyone outside of Congress. For example, the Senate’s inquiry into the propriety of intervention by several senators into regulatory investigations of savings and loan executive Charles


9. In In re Chapman, 166 U.S. 661 (1897), the Court said that either house could punish conduct that it regarded as "inconsistent with the trust and duty of a member," even if it was "not a statutable offense nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government." Id. at 669-70.
Keating was governed by the Senate's rule against "improper conduct which may reflect upon the Senate." 10

Congress does not have a history of strict enforcement of its internal rules. 11 Several reasons may account for congressional reluctance to punish miscreant members. Most important, the powers of exclusion and expulsion threaten our basic value "that the people should choose whom they please to govern them." 12 A vigorous disciplinary process could easily become a politicized tool to punish unpopular members or views. Other factors dampening discipline include: the desire to minimize scandal that flows from loyalty to the institution, the need for harmony in a collegial institution, and the press of other business. 13 Congress also encounters a criticism that is common to self-regulation by lawyers and other professionals—that these systems inherently tend to be overly sympathetic to transgressors and thereby forfeit their effectiveness. 14 Hence, it may be

12. See Powell v. McCormack, 395 U.S. 486, 547 (1969), in which the Court, justifying a narrow construction of Congress' power to exclude members-elect, quoted this phrase from Hamilton; see infra text accompanying note 68.
neither realistic nor wise to attempt strongly to invigorate the congressional disciplinary process.

Second, the federal criminal laws apply to congressmen. This fact exposes them to the full powers of investigation and prosecution of the Department of Justice. Congress has even included language in some criminal statutes that explicitly applies them to its members, for example the prohibition on giving or taking bribes. Prosecutions for crimes such as bribery or receiving illegal gratuities have succeeded even though they present tricky problems of avoiding intrusion on the Speech or Debate privilege of the members. Still, criminal prosecutions of congressmen have not been frequent, despite occasional lurid events such as the ABSCAM investigation. This fact suggests that interbranch jealousies have not led to over-prosecution of congressmen by the executive.

Third, private plaintiffs have successfully pursued state law tort claims for damages against members and employees of Congress for behavior that is related to official business but is outside the rather narrow scope of the constitutional privilege. For example, Hutchinson v. Proxmire was a suit for defamation against a senator for statements made in a newsletter he issued. Private plain-

15. It might be thought that congressmen derive an immunity from the criminal law from the Constitution's provision in art. I, § 6 that: "[t]hey shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest . . . ." The Supreme Court held, however, in Williamson v. United States, 207 U.S. 425 (1908), that any criminal charge falls within the clause's exemptions from immunity. The clause protected congressmen from civil arrest while that practice survived; it does not protect them from ordinary civil process. Long v. Ansell, 293 U.S. 76 (1934).


tiffs are probably quite aggressive in pressing such tort claims, especially when political animus is present.\textsuperscript{20}

Fourth, Congress sometimes subjects itself to the civil enforcement authority of federal or state executive agencies for statutory provisions that apply to government employees generally. For example, the Department of Labor considers both workers' compensation claims\textsuperscript{21} and unemployment compensation claims\textsuperscript{22} by employees of Congress. The workers' compensation scheme can result in a job restoration order in favor of an injured congressional employee. The unemployment compensation statute is partially administered by state agencies which determine whether a congressional employee is eligible for an award and its amount. These statutes appear to operate without serious interbranch strain.

Fifth, Congress sometimes formally exempts itself from a statute that binds the public, but then adopts, through internal rules, a system that may closely resemble the generally applicable one. I call this "shadow regulation." For example, although Congress did not at first subject itself to the employment discrimination statutes, the House of Representatives created an Office of Fair Employment Practices by rule and empowered it to adjudicate complaints by employees against their offices to enforce the central prohibitions of those statutes.\textsuperscript{23} When the Senate subjected

\textsuperscript{20} The deterrent effect of private tort suits against congressmen would not extend, however, to suits brought under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1988 & Supp. 1992), because these judgments are paid out of the Treasury. The Act waives the sovereign immunity of the United States for certain torts committed by its employees, a term that appears to cover both members of Congress and their employees. See \textit{id.} at § 2671. For discussion of deficiencies in the Act's deterrent effects, see \textbf{PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS} (1983).


\textsuperscript{23} Fair Employment Practices Resolution, H.R. Res. 558, 100th Cong., 1st Sess. (1987)(codified as House Rule 51, H.R. Res. 5, 103d Cong., 1st Sess. (1993). It provides that "personnel actions affecting employment positions in the House of Representatives shall be made free from discrimination based on race, color, national origin, religion, sex (including marital or parental status), disability, or age" and that "interpretations [of the rule] shall reflect the principles of current law."
itself to similar procedures in the Civil Rights Act of 1991, the House chose to remain under its existing scheme. Both houses employ systems of administrative adjudication by hearing boards that are similar to each other and to the procedures that the Equal Employment Opportunity Commission uses to decide complaints against executive agencies. The Senate, like the executive branch, is also subject to federal court review; the House is not.

Shadow regulation risks the omission of some element that vitally affects those who are subject to the general regime. On the other hand, it allows tailoring a norm to the nature of Congress. Judging its adequacy would require a close analysis of particular departures from generally applicable statutory provisions and the justifications for them.

This overview reveals that it would be quite inaccurate to characterize Congress as holding itself generally "above the law." Notwithstanding their constitutional privilege, members of Congress are subject to a complex set of legal constraints. Although the efficacy of these constraints varies, all are supplemented by the electoral sanction held by the public. Still, Congress remains exempt from some important statutes. These fall into two broad categories: laws regulating the executive branch and laws regulating the public.


All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or


Id. at 302 (codified as amended at 2 U.S.C. § 1202 (1991)).

25. Section 117(a) of the Act extended the "rights and protections" of Title VII of the Civil Rights Act of 1964 and of the Americans With Disabilities Act to House employees, subject to the internal enforcement procedures now codified in House Rule LI. Id. (codified as amended at 2 U.S.C. § 601 (1991)).

26. This scheme is also used to enforce the provisions of the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.
The most important statutes regulating internal processes of the executive branch that Congress has not applied to itself are the Freedom of Information Act (FOIA),\(^2\) and the Privacy Act.\(^2\)\(^8\) Congress has recently subjected itself to the provisions of the Ethics in Government Act of 1978 that require the appointment of independent counsel to investigate and prosecute serious federal crimes allegedly committed by executive officers.\(^2\)\(^9\)

I will discuss the constitutional and policy implications of applying these statutes to Congress.\(^3\)

Second, many modern federal statutes impose burdensome regulation on the public. Those that regulate the terms and conditions of employment usually do apply to Congress, at least through shadow regulation. Some, however, apply only to portions of the legislative branch.\(^3\)\(^1\) Another group of statutes regulates occupational health and safety or environmental conditions. All of these statutes require large expenditures by private and public institutions for compliance, and each involves a major administrative apparatus and a complex set of regulations with which affected persons must deal. Many of these statutes are inapplicable to Congress simply because they regulate functions


\(^{29}\) 28 U.S.C. § 591(b) (1988). Under subsection (c), however, the Attorney General was already authorized to seek appointment of an independent counsel for anyone if participation by the Department of Justice “may result in a personal, financial, or political conflict of interest.” This portion of the Act expired in December, 1992, and has since been renewed by Congress. Pub. L. No. 103-270, 108 Stat. 732. Congress was already subject to the Act’s other principal provisions, which require public financial disclosure and which restrict outside income and post-employment lobbying contacts. See generally Beth Nolan, Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials, 87 Nw. U. L. Rev. 57 (1992); Thomas D. Morgan, Public Financial Disclosure by Federal Officials: A Functional Approach, 3 Geo. J. Legal Ethics 217 (1989).

\(^{30}\) See infra text accompanying notes 35-48.

Congress does not perform, such as mining\textsuperscript{32} or shipping.\textsuperscript{33} Congress is also exempt, though, from the Occupational Safety and Health Act (OSHA),\textsuperscript{34} which governs some private workplace functions that Congress does perform.

Thus, Congress' decisions to apply statutes to its own operations form a complex mosaic. Today, the critical issues have less to do with whether statutes should govern Congress (in general, they do) but how they should apply. Most important, who should apply them—congressional or executive and judicial personnel? To begin addressing these issues, I return to first principles, with an inquiry about why we subject Congress to its laws.

II. BENEFITS AND COSTS OF APPLYING LAWS TO CONGRESS

Why should statutes apply to Congress? What advantages and disadvantages will ensue? A number of principles bear on these questions. First, the advantages:

1. Reducing the Burdens of Legislation. The movement to apply statutes to Congress has deep roots in republican theory. Aristotle, viewing ancient Athens' direct democracy, stressed that the fairness of legislation was promoted by the fact that as soon as a citizen finished serving as a legislator on a given day, he returned to the mass of citizens who were subject to the laws.\textsuperscript{35} What he did to others, he did to himself. Locke, viewing an emerging representative republic at the threshold of the modern era, echoed Aristotle. A legislator would be impelled to consider the interests of his constituents because he would bear the same burdens he placed on them when he resumed his original status as an ordinary citizen.\textsuperscript{36}

\begin{itemize}
  \item \textsuperscript{33} Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988).
  \item \textsuperscript{34} 29 U.S.C. § 652(5) (1988).
  \item \textsuperscript{35} ARISTOTLE, THE POLITICS OF ARISTOTLE 42 (Ernest Barker ed., 1946)(rotation of citizens in office means that "some rule, and others are ruled, in turn").
  \item \textsuperscript{36} JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, IN TWO TREATISES OF GOVERNMENT 379 (Peter Laslett ed., 1967)(2d ed. 1698)(Locke argues that arbitrary treatment of property "is not much to be fear'd in Governments where the Legisla-
At the time of our founding, Madison emphasized the need to preserve common interests among governors and governed:

I will add, as a . . . circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests and sympathy of sentiments . . . without which every government degenerates into tyranny.37

Thus, the views of Madison and Jefferson reflected ancient tradition.

These values, grounded in common sense perceptions about human nature, have great force in our own polity. The Constitution embodies them in its assignment of the power to initiate taxation to the House of Representatives, the body that is most frequently elected by the people.38 Yet modern constitutional law imposes few constraints on the power of Congress to burden American citizens, as long as the protections of the Bill of Rights are honored. The limits that are implicit in enumerated powers have effectively disappeared since the New Deal left Congress a legacy of plenary power under the Commerce Clause.39 Similarly, protection of federalist values is mostly left to the representation of state and local interests in the structure of Congress.40 With external legal constraints on Congress so weak, internal incentives that have direct and powerful effects on the members' behavior become especially important. In an era of professional politicians who often spend

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decades in Congress and who are quite difficult to defeat, we cannot expect that lawmaking will be much constrained by a member’s eventual return to the citizenry.  

Perhaps, then, we should recognize a constitutional principle that Congress must subject itself to the laws it enacts. Courts could entertain challenges by citizens to statutes that do not apply to Congress. The grounds of objection could be either the equal protection principle or a notion of “due process of lawmaking.” The ultimate value lying behind such formulae is the rule of law, which informs many particular constitutional doctrines. Presumably, Congress would be entitled to defend an exemption by showing that application of the law to it or to its members would be incompatible with its unique institutional nature and functions. (A fervid Antifederalist might even deny the validity of any such defense.) For example, it appears that congressional agencies, protected by an exemption from OSHA’s requirements for safe working conditions, lag behind private industry in ways that applying OSHA would correct. Courts could entertain claims that the exemption should be invalidated unless Congress could demonstrate that the operations of the Government Printing Office or the House Folding Room are somehow distinct from their private analogues.

Before we erect new constitutional rights and duties, however, we need to examine, as I do below, whether voluntary congressional acceptance of a responsibility to comply with statutes poses special difficulties. Congress has recently shown a willingness to apply its laws to its own operations; new constitutional obligations should be created

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42. For an able review of ways that constitutions could constrain lawmaking processes, see Hans A. Linde, Due Process of Lawmaking, 55 NEBR. L. REV. 197 (1976).


44. There would be obvious, and perhaps insurmountable, problems with establishing the standing of a private plaintiff for such litigation, however. See United States v. Richardson, 418 U.S. 166 (1974).
only when a need for them has been demonstrated. At present, the electoral pressure that our system relies on as the primal control on Congress seems to be working adequately.

2. Informing Congress About Its Laws. The duty to comply with a law fully informs a person about its operation. Although members of Congress attempt to predict how their statutes will operate, no law is the same in execution as it was in contemplation. The disparity can be considerable, partly because words are imperfect tools to communicate intention, and partly because most statutes undergo considerable interpretation and supplementation by the executive agencies before they apply to the public. Because the statutes that regulate public health and safety, like icebergs, contain most of their bulk below the surface of their text, it may be that the only way Congress can know them fully is to feel their force directly.

Congress makes a serious effort to oversee execution, but its success is never complete. Constituent complaints or testimony in oversight hearings are no substitute for the personal knowledge of a law’s impact that comes from an effort to comply with it. If Congress must obey a law rather than watch others do so, the chances for an “information gap” decline radically.

3. Maintaining Public Confidence. Nothing is more important to the actual health and legitimacy of a democratic government than the public’s confidence in it. The absence of that confidence, moreover, poses dangers more concrete than editorial handwringing. A people that is angry with its legislators for being “above the law” may punish them with constitutionally imposed restrictions that are undesirable in themselves, or at least unnecessary to the extent that Congress is willing to take curative action itself. For example, the movement for congressional term limitations is designed to replace unresponsive professional legislators with citizen-legislators in the classic republican

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Yet such limits necessarily forfeit vast amounts of expertise and dedication by removing the good legislators along with the bad. Reforms that target the specific sources of public discontent can avoid incurring these collateral costs.

4. Avoiding Executive or Judicial Overreaching. In our system of separated and checked powers, a deficiency in one of the branches may impel the others to attempt correctives, including unwise ones. The judiciary, wishing to redress a congressman's misbehavior that would be subject to statutory damages but for an exemption, may imply a constitutional cause of action to fill the gap. Thus, in *Davis v. Passman*, the Supreme Court created a constitutional cause of action for a congressional employee who alleged that her dismissal was due to gender discrimination—at the time, Congress was exempt from the statute banning such discrimination in other employment. Similarly, the executive, frustrated by Congress' unwillingness to follow civil norms that it imposes on others, may press to expand criminal norms from which Congress is not exempt. If Congress is seen to make considered and justifiable judgments about its own amenability to law, these pressures may diminish.

5. Promoting Parity in Public Service Obligations. Executive officers are subject to a number of constraints on their conduct that do not apply to ordinary citizens. Examples include exposure to special prosecutors, prohibitions on conflicts of interest, and requirements to open their processes and records to public scrutiny. To the extent that members of Congress are not subject to these constraints, the burdens of public service may seem to be unequally shared. When Congress applies burdensome openness requirements or special prosecutorial processes to its chief institutional rival but not to itself, inferences of motives to shackle the executive, rather than to benefit the public, are


47. 442 U.S. 228 (1979).
easy to draw and may sometimes be warranted. The results are resentment and diminished moral imperative to comply. In a democracy, there is value in treating public servants alike, regardless of their station or the branch in which they serve, except where special functional needs counsel otherwise.  

The foregoing advantages to applying laws to Congress are powerful ones. As with all proposals for legal change, however, there are potential disadvantages:

1. **Impeding Performance of Constitutional Functions.** At a minimum, compliance with law always entails the expenditure of time, effort, and money by someone, with opportunity cost to the preferred uses of those resources. Members of Congress are already very busy performing their public duties. If the scarce resource of their time is channeled into law compliance, other activities must give way. The most serious danger is that the core constitutional functions of Congress, such as consideration of legislation, will be impeded. Even if this does not occur, added disincentives to service in Congress are not a minor matter.

2. **Deterring Desired Conduct.** The task of legislating is unique in many ways, as the Constitution recognizes by extending special privileges from outside harassment to congressmen but not to other officers of the government. Insofar as a major purpose—or at least a necessary effect—of extending laws to Congress is to modify the members' behavior, the danger arises that some of the modifications will prove undesirable. At worst, the possibility is that Congress could lose some of the independence and fearlessness that its privileges are designed to protect.

Because congressmen are constantly exposed to the judgment of the electorate, they are uniquely sensitive to disclosure as a sanction. To the extent that anticipation of negative publicity deters congressional misconduct, the addition of sanctions designed to penalize private misconduct may prove superfluous at best. And since the most technical violation of law provides a political opponent grist for

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scandal, there is a significant potential that an unhealthy overcautiousness could develop due to overdeterrence.

3. Encouraging Judicial or Executive Encroachment. Federal statutes are enforced either by the courts or by the executive. In our government, the branches are expected to be in constant competition for power, and the checks in the system are designed to balance that competition. If Congress subjects itself to enforcement activities of the other branches, an opportunity arises for one or both of them to harass members of Congress in retribution for their unrelated conduct of office. I argued above that legal exemptions for Congress can lead to overcompensation by the other branches. Thus, either too little or too much application of statutes to Congress can induce improper behavior by one or both of the other branches.

4. Creating Legal Misfits. Statutes that are designed and administered with general public compliance in mind may fit the unique institution of Congress badly. Neither executive regulations nor judicial interpretations that implement statutes are tailored to congressional characteristics. To the extent that a law operates in an unusual fashion when applied to Congress, much of the purpose of subjecting Congress to it disappears and the chance of disrupting legislative operations increases.

Discussion of the advantages and disadvantages of applying laws to Congress has demonstrated that the stakes are high. To isolate ways that we may be able to capture most of the former while minimizing most of the latter, I begin by attempting a taxonomy of congressional functions.

III. A HIERARCHY OF CONGRESSIONAL FUNCTIONS

The functions that Congress performs can be grouped into three broad categories that aid analysis of how legal constraints should apply. These categories begin with the powers that the Constitution explicitly assigns Congress, and move toward activities for which Congress appears to differ little from other public and private institutions of its size. My general conclusion will be that congressional functions nearest the constitutional core must be policed by
Congress itself, and that activities far from that core may or must be policed by the executive.

1. Constitutional Functions. The Constitution assigns Congress a number of responsibilities whose actual performance surely must be by the members themselves and no one else. First and foremost is the vesting in Congress, by the first sentence of article I, of “[a]ll legislative Powers herein granted.” The other important constitutional powers of Congress are: to impeach executive and judicial officers; to determine the elections and qualifications of its own members and to punish or expel them for misconduct to propose constitutional amendments; and, for the Senate, to advise and consent to treaties and executive nominations.

All of these functions are doubtless protected by the Speech or Debate privilege, which covers matters that are an integral part of the deliberative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

The Supreme Court’s shorthand term for the activities protected by the privilege is “legislative acts.” Not only the members themselves, but also their aides, can claim the privilege “insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself.”

2. Quasi-Constitutional Functions. Intimately related in practice to Congress’ constitutional functions are two

51. U.S. Const. art. V.
52. U.S. Const. art. II, § 2.
53. Gravel v. United States, 408 U.S. 606, 625 (1972). The Court also often says that the privilege covers “things generally done in a session of the House by one of its members in relation to the business before it.” Id. at 617 (quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1880)); see generally Note, Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity, 60 Notre Dame L. Rev. 589 (1985).
54. Gravel, 408 U.S. at 618; see generally Note, The Speech or Debate Clause Protection of Congressional Aides, 91 Yale L.J. 961 (1982).
kinds of investigating activity that are only partially covered by the Speech or Debate privilege. Congress investigates conditions in society and often publicizes the results of its inquiries. Congress also oversees the executive and judicial branches, and may publicize the results of these inquiries. Some of these investigations are formally authorized hearings by committees and subcommittees. Others, such as inquiries responding to constituents’ requests for aid with the executive, are informal efforts by individual members and their staffs.

This is a broad range of activity, much of which only indirectly supports constitutional functions such as legislating or reviewing treaties. The Supreme Court has extended the constitutional privilege only to the relatively formal steps by which Congress obtains information in aid of its constitutional functions, and not to the informal satellite activities. Protected activities include gathering information for a hearing, performing the hearing, and printing a report for use within Congress. Activities not protected include issuing a newsletter to constituents, representing them before executive agencies, or publicizing national problems beyond Congress.

Perhaps the reason for the Court’s evident caution in defining the scope of the privilege was captured by Jefferson’s perception of the “encroaching character” of privileges. A history of congressional abuse of the investigative function, especially in the loyalty investigations of this century, may also explain the Court’s approach. Moreover, many quasi-constitutional functions are delegated to staff personnel, who are numerous and who lack direct electoral responsibility.


58. See Michael J. Malbin, Unelected Representatives: Congressional Staff and the Future of Representative Government (1980).
3. Proprietary Functions. As an institution, Congress must perform a number of housekeeping functions that are like those of a federal or state agency or a private business. The House and Senate have a number of support agencies: the Library of Congress, the Government Printing Office, the Congressional Budget Office, the General Accounting Office, the Architect of the Capitol, the Botanic Garden, and the Office of Technology Assessment. Altogether, Congress has about 40,000 employees. Congress differs little from any other organization its size when it serves food, issues parking permits, buys office supplies, or prints its papers. The Capitol Police may be distinguished by their courtesy, the cafeterias by their bean soup, but constitutional distinctions from similar activities at the Texas State Capitol or the Boeing factory would be difficult to draw.

Not surprisingly, the Supreme Court has never extended the constitutional privilege to these proprietary activities. There are some difficulties that I will discuss, however, in distinguishing them from Congress' constitutional functions in cases involving employment, where the constitutional privilege is sometimes pertinent.

Each of these three categories needs full analysis of congressional and executive roles in the application of legal norms. I now turn to that task.

IV. CONSTITUTIONAL FUNCTIONS

Congress certainly bears the principal responsibility for punishing its members' misconduct in the performance of their constitutional functions. That responsibility may well be almost entirely exclusive of the other two branches. It is clear that the Speech or Debate privilege prevents the executive from prosecuting congressmen for these activities, or even from offering evidence about them at a trial for other crimes. Less clear is whether the Supreme Court will treat most aspects of the congressional disciplinary process as political questions and deny judicial review of them.

Describing the purpose of the Speech or Debate privilege, the Supreme Court often says:

The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the "practical security" for ensuring the independence of the legislature. The Court's reference to "practical security" is a quote from Madison's argument in The Federalist that each branch needs guarantees "against the invasion of the others." The Court's emphasis on the privilege's purpose to safeguard the autonomy of Congress suggests strongly that, although the range of "legislative acts" covered is relatively narrow, it will include all the constitutional functions of Congress.

The Court has consistently refused to allow the executive to offer proof of a congressman's legislative acts as part of a prosecution for crime. For example, in bribery prosecutions convictions must rest on proof that a member promised legislative action in return for a bribe, without any reference to whether the promise was performed. Thus, where it can, the Court accommodates criminal law to the privilege by defining the elements of a crime to steer clear of any need for proof of legislative acts.

Although the executive may not enter the privileged realm, the courts could decide to extend judicial review to Congress' performance of its power to punish and expel members. Intrusion on the privilege would be lessened, because, instead of allowing hostile prosecutors to haul congressmen into the criminal courts, the judiciary would only be assuring that Congress' own decision to punish a mem-

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63. In McCormick v. United States, 500 U.S. 1807 (1991), the Court interpreted the federal extortion statute to require an explicit promise by a legislator to perform an official act in return for a contribution before there could be a conviction. The Court's ruling both helped to distinguish ordinary campaign contributions from extortion and specified elements of crime that could be proved without invading the privilege.
ber is within constitutional limits. The cases have contained conflicting implications about judicial review.

In *United States v. Brewster*, the Court explained why judicial review might be needed. A senator convicted of bribery argued for a very broad interpretation of the immunity, claiming that Congress should be left to police matters having any relationship to the legislative process. The Court noted that if Congress took on such a responsibility, the effect might be to impair the independence of individual members:

The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards and is at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge, and jury from whose decision there is no established right of review. In short, a Member would be compelled to defend in what would be comparable to a criminal prosecution without the safeguards provided by the Constitution. Moreover, it would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment. Strong arguments can be made that trials conducted in a Congress with an entrenched majority from one political party could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused, including indictment by grand jury, trial by jury under strict standards of proof with fixed rules of evidence, and extensive appellate review.

These reflections may reveal why the Court was willing to review some aspects of the congressional disciplinary process in *Powell v. McCormack*. The House of Representatives, finding Adam Clayton Powell guilty of some financial irregularities in a preceding Congress, excluded him

64. 408 U.S. at 519-20.
at the beginning of a session. Charges of political and racial bias on the part of the House swirled around the affair.

The Court held that the phrase in article I, § 5, authorizing each house to "be the judge of the Qualifications of its own Members," was not a "textual commitment" of all issues surrounding an exclusion to Congress without judicial review. Reaching the merits, the Court held that Congress could exclude a member only for failing to meet the Constitution's "standing qualifications" of age, citizenship, and residency in article I. There was no allegation that Powell failed to meet these qualifications.

To justify its narrow construction of the exclusion power, the Court argued that a fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them." 2 Elliott's Debates 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. This emphasis on the people's right to choose their representatives suggests that the Court would review expulsions from Congress, for which the Constitution requires a two-thirds majority vote, as well as exclusions. Of course, the Powell Court was not presented with that question. The Court did remark, however, that Congress had often seemed uncertain of its power to expel for conduct occurring in prior congresses, implying that departure from this practice might warrant review.


67. 395 U.S. at 547.

68. The Court also quoted James Wilson's understanding of the reason for the Speech or Debate privilege, a formulation suggesting that it protects the legislator personally against everyone, including colleagues:

In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.

395 U.S. at 503 (citing 1 The Works of James Wilson 421 (Robert McCloskey ed., 1967)).
On the other hand, the Court noted that the Convention had altered a proposal to allow expulsion by majority vote to the two-thirds concurrence that appears in the Constitution. Perhaps, then, the framers were constructing a system that would confine exclusion by majority vote to a few, stated grounds that a court could review, but would allow expulsion by two-thirds vote at the unreviewable discretion of the House. Since political abuse of the disciplinary process could still occur, however, such a system would have to rest on two judgments. The first would be that a supermajority requirement is an adequate practical control on political abuse. The second would be that since expulsion is ordinarily for conduct during a session, Congress has a greater interest in controlling its own proceedings than it has in exclusion cases, even if voter choice may be frustrated.

The Court has since held that an individual congressman’s waiver of the privilege must be “explicit and unequivocal” to be effective. The Court also suggested that Congress could not impose waivers on its members, because “the privilege secured . . . is not so much the privilege of the house as an organized body, as of each member composing it, who is entitled to this privilege, even against the declared will of the house.” It is important, however, to distinguish congressional attempts to waive the rights of members to defend themselves against the executive or the judiciary from congressional rules that enforce the internal disciplinary process. Although, as Powell reveals, congressional discipline has the potential to interfere with the electorate’s right to choose their representatives, the interest of Congress in effective self-policing is substantial, especially in the realm of privilege where no other branch may enter. Hence, the two houses can force their members to provide evidence for disciplinary proceedings even when the mater-

71. Id. at 493 (quoting Coffin v. Coffin, 4 Mass. 1, 27 (1808)).
ials would be privileged from forced disclosure to the other branches.\footnote{72}

The Court’s recent decision in \textit{Nixon v. United States}\footnote{73} implies that all aspects of the congressional disciplinary process except for exclusion are unreviewable political questions. Nixon, a federal judge who had been impeached and removed following a criminal conviction, objected to the Senate’s practice of delegating the initial stages of its impeachment trial process to a committee.\footnote{74} The Court held that the Constitution’s provision that the Senate “shall have sole Power to try all Impeachments” was a textual commitment to the Senate of the power to decide how to try impeachments. Concurring, Justice White emphasized the possibility of abuse of such unreviewable power, but found no cause for intervention in the case at hand.

The Court is certainly aware that impeachment, like internal congressional discipline, can be arbitrary—the impeachments of Justice Chase and of President Johnson were notoriously so.\footnote{75} Perhaps the sweep of the \textit{Nixon} opinion is explained by the institutional considerations that often play so large a role in political question cases. The Court remarked that judicial review of impeachments could lead to a disastrous lack of finality if a President were impeached.

When Congress expels a member, no such national calamity impends; perhaps \textit{Nixon} will be confined to the impeachment context.\footnote{76} It may even be, as some have suggested, that the houses can delegate the initial stages of

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  \item[73.] 113 S. Ct. 732 (1993).
  \item[74.] See generally Napoleon B. Williams, Jr., \textit{The Historical and Constitutional Bases for the Senate’s Power to Use Masters or Committees to Receive Evidence in Impeachment Trials}, 50 N.Y.U. L. REV. 512 (1975). For a critique of this process, see Note, Committee Impeachment Trials: The Best Solution?, 80 \textit{Georgetown L.J.} 163 (1991).
  \item[75.] Indeed, Chief Justice William Rehnquist, the author of \textit{Nixon}, has written a history of the Chase and Johnson impeachments. \textit{William Rehnquist, Grand Inquests} (1992). The Chief Justice concludes that, if successful, the impeachments would have threatened the independence of the judiciary and the executive.
  \item[76.] The courts could, however, enforce subpoenas from the congressional ethics committees against members, see \textit{supra} note 72, without reviewing the merits of the pending charges, if they confined themselves to questions of constitutional privileges against providing the information (such as the privilege against self-incrimination).
\end{itemize}
\end{footnotesize}
disciplinary inquiries to bodies composed partly or entirely of outsiders, as long as the whole house makes the final disposition. Nixon could be distinguished, however, by the fact that the impeachment process remains entirely “in-house.”

The discussion so far reveals that criminal law and congressional self-discipline can play complementary roles in regulating the behavior of congressmen. Congress must retain responsibility for its members’ performance of constitutional functions, all of which are immune from prosecution. Conduct related to the legislative process but not within the privilege, such as acceptance of bribes, can be punished by both criminal and congressional processes. As the Brewster Court argued, there is reason to prefer criminal processes for misconduct outside the privilege, at least in the first instance. The safeguards normal to criminal trials replace a discretionary process that is vulnerable to political influence. Certainly, congressional discipline could be too harsh when applied to an unpopular member. Still, Congress does not have a record of frequent disciplinary proceedings against unpopular members. Everyone knows how destructive such a practice could rapidly become, and how quickly the wheel of politics could turn today’s prosecutor into tomorrow’s defendant.

Indeed, the infrequency of congressional disciplinary action suggests that the process is too lenient in application to anyone not already convicted of a serious felony or grossly out of favor with the congressional establishment. Certainly the reputation of self-disciplinary processes in the professions is one of laxity due to collegial sympathies. If Congress usually underprosecutes the sins of its members, the presence of executive prosecutors who do not share that tendency is needed to deter misconduct.

There is, however, a possibility that the executive will overprosecute congressmen as part of the constant competition for power that is built into the heart of our system of

separation of powers.\textsuperscript{78} To date, executive prosecutors have not produced a record of harassment of Congress around the boundaries of the constitutional privilege. Numerous checks and balances exist to deter executive overprosecution. Agents of the Department of Justice know that if they overreach in investigating or prosecuting members and staff of Congress, the legislature has ample means of revenge. These include statutory restrictions on investigative and prosecutorial authority, outright exemption of congressmen or staff from criminal statutes, funding cuts for the Department, refusal to confirm nominees to its principal positions, and, ultimately, impeachment of its officers. Consequently, underenforcement of the criminal law against Congress, not overenforcement, seems more likely to have been the norm.

This analysis suggests a justification for extending statutory authority to appoint independent counsel to cases involving congressmen.\textsuperscript{79} True, the direct conflicts of interest that hamper executive self-investigation are absent.\textsuperscript{80} But several of the advantages of applying laws to Congress would be present. First, if congressmen can subject executive officers to special prosecutors only at the cost of exposing themselves to the same perils, it is less likely that these burdens will be placed on anyone. Second, full appreciation for the operation of this statute may be possible only for those who fear its impact, even though there is no large body of federal regulations to be mastered (as there would be for statutes regulating businesses). Third, public confidence might well increase if Congress were subject to prosecutors that it could not hope to intimidate. Fourth, there would be greater parity of public service obligations. The other advantage, avoiding temptations on the part of the other branches to overcompensate, seems not to apply

\textsuperscript{78} The classic discussion of this competition is in \textit{The Federalist} No. 51 (James Madison).


here, however. It is not likely that the judiciary relishes prosecutions of congressmen any more than does the executive.

On the other hand, the disadvantages that usually attend applying laws to Congress seem substantial regarding the independent counsel statute. Although the Speech or Debate privilege should sufficiently protect the performance of constitutional functions, the boundaries of the privilege are murky enough to allow some attempted incursions. Overdeterrence is also a troubling possibility, as indeed it is for the executive branch. And a central fear that underlies the privilege, that of prosecution by an "unfriendly executive," might be more realistic concerning a prosecutor who is substantially independent of all three branches than it is for the Department of Justice, which depends on Congress in many ways. There does not seem to be much of a problem of legal misfits, though, since most criminal statutes apply in the same ways to congressional and executive personnel, and Congress has already made special exceptions for itself in those that do not.

I think these arguments are roughly in equipoise. If so, Congress could reasonably decline to extend the independent counsel provisions to itself. If Congress opts for self-application, though, the advantages of doing so should help to support the constitutionality of shifting prosecutorial power away from its usual locus in the executive.

The application of criminal statutes to Congress has entailed adaptations to avoid the Speech or Debate privilege. Similarly, the application of civil statutes to Congress needs to steer clear of interference with constitutional functions. It seems likely that most civil statutes will affect the proprietary activities of Congress. Even where this is the case, constitutional implications arise if the net burden of compliance on the members themselves becomes sufficient to jeopardize their performance of constitutional functions. Congress' scarcest resource is the time of its members. Accordingly, Congress needs to consider the incremental dis-
traction that flows from each statute that it promises to obey.\textsuperscript{81}

The civil statutes that most implicate Congress’ constitutional functions are those that regulate government process directly. Applying these statutes to Congress could create many legal misfits because they are designed to regulate the hierarchically organized executive branch as it administers existing statutes, instead of the collegial legislature as it considers enacting new statutes and oversees the executive. Some of these misfits may raise constitutional concerns, as follows.

Two specific kinds of interference with Congress can be anticipated. First, open government laws such as FOIA, the Government in the Sunshine Act,\textsuperscript{82} and the Federal Advisory Committee Act (FACA)\textsuperscript{83} may reveal parts of the congressional process that need to be shielded for effective performance.\textsuperscript{84} Since Congress is already quite an open institution under its own rules, the incremental effect of these statutes may be mostly in sensitive areas.\textsuperscript{85}

The most serious difficulty with adapting the open government statutes to Congress concerns the opportunity to deliberate in secret. The executive has a constitutionally based deliberative privilege, which it sometimes waives.\textsuperscript{86} FOIA contains an “executive privilege” exemption to pro-

\textsuperscript{81} Congress also needs to structure its compliance mechanisms in ways that confine their drain on the members’ time.

\textsuperscript{82} 5 U.S.C. § 552b (1988). The Act is the federal open meetings statute. It applies to multi-member agencies only.

\textsuperscript{83} 5 U.S.C. app. I (1988). The Act opens meetings between private advisory groups and federal agencies to the public, and requires “balanced” membership on the groups.


\textsuperscript{85} Both FOIA and the Sunshine Act contain exemptions protecting national security secrets, law enforcement matters, and information affecting the privacy of individuals. Perhaps these exemptions are already sufficient to preserve the efficacy of congressional legislation and oversight for defense, foreign policy, and law enforcement functions, and the confidentiality of advice and consent to controversial nominations. If not, Congress should consider appropriate modifications.

tect such material.\textsuperscript{87} The Sunshine Act does not, since its purpose is to open policy debate in collegial agencies. To avoid executive privilege issues, courts have twice interpreted FACA not to apply to presidential functions.\textsuperscript{88}

Congress has never established a deliberative privilege in court.\textsuperscript{89} Judicial subpoenas for congressional papers have usually been honored, amid representations that compliance is voluntary.\textsuperscript{90} Because policy debate is the lifeblood of Congress, it ordinarily occurs in public. Needs to shield it arise in relatively limited contexts, such as the advice of aides to members concerning policy formulation. Still, the fact that congressional secrecy needs are more limited than those of the executive does not mean that they fall short of constitutional significance. The derivative constitutional immunity that the aides enjoy recognizes the importance of their work to the constitutional functions of congressmen.

These statutes would need to be modified before they are applied to Congress. Some of the likely changes would illustrate the general benefits of applying law to Congress. FOIA, in particular, is a strict statute that imposes considerable compliance costs and burdens on federal agencies, and that is enforced by a readily available judicial action in which the court is instructed not to defer to the agency's


\textsuperscript{89} Such a privilege might flow from art. I, § 5, cl.3, which provides: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ." See generally David Kaye, Congressional Papers, Judicial Subpoenas, and the Constitution, 24 U.C.L.A. L. Rev. 523 (1977); Robert J. Reinstein & Harvey A. Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113 (1973); see also 2 Joseph Story, Commentaries on the Constitution of the United States § 840 (1833).

\textsuperscript{90} David Kaye, Congressional Papers and Judicial Subpoenas, 23 U.C.L.A. L. Rev. 57 (1975).
reasons for withholding documents. If Congress is not prepared to tolerate these features of the Act, it must answer a serious parity objection before it continues to impose them on the executive. The congressional response is likely to be that executive agencies apply the law directly to the public, so that information about their activities is more needed to prevent abuses than is information about the more remote legislature. Yet the intrinsic importance of legislation, and of information about its generation, is surely at least as great as that of execution of the law.

The second kind of interference with Congress that may result from statutes regulating government consists of hampering the exercise of constitutional functions by applying burdensome process requirements. The best example is the National Environmental Policy Act (NEPA), which requires the creation of detailed environmental impact statements (EIS) for “proposals for legislation and other major Federal actions significantly affecting the . . . environment.” The requirement that environmental impact statements accompany proposals for legislation has always been ignored within Congress because it is neither desirable nor feasible to delay major legislation, including yearly appropriations, while awaiting the compilation of an EIS.

A serious effort to enforce this provision could produce sufficient delays to raise the question whether anyone—Congress included—should be able so to shackle the

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95. In Andrus v. Sierra Club, 442 U.S. 347 (1979), the Court held that NEPA does not require agencies to file environmental impact statements with their appropriation requests to the Office of Management and Budget, from whence they go to Congress. In Public Citizen v. United States Trade Representative, 5 F.3d 549 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 685 (1994), the Court of Appeals overturned a holding that an EIS had to accompany the submission of the North American Free Trade Agreement to Congress, on grounds that there was no final agency action to review.
Here the problem is partly cumulative. Congress instructs agencies to consider the effects of their actions not only on the environment but on small business and other interests. If all these mandatory analytic requirements were applied to proposals for legislation, the total amount of drag could be considerable. The compensating advantages would be the provision of full information to Congress about the impact of these requirements and parity of burdens in public service. The parity argument would be weakened, however, by the fact that legislation, unlike execution, is not intrinsically limited to the rational implementation of previously stated goals.

Although federal employment statutes relate mostly to the proprietary functions of Congress, they implicate its constitutional functions in application to the hiring and firing of principal staff personnel. The Supreme Court has been of two minds regarding the status of aides. In *Gravel v. United States*, the Court granted derivative immunity to an aide for functions which would have been protected if performed by the member personally, for example, preparation for committee hearings. The Court emphasized "that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos" lest the purposes of the immunity be frustrated. Yet, in *Davis v. Passman*, the Court recognized a constitutional cause of action for gender discrimination by an aide against a congressman, rejecting a plea by three dissenting Justices that application of ordinary strictures against discrimination ignored "the imperative need for loyalty, confidentiality, and political compatibility . . . to the individual Member."

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96. Similarly, applying the Privacy Act, 5 U.S.C. § 552a (1988 & Supp. 1993), to Congress could grievously hamper the quasi-constitutional functions of constituent service because the Act closely controls the disposition within the bureaucracy of files concerning individuals. See O'Reilly, supra note 84.


98. See Bruff, supra note 45.


100. Id. at 616-17.


102. Id. at 249.
Considered together, *Gravel* and *Davis* suggest that aides are constitutional alter egos in only a limited sense. Their actions are protected against the outside assaults that the Speech or Debate immunity was designed to prevent, but that does not leave a congressman wholly free to choose them. Surely a member may require political compatibility; but, he or she may not use race or gender as a proxy for compatibility. In applying the federal employment discrimination statutes to the Senate, Congress has confirmed that an employing office may consider a person's party affiliation, domicile, and political compatibility. This provision effects rough parity with political hiring in the executive branch, which is constitutional when "party affiliation is an appropriate requirement for the effective performance of the public office involved."  

*Davis* did not reach the question whether the Speech or Debate privilege extends to employment decisions. Obviously, however, there was little point in recognizing a special constitutional claim if the Justices thought that it would be wholly barred by the privilege. *Davis* seems to stand for the proposition that congressional employment decisions are not in themselves privileged "legislative acts." Nevertheless, the ordinary operation of the privilege may forestall executive or judicial inquiries into the basis for employment decisions when that basis concerns privileged activities. This line of analysis would make the privilege apply as it does for enforcement of the criminal law.

The lower courts have struggled to apply the privilege faithfully to employment. In *Walker v. Jones*, a former manager of the House of Representatives restaurants brought a due process suit against a member of Congress, claiming that she had been dismissed because she was a woman. The court held that the Speech or Debate Clause did not bar the suit because this sort of proprietary function did not involve the congressman's "conduct as a legisla-

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tor." Walker is surely correct—no aspect of the claim or defense involved privileged activities.

Yet, in Browning v. Clerk, U.S. House of Representatives, when an Official Reporter for the House brought a due process suit alleging a dismissal due to race discrimination, the court held that immunity barred the suit because the function of recording the testimony of witnesses in hearings was "directly related to the due functioning of the legislative process." The Browning court rejected an argument that an aide’s duties "must entail discretionary input into the legislative process” to be protected. Although the aide in Gravel had performed discretionary functions in a close working relationship to the senator, the Browning court emphasized that it would have to probe legislative acts if the court reporter’s claim and the employer’s defense were to be fully considered. Since the controversy revolved around the nature of mistakes made by the reporter in taking testimony, Browning also seems to be correct.

These cases demonstrate the probability that the privilege will shield some, but not all, congressional employment decisions from outside scrutiny, depending on an employee’s proximity to privileged functions instead of the discretionary nature of the aide’s job.

106. Id. at 931 (quoting Gravel v. United States, 408 U.S. 606, 618 (1972)). The Walker court distinguished Consumers Union of United States v. Periodical Correspondents’ Ass’n, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, 423 U.S. 1051 (1976), which held that the privilege shielded arrangements for seating the press in the House and Senate galleries, as involving issues that “immediately concerned House consideration of proposed legislation.” 733 F.2d at 930.
108. Id. at 929.
109. Id. at 928.
110. In the related context of official immunity from damages, the Supreme Court has applied an approach that inquires into the “nature of the functions” which give rise to the immunity, and that “evaluate[s] the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.” Forrester v. White, 484 U.S. 219, 224 (1988)(holding that judicial immunity did not protect a judge’s dismissal of a probation officer). In Chastain v. Sundquist, 833 F.2d 311 (D.C. Cir. 1987), cert. denied, 487 U.S. 1240 (1988), the court held that congressmen have no immunity for common law torts committed within the scope of their official duties but outside the constitutional privilege. However, in Walker, 733
V. QUASI-CONSTITUTIONAL FUNCTIONS

When Congress investigates conditions in society or in the other two branches of government, the Speech or Debate privilege shields the information-gathering process. But when Congress or one of its members publicizes the results, or when individual congressmen make constituent service inquiries to agencies, the immunity drops away. These quasi-constitutional functions are unlikely to violate the general criminal statutes, which do not focus on informational activities (in part because of First Amendment sensitivities). Notwithstanding some lurid abuses of individual rights in the loyalty investigations of the 1950s, which placed Senator McCarthy in our lexicon as an “ism,” the Supreme Court has applied only weak controls to the validity of congressional investigative activity.¹¹¹ Fearing to constrain Congress’ vital and legitimate needs to gather information, the Court only requires that a committee’s investigation be properly authorized by its house, that a particular inquiry be pertinent to a proper legislative purpose, and that constitutional privileges, such as the right against self-incrimination, be respected.¹¹²

The quasi-constitutional functions of Congress resemble similar executive branch activities of investigation, publicity, and internal oversight. The executive analogues are also only loosely controlled, in this case mostly by court-made administrative law doctrine.¹¹³ The courts appear to have concluded that no matter who performs these functions, they require broad discretion for their effective exercise, notwithstanding their clear capacity for abuse. At least the executive is somewhat constrained by congressional oversight of its own informational functions. Neither

¹¹² Grabow, supra note 55, § 4.
of the other two branches of government meaningfully polices Congress.\textsuperscript{114}

Nor has Congress compiled a strong record of discipline for abuses of quasi-constitutional power.\textsuperscript{115} The absence of criminal sanctions or internal congressional discipline has left private tort plaintiffs as the primary policers of these functions. The most prominent case is \textit{Hutchinson v. Proxmire},\textsuperscript{116} which allowed a scientist to sue Senator Proxmire for defamatory material contained in a press release. The Court has repeatedly rejected arguments by dissenting Justices for extending the Speech or Debate privilege to cover such "informational" activities of Congressmen.\textsuperscript{117} Given the strong First Amendment values that buttress these activities, the Court may be confining the scope of the privilege as a silent monument to the example of Senator McCarthy.

In the wake of recent scandals surrounding interventions by House Speaker Wright and by five senators with federal regulators on behalf of constituents and contributors, both houses have considered strengthening their ethical standards for constituent service. No sharp break with past practices has occurred to date, however. The underlying dilemma of reconciling the need for vigorous oversight of the executive with the reality of private campaign finance is resistant to any simple, sweeping solution. At present, such difficulties in effective congressional discipline suggest the wisdom of retaining tort immunity as a deterrent to misconduct and as a means to compensate those harmed by it.

\textsuperscript{114} In 1988, the American Bar Association adopted Guidelines Regarding the Rights of Witnesses in Congressional Investigations. The Guidelines call for Congress to allow witnesses the assistance of counsel, to respect constitutional and common law privileges, and otherwise to treat witnesses with fairness and respect.

\textsuperscript{115} Although the Senate eventually censured Joseph McCarthy, it was only after he had blasted the careers and reputations of his victims for years. \textit{See DAVID HALBERSTAM, THE Fifties}, chs. 3 & 18 (1993).

\textsuperscript{116} 443 U.S. 111 (1979). \textit{See also} Chastain v. Sundquist, 833 F.2d 311 (D.C. Cir. 1987), \textit{cert. denied}, 487 U.S. 1240 (1988)(the court held that congressmen have no immunity for common law torts committed within the scope of their official duties but outside the constitutional privilege).

\textsuperscript{117} \textit{See Hutchinson}, 443 U.S. at 124-34; Gravel v. United States, 408 U.S. 606, 622-26 (1972).
VI. PROPRIETARY FUNCTIONS

When Congress performs its housekeeping functions of employment, police, and general services, it resembles the other two federal branches or state governments and private businesses. The executive branch enforces statutes regulating these activities by entities other than Congress. The chief constitutional question about the application of statutes involving proprietary functions to Congress is whether the executive must be assigned the enforcement responsibility, or whether Congress may employ its own agents or even private persons such as arbitrators.

The constitutional issues are squarely presented by the general mechanism for applying laws to Congress that the House members of the Joint Committee on the Organization of Congress have recommended. These members have urged Congress to apply federal statutes “concerning the terms and conditions of employment, protection from discrimination in employment, and matters affecting the health and safety of employees” throughout the legislative branch. They recommend the establishment of an Office of Compliance within the legislative branch, to be headed by a Board of Directors that is jointly appointed by the leaders of both houses: “A bipartisan and bicameral appointment process . . . seeks to ensure that they are adequately insulated from political pressures in their application of the laws and in the ultimate supervision of the enforcement process.”

The Office would be charged to study which provisions of federal law should apply and to make recommendations to Congress. The two houses would apply the substance of the statutory provisions to the legislative branch by concurrent resolution, pursuant to their constitutional power to make rules for their own operations. The Office would adopt procedural rules and would investigate and adjudi-

119. Id. at 22.
120. Id. at 23.
cate complaints. The process for considering alleged violations of law is to include informal stages such as mediation, followed by hearings before independent boards composed of neutrals who are recommended by professional organizations. The boards would have subpoena power and would hold hearings on the record. They could order compensation to be paid from funds to be set aside by each house. Their decisions would be subject to review within the Office, after which any aggrieved employee or member could seek judicial review. That review, in the Court of Appeals for the Federal Circuit, would set aside decisions for errors of fact, law, or procedure.

This scheme is in the normal pattern of administrative law for adjudication of violations of civil statutes, with two exceptions. The governing standards would be congressional rules rather than statutes, and the enforcement personnel would be congressional employees and private persons rather than executive branch employees. Several Supreme Court cases throw serious doubt on the constitutionality of this scheme. The Court has drawn a bright line between legislative and executive functions, and has evinced its determination to prevent Congress from controlling execution except through its constitutional powers such as legislation.

In *Immigration and Naturalization Service v. Chadha*, the Court invalidated all forms of the "legislative veto." This was a device by which Congress overturned executive actions implementing statutes by passing a resolution of one or both houses. Since the Presentment Clauses of article I, section 7, require all legislation to be presented to the President for his signature or veto, the Court had to determine whether the legislative veto was "essentially legislative in purpose and effect." The Court held that it was, because when the House of Representatives passed a resolution overriding an INS determination to allow a deportable alien to remain in the country, its action "had the purpose and effect of altering the legal rights, duties and

122. *Id.* at 952.
relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."\(^{123}\) In closing, the Court emphasized that when Congress grants statutory power to the executive, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."\(^{124}\)

Chadha is often styled a formalist decision in that it reasoned logically from the constitutional text and the framers' general purpose to separate the branches, and drew a conclusion that established categorical lines between the functions of the branches.\(^{125}\) If resort to the rulemaking power to apply legal norms to Congress appears to be an evasion of the constitutional requirements for legislation, it would fall under Chadha. Arguments were sometimes made that legislative vetoes were simply exercises of the rulemaking power of Congress; the Chadha Court showed no sympathy for them.

Even on its own formalist terms, Chadha may not apply to the functions of the proposed Office of Compliance, which would alter legal rights and duties within the legislative branch. Hence, Congress' explicit constitutional power to "determine the Rules of its Proceedings" would be read as an exception to the requirements of the Presentment Clauses for matters internal to regulation of the legislative branch, but not for regulation of the public. This is certainly a plausible reading of the text of the Constitution, and one that attempts to give full scope to both of the pertinent provisions. The Chadha Court explicitly stated that congressional action need not follow the Presentment Clause if the Constitution creates a separate process for it.\(^{126}\)

\(^{123}\) Id.
\(^{124}\) Id. at 955.

\(^{126}\) 462 U.S. at 955. The Court said that there "are four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto." It then listed only the impeachment powers of the two houses and the Senate's powers to advise and
Formalist arguments, however, tend to engender formalist responses, and one is available here. The indispensable role of Congress' rulemaking power, and, therefore, a possible definition of its scope, is to govern the exercise of Congress' constitutional functions. For example, rules set procedures for legislation, outline committee structure and jurisdiction, and define the disciplinary processes for congressmen. Hence, it is clear that action by either house to punish, or even to expel, a member consists of the exercise of explicit constitutional power under article I, section 5, and need not follow the process of legislation. Using rulemaking to apply legal norms to employees performing proprietary functions, however, is well outside the core of this power.

If formalist arguments are indeterminate, the Court might turn to its main alternative approach to separation of powers analysis. This is a "functional" one:

[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.¹²⁷

Functionalism, by balancing the needs of the branches, tends to allow blended powers that a formalist would condemn.¹²⁸ The Court has oscillated between the approaches in recent years, selecting the strictness of formalism when it

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perceives "the aggrandizement of congressional power at the expense of a coordinate branch."\textsuperscript{129}

To obtain relatively permissive judicial review of its preferred method of applying law to itself, Congress needs to make a persuasive argument that it is not aggrandizing its own power or disrupting that of the executive. To appraise the interests of the two branches in this context, we need to consider the cases that delineate the scope of the executive's appointment powers.

In \textit{Buckley v. Valeo},\textsuperscript{130} the Court refused to allow Congress to appoint members of the Federal Election Commission (FEC), which regulates campaigns for federal elective office. Congress had required the FEC, an independent regulatory agency, to have two Commissioners appointed by the President, two by the Speaker of the House, and two by the President \textit{pro tempore} of the Senate. (The Secretary of the Senate and the Clerk of the House were also to serve as \textit{ex officio}, nonvoting members.) This unique arrangement undoubtedly reflected the political sensitivity of the FEC's duties, which are to regulate candidates for Congress and the Presidency.

The Court held that this scheme violated the Appointments Clause of the Constitution,\textsuperscript{131} which does not authorize congressional appointments of executive officers. The Court held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Clause]."\textsuperscript{132} The Court said that congressional appointees could perform investigative and informative tasks of the sort that congressional committees do, but that the FEC's duties to bring

\textsuperscript{129} Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986).
\textsuperscript{130} 424 U.S. 1 (1976).
\textsuperscript{131} U.S. CONST. art. II, § 2, cl. 2: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."
\textsuperscript{132} 424 U.S. at 126.
civil enforcement actions, to promulgate regulations, and to decide administrative adjudications could be done only by "Officers of the United States."

_Buckley_ was an easy formalist decision because the Appointments Clause does not include Congress in its list of those who may appoint executive officers. A functional approach should have led to the same result, since Congress would have fundamentally aggrandized its constitutional role if it could have seized the appointments power for federal regulators.

In _Bowsher v. Synar_, the Court invalidated the "Gramm-Rudman-Hollings Act" because the Act was partly administered by the Comptroller General, an officer who is removable by joint resolution of Congress (the equivalent of a statute), rather than by the President, as are other executive officers. Chief Justice Burger's opinion for the Court stated:

> The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.... _[T]he Constitution explicitly provides for removal of Officers of the United States by Congress only upon impeachment.... A direct congressional role in the removal of officers charged with the execution of the laws beyond this limited one is inconsistent with separation of powers.... To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws.... The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess._

The Court then defined execution broadly: "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."

133. 478 U.S. 714 (1986).
135. 478 U.S. at 722-23, 26 (footnotes and citations omitted).
136. _Id._ at 733.
Justice Stevens, concurring, was unsure the Comptroller’s actions under the Act could properly be called “executive,” but he argued that the Comptroller was an agent of Congress due to the sum of his statutory responsibilities, and that the Act gave him “the duty to make policy decisions that have the force of law.” He concluded that Congress must follow the constitutional process for legislation “when it makes policy that binds the Nation,” either directly or through an agent.

In *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Incorporated (MWAA)*, the Supreme Court overturned another extension of congressional involvement into administration. In *MWAA*, Congress authorized the transfer of control over two major airports near the District of Columbia from the Federal Aviation Administration to the MWAA, a regional authority established by Virginia-D.C. compact. To assume control of the airports, the MWAA Board of Directors had to create a Board of Review with the power to veto certain actions of the MWAA Directors. The nine members of the Board of Review were required to be members of Congress, “serving in their individual capacities, as representatives of the users of the Metropolitan Washington Airports;” eight of the nine had to be chosen from congressional committees having jurisdiction over transportation issues.

One of the first matters subjected to the Board of Review’s potential veto was a “master plan” providing for the enhanced usage of National Airport, an airport especially convenient to Capitol Hill and already the chronic target of citizen complaints about aircraft noise. Six members of the Court held that the Board of Review’s power to veto decisions by the MWAA Directors represented federal action taken on behalf of Congress. Justice Stevens’ majority opinion noted the framers’ fears of the legislature:

> To forestall the danger of encroachment “beyond the legislative sphere,” the Constitution imposes two basic and related constraints on Congress. It may not “invest

\*137 Id. at 754 (Stevens, J., concurring).
itself or its Members with either executive power or judicial power.” And, when it exercises its legislative power, it must follow the “single, finely wrought and exhaustively considered procedures” specified in Article I. . . . The Court of Appeals found it unnecessary to discuss the second constraint because the court was satisfied that the power exercised by the Board of Review over “key operational decisions is quintessentially executive.” We need not agree or disagree with this characterization [to] conclude that the Board of Review’s power is constitutionally impermissible. If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements . . . .

Hence, the scheme violated either Bowsher or Chadha, and the majority felt no need to determine which was the better characterization. The Court regarded the Act as “a blueprint for extensive expansion of the legislative power . . .”

In Federal Election Commission v. NRA Political Victory Fund, a court of appeals interpreted Buckley and MWAA strictly by holding that the continuing presence on the FEC of the two nonvoting congressional appointees (a matter not discussed in Buckley) was unconstitutional. The court held that “the mere presence of agents of Congress on an entity with executive powers offends the Constitution” because the congressional agents would necessarily influence the other commissioners. As in MWAA, the court thought the danger of congressional encroachment on the executive justified a strict separation of powers approach.

Thus, the courts have made it clear that Congress may not administer the laws it enacts, either directly through its own members (MWAA), or indirectly by appointing (Buck-

139. Id. at 274-76 (citations omitted).
140. Id. at 277. Justice White and two others dissented, arguing that it was implausible to regard Board of Review members as agents of Congress because Congress did not appoint them, continuity in Congress or on any committee was not a condition for completion of service on the Board, Congress could not remove Board members, and Board members had no legal obligations to Congress.
ley) or retaining removal power (Bowsher) over persons who thereby become its agents. Nor may either house, or both together, enact legislation without presentation to the President (Chadha). How does congressional self-regulation of its proprietary functions fare under these rules?

There is a straightforward reading of the cases that would condemn it. Buckley instructs us that Congress cannot assign its own appointees to perform "a significant governmental duty exercised pursuant to a public law." The functions that Buckley would not allow congressional appointees to perform included regulation of members of Congress by means of rulemaking and administrative adjudication. That is what the Office of Compliance would do. (The followup NRA decision would not even allow congressional appointees to sit with executive officers in a nonvoting capacity, for fear of influence upon them.) Bowsher emphasized that if Congress can remove those who execute the law, it impermissibly controls them. Presumably, Congress could remove the Office's Board of Directors and its administrative personnel. If congressional agents select the hearing officers, it may not matter if Congress cannot remove them—administrative law judges cannot be removed easily by the executive, but that does not prevent them from being executive officers for constitutional purposes.

Yet the Court's holding in Buckley, and especially its broad statements that all execution of federal law must be in the hands of federal officers, must be understood in context. The Court considered the operation of an agency that regulates not only congressmen but private persons contending for federal office. Hence, many of the arguments pressed on the Court, and rejected by it, would have supported congressional appointments to all kinds of regulatory agencies. The threat of congressional aggrandizement was quite real. Congressional regulation that is confined to the legislative branch presents no such threat.

Where Congress is not trying to seize the reins of ordinary regulation from the executive, the Court has not taken

a strict formalist view of the Appointments Clause. Thus, the Court has upheld the use of private arbitrators to execute statutory norms in some federal programs.\textsuperscript{144} Because these cases concerned adjudicative functions, however, the Court’s concerns centered on the requisites of article III and due process, not the Appointments Clause. The Court has also blessed an executive agreement that transferred claims pending in federal court to international arbitral panels composed partly of foreign citizens who are emphatically not “Officers of the United States.”\textsuperscript{145}

In these cases, the Court has never relied on another constitutional provision that pertains to congressional self-regulation. This is the Incompatibility Clause in article I, section 6, which provides that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” The Incompatibility Clause, which forbids Congress to execute the laws, has never been interpreted by the Supreme Court.\textsuperscript{146} That does not render it unimportant, however. The basic nature of our system of government depends on textual provisions of the Constitution that have never been litigated because their clarity has forestalled controversies that the framers intended to prevent.\textsuperscript{147}

The effect of the Incompatibility Clause has been to prevent the formation of a parliamentary form of govern-


\textsuperscript{147} For example, article I assures Congress the right to meet every year, and to control who sits as a member. These provisions responded to abuses that had occurred in seventeenth century England, when a king prorogued Parliament for eleven years and when Cromwell’s generals sat at the door of Parliament, determining who might enter. See generally Hill, supra note 3; Ashley, supra note 3. Hence, fundamental guarantees of the autonomy of Congress lie partly in constitutional commands that have (happily) lain beyond controversy.
ment in the United States. Ironically, its original purpose was more to protect than to confine legislative power. The framers, who kept a close eye on political developments in the mother country, were aware of a longstanding controversy over what was called “corruption.” After restoration of the monarchy in the seventeenth century, English kings searched for ways to control the surging power of Parliament. They began “corrupting” Parliament by offering its members lucrative executive positions, in hopes of securing influence over them in their legislative capacity. Hence, to our founding generation, joint officeholding threatened to allow the executive undue influence over the legislature. Without controversy, the Constitutional Convention adopted the Incompatibility Clause to stop the practice.

Ironically, the subsequent history of Great Britain demonstrated that “corruption” works both ways. Joint officeholding soon became the mechanism by which Parliament worked its will with the executive. This point about the potential effects of blended functions is fundamental to the way we should view the modern operation of the Incompatibility Clause. By drawing a bright line between our own legislative and executive branches, the Incompatibility Clause assures the autonomy of each from the other. The generation and application of laws are then placed in distinct hands, reducing the potential for arbitrary treatment of citizens. Indeed, the spirit of the clause appears to animate the strict formalist cases that have prevented any blending of legislative and executive functions, even though the Court has chosen to rely on other, related constitutional provisions such as the Appointments Clause.


149. The classic statement of this purpose of separation of powers is in The Federalist No. 47 (James Madison).

150. See, e.g., Myers v. United States, 272 U.S. 52 (1926). The Myers Court quoted Madison regarding the framers’ purpose to separate legislative and executive functions, to wit:

“If there is any point in which the separation of the Legislative and Executive powers sought to be maintained with great caution, it is that which relates to officers and offices.” 1 Annals of Congress, 581.
This analysis somewhat refines the question we must consider: where does the greater danger lie, in executive harassment of Congress or in congressional encroachment on executive responsibilities? If there is an identifiable institutional need to place enforcement in congressional hands, the courts might be inclined to avoid the rigors of formalism. The looser functional approach would ask whether congressional self-regulation of proprietary activities can be justified in light of its potential to disrupt the executive's performance of its constitutional functions. I now turn to that inquiry.

The creation of an Office of Compliance would serve important congressional autonomy interests. Both the constitutional rulemaking power of Congress and the Speech or Debate privilege embody those interests. Congress could assert several justifications for avoiding executive enforcement of proprietary statutes.

First, as I have explained, the scope of the privilege is unclear regarding the employment of principal staff personnel. Even if the Supreme Court eventually holds that congressional employment decisions are never protected legislative actions, it is possible for an employment controversy to revolve around proof of those actions. For example, if a fired staff member alleges discrimination, the defense may be that the employee badly performed privileged duties. Although congressmen can waive the privilege and supply protected information to the executive, it is doubtful that Congress can force its members to do so. Therefore, the commingling of constitutional issues about privilege in otherwise ordinary enforcement situations could vitiate effective executive enforcement, unless the ethics committees took on the role of obtaining and transferring information covered by the privilege.

Second, creation of an Office of Compliance would present a closely bounded intrusion on executive enforcement responsibilities. As long as the functions of the Office are limited to enforcing statutes against the legislative branch, substantial encroachments on the executive of the

272 U.S. at 116.
kind that the Buckley Court apparently feared cannot arise. For about 40,000 federal employees, a tiny fraction of the whole number, responsibility for enforcing federal laws would lie with their own branch, rather than the executive. The mechanism, if sustained, would not provide a precedent for congressional enforcement of statutes against the public, as long as it is based on a rationale that stresses the need of Congress to avoid direct assaults on its independence from the executive. No such need could be shown for the ordinary operation of statutes outside Capitol Hill.

Third, Congress could argue plausibly that self-regulation might be more effective than executive enforcement. I argued above that executive branch prosecutors seem more likely to underenforce criminal laws against congressmen than to overenforce them, because of the executive's dependence on Congress. It seems doubtful that enforcement of civil statutes would present a different pattern. Hence, it is possible that an internal Office of Compliance would be more vigorous than an executive version that quailed before congressional powers of retaliation.

Fourth, since disclosure of information about miscreance is a particularly potent weapon against elected officials, there is cause for concern about vesting control of such information in the hands of an institutional rival. Either general overdeterrence of congressional conduct from the very presence of an executive overseer or targeted executive harassment of political enemies could result.

If abuse by an executive branch enforcement entity were to occur, it might be especially difficult for Congress to protect its autonomy effectively. Retaliatory powers can be one thing in theory and another in practice. Once Congress creates an Office of Compliance, of whatever sort, it will become extremely difficult politically to hamstring or abolish it. A pattern of executive abuse that one might anticipate would unfold as follows. The executive, finding a congressman or a principal staff aide to be a thorn in its side, would investigate that congressional office much more thoroughly than those of more compliant members. Partisan politics would likely identify the fault lines of institutional strain here. Given the complexity of most of the
regulatory regimes to which Congress might subject itself, intense investigation would be sure to discover at least technical violations of statute or regulation. Vigorous enforcement action would ensue, amid publicity about the scofflaws discovered in Congress. Given the power of such publicity, especially when exploited by a political opponent at the next election, effective response by an unjustly treated congressman or aide might be impossible. Ultimately, the executive would succeed in wearing down and purging its opponents in Congress.

I do not think this is a likely scenario. Yet, if Congress chooses to endorse it as a rationale for creating an internal Office of Compliance, I cannot say their conclusion would be beyond reason. In our system of elaborately checked and balanced powers, virtually every check that one branch has over another has been abused sometime in our history. There does seem to be enough potential for abuse of an executive enforcement agency to warrant the courts in taking the relatively permissive functional approach to blended powers in this instance. Finding some legitimate reason for Congress to fear executive disruption of its institutional autonomy, and finding no reason to fear substantial congressional encroachment on executive branch functions, the courts should conclude that there is sufficient constitutional justification for a legislative branch enforcement agency.

An institutional alternative exists, however, that may affect this calculus. Congress could honor the Constitution's usual placement of enforcement responsibilities in executive hands while dampening the possibility of executive disruption of congressional operations by creating an independent regulatory commission to apply statutes to Congress. The usual format for such an agency features a multi-member governing body whose members serve long, staggered terms and who must be appointed from both political parties. Examples include the Federal Election Commission and the Federal Trade Commission. The President appoints the members with the advice and consent of the Senate, and may remove them for misconduct or other
specified cause. The purpose of the independent commission form is to render regulation "relatively immune from the 'political winds that sweep Washington.'"152

Claims have arisen that independent agencies are unconstitutional when employed for ordinary regulation of the public.153 The Supreme Court has announced that it will invalidate the removal restrictions that are the hallmark of independence if "they impede the President's ability to perform his constitutional duty" in a particular case.154 It may be that most existing independent regulatory agencies will clear this doctrinal hurdle.155 In any event, an independent commission designed to enforce laws against Congress would have to be subject to sufficient presidential powers of removal to allow him to assure the faithful execution of the laws.

In the precedent that is most closely on point, Mistretta v. United States,156 the Court upheld the constitutionality of the United States Sentencing Commission. The Commission, an independent agency in the judicial branch that is composed of executive officers and federal judges, issues mandatory sentencing guidelines for federal criminal trials. Thus, Mistretta upheld independent regulation of the federal judiciary.157 Employing functional analysis, the Court could find no danger of encroachment or aggrandizement in this scheme. In the Court's view, the statute neither undermined the integrity of the judiciary nor expanded its power dangerously by uniting the rulemaking powers of

Commission with the judicial power of the courts. The reason there was no such unification of judging and policymaking was that, although located within the judicial branch, the Commission was “an independent agency in every relevant sense,”\(^{158}\) rather than part of the hierarchy of the federal courts. Moreover, because sentencing discretion had long lain within the judiciary, creation of the Commission had not “aggrandized the authority of that Branch or . . . deprived the Executive Branch of a power it once possessed.”\(^{159}\)

*Mistretta* supports the power of Congress to create an independent commission to apply statutes to the legislative branch. Such a statute would not materially alter the existing balance of power among the branches. First, it would not increase congressional authority overall. As in *Mistretta*, enhanced regulation within a branch leaves its power “if anything, somewhat diminished.”\(^{160}\) Second, the statute would not deprive the executive of any existing authority. Equally important, as the *Mistretta* Court stressed, self-regulation within a branch needs to have structural insulation from the daily constitutional functions of that branch if it is to avoid disrupting them and if it is to have integrity.

Hence, Congress could avoid the constitutional doubts that would surround an Office of Compliance headed by congressional appointees if it created an independent commission to perform this task. It may not matter whether Congress styles this entity as being located “within the legislative branch.” Since the commission’s function would clearly be execution of the law, its constitutionality would be assured only if, like the Sentencing Commission, it is headed by Officers of the United States, rather than congressional appointees.

Congress need not fear that placing power in the President to nominate and to remove members of such a commission would allow him to encroach on congressional autonomy by placing only persons hostile to or ignorant of Congress on the commission. The Senate’s check of advice

\(^{158}\) 488 U.S. at 393.

\(^{159}\) *Id.* at 395.

\(^{160}\) *Id.*
and consent is one control. In addition, Congress could employ its power to set qualifications for federal office not only to require party balance among nominees but also to command that some or all of them have prior experience as members or staff of Congress. Also, Congress could claim an informal role in being consulted about prospective nominees, as it now plays for the Federal Election Commission and for the inferior federal courts.

Several of the policy considerations that usually support the application of laws to Congress would counsel use of an executive enforcement mechanism. The perils of executive enforcement constitute an important part of the burden of statutes for citizens. Although an executive agency probably cannot be made to treat congressional personnel exactly the same as it treats ordinary citizens, the nature of enforcement would surely be more unitary than under a special congressional entity. This would maximize the information to Congress about the actual operation of its statutes.

Executive enforcement would also maximize parity of obligations on private and public citizens alike. Congressional enforcement mechanisms, by providing for the tailoring of legal rules to recognize the special characteristics of Congress, do risk the elision of apparently minor elements of a statutory scheme that actually affect the public critically. Mundane administrative features such as record-keeping and reporting requirements are the regular target of complaints by the regulated.

It may not be possible for congressional self-regulation to obtain full public confidence. There are signs that congressional employees have never trusted the independence of existing internal enforcement entities. As the framers of the Constitution understood, legislation and enforcement need to be in separate hands for the process to be trustworthy.

In light of these considerations, I conclude that the independent commission form would be a better way to per-

form this function than an Office of Compliance headed by congressional employees. By subjecting itself to a form of regulation most similar to the one that governs the public, Congress would best assure "that the laws shall bind equally on all."

VII. THE CONGRESSIONAL ACCOUNTABILITY ACT

The scheme that Congress eventually enacted to apply legislation to itself follows the general lines of the proposals of the House members of the Joint Committee on the Organization of Congress that I have discussed, but with some important modifications. I believe that the changes adequately respond to the constitutional concerns that attended the earlier formulation.

The Congressional Accountability Act applies to the employees of the House and Senate and to such immediate support organizations as the Capitol Police and the Congressional Budget Office. For the most part, it excepts the Library of Congress, the General Accounting Office, and the Government Printing Office, which were already partially covered by law. As a result, the Act nestles close to the core of the legislative branch, and excludes some of the proprietary functions for which there is relatively little justification for legislative branch enforcement techniques.

The Act directly applies the core substantive provisions of eleven federal statutes to Congress. The most important of these are: The Fair Labor Standards Act, Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination Act, the Family and Medical Leave Act, the Rehabilitation Act, the Occupational Safety and Health Act, and the statutes defining labor-management relations in the federal service. Thus, Congress has met the Joint Committee's goal of invoking the statutes that govern terms of employment, protection from discrimination, and guarantees of employee health and safety.

163. See supra note 31.
The Act will be administered by an Office of Compliance within the legislative branch, headed by a Board of Directors who are congressional appointees. The Act contains a complex scheme for the Board’s adoption of substantive regulations, which is obviously designed to allay constitutional concerns. First, most of the provisions that apply particular federal statutes to congressional employees contain a requirement that the Board’s regulations “shall be the same as” those promulgated by the executive branch official who usually administers the statute, “except insofar as the Board may determine, for good cause shown... that a modification... would be more effective for the implementation of the rights and protection under this section.”

Second, after the Board adopts regulations, they are approved by any of three methods: simple resolution of the house to which they apply; concurrent resolution of both Houses; or joint resolution, which requires the assent of the President. The Board’s recommendation to Congress regarding which method to apply will doubtless depend on whether there is enough variance from the text of the statute and the regulations of the executive to support an argument that new law is being made, so that presentation to the President is required.

The Act contemplates a process for complaints and hearings that tracks the earlier proposals. The Office will appoint hearing officers to hold adjudications. On appeal, the Board will review the records of the hearings. Judicial review follows in the Federal Circuit, under a normal administrative law “substantial evidence” standard. The Act authorizes judicial review of the Board’s regulations under the Administrative Procedure Act’s normal criteria.

165. Id. at Title III.
166. E.g., id. § 215(d)(2) (OSHA).
167. Id. § 304.
168. Id. § 407. In civil rights cases, under § 408 an employee can elect an action in district court instead of the Board’s adjudicatory process.
169. Id. § 409. Regulations that have been adopted by joint resolution are, however, only to be reviewed for constitutionality, since they are the equivalent of statutes.
This scheme should be safe from constitutional invalidation. The Act’s principal departure from earlier proposals lies in its application of norms to Congress by statute rather than by rules of the houses. Similarly, federal court review can focus on statutory provisions, not internal congressional regulations. These steps should go far to satisfy Chadha’s emphasis that the rulemaking power of Congress may not have the effects of law on the rights of citizens.

Still, the Act authorizes congressional employees to promulgate regulations to implement the statutes. Under Buckley, does this constitute execution of the law that must be performed by executive branch officers? I think not, for several reasons. First, the Act stays sufficiently near the core support functions of Congress for the regulations to derive some support from the constitutional rulemaking power of Congress. In contrast, Buckley involved regulation of many persons having no current affiliation with Congress. Second, the Act requires the regulations to conform to the executive branch’s substantive regulations unless there is good reason to vary them. Hence, executive enforcement policy will have at least indirect influence within Congress, and will often have binding force.

Certainly Congress may—indeed it should—design a mechanism for adapting executive regulations to the special institutional nature of Congress. When there is a need for substantial addition to the statutory text or substantial variation from an executive branch regulation, Congress can adopt a joint resolution that is the equivalent of a new statute. Otherwise, the congressional regulations can have the ambiguous legal effect of interpretive regulations of the executive branch. These regulations lack the force of law, but courts defer to any persuasive effect that they possess. The fact that they will be administered by congressional rather than executive officers should be adequately justified by the reluctance of Congress to subject its personnel to the enforcement efforts of a rival branch of government.
