

**THE ETHICS RESOURCE TEAM**

**Organized By**

**The National Democratic Institute for International Affairs  
(NDI)**

**A Report Presented to**

**The Joint Subcommittee on Ethics**

**The Parliament of The Republic of South Africa**

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## **The National Democratic Institute for International Affairs**

The National Democratic Institute for International Affairs (NDI) was established in 1983. By working with political parties and other institutions, NDI seeks to promote, maintain and strengthen democratic institutions in new and emerging democracies. The Institute is headquartered in Washington D.C. and has field offices in Africa, Asia, Eastern Europe, Latin America and the former Soviet Union. NDI has supported the development of democratic institutions in more than 60 countries. NDI has two offices in South Africa.

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## TABLE OF CONTENTS

<b>INTRODUCTION</b>	<b>1</b>
<b>COMPARATIVE CHARTS</b>	
<b>Introduction to the Comparative Charts</b>	<b>8</b>
<b>Chart I</b> <b>Categories of Financial Disclosure</b>	<b>11</b>
<b>Chart II</b> <b>Methods and Timing of Financial Disclosure</b>	<b>19</b>
<b>Chart III</b> <b>The Governance of Financial Disclosure</b>	<b>21</b>
<b>THE ETHICS RESOURCE TEAM ADVISORY OPINIONS</b>	
<b>Members of the United States Congress</b>	
<b>Cong. Elizabeth Furse</b>	<b>24</b>
<b>Cong. Amo Houghton</b>	<b>28</b>
<b>Cong. Sheila Jackson Lee</b>	<b>30</b>
<b>Ethics Counsels</b>	
<b>Stuart C. Gilman</b>	<b>32</b>
<b>Bernard Raimo</b>	<b>40</b>
<b>Representatives of Civic Organizations</b>	
<b>Robert L. Schiff</b>	<b>50</b>
<b>Fred Wertheimer</b>	<b>54</b>
<b>Academic Experts</b>	
<b>Frederick Schauer</b>	<b>61</b>
<b>Dennis Thompson</b>	<b>65</b>

C

## **APPENDICES**

- I. Ethics Resource Team Biographies**
- II. Memorandum to the Ethics Resource Team**
- III. Stuart Gilman: "U.S. Laws on Integrity and Public Ethics"**
- IV. Dennis Thompson: "Tribunals of Legislative Ethics"**
- V. Fred Wertheimer: Testimony to the United States Congress on  
"Congressional Ethics Procedures and  
Employment Discrimination Procedures"**

## Introduction

Defining a code of ethics is vital to the development of democratic institutions which are transparent and accountable to the citizens of the country. An effective code of ethics, including provisions for financial disclosure, assures the public that government decisions are made fairly and without the inappropriate influence of private interests. Most importantly, an effective code of ethics creates guidelines on how to avoid corruption in government, and establishes mechanisms to decisively respond to cases where corruption has occurred. A code of ethics is essential to building the public's confidence and trust in elected representatives and democratic institutions.

Given the importance of a code of ethics to the development of democracy in South Africa, the National Democratic Institute for International Affairs (NDI) has created an Ethics Resource Team (ERT) to assist parliament with its deliberations. The purpose of the ERT is to provide members of parliament with access to an expanded cadre of international practitioners and experts who will be available to supply information and advisory opinions on a wide range of ethics issues as they arise.

There are two forms of assistance provided by the ERT. The first is comparative information which is gathered and compiled by NDI's professional research staff based in Washington D.C.. This report includes three charts comparing ethics rules and laws which have been passed in ten other countries. The charts compare what interests are required to be declared, methods of implementing ethics rules and laws, and sanctioning mechanisms. This report is also accompanied by an Ethics Resource Book which includes the actual rules and laws from the ten countries. These materials will hopefully provide a useful resource for the ethics deliberations in South Africa.

The second form of assistance are the ERT experts and practitioners who have agreed to follow South Africa's ethics debate and provide regular advisory opinions. NDI staff in Cape Town send memoranda about developments in the ethics debate to the ERT

members. The memoranda also include questions which have been raised by members of parliament in committee meetings or directly with the NDI staff. The ERT members then respond to the questions with short papers. The opinions put forth by the members of the team are entirely their own. NDI does not advocate any particular political positions, but is interested in presenting a range of informed opinions and options to inform the ethics debate. Within this report, a reader may in fact find areas where members of the team disagree, and offer different recommendations. It is up to the elected representatives of South Africa's Parliament to judge which proposals and suggestions are useful to the South African context.

This is the first report of the NDI Ethics Resource Team. The first section of the report presents the comparative charts. These charts may be used by the reader to gain an understanding of how different parliaments have addressed financial disclosure issues. The second section of the report includes the advisory responses from the members of the ERT. These responses will provide the reader with a wide range of perspectives on ethics issues.

The ERT will continue to be available to respond to requests and questions from parliament. Members of the team may also be available to conduct video conferences with key leaders in South Africa's ethics debate. Finally, as the ethics debate progresses, the team may be called upon to provide annotated reviews of legislative proposals. Annotated reviews have proven useful in other countries where parliaments have requested more detailed background on various legislative proposals before final consideration.

The NDI Ethics Resource Team is an innovative approach to providing responsive and ongoing support to parliament. By assisting parliament to conduct a thorough investigation of ethics issues, the ERT hopes that the political parties may be able to develop a consensus for an effective code of ethics for the benefit of democracy in South Africa.

## The Ethics Resource Team

The Ethics Resource Team (ERT) makes use of professional research staff within NDI as well as individuals invited to participate on the team because of their expertise in ethics issues or their experience with legislative institutions. Participants for the ERT have been selected based on their knowledge of ethics issues and their practical experience with legislative institutions.

In selecting outside participants, the ERT has initially focused on individuals from the United States, but as the program progresses members from other countries will be added as well. The team currently includes three members of the United States Congress representing both the Democratic and Republican political parties, a counsel on ethics for the House of Representatives, the special assistant to the director of the department which monitors ethics rules for the executive branch, two representatives of civic organizations which have been involved in ethics issues, and two leading academics from Harvard University. Short biographies of the ERT members are included with their advisory responses. The initial membership of the team includes the following individuals:

Cong. Elizabeth Furse  
United States House of Representatives

Stuart Gilman  
Special Assistant to the Director  
United States Office of Government Ethics

Cong. Amo Houghton  
United States House of Representatives

Cong. Harry Johnston  
United States House of Representatives

Bernard Raimo  
Counsel for the Committee on Standards of Official Conduct  
United States House of Representatives

Frederick Schauer  
Frank Stanton Professor of the First Amendment  
Harvard University

Robert L. Schiff  
Staff Attorney  
Public Citizen

Dennis Thompson  
Director of the Program in Ethics and the Professions  
Harvard University

Fred Wertheimer  
Former President  
Common Cause

### **ERT Advisory Opinions**

The ERT has been organized to provide a steady flow of assistance throughout the legislative process. In order to communicate with a broad range of practitioners and experts on a consistent basis, NDI is utilizing the system of electronic mail (email) over the internet. By using electronic mail, communication is transmitted instantaneously to ERT members keeping them informed about the political situation in South Africa and

developments concerning the ethics debate. Through email, ERT members are also able to quickly respond to requests for advice.

Following the last meeting of the Joint Subcommittee on Ethics (26 September 1995), a detailed memorandum was sent by email to each member of the ERT. (See Appendix I) The content of the memorandum was derived from the discussions of the subcommittee about financial disclosure, and also included suggested questions for each member of the team to address. ERT members have subsequently submitted their responses, which are included in this report. It is important to again emphasize that the opinions expressed in these papers belong solely to the members of the ERT, and are not advocated by NDI.

The papers presented in this report by the ERT cover a wide range of issues. The members of Congress address the purpose of financial disclosure rules, their views on the rules in the United States Congress, their concerns about privacy, and their thoughts on the implementation of financial disclosure. The two legal counsels, Stuart Gilman and Bernard Raimo, provide an in depth analysis of the principles underpinning ethics legislation, and the implementation of rules in the categories of disclosure which have been raised by the subcommittee in South Africa.

The representatives of civic organizations, Fred Wertheimer and Robert Schiff, provide an outsider's perspective on the importance of ethics rules in maintaining the confidence of the public in democratic institutions. Frederick Schauer, a legal expert on privacy, reviews the ethical foundation for financial disclosure rules, and addresses privacy issue in the context of financial disclosure. Finally, Dennis Thompson, a pre-eminent scholar of the philosophy of ethics as well as an experienced observer of the United States Congress, discusses the advantages and disadvantages of several ethics proposals.

It is interesting to note that the members of the ERT emphasize the need for South Africa's Parliament to develop a strong consensus for its own code of ethics. Members of

the team are aware that rules or laws cannot be prescribed from afar. However, the papers presented in this report represent the thinking of individuals who are committed to the development of democracy and the principle of transparent, accountable government. Their contributions may prove valuable to those leaders who are moving forward to develop a South African consensus for a comprehensive code of ethics.

### **The National Democratic Institute (NDI)**

The National Democratic Institute for International Affairs (NDI), based in Washington, D.C., conducts nonpartisan political development programs throughout the world. By working with political parties, legislatures, civic organizations and other institutions, NDI seeks to promote, maintain and strengthen democratic institutions in new and emerging democracies. Since 1990 NDI has had an active program in South Africa; first in assisting the negotiations and preparations for the April 1994 elections, and subsequently in supporting the development of their parliamentary organization and processes.

Patricia Keefer is the Director of NDI's programs in the southern Africa region, and is based in Johannesburg. Roger Berry is the Director for the ethics project. Roger is based in NDI's offices in Cape Town and maintains regular contact with both parliamentary leaders and staff. He is also responsible for managing communication with the members of the ERT. Patrick Henry is the NDI Research Officer who is directing the comparative research for the ERT. He is responsible for compiling the NDI comparative ethics charts, and for supporting the ERT members from the Washington office. Susan Benda, an NDI Program Officer for parliamentary programs, has also assisted in the development of the comparative materials. This project is funded by a two-year grant from the United States Agency for International Development (USAID).

The activities of the ERT have been coordinated with the office of the Speaker of the National Assembly, Mrs. Frene Ginwala, and parliament's Joint Subcommittee on Ethics. In the future, the ERT will be available to assist the Rules Committees of both the Assembly and the Senate as well as the political parties represented in parliament.

**COMPARATIVE CHARTS ON FINANCIAL DISCLOSURE**

**Prepared By**

**The National Democratic Institute for International Affairs**

## COMPARATIVE CHARTS

### Introduction

Comparative charts have proven to be an effective legislative resource. By analyzing how other countries have addressed similar legislative challenges, a parliament may benefit from their experiences and build upon their efforts. The National Democratic Institute (NDI) has created three comparative charts to assist the parliament of South Africa's deliberations on the development of a code of ethics.

The charts compare the financial disclosure rules of ten countries. The countries which have been selected for the comparison are Australia, Canada, Egypt, India, Ireland, Korea, Singapore, Tanzania, the United Kingdom, and the United States. This wide range of countries spanning five continents should present an illustrative comparison.

There are three charts which have been organized to provide easy access to a comprehensive collection of research information. The first chart takes the twelve categories of financial interests which are being reviewed by South Africa's Joint Subcommittee on Ethics, and compares the requirements for disclosure. The categories of financial interests are shareholdings, outside employment, directorships, consultancies, lobbying, liabilities, gifts and benefits, foreign travel, real estate and property, savings and investments, trusts, and those interests held by family members. This chart therefore offers the reader a direct comparison for the categories of disclosure which are being considered by the parliament of South Africa. For example, concerning rules on outside employment, a reader will find that in India a member of parliament cannot hold any outside employment, while in Ireland a member must simply declare any sources of remuneration which yield more than 12,000 Rand.

The second chart focuses on the methods and timing of financial disclosure. With the same ten countries, the chart compares the provisions for the date of filing, updating

requirements, the period of time covered by disclosure requirements, the applicability of the provisions to a spouse and dependent children, and whether the disclosure is public or confidential. This chart is intended to help members of parliament understand the key issues involved in implementing financial disclosure rules.

The third chart reviews the governance of ethics and sanctioning mechanisms. The chart compares provisions concerning whether ethics provisions have been passed as parliamentary rules or as law, the legislative entity which monitors the implementation of the provisions, the membership of the legislative entity, and the sanctions for violations. The effectiveness of a code of ethics depends upon the strength and legitimacy of the institutional organs established to implement the code. This chart provides members with a comparison of these extremely important issues.

The materials within the charts are first source materials drawn directly from each country's laws and the Standing Orders of parliament. The information on the countries of India, Korea and Singapore was also drawn from the Congressional Research Service Report titled *Legislative Ethics in Democratic Countries: Comparative Analysis of Financial Standards* coordinated by Stephen F. Clarke, Ruth Levush, and Jack H. Maskell.

NDI has also developed a separate Ethics Resource Book to provide South Africa's parliament with direct access to the primary sources for the comparative charts. This book includes the rules and laws from the ten countries analyzed in these charts, and should provide a useful source of information on ethics.

Before examining the charts, it is important to note that the information collected in these charts concerns only a legislature's lower house. The information is also confined to the members of each legislature. A conscious attempt was made to exclude any information on ministers, secretaries and civil servants, although comparative charts on these public officers may be compiled at a later date.

In each chart, certain terms are used to represent a specific item or phrase. The term *Not Applicable* is used to mean that the information assembled by NDI was incomplete, and this category cannot be properly addressed. It does not mean that this category does not necessarily exist in the ethics law, but that NDI lacks the requisite information to answer this category with any degree of certainty. In the chart titled *Interests to be Declared by Members of the Legislature - Section I* the term “Lobbying” appears. In this chart lobbying is defined as one member attempting to influence other members on a specific piece of legislation. This definition of lobbying applies solely to parliamentary systems because of the strength of political parties.

All references to a currency amount or limit have been converted into *Rand* so as to be applicable to the South African context. Also, all information inside of quote marks is language from the specific rule or law of the country in question. This information was quoted because of the vagueness of the language. Law is a precise science and when a word or phrase appears vague it is done so with an underlying motive in mind. In many cases the vague wording of a rule or law allows a certain degree of flexibility not realizable in the text itself. Finally, certain countries were included which lack specific or comprehensive pieces of ethics legislation. The reasoning behind these inclusions rests in the fact that different cultures and perspectives exist on ethics legislation, and for comparative purposes it is important to see these contrasts.

**CHART I**  
**CATEGORIES OF FINANCIAL DISCLOSURE**

<b>INTERESTS TO BE DECLARED BY MEMBERS OF THE LEGISLATURE - SECTION I</b>						
<b>Country</b>	<b>Shareholdings:</b> a) Limits & Requirements b) Listing Specifics	<b>Outside Employment:</b> a) Limits & Requirements b) Listing Specifics	<b>Directorships:</b> a) Limits & Requirements b) Listing Specifics	<b>Counsultancies:</b>	<b>Lobbying:</b>	<b>Liabilities:</b> Limits & Requirements
<b>Australia</b>	a) Members can not vote on any issue in which they have a pecuniary interest. Must declare any holding valued at over 13,590 Rand. Cannot be "involved" in a firm that is attempting to secure government contracts. b) Must list whether the shareholding is with a public or private company, the name of the company and whether it is a holding or subsidiary company.	a) Members can not collect fees or honorariums for services while in office. b) Not Applicable.	a) Must list all directorships and partnerships. b) Must name the company and briefly describe its activities.	Not Applicable.	Not Applicable.	Must declare the nature of the liability and the creditor concerned.
<b>Canada</b>	a) Members can not vote on matters affecting a business in which they have a direct pecuniary interest. b) Not Applicable.	a) Cannot maintain an interest with companies seeking contracts with the Government of Canada for which federal monies are paid. Cannot hold certain municipal, local, provincial or federal offices except if it is without remuneration or if a member of the military. b) No.	a) No. b) No.	No.	Cannot receive services or compensation for lobbying for a bill or lobbying a House member.	No.
<b>Egypt</b>	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.

Country	Shareholdings	Outside Employment	Directorships	Consultancies	Lobbying	Liabilities
<b>India</b>	a) Must declare any interest in a commercial venture. b) Must declare the institution in which share(s) is held.	a) The Prime Minister, Speaker, Ministers and MPs cannot accept outside jobs. MPs are banned from accepting honoraria to supplement their salaries. b) Not Applicable.	a) Cannot hold a directorship. b) Not Applicable.	Not Applicable.	Not Applicable.	Must declare debt over 519 Rand.
<b>Ireland</b>	a) Must declare shares or similar investments totaling more than 60,000 Rand at any time. b) Must list the particular share although the specific amount of shares does not need to be declared.	a) Must declare any source of remuneration which yields more than 12,000 Rand. b) Not Applicable.	a) Must declare any directorship or shadow directorship. b) Not Applicable.	Must declare any paid position as a political consultant or advisor.	Must declare any paid position as a political lobbyist .	Not Applicable.
<b>Korea</b>	a) Not Applicable. b) Not Applicable.	a) Committee chairs cannot hold a job in the sector of the economy which pertains to their committee. b) Must declare the name of the company and duties of the position to the President of the Assembly. Cannot work for an institution in which more than 50% of capital is government invested or an agricultural, fishery or livestock cooperative or be a journalist or a teacher.	a) Not Applicable. b) Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.

Country	Shareholdings	Outside Employment	Directorships	Counsultancies	Lobbying	Liabilities
<b>Singapore</b>	a) Members "must declare interests before can participate in the House." Cannot vote if have a direct pecuniary interest. b) Do not have to disclose specific companies.	a) Not Applicable. b) Not Applicable.	a) Not Applicable. b) Not Applicable.	Not Applicable.	Can only lobby government ministries for the interests of constituents. Lobbying must be written or transcribed.	Not Applicable.
<b>Tanzania</b>	a) Must declare all dividends from stocks and shares. b) Must declare only "interested shareholdings" which are shareholdings with a total market value more than the annual emoluments from the office of the public leader. Must declare in writing that he/she has the interest, the nature and extent of the interest and the specific proportion of ownership. Must include a special mention if the government has an interest in contracting with the organization in which that the MP has an interest.	a) Cannot use status to gain unfair advantage in gaining outside employment. b) Not Applicable.	a) Must declare directorships of companies in which there is a financial interest. b) Must declare the nature and extent of the interest which is held.	Not Applicable.	Not Applicable.	Not Applicable.
<b>United Kingdom</b>	a) Must declare companies in which an MP has a holding with a nominal value greater than 150,000 Rand or greater than 1% of the issued share capital in the company. b) Do not have to declare the amount or value.	a) Must declare that have an interest in company. b) Do not have to declare income.	a) Must declare directorship. b) Do not have to declare income or benefits.	Must declare any consultancies or retainers pertaining to MP's work, the exact income and remuneration. Must declare consultancies and retainers not relating to the MPs work but do not have to disclose exact income or remuneration.	Not Applicable.	Not Applicable.

Country	Shareholdings	Outside Employment	Directorships	Counsultancies	Lobbying	Liabilities
<b>United States</b>	<p>a) Must declare all stocks, bonds, and other securities over 3,670 Rand. It is left to the Member to determine whether to recuse himself/herself from particular committee business or to refrain from voting if "legislation uniquely affects a personal or financial interest."</p> <p>b) Do not have to report the actual shares nor the actual value. Must report the value of the shares in one of six categories ranging from 3,670 Rand to 55,050 Rand and over 3,670,000 Rand.</p>	<p>a) Cannot earn more than 73,546 Rand per year. May not contract with the Federal Government.</p> <p>b) Cannot receive compensation for providing professional services involving a fiduciary relationship. No honoraria for speeches. No paid teaching without prior written approval from the Ethics Committee.</p>	<p>a) Cannot receive compensation for serving on the Board of Directors or as an officer of any organization.</p> <p>b) Not Applicable.</p>	<p>Prohibited if related to Congressional business. If the Member is an expert in unrelated area, then can receive compensation for providing advice.</p>	<p>Not Applicable.</p>	<p>Not Applicable.</p>

**INTERESTS TO BE DECLARED BY MEMBERS OF THE LEGISLATURE - SECTION II**

<b>Country</b>	<b>Gifts and Benefits</b>	<b>Foreign Travel</b>	<b>Real Estate and Property</b>	<b>Savings and Investments</b>	<b>Spouse and Children</b>	<b>Trusts</b>
<b>Australia</b>	Must declare any gift or benefit over 680 Rand from official sources and any gift or benefit over 272 Rand from other sources provided it is not a "purely personal" gift or benefit.	Must declare sponsored travel or any hospitality received.	Must declare location (area only) and the purpose for which the property is owned.	Must declare savings and investment accounts including the name of the bank or institution concerned.	Must declare assets of spouse as well as dependent children until they are 16 or if full-time students, until 25.	Must declare trusts and family business including the name, nature of the operation and the beneficial interest that is held.
<b>Canada</b>	Must decline a gift or benefit if it is meant to gain favor or influence.	Clerk of the House maintains a registry of foreign travel and must register all trips when not paid for out of the Consolidated Revenue fund, by the member or a party. All foreign travel arising from or related to membership in the House must be disclosed, be it personal or business travel and must name the person or group sponsoring the trip.	No.	Not Applicable.	Not Applicable.	Not Applicable.
<b>Egypt</b>	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.
<b>India</b>	Generally not allowed to accept gifts or benefits but can keep souvenirs.	Cannot accept travel paid for by others.	Not Applicable.	Must declare cash and travelers checks over 518 Rand. Must declare bank balances and fixed bank deposits. Also, declare all assets including jewelry and motor vehicles over 518 Rand.	Not Applicable.	Not Applicable.

<b>Country</b>	<b>Gifts and Benefits</b>	<b>Foreign Travel</b>	<b>Real Estate and Property</b>	<b>Savings and Investments</b>	<b>Spouse and Children</b>	<b>Trusts</b>
<b>Ireland</b>	Must declare any gifts totaling over 3,000 Rand.	Must declare any trip totaling over 3,000 Rand including travel, meals and entertainment. Personal travel on personal expense does not need to be declared.	Must declare any interest in land over 60,000 Rand excluding private homes. Vacation homes do not have to be declared unless used for commercial purposes.	Must declare any investment worth over 60,000 Rand at any time.	Only spouses of those in executive positions including Ministers who are also MPs must make confidential disclosures.	Not Applicable.
<b>Korea</b>	Must declare any gift or benefit in excess of 367 Rand from a foreign government, foreign national, or a foreign organization by filing a report with the Director-General of the Assembly. Cannot accept any gift if have a stake in a bill, but can accept a gift for a speech as long as is the normal rate.	No member is to accept meals, travel or entertainment in the amount exceeding the customary standards.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.
<b>Singapore</b>	Prohibited entirely, "accepting a gift or benefit can be construed as a sign of guilt."	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.

Country	Gifts and Benefits	Foreign Travel	Real Estate and Property	Savings and Investments	Spouse and Children	Trusts
<b>Tanzania</b>	Members may not solicit or accept transfers of economic benefit. This clause excludes customary hospitality and traditional or token gifts. Gifts from foreign leaders are allowed.	Not Applicable.	MPs must file written deed of all properties, including those jointly owned with a spouse or unmarried, dependent children. Does not demand location or area of the property. Does not require declaration of personal affects, household goods, art, antiques, collectibles, residences, recreational property, noncommercial farms, property owned independently by spouses.	Must declare treasury bills, and other similar investments in securities of fixed value or guaranteed by the government or agencies of the government. Need not declare registered retirement savings plans that are not self-administered, annuities and life insurance policies are considered non-declarable.	Must declare property of spouse when held in common.	Not Applicable.
<b>United Kingdom</b>	Must declare tangible gifts of 750 Rand or more. Must declare hospitality exceeding 0.5% of the parliamentary salary (approximately 960 Rand). Gifts not relating to MPs work need not be declared.	Must declare any foreign travel by a member or spouse related to work in the House if the costs of the trip were not entirely paid by the member or were paid by public funds. Must declare the name of the paying organization. Certain official visits are exempt.	Must declare property which provides a source of income. Need not declare residential and vacation homes unless used for rental.	Must declare pensions but not the value or the amount. Does not differentiate between public and private pensions.	Must declare family property, but not all interests of spouse. Cannot use spouse to "divert interests."	Not Applicable.

Country	Gifts and Benefits	Foreign Travel	Real Estate and Property	Savings and Investments	Spouse and Children	Trusts
<b>United States</b>	Gifts are banned outright and must be returned or purchased at fair market value. Only items of nominal value such as t-shirts, hats, pens and mugs may be accepted. All local meals are banned.	All travel is banned except for meetings, speaking engagements, and fact-finding trips in connection with official duties. Privately funded travel must include an itemized description of the "good faith" estimates of total expenditures for travel, lodging, meals and other expenses and be submitted to the Clerk of the House within 30 days. Foreign government sponsored travel is acceptable.	Must disclose real estate, stocks and bonds over 3,670 Rand. The items must be identified and placed in one of six categories ranging from 3,670 Rand to 55,050 Rand and over 3,670,00 Rand.	Must disclose savings and investments over 3,670 Rand. These items must be identified and placed into the proper value category.	Must disclose the interests of spouse and dependent children in general unless meet three specific exceptions.	Must disclose trusts.

**CHART II**

**METHODS AND TIMING OF FINANCIAL DISCLOSURE**

<b>METHODS AND TIMING OF DISCLOSURE</b>					
<b>Country</b>	<b>Filing Date</b>	<b>Updating Requirements</b>	<b>Period of Time Covered by Disclosure Requirements</b>	<b>Applicability to Spouse and Dependent Children</b>	<b>Public or Confidential</b>
<b>Australia</b>	Must file within 28 days of taking oath of office.	Must file changes within 28 days from the beginning of each session and within 28 days of a change occurring in a disclosure category.	Only while a sitting member of the House.	Disclosure required regarding spouse and dependent children (up to 16 years old or up to 25 years old if full-time student.)	Open for public inspection by anyone.
<b>Canada</b>	No.	No.	No.	No.	No.
<b>Egypt</b>	Must submit financial statement to the Secretary General within 2 months from the election date.	Must file any changes to your original disclosure report 2 months after leaving office.	Time of service and up to 2 months afterward.	Not Applicable.	Not Applicable.
<b>India</b>	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.
<b>Ireland</b>	Not Applicable	Must file an annual statement of interests.	Not Applicable.	No.	Must file in the public register.
<b>Korea</b>	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.
<b>Singapore</b>	Only those members belonging to the People's Action Party must file statements.	Not Applicable.	Not Applicable.	No.	Not Applicable.

<b>Country</b>	<b>Filing Date</b>	<b>Updating Requirements</b>	<b>Period of Time Covered by Disclosure</b>	<b>Applicability to Spouse and Dependent Children</b>	<b>Public or Confidential</b>
<b>Tanzania</b>	Must file within 30 days of taking office.	Must file annually on the anniversary of the first disclosure.	Disclosure covers the year leading up to the disclosure date. Must file a disclosure statement upon leaving office.	Not Applicable.	Register is open to the public "at reasonable times." A fee can be charged for inspection of the register.
<b>United Kingdom</b>	Filing can occur at any time. Must be noted when an interest may have a direct impact on a particular bill or debate.	Not Applicable.	Not Applicable.	Not Applicable.	Public.
<b>United States</b>	Members must file May 15 of each year and 30 days after leaving office. Candidates: must file when more than 18,350 Rand spent for campaign activities.	Must file annually by May 15.	Disclosure covers the year preceding the disclosure date.	Disclosure required regarding spouse and dependent children.	Public.

**CHART III**  
**THE GOVERNANCE OF FINANCIAL DISCLOSURE**

<b>THE GOVERNANCE OF FINANCIAL DISCLOSURE</b>				
<b>Country</b>	<b>Ethics Laws or Rules</b>	<b>Legislative Entity with Jurisdiction</b>	<b>Membership of Legislative Entity</b>	<b>Sanctions for Violations</b>
<b>Australia</b>	Article 44 of the Constitution states that one cannot be an MP if controlled by a foreign power, bankrupt, working for the Government or party or interest to a Government contract. Rules promulgated in the Standing Orders.	Ethics Committee and the Registrar of the Members Interests.	The Ethics Committee is chaired by an MP. The Speaker appoints an MP to act as the Registrar of Members Interests.	Article 45 of the Constitution states that violating Article 44 can result in expulsion. The House has the ability to sanction members for violations of the Standing Orders which pertain to ethics.
<b>Canada</b>	Rules promulgated in the Standing Orders, Parliament of Canada Act and Criminal Code.	The Board of Internal Economy has the authority to act on all financial and administrative matters respecting the House and its Members.	The Board of Internal Economy is made up of nine members of the House.	Can be expelled from the House.
<b>Egypt</b>	Rules promulgated in the Standing Orders.	Ethics Committee is set up by the Assembly and specific membership proscribed by the Standing Orders. A special committee must be established to hear cases in which expulsion may result.	Membership of the Ethics Committee includes the Chairs of the 3 key committees of parliament, 5 General Assembly members including 2 from each majority party and 5 members chosen by a vote from the Assembly at large and it must include 1 female.	Parliament enjoys immunity from normal prosecution. According to the Standing Orders Article 26 allows the Assembly to punish indiscretions. Under Article 377 blame can be placed on a member with penalties ranging from exclusions in delegations to revoking of membership. Articles 382 and 383 provide the procedures to expel a member from parliament.
<b>India</b>	Rules promulgated in the Standing Orders.	None, but in cases of official corruption <i>ad hoc</i> commissions can be established.	Not Applicable.	Rules and Laws are not backed up by an investigative procedure or penalties.
<b>Ireland</b>	Law and rules promulgated in the Standing Orders.	The law establishes a Committee on Member's Interests to monitor the register of members interests. [There is also an independent commission responsible for hearing complaints and making recommendations on those complaints.]	The exact make-up of the committee has yet to be determined. [The independent commission includes the Ombudsman, the Auditor General, clerks and the Speaker.]	Not Applicable..
<b>Korea</b>	Not Applicable.	Not Applicable.	Not Applicable.	Not Applicable.

Country	Ethics Laws or Rules	Legislative Entity with Jurisdiction	Membership of Legislative Entity	Sanctions for Violations
<b>Singapore</b>	The Parliament Privileges, Immunities and Powers Act of 1962 and the 1986 Amendment to this Act. Rules promulgated in the Standing Orders.	Parliament oversees ethics rules but in severe cases the Attorney General can take up prosecution. Also, special tribunals can be set up to deal with specific issues such as corruption.	Not Applicable.	Violations cannot be prosecuted without the consent of parliament. [Violations of ethics rules can incur a fine up to \$10,000 or 7 years in prison or both. Also, pension rights can be revoked.
<b>Tanzania</b>	Section 132 of the Constitution establishes the Ethics Secretariat; 1971 Prevention of Corruption Act and the Ethics Code of Parliament contained in the Standing Orders.	The Ethics Secretariat is similar in structure to a cabinet post. The Ethics Commissioner heads the Secretariat and is appointed by the President for a term of five years. Only in the event of "good cause" can the Commissioner be removed. In consultation with the Attorney General, the Commissioner calls for a Tribunal to investigate the allegation, but the President appoints the members. The Tribunal has broad powers to call witnesses and the power to arrest those who do not obey its rulings.	Not Applicable.	Anyone has the right to submit a written ethics complaint to the Secretariat. Anyone who knowingly makes a false accusation can be imprisoned for up to 2 years. If the Commissioner decides to pursue a case, the allegations are submitted to the President and the Speaker. The hearings are conducted in public unless the tribunal deems it necessary to close them to "preserve order". Once called, the Tribunal can hear any ethics case. It has 45 days after initially adjourned to submit a report to the Commissioner which is in turn submitted to the President and the Speaker. The tribunal can recommend administrative action, criminal prosecutions or what ever it sees fit. Also, separate institutions can pursue parallel investigations to the Tribunal and proceed with separate prosecutions under existing law.

Country	Ethics Laws or Rules	Legislative Entity with Jurisdiction	Membership of Legislative Entity	Sanctions for Violations
<b>United Kingdom</b>	Rules promulgated in the Standing Orders.	The Parliamentary Commissioner for Standards and the Committee of Privileges regulate the ethics code.	The Commissioner is a person of independent standing who is responsible for maintaining the Register of Interests, providing advice on the Code of Conduct and investigating and reporting on complaints concerning members conduct. The Committee is responsible for hearing complaints and issuing sanctions in accordance with the rules.	Not Applicable
<b>United States</b>	Rules promulgated in the Standing Orders.	House Committee on Standards of Official Conduct ("Ethics Committee").	14 members; 7 from each party.	Members can file written complaints under oath with the Ethics Committee. A private individual can only submit a claim after 3 members have refused to sign the complaint. The Committee recommends to the House to impose penalties of censure, reprimand, condemnation, reduction of seniority or a fine on its members. In order for the sanctions to take effect, the whole House must vote to accept the sanctions by a simple majority. In extreme cases a member can be expelled from the House by a 2/3 vote of the whole House.

**THE ETHICS RESOURCE TEAM**  
**ADVISORY OPINIONS**

**ELIZABETH FURSE**  
**Member of the United States Congress**

**Elizabeth Furse**  
**Member of the United States Congress**

1. As elected members of Congress, how do you view financial disclosure rules?

In general, I believe that financial disclosure rules are useful to highlight pressures which could indicate a conflict of interest between individual gain at the expense of official responsibilities. Of all the responsibilities entrusted to an elected official, it is paramount that they retain the confidence of their constituents. Conflicts of interest can slowly chip away at the good work of an elected official unless they are prevented through carefully crafted and enforceable rules.

In particular, it is my contention that the relationships between business interests and individual elected officials are especially susceptible to charges of favoritism. For example, consider the routine practice of obtaining a loan from a bank. Without proper disclosure laws, it would be possible for members of Congress to -- unwittingly or otherwise -- receive favorable treatment. The rather mundane transaction of obtaining a loan is emblematic of ordinary activities that, while not constituting direct conflicts of interest, could in certain situations potentially damage the credibility of an elected official.

Moreover, financial disclosure rules protect elected officials from constituents who may unintentionally err in judgment. By knowing that most relationships are subject to public oversight, Members of Congress have heightened awareness about the treatment they receive from all private sources. The knowledge that financial disclosure laws exist, and will be the subject of intense interest in the press, makes elected officials closely examine their role as representatives and their relevant actions in both official and personal capacities. Financial disclosure rules help stem even appearances of impropriety.

Ultimately, conflicts of interest undermine the efficacy of the elected official, resulting in poor representation at the government level for constituents. Broadly speaking, government needs the trust of the governed to be an effective, lasting institution. Financial disclosure rules are part of ensuring that end.

2. How do you define the purpose of those rules?

The rules have the main objective of making elected officials, in this case Members of Congress, more accountable to their constituents. Beneath this main objective, however, are two important corollary ramifications. First, financial disclosure provides an additional piece of information for press and voters to scrutinize. The press usually does an immediate report on the results of the financial disclosure forms when they become public, but they almost never becomes a subject of controversy. Thus, this information is provided to the voting public for their consumption with relative ease. Secondly, as stated earlier, the rules also make elected officials more closely examine their relationships vis a vis their official responsibilities. Both of these results are integral to making elected official more accountable.

3. Would you recommend any changes to the current rules governing financial disclosure in the United States Congress?

While I would not recommend any specific changes to the current rules, I want to make an important point regarding the context of financial disclosure rules.

In the United States Congress, members of the House and Senate receive adequate compensation and staff. Because of this, the members of the House and Senate are able -- for the length of their service -- put funds in blind trusts or make other arrangements to keep potential financial conflicts of interest at bay. In this sense, adequate compensation for elected officials acts to preempt unethical behavior.

Financial disclosure becomes more readily accepted because there are less pressures on the relationships between the elected officials and the interests that are permanent players in the political arena.

In addition, the U.S. Congress maintains also adequate, non-partisan staff representing the institution to help advise the Members of Congress on dealing these matters. Having institutional knowledge to help wade through the maze of financial disclosure requirements is key to making them acceptable, workable rules. The existence of staff also ensures uniformity in implementation of the rules.

I would caution that if compensation for elected officials is not adequate, or if there is not existing staff to assist elected officials, financial disclosure rules could become too cumbersome and/or unenforceable. Both of the aforementioned are critical to ensuring the success of financial disclosure laws.

4. Do you feel that financial disclosure rules unduly infringe on your privacy? If so, how?

I don't feel that financial disclosure rules infringe upon my privacy at all. Many people who are not involved in the process often worry about the political impact of disclosing their financial status. My experience has been that after the financial disclosure forms are made public, there is usually a story or two in the press about the results and very little fuss. In my three years in Congress, I have never had a constituent express a concern to me about something that was made public in a financial disclosure report. Financial disclosure is done in a manner consistent with other facets of public accountability in American government.

5. Finally, should an independent board or a committee of the House oversee the implementation of ethics rules such as those governing financial disclosure?

In all respects, ethics and financial disclosure rules must be above traditional party and institutional differences. I think independent boards are important, particularly for enforcement reasons. It is paramount that the composition of any independent board consist of all parties that are equally represented. I believe one feature that makes the system in the U.S. Congress effective is having both parties represented equally with commensurate voting power. If South Africa were to administer an ethics panel, each party which has earned seats in government should have an equal voting power. The prevailing view by all people in government must be that ethics and financial disclosure rules should be enforced in a non-partisan manner.

**AMO HOUGHTON**  
**Member of the United States Congress**

29A

**Amo Houghton**  
**Member of the United States Congress**

I happen to think that the U.S. House ethics rules are strict, and thankfully so. The biggest problem we face as legislators is "public opinion." Most of us live within the ethics rules, and it really isn't a problem for us, but there are always a few rotten apples that appear to spoil the bunch. For this reason, ethics guidelines and rules are necessary and tend to help us more than we think.

In all of our dealings, there should be full and open disclosure of any income we receive from any sources -- and this income should be tightly monitored to ensure that there is no impropriety.

I recently supported a complete and total gift ban on the floor. I happen to think that this is a bit ridiculous, but it's a far better system than limiting the worth of a gift or who we can receive it from. Ethics rules should be short and to the point, so they are not impossible to adhere to.

As for disclosures, they should be filed annually, and shouldn't be very difficult to fill out. They should also be open to the public. There really isn't any reason to keep them confidential, as long as they aren't too probing and personal.

One final point, I can't help but think that our Ethics Committee system works fairly well. It should be equally bipartisan (which is easy in our case -- five from each party, and we only have two parties. Maybe in South Africa's case it should be only one member from each party) and most of the Committees dealings should be confidential until a decision is made. Then most of the Committee's work on an issue should be made public.

Public disclosure is the key to keeping yourself clean of all impropriety. My general rule is not to do anything that you wouldn't want to see on the front page of your local newspaper.

I wish the members of South Africa's Parliament the best of luck on this important legislative matter. I look forward to working with everyone on this project.

**SHEILA JACKSON LEE**  
**Member of the United States Congress**

**Sheila Jackson Lee**  
**Member of the United States Congress**

Financial disclosure rules of the United States House of Representatives are designed to promote integrity in government and enable American citizens to have greater confidence in their elected officials. I support financial disclosure rules because our citizens' confidence in government is critical to preserving our democracy. Members of the United States House of Representatives are required by the rules of the House of Representatives and the Ethics in Government Act to file financial disclosure statements on an annual basis. These statements are available to the public for review.

The financial disclosure rules help avoid conflicts of interest between an elected official's private financial interests and investments and their duties as elected officials. For example, members of the United House are prohibited from using their official positions for personal gain or entering into contracts with the United States government.

I believe that the disclosure rules are reasonable, and attempt to strike a balance between an elected official's right to privacy and the desire to have openness in government. The disclosure rules generally require members of Congress to report information on assets with respect to real estate, stocks and bonds if the worth of the such investments exceed \$1,000 per calendar year. Liabilities over \$10,000 to any creditor within a calendar year, except for debt to family members, must be reported.

Additionally, members must report income received such as interest, rents, dividends, capital gains or trust income if the income in such categories exceeds \$200 per calendar year. Furthermore, transactions in real estate, stocks, bonds or

commodities exceeding \$1,000 must also be reported. Information must also be reported on travel expenses provided by non-governmental sources if such expenses aggregate more than \$250 from one source in a year.

Financial information may be required, in some instances, on the elected official's spouse. While some members of Congress believe that some of the disclosure requirements infringe upon their privacy, the rules do not require you to specify the exact amount of the income or the value of the asset. For example, income from rents, dividends, capital gains or interest can be listed within several categories such as less than a \$1,000, greater than \$1,000 but not more than \$2,500, greater than \$2,500 and not more than \$5,000, greater than \$5,000 and not more than \$15,000, etc. Moreover, real estate can be listed in categories such as valued less than \$15,000, greater than \$15,000 but not more than \$50,000, greater than \$50,000 but not more than \$100,000, etc.

The United States House of Representatives has a permanent committee, known officially as the Committee on Standards of Official Conduct and unofficially as the Ethics Committee, to oversee the implementation of the House's financial disclosure rules. The committee is comprised of five members from each political party. The committee staff, on a bipartisan basis, provides advice and counsel to members of Congress on questions involving financial disclosure and other issues relating to ethical conduct.

It is important to note that these rules are periodically reviewed by the Ethics Committee and the entire House of Representatives. Therefore, there are opportunities to revise these rules.

**STUART C. GILMAN**  
**U.S. Office of Government Ethics**

31A

**Stuart C. Gilman**  
**U.S. Office of Government Ethics**

**Financial Disclosure**

At the outset it is critically important to issue a reminder that the OGE's role is limited to the Executive Branch of the federal government. The possible differences between parliamentary and presidential systems (especially in terms of separation of powers in the latter) should be taken into account.

**CATEGORIES OF FINANCIAL DISCLOSURE**

1. Shareholdings

Under 18 U.S.C. 208, the financial conflict of interest statute, there is no de minimis. That is, any holding, no matter how small, may be deemed a conflict of interest. However, the financial disclosure rules require reporting of interests that are worth over \$1,000 or which accrued over \$200 during the reporting year. In addition, there are a variety of waiver provisions which exclude reporting of certain assets; e.g. private residence, widely diversified funds, etc. This disjuncture between reporting for financial disclosure and the coverage of the conflict of interest statute has caused some confusion in the past.

Any reported corporate security must include an identification of the company. There is not, however, any separate listing of companies in which an interest is held.

There are two systems of disclosure which OGE oversees: a public system and a confidential system. The public system - in which all forms are readily available to anyone

upon request, requires the individual to identify categories of valuation, e.g. \$1-\$1000, \$1000 - \$10000, etc. The public system has approximately 30,000 filers in the executive branch, civilian and military. There is no requirement to report the number of shares held, only the overall value of the shares. The confidential system does not require the listing of number of shares or their value.

(Discussion: Since there is no de minimis, the value of a holding is not relevant to a determination of conflict of interest. The reason why the public form requires disclosure of values is because it was mandated by Congress. Public disclosure is seen as an inherently beneficial practice, and Congress felt it appropriate to include values in those disclosures. When OGE created the confidential system, it decided that values of interests were not relevant enough to be reported.)

## 2. Outside Employment

Most outside relationships, including employment, partnerships, and positions held, must be declared.

The particulars of employment (e.g. actual position, salary/payment, and long term agreements) all must be disclosed.

## 3. Directorships

All directorships must be disclosed as well as a listing of particular companies. Past Presidential administrations have not allowed senior appointees to retain any directorships or positions with for-profit enterprises.

#### 4. Retainers

I cannot comment on legislators. In the executive branch, retainers would be scrutinized as to whether they present an actual or potential conflict of interest. They are completely banned for certain high level executive branch officials. (These officials are actually banned from receiving any outside earned income (that is, income in exchange for services) while they hold their positions.)

These would all be required to be fully disclosed.

#### 5. Consultancies

Consultancies again would be fully disclosed and would be scrutinized for conflicts of interest. They would also be banned for certain senior level executive branch officials.

#### 6. Sponsorships

I cannot comment on the legislature. In the executive branch, there are severe limits in some areas and outright prohibitions in other areas. Because these would be provided to an agency (technically) they would not be disclosed but would be subject to scrutiny by legal authorities.

#### 7. Gifts, Benefits, Hospitality

The Standards of Conduct for the executive branch say that no employee can accept a gift given by a prohibited source or given because of the employee's official position. A prohibited source is any entity that does business with or has an interest with the employee's agency. There are a number of exceptions to this general rule, including one allowing any gift up to \$20, with a \$50 per year maximum from one source. There are several other exceptions, such as coffee and tea, honorary awards (e.g. Nobel Prize), etc.

(If it is relevant, I can e-mail a copy of the Executive Branch Standards of Conduct to you.) In addition to the Standards of Conduct, a criminal statute prohibits accepting bribes.

Generally, anything of value, including waivers of fees, insurance benefits, and so on, is covered by these gift rules and could not be accepted unless it did not violate the general prohibition or fit one of the exceptions to that general prohibition. One notable exception is that anything given to an employee on the basis of an outside business relationship would be acceptable, as long as that position has nothing to do with the employee's job with the Government.

Gifts can be accepted on behalf of the agency, if the agency has statutory authority to accept gifts, but those gifts are turned over to the Government.

Employees that file financial disclosure forms must report all gifts worth over \$250, even if they are not covered by the Standards of Conduct. There are certain minor exceptions to this rule, but most gifts are reportable.

#### 8. Overseas Visits

All travel over \$250, paid for by another source, must be disclosed by the agency in a public document issued semi-annually. Official trips paid for by the U.S. Government are not disclosed.

Disclosure of trips paid for by a political party are handled by the Federal Election Commission. I am not certain what the disclosure requirements are.

## 9. Overseas Gifts and Benefits

For executive branch employees, gifts and benefits from foreign governments are governed by the Foreign Gifts Act. This is overseen by the General Services administration and the State Department. Generally, any gift up to \$225 is acceptable. Above that limit, some restrictions apply. Additionally, there are stipulations to allow the acceptance of gifts, if declining them would violation cultural norms of the country or potentially insult a host.

## 10. Land and Property

Land and property are treated like normal assets, except for one's personal residence. Any property worth over \$1,000 must be disclosed, including what the property is used for and in what city and state the property is located. A few agencies-- such as the Department of Interior-- do have more specific restrictions about employees, for example, owning lands adjacent to federal lands. These agencies require more specific disclosure.

All mortgages must be reported, except those on personal residences. Mortgages and other liabilities are reported in a section separate from the reporting of assets.

## 11. Pensions

Pensions must be declared as assets. Their underlying holdings must also be reported unless they fall under the waivers for widely diversified funds.

No distinction is made between pensions from private companies and pensions from governments, except that pensions from the U.S. Government are not reportable.

## **METHOD OF DISCLOSURE:**

1. Public financial disclosures must be filed by upon entering office, annually (each May) and then upon leaving the position. Confidential disclosures are filed upon entering a position and annually (each October).
2. They are updated annually for the previous year. Public forms are updated in May, and Confidential forms are updated in October.
3. Disclosures generally cover only that period while one is a government employee. There are no residual requirements, except for the termination report for public disclosure filers.
4. Spouses and dependent children are considered to share the holding with the filer and therefore, the filer discloses all of their assets with his or her own. A spouse is someone who is still legally married to the employee, a dependent child is a child who is financially dependent on the employee. Employees need not report the interests of spouses that maintain strictly separate financial portfolios (e.g., they file separate tax returns).
5. 30,000 are open to public inspection and are required of all senior civilian and military in the executive branch. Confidential disclosures (totaling about 290,000 last year) are used only for counseling but are available to enforcement agencies, such as the inspectors general.

## **GOVERNING FINANCIAL DISCLOSURE**

1. In the executive branch, the public disclosure is promulgated by Congress. OGE has written regulations to implement the statute. The Confidential system was authorized by executive order and implemented by OGE regulation.

2. The Office of Government Ethics, and its representative in the agencies (Designated Agency Ethics Officials), process all financial disclosures.

3. A large number of countries now have ethics committees/ commissions/offices and they all handle financial disclosure.

The Office of Government Ethics has only one political appointee, the Director. The Director is appointed by the President, with the advice and consent of the Senate. He is appointed for a five year term, not to coincide with a presidential election. All of the other staff at OGE are civil servants.

OGE was created by statute, and is an independent agency within the executive branch.

4. Financial disclosure is covered either by 18 U.S.C. 208 or by 18 U.S.C. 1001. Under 208, there is a maximum prison term of 5 years and \$750,000 fine. There are also civil remedies available. 1001 covers lying on an official government document. It has lesser penalties.

Although a variety of principles underlie the financial disclosure system (See Executive Order 12674), there are probably only two fundamental principles:

Government officials should not use their public office for unwarranted private gain.

Government officials should show impartiality in carrying out their public duties.

It is difficult to answer which disclosure should apply differently, depending on the level of the member. In trying to find a parallel between systems, it would make the most sense

to require complete public disclosure from cabinet members. Beyond this, I would trust the ideas of the members of the resource team from our legislative branch.

I believe it is critical to create an independent entity to oversee your disclosure system. I am sure Dennis Thompson will make reference to his recent book ETHICS IN CONGRESS. Thompson presents a compelling argument as to the impossibility of creating an effective, dependent committee or group to oversee this process. Independence ultimately protects everyone, the public, the member of parliament and the institution.

I absolutely believe parliament should, and probably must, create a system of financial disclosure.

**BERNARD RAIMO**  
**Counsel for the United States House of Representatives**

**Bernard Raimo**  
**Counsel for the Committee on Standards of Official Conduct**  
**United States House of Representatives**

**Parliamentary Financial Disclosure Requirements**

**Introduction**

You have asked me to comment on several issues pertaining to the development of financial disclosure requirements by the South African Parliament. My comments are, of course, informed by the peculiarities of the American governmental system, and may be of limited relevance to the South African experience.

Therefore, those providing advice on procedures and requirements of the House of Representatives which may serve as useful models for South Africa, must take into account such peculiarities. Among them are the American system of separation of legislative and executive powers, the central role of committees in our legislative process, the almost complete lack of party control over Members (in terms of both their selection as candidates and their voting in the House), the ability of junior Members to substantially influence policy and command public attention, the need for individual Members to raise large amounts of money for campaign purposes, and a two-party (rather than a multi-party) system.

**General Principles**

Generally, the aim should be to impose only those disclosure and other ethical requirements that are necessary to insure the people's trust. Since it does intrude into personal privacy and will dissuade some good people from entering government service,

financial disclosure should be as limited as necessary to serve its purpose. The stated purpose for the House of Representatives is to reveal, and thus deter, possible conflicts of interest, not to present a net worth statement. The latter, theoretically is none of the electorate's business.

Obviously, the electorate can make it its business, by withholding votes. Consequently, the extent of disclosure requirements is essentially what the market will bear, i.e. if the press and the public want more they will get it. However, the demand for more (whether increased financial disclosure or stricter ethics rules in other areas) usually is a response to revelations of corruption and/or stupid legislation and a general feeling that things aren't going right.

In the House of Representatives, the first financial disclosure requirements (in the late 1960's) consisted of limited reporting to the Ethics Committee, with very little made public. Several scandals later, the current rules call for detailed public disclosure applicable to Members and their families. The same perceptions that gave rise to expanded disclosure requirements, that legislators were cashing in on their offices, selling out to special interests, and otherwise abusing the public trust, have given rise to the rules placing limits on outside income, prohibiting certain kinds of outside employment altogether, and restricting gifts to Members.

All of which is to make the obvious point that financial disclosure and other ethics rules will differ from country to country depending on each citizenry's confidence in the honesty and effectiveness of government officials. Therefore, while transparency should be a guiding principle, stringent American type rules may be unnecessary, and even harmful, in other countries, if they serve only to drive good people away from public service, or government becomes a plaything of the rich. On the other hand, governments should not wait for scandal in order to impose needed guidelines. Such action only adds to the general cynicism and may result in the enactment of ill-considered measures.

Within this framework, a guiding principle should be to extend full disclosure requirements only to policy-makers. Those with more power and influence should be required to disclose more, with more specificity, and do it more often. Thus, within the South African context, it would be reasonable to impose full disclosure and reporting requirements on cabinet members, more limited requirements on committee chairs, and much more limited requirements on back benchers. However, other restrictions, such as limits on gifts and certain outside employment should apply to all - as the aim is to prevent financial gain that comes solely from holding office, not simply to disclose conflicts of interest.

### **Governing Body**

Although the self-policing efforts of the Senate and House Ethics Committees have been much criticized of late, I am still of the opinion that such committees are the fairest and most effective forums for disciplining Members and holding them to high ethical standards. Bear in mind that in the American system Members are always subject to civil suit and criminal prosecution. The duties of the ethics committees, on the other hand, are to interpret rules and regulations, provide guidance thereon, and, when necessary, recommend to the full House and Senate that Members be disciplined. Such discipline usually consists of reprimand, censure, or, in rare cases, expulsion. These functions, it seems to me, can best be handled by those most familiar with the unique rules, customs, idiosyncrasies, and daily business practices of the legislative body - its Members. To insert outsiders into the process risks both the independence of the legislature and the rights of the Members. The counter argument - that Members can't be trusted to judge their colleagues honestly - sounds good; but there is little concrete evidence of its validity, especially in this age of press scrutiny.

The same considerations weigh in favor of an in-house body governing a financial disclosure system - if the body will have the authority to order divestment of assets or the

withholding of a vote. If the body's role is only administrative, inside expertise is not necessary and a non-legislative group could do the job.

### **Rules or Legislation**

Whether parliamentary rules or statute should govern a financial disclosure system depends on the underlying legal system and other local custom. In the United States, financial disclosure requirements are contained in both the Rules of the House and in federal statute. Thus a Member who violates the disclosure provisions is subject to sanction by the House, a civil penalty enforced by the Department of Justice, or, in limited cases, criminal prosecution by the Department of Justice. However, only the Ethics Committee, or the House, could order divestment of assets or recusal from voting.

### **Categories of Financial Disclosure**

#### Shareholdings

The current rules of the House of Representatives require that all Members, senior staff, and candidates disclose stocks, bonds, and other securities valued at over \$1000 which are held by the filer or his or her spouse and dependent children. While the issuing authority must be identified, neither the number of shares nor the actual value thereof must be reported. However, the value of each holding must be reported according to one of six categories, ranging from "\$1000 - \$15,000" to "over \$1,000,000". The required disclosure occurs once a year, and is made public.

It is assumed that all Members, and the senior staff, have a direct influence on legislation and, therefore, should disclose financial interests which may present a conflict. However, unlike what obtains in the executive branch, where an agency ethics official can, and often does, order divestment, there is very little post-disclosure inquiry by the Ethics Committee into the actual holdings of a House Member. Generally, since a House

Member's actions can impact such a wide array of the nation's activities, and continuing recusals would, in effect, disenfranchise a constituency on a regular basis, it is left to the Member, in the first instance, to determine whether to recuse himself or herself from particular committee business or refrain from voting on the floor; and it is up to the press and the voters to apply pressure on the matter. The work of most Executive Branch officials, on the other hand, usually is confined to discrete areas so that it is relatively easy to identify conflicts and relatively painless for the individual to divest.

### Outside Employment

Current rules permit House Members and senior staff to earn not more than \$20,040 per year from outside work. In addition, compensation for serving on the Board of Directors, or as an officer of any organization, is prohibited, as is receiving compensation for providing professional services involving a fiduciary relationship (essentially, the practice of law). Thus, "retainers for professional services" are prohibited.

Consultancies, as I understand the practice to be in the U.K., that is, receiving compensation for advising a private company, union, or other organization on what is transpiring in Parliament or on how to achieve a desired result in Parliament, are clearly prohibited. On the other hand, if a Member, for example, is an expert in the restaurant business, he or she can receive compensation for providing advice thereon to private companies. The underlying principle is that a Member should not receive outside remuneration solely because of service in the House.

The prohibition on practicing law, and similar professions, is not without its opponents, as much legal work has absolutely nothing to do with legislative activity and many of the same interests that lead a person to the study of law lead also to politics. However, the weight of opinion is that the prohibition is necessary to insure that Members devote sufficient time to their congressional activities, do not receive payments intended solely to influence their official activities, and are not subject to a conflict between their

duties to the public and their fiduciary duties to their clients. In the United States, at least, it was not uncommon for a Member to be offered a lucrative partnership in a law firm solely in order to draw business to the firm, with the understanding that the Member would do little or no work.

The sources of all outside earned income must be reported on the annual Financial Disclosure Statement, as well as any agreement entered into for future employment and all positions held in outside organizations.

### Sponsorships

Members are not permitted to accept sponsorship in the form of staff and resource assistance from private sources. Such practices are expressly prohibited by both the Rules of the House and federal statute.

The prohibition applies to any private contribution of money, goods, or services to a Member to aid in the conduct of official business. While this rule seems to most observers of the House to be a reasonable attempt to prevent improper "influence peddling", it must be understood in the context of the considerable resources and staff that are provided to Members. Each Member of Congress is entitled to spend from public funds approximately \$750,000 per year on supplies, equipment, travel, and not more than 22 staffers to conduct official business. An additional allowance for franked mail is provided and House Committees have separate and equally sizable staff and expense allowances.

I assume that such largesse is not available to the average M.P. in South Africa. However, I still believe outside support should be avoided. If it is allowed, restrictions should be placed on the sources and public disclosure should be required.

## Gifts, Benefits, Hospitality

The House first restricted the gifts Members and employees could receive in 1968 with a rule prohibiting the acceptance of gifts of substantial value from anyone having an interest in legislation. In 1977, the term "substantial value" was replaced by specific monetary limits. Prohibited was the acceptance from a single source, other than a relative, during a calendar year of gifts valued at more than \$100. Gifts of personal hospitality and gifts valued at less than \$35 were not counted. The restriction continued to apply only to those with an interest in legislation. In 1987 the \$35 aggregation threshold was increased to \$50.

In 1990, the aggregation threshold was increased to \$75 and the acceptance threshold to \$200. In addition, the "interest in legislation" standard was abolished, the House Ethics Committee was empowered to waive the rule "in exceptional circumstances," and food and beverage provided for immediate consumption by an attendant host were exempted from the rule altogether.

In 1992, the current aggregation and acceptance thresholds of \$100 and \$250, respectively, were established. However, pending measures, which are expected to be adopted later in November, would reverse this direction. Under the proposed rule, Members and staff could accept gifts with a value of less than \$50, as long as all gifts from a single source in a calendar year totaled less than \$100. Gifts valued at less than \$10 would not be counted. The new, lower, limits would now apply to meals, and several current exceptions would be eliminated. Under both the old and the proposed limits, such benefits as school fees and insurance would be considered gifts, as would privately paid for travel. The latter would be permitted for short periods if directly related to official duties or if the Member substantially participated in an event sponsored by the donor.

Since the gift limit is now relatively low, and will soon be lowered even more, the annual public disclosure requirements apply only to gifts which exceed the limit, either

those received pursuant to a waiver of the rule by the Ethics Committee or those pertaining to the travel exceptions.

Unlike the restrictions pertaining to financial disclosure, outside earnings, and post-employment lobbying activities, the gift limits cover all House employees, whether or not they earn above a certain amount or otherwise hold policy making positions. As with the House wide ban on being paid to make a speech or write an article, the gift restrictions are seen as necessary to reinstall in the public the perception that their elected representatives, and those they employ, are making decisions with the public interest in mind, not the private interests of those from whom gifts were received.

The basic principle - government officials should not be influenced in their official actions by those who give them gifts -is, of course, one of universal application, and should be honored in America, South Africa, and elsewhere. However, it is not so clear that such restrictive rules as described above are necessary or wise in all countries. (Indeed, many Members of the House - all of whom are honorable people - believe the proposed rules to be unduly restrictive but feel compelled to vote for them.) I don't mean to suggest that other countries are more corrupt, or have a tradition of under the table payments, or, because they are new are less honest than others. Rather, the House rules, especially the proposed restrictions on receiving meals, may be overly burdensome and may unnecessarily interfere with basic social intercourse, wherever conducted.

### Overseas Visits

Overseas travel by Members of the House is subject to differing substantive and disclosure rules, depending on who is paying for the travel. A Member can be authorized to undertake official foreign travel (i.e. the House of Representatives pays for it) only by the Speaker of the House or by the chairs of the committees on which the Member serves. Such travel is publicly reported four times a year. A Member can also participate in

official foreign travel sponsored by the Executive Branch. It, too, must be publicly disclosed.

A Member can accept privately paid for travel if the purpose of the travel is fact-finding related to the official duties of the Member, or if the Member is substantially participating in an event sponsored by or connected with, the payer. If the cost of such travel exceeds \$250 it must be reported in the annual Financial Disclosure Statement. Travel under the auspices of a political party would be considered private travel, subject to the above rules.

A foreign government is permitted to pay a Member's travel expenses if the travel is related to official duties and the Member already present in the country, but cannot pay for the Member's transportation to that country unless the travel is undertaken pursuant to a USIA sponsored exchange program. The in-country travel expenses must be reported to the Ethics Committee within 30 days of the travel, and is disclosed publicly once a year by the State Department.

Many of the foreign travel rules are based on a particular provision in the U.S. Constitution which prohibits government officials from receiving any "gifts or emoluments" from foreign governments without the consent of Congress, a provision written over 200 years ago when fear of foreign influence was uppermost in the minds of the founders of the new country.

#### Overseas Gifts and Benefits

While on official foreign travel paid for by the United States Government, a Member may receive personal gifts or benefits from private sources only to the extent their value does not exceed the gift rule threshold, which is currently \$250. A private source may not pay for the transportation or lodging expenses of the trip, no matter

what the amount. The latter would violate a House Rule which prohibits the commingling of public and private resources.

The government of the country being visited may pay for in-country food, transportation and lodging expenses, but a Member may accept personal gifts from foreign governments only if tendered and received as a souvenir or a mark of courtesy and only if the value is less than \$200. Gifts of greater value can only be accepted if to refuse them would cause offense or embarrassment. However, such gifts are deemed to have been accepted on behalf of the United States, and must be turned over to the U.S. government within 60 days of acceptance.

#### Land and Property

On the annual Financial Disclosure Statement, a Member must disclose all property, real or personal, which is held for investment or the production of income and which is valued at more than \$1000 at the close of the reporting period. The Member's personal residence, unless it generated income, need not be disclosed. Similarly, a second home, vacation house, or other property that is held purely for recreational purposes, and is not rented out at any time, need not be reported. The location of the holdings must be disclosed with specificity, and any liability connected to the holdings must be disclosed if it exceeds \$10,000.

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**I. Reconciling The Public's Right To Know With Privacy Rights Of Elected Officials**

The overriding purpose of financial disclosure requirements, like many ethical rules, is maintaining the public's confidence in the impartiality of its elected officials. The goal must be to assure the public that official decisions are being made based on the public interest, not private financial interests.

Public confidence cannot be maintained solely through prescriptive rules, whether broad (e.g., prohibiting the use of office for personal gain) or specific (e.g., prohibiting receiving a fee for making a representation to the Parliament). The public must be satisfied that such rules are being observed. Disclosure of financial holdings allows the public to make its own judgment on whether certain actions constitute a conflict of interest.

Virtually any disclosure of personal financial information is an invasion of privacy. Thus, the question that the Subcommittee must answer is: how much disclosure is necessary to meet the goals of the ethics rules? In my view, the public has a right to all information about the personal finances of an elected official that is necessary to make a reasoned judgment about potential or actual conflicts of interest that might arise in the course of that official's duties. This principle yields different results when applied to the various types of financial dealings that MPs might have.

**A. Gifts and Travel --**

Questions about the extent of disclosure of gifts and privately-funded travel can be minimized, of course, by strictly limiting the gifts and travel that can be accepted. In my

view, there is very little justification for MPs accepting gifts from persons other than friends and family. Public service is service, not a means for self-enrichment. To the extent that gifts can be accepted, they should be fully reported. The public must be able to judge whether an elected official is abusing his or her office for personal gain. I do not know whether R500 is a relatively large or small amount, but de minimis exceptions are an invitation to abuse and present an appearance problem. They should be avoided.

Travel is a more complicated issue. Travel funded by private interests presents a serious appearance problem, no matter how worthy the purpose of the travel. On the other hand, the official duties of an MP include more than staying in one place and voting. Some travel is justified. Complete and prompt disclosure is essential so that the public can monitor the activities of an MP and decide for itself whether the travel is excessive.

#### B. Investments and Property

It is in this area that the concern over conflicts of interest is high and the privacy concerns are strongest. In general, determining the existence of a conflict of interest requires more than just knowing the type of holding, but may not require complete information down to the precise number of shares and value of a holding. Enough information must be given on rental or business property holdings to allow independent verification of value. On the other hand, I see little reason to require an MP to list the exact address of a primary residence.

Financial disclosure requirements in the U.S. Congress allow for reporting of the value of investments and property within ranges. This protects privacy to some extent, but also indicates whether a holding has a significant or minor dollar value and whether it is a significant part of a member's assets. This seems to me to be a sensible balance. The ranges should not be too broad however, and I would recommend against having an upper limit to those ranges -- in the U.S. Congress, for example, holdings worth \$1.1 million and \$20 million are both reported as "over \$1 million." There is obviously a

significant difference between those holdings that might have an impact on a conflict of interest analysis.

It is worth noting that concerns over privacy and conflicts can both be addressed through appropriately structured blind trusts. For high-level officials at least, these should be required to remove any possibility of abuse of office. Indeed, since the Subcommittee is writing on a clean slate, I would recommend at least considering the possibility of requiring all members to put their assets in blind trusts. This would eliminate the difficult questions of just what constitutes a conflict of interest when government action might affect the value of an MP's investments or property.

### C. Outside Employment, Directorships, Sponsorships

The best approach here is to sharply restrict the outside business activities of a Member. Outside employment or paid directorships create prima facie conflicts of interest. Even unpaid directorships are problematic because of the prestige such positions offer and the fiduciary duties they entail. To the extent that any such activities are permitted, complete disclosure is necessary, including amounts paid and exact duties involved. The minimal privacy interest here is nowhere near sufficient to override the public's need to know what business interests an MP might have in issues before the Parliament.

I certainly have no basis for making a recommendation on the security concerns that have led some to argue for requiring less than full disclosure in certain areas. Confidential disclosure of certain information is obviously better than no disclosure at all. But the Subcommittee should recognize that while confidential disclosure may help in a post hoc determination of whether ethical standards have been violated, it does not serve the purpose of ensuring public confidence.

## II. Legislation vs. Rules

Again, I would look at this question from the perspective of ensuring public confidence in the ethical standards of elected officials. My sense is that legislatively enacted standards will better serve the underlying purposes of the disclosure requirements than will parliamentary rules, but I really don't know enough about how a rule differs from a statute in a parliamentary system to make a firm judgment.

In any event, convincing the public that the requirements are serious is extremely important. In this arena, not only are rules without enforcement meaningless, but also rules that the public thinks will be ignored or not enforced are meaningless. Thus, enforcement is a significant issue that deserves serious attention by the Subcommittee. I have come to believe that an independent enforcement body is much better able to command public confidence. I would think that such a body might be even more necessary in a parliamentary system where party loyalty and power is even more structured than in the U.S.

In an emerging democracy, the rules that a representative body puts in place to govern the conduct of its own members will tell much about the ability of that body to command the respect and support of the people. Insisting on strong ethical standards, significant public disclosure of personal financial information, and meaningful enforcement with tough penalties, even when they might cause inconvenience to members, will send a strong positive message to the public.

Please note: The views expressed in this Advisory Opinion are my own, and not necessarily those of my organization.

**FRED WERTHEIMER**  
**Former President of Common Cause**

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**Former President of Common Cause**

**Importance of Financial Disclosure Laws**

1. Financial disclosure laws play an essential role in helping to protect the integrity of government.

In order for people to have confidence and trust in their institutions of government they must be able to conclude that their elected representatives are making decisions based on the merits and are acting to promote the best interests of the people, not to provide personal financial gain for themselves.

This is central to the relationship between constituents and their representatives in a representative democracy. Nothing breeds contempt and distrust of elected officials more than the belief among citizens that their representatives are taking actions to place money in their own pockets rather than to advance the interests of their constituents.

2. Financial disclosure laws help to insure that public office is not misused for personal financial gain.

As one of the authors of the United States Constitution, James Madison, wrote in *The Federalist papers*, " The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."

3. Financial disclosure laws have proven to be an "effectual precaution."

While there are significant problems today in the United States regarding citizens having confidence that Members of Congress are making decisions based on the merits, most of this flows from public perceptions about the improper influence of campaign contributions on legislative decisions, not from perceptions that public officials are misusing public office for their personal financial gain.

This result stems, in good part, from the fact that the public financial disclosure laws that have existed for both Congress and the Executive Branch since 1978 have been effective in protecting against government officials using their office for personal gain.

Public financial disclosure serves to protect against financial abuses by elected officials in several ways. First, when elected officials know that their financial interests have to be made public, they are far less likely to engage in improper activities to financially benefit themselves. Second, with the information available to the public, this places greater pressure on enforcement officials to address conflicts of interest problems or other forms of misuse of office by government officials for personal gain. Third, publicity about inappropriate financial activities by elected officials pressures those elected officials to take corrective action.

Public financial disclosure doesn't just serve to protect citizens, it protects the legislature and the representatives who serve in it. Absent effective ethics rules to protect the integrity of the legislature, such as effective public financial disclosure, lowest-common denominator ethics end up setting the standard for the legislature, diminishing the credibility and moral authority of all of the representatives.

In other words, if effective ethics rules are not established and enforced, then the worst ethics abusers in the legislature will end up being viewed by the public as the norm and the many legislators who are conducting themselves honorably will be viewed by the

public as no better than the abusers. The public will have no basis for knowing that honorable legislators are not engaged in the same practices as the abusers. That is why it is in the best interests of legislators and of the legislature itself to have rules that make clear that ethical abuses are not acceptable and will not be tolerated.

### **Principles For Financial Disclosure**

The principles that should guide financial disclosure flow from the two basic goals of financial disclosure-- to protect against elected officials misusing their public office for private financial gain, and to ensure that citizens can be confident that such improper activities are not occurring. This means that financial disclosure laws must protect against actual abuse of office and against the appearance of such abuse.

In order to accomplish these goals, the presumption must be in favor of public financial disclosure. This is necessary for citizens to know what is going on and to be able to make judgments about whether there are conflicts of interest or other ethical problems involved in the financial dealings of a representative.

The United States had experience with "confidential " disclosure prior to the 1978 Ethics in Government Act and it did not work. A study by the General Accounting Office of the executive branch before the 1978 Ethics Act was passed found widespread non-compliance by executive branch officials with existing conflict of interest regulations under the system of confidential disclosure. A follow up study by GAO, after public financial disclosure was enacted, found that the fact that disclosure documents were public information led to individuals being more accurate in filing out their reports, and resulted in ethics officials paying more attention to their enforcement responsibilities.

While there was strong resistance by some executive branch officials and some Members of Congress to public financial disclosure, prior to its enactment as part of the 1978 Ethics Act, on the grounds it was an invasion of privacy and would subject wealthy officials to potential harassment, this did not prove to be the case.

Most officials quickly got use to the system of public financial disclosure as one of the responsibilities of holding public office, and it has become a routine part of holding public office today in the United States.

In establishing a presumption for public financial disclosure, it is also important to recognize the privacy rights of elected officials whenever that can be done without interfering with the goals of financial disclosure. Thus the public disclosure laws governing the U.S. Congress do not require the disclosure of either income tax returns or personal net worth since this information is not necessary to protect against conflict of interest or other improper financial dealings. Instead, the Ethics Act requires that specific holdings be disclosed in broad categories of values so that the public will have knowledge of the particular interest involved and a sense of the magnitude of the holding, without knowing the exact amount.

Since financial disclosure is intended to prevent misuse of office for personal gain, an important principle here is to provide sufficient information to the public about a representative's financial holdings and outside earnings in order to be able to determine if improper conduct has occurred.

Public financial disclosure in the United States Congress is accompanied by other important ethics rules including a ban on speaking fees, restrictions on earned income for certain kinds of professional activities and an overall cap on how much earned income can be received by a representative in addition to his official salary.

In order for financial disclosure to effectively accomplish its goals, it also needs to be accompanied by guidelines for elected officials on what steps need to be taken in circumstances where their financial holdings create a potential conflict of interest with their legislative responsibilities. Possible remedies range from not voting on a matter where a conflict exists, to publicly disclosing the potential conflict at the time of a vote, to divestiture of certain holdings that may conflict with special legislative responsibilities of a representative.

### **Essential Elements In Public Disclosure**

There needs to be public disclosure of holdings, investments, earnings and other assets that might cause a conflict with a representative's legislative responsibilities. The disclosures should include specific holdings set forth in broad categories of values, not precise amounts. There should be restrictions on outside employment to ensure that a representative is not working for an employer at the expense of serving his or her constituents. There should be strict prohibitions on accepting gifts, trips and other financial favors from anyone other than family members and personal friends. There needs to be sufficient disclosure regarding immediate family members-- spouse and children-- to protect against family members becoming a way to shelter or hide a representative's financial interests.

### **Lessons from the Experiences of the United States Congress**

Perhaps the most important lesson to be learned from the experiences of the United States Congress is that it is essential to have effective oversight and enforcement of ethics laws if they are to work and accomplish their goals. No matter how good the rules are, if there isn't a common understanding among representatives that the rules will be properly interpreted and seriously enforced, the ethics rules will break down and

public distrust in the integrity of the representatives and the legislature will grow. In order to be successful, the new ethics provisions must be accompanied by a credible and effective system of enforcement.

There also needs to be a serious education effort to make sure that those covered by the rules understand how they work and what must be done in order to comply with them.

Representatives have to have a clear understanding of what is expected of them. And, citizens need to know that if their elected leaders violate the rules they will be held accountable just like other citizens are if they fail to comply with the laws that apply to them. There must be no double standard when it comes to enforcing the rules.

Another lesson from the experiences of Congress is that it is very hard for elected representatives to oversee and police their peers in Congress. This leads to the conclusion that oversight and enforcement should be carried out in a way that involves individuals independent from the legislature.

There could be, for example, an Independent Office of Ethics that was responsible for interpreting the rules and giving advisory opinions to representatives. This Office also could be responsible for examining alleged or potential violations of the rules and presenting cases it determined to be serious to an independent body of individuals to judge whether violations had occurred.

A key to establishing this kind of system would be the process for appointing the individual to head the Office of Ethics and the individuals to serve on the independent body to judge cases of potential violations. There would need to be a way of ensuring that these individuals have the highest professional qualifications, and reputations for integrity and independence, and would not be vulnerable to charges that they were engaged in partisan activities to benefit one party or another

I testified in the last Congress on ways to provide independent oversight and enforcement of congressional ethics rules and will forward a copy of this testimony to see if it might be helpful.

On the issue of whether parliament should develop legislation or parliamentary rules, my experiences with Congress strongly argues for enacting legislation.

A number of ethics provisions in Congress are currently in the form of rules, which are much easier to change than a statute. This has led to a great deal of mischief in Congress in the past, with ethics rules being quickly changed and undermined without anyone learning about until it was too late to do anything. In some cases, ethics rules that were adopted with great fanfare were actually repealed before they ever took effect because it was so easy to change the rules.

In contrast, statutes are much more difficult to change and as a result the ethics provisions for Congress that have been enacted by statute, such as the public financial disclosure requirements enacted in 1978, have remained on the books virtually intact.

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**Financial Disclosure and The Question of Privacy**

There is a tendency to attach excess significance to the word "privacy," and indeed this is apparent from a number of the position statements of the various parties. Here it might be useful to rely on the philosophical distinction between description and ascription. In plain words, the distinction reminds us that sometimes we use words to describe something in the world (description), but sometimes we use them as the label for a conclusion reached on other grounds (ascription).

When a court of appeals, for example, says that a decision of a lower court is "overruled," it is not describing a feature of the lower court decision, but is instead ascribing a result reached on grounds not contained in the word "overruled." This, I fear, is what is going on quite often with the word "privacy," where we use the word at the end of the analysis to state the outcome, but we deceive ourselves into thinking that the word itself carries more weight than is actually the case. Thus, it is quite possible that the word "privacy" does not describe very much, but is simply the word we attach (ascribe) after we have decided what we wish to allow people to keep secret. In this context, it may be better to recognize the flaws in thinking that the word "privacy" has a great deal of descriptive content, or that it is especially helpful to the analysis. Instead, we should decide what it is desirable to have disclosed, and what it is desirable (perhaps for different reasons) to allow people not to disclose. When this decision has been made, then, and only then, should we attach the word "private" to the domain of non-disclosure, or at least non-compelled disclosure.

Under this approach, we should think first of why financial disclosure is a good idea. The submissions of the various parties all appear to assume that the exclusive reason for disclosure is to expose and to deter financial impropriety, such as conflict of interest, accepting bribes, self-dealing, and the like. This is indeed important, but it is a mistake to assume that it is the only reason. The other reason, at least as important and arguably more so in a democracy, is that people in a democracy are entitled to base their votes on what they think important, and people in a democracy are entitled to know a fair amount about the people for whom they wish to vote. That someone has an honestly earned 5 million Rand, or an inherited 10 million Rand, may not bear on their proclivity to engage in dishonest acts, but may be relevant to the voters. Voters have the right to refuse to vote for rich people (or for poor people, for that matter), or to refuse to vote for people who have inherited wealth, or to refuse to vote for people who have invested in tobacco companies, etc. This in itself is not an argument for disclosure of all of this. It is only to say that it is a mistake to assume that the argument for disclosure is only or even substantially an argument based on deterring improprieties. It is most of all an argument for giving to the voters in a democracy the kind of information on which people might wish to base their votes.

To refine this further, there is a difficult question of where to draw the line between what the people in fact what to know and what, in a higher sense, we think they have the right to know. We would be reluctant to force people to disclose their religious preferences, or their grandparents' occupations, or their sexual orientation, even if many voters would find it relevant. So there appears to be a category about which we will not require disclosure (even though, in the U.S., we would certainly permit newspapers to disclose without the threat of lawsuits) even if voters would want to have the information, and a category that is a legitimate source of information, even if not all voters think it relevant. There is a very plausible argument that financial disclosure fits this latter category.

This is apart from the question of disclosure as deterrence, or disclosure as a way of identifying wrongdoing. These arguments are strong as well, although if this is the only

argument than it is true that disclosure in some sense “penalizes” the good as well as the bad, an argument that is not pertinent to the previously described voter or citizen information rationale. Still, all laws have this same characteristic. Low speed limits, designed to deter bad drivers, penalize good ones as well. Minimum voting ages penalize intelligent and involved people below that age. So although it is of some concern that disclosure to root out wrongdoing places burdens on those who are not wrongdoers, so too do most other laws designed to lessen wrongdoing.

Yet it is a concern if disclosure will lessen the likelihood of able people going into public life. It is perhaps better to think of the issue less in terms of some natural or human right to keep one’s financial dealings to one’s self, an argument that seems somewhat attenuated, and more in terms of the practicalities of deterrence in the other direction. People with substantial assets are often people with substantial abilities as well (this may be coincidence, or there may be a correlation based on some other variable, or there may even be a causal connection), and people with substantial assets usually have more reason for preferring non-disclosure than people with few assets. Some of these reasons may relate to business dealings. If you are known to be wealthy, you are in a less desirable negotiating position than might otherwise be the case. Others may be political. If you are known to be wealthy, this may be the “frame” in which people view your political activities, even if the frame is in some sense inaccurate. But whatever the reason, it is certainly likely, and the experience in many countries supports this, that compelled financial disclosure leads some people (including some honest people) who would otherwise go into public life to avoid it.

Despite this argument, however, it is probably the case that the deterrence from compelled financial disclosure is much less than the deterrence from the risk of harsh press criticism or exposure of more intimate facts. I will not deal with the latter here, but I observe only that the phenomenon of people with ability being deterred from going into public life because of legally mandated financial disclosure is probably exaggerated.

The consequence of all of this is probably to conclude that the advantages of compelled disclosure probably outweigh the disadvantages, although this balance of costs

and benefits will obviously vary with the values and empirical conditions in different countries. Still, once we recognize that the empirical claim of deterrence from public life is often exaggerated, once we recognize that the argument from information is much stronger than the argument from exposure of wrongdoing as an argument for disclosure, and once we recognize that we are not dealing with the most intimate details of a person's being, the arguments for disclosure are quite strong. If this is so, then the domain to be recognized as private, with respect to finances, is likely to be quite small in terms of the individuals who do or might hold office, although it could be quite a bit larger in terms of their relatives, etc.

If there is to be disclosure, and if the argument for it is informational, then the categories of disclosure ought to be set out in advance by legislation. Unfortunately, attempting to do so in a politically charged environment might result in decisions being made for partisan advantage, rather than for higher purposes. It might be best for parliament to create an independent commission, with an advance agreement either to accept or to reject its recommendations, but not to change it on the floor of the legislature.

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**Notes on Legislative Ethics and Financial Disclosure**

**Institutions for Enforcement of Legislative Ethics**

1. Exclusive Legislative Authority

An ethics committee, composed of an equal or proportionate number of members from all parties, conducts investigation and makes recommendation, and the whole legislature (or relevant chamber) renders the final judgment. (Examples: the U.S. Congress, some European parliaments, and some U.S. state legislatures).

Advantages:

- preserves legislative sovereignty
- enables judgments to be made by knowledgeable persons
- more likely to protect rights of members

Disadvantages:

- creates an inherent conflict of interest by having members judge each other, the institution and in effect themselves
- exposes process to partisanship and bargaining takes large amounts of time that would be better devoted to legislative business
- diminishes public confidence in the objectivity of the process

## 2. Independent (or Quasi-Independent) Commission

An outside body, composed of respected citizens (e.g. former judges, legislators, and community leaders), provides advice to members, conducts investigations, makes recommendations and issues reports. The members may be appointed by the legislature, or by some other authority. In the version proposed for the U.S., the Commission only makes a recommendation in particular cases, and the legislative chamber makes the final decision. (Examples: some U.S. state legislatures, fair campaign practices commissions in some states, proposals in several bills introduced in Congress; bodies that regulate physicians and attorneys in some U.S. states).

### Advantages:

- eliminates or reduces the inherent conflict of interest involved in having members judge each other
- reduces the likelihood of partisanship and political bargaining in individual cases
- increases the likelihood of fair and objective decisions
- allows members to spend more time on legislative business
- enhances public confidence in the process

### Disadvantages:

- weakens legislative sovereignty over discipline of members
- allows judgments to be made by people who may be less sympathetic and less informed about legislative practices
- increases concern that members rights will be violated

### 3. Exclusive Electoral Enforcement

Voters enforce ethics through the electoral process. The legislature may play no role at all in the enforcement, or may (a) formulate rules to guide voters; or (b) establish committees that issues findings of violations (e.g. disclosure) without imposing any discipline. (Examples: some state legislatures; some European parliaments; and the de facto practice of U.S. Congress in its earlier history)

#### Advantages:

- Grants voters complete control over the choice of their representative
- Reduces controversy and conflict within the legislature over particular cases
- Avoids problems of resolving disagreements about different ethical standards

#### Disadvantages:

- Denies voters any control over conduct of members from other districts, and therefore of the integrity of legislature as a whole
- Ignores misconduct of members who do not stand for election, and conduct after leaving office
- Leads to arbitrary variation in outcomes
- Produces decisions based on inadequate and distorted information
- Permits more guilty members to escape (as voters tend to ignore ethics violations in favor of other factors)

### 4. Exclusive Enforcement through the Criminal Justice System

Public prosecutors and the judicial process enforce all ethics violations, which may be (a) laws that specifically apply to public officials; or (b) only general criminal laws.

(Examples: certain provisions of U.S. executive branch ethics; some U.S. states; and some European parliaments until recently).

Advantages:

- Assigns enforcement to institutions most competent to investigate and judge misconduct fairly and efficiently
- Provides clearer rules and more definite punishments
- Reduces time spent on ethics by the legislature

Disadvantages:

- Diminishes legislative sovereignty, and gives prosecutorial authorities power to pressure
- the legislature
- Ignores wide range of offenses that are not (and should not) be crimes but that may seriously damage legislative process
- Sets low standards, implying that legislative ethics requires only that members not be criminals
- Permits members who are clearly guilty to continue to serve while the generally lengthy legal process runs its course (through all appeals)

For more extensive discussion of each of these models and some variations on them, see Dennis Thompson, *Ethics in Congress* (Brookings, 1995), ch. 6. A shorter version is Thompson, "Both Judge and Party: Why Congressional Ethics Committees are Unethical," *Brookings Review* (Fall, 1995), pp.44-48. For examples in other countries, see Congressional Research Service, *Legislative Ethics in Democratic Countries* (1994).

## Financial Disclosure

### Why Disclosure is Necessary?

- enables public (as well as colleagues and other officials) to judge to what extent members are deciding legislative questions on the merits
- discourages members from pursuing personal financial interests while in office; and discourages citizens who would pursue such interests from seeking office
- enables public and others to identify and compensate for imbalances and biases in legislative representation (e.g. over-representation of certain industries or sectors of the economy)
- provides information to identify systematic patterns of abuse and to help formulate laws and ethics rules, such as conflict of interest regulations

### Why Disclosure is not Sufficient?

- provides no means for interpreting the disclosed information, and thus permits unfair accusations
- provides no means for acting on the information, and thus increases public suspicion of members without offering any way to overcome it
- encourages the media's tendency to present superficial and sensationalistic stories (e.g. the "Ten Richest Members of Parliament")
- allows delinquent members to escape discipline even for failure to comply with disclosure rules (because voters and ethics committees rarely punish disclosure violations)
- encourages the tendency toward more complex rules and thus multiplies the opportunities for technical and inadvertent violations. (In the absence of other rules and mechanisms of ethics enforcement, the public demand for more detailed financial disclosure is likely to be greater and also more ethically justified.)
- provides no sanctions for questionable financial arrangements that should be prohibited or regulated, such as severe conflicts of interest

## The Relation of Disclosure to other Methods of Enforcement

The more independent the ethics enforcement authority is (and is seen to be), the less public disclosure is necessary. (In a system with an independent ethics commission, for example, members might publicly disclose only the types of their financial holdings, while filing more detailed information with the Commission, to be used only in specified circumstances.)

1. The more independent the enforcement authority, the less detailed and complex the disclosure rules need to be.
2. Ethics committees or commissions should use disclosure information not only or mainly to discipline individual members but also to identify and correct systematic abuses or deleterious tendencies in the legislature as a whole.
3. Ethics committees or commissions should have discretion to require more or less disclosure in particular cases, depending on the position that a member holds in the legislature (e.g. the chair of the banking committee may have to provide more detailed information about his holdings than an ordinary member)

More scope for modification of and experimentation with disclosure rules is possible if ethics committees or commissions periodically review the effectiveness of the rules. In a system of regular, required review, a legislature could begin by trying a system of minimal rules (e.g. requiring disclosure of only broad categories of holdings), and then move to more elaborate rules if the review shows they are necessary.

(For further discussion of disclosure, see Thompson, *Ethics in Congress*, pp. 137-40; and Joel L. Fleishman, "The Disclosure Model and its Limitations," in *Hastings Center Report*, Special Supplement, *Revising the United States Code of Ethics* (February 1981), pp. 15-17)

**APPENDIX I**

**The Ethics Resource Team Biographies**

## THE ETHICS RESOURCE TEAM BIOGRAPHIES OF PARTICIPANTS

### **ELIZABETH FURSE**

Congresswoman Elizabeth Furse was born in Nairobi to British parents in 1936. She was raised in South Africa. Ms. Furse began her involvement in public service at the age of 15 when she marched against apartheid with her mother, a founder of the Black Sash (a South African women's anti-apartheid group). She moved to the United States as a young woman where she became a citizen in 1972. She moved to Oregon in 1978, and from 1980 to 1986 she successfully lobbied Congress to pass legislation restoring legal status to three Oregon tribes. In 1985 she co-founded and directed the Oregon Peace Institute, an organization dedicated to teaching peace and non-violent conflict resolution. Ms. Furse was elected to Congress in November, 1992, and currently serves on the Commerce Committee and its Subcommittee on Oversight and Investigations. She lives with her husband, John Platt, in Washington County where they own and operate Helvetia Vineyards.

### **STUART GILMAN**

Stuart Gilman is currently the special assistant to the director of the United States Office of Government Ethics. In that capacity he helps to oversee the implementation of ethics provisions for civil servants and appointments in the executive branch of government. He is also an adjunct professor in the Graduate Public Policy Program at Georgetown University and the Contemporary Executive Development Program of George Washington University. Dr. Gilman has served on the faculties of the University of Richmond, Saint Louis University, and the Federal Executive Institute.

### **AMO HOUGHTON**

Amo Houghton was elected to Congress in 1987 as the Representative of New York's 31st Congressional District. He serves on the Ways and Means Committee and two of its Subcommittees (Trade and Health). He also serves on the International Relations Committee where he is the Vice-Chairman of the Africa Subcommittee. Houghton is a member of the Republican Party who espouses moderate social programs and conservative fiscal policies. He is the only former CEO of a Fortune 500 firm, Corning Glass Works, to serve in the House. He served in the U.S. Marine Corps during World War II. He is a graduate of Harvard University (B.A.) and Harvard Business School (M.B.A.).

## **SHEILA JACKSON LEE**

Sheila Jackson Lee was elected to Congress in 1994 from Houston, Texas. She is a member of the Democratic Party, and is an active participant in the Congressional Black Caucus. Ms. Lee serves on two committees covering the Judiciary and Science. She also has a keen interest in United States foreign policy with regard to Africa. Before coming to Congress, Mrs. Jackson Lee served for four years on the Houston City Council. She is a graduate of Yale University, and received her J.D. from the University of Virginia.

## **BERNARD RAIMO**

Bernard Raimo served as the Chief Counsel and Staff Director from 1991 to 1995, and remains a counsel on the Committee on Standards and Official Conduct in the United States House of Representatives. This standing committee is responsible for enforcing, developing and interpreting ethics rules for the House of Representatives and administering the House's financial disclosure requirements. As counsel, he is responsible for the initial screening of complaints against Members and staff, providing recommendations thereon to the Chair and Ranking Minority Member, and directing investigative activities. Mr. Raimo graduated from the University of Notre Dame in 1965, and received his J.D. at George Washington University in 1972. He was born in 1944 in Kansas City, Missouri.

## **FREDERICK SCHAUER**

Frederick Schauer is the Frank Stanton Professor of the First Amendment at the Kennedy School of Government (KSG). He teaches the required course on ethics for MPP students at the KSG. He is a holder of A.B. and M.B.A. degrees from Dartmouth and a J.D. from Harvard. He was a Professor of Law at the University of Michigan before coming to the Kennedy School in 1990. A specialist in constitutional law and the philosophy of law, he is the author of several books including *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. He is the co-editor of *Legal Theory*, and has been the chair of the Section on Constitutional Law at the Association of American Law Schools.

## **ROBERT L. SCHIFF**

Bob Schiff is a staff attorney and lobbyist with Public Citizen's Congress Watch. His main areas of responsibility are campaign finance reform, lobbying reform, and congressional ethics. Bob has testified before Congress and has appeared on CNN, CNBC, NewsTalk Television, the America's Talking cable network, and on numerous local television news programs and radio talk shows. Bob is a graduate of Brown University (1979) and the University of Michigan Law School (1985). Public Citizen is a national consumer advocacy organization founded in 1971 by Ralph Nader, with over 100,000 members across the country. Congress Watch is the legislative arm of Public Citizen, advocating for consumer and citizen interests on issues such as health care, international trade policy, campaign finance reform, corporate accountability, and the civil justice system.

## **DENNIS THOMPSON**

Dennis Thompson teaches at Harvard University where he is the Alfred North Whitehead Professor of Political Philosophy and the founding Director of the university's program in Ethics and the Professions. He teaches in the university's Government Department and the John F. Kennedy School of Government. His book, *Political Ethics and Public Office*, was named "the best political science publication in the field of U.S. national policy" by the American Political Science Association in 1987. He published his latest book, *Ethics in Congress: From Individual to Institutional Corruption*, in 1995 following fellowship at the Brookings Institution in Washington D.C..

## **FRED WERTHEIMER**

Fred Wertheimer has recently retired from his position as President of Common Cause, an active civic organization which promotes ethical government, campaign finance reform and other issues. As President of Common Cause, Mr. Wertheimer has been a tireless campaigner for comprehensive congressional reforms, and has built a strong organization capable of mounting a powerful grass-roots lobbying campaign.. He has testified many times in front of congressional committees, and is a nationally recognized leader of the reform movement. He has appeared on numerous television programs and is a regular political commentator.

**APPENDIX II**

**Memorandum to The Ethics Resource Team**

## Memorandum

**To: Ethics Resource Team**  
**From: Roger Berry**  
**Re: Advisory Opinions on Financial Disclosure and other ethics issues.**  
**Date: 26 October 1995**

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In preparation for the December 4, 1995 meeting of the Ethics Subcommittee, members were asked to consult their caucuses on a number of issues which are listed below. Please review these issues and refer to the section of this memo which suggests what questions you may wish to address. Your responses can be as long as you like, and please feel free to refer us to any reference materials. Responses should be submitted by November 13, 1995, but please contact me if you have any questions concerning the timing. Once again, thank you for your participation on this project.

### CATEGORIES OF FINANCIAL DISCLOSURE

During the last meeting of the Ethics Subcommittee, members were asked to review the following issues and consult their caucuses. The issues discussed below refer to a potential code of conduct for elected officials.

#### 1. Shareholdings

- What are the limits and disclosure requirements concerning shareholdings?
- Does disclosure include a listing of the specific companies?
- Does disclosure include the number and value of shares in addition to the source of shares?

#### 2. Outside Employment

- What are the limits and disclosure requirements concerning outside employment?
- Does disclosure include listing the particulars of the employment?

#### 3. Directorships

- What are the limits and disclosure requirements concerning directorships?
- Does disclosure include listing the particular companies?

#### 4. Retainers

- Can legislators accept retainers for professional services?
- What are the disclosure requirements?

#### 5. Consultancies

- What are the limits and disclosure requirements concerning consultancies?

#### 6. Sponsorships

- What are the limits concerning a legislator's freedom to accept sponsorship in the form of staff and resource assistance from outside organizations?
- What are the requirements for disclosure?

#### 7. Gifts, Benefits, Hospitality

- What are the limits on accepting gifts and hospitality?
- What are the requirements for disclosure?
- What belongs to the individual and what belongs to the government?
- What are the limits and regulations concerning benefits such as school fees, insurance, etc. which can be provided by an outside source?

#### 8. Overseas Visits

- What travel needs to be disclosed?
- If a political party pays for one of its MP's to travel abroad, does this trip need to be disclosed?
- If an MP is invited to advise political parties involved in sensitive negotiations (such as Ireland or Israel), does this trip need to be disclosed even though there are issues of "quiet diplomacy"?

## 9. Overseas Gifts and Benefits

- What gifts and benefits may be accepted during official overseas travel?
- What are the disclosure requirements?

## 10. Land and Property

- What are the disclosure requirements concerning land and property holdings?
- How specific is the disclosure? Does disclosure include divulging the exact location of the holdings, the area of the holdings, etc.?
- Does disclosure include the value and debt involved in the holding? How are value and debt calculated for purposes of disclosure?

## 11. Pensions

- What are the limits and disclosure requirements concerning pensions?
- Are there different requirements for public (government pensions provided to elected officials) and private pensions?

## METHOD OF DISCLOSURE

During the subcommittee meeting, the Speaker also suggested that members should consider some further issues concerning the method of filing disclosures. The following questions were raised.

1. When must financial disclosures be filed?

2. How often must financial disclosures be updated?

- These requirements will probably differ between categories.

3. What is the period covered by disclosure requirements?

- Is the period the time of service, or does it extend to cover a period following the termination of service?

4. Do financial disclosure requirements cover spouses and dependent children?

- How are spouses and dependent children defined?

5. Are financial disclosures open to public inspection or are they confidential?

- Requirements could differ depending on the category of disclosure.

### **GOVERNING FINANCIAL DISCLOSURE**

After the subcommittee meeting, Speaker Ginwala suggested several further questions which she would like to have addressed before the next meeting on December 4.

1. Are the rules covering financial disclosure promulgated through legislation or through parliamentary rules?

2. What body processes financial disclosures?

3. What countries have Ethics Committees and do they handle financial disclosures?

- How are the Ethics Committees Constituted? Is it constituted by law or parliamentary rule? Is it a parliamentary committee or an independent committee?
- Who belongs to the Ethics Committee?

4. What sanctions are there for offenses concerning financial disclosure?

### **RESOURCE TEAM SUGGESTED ASSIGNMENTS**

The following suggested assignments should help guide your responses to this advisory request. You are free to alter your area of discussion and overlap between respondents is indeed desirable as we would like to give the subcommittee a comparison of different ways of addressing these issues. If you would like to alter the focus of your response please contact Roger Berry via email. As much as possible, write your responses as an advisory opinion, and where possible suggest different options and examples.

Congresswoman Elizabeth Furse  
Congressman Amo Houghton  
Congresswoman Sheila Jackson Lee

As elected members of Congress how do you view financial disclosure rules? How do you define the purpose of those rules? Would you recommend any changes to the current rules governing financial disclosure in the United States Congress? Do you feel that financial disclosure rules unduly infringe on your privacy? If so, how? Finally, should an independent body or a committee of the house oversee the implementation of ethics rules such as those governing financial disclosure?

Stuart Gilman  
Bernard Raimo

Taking the categories of financial disclosure listed above, please discuss your opinion on what principles should guide the debate in the ethics subcommittee and what issues should be considered for each category? In a parliamentary system such as South Africa's, should the rules addressing financial disclosure apply equally to all members whether they are in the cabinet, a committee chair or are simply a back-bencher? What recommendations do you have concerning the governing body which should oversee the implementation of ethics rules such as those covering financial disclosure? Should parliament develop legislation or parliamentary rules to govern financial disclosure?

Robert L. Schiff  
Fred Wertheimer

As representatives of nongovernmental, public interest organizations concerned with Congressional ethics, could you please describe the importance of financial disclosure laws in developing legitimacy for a legislative institution. What principles do you believe should guide the discussions concerning financial disclosure? What are the essential elements to include in public disclosure? How do you think members of the ethics subcommittee can learn from the successes and failures in the United States Congress concerning these issues?

Dennis Thompson

Please discuss the options for creating a body to govern the implementation of ethics provisions. What examples would be worthy for the subcommittee to consider? What are the benefits and drawbacks to having a Congressional committee versus an independent body? What principles do you believe should guide the subcommittee's work on financial disclosure? Should parliament develop legislation or parliamentary rules to govern financial disclosure?

Frederick Schauer

Please discuss the impact of financial disclosure laws on the privacy of elected officials? How are these intrusions of privacy justified? Concerning financial disclosure, how does one define limits to the intrusion of privacy for elected officials? Should parliament develop legislation or parliamentary rules to govern financial disclosure?

**APPENDIX III**

**U.S. Laws on Integrity and Public Ethics**

**By**

**Stuart Gilman**

# Explanatory Paper Relating to U.S. Laws on Integrity and Public Ethics

Stuart Gilman

## I. Introduction.

This paper provides an overview of ethics programs in the public sector of the United States. It discusses the Federal Government ethics community, including the U.S. Office of Government Ethics (OGE) and other agencies and entities within the executive branch of the Federal Government that have policy and program responsibility in the area of Government ethics, integrity and accountability. The paper discusses the authority and programs of the Office of Government Ethics in some detail. The paper then presents information on State and local government ethics programs and on the ethics codes of professional associations which have significant membership employed in the public sector.

## II. Basic Principles.

Government ethics regulation in the United States rests upon certain fundamental principles. First and foremost is the central concept that public office is a public trust. This principle requires Government officials and employees to place loyalty to the Constitution above agency interests, personal benefits and private gain. Closely related to this is the principle that employees shall act impartially and not give preferential treatment to any private organization or individual.

These principles are deeply ingrained in the concept of democracy and in constitutional values of due process and fundamental fairness. For that reason agencies charged with ethics responsibilities in the United States have the dual responsibility of preventing misconduct on the part of employees as well as protecting the integrity of the Government.

Government authority in the U.S. is derived from the consent of the governed and therefore, Government officials, whether elected or appointed, are ultimately accountable to the citizenry. The paramount duty of Government officials is to serve the public interest.

## III. The Federal System.

Distinct systems of ethics laws and regulations exist at the Federal, State and local government levels. At the Federal level, for example, laws and regulations apply in such areas as financial disclosure, conflict of interest, employee conduct, and fraud and mismanagement of Federal programs. Each of the States also has its own statutes and regulations, covering many or all of these areas, that apply within its jurisdiction. In addition, many local government bodies have regulations, ordinances or policies that

address issues of ethics and accountability at the local level.

At the Federal level, in a number of areas, separate legal requirements apply to, and are independently administered by, each of the three branches of Government: legislative, judicial and executive. In the legislative branch, for example, each of the Houses of the Congress has established its own rules of conduct for Members and staff which are administered by its own committees. Ethics matters fall within the scope of the Select Committee on Ethics in the Senate and within the Committee on Standards of Conduct in the House of Representatives. Similarly, in the judicial branch, ethics matters such as the financial disclosure system, are administered by the Judicial Conference of the United States. In the executive branch, the Office of Government Ethics is responsible for providing overall direction for the individually administered ethics programs of the Federal departments and agencies.

#### IV. Federal Agencies and Officials With Ethics Responsibilities.

The concept of "Government ethics" has a very broad scope in the U.S.; no single office or agency has jurisdiction over the entire array of laws and regulations on ethics and accountability. Accordingly, several agencies have responsibility for maintaining Government ethics, accountability and employee discipline, either at the policy or the programmatic level.

Of the many Federal agencies in the U.S. which have responsibilities for ethics matters, three have a central role and deserve to be highlighted here:

1. The United States Office of Government Ethics (OGE)\* was created to oversee the enforcement of the conflict of interest statutes and to create and enforce standards of conduct for Federal employees. (Much of the rest of this document will deal with the roles and functions of this critical agency.)
2. The Office of Special Counsel (OSC) was created to protect Federal employees, including "whistle-blowers," in the Federal system as well as to enforce restrictions on political activity by Government employees. "Whistle-blowing" is the activity of reporting waste, fraud and abuse either inside or outside an agency. OSC protects employees from reprisals and ensures they are not punished for reporting illegal or improper activities. (Documentation attached includes the Whistleblower Protection Act of 1989 {PL-101-12} and Re-authorization of OSC in 1994 which expands its responsibilities.)
3. The Federal Election Commission (FEC) was created to

oversee and ensure the fairness and properness of elections at the Federal, State and local levels in the United States.

In addition to these three agencies, there are several other entities which have responsibilities that normally fall under the category of Government ethics, including: the Executive Office of the President, the U.S. Department of Justice, Inspectors General, the Merit Systems Protection Board, General Services Administration, Office of Personnel Management, and the General Accounting Office. In some areas, responsibility may overlap to some extent. (For a more detailed account of the functions of these agencies, refer to Appendix I.)

#### V. OGE and the Federal Ethics Community.

The Office of Government Ethics is administered by a Director who is appointed by the President, with the advice and consent of the Senate, for a 5-year term. OGE provides overall policy leadership and direction for the ethics program in the executive branch.

The executive branch ethics program is decentralized, with each department or agency having the responsibility for the management of its own ethics program. That responsibility rests with the head of each agency who, in turn, by statute must delegate that authority to a Designated Agency Ethics Official (DAEO)\* who is responsible for the day-to-day, on-site management of the agency's ethics program. The DAEO, in turn, is held accountable for his or her program by the Director of OGE.

Ethics program management by the DAEO and other delegated ethics officials includes giving advice and providing guidance on potential or actual conflicts of interest between an employee's official duties and his or her personal and financial interests, the standards of ethical conduct, financial disclosure, post-employment restrictions and other matters. In addition, DAEOs are responsible for providing ethics training and education to their employees regarding the criminal statutes and the standards of ethical conduct, for assisting in individual employee disciplinary actions, and for implementing and maintaining their agency's public and confidential financial disclosure systems.

OGE maintains a close liaison with the DAEOs and other ethics officials at approximately 125 agency ethics offices throughout the executive branch.

#### VI. OGE Programs, Responsibilities and Activities.

## A. Code of Ethical Conduct.

In 1989, the President of the United States updated principles of ethical conduct for employees of the executive branch. Not only do these principles provide general guidance for public servants, but they were also used as a basis for issuing detailed regulations provided in the Standards of Ethical Conduct for Employees of the Executive Branch. (A Code of Ethics is enclosed in your information packet.)

## B. Transparency: The Use of Financial Disclosure to Ensure Public Confidence.

### 1. Public Financial Disclosure.

OGE has general oversight of the public financial disclosure system within the executive branch. The theory of public financial disclosure is rooted in post-Watergate concepts of "Government in the Sunshine," which aims to promote public confidence in the integrity of Government officials. Since 1979, senior executive branch employees have been required to disclose, in a public system, their personal financial interests to demonstrate in part, that they are able to perform their duties without finding themselves in a potential or real conflict of interest which could compromise the public's confidence and trust. Some of the more noteworthy features of the public financial disclosure system is its broad scope and the availability of reports to the general public. (A copy of the public financial disclosure form, the SF 278, is enclosed in your information packet.)

Under U.S. law, there is broad coverage of high-level officers and employees under the public disclosure system. In the executive branch this includes: (1) the President; (2) the Vice President; (3) executive branch employees classified above GS-15 including the Senior Executive Service and certain high-ranking uniformed officers; (4) administrative law judges; (5) certain employees in confidential or policy-making positions; (6) high-ranking postal officials and employees; (7) the Director of the Office of Government Ethics and each Designated Agency Ethics Official; and (8) certain civilian employees in the Executive Office of the President who hold a commission of appointment from the President and who are not otherwise covered.

### 2. Confidential Financial Disclosure.

OGE also oversees the uniform confidential financial disclosure system within the executive branch. Similar to the public financial disclosure system, the confidential financial disclosure system also ensures that other, less senior executive branch employees, whose Government duties involve significant discretion in certain sensitive areas, report their financial holdings and outside business activities to their employing agencies. This process facilitates the agency review of possible conflicts of interest, assists the agency in administering its ethics program, and assists in counseling employees to avoid conflicts of interest. (A copy of the confidential financial

disclosure form, the SF 450, is enclosed in your information packet.)

### 3. Resolving Financial Conflicts of Interest.

If an ethics official finds, from reviewing an employee's financial disclosure report, that an employee has a potential or actual conflict of interest, the conflict may be resolved using one of several remedies, including resignation, recusal, waiver, divestiture, and blind trust:

- Resignation from a position may be required if an individual's position in a non-Federal entity could result in a conflict of interest or the appearance of a conflict of interest with his Federal duties.
- Recusal or disqualification from participation in a particular matter may be necessary in an instance where the individual holds certain assets that may conflict with his official responsibilities.
- Waiver may be granted which allows an employee to continue to participate in a particular matter if the ethics official determines that the financial interest is not so great to affect the integrity of a Government employee's services.
- Divestiture may be required where none of the above solutions will resolve an employee's conflicting financial interests. Divestiture requires that the individual sell his conflicting financial interest.
- Blind trust may be established if an individual has holdings of such a nature or magnitude that they would frequently present potential financial conflicts.

#### C. Nominee Clearance Process.

OGE participates in the process of clearance of Presidential nominees to Senate-confirmed positions. Prior to the announcement of a nominee's name, there is an informal review process of the draft financial disclosure report that is undertaken by the White House Counsel's Office, by the agency where the nominee will serve, and by OGE to assess the report for any potential conflicts and to determine how they should be resolved.

When a nominee is formally nominated by the President, the nominee's financial disclosure report is submitted to OGE for its formal review and certification. Only when OGE has transmitted the report and its clearance letter to the appropriate committee of the Senate, will the Senate hold the nominee's confirmation hearing.

#### D. Regulatory Authority and Consultation and Guidance.

OGE has responsibility for issuing executive branchwide regulations in a number of areas including rules governing conflicts of interest, post employment, standards of conduct, public and confidential financial disclosure systems and honoraria.

OGE provides interpretive guidance on conflict of interest laws, standards of conduct, post employment and financial disclosure. OGE issues both formal advisory opinions and informal letter opinions, as well as policy memoranda. OGE also regularly consults with agency ethics officials on individual cases.

#### E. Education and Training.

Each executive branch agency is required to maintain a program of ethics training to ensure that employees are aware of and understand ethics requirements. OGE provides leadership for agency training efforts by conducting workshops in Washington, DC and throughout the United States for ethics officials. OGE also supports agency training programs by developing training and educational materials such as pamphlets, a computer-based ethics game, an interactive video game, and single-issue videotapes.

As an example of some of these training materials we have attached three separate pamphlets, each targeted at employees with specific levels of responsibility and experience.

#### F. Enforcement.

OGE is responsible for reviewing agency programs to determine compliance with statutory and regulatory requirements. This monitoring responsibility is one means of assuring that programs are operated at a quality level. OGE management analysts reviewing agency programs focus on structure and staffing, public and confidential financial disclosure systems, ethics education and training, and counseling and advice. OGE has the authority to order corrective action with respect to agency programs and may recommend that an agency take certain disciplinary action in the case of individual employees. However, because agencies almost always respond positively to OGE recommendations regarding their ethics programs, it has rarely been necessary to order corrective action on the part of agencies.

### VII. Application of U.S. Ethics Laws.

#### A. Areas Covered by Ethics Laws.

Some areas covered by ethics laws and regulations include actual and potential conflicts of interest, inappropriate use of confidential information, the acceptance of gifts, misuse of one's position, outside employment, and post employment.

##### 1. Actual Conflict of Interest. The financial

interests of a Federal employee's spouse, minor children, general partner, or organization in which the Federal employee is serving as officer, director, trustee, general partner, or employee are also imputed to the Federal employee and are therefore disqualifying interests. In addition, the interest of any person or organization with whom the Federal employee is negotiating or has an arrangement concerning prospective employment is also treated as a disqualifying interest of the Federal employee.

2. Appearance of Conflict of Interest. Under the general appearance standard contained in the Standards of Conduct issued by OGE, employees are directed to avoid any actions creating the appearance that they are violating the law or the ethics standards set forth in the rule. An appearance of a conflict would be judged "from the perspective of a reasonable person with knowledge of the relevant facts." OGE has also promulgated regulations that are intended to ensure that employees take appropriate steps to avoid an appearance of loss of impartiality in the performance of official duties. These regulations establish procedures for dealing with such situations.

3. Inappropriate Use of Confidential Information. Federal ethics regulations address a form of "insider trading," that is, the use of nonpublic confidential Government information to benefit a Government employee's own personal financial interest.

4. Acceptance of Gifts. A gift includes almost anything of monetary value. A Federal employee of the executive branch may not solicit or accept a gift that is given because of the employee's official position or accept a gift that is offered by a person or organization whose interests could be affected by the employee's official actions. The gifts rules exclude certain items, for example, a cup of coffee, from the definition of gift and provide for a number of exceptions, for example, honorary awards such as the Nobel Prize, from the prohibition.

5. Misuse of Position. Another issue concerns the use of official position to benefit an official, or perhaps a business partner, relative or friend of an official.

6. Outside Employment. Ethical issues and concerns often arise whenever a Government official continues to practice his or her former occupation or otherwise to engage in outside employment while holding public office. There is a great potential for conflict when an official acts in an official capacity in a

matter that could have an effect upon the official's private business or professional interests.

7. Post employment. U.S. law addresses a number of concerns that may arise after a public official or employee leaves his or her office or position and becomes involved in matters in which the Government has an interest.

Generally, under U.S. law, no Governmentwide prohibition would restrict employment with any particular employer once a Federal employee leaves the Government. U.S. post-employment statutes do, however, restrict the matters on which a person may act after they have left Government service. Former Government employees are permanently barred from "switching sides," i.e., representing anyone in a particular matter involving specific parties in which the United States has a direct and substantial interest and in which the former employee participated personally and substantially as a Government official. Depending on a Government official's level of responsibility, other post-employment restrictions may apply.

The Office of Government Ethics has issued regulations that implement the post-employment statutes. However, in keeping with the decentralized system of administration of the ethics program of the executive branch, it is the individual agencies and departments that, in the first instance, interpret and advise on post-employment questions. The agencies are also responsible for administrative enforcement of post-employment rules by holding proceedings and imposing sanctions.

#### B. Criminal and Noncriminal Penalties for Ethics Violations.

Criminal offenses of ethics laws are treated differently from noncriminal offenses. Penalties for criminal offenses include fines, imprisonment or both. These penalties are specifically defined in the U.S. Code and are administered by the Department of Justice. In addition to the criminal penalties, agencies may also impose disciplinary action at their discretion for employees who violate the ethics laws. Penalties for noncriminal violations, such as violations of the standards of conduct, are generally determined by the official's employing agency. Penalties for noncriminal violations may include a verbal or written reprimand, leave without pay, a reduction in pay, or dismissal of the employee.

### VIII. State and Local Government Ethics Regulation.

Because of the decentralized nature of the United States Government, each State and local jurisdiction has the authority to create (or not create) ethics agencies and ethics systems. For that reason, there is no single pattern to ethics programs below the Federal level.

There is a total of 45 ethics commissions or agencies at the State level and 19 commissions or agencies at the local level. By local level commission, we mean those created at the local level, not mandated at the State level. There are at least two states which mandate ethics commissions in each county in the state.

The activities of these commissions also vary widely. Each State has its own laws and regulations governing the ethics of their own state employees. Some have conflict of interest and standards of conduct laws while others focus only on ethics as it relates to elections. Some States do both. This same variation occurs at the local level in the United States.

The Council of Government Ethics Laws, which has members from State, local and Provincial governments in the United States and Canada, is the one professional association for all of the ethics commissions at the State and local levels. It has an annual meeting and provides consulting when requested.

#### IX. Professional Associations, Codes and Public Service.

The bureaucracy at the Federal level is comprised of individuals who are often professionals in technical fields. For this reason, it is worth mentioning that most of these professions have their own ethics codes which are enforceable by their Associations, and have an impact on civil servants.

Some of the better known professional associations are the American Bar Association (attorneys) and the American Medical Association (physicians). These organizations not only have codes of ethics but also debarment procedures. Association debarment can have serious consequences. If a lawyer is removed from the bar, or if a physician loses his or her license to practice, he or she is also likely to lose his or her Federal job.

A variation on this comes from the International City and County Managers Association. This association has a code of ethics and an active enforcement entity. It can debar both city managers who violate the ethics code as well as prevent cities or counties which violate the code from employing city managers.

The ethics code of the American Society of Public Administration represents a third type of professional code which impacts public employees in the United States. This code is designed not necessarily for enforcement but for education. It is used to train and educate those in public administration.

#### X. Conclusion.

One of the core concepts of modern ethics laws and regulations in the United States has been the principle of financial disclosure as a mechanism for dealing with potential conflicts of interest and ensuring the integrity of governmental processes. This principle is embodied in the Ethics in Government Act of 1978 which requires public financial disclosure by high-ranking Government officials

and employees. Disclosure is not an end in itself but is a tool for identifying a potential conflict of interest and applying an appropriate remedy. A confidential financial disclosure system also embodies this principle in the form of disclosure of financial interests to the employee's agency although not to the general public.

A second core concept of modern U.S. ethics regulation has been the establishment of a uniform set of standards of conduct for the executive branch to ensure accountability of public officials. Although a model set of standards of conduct for the executive branch had been in existence since the 1960's pursuant to an Executive Order 11222, a single, comprehensive set of standards applicable to all employees of the executive branch became effective in 1993. The goal of these regulations, developed and issued by the Office of Government Ethics pursuant to Executive Order 12674, is to ensure that the highest ethical standards will be observed by U.S. executive branch employees in carrying out official duties within a regulatory framework that is objective, reasonable and enforceable.

## Appendix I

### Related Ethics Offices

#### 1. The Executive Office of the President.

A number of offices and entities within the Executive Office of the President have ethics-related responsibilities. The White House Office, together with OGE, is involved in the process of clearing Presidential nominees to Senate-confirmed positions, as well as in other ethics matters. Two interagency groups located within the Office of Management and Budget (OMB) are charged with promoting integrity and effectiveness in Federal programs. These groups are the President's Council on Integrity and Efficiency (PCIE) and the Executive Council on Integrity and Efficiency (ECIE). Also located within OMB is the Office of Federal Procurement Policy (OFPP) which has responsibility for providing overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. OFPP plays a key role in formulating the uniform Federal procurement regulations that are issued by the Federal Acquisition Regulatory Council.

#### 2. The Department of Justice.

The responsibility for bringing both criminal and civil actions to enforce the Federal conflict of interest statutes resides with the U.S. Department of Justice and the Offices of the United States Attorneys. OGE, as are all agencies, is obligated by statute to refer to the Justice Department cases that may involve possible violation of the criminal conflicts statutes. OGE also consults with the Office of Legal Counsel (OLC) in the Department in connection with the issuance of OGE regulations. OGE regularly confers with OLC on issues of interpretation of the conflict of interest statutes when it issues informal advisory letters. Finally, the Department of Justice represents OGE in connection with any litigation that may arise out of the statutes and regulations which OGE administers.

#### 3. Inspectors General.

The investigation of fraud, waste and mismanagement is generally conducted by an agency Inspector General pursuant to the authority of the Inspector General Act of 1978. Most agencies have an Inspector General either by statute or by the agency's own administrative determination. An Inspector General may investigate allegations of violations of ethics rules and laws as well as other Federal statutes and regulations. Where it is necessary and appropriate, OGE customarily refers allegations of ethics violations to an agency ethics official with a request that the ethics official ask the Inspector General of the agency to look into the matter. On occasion, OGE may refer a matter directly to the office of an Inspector General of an agency.

#### 4. Merit Systems Protection Board.

In keeping with a decentralized ethics program in the executive branch, it is the individual agency that initially reviews allegations of violations of ethics rules. As noted above, allegations of criminal misconduct must be referred to the Department of Justice. On the other hand, allegations of violations of administrative rules are handled by the agency. It is up to the individual agency initially to determine the appropriate administrative sanction. However, an employee may appeal an adverse action to the Merit Systems Protection Board (MSPB). MSPB administrative decisions establish authoritative precedent regarding the appropriate disciplinary sanction for violations of administrative rules, including violations of the standards of conduct.

#### 5. Office of Special Counsel.

Regulation of political activity on the part of Federal employees is carried out by the Office of Special Counsel (OSC). OSC investigates and rules on allegations that employees have violated restrictions on political activity. In addition, OSC investigates cases of reprisal for "whistle-blowing" and other prohibited personnel practices.

#### 6. General Services Administration.

The General Services Administration establishes policy for and manages Government property and records. It has

responsibility for regulations on the proper use of Government property, equipment and vehicles. GSA consults with OGE on regulations issued by GSA on the acceptance by agencies of gifts of travel. Agency reports regarding the use of travel reimbursement authority are filed with the Office of Government Ethics.

#### 7. Office of Personnel Management.

The Office of Personnel Management (OPM) has general responsibility for Federal personnel law throughout the executive branch. OPM has responsibility for certain conduct-related areas such as nepotism and gambling.

#### 8. Federal Elections Commission.

In the United States, the Federal election campaign process is subject to regulation by the Federal Election Commission (FEC). The FEC is an independent agency that administers and enforces the Federal Election Campaign Act of 1971, as amended, and the Revenue Act. The FEC oversees the public financing of Presidential elections, provides for public disclosure of campaign finance activities, and administers the law with respect to limits and prohibitions on contributions and expenditures made to influence Federal elections, i.e., the Presidency, the U.S. Senate, and the U.S. House of Representatives. In addition, at the State level, each of the states has enacted its own State election laws.

#### 9. General Accounting Office.

Finally, one agency that is not in the executive branch, but which has a significant impact on ethics matters within the executive branch is the General Accounting Office. This investigating and auditing arm of the Congress issues opinions by the Comptroller General which deal with a wide range of ethics-related subjects including frequent flyer miles, appropriations law and various fiscal matters. GAO performs audits of Federal programs and issues reports on its findings and recommendations.

## Appendix II

### Ethics-Related Definitions with Legal Citations

**Actual Conflict of Interest:** See 18 U.S.C. 208. In addition to a Federal employee's own personal financial interests, the financial interests of a Federal employee's spouse, minor children, general partner, or organization in which the Federal employee is serving as officer, director, trustee, general partner, or employee are imputed to the Federal employee and are also disqualifying interests.

**Appearance of Conflict of Interest:** See 5 C.F.R. part 2635, subpart E. Under the general appearance standard contained in the Standards of Conduct issued by OGE, employees are directed to avoid any actions creating the appearance that they are violating the law or the ethics standards set forth in the rule. Specific impartiality standards are set forth in subpart E.

**Blind Trust:** See 5 C.F.R. part 2634, subpart D. A qualified blind trust is a trust in which the filer of the financial report confers upon an independent trustee the sole responsibility to administer and manage the trust assets without the participation by or the knowledge of any interested party.

**Confidential Financial Disclosure:** See 5 C.F.R. part 2634, subpart I. This regulation is designed to complement the public reporting system established by title I of the Ethics in Government Act. The reports provided for by this section contain sensitive commercial and financial information and are not made available to the public.

**Confidential Information:** See 5 C.F.R. 2635.703. An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

**Designated Agency Ethics Official (DAEO):** See 5 C.F.R. 2638.203. Each agency has a designated agency ethics official who is the officer or employee designated by the head of the agency to administer the provisions of the ethics program pursuant to title II of the Ethics in Government Act. The DAEO acts as a liaison with the Office of Government Ethics.

**Disqualification:** See 5 C.F.R. 2635.402(c). Unless an employee is authorized to participate in the particular matter through a waiver or has divested of the conflicting interest, the employee must disqualify by not participating in the particular matter in which, to the employee's knowledge, the employee or a person whose interests are imputed to the employee has a financial interest.

**Divestiture:** See 5 C.F.R. 2635.402(e) and 5 C.F.R. part 2634, subpart J. An employee may voluntarily sell or may be required to sell an interest if the continued holding of that interest is prohibited by statute or regulation or if a substantial conflict exists between the financial interest and the employee's duties.

**Education and Training:** See 5 C.F.R. part 2638, subpart G. Each executive branch agency shall maintain a program of ethics training designed to ensure that all of its employees are aware of the Federal conflict of interest statutes and principles of ethical conduct.

**Enforcement:** See 5 C.F.R. part 2634, subpart G; 5 C.F.R. 2638, subparts D-E. The Director of the Office of Government Ethics has authority under subsections 402(b)(9) and 402(f)(2) of the Act to order corrective and remedial action with respect to individual employees to bring about compliance with applicable ethics provisions. Enforcement duties are divided among the Department of Justice, Inspectors General, executive branch agencies and the Office of Government Ethics.

**Ethics in Government Act of 1978:** The Ethics in Government Act of 1978 was signed into law on October 26, 1978, as Public Law 95-521, and was amended by the Ethics Reform Act of 1989, Public Law 101-194, as amended. The purpose of the Act, as amended, is to preserve and promote public confidence in the integrity of Federal officials through financial disclosure, post-government employment restrictions, and independent investigations of alleged wrongdoing by Government officials. Title I of the Act provides for financial disclosure by designated officials and employees of the executive branch. Title IV of the Act establishes the Office of Government Ethics to provide overall direction of executive branch policies relating to conflicts of interest.

**Executive Order 12674, modified by Executive Order 12731:** The Executive Order contains the Principles of Ethical Conduct which establish the basis for the Standards of Ethical Conduct located at 5 C.F.R. part 2635. OGE's authority to write these Standards, as

well as other regulations, which interpret criminal statutes found at 18 U.S.C. 207, 208 and 209, is based upon this Executive Order.

**Formal Advisory Opinions:** See 5 C.F.R. part 2638, subpart C. The Director of the Office of Government Ethics has the authority and responsibility to render formal advisory opinions pursuant to Section 402(b)(8) of the Act. This service is available to any person who has a question about a matter over which the Office of Government Ethics has jurisdiction.

**Gifts:** See 5 C.F.R. part 2635, subpart B. This subpart contains standards that prohibit an employee from soliciting or accepting any gift from a prohibited source or any gift given because of the employee's official position unless the item is excluded from the definition of a gift or falls within one of the exceptions set forth in this subpart. See also, 5 C.F.R. part 2635, subpart C (Gifts Between Employees).

**Informal Advisory Opinions:** The advisory letters and memoranda are edited versions of selected letters written by OGE in response to requests for guidance in situations not meeting the test of 5 C.F.R. part 2638.303 for formal advisory opinions. Also included as advisory letters in this part are selected memoranda to the Designated Agency Ethics Officials, General Counsels, and Inspectors General on specific issues frequently faced by ethics officials. These letters and memoranda contain OGE's analysis of the provisions of Executive Order 12674, the implementing regulations at 5 C.F.R. part 2635, and the criminal conflict of interest statutes, 18 U.S.C. 202-209, applicable to the specific fact patterns presented.

**Misuse of Position:** See 5 C.F.R. part 2635, subpart G. An employee shall not use his public office for his own private gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the employee is an officer or member, and persons with whom the employee has or seeks employment or business relations.

**Office of Government Ethics (OGE):** See 5 C.F.R. part 2638 for Office of Government Ethics and Executive Agency Ethics Program Responsibilities. The Office of Government Ethics, previously part of the Office of Personnel Management, was established as a

separate executive agency on October 1, 1989, pursuant to Public Law No. 100-598. See the Ethics in Government Act of 1978, as amended (5 U.S.C. app. 401).

Outside Employment: See 5 C.F.R. 2635.802-2635.804. Ethical issues and concerns often arise whenever a Government official continues to practice his or her former occupation or otherwise to engage in outside employment while holding public office.

Post-employment: See 18 U.S.C. 207 and 5 C.F.R. part 2637 and part 2641. Post-employment restrictions bar certain representational and other activities by former Government employees before the Government.

Public Financial Disclosure: See 5 C.F.R. part 2634. This regulation implements title I of the Ethics in Government Act and section 201(d) of Executive Order 12674 with respect to executive branch employees, by setting forth more specifically the uniform procedures and requirements for financial disclosure.

Recusal: See 5 C.F.R. 2635.402(c). Unless an employee is authorized to participate in the particular matter through a waiver or has divested himself of the conflicting interest, he must disqualify by not participating in the particular matter in which to his knowledge, he or a person whose interests are imputed to him has a financial interest.

Standards of Conduct: See 5 C.F.R. part 2635. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws, and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

Waiver: See 5 C.F.R. part 2635, subpart D. An employee who would otherwise be disqualified by 18 U.S.C. 208(a) may be permitted to participate in a particular matter where the otherwise disqualifying financial interest is the subject of a regulatory or individual waiver.

**APPENDIX IV**

**Tribunals of Legislative Ethics**

**Excerpt from:**

**“Ethics in Congress: From Individual to Institutional Corruption”**

**By Dennis Thompson**

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## Tribunals of Legislative Ethics

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

While insisting that he was only "being a bit of a Devil's advocate," Representative Lee Hamilton in testimony before the Joint Committee on the Organization of Congress exposed the conflict of interest at the heart of efforts to enforce legislative ethics.<sup>1</sup> The Constitution assigns Congress the responsibility for disciplining its own members.<sup>2</sup> Yet principles of legislative ethics cast suspicion on any process in which members discipline themselves. How can ethics committees claim to judge an individual conflict of interest when they themselves stand in a position of institutional conflict of interest? The chief constitutional instrument for enforcing ethics seems itself to be ethically compromised. Members judging members raises reasonable doubts about the independence, fairness, and accountability of the process.

This chapter explores the difficulties that this institutional conflict creates for congressional ethics. The difficulties cannot be overcome simply by relying on the electoral process and the system of criminal justice, the other principal tribunals of judgment. Some changes in the way the ethics committees conduct their business are necessary. Most important, both chambers need to establish a new body, composed of citizens who are not members and who enjoy some independent authority. Such a body is especially needed to cope with the increase in cases of institutional corruption.

## The Deficiencies of Self-Discipline

"No one should be the judge in his own cause."<sup>3</sup> This maxim has guided judges of controversies and makers of constitutions since ancient times. It expresses fundamental values of due process and limited government, providing the foundation for the separation of powers, judicial review, and federalism in the U.S. Constitution. It is the principle that the authors of the *Federalist Papers* invoke at critical junctures in their arguments for the Constitution. Both James Madison and Alexander Hamilton apply the principle to institutions—the states, Congress, the federal government as a whole—not only or mainly to individuals. Madison commented, "no man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time."<sup>4</sup>

In what sense is the Senate or the House a party to the cause when it judges the case of an individual member charged with an ethics violation? Although neither chamber is literally on trial in any particular case, their interest is closely connected to the fate of the individual member. The perspectives of the judges and the judged are not so distinct as they are in a judicial trial or even in disciplinary hearings such as those conducted in some other professions. The distinction between judge and a party to the cause in a legislative institution is blurred in three ways, all of which tend to bias the judgment and corrupt the integrity of both the members and the institution. These effects operate in cases of individual corruption, but they become even more potent in cases of institutional corruption.

The first way in which the distinction breaks down is the result of collegial interdependence. More than officials in most other institutions (even in the other branches of government) and more than members of most other professions, members of Congress depend on one another to do their job. They have worked together in the past and they must work together in the future. The obligations, loyalties, and civilities that are necessary, even admirable, in these circumstances make it difficult to judge colleagues objectively or to act on the judgments even when objectively made. Furthermore, the less that a charge seems to stem from individual corruption, the

harder it is for colleagues to come to a severe judgment even if it is warranted. The member implicated in institutional corruption, showing no obvious signs of a guilty mind or unusually selfish motives, is seen as simply doing what the job requires or at least permits. Under such circumstances the sympathy of colleagues is maximized and their capacity for objectivity minimized. The circumstances are not favorable for the principle of independence, which calls for judgment on the merits.

The attitude of "we are going to protect our own" that Lee Hamilton criticizes can produce bias against members as well as in favor of them. "Protecting our own" when the "own" are members of one's party or faction may lead not only to defending guilty members but also to attacking innocent ones. In an interdependent and partisan legislature, ethics charges can become a political weapon, setting off the cycle of accusation described in chapter 2. In the succession of charges and countercharges that followed the judgment against Speaker Wright, both judges and those they were to judge found themselves the objects of charges.

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

In other cases the conduct of most members may not in fact differ from that of the accused, and the committee may readily accept the defendant's plea without considering whether the conduct, and the standards that seem to permit it, should be criticized. The House committee could not bring itself to criticize the ways Wright intervened on behalf of a *various* real estate investor in the Neptune Cut

Company. Committee members may have assumed that he had only done what some of them had done in the past and what others might wish to do in the future. In their effort to be fair to Wright, they neglected to ask whether, from the perspective of the democratic process as a whole, the norms that permitted his conduct were fair to citizens.

Even when committees stand firm, their members may find themselves devoting as much attention to defending their own actions as to investigating the misconduct of an accused member. The committee and its procedures become the issue. During the fall of 1993 the entire Senate spent two full days on the case of Senator Bob Packwood.<sup>5</sup> The debate ignored the charges of sexual harassment and intimidation of witnesses that had been raised against him. The only subject was Packwood's challenge to the subpoena for his diary that the ethics committee had issued as part of its investigation of the charges. The substantive business of the chamber ceased while senators debated extensively a claim of privacy that, if made by an ordinary citizen, no court would take seriously.<sup>6</sup>

The third way the positions of the judges and the judged converge in congressional ethics affects the principle of accountability. Members who are judging their colleagues know that they themselves will be judged by the public. The political pressures that build during the disposition of ethics cases are potent, often more potent than judicious. In the Keating Five case, Vice Chair Rudman believed that "the public had decided [for] the guillotine at dawn on the Capitol grounds. That was the atmosphere in which the Ethics Committee was operating. . . . Capital punishment would be just about right."<sup>7</sup> Some members also thought that some of their colleagues may have been too sensitive to public opinion because they were facing reelection in November.<sup>8</sup>

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

ing greater public suspicion. The conclusion and the process continued to be the subject of public criticism long after the committee reached its conclusion.<sup>9</sup>

Because of the political nature of a legislature, it is difficult, and not even desirable, for members to act purely as judges, focusing only on the case at hand. Legislators have obligations that judges do not have. They must take seriously the reactions of constituents and consider the effects of their decisions on the health of democratic political institutions, including Congress itself. Ethics committees must determine whether a member has conducted himself or herself "in a manner which shall reflect creditably on the House," or has avoided "improper conduct which may reflect upon the Senate."<sup>10</sup> In judging colleagues the committees must assess not only their institutional norms and practices but also public confidence in those norms and practices. Balancing the scales of justice in these circumstance would try the skill of Solomon.

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

Similar considerations have persuaded most other professions to move away from self-regulation. The model rules and codes that govern the ethics of lawyers, for example, are mostly enforced by the courts. Lawyers are increasingly subject to other kinds of sanctions, such as liability suits for breach of ethical duties, institutional controls, and administrative regulations affecting representation before government agencies. Still, some of the most thoughtful commentators on legal ethics are challenging the adequacy of the present system, calling for more outside controls (though tailored to specific contexts).<sup>11</sup> Even accountants and business executives face many more controls on conduct than only their peers or their consciences once regulated. External agencies such as the Securities Exchange Commission now set ethical standards and punish violations.

The practice of medicine is highly regulated by state agencies, and health care reform eventually is likely to lead to still more control. Physicians also face the threat of malpractice suits if they fail to meet professional standards of care and sometimes even if

they meet them.<sup>12</sup> The profession has not distinguished itself in dealing with those few areas of medical ethics for which it still retains primary responsibility, in particular, conflict of interest and self-referral.<sup>13</sup> The American Medical Association has only recently adopted, evidently under the threat of legislation, rules against self-referral. But the rules remain vague and without enforcement mechanisms, even though there is growing evidence of abuse. As a result, governments are beginning to regulate self-referral.<sup>14</sup>

Two other professions that have traditionally insisted on regulating their own ethical conduct, academics and the clergy, also face increasing demands for scrutiny by outside authorities. Professors in many institutions are now required by state legislatures and other agencies to disclose sources of funding for their research, report their outside activities, and follow certain procedures in making appointments to the faculty.<sup>15</sup> The enforcement of ethical standards among the clergy is probably the most varied, ranging from completely laissez-faire systems in some Protestant denominations to the relatively rigid controls in the Catholic Church.<sup>16</sup> But revelations of sexual misconduct in the priesthood have cast doubt on the efficacy of even those controls.

The profession that has most successfully resisted outside regulation of its ethics is journalism. It typically wards off evil by waving the First Amendment before its attackers. Compared with most other professions, journalism also has few institutional mechanisms for enforcing ethical standards. Even moderate proposals that would limit the speaking fees journalists can accept from organizations they cover have been met with powerful opposition within the profession.<sup>17</sup> Journalists, like legislators, think they can regulate themselves well enough and indeed see no need for much regulation of any kind. It is ironic that the only professionals who affirm their right to self-regulation as strongly as legislators do are also those whose ethics many legislators most distrust.

During the hearings of the Senate Ethics Study Commission, Senator Thomas Daschle observed: "We wouldn't stand for doctors or lawyers or insurance agents or any others forming a group with which to discipline themselves and accepting that as the sole determinant as to whether or not someone is appropriately within his bounds."<sup>18</sup> He asked why are senators different? The question is germane, and more difficult to answer than is usually assumed.

## Letting Voters Decide

The most prominent difference between legislators and members of other professions is that legislators have to run for office. They must defend their performance in public and at regular intervals let voters judge their success. Because of this electoral connection, they are more directly accountable than other professionals who exercise power over other people. They can be trusted to run their own disciplinary procedures, it is said, because they are subject to the most fatal form of discipline of all for a politician—loss of office. "You are not your brother's keeper," a House member once said. "He is answerable to the people in his district just as you are."<sup>19</sup>

### *Disclosure*

Because legislators stand for election, some question why any further accountability is necessary at all. "We ought to disclose what we do," Senator J. Bennett Johnston suggested during the debate on the gift ban, "and let the voters decide."<sup>20</sup> Others have proposed that Congress should replace its elaborate regulations on conflict of interest, acceptance of gifts, and allowable outside income with a simple set of rules requiring only disclosure of financial interests.<sup>21</sup> Ethics committees would make sure that members disclose what the rules required, but only voters would decide whether members were guilty of any ethical improprieties.

This approach is deficient in principle and practice. As a matter of principle it relies on a mistaken view of democratic representation. It assumes that the constituents in one district or one state should have the exclusive authority over the conduct of the representative from that district or state. This kind of representative system may be appropriate for a transient convention, what Edmund Burke called a "congress of ambassadors from different and hostile interests."<sup>22</sup> But it is hardly adequate for a permanent legislature, a congress of members who can pursue their different interests only if they preserve their common interest in the integrity of the institution. A true legislature cannot leave the ethical fate of the whole body to the mercy of a few members and their constituents.

Because legislative ethics provides (as chapter 1 emphasized) the preconditions for all legislative action, citizens rightly take an interest in the ethical conduct of all members, not only that of their own representatives. In this respect their concern about ethical conduct differs from their interest in any particular piece of legislation. Even on delegate conceptions of democratic representation, constituents in *any* state or district may quite properly instruct their representative to seek, through procedures of the representative assembly, standards to govern the ethical conduct of *all* representatives. That is part of the rationale for the disciplinary authority of the ethics committees and ultimately for Congress's constitutional power of expulsion. That is also why letting members disclose and voters decide is in principle not sufficient.

In practice in the current system, disclosure serves only a limited function.<sup>23</sup> Each year members and high-level staff are required to file an elaborate report listing virtually all their own and their spouses' financial holdings and indicating the range of value (as in "greater than \$1,000, but not more than \$2,500," one of eight possible categories for income alone).<sup>24</sup> Because the forms do not correspond to any familiar pattern such as an income tax return, members and the public often find them confusing. Furthermore, although ethics committee staff usually examine the forms and notify members of discrepancies, there is no independent audit, not even a review of the kind conducted by the Office of Government Ethics for executive branch officials who are subject to essentially the same requirements. It is therefore impossible to know whether the tougher penalties adopted in 1989 (doubling the maximum civil fine to \$10,000 for violating disclosure rules) has improved compliance.

Members who have been caught violating *only* disclosure rules rarely suffer any serious sanctions from their colleagues, let alone voters. Only three of the sixteen cases involving disclosure violations considered by the committees since 1977 involved no other charges.<sup>25</sup> Of the seven cases in which a committee decided to impose a sanction, only one did not involve other charges. Only two of those receiving sanctions were defeated for reelection.<sup>26</sup>

Like mail fraud and income tax evasion, disclosure offenses are sometimes used to reinforce charges that investigators regard as more serious but for which they have less conclusive evidence. In

the only case in which a sanction was imposed after a member was charged with only a disclosure violation, the House reprimanded George Hansen in 1984 for failing to disclose \$334,000 in loans and profits received under suspicious circumstances, but only after he had been convicted of federal felony and sentenced to prison.<sup>27</sup> Even when other serious charges have been made and a member has violated disclosure rules, committees do not always impose any sanction. In 1987 the House ethics committee found that Fernand St. Germain had repeatedly violated disclosure provisions of both the House code and the Ethics in Government Act, but concluded that the "identified improprieties do not rise to such a level warranting further action by this committee."<sup>28</sup>

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

What is disclosed is generally not used effectively. Stories on the financial resources of members are rarely presented in a way that would best help voters make balanced judgments about the ethics of members. The press is often most interested in who the wealthiest members are, how much their spouses make, or who takes the most expensive trips paid by corporations.<sup>29</sup> A few reporters try to show connections between political action committee contributions and legislative committee memberships, but given the ambiguity of those connections, the stories can usually do no more than raise suspicions. This effect points to yet another limitation of disclosure. By itself, disclosure may merely further undermine confidence in government, causing citizens to suspect the motives of legislators but providing no constructive ways to restore trust. Disclosing a possible conflict of interest merely reveals a problem without providing any guidance for resolving it.

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

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

### *The Electoral Verdict*

In practice the current system of enforcement consists of two decisions: a finding by Congress and a subsequent verdict by the electorate. (Expulsion is so rare in modern times that it has little practical effect even as a threat.)<sup>30</sup> Colleagues declare a judgment and voters deliver the final verdict. When voters have the last word, what do they say?

Of the twenty-three members on whom an ethics committee imposed sanctions from 1978 to 1992 for corruption offenses, five (22 percent) were defeated in their bid for reelection and four (17 percent) decided not to run again.<sup>31</sup> During the same period the average rate of defeat for all members facing reelection was 7 percent and that of retirement 10 percent.<sup>32</sup> This comparison does not, however, indicate whether the ethics charges actually contributed to the retirement or the failure to win reelection.<sup>33</sup>

The most systematic study of the effects of charges of corruption on voting behavior in more than one election found that accused candidates suffered a loss of 6 to 11 percent from their expected vote in reelection races.<sup>34</sup> A significant number of accused candidates lost the primary or resigned rather than risk defeat in the general election. (The study covered all races in which a candidate's alleged

corruption was an important issue, not only races in which a candidate had been charged or had a sanction imposed by an ethics committee.) Although voters evidently do not ignore corruption, they do not protest unequivocally against it at the polls. More than 60 percent of all those accused won reelection. Of the accused candidates who reached the general election, nearly three-quarters prevailed.<sup>35</sup> The voters most likely to vote against the accused candidates may be those least likely to have the classic characteristics of good citizenship: strong issue orientation, party identification, active participation, and commitment to the democratic rules of the game.<sup>36</sup> If this is so, relying on the electoral verdict puts the health of the democratic process in the hands of the least reliable citizens.

Neither do electoral judgments discriminate among types of corruption in a way that satisfactorily tracks their effects on the democratic process. Individual corruption is punished much more severely than offenses involving institutional corruption. Campaign and conflict-of-interest violations produced losses on the order of 1 percent of the expected vote, while bribery charges led to losses of about 12 percent. Members charged with morals offenses suffered the most: they lost more than 20 percent of their expected vote.<sup>37</sup>

Doubts about depending on voters to punish corruption are further reinforced by studies of the effects of the House Bank Scandal.<sup>38</sup> A political disaster for members but a professional windfall for political scientists, the scandal provided a rare natural experiment: "a new, exogenous, accurately measured and potentially powerful independent variable."<sup>39</sup> Because a large number of members were charged with different degrees of the same offense at the same time in a late phase of the election cycle, political scientists could more accurately assess the electoral effects of the scandal. The more bad checks a member had written, the more likely he or she was to retire, fail to win the nomination in the primary, or lose the general election.<sup>40</sup> The best estimate is that the scandal reduced the reported vote for incumbents by about 5 percentage points.<sup>41</sup>

The scandal influenced the vote primarily through its effect on the decisions of a relatively small group of voters (about 7 percent). Those who were most inclined to punish the malefactors were also the least disposed to believe that their own members had written bad checks, even when they had. Voters who were not sure whether their incumbents were guilty tended to assume they were. In gen-

eral, "ignorance and misperception" limited the electoral effects of scandal. Only 43 percent of voters could correctly say whether their representative wrote any bad checks.<sup>42</sup>

Even more troubling than voters' misperceptions are the distorted priorities that the electoral verdict expresses. Voters acted with much more effect against the culprits in the House Bank scandal than against the perpetrators of many other more serious scandals, such as the savings and loan crisis or irresponsible budget deficits. The Bank scandal should not even count as corruption in the sense most voters assumed (see chapter 3). Insofar as the scandal revealed corruption, it was institutional. The problem was administrative negligence by members (particularly the leadership) rather than fraud against the taxpayers, the kind of individual corruption that most voters assumed had occurred.

To criticize these misperceptions and mistaken priorities is not necessarily to criticize voters. Their behavior was perfectly sensible under the circumstances. The information about the House Bank was kept secret for many years and then came out in a fragmentary and confusing form. Only the reports of the investigations, not the details of the investigations themselves, were made public. The special counsel released his report only after the election. Few reporters bothered to try to put what information was available into perspective. As for their priorities, voters could not "measure their representative's personal contribution to the savings and loan fiasco or budget deficits, but they [could] know who wrote overdrafts."<sup>43</sup>

More generally, when voters choose their representatives, they may understandably take into account factors other than ethics. They are often willing to forgive lapses in ethical behavior if the member looks after constituents. As one of D'Amato's supporters observed, "Here [on the streets of Island Park, Long Island]—this is where I know Al D'Amato. He's been here when he had to be here. The rest of it—that's stuff that happens in Washington."<sup>44</sup> For others, a representative's party or position on policy issues weighs more heavily in their decision than any charge of corruption.<sup>45</sup> Voters do not necessarily think that party or policy matters more than honesty; they may discount the corruption simply because, unless a case goes to trial, they usually do not have enough information to assess the validity of the charges. Most of the charges investigated by ethics committees remain confidential, and even those that result in in-

vestigations and sanctions do not include public hearings like those held in the cases of Durenberger and the Keating Five. Finally, even with full information and discerning judgment, voters have only one sentence they can impose: the political equivalent of capital punishment.

The considerations that explain why voters should not be blamed also underscore why the ethics process should not rely mainly on the electoral verdict as it currently operates. Voters have, of course, the final word in any democratic system, but before they give that word the process should provide more and better information than it does now. Some of the proposals considered later in this chapter to strengthen the ethics committees could improve the quality and efficacy of the verdicts voters deliver in the electoral tribunal.

### Letting Courts Decide

During hearings on the organization of Congress, Senator Richard Lugar surprised some of his colleagues by suggesting that "one solution to the ethics committee problem is not to have one." Persons who file complaints could be told to "see the local court system or State court or the Federal court, and let them try your case." Other members have from time to time made the same proposal. Its attractions are plain. The legal process has the permanent expertise to investigate the complaints effectively and the procedures to adjudicate them fairly. As a legislature, Congress has neither. Although the ethics committees have hired outside counsel a dozen times since 1978 and codified their own procedures (some forty pages for each chamber), the "perception of many of our trials here," Lugar observed, is that "we're amateurs flailing about."<sup>46</sup> The perception does not do justice to the professional competence that the staffs (and some members) of both ethics committees have demonstrated over the years, but it does reflect an institutional fact: because the congressional ethics process stands closer to the political process, it is not likely to be as orderly and stable as legal proceedings.

To some extent Lugar's proposal has already been put into practice. Many of the most serious charges against members are prosecuted in the criminal justice system. More than half the cases in which ethics committees have taken action since 1978 have also

been the subject of criminal investigation.<sup>47</sup> In other cases, such as those of Harrison Williams or Mario Biaggi, the courts have provided the only sanction because members resign before Congress can act. The ethics committees have not taken any action on the fourteen cases since 1977 that involved members who were indicted or convicted for offenses committed while in office.<sup>48</sup> Why then not let the courts take over all the cases involving corruption charges against members?

As was suggested in chapter 3, cases involving general offenses are better left to the criminal court system. Although reserving the right to take up a case at any time, the committees could declare as a matter of policy that they would let the courts deal with these offenses. Ethics committees are increasingly postponing action until courts reach a judgment or at least prosecutors conclude their investigation. A case like that of Durenberger, in which Congress acts before the courts, is now less common than one like that of Representative Dan Rostenkowski, in which the ethics committee declines to act until the courts conclude their work. In practice, the ethics process is moving toward Lugar's proposed solution, or at least toward the moderate version he also suggested: violations of ordinary law should go to the courts, and violations of "higher standards" should be heard by the committees.<sup>49</sup>

Although the courts can in this way play an important role in some ethics enforcement, they are not an appropriate tribunal for many charges against members and should not be the sole or final tribunal for any ethics charge. Because the aims and methods of the criminal process and the ethics process differ in principle, the two must remain distinct in practice. In simplest terms, the ethics process seeks to determine whether a member's conduct has harmed the institution; the criminal process judges whether a citizen has harmed society. In this respect the ethics rules and committees, as two experienced members once observed, are "like the professional standards and the disciplinary board of a medical or bar association." They explained: "just as the question for such a board is professional integrity and performance as prescribed by the standards, so the question for the committee is [congressional] integrity and performance as prescribed by the Code."<sup>50</sup>

The punishments imposed by the ethics process are also more limited in scope than those imposed by criminal law. An ethics sanc-

tion does not deprive a citizen of life or liberty. The criminal courts can do both, and can also deny a member the right to hold public office again.<sup>51</sup> In a colloquy with Lugar, Hamilton emphasized yet another important difference: "the standards for serving in Congress ought to be higher than whether or not you have committed a felony."<sup>52</sup> Whether or not they are higher, many are different. Ordinary citizens do not have to disclose their personal finances to the public, and most are not subject to restrictions on gifts they can accept. Even more significant for the purposes of legislative ethics is the whole range of offenses that produce institutional corruption, such as giving special help to big campaign contributors or putting improper pressure on federal regulators. The reason most of these offenses are not crimes is not that only legislators can commit them but that they involve ambiguous conduct, difficult to define in advance and awkward to condemn after the fact. This kind of conduct lacks the corrupt motive that criminal prosecution usually requires.

Because some of the offenses differ, so should some of the procedures. When disciplining members, Congress and its ethics committees are not bound to observe the procedural protections of the criminal process. Accused members do not have access to all the testimony and evidence gathered by the committees (although committees often make much of it available). More significantly, the standards of proof, especially in the earlier and usually most critical phase of an inquiry, require much less than a conclusion beyond reasonable doubt. Only "substantial credible evidence" is necessary to impose some sanctions and to initiate a formal investigation. (The hearings for the Keating Five constituted only a preliminary inquiry).<sup>53</sup> The committees may even legitimately pursue a case against a member who has been justly acquitted in court on the same charge.

For many institutional offenses a criterion of strict liability or at least a standard short of criminal negligence may be appropriate. Senator D'Amato was rightly rebuked for permitting his brother to use his office improperly, even though the committee had no evidence that the senator knew about his brother's conduct. Ethics committees may also legitimately decide to move more quickly to a conclusion for reasons that would not be appropriate in court, for example, because of the need to settle a case before the next election or to resolve the chairmanship of a critical committee. (This is an

important reason the committees should not totally relinquish their jurisdiction over even general offenses.)

Some members would create a sharper division between Congress and the courts than these considerations suggest. They object, for example, to the Justice Department's using testimony or documents that accused members have provided in the course of an ethics committee investigation. They argue that such use will discourage members from cooperating with the committees and that it violates the "speech and debate" clause, which protects members from being "questioned in any other place" than Congress for their legislative statements and actions. On these grounds Durenberger persuaded a federal district judge in 1993 to dismiss an indictment against him for submitting false claims to Congress for travel reimbursement.<sup>54</sup> The prosecutors had used several pages of the ethics committee report in their presentation to the grand jury.

This decision and the objection carry the separation too far. The committee report in question was part of the public record and therefore potentially available to members of the grand jury anyhow. It is difficult to see why under these circumstances prosecutors should be barred from using it. (They should not of course mislead the court, as the judge in this case accused them of doing; they had explicitly told the court that they had not submitted any of the report to the jury.) Durenberger was reindicted, but this time the prosecutors avoided using any documents from the ethics committee, and the courts refused to dismiss the indictment.<sup>55</sup>

In another case, a federal appeals court held that the Justice Department's use of ethics committee testimony did not violate the speech and debate clause and did not interfere with the congressional disciplinary process. The ethics committee had sent Representative Charles Rose a formal and public letter of reproof for violating the financial disclosure provisions of the House rules and the Ethics Act. Contrary to the committee's wishes, the Justice Department began its own investigation and filed a formal complaint against Rose for violations of some of the same provisions. (Unlike the committee, the department charged that the violations were "knowing and willful.") The appeals court held that testimony given in a personal capacity to a congressional committee does not count as a legislative act protected by the speech and debate clause.<sup>56</sup> The court explicitly criticized the decision in the Durenberger case for

misreading Supreme Court precedent on this point. There was no violation of separation of power or interference with committee processes, the appeals court said, because Congress itself delegated to the Justice Department part of the responsibility for prosecuting violations of this act, and Congress itself could always change the law.

Although the appeals court generally drew the boundaries between the two processes in a sensible way, one aspect of the decision is troubling. The court commented in passing that if the ethics committee had wished to prevent the Justice Department from using any part of its proceedings to prosecute Rose, it "could have declined to issue a report or issued one in redacted form."<sup>57</sup> Such a practice might well protect the committee and the accused member, but at the price of diminishing public confidence in the ethics process.

### Strengthening the Ethics Committees

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

#### *Partisanship and Prejudgment*

Partisanship is the first fear that comes to members' minds when the independence of the ethics process is challenged. The Senate created a strictly bipartisan committee in 1964, partly in response to the partisan disputes over the investigation of Bobby Baker, the

secretary of the majority, who was later convicted of criminal charges involving the misuse of his office and campaign contributions. The House followed suit in 1967 after the controversial case of Adam Clayton Powell, who was "excluded" by the House but was later reinstated by the Supreme Court. To avoid partisanship, the ethics committees have an equal number of members from each party, the only congressional committees to have such balanced representation. The members chosen for service are generally known as moderates and are usually less partisan than their colleagues. Members rarely volunteer for service on these committees.

The public decisions that the committees have reached generally do not seem to be partisan.<sup>58</sup> The final votes are almost always unanimous and dissenting opinions are rare. The committees have imposed sanctions on more Democrats than Republicans in the past decade and a half, even though the Democrats controlled Congress during most of this period. On average Democrats made up two-thirds of Congress but four-fifths of the total of members who received sanctions.<sup>59</sup> There is no reason to believe that Democrats are more corrupt than their higher rate of sanction implies. Rather, it appears that the offenses they are more likely to commit are those most likely to receive more severe sanctions. Democrats are more often charged with bribery and related offenses; Republicans are more often accused of conflicts of interest.<sup>60</sup>

Although the ethics committees have probably provided a less partisan forum than other committees in Congress, their independence has come at a cost in accountability. One of the reasons they have been able to maintain a spirit of cooperation is that they have done much of their business in private. To the extent that the proceedings take place in public, partisanship is more likely to break out. In the future the committees may find it more difficult to maintain the traditions of bipartisanship, even in private. There are already some ominous signs. Some members with long experience on the Senate committee say that during the Keating Five case partisanship intruded into their proceedings for the first time. Most of the members of the House committee in the 1990s are new, as are the chair and ranking member, and the tone of these meetings is also becoming more partisan, according to staff and former members.<sup>61</sup> As comity deteriorates in Congress, the committees cannot expect to escape its effects.<sup>62</sup> To the extent that they are creatures

of Congress, the committees will partake of the characteristics of Congress. A body for deciding ethics charges that is more removed would provide better insurance for independent judgment.

A different threat to the independent judgment of the committees comes from the structure of the process itself. The committee that decides whether there is sufficient evidence to go forward with a case is the same committee that decides whether the accused member is guilty and should be punished. It is as if the prosecutor, grand jury, jury, and judge were combined in a single body. Committee members themselves have said that it is difficult under these circumstances to avoid prejudging a case.<sup>63</sup> For the accused member and for the public, the preliminary judgment is often regarded as the final judgment.

To avoid these difficulties, House committee rules now provide that the preliminary inquiry be conducted by a subcommittee and the final adjudication be settled by the rest of the committee.<sup>64</sup> But the new procedure has yet to be tested, and some observers do not think it is likely to overcome the problems of prejudgment. The committee chair and ranking member serve *ex officio* on the subcommittee, and the same staff serves both the subcommittee and the full committee. A reform proposed by Senator Rudman would avoid this problem in the Senate by establishing a separate adjudicatory committee; it would be composed only of senators who are not members of the ethics committee and who serve only once to decide a single case.<sup>65</sup> This proposal would probably lessen the problem of prejudgment, but it might well create new problems of continuity. Because its membership would change from case to case, the adjudicatory committee could not develop any traditions or common experience and would be less likely to reach consistent judgments over time. The Senate Ethics Study Commission could not agree on any proposal that would assign different members to different phases of an inquiry. It restricted itself to recommending that the current multistep process be reduced to two basic steps, investigatory and adjudicatory.<sup>66</sup>

These proposals move in the right direction. The multistep process was intended to dispose of false or frivolous charges expeditiously and thereby serve fairness, but it has had the opposite effect. It gives prominence to charges earlier and for a longer time before any final judgment is reached. A two-step process would reduce

unnecessary delay and duplication and create less confusion about the meaning of findings at each stage. It is likely better to serve the interests of members and the public.

In the ethics committees of both chambers, therefore, investigation should be separated from adjudication.<sup>67</sup> Investigation should include the power to make a preliminary finding (for example, whether there is substantial credible evidence that a violation of standards has occurred). Different members with different staffs should serve on bodies performing each function, and some continuity of membership should be maintained. Even if no other changes were made, the separation of these functions would improve on the present process, especially in the Senate.

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

In any two-step process the appointment of a special counsel should be required in the investigatory phase unless there is a compelling reason to the contrary. This is close to the present *de facto* procedure in the Senate.<sup>68</sup> In the first phase the counsel would act primarily as a fact finder and legal adviser. The counsel should also normally continue in the adjudicatory phase, but the role here would be that of an advocate for the committee's conclusion reached in the first phase.

#### *Fairness to Members*

Another purpose of separating investigation and adjudication is to enhance the fairness of the process. Other changes may also be necessary to ensure that accused members are treated fairly. Fairness does not require that members be granted the same rights an ordinary citizen would receive in the criminal process. They should not enjoy the same kinds of rights of privacy, for example. Nor should members demand greater rights than other citizens: like an

ordinary citizen in a criminal proceeding, a senator must comply with a subpoena for his diary.<sup>69</sup> But fairness does call for some basic procedural protections for the sake of members as well as for the public interest in the rights of all public officials.

The current rules of both committees grant certain rights to accused members, but the rights are not complete and their exercise is wholly subject to the discretion of the committees.<sup>70</sup> The full Senate and House should guarantee members some basic protections. They should be notified promptly of the content of any complaint against them and of any decision by the committee to proceed with an investigation. They should have the right to be represented by counsel once an investigation begins and throughout the rest of the process, up to and including action by the full Senate or House. Members should have the opportunity to see (in an appropriate form) the evidence available to the committee and the opportunity to be heard by the committee and bring further evidence to its attention. None of these protections need delay or obstruct an otherwise legitimate proceeding. All are necessary not only to ensure fairness but also to expedite the dismissal of unfounded or frivolous allegations and to improve the quality of information that the committees receive.

Probably the most disturbing unfair treatment comes from the effects of a false charge. The mere making of a charge, whether it has merit or not, is sometimes enough to damage a member's reputation and career. Even if the member is exonerated, the damage often has been done. The charge can cause serious damage to the institution as well. One of the most egregious cases—the one most often mentioned by members in interviews—was the charge in 1982 by two former pages that some thirty members had had sexual relations with pages. After a yearlong investigation, a special counsel concluded that the original charges had no foundation.<sup>71</sup> Many of the members who had been falsely accused believe that far more people noticed the accusation than the vindication.<sup>72</sup> (In the course of investigation the special counsel did discover two other cases of improper sexual relations with pages. The members involved, who had not been named in the original accusations, were censured by the House.)<sup>73</sup>

In the current system the principal protection against false charges is the requirement that any individual who submits a com-

plaint to the committee must swear to its truth and satisfy several other procedural requirements. In the House the complainant must try to get three members to sign the complaint before going to the committee.<sup>74</sup> One staff member acknowledges that "we have made it more difficult for ordinary citizens to file a complaint."<sup>75</sup> The strategy seems to be to keep the threshold for making complaints high in the hope of discouraging unfair charges. If so, it is misguided. The threshold fails to block some ill-founded charges that the committee should not consider and may suppress some well-grounded ones that it should consider seriously.

Formal complaints are not the only the basis for starting an investigation. The committees find it impossible to ignore some serious charges made in the press or in public forums, whether or not any formal complaints are filed.<sup>76</sup> In the past, committees have begun an inquiry simply on the basis of a report in the press, as the House committee did in the 1987 case of St. Germain.<sup>77</sup> In general, barriers to bringing complaints should be kept low for several reasons. First, public confidence in the process will be undermined if citizens think that complaints are dismissed for technical reasons or that one has to be a lawyer to get the attention of an ethics committee. Second, if the barrier is high, valid charges may escape investigation. Formal requirements do not reliably separate valid or serious from invalid or trivial charges. An anonymous submission of documents could turn out to be more substantial than a sworn complaint as the basis of a serious charge. Neither should committees have to wait for a complaint from any individual: some of the offenses most damaging to Congress have no identifiable victims.

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

Rather than raising the threshold, Congress should consider raising the cost of making false charges. The committees, or preferably a semi-independent commission, could issue a formal criticism of members who deliberately or negligently make false charges.

In some cases committees could impose more serious sanctions on such members. Although the First Amendment prevents Congress from punishing private citizens or members of the press for making false charges, it does not prevent ethics committees from criticizing them. It is of course often controversial whether a charge is false or frivolous, but in flagrant cases there should be enough agreement to make sanctions credible.

Another potential source of unfairness is the breadth of the standards by which members are judged. Standards that refer to conduct that "shall reflect creditably on the House" or the avoidance of "improper conduct which may reflect upon the Senate" do not themselves provide much guidance.<sup>78</sup> As noted earlier, similar concerns arise about the appearance standard. Some members object that broad standards subject them to something like an *ex post facto* law. They do not provide fair notice of what conduct is prohibited, and they invite politically motivated charges.

Nevertheless, this kind of broad standard is important and should be retained. No specific code could capture the full range of conduct that, in the changing circumstances of political life, could damage Congress. A code would inevitably fail to capture some conduct that should be prohibited and could impugn some innocent conduct by failing to recognize explicitly some of the special circumstances under which members work and the environment of the institution. Protections against institutional corruption are especially difficult to codify.

Furthermore, the more comprehensive a code is, the more complicated it becomes and the more easily subject to neglect by members or abuse by those who would make false or politically motivated charges. A broad general standard permits more charges, but it also gives fewer of them immediate legitimacy. A charge under a broad standard will have little public impact unless it identifies a genuine and serious wrong. It must appeal to a distinct sense that the conduct in question violates some widely shared moral principle, not simply some obscure technical rule of the Senate or House. Institutional corruption could be brought under such a general moral principle by emphasizing the damage it causes to the democratic process and thereby to the rights and welfare of all citizens.

Fairness is a matter not only of the rights but also of the obligations of members. A duty of fair play, demanding that one not take

the institution work, imposes institutional responsibilities on all members.<sup>79</sup> They are responsible for accepting unpleasant assignments (such as service on the ethics committees), for trying to improve the institution rather than just attacking it, and for calling colleagues to account for misconduct. Failure to take responsibility for collective problems poses serious dangers to the capacity of the institution to function and contributes to the erosion of public confidence in it. If each member looks only after his or her political fortunes, no one is left to look after the institution's ethical integrity.

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

It is bound to be difficult to implement reforms that would institutionalize such incentives in Congress. The same logic that makes the incentives necessary also makes their institutionalization less likely. It is not usually in the interest of individual members to devote themselves to carrying out this kind of reform. Nor is it easy to find incentives powerful enough to overcome the political pressures working in the opposite direction. Nevertheless, some members are dedicated to making the institution work better and are prepared to take political risks to do so. They may provide the leadership necessary to undertake reforms of this kind. Although many failures of institutional responsibility are probably beyond the reach of internal discipline, some are not. For a start the chambers could

establish a rule, once proposed by the House ethics committee but never adopted, that would require any member and employee who becomes aware of any ethics violation to report it in writing to an ethics committee.<sup>80</sup> Some of the measures discussed in chapter 3 could also help: for example, denying members certain committee assignments or eliminating procedural devices that invite abuses.

The incentives need not be only punitive. A more positive approach is worth considering, at least as a supplement. Members should look for ways to balance the almost wholly negative character of ethics enforcement so that it would depend more on reward. Jeremy Bentham, that diligent theorist of legislatures, noted long ago that reward serves better to produce “acts of the positive stamp” and is more likely to be self-enforcing because officials have an incentive to bring forward the necessary evidence.<sup>81</sup> We should care as much about honoring faithful legislators as condemning felonious ones. For example, some independent body might be authorized to formally recognize members who have exceptional records in fulfilling their institutional responsibilities. The body would have to guard against the natural tendency to pass out so many of these awards that they would come to mean little. But if judiciously selected and effectively presented, they could serve not only to recognize the contributions of individuals but might also eventually improve the reputation of the institution.

#### *Accountability to the Public*

It has already been shown how accountability places some limits on what fairness might otherwise require. Now further implications of members' duty to account for their conduct need to be considered.

In a legislature that is the most open in the world, the ethics committees are relatively closed.<sup>82</sup> The Senate committee has held public hearings on charges only five times since 1977 and the House only three.<sup>83</sup> The rules of procedure of both committees contain many provisions to prevent unauthorized disclosure but few to ensure legitimate publicity. The largest part of the committees' work takes place without any public record at all. Members, often only the chair and vice chair or ranking member, deal with most of the complaints and conduct preliminary reviews when necessary. The staff spends

most of its time giving advice to members, only a small part of which ever becomes part of the record in the form of advisory opinions. Several former staff members with long experience in providing such advice said that they were often told not to be so hard on members and to tell them "how to do what they want to do." The kind of common law that develops under these conditions of confidentiality, one staffer said, is "parochial and permissive."<sup>84</sup>

The committees have the power to convene executive sessions at any time. In the House the committee is required to make public only a brief statement of an alleged violation and any written response from the accused member once a formal inquiry has begun. In the Senate the reports of staff and special counsel are treated as confidential.<sup>85</sup> The special counsel's report in the Keating Five case became public only because one of the committee members made it part of his own report. Some other members even brought charges against him for leaking a confidential document. When the committees do issue public reports, they are often too brief to be informative. From reading only the Senate committee's report on the D'Amato case, even well-informed readers would have difficulty in discovering what conduct led to the charges, let alone why the committee thought the conduct did not violate any standards.<sup>86</sup> Although critics later raised questions about D'Amato's testimony, the committee never released the transcripts of the hearings.<sup>87</sup>

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

If the present structure of the ethics process is not changed, the ethics committees should be required to make public the content of all complaints and their disposition. If the complaint is dismissed, reasons should be given. Committees should issue a full report at the end of any investigation and at the conclusion of any adjudication. If a special counsel is appointed at any stage, he or she should be required to prepare a report, which should also be made public at an appropriate time. The need for accountability and public con-

fidence outweighs any increased burden of work and any risk of harm from leaked reports. Furthermore, if citizens knew that a full report would be made public at some stage, they could more easily accept the fact that some of the proceedings would be kept confidential in the earlier stages.

Another aspect of accountability is the length of time in which members are answerable for their actions. How far into the past are ethics committees entitled to probe? The Senate committee has no statute of limitations, a policy reaffirmed by its Ethics Study Commission. The House committee generally does not consider any allegations of conduct that occurred before the third previous Congress.<sup>88</sup>

These practices are more defensible than they might at first appear. Fairness does not require committees to refuse absolutely to consider allegations of violations that occurred in the past. A statute of limitations for ethics violations could even deny a member the opportunity of vindication in the face of old charges. It would also prevent action against offenses such as crimes of violence that could seriously impair collegial relations and could further undermine public confidence. But statutes of limitations in general serve some important purposes. They help prevent the prosecution of cases in which the evidence is unreliable because of the passage of time. They also provide an incentive for law enforcement officials to carry out their investigations expeditiously. Further, they provide a sense of security by ensuring that no citizen has to live indefinitely under the threat of possible prosecution for an offense that may or may not have been committed.

For public officials, however, the value of statutes of limitations is reduced or outweighed by other factors, particularly by accountability. Evidence against public officials is likely to have a longer shelf life than evidence against other citizens; it is likely to remain reliable for a longer period of time. Many charges against public officials rest heavily on documents, for example. Besides, the committees could take into account the reliability of evidence before proceeding to a full investigation. The passage of time may be a reasonable basis for dismissing cases in which the most important evidence consists of testimony of eyewitnesses or participants. Similarly, committees need not pursue charges that have lost their relevance because of the passage of time, such as charges of infidelity.

violations when a member's financial circumstances have changed significantly.

A statute of limitations may be desirable in a system in which a large number of prosecutors deal with a large number of cases. But it is an unnecessarily crude instrument in the more limited and more visible system that constitutes the ethics process. This is also why the incentive to pursue investigations expeditiously is less relevant. Finally, legislators should not (and indeed most do not) expect to enjoy as much protection from public scrutiny of their past lives as ordinary citizens reasonably demand. Part of the price of public service is the sacrifice of some of this security.

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

The Senate Ethics Study Commission's recommendation to simplify the schema of sanctions (bringing it closer to the one used by the House) could help alleviate the problem.<sup>89</sup> Committees themselves should take more responsibility to clarify the meaning of the sanction in each case they decide. In addition to specifying the level of severity and the rule or standard that was violated, a formal judgment by a committee could describe the kind of injury to individuals and the kind of damage to the institution at stake.

Measures could also be taken to give the committee (or at least the chamber as a whole) more authority over what can be one of the most potent sanctions: the loss of positions of power within Congress (chairmanships, ranking memberships, and seniority). At present the Senate committee can only recommend these sanctions to party conferences, which have never imposed any such discipline.<sup>90</sup> In the

House since 1980 the Democratic Caucus has required members who are indicted in the criminal process to step down from chairmanships. Republicans have been more reluctant to discipline members under such circumstances. The party refused to remove Joseph McDade from his position as ranking member of the Appropriations Committee long after he had been indicted in 1992 on charges of bribery.<sup>91</sup> Because party organizations in Congress have not acted as vigorously as they should, prohibitions should become part of the chambers' rules, and ethics committees should be given the authority to impose these sanctions. The positions from which members would be removed are properly considered offices of the institution, not the private property of the parties or individual members. All citizens and therefore all members have a legitimate interest in making sure that those who hold these positions live up to the ethical standards of the institution.<sup>92</sup>

#### *The Need for Ethics Commissions*

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

Proposals to establish an independent body that would supplement and partially replace the functions of the ethics committees are not popular in Congress. In 1994 the Senate Ethics Study Commission considered and rejected all proposals that would involve outsiders in the process.<sup>93</sup> Nevertheless, support for them is growing. Members in both houses have introduced resolutions—at last count, five—that would establish some version of an independent body.<sup>94</sup> Many state legislatures have set up independent ethics commissions, many of which regulate conduct of legislators as well as campaign practices and lobbyists.<sup>95</sup> Some city councils have created similar commissions.

The advantages of delegating some authority to a relatively independent body should be clear. They mirror the deficiencies of self-regulation discussed earlier. An outside body would be likely to reach more objective, independent judgments. It could more credibly

protect members' rights and enforce institutional obligations without regard to political or personal loyalties. It would provide more effective accountability and help restore the confidence of the public in the ethics process. An additional advantage that should appeal to all members: an outside body would reduce the time that any member would have to spend on the chores of ethics regulation.

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

There are many different ways of involving nonmembers in the process, and some are more likely than others to achieve the needed improvements.<sup>96</sup> In general, the better methods keep the roles of the members and nonmembers separate. Any such reform should also be consistent with a two-step process of investigation and adjudication and with the principles of legislative ethics. Here is one version of an enforcement process that meets these criteria.

#### *A Model for Ethics Commissions*

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

force would all be under the control of their ethics committee or each chamber as a whole.

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

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

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

### *The Role of the Ethics Committees*

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

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

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

### *Objections to Ethics Commissions*

But would this proposal ease the problems of the ethics committees only to create greater problems for the new commissions? Some critics argue that assigning any significant part of the ethics process to outsiders would be an abdication of congressional responsibility.<sup>97</sup> The constitutional provision (Article I, section 5) granting Congress the authority to determine rules and punish members implies that

only members should discipline other members for ethics violations. Any attempt to dilute that authority, it is argued, would be irresponsible and perhaps unconstitutional.

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

But the objection does not go as far as the critics think. That Congress must have final authority does not mean that it must have continuous control of the process. In the first place, Article I, section 5 does not literally prohibit the delegation of this authority. It says only that Congress "may" determine rules and punish its members, not "shall," the term used in some other clauses to express nondiscretionary standards. In addition, no authoritative court decision has interpreted this clause in a way that would prevent Congress from establishing an outside body for enforcing ethics rules. One of the few cases bearing on the clause points in the opposite direction. The decision held that a lower court did not have jurisdiction over a claim made by House members that they were denied their share of seats on committees.<sup>98</sup>

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

If Congress delegated some authority to the ethics commissions described here, it would not be abdicating responsibility but fulfilling it. Congress would be demonstrating confidence in itself by entrusting part of the process of enforcing ethics rules to citizens who would be more independent than any member could be, not by virtue of their character but of simply their status: they would not be judges in their own cause. The logic of the proposal to establish the com-

missions is very much in the spirit of other principles inherent in the Constitution. It is a constitutional principle that seeks to separate as far as possible the judges and parties to a cause.

A second common objection to proposals that would establish ethics commissions is that outsiders are not likely to know enough about Congress and its customary practices and are not likely to appreciate the pressures under which members work.<sup>99</sup> It is true that the composition of the proposed commissions favors independence and objectivity over knowledge and sympathy. It is also true that the members of an outside commission should understand well the practices and pressures of life in Congress. However, there is no reason that commission members, especially respected citizens who have followed Congress from the outside for many years, could not learn what they need to know about life inside the institution.

Virtually no one making the objection that outsiders do not know enough ever provides a specific example of knowledge about Congress that could not be conveyed to at least some nonmembers. Pressed in interviews to give such an example, most responded along the lines of "I can't think of anything specific, more a general feeling about the institution. Maybe I will think of something as we go along." Only one of the members interviewed offered a specific example: "an outsider might not appreciate how important it is for members to challenge abuses by the bureaucrats in the executive branch."<sup>100</sup>

The implications of the general objection, if taken seriously, are more far-reaching than may be recognized. If outsiders (even the well-informed citizens that all these proposals assume would be appointed) lack the necessary insight into the legislative service to serve responsibly on a commission, the prospects of the public's learning to trust the decisions of any ethics committee are even more bleak than they seem now. To the extent that no one but insiders can truly understand the customs and practices of Congress, one of the chief purposes of legislative ethics—maintaining public confidence—could never be fulfilled. Legislators could not be held accountable for ethics of the institution as a whole.

A third objection to these commissions is that their members would not be accountable in the way that members of Congress are and therefore would be less likely to make sure that any decision they made could withstand public scrutiny.<sup>101</sup> This would be more

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

These objections may tell against more extreme proposals that would transfer entirely some of Congress's authority for disciplining its members to a completely independent body. But the objections are not fatal to more moderate proposals that, like the model outlined here, leave Congress with the final authority for enforcing its standards of ethics. Such proposals avoid the vices of not only the more extreme proposals for reform but also the more familiar practices of the current system. A properly designed and adequately staffed outside body could begin to overcome the "innate conflict of interest [that exists] when members of the Ethics Committee are called upon to judge their colleagues."<sup>102</sup>

**APPENDIX V**

**Congressional Ethics Procedures and Employment Discrimination Procedures**

**Testimony Presented By  
Fred Wertheimer**

**To The United States Congress**

# Common Cause

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## Congressional Ethics Procedures and Employment Discrimination Procedures

Testimony presented by Fred Wertheimer  
President  
Common Cause

Before the Joint Committee on the Organization of Congress

June 29, 1993

Mr. Chairman, Members of the Joint Committee:

I appreciate the opportunity to present Common Cause's views on ways to strengthen and improve the operation of Congress and commend you, Mr. Chairman, and members of this committee for these hearings on a wide range of issues concerning reform of congressional operations.

I intend to focus our comments today on two specific areas. The first is reform of the congressional ethics process. The second is suggested changes in the way Congress deals with allegations of employment discrimination.

## **I. CONGRESSIONAL ETHICS PROCESS**

Common Cause Senior Vice President Ann McBride recently testified before the Senate Ethics Study Commission on the issue of reforming the congressional ethics process. My testimony today incorporates the views Common Cause presented at that hearing.

The integrity of government is fundamental to our system of representative

democracy. If the institutions of government are to command the respect, trust and confidence of the people, the individuals who serve in those institutions must operate and must be perceived as operating according to high standards of fair and ethical conduct. Nowhere is this more important than in Congress.

To meet this challenge, the Congress must first have rules that set high ethics standards for its Members. But as important as the rules are, they are not enough. Without effective enforcement and oversight, even the best rules can be rendered meaningless. Without effective ethics enforcement and oversight, lowest-common-denominator ethics are allowed to set the standards for the institution, the credibility of congressional decisions is diminished, and the moral authority of Congress is undermined.

Dennis Thompson, Professor of Political Philosophy at Harvard University's Kennedy School of Government and Director of the university-wide Program in Ethics and Professions, has underscored the importance of ethics rules and enforcement to congressional decision-making:

Political ethics provides the *preconditions* for making good public policy. ... Ethics rules, if reasonably drafted and reliably enforced, increase the likelihood that legislators (and other officials) will make decisions and policies on the basis of the merits of issues, rather than on the basis of factors (such as personal gain) that should be irrelevant.

Effective ethics rules and enforcement are needed to protect the institution from the damage done when someone engages in unethical or illegal activities. It

is not enough to rely only on either criminal prosecution or voter rejection at the polls to punish misbehavior by Members. Although both sanctions are powerful, they are by themselves inadequate to accomplish the task of protecting the integrity of the institution. Effective ethics enforcement and oversight is also needed to help ensure that Members and staff are aware of and comply with their ethical obligations and to help guide those Members who are ethically conscientious.

Each body of Congress, under Article I, §5, cl. 2 of the U.S. Constitution, has the responsibility to monitor and take action on any final decision to sanction or punish a Member for violations of ethics rules and standards. The process that the Congress currently uses to arrive at this decision, however, has lost credibility.

Many outside of Congress believe that too often in the past the congressional ethics committees have compiled a record of lax enforcement and oversight. Inside Congress, dissatisfaction with the ethics process transcends party and ideological lines. The former chair of the Senate Ethics Committee, Senator Howell Heflin (D-AL), has expressed his own doubts about the current process: "There are just innumerable things wrong with senators judging senators. You censure someone, and the next day you're seeking their vote." Another Ethics Committee member, Senator Trent Lott (R-MS), echoed Senator Heflin's views, stating, "Maybe it's an impossible assignment to try to sit in totally dispassionate judgment on people we literally live with."

Nevertheless, the Constitution places responsibility on Members of Congress

to make the final decision in these cases. We believe that within this constitutional framework, the key is to build an effective independent voice to help ensure objectivity and credibility for the process.

Common Cause recommends several changes which, if enacted, could significantly improve the current process for dealing with allegations of ethics violations.

**Creation in Each House of Congress of an Office of Ethics Counsel to Ensure an Independent Voice in the Congressional Ethics Process**

It is essential to structure an ethics process that will have the necessary independence to interpret and enforce ethics rules and laws and that will be viewed both inside and outside of Congress as ensuring a credible process. One way to achieve this would be to create an independent Office of Ethics Counsel for each House of Congress.

This Office would be charged with two main tasks. First, each Office of Ethics Counsel would be responsible for investigating, and where appropriate presenting to the respective ethics committee, allegations of violations of ethics standards or rules. In exercising its functions, each Ethics Office would have authority to hear witnesses, gather other evidence and bring charges before the body's ethics committees. Second, the Office of Ethics Counsel would be responsible for interpreting ethics rules, issuing advisory opinions and providing ethics training.

The head of the Senate Office of Ethics Counsel could be appointed by an agreement between the Majority and Minority Leaders with a similar appointment for the House office made by the House Speaker and the Minority Leader. To ensure independence, the head of each office should serve for a fixed term, with removal only for cause, as is the case with the Director of the Office of Government Ethics (OGE) in the executive branch. To ensure credibility, the head of each office should be an individual who meets high standards of integrity and has a proven record of professionalism and impartiality.

### **1. Role of the Office of Ethics Counsel in enforcement proceedings**

Many have criticized the current ethics process in the Senate for allowing the Ethics Committee to serve multiple functions in enforcement proceedings -- investigator, prosecutor, jury and judge. Others have faulted the enforcement system in both bodies for not providing sufficient independence within the process.

The creation of independent Offices of Ethics Counsel would help to remedy these two major problems while meeting the constitutional requirement that the Members of each body be the judge of its own Members. The procedure would be a bifurcated, two-step process with the independent Ethics Offices responsible for conducting investigations to determine if there is substantial, credible evidence that a violation had occurred and for bringing charges before the Senate or House ethics committee. Upon receiving information of a possible violation or on its own initiative, the Office would look into a matter to see if further investigation was

12-6

warranted. At this point, the Office could decide against further investigation if, for example, the source was non-credible, the charge frivolous or easily proven to be untrue. Because a decision not to pursue an investigation would be made by an independent entity, the decision would have greater public credibility.

If the investigation proceeded, the Office could determine if use of an outside counsel was warranted and, if so, could select an outside counsel, perhaps from an agreed-upon list of private lawyers who meet established criteria and would be willing to take cases as the need arises. An outside counsel is particularly necessary in controversial or complicated cases. The ability of the Ethics Office to obtain the services of an outside counsel when needed would allow the staff of the Office on a day-to-day basis to remain relatively small.

If the Ethics Office finds substantial credible evidence, the Office would bring the case and any recommendations for sanctions to the Ethics Committee to hear and decide.

We believe that this process could work with either one Ethics Committee in each body hearing all cases in a Congress or with an ad hoc committee established for each case.

## **2. Role of the Office of Ethics Counsel in interpreting ethics rules and providing advisory opinions**

In the current process, responsibility for providing interpretations or advisory opinions falls to the congressional ethics committees and their chairs and ranking

members. In the House, the Office of Advice and Education established in 1989 is under the House ethics committee.

A lack of ongoing and vigorous oversight has undermined rules that in some cases are ignored and cease to be effective. A prime example is the ban on the personal use of campaign funds where a record of inaction has allowed a number of questionable uses of campaign funds to become common practice, such as the purchase with campaign funds of meals, country club memberships, vacations and even automobiles.

To ensure ongoing enforcement and clear and correct ethics guidance, there must be a strong mandate for and commitment to effective ethics oversight, backed by the necessary resources. An Office of Ethics Counsel for each body could provide the needed independence, mandate and resources to carry out oversight functions. The Office could interpret the rules and make public its interpretations, providing overall guidance to Members and making clear to the public what the rules mean and how they apply in general cases. The Office could also serve as a clearinghouse for giving Members reliable and timely advice on ethics and providing written advisory opinions on specific ethics questions from individual Members.

Common Cause believes that an independent voice in interpretation and advice would improve the current process and provide public credibility to the results. An Office of Ethics Counsel for each House could help ensure an

affirmative commitment to uphold standards and could help ensure that guidance is given in a way that reinforces -- and does not undermine -- the rules.

Some have criticized the ethics process as not focusing enough on helping Members and staff to understand and live up to high ethical standards. An independent Office of Ethics Counsel could help not only by placing more emphasis on interpretation and advice but also by establishing ethics education to train Members and staff in ethics standards and concepts.

A model for these functions may be found in the Office of Government Ethics in the executive branch. OGE currently interprets executive branch rules and standards, issues advisory opinions for the executive branch, provides ethics training and consults with agencies and individuals to ensure ethics rules and standards are consistently and uniformly interpreted and enforced. The Director of OGE is appointed for a five-year term and is removable only for cause.

**Ensuring That Sanctions are Consistent, Commensurate with Violations and Publicly Credible**

Under the current system, obviously the most serious sanction facing a Member who violates congressional ethics rules and standards is expulsion from the Congress. For most rules violations, however, the punishment most often imposed is one of a series of verbal sanctions. There is a missing element between these two current choices.

While the ethics committees may recommend the loss of seniority, it has

rarely been used as a sanction and the committees must go to a party caucus to get such a sanction imposed.

In order to strengthen the ethics process, potential loss of seniority and positions of responsibility in Congress should be explicitly made one of the possible choices of sanctions the ethics Committees may choose to recommend to the full House and Senate in cases of serious violations. Congress allocates institutional power largely on the basis of seniority. Losing seniority and positions of congressional responsibility would permit disciplined Members of Congress to fulfill their constitutional responsibilities to their constituents, while making clear that improper or unethical conduct carries commensurate institutional sanctions.

Common Cause believes that the creation of new independent Offices of Ethics Counsel for the House and Senate would strengthen procedures for handling alleged ethics violations, help provide clear interpretation of the rules and impartial ethics guidance, and provide credibility to the process. We stand ready to work with you in any way that we can as you move forward with your important mandate.

## II. EMPLOYMENT DISCRIMINATION

Despite establishing a system more than twenty years ago for dealing with employment discrimination in the executive branch and in the private sector, Congress has failed to provide the same protections for its own employees.

In recent years, Congress has taken some significant steps to bring its employees under the coverage of the nation's employment discrimination laws. But the enforcement procedures for dealing with employee grievances, especially in the House, lack essential elements of the process established under the Equal Employment Opportunity Act for executive branch employees.

There is no rationale for allowing Members of Congress to operate under a system of anti-discrimination laws that provides congressional employees with less effective enforcement procedures than those that apply to executive branch employees.

Some Members of Congress and others have advanced the argument that because of the unique nature of the institution and congressional business, Members must have complete discretion in the hiring, firing and work conditions of employees.

Few would argue with the proposition that Congress, as the only national body of elected officials, is unique. There is, for instance, some validity to the contentions that Members' staff need to be politically compatible and, in some cases, may need to be from the Member's state or district.

But beyond this narrow exception, Members of Congress should be subject to the full force of employment discrimination laws, including enforcement mechanisms modelled on those existing for executive branch employees.

### **Current Procedures for Employment Discrimination Complaints**

Currently, about 20,000 employees of Congress, including House and Senate employees, members of the Capitol Police Force and employees of the Architect of the Capitol do not have the same level of employment discrimination protection as federal employees outside of Congress. (Other legislative branch employees, primarily in the Library of Congress and the General Accounting Office, have the same protections as executive branch employees.)

#### House of Representatives

In 1988, the House established the Office of Fair Employment Practices (OFEP) and set up a grievance procedure for employees who believe they have been subjects of discrimination in violation of House rules.

In 1990, the House brought House employees under the provisions of the Americans With Disabilities Act and in 1991 under the provisions of the Civil Rights Act. The House did not include itself, as the Senate did, under the provisions of the Rehabilitation Act and the Age Discrimination in Employment Act (although age discrimination is prohibited under House rules).

#### Senate

On October 28, 1991, the Senate passed, by the unanimous vote of 92

Senators, S. Res. 209, which condemned sexual harassment and stated:

It is the sense of the Senate that the Senate does not tolerate or condone sexual harassment in government, private sector, or congressional workplaces, and that the Senate should consider appropriate changes to the laws of the United States and the rules of the Senate to prevent sexual harassment.

The Senate acted at the same time to include provisions in the Civil Rights Act of 1991 to bring Senate employees under protections of that Act, the Americans With Disabilities Act, the Rehabilitation Act and the Age Discrimination in Employment Act. The Senate excluded "party affiliation, domicile or political compatibility" as grounds for discrimination complaints.

In the Civil Rights Act of 1991, the Senate provided for the establishment of a new Senate Fair Employment Practices office headed by a director appointed by the President pro tempore of the Senate on the recommendation of the Senate Majority Leader in consultation with the Senate Minority Leader. The office oversees the employment discrimination complaint process, while independent hearing officers, who are not Senate employees or officers, hear and decide on complaints. The process allows for either side to appeal the decision to the U.S. Court of Appeals for the Federal District.

#### Problems With Current Procedures

The Senate OFEP, with independent hearing officers and court review, is a far better process than in the House. It is apparent that the procedures in the House have serious shortcomings. According to a recent General Accounting

Office, there have been only seven formal complaints filed by House employees since the office opened in November 1988. Since there have been more than 1,200 "inquiries" made to the office, almost one-third with specific employment discrimination concerns, it appears that employees with complaints feel constrained from pursuing the procedures for formally making complaints.

A critical deficiency of the process in both houses is that congressional employees do not have full, direct recourse to the courts. Decisions reached about Senate employees under the Senate's procedures are subject to review by an appeals court. There is no such review available to House employees. Neither Senate nor House employees, however, can bring direct suit against their employers if they are not satisfied with the results of the congressional process -- a right enjoyed by executive branch employees.

There are other significant problems with both the House and Senate enforcement processes.

The process for reviewing decisions of the OFEPs has serious problems in both the House and Senate. In both bodies, the responsibility for reviewing the decisions of the offices lies with the employers: the Ethics Committee in the Senate and, in the House, a panel that includes Members of Congress -- it is composed of four members of the House Administration Committee and four staff or House officers chosen by the Speaker and Minority Leader.

## **Recommendations**

Common Cause believes that the procedures in Congress for dealing with employment discrimination complaints are inadequate and need to be changed in order to ensure that employees of Congress are provided with the same anti-discrimination protections as employees of the Executive Branch, including full recourse to the courts.

The process for hearing and acting on complaints should be significantly reformed, including establishment of a single fair employment practices office for the legislative branch with a staff chosen for expertise in the field of employment discrimination. The head of the office should be appointed to a fixed, ten-year term and hearing officers should be chosen from experts outside of Congress.

Review of decisions should be either directly to court or by a panel of independent experts in the field of employment discrimination, chosen by the head of the office. Review by panels dominated by Members of Congress necessarily raises questions by potential complainants about whether the system will treat their interests fairly. The ethics committees should have no role in reviewing the decisions of the office. Those reviewing the office's decisions should be independent of the institution and should not include officers of the House or Senate or Members of Congress.

We believe taking these steps will substantially strengthen the current process for addressing employment discrimination in Congress and help to ensure

that employment discrimination laws are enforced for Members of Congress by a process that is substantially the same as that which applies for the rest of government.