Report on the Creation of an Independent Ethics Commission

The Association of the Bar of the City of New York
Committee On Government Ethics

Corruption and ethics in Congress ranked near the top of voters' concerns in the 2006 mid-term elections. Exit polls showed that 42 percent of voters were "extremely concerned" about the issue.[1] Those results were consistent with earlier polls illustrating the depth of public distrust of Congress. For example, in a poll conducted in January, 2006, 64 percent of those polled said that ethics and honesty in Congress are "not so good" or "poor" and 57 percent agreed that at least half of all Members of Congress accept bribes or gifts that influence their votes.[2] Public confidence in the current system of congressional ethics and oversight is also low and the desire for reform is clear: 81 percent of Americans are upset about the way the House Ethics Committee is operating;[3] 72 percent would be more likely to vote for a candidate who supports creating an independent, bipartisan ethics committee.[4]

It is tempting to conclude that Americans have always lacked basic confidence in the integrity of Congress and other elected officials. In the last several decades, we have witnessed a sharp turn for the worse in public attitudes about elected officials that are now accepted as the norm. However, in 1964, 76 percent of Americans answered yes to the question of whether "you can trust the government in Washington to do what is right most of the time." By 1996, merely 19 percent of Americans agreed.[5] Many factors contribute to such public skepticism, but

[1] The Campaign Legal Center, November 9, 2006, "Reform Groups Call for Immediate Action by New Congress on Lobbying and Ethics Reforms, Stress Need for Independent Ethics Enforcement Entity," available at http://www.campaignlegalcenter.org.
[2] Los Angeles Times/Bloomberg Poll (Jan. 22-25, 2006).
[3] Democracy Corps Questionnaire (Jan. 22-25, 2006) (24 percent are "extremely" upset, 26 percent "very" upset, and 31 percent "somewhat" upset).
[4] *Id*. (43 percent are "much more" likely, 29 percent "somewhat more" likely).
[5] Sabato, L. & Simpson, G., *Dirty Little Secrets – The Persistence of Corruption in American Politics*, Foreword, ix (Times Books, Random House, 1996).

scandals from Watergate through the Jack Abramoff lobbying debacle have plainly taken their toll on Americans' confidence in government.

Public skepticism about the integrity of individual congressional Members naturally implicates the congressional ethics process itself. Where the public has lost faith in the integrity of legislators, it makes sense for the public to also doubt the efficacy of the congressional bodies charged with enforcing existing ethical rules. This is especially true when the responsibility for congressional ethics is entrusted exclusively to members of the institution. Indeed, the U.S. Constitution places ultimate responsibility for the enforcement of congressional ethics in the hands of legislators themselves.[6] This system of self-discipline is carried out by the Senate's Select Committee on Ethics and, in the House of Representatives, by the House Committee on the Standards of Official Conduct.

Critics of the current ethics process contend that the congressional ethics committees – made up of equal numbers of majority and minority Members – are unable to effectively enforce congressional ethics. One explanation for tepid ethics enforcement is that Members of congressional committees may be naturally disinclined to sanction their colleagues based on norms of collegiality or fear that they themselves could face the perils of aggressive enforcement. On the House side, the reticence to discipline fellow Members has at times allegedly been embodied in the ethics committee's adherence to an informal "truce" pursuant to which Members of both parties agree not to file any ethics complaints against one another.[7]

In order to address the perception that the system of ethical oversight is broken and restore Americans' faith in the institution of Congress, many public interest organizations, academics, and other congressional observers have long argued for the creation of an

[6] *See* U.S. Constitution Art. I, § 5, Clause 2.
[7] "Ethics in the House of Representatives," Common Cause, available at http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1129673.

independent ethics commission ("IEC") that would cover both houses of Congress. An IEC, composed of non-congressional members, would assume some of the duties that the congressional ethics committees are currently charged with carrying out. As discussed within, the greater independence of such a non-congressional ethics body is thought to address some of the structural deficiencies inherent in the current system.

Part I of this Report offers a brief summary of the existing system of congressional ethics enforcement. Part II describes briefly some of the features of the IEC proposals recently considered by Congress. This Report does not offer a detailed critique of each proposal, but instead seeks to provide enough details concerning the proposals to give the reader a general understanding of how the proposed independent ethics office could work in practice. Additional details on the legislative proposals to create an IEC are set forth in an Appendix to this Report. The focus of Part III is on the potential benefits that an IEC would offer. Part IV considers some of the objections voiced by opponents of the creation of a Federal IEC. This section of the Report focuses primarily on the constitutional concerns arguably implicated by transferring some responsibilities for ethics enforcement to an independent, non-congressional entity. Part V considers briefly the guidance that can be provided by the States' experience with IECs, especially the features that influence a commission's degree of independence. Finally, the Report concludes with our recommendations.

I. THE CURRENT SYSTEM OF CONGRESSIONAL ETHICS ENFORCEMENT

Congress established standing congressional ethics committees in the 1960s – in the Senate in 1964 and the House in 1967.[8] Prior to the creation of ethics committees, investigations

[8] *See* background report entitled "Enforcement of Ethical Standards in Congress," available at http://www.rules.house.gov/Archives/jcoc2ac.htm, which was prepared in connection with the work of the Joint Committee on the Organization of Congress, 103rd Congress (1993) (last visited June 23, 2007) (hereinafter referred

of congressional misconduct were typically referred to specially-created committees.[9] A written code of congressional ethics was first adopted in 1968.[10] The actions of legislators were previously judged according to an unwritten set of ethical standards.[11]

The Senate's Select Committee on Ethics (the "Senate Ethics Committee") is made up of six Senators – three from each party. The House of Representatives' Committee on Standards of Official Conduct (the "House Ethics Committee") is made up of ten Representatives, five from each party. All members of both committees continue to exercise, of course, their full slate of legislative responsibilities. Thus, ethics committee members inevitably face the difficult and potentially conflict-laden task of participating in the give-and-take process of legislating while serving on a committee that may be called upon to evaluate and/or censure the conduct of legislators with whom they work on an ongoing basis.

The congressional ethics committees currently review ethics complaints, and, theoretically, when formal disciplinary action is warranted (such as a censure or expulsion in the Senate, or a reprimand in the House) the committees make recommendations to the respective body to be voted upon by the full House or Senate. Without a vote of the full legislative body, the committees may issue letters of reproval or reprimand to Members, but this is not considered a formal disciplinary action by the entire institution such as a censure.[12] Since 1990, ethics enforcement by the House Ethics Committee has been "bifurcated," whereby a subcommittee consisting of Members of the standing committee reviews initial charges and conducts preliminary investigations. Following this initial procedure, if appropriate, a second

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to as "Enforcement of Ethical Standards"). "Enforcement of Ethical Standards" presents some of the analysis and historical background information supporting the Joint Committee's recommendations regarding the ethics process that are referred to later in this Report.

[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id.*

subcommittee (made up of the remaining members of the House Ethics Committee) hears the evidence and determines whether the charges are proven.[13] The full Committee then may make disciplinary recommendations to the membership of the House.

In practice, examples of congressional sanctions or expulsion are relatively rare. Historically, 31 Members of Congress have been censured (22 representative and 9 senators) and 19 Members have been expelled (15 senators and 4 representatives) with the majority of such sanctions relating to support of the Confederacy.[14] While the numbers also show that formal discipline of Members has been infrequent over the last three decades, it should be noted that Members may choose to resign rather than face disciplinary consequences. For instance, in 1995, Senator Robert Packwood of Oregon resigned after the Senate Ethics Committee recommended his expulsion for misuse of his position and for sexual misconduct.[15]

In 1997, the House of Representatives' rules for filing ethics complaints were modified to prevent private citizens from filing ethics complaints unless a Member of the House serves as a sponsor for the complaint (effectively prohibiting a private citizen from bringing an independent complaint). Specifically, the House Committee on Standards of Official Conduct Rule 15 (d) states: "Information offered as a complaint by an individual not a Member of the House may be transmitted to the Committee, provided that a Member of the House certifies in writing that he or she believes the information is submitted in good faith and warrants the review and consideration of the Committee."

While the House Ethics Committee is required to report the outcome of any investigation to the full House, it is not required to report any resolutions, reports, recommendations, or

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[13] *Id.*
[14] "Expulsion and Censure," Sunlight Foundation and the Center for Media & Democracy, available at http://www.sourcewatch.org/index.php?title=Expulsion_and_censure#Full_List_of_Expelled_and_Censured (last visited July 15, 2007).
[15] *Id*. at "History of disciplinary action."

advisory opinions to the House. The Committee may, however, choose to do so by majority vote.[16] In addition, the Committee may choose by majority vote to permit the public disclosure of any information or testimony received, the contents of a complaint, or the fact that a complaint was filed.[17] Only the chairman and ranking minority member of the Committee are authorized to make public statements about the Committee's business.[18] Moreover, the meetings of the House Ethics Committee are generally closed to the public (though certain subcommittee hearings are open unless specifically closed by affirmative vote).[19]

According to Standing Rule XXVI of the Senate, Senate Ethics Committee meetings shall be open to the public unless they "will tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual, or otherwise expose an individual to public contempt or obloquy, or will represent a clearly unwarranted invasion of the privacy of an individual." In that case, the meeting can be closed by majority vote.[20] Notably, the Senate Ethics Committee may *not* divulge to the public any information or materials related to the illegal or improper conduct of Members, officers, or employees subject to investigation.[21]

[16] *See* Rule XI: Procedures of Committees and Unfinished Business, cl. 3 (a)(2), cl. 3 (b)(1)(A) available at http://www.rules.house.gov/ruleprec/RXI.htm.
[17] *Id.* at cl. 3 (b)(6).
[18] *Id.* at cl. 3(h)(1)(B)(i)
[19] *Id.* at cl. 3 (c)(1-2)
[20] Rule XXVI: Committee Procedure, cl. 5 (b) http://rules.senate.gov/senaterules/rule26.php (last visited April 27, 2007).
[21] *See* Senate Select Committee on Ethics Rules of Procedure (Appendix to Senate Ethics Manual), available at http://ethics.senate.gov/downloads/pdffiles/manual.pdf at 380-381 (last visited April 27, 2007).

II. PROPOSALS FOR THE CREATION OF A FEDERAL INDEPENDENT ETHICS COMMISSION

Recent congressional scandals have led to renewed interest in ethics reform generally and in the creation of an independent ethics commission specifically.[22] Indeed, during the 109th Congress, several bills that would have established an IEC were referred to congressional committees. One bill, in the form of an amendment offered to the Legislative Transparency and Accountability Act of 2006, was ultimately considered and rejected by the Senate.[23] Although the Senate rejected the proposal, House Speaker Nancy Pelosi appointed a task force of House Members to explore the possible creation of an IEC. The task force was scheduled to report its results by May 1, 2007. As of this writing, the task force has not submitted any formal recommendations to the House.

The current congressional task force is not the first congressional body to study the merits of an IEC. In the 102nd Congress, a joint task force of twenty-eight congressional Members– equally divided among Democrats and Republicans from both Houses – was charged with studying the operations of Congress, including the ethics process, and providing recommendations for reform.[24] After holding thirty-six hearings and taking testimony from more than two hundred witnesses, the 1993 congressional task force completed a comprehensive report on Congress's operations. In regard to the ethics process specifically, a subcommittee

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[22] The Jack Abramoff lobbying debacle and the congressional page scandal are two of the high-profile congressional ethics scandals that occurred during the 109th Congress. *See e.g.,* "Report Finds Negligence in Foley Case," *New York Times*, dated December 9, 2006.

[23] *See* Senate debate accompanying Amendment No. 3176 to the Legislative and Transparency and Accountability Act of 2006, U.S. Senate, March 28, 2006, available at http://www.thomas.gov /cgi-bin/query/C?r109:./temp/~r109kvuZPE (the "Senate Debate"), at S2447. Amendment No. 3176, which would have created an IEC on the Senate side, was rejected by the Senate on March 28, 2006. *See* Senate Debate at S2359.

[24] *See* Final Report of the House Members of the Joint Committee on the Organization of Congress (the "House Report"), *Joint Committee on the Organization of Congress*, available at http://www.rules.house.gov/archives/JointComm.htm (last visited May 14, 2007). A 1997 congressional task force also considered reforms to the House ethics process. The 1997 task force ultimately rejected the notion of having non-Members participate in the investigative or adjudicative phases of the process. *See* Report of the Ethics Reform Task Force on H. Res. 168, at 6, available at http://www.house.gov/ethics/ethicsreport.pdf (last visited July 15, 2007).

recommended that a panel of private citizens serve as the fact-finders for the House Ethics Committee in place of the subcommittee of congressional Members then performing that function.[25] The involvement of private citizens, according to the report's drafters, would diminish the "inherent conflict of interest" that exists with a system of self-discipline and "help restore the public's credibility in the process."[26] The proposal was never enacted.

Current proposals for the creation of an IEC, while differing with respect to the degree of independent investigatory powers that would be afforded to commission members and other factors, share many of the same features.[27] At a minimum, the proposals would generally:

- create an independent ethics body staffed by non-congressional members chosen jointly by congressional leaders of both parties;
- entrust authority to the commission to initiate an ethics investigation upon a complaint being filed by a Member of Congress or a private citizen subject to the potential for being overridden by the congressional ethics committees;
- under certain circumstances, grant authority to the commission to administer oaths, compel testimony and take depositions to facilitate an investigation; and
- authorize the commission to report the results of any investigation to the congressional ethics committees.

The ethics enforcement process under an IEC would thus generally proceed as follows: (1) an ethics complaint is filed with the IEC by a Member or an outside complainant or initiated by the commission itself; (2) within thirty days of the complaint's filing, the commission, or the head of the commission under some proposals, makes an initial determination whether there are sufficient grounds to conduct an investigation or whether to dismiss the complaint; (3) the subject of the complaint is provided the opportunity during that period to respond to the complaint; (4) the commission may dismiss the complaint if it fails to state a violation, lacks

[25] *See* House Report "The Ethics Process" at "Executive Summary of Recommendations." The report was silent on the creation of a similar body in the Senate.
[26] *Id.*
[27] An Appendix to this Report details some of the key features of four IEC proposals.

credible evidence or is *de minimis* in nature; where the complaint is dismissed, it may also be referred to the congressional ethics committee for determination of whether the complaint is frivolous; (5) if the commission determines there are sufficient grounds to conduct an investigation, the commission notifies the congressional ethics committee, which can override that determination by a two-thirds, public roll-call vote, accompanied by a report explaining the reasons for overriding the determination; (6) if the ethics committee does not override the determination, the commission conducts an investigation to determine if probable cause exists that an ethics violation has occurred, subject to the same process for possible congressional ethics committee override; (7) if the investigation proceeds, the commission determines whether a violation has occurred and reports to the congressional ethics committee with recommendations for appropriate sanctions.[28]

Under all of the proposals, the congressional ethics committees would retain *final* authority over the decision to actually discipline a Member. At most, the IEC would have the power to "recommend" appropriate sanctions. This feature is intended to address the primary constitutional objections raised by opponents of an IEC (*see infra* Section IV).

III. POTENTIAL BENEFITS OF AN INDEPENDENT ETHICS COMMISSION

The creation of an IEC, by transferring some of the initial investigatory powers and responsibilities to an outside body consisting of non-congressional members, seeks to address the potential structural impediments to effective ethics enforcement existing under the current

[28] The process outlined here was presented by Senator Lieberman during Senate consideration of the legislative amendment, referred to previously, that would have created an IEC to assume responsibilities with respect to the Senate ethics process only. *See* Senate Debate at S2443-2444. The Senate-only proposal was offered as a compromise to address the concern that a "bicameral" IEC would run afoul of constitutional provisions (*see* Art. I, § 5, Clause 2, discussed *infra*) entrusting to each house the authority to determine its own rules and punish its own Members. *See Id*. at page S2443 Although the IEC proposals described in the Appendix vary in their specifics, including with respect to whether the IEC would cover one or both houses of Congress, the significant similarities shared by the proposals means the above summary of the ethics process under an IEC would, in large measure, accurately describe the revised process under most of the proposals.

system. As detailed further below, proponents assert that the greater independence of an IEC would help to (a) restore the public's faith in the ethics process and, more important, in the institution of Congress overall; (b) reduce the role of politics in the process of ethics enforcement; and (c) minimize the burdens on legislators currently serving on congressional ethics committees. Although proponents emphasize other benefits (*e.g.*, the involvement of the public as a means to promote ethical behavior), this Report focuses below on the potential benefits already mentioned, most notably, the enhancement of the public's perception of Congress.

A. Restoring Public Confidence in Congress

In supporting legislation that would have created an IEC, Senator McCain summed up the rationale for the proposal as follows: "[T]he fundamental point is that we need to restore the confidence of the American people in the way we do business."[29] Senator Lieberman struck the same chord in calling the creation of an IEC a means to restore Congress's "credibility and legitimacy" with the American people.[30] An IEC is thus viewed by its supporters as a vehicle for addressing the public's perception that a system of congressional ethics administered entirely by Congress itself is structurally incapable of effectively promoting and enforcing high standards of ethical conduct among its Members.

As illustrated by testimony provided to the 1993 congressional task force, there may be good reason to doubt the efficacy of the current process based on the current structure of congressional ethics committees and the realities of partisan politics.[31] First, unlike other congressional committees, the ethics committees consist of an equal number of Members from

[29] Senate Debate at S2443.
[30] *Id*.
[31] *See generally* Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993, and discussion *infra*.

each party. Although that membership is meant to ensure bipartisanship, in practice, it has often left the committees deadlocked on the key issue of whether to even commence an investigation in the first instance. Second, members of such committees inevitably must work closely with any congressional Member under potential investigation. Ethics committee members, aware that the assistance of their colleagues on legislative matters may be needed in the future, may be naturally reluctant to commence an investigation that could result in punishment.[32] Third, an investigation may also put legislators in the difficult position of scrutinizing behavior that they themselves are engaged in, another potential disincentive to comprehensive ethics enforcement.[33] These are potential impediments that flow directly from the structure of the ethics process itself.

Senator Obama has also described how an additional structural flaw with the current process may contribute to public mistrust: "[T]here's some good reason for the American people to be skeptical of our enforcement system. After all, we in the Senate are our own judge, jury and prosecutor."[34] This precise concern was addressed in testimony provided to Congress in 1993 by Professor Dennis P. Thompson of Harvard University.[35] Professor Thompson noted that while there may not be a literal trial of a Member in a given case, the interests of members of the ethics committees, as Members of Congress, are so "closely connected" to that of the individual Member facing a potential ethics inquiry that, in effect, the principle that no person shall serve as a judge in his own case is undermined.[36] The concern may be amplified in the Senate because the Senate ethics process (unlike the House process) is not bifurcated, *i.e.*, Senate ethics

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[32] Testimony of Alan Rosenthal, Professor of Political Science, Rutgers University, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993 (the "Rosenthal Testimony"), at 26.
[33] Statement of Dennis P. Thompson, Harvard University Professor, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993 (the "Thompson Statement"), at 112.
[34] Senate Debate at S2442.
[35] *See* Thompson Statement, at 111-113.
[36] *Id*. (relying on James Madison who wrote, "No man is allowed to be a judge in his own case, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal force, nay with greater reason, *a body of men* are unfit to be both judges and parties at the same time.")

committee members that participate in the investigation of a fellow Senator also participate in the committee's vote on whether to recommend to the full Senate that a Member face discipline.

Critics of the current process argue that instances of congressional discipline have been relatively infrequent, despite public knowledge of congressional misconduct, and that reforms to the system are thus necessary. One such critic points to the fact that in the last twenty years, the two houses of Congress combined have reprimanded or "denounced" only four Members and expelled only one *after* a federal conviction.[37] Previous examples in which the House disciplinary process has been called into question include the case of Rep. Dan Rostenkowski who never faced congressional discipline despite serving fifteen months in prison for his actions in the House Post Office Scandal and the proceedings involving Rep. Tom DeLay, which stopped short of actual congressional sanctions.[38] More recently, two congressional scandals that appeared to some observers as warranting ethics committee sanctions never resulted in any. First, Rep. Duke Cunningham faced no ethics committee sanctions although engaging in activity that culminated in his guilty plea to accepting $2.4 million in bribes from defense lobbyists and to tax evasion.[39] Second, after a nine-week investigation, the House Ethics Committee, while finding then-Speaker Dennis Hastert and other Republican leaders "negligent" in connection with the congressional page scandal, concluded that no Members violated any House rules and thus recommended no sanctions.[40]

Congressional ethics committees may have reached their decision not to sanction Members in the above cases after thoughtful deliberation and analysis. The reverse, however, may also be true: namely that such examples show the extent to which flaws in the current

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[37] *See* "Politician, Police Thyself," op-ed by Chafetz, J., *New York Times*, December 2, 2006.
[38] *Id*.
[39] *See* "Timelines of Lobbying & Ethics Scandals in the 109th Congress," available at http://www.campaignlegalcenter.org.
[40] *See* "Report Finds Negligence in Foley Case," *New York Times*, dated December 9, 2006.

process conspire to make the discipline of legislators, by legislators themselves, unlikely. Regardless, it seems clear that the public, based in part on such high-profile cases of congressional misconduct that were not met with any congressional sanctions, believes that the current system of ethics enforcement is tilted in favor of weak ethics enforcement or, that when action is taken, partisan politics plays a role in limiting the use of sanctions.[41] This perception undermines the public's overall faith and confidence in the workings of Congress. Accordingly, at a minimum, the appearance of greater objectivity and independence is an important benefit that will likely be realized by the creation of an IEC.

This potential benefit is not a trivial one. Ethics reforms beyond the IEC proposals described herein have been and continue to be enacted in significant part in the hopes of improving the public's faith in the legitimacy of the legislative process. To the extent that the effectiveness of Congress rests, at least in part, on the public's attitudes towards the institution of Congress (as many advocates contend), the problem of public perception becomes a matter of serious concern.[42] Simply put, a legislature's effectiveness may depend on the goodwill and trust of the constituents that Members of the legislature are elected to serve. Where that trust is diminished, legislator effectiveness can be expected to be impacted as well.

B. Reducing Political Pressures

The political pressures placed on congressional ethics committee members when making the decision to commence an investigation − and during the course of an investigation itself − are enormous. Publicity concerning congressional misconduct can affect not only an election for a

[41] *See, e.g.*, Senate Debate at S2442.
[42] *See, e.g.*, Senate Debate at S2453 (Senator Collins: "We are dealing with a reality that public confidence in Congress is very low. It is perilously low. It makes it difficult for us to pass legislation because the public believes that oftentimes our decisions are not in the public interest but, rather, beholden to some private interest.")

particular House or Senate seat but the balance of power in Congress overall. In close elections, the impact of an investigation can be significant.[43]

Members of congressional ethics committees cannot be entirely immune from such political considerations. Examples of how partisan concerns may influence the process are not uncommon.[44] Decreasing the impact of electoral and partisan concerns on investigations of congressional misconduct is thus a potential benefit of an IEC.[45] Investigations conducted by an IEC could also produce electoral consequences, but there is reason to believe that that the decision-making process itself, especially at the outset, would be better insulated from electoral considerations. First, IEC members would not be directly subject to the same electoral pressures as members of congressional ethics committees. The IEC members would not be elected by the public with their partisan affiliation in mind, and members would not be subject to re-election. Second, their professional livelihoods would not be as closely bound to the fortunes of fellow legislators. Members of an IEC, although dependent upon legislators for an initial appointment, would not need to work collaboratively on other matters with legislators who are the subject of an ethics inquiry. Third, the fear of facing an ethics inquiry for similar conduct would be absent. Thus, to the extent that electoral and political pressures do in fact affect the ethics process, the creation of an IEC could diminish the impact of such considerations. An IEC would thus offer a greater chance of truly non-partisan ethics enforcement.

C. Conserving Congressional Member Resources

[43] IEC proposals seek to address the concern over investigations being commenced for purely partisan, electoral purposes by prohibiting complaints from being filed, for example, within 30 days prior to a primary election for which the Member is a candidate or 60 days prior to general election. *See* Appendix.

[44] *See e.g.,* "Senator Scolded for Pressing Packwood Hearing," *New York Times*, July 22, 1995 (detailing how a call for public hearings by Democrat Barbara Boxer in matter before Senate Ethics Committee was met with apparent threat by Republican Ethics Committee Chairman Mitch McConnell to open investigations into Democrats Tom Daschle and Edward Kennedy).

[45] These potential benefits were discussed in congressional testimony offered to the 1993 Joint Committee on the Organization of Congress and in the Senate Debate, *supra* at 11.

In both congressional testimony offered in 1993 and in recent Senate debate, proponents of an IEC argued that an independent body would reduce the burden on members of congressional ethics committees.[46] In the words of a former counsel to the Senate Ethics Committee, service on the committee is "extraordinarily time consuming" and, when disciplinary proceedings are conducted, Members may be "diverted" from more traditional legislative tasks such as budget deliberations or the markup of appropriations bills.[47] The investigation phase, by definition, is often especially burdensome, involving the interviews of witnesses, scrutiny of documentary evidence and the synthesis of large amounts of information. Investigations can take years and may be conducted under unusually strong public and personal pressures.

Beyond the professional unpleasantness that may come with sitting as a judge of one's peers, the sheer amount of time needed for effective ethics committee service has been noted as a disincentive for Members to serve in the first instance. Transferring many of the investigatory responsibilities to an IEC would diminish some of these burdens. Ethics committee members would of course have to review and scrutinize the investigations conducted by an IEC, but the investigatory burdens should be significantly lessened.

IV. OBJECTIONS TO THE CREATION OF A FEDERAL IEC

Opponents of the creation of a federal IEC have raised numerous objections to the proposed reform. Such objections include that an IEC (a) would violate the U.S. Constitution; (b) is largely unnecessary given the role played by regular elections and the criminal justice system in policing congressional misconduct; (c) would create the possibility of a "runaway"

[46] *See* "Enforcement of Ethical Standards in Congress," *supra* n.8 ("[N]umerous witnesses said that using outsiders would solve the problem of Members not having sufficient time to serve on the Ethics Committee").
[47] Testimony of John D. Saxon, former counsel to U.S. Senate Select Committee on Ethics, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993, at 97 (noting demands of current ethics process and recommending creation of outside panel as part of bifurcated ethics process).

investigation reminiscent of an independent counsel; and (d) would unnecessarily duplicate the work of existing ethics committees.

The discussion in this section focuses primarily on the constitutional objections that, while they have often been raised by opponents of an IEC, have not been the subject of extensive analysis. This Report concludes that an IEC can be created without running afoul of any constitutional safeguards. In addition, this Report addresses briefly the remaining objections listed above.[48]

A. Constitutional Objections to a Federal IEC

Opponents of the creation of a federal IEC have asserted that its creation would conflict with two provisions of the U.S. Constitution: Article I, § 5, Clause 2 and the so-called "Speech or Debate Clause," Article I, § 6, Clause 1. These suggested constitutional conflicts were cited repeatedly during congressional debate of an IEC proposal in 2006.[49] Although the constitutional objections are sometimes raised without much specificity, the discussion below considers some of the ways that an IEC could conceivably implicate the Constitution.

1. *Article I, § 5, Clause 2*

The above Clause of the Constitution provides: "Each House *may* determine the Rules of its Proceedings [and] punish its Members for disorderly behavior" (emphasis added). Objections on the basis of this provision to the creation of an IEC appear to rest on the notion that entrusting investigatory powers to an IEC and authorizing the IEC recommend sanctions undermines Congress's exclusive authority to "punish" its Members. As an initial matter, the Clause does not speak in compulsory terms – the fact that Congress "may" determine rules and punishment

[48] Additional criticisms not considered here include the argument that an IEC (a) would insert greater partisanship into the ethics process, (b) would increase the filing of frivolous ethics complaints, (c) would create unproductive tension with existing ethics committees, and (d) would undermine a Senate ethics process that has proven effective.
[49] *See, e.g.,* Senate Debate at S2248.

does not, as some advocates would have it, mean that congressional Members "shall" be the only ones exercising such power.[50]

As discussed in Part II *supra*, none of the IEC proposals would alter the current system in which existing congressional ethics committee retain final authority to sanction or "punish" Members. Thus, it is not readily apparent how an IEC would actually implicate this constitutional provision. Nothing in the IEC proposals appears to infringe upon Congress's ability to make its own rules or punish its Members. Indeed, Congress's plenary authority to make such rules is undisturbed. An IEC, if (properly) created, would exercise only the limited authority delegated to it by Congress for the express purpose of facilitating the investigation and ultimate disposition of potential ethics violations. In sum, a congressionally-created IEC would be no more than a vehicle by which Congress could effectively enforce the very ethical rules it has created.

2. *Article I, § 6, Clause 1 (the "Speech or Debate Clause")*

The "Speech or Debate Clause" provides in relevant part:

> *The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.*

Opposition to an IEC based on the Speech or Debate Clause appears to be premised on the notion that an IEC's operation will (a) invite Executive or Judicial interference with legislative immunities established under the Clause or (b) interfere with the protections afforded to Members for their "legislative" acts. However, analysis of the Supreme Court's interpretation of the Speech or Debate Clause – which has been largely settled for over three decades –

[50] *See* Thompson Statement, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993, at 113-115.

suggests that the concern that an IEC could conflict with the Clause is largely unfounded. Legislation that takes into account the jurisprudence summarized below could be tailored to avoid running afoul of any purported constitutional boundaries.

(a) Executive or Judicial Interference

Both the fundamental purpose of the Speech or Debate Clause, as interpreted by the Supreme Court, and its application to the conduct of legislators, strongly suggest that an IEC charged with investigating congressional ethics violations and effectuating the congressional discipline of Members would not undermine or interfere with the operation of the Clause. The purpose of the Clause is "to prevent intimidation of legislators *by the Executive and accountability before a possibly hostile judiciary.*" *Doe v. McMillan*, 412 U.S. 306, 316 (1973) (emphasis added) *quoting Gravel v. United States*, 408 U.S. 606, 617 (1972); *citing also Powell v. McCormack*, 395 U.S. 486, 502 (1969) and *United States v. Johnson*, 383 U.S. 169, 181 (1966).[51] As the Supreme Court stated in *United States v. Brewster*, 408 U.S. 501, 508 (1972), "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government."

The creation of an IEC would not grant the executive or judicial branches of government any additional authority. Rather, an IEC implicates only the work of Congress. Where an IEC provides investigation results and disciplinary recommendations *directly to Congress*, no potential Executive intimidation or judicial hostility is implicated. Of course, certain actions by an IEC, under some of the legislative proposals discussed herein, could culminate with the

[51] The Supreme Court in *Johnson,* 383 U.S. at 177-183, discusses the history of the Speech or Debate Clause, and the relative scarcity of "judicial illumination" of the Clause, in part because the tradition of legislative immunity is well established.

referral of potentially criminal matters to an Executive Branch office. An IEC's power, however, would be limited to the power to "recommend" to a congressional ethics committee that such a referral be made. As with the present system, the congressional ethics committees would retain the exclusive authority to determine whether to refer a matter to another branch of government.[52] Moreover, as discussed below, even under such circumstances, the Speech or Debate Clause would afford its usual protections to Members of Congress.

The Supreme Court's decision in *United States v. Johnson*, 383 U.S. 169 (1966), is particularly illuminating. In *Johnson*, a former Congressman was convicted on several counts of violating a conflict of interest statute and one count of conspiring to defraud the United States. *Johnson*, 383 U.S. at 171. The conspiracy charge involved an alleged agreement by the Congressman and a colleague to attempt to influence the Justice Department to dismiss some pending federal indictments against a loan company and its savings and loan officers. *Id.* The Congressman allegedly accepted a bribe to, *inter alia*, read a speech favorable to independent savings and loans associations in the House. *Id.* at 172. The Supreme Court considered whether the conspiracy statute could be constitutionally applied to "an improperly motivated speech" in Congress. *Id.*

The Court found that the Speech or Debate Clause "clearly proscribes at least some of the evidence taken during trial," specifically, questioning at trial relating to how much of the speech was written by the Congressman and how much was written by representatives of the loan company. *Id.* at 174-177. The Court concluded that "such an intensive *judicial* inquiry, made in the course of a prosecution by the *Executive Branch* under a general conspiracy statute, violates

[52] *See* Appendix, "Sanctions of Members," detailing IEC's power to only "recommend" referral to, for example, the Department of Justice.

the express language of the Constitution and the policies which underlie it." *Johnson*, 383 U.S. at 177 (emphasis added).

After discussion of the underlying history and purpose of the Speech or Debate Clause, the *Johnson* Court concluded that "however reprehensible such conduct may be," the essence of the conspiracy charge was "that the Congressman's conduct was improperly motivated, and . . . that is precisely what the Speech or Debate Clause generally forecloses *from executive and judicial inquiry.*" *Id.* at 180 (emphasis added). The Court's analysis in *Johnson* underscores that the Court's concern (and the Speech or Debate Clause's applicability) related to executive and judiciary branch influence on the legislative conduct of Members of Congress. In guarding against such concerns, the functions and operating procedures of an IEC can and should be tailored to take into account the possibility that certain IEC investigatory materials may not be properly provided to the Executive Branch (*e.g.,* in the event an investigation is referred for criminal prosecution).[53]

Notably, the *Johnson* Court also suggested, without opining, that an open question remains regarding whether a criminal prosecution could, in fact, "entail[] inquiry into legislative acts or motivations, [if] founded upon a *narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.*" *Johnson*, 383 U.S. at 185 (emphasis added). In other words, the Court, which was dealing with a criminal prosecution by the Executive Branch of a congressional Member, suggested the possibility that narrowly tailored legislation could authorize Executive Branch enforcement of Congress's power to regulate its Members' conduct. This statement, though not dispositive, implicitly supports the

[53] *See, e.g., United States v. Helstoski*, 442 U.S. 477, 487 (1979), affirming that evidence of past legislative acts of members of Congress may not be introduced as evidence by the government in a prosecution of the Member for allegedly accepting money for promising to introduce, or introducing, private bills that would suspend immigration laws to allow aliens to remain in the country.

conclusion that a congressionally-created IEC would not violate the Constitution. The creation of an IEC with limited powers, that reports directly to Congress, does not go nearly as far as a delegation of power to the Executive Branch. Indeed, an IEC does not expand Executive Branch involvement, but merely creates a congressionally-authorized commission that would provide *to Congress*, effective tools to effectuate its own recognized authority to regulate the conduct of its Members.

(b) Protection for "Legislative" Acts.

The United States Supreme Court has made clear that the last sentence of the Clause – that Members may not be questioned in any other place for any speech or debate in either House – provides Members a "vital privilege." *See Gravel,* 408 U.S. at 615. The practical effect of this privilege is to insulate from *civil or criminal liability* actions taken by Members of Congress that are within the "sphere of legitimate legislative activity." *See Doe*, 421 U.S. at 311 *citing Gravel*, 408 U.S. at 624; *see also Eastland v. United States Servicemen's Fund, et al.*, 421 U.S. 491, 501 (1975). The Supreme Court in *Brewster*, however, noted that "[a] legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or Senate in the performance of official duties and into the motivation for those acts." 408 U.S. at 512.

Further, the Supreme Court has also recognized that "everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause." *Doe*, 412 U.S. at 313. For instance, "Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct, 'though generally done, is not protected legislative activity.'" *Id. quoting in part*, *Gravel*, 408 U.S. at 625. Similarly,

"[p]romises by a Member to perform an act in the future are not legislative acts." *Helstoski*, 442 U.S. at 489.

It is accordingly plain that many congressional Member actions will not even fall within the ambit of the Speech or Debate Clause. An IEC's investigation of those types of activities logically presents no constitutional issue under the Clause. In light of the broad range of activities that could involve an ethics violation but that would not qualify for "legislative activity" protection – including such unethical conduct as fundraising improprieties or the exercise of unethical influence in securing government contracts – much of the work of an IEC would not even potentially implicate the Speech or Debate Clause. Similarly, where Congress disciplines Members for activities that do not implicate civil or criminal liability (and many types of unethical conduct may not rise to the level of legal accountability), the role of an IEC in the disciplinary process should not offend the Speech or Debate Clause.[54] All of this suggests an IEC could be constructed to minimize or eliminate entirely any constitutional concerns.

[54] The inapplicability of the Speech or Debate Clause seems even clearer on this point given that the Clause is limited to Executive or Judicial inquiries rather than the type of congressional inquiry ultimately at issue with an IEC.

B. Additional Objections to the Creation of a Federal IEC

1. *Regular elections and the criminal justice system effectively police congressional ethics.*

Critics of the creation of an IEC also assert that the regular electoral review of legislators, especially when coupled with the workings of the criminal justice system, already ensures that Members involved in ethical improprieties face consequences for their behavior. Indeed, many of the legislators involved in recent scandals have been forced to resign, have decided to forego reelection rather than face defeat as a result of negative public sentiment, or have been voted out of office. The role played by prosecutors and especially by the public at the voting booths in policing congressional ethics is no doubt a significant one.[55] However, criticism of an IEC on these grounds somewhat begs the central question of whether an IEC, as opposed to congressional ethics committees operating alone, will improve Congress's ability to enforce its own, independent system of ethics.

Congress itself, as discussed *surpa*, has instituted a code of ethics and a system for potential sanctions for their violation despite the existence of the criminal justice system and regular elections as a means to police congressional ethics. Congress has thus already made the decision that a system of congressional ethics should exist independent of these other means even if the systems sometimes overlap (*i.e.*, where the same behavior may subject a Member to congressional sanctions, criminal penalties, and defeat at the ballot box). Thus, criticism of an IEC based solely on the availability of other means to enforce congressional ethics cannot settle the debate over an IEC's creation. Proponents view an IEC as an additional tool for ensuring that the system Congress has put into place is effectively carried out.

[55] *See* "Enforcement of Ethical Standards" at 6 (discussing regular electoral review as a "significant factor in the theory and practice of congressional discipline").

In the case of elections as a means of ethics enforcement, the following observation has been offered:

> The trouble with this line of argument is that all of us, all citizens, have an interest in the conduct of all members, not just the ones whom we can vote for, because we all have an interest in the effect and credibility of Congress as an institution. Yet when citizens vote for their own representative, they are generally more concerned about their own district or State than about the institution. So the electoral connection is not a very effective substitute for enforcing institutional standards . . .[56]

The above concern was one reason that the 1993 congressional task force ultimately recommended the creation of a panel of private citizens to serve as the fact-finder to investigate complaints.[57]

More fundamentally, it is plain from the public's poor perception of Congress that criminal convictions and resignations have done little to improve the public's overall trust in the institution, which is a major goal of ethics reform in the first place. In fact, it seems possible that a legislator's criminal conviction in the absence of any discipline by his or her peers only reinforces the perception that Members are disinclined to police themselves or that electoral considerations trump meaningful ethics enforcement.

2. *The IEC will create some of the same problems experienced previously with the work of independent counsels.*

In recent Senate debate, Sen. Voinovich opposed the creation of an IEC, in part based on the argument that an IEC "would resurrect the independent counsel in the institution of the Senate."[58] By this, Senator Voinovich was presumably raising the specter of Congress losing

[56] *See* Testimony of Professor Dennis F. Thompson, Harvard University Professor, Hearing Before the Joint Committee on the Organization of Congress (S. Hrg. 103-14), 103rd Congress, February 25, 1993 at 29-30.
[57] *See* House Report at "The Ethics Process."
[58] *See* Senate Debate at S2447.

control of the investigatory process once an IEC is created and perhaps enduring fruitless and unfounded investigations that needlessly consume taxpayer dollars.

Bipartisan appointment procedures, which are a feature of all the recent IEC proposals, may provide some inherent protection against this concern, minimizing the likelihood of a purely partisan commission. More fundamentally, under several of the IEC proposals detailed in the Appendix, congressional ethics committees retain the power to, in effect, "check" the power of the IEC by exercising the right to halt an IEC's work at three stages of the ethics process.[59] First, a two-thirds vote of committee members can override the decision to commence an investigation. Second, after an investigation, the ethics committee can override the finding that "probable cause" exists to believe that an ethics violation has occurred. Third, the ethics committee retains final authority on whether to recommend sanctions that are ultimately voted on by the entire legislative body.

As a result, the "runaway" IEC need not be an inevitable feature of its creation. However, it is possible that current proposals can be improved by additional procedural safeguards providing Congress with an "emergency shut-off" mechanism in the unlikely event that an IEC investigation proceeds unreasonably far afield of the underlying congressional ethics complaint.[60] One method of providing Congress with a check against an overreaching ethics investigation would be for IEC legislation to maintain in the standing congressional ethics committees the power to terminate an ethics investigation at anytime with a two-thirds vote.

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[59] As the Appendix indicates, Senate Bill 2259, if enacted, would not have provided for an ethics committee override of an IEC's decision to investigate. Although other proposals lacked this feature, as the Appendix also shows, the override feature has been included in some proposals.

[60] Of course, some proposals already have safeguards that could be used to prevent a gross abuse of power. For example, SA 3176, the Collins Amendment for creation of an Office of Public Integrity discussed *supra*, provides for removal of the Director of the Office of Public Integrity by the President *Pro Tempore* of the Senate, upon the joint recommendation of the Senate majority and minority leaders, for *inter alia*, "neglect of duty" or "inefficiency," both of which might be implicated in the event of an overbroad ethics investigation.

3. *The IEC will duplicate the work of existing ethics committees.*

Earlier, this Report noted that an IEC could diminish the burden on existing ethics committee members by, among other things, transferring investigatory responsibilities to an IEC. Critics of the IEC proposal, however, argue that the IEC's work will not decrease the time demands of ethics committee members because a parallel or duplicate investigation will be required.[61] Nothing in the IEC proposals actually *requires* such duplication of effort. The results of the investigation are presented to the congressional ethics committees, which appear to be free to determine the level of additional inquiry needed to assess an IEC's recommendations. Presumably, a committee and its staff could, if it wished, conduct an entirely new investigation. More likely, committee members can thoroughly review the content and quality of the investigation before reaching any decisions, a task that should demand less time than a full-scale investigatory process. Simply put, it appears less burdensome for legislators to review and perhaps supplement a thorough investigation than to conduct an entirely duplicate one on their own.

V. LESSONS FROM STATE-LEVEL IECs: INDEPENDENCE IS KEY

Many of the features of an IEC discussed above or detailed in the Appendix have been incorporated into IECs at the State level. Indeed, dozens of states have adopted and implemented commissions to oversee, monitor, investigate and/or enforce ethics laws or codes of conduct. A review of the various state ethics commissions should inform Congress's endeavors to create a federal IEC. While a complete review of the numerous State-level IECs is beyond the scope of this Report, a brief consideration of some of these IECs is presented below.

Not surprisingly, our review of State-level IECs suggests that the actual "independence" of any IEC may be determined at the outset by its structure and that structural independence may

[61] *See* Senate Debate at S2449.

play an important role in an IEC's effectiveness. The extent of an IEC's actual independence is a crucial variable for another reason – as described above, a basic goal thought to be achieved by the creation of an IEC is greater insulation of the ethics process from institutional or partisan pressures. On this score, State IECs vary significantly.

A few of the key components that may determine the degree of independence that an IEC enjoys, as presented below, include: (i) the membership of the commission and the process by which members may be removed; (ii) the jurisdiction of the commission; (iii) the investigative powers of the commission; (iv) the enforcement powers of the commission; and (v) the funding of the commission.

A. Membership and Removal

Generally speaking, an "independent" commission means that sitting legislators are not permitted to sit on the commission. Beyond this prohibition, the limitations on membership vary from state to state. Many states prohibit state employees, public officials, elected officials (including their family members) and/or political party officials from serving on ethics commissions.[62] A few states forbid lobbyists from serving on ethics commissions.[63] The West Virginia Ethics Commission requires that two of its twelve members be former members of the West Virginia state legislature and that the other member seats be filled by a certain number of

[62] Among the commissions that have such membership limitations are the Connecticut Office of State Ethics, the Florida Ethics Commission, the Louisiana Board of Ethics, the Maine Commission on Governmental Ethics and Election Practices, the Massachusetts State Ethics Commission, the Minnesota Campaign Finance and Public Disclosure Board, the Missouri Ethics Commission, the Nebraska Accountability and Disclosure Commission, the Nevada Commission on Ethics, the North Carolina State Ethics Commission, the Oklahoma Ethics Commission, the Oregon Government Standards and Practices Commission, the Pennsylvania State Ethics Commission, the Rhode Island Ethics Commission, the Tennessee Ethics Commission, and the Wisconsin Ethics Board. The West Virginia Ethics Commission bars anyone covered by the state ethics law from serving on the commission. Public officials are not prohibited from serving on the New York State Ethics Commission; however, only one of the governor's three appointees may be a public official. *See* Executive Law § 94, ¶ 2.

[63] The Florida Ethics Commission and the New York State Ethics Commission prohibit lobbyists from serving on their commissions. The Kansas Governmental Ethics Commission has a five year 'cooling off' period before lobbyists may serve on the commission.

former state employees, former county employees and officials and/or municipal employees or officials.[64]

Typically, although legislators are not permitted to be members of independent commissions, IEC members (or some number of them) are often appointed by ranking officials of the state legislature; alternatively, IEC members (or some number of them) are appointed by the governor. In order to protect against partisanship, those who appoint members to the commission may have to appoint members from different political parties. In New York, for example, three of the five members of the ethics commission are appointed by the governor, and no more than two of these three appointees can be a member of the same political party.[65]

Restrictive rules for the removal of commission members may provide another layer of independence to ethics commissions. In many states, commissioners may only be removed for cause, (*i.e.*, gross misconduct, substantial neglect of duty, etc.). Members of the New York State Ethics Commission, for example, "may be removed by the governor for substantial neglect of duty, gross misconduct in office, inability to discharge the powers or duties of office or violation of this section, after written notice and opportunity for a reply."[66]

B. Jurisdiction and Investigative/Enforcement Powers

Most independent state ethics commissions are granted jurisdiction to monitor compliance over state ethics laws and codes of conduct as they apply to state/public employees, elected officials and their staffs. In some cases there are exemptions to this jurisdiction. In New

[64] *See* West Virginia Code §6B-2-1(b).
[65] *See* New York Executive Law § 94, ¶ 2.
[66] Executive Law §94, ¶ 7. *See also*, Nevada Commission on Ethics, NRS § 281.1572, ¶ 3 ("A member of the Commission may be removed by the Governor before the expiration of his term for misconduct in office, incompetence or neglect of duty."); Kentucky Legislative Ethics Commission, KRS Chapter 6.651(8) (members of the Commission can only be removed for cause). Members of the Missouri Ethics Commission may be removed for cause, but also may be removed from office "by concurrent resolution of the general assembly signed by the governor. If such resolution receives the vote of two-thirds or more of the membership of both houses of the general assembly, the signature of the governor shall not be necessary to effect removal." *See* § 105.955(5) R.S. Mo.

York State, for example, the ethics commission does not have jurisdiction over the legislature or local government officials (and thus cannot investigate wrongdoing by such officials). Further, although the New York State Ethics Commission has jurisdiction over the governor, attorney general, comptroller and lieutenant governor, critics point out that its effectiveness is limited because "it can do nothing more than report its findings to the Assembly and Senate, over which it has no jurisdiction".[67]

By contrast, the Kentucky Legislative Ethics Commission has jurisdiction over Kentucky's General Assembly and the power to punish a legislator for ethical violations, including imposing a fine of up to $2000.[68] Likewise, the Montana Commissioner of Political Practices has jurisdiction over state officers, legislators and state employees (except that it has no jurisdiction over the legislature if the complaint involves a legislative act) and may issue decisions and impose sanctions against those subject to its jurisdiction.[69] The North Carolina Ethics Commission has jurisdiction over the legislators, legislative employees, judicial officers, judicial employees and public servants.[70] Some states, like Florida and Missouri, have a bifurcated process that permits the commission to investigate complaints against legislators, but does not grant it power to impose penalties − if a finding of probable cause is made, the commission must submit its report to the legislature for final action.[71]

Separate and apart from the jurisdiction and enforcement powers of state ethics commissions, another important component of a commission's power is the ability of its members to commence an investigation in the first instance (regardless of who is being

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[67] *See* "Independence Seen as Key to Ethics Reform," *N.Y.L.J.*, January 22, 2007.
[68] *See* KRS Chapter 6.601 – 6.849; *see also* comments of Judge Anthony Wilhoit, Executive Director of the Kentucky Legislative Ethics Commission during Common Cause panel on independent ethics commissions (2006).
[69] S*ee* M.C.A. § 2-2-136(1)(a); M.C.A. § 2-2-136(1)(c)(2).
[70] *See* N.C.G.S. § 138A-10(a)(5).
[71] *See* FS Ch. 34-5.006; § 105.955(14) R.S. Mo.

investigated). State ethics commissions with the broadest powers have the authority to launch investigations without permission or approval from the legislature or the executive branch.[72] However, generally these commissions can only act upon a sworn complaint by a member of the public (as opposed to acting on its own initiative). Notably, the Oregon Government Standards and Practices Commission may act on its own initiative or upon a complaint from the public.[73] Further, although the members of the Kentucky Legislative Ethics Commission as a whole may not file a complaint, any individual member may file a complaint upon which the commission may act. In West Virginia, complaints are screened by the Probable Cause Review Board (a three member board appointed by the governor with the advice and consent of the state senate).[74] The Review Board then determines whether to refer the case to the West Virginia Ethics Commission.[75]

The North Carolina State Ethics Commission may upon its own motion initiate a complaint involving covered persons and conduct a preliminary inquiry.[76] To the extent the Commission finds probable cause of a violation, in the case of public servants, the Commission may proceed to a hearing, but in the case of legislators, the matter is referred to the legislative ethics committee for further action and in the case of judicial officers, the matter is referred to the Judicial Standards Commission.[77]

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[72] States whose ethics commissions can act without approvals from the legislature or other outside body include Connecticut, Florida, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New York, Oklahoma, Pennsylvania, Rhode Island, Tennessee and Wisconsin.
[73] *See* ORS 244.260 (1)(a).
[74] *See* CSR, Title 158-16-3.
[75] *Id*.
[76] *See* N.C.G.S. § 138A-12(b).
[77] *See* N.C.G.S. § 138A-12(h).

C. Funding

State ethics commissions whose budgets for enforcement are not wholly at the mercy of legislatures enjoy a greater degree of independence. Exemplars in that regard are Connecticut and North Carolina whose ethics commissions' budgets are protected by statutory provisions which limit the legislature and governor from reducing their budget requests.[78] The budget of the Nevada Commission on Ethics is similarly protected in that sixty percent of its budget comes from assessments on the state's larger cities and counties.[79]

RECOMMENDATIONS

This Report recommends that Congress strongly consider implementation of an independent ethics commission. Although a perfect system of ethics enforcement is impossible, an IEC may offer Congress the best chance of remedying two major problems under the current system: the inherent tension that comes with entrusting Members of Congress alone to investigate and discipline their own colleagues and the public's perception that a weak ethics process allows legislators to engage in misconduct with impunity. As explored within this Report, the public's perception should not be chalked up to a reflexive distrust of politicians. The structure of the ethics process itself, which rests exclusively on the ability of legislators to root out corruption among their own peers despite personal and electoral pressures that may counsel against comprehensive enforcement, lends support to public skepticism.

To address most directly such structural impediments to effective enforcement and public skepticism of the current ethics process, this Report recommends that the initial decision of whether to investigate a claim should be entrusted to an IEC. Additionally, the commission

[78] *See* "Honest Enforcement: What Congress Can Learn From Independent State Ethics Commissions," U.S. PIRG, Federation of State PIRGs, February 2007, at 10,13.
[79] *Id*.

should be granted the power and the tools needed to carry out the investigation itself. Only when an independent commission makes the initial decision of whether to commence an investigation *and* also carries out the investigation will there be a realistic expectation that barriers to comprehensive ethics enforcement will be diminished and the public's perception of the process improved. These key features may offer the best chance for ensuring that worthy investigations are commenced and that partisan pressures are reduced.

Safeguards, however, can and should be included in the process to prevent the abuse of an IEC's powers. This Report recommends that congressional ethics committees be provided the power, as discussed within, to "check" the IEC during each stage of the ethics process with a two-thirds vote of congressional ethics committee members, including after an investigation has been commenced but a report not yet completed. Although the independence of an IEC is a crucial element of its perceived and actual effectiveness, this safeguard may prove to be a reasonable compromise to avoid overbroad investigations or at least minimize concerns that such investigations are inevitable. Additional safeguards should include, but are not necessarily limited to, penalties for the filing of frivolous complaints and restrictions on how close to an election a commission may consider complaints. Experiments with ethics commissions at the state level may provide a roadmap for Congress in addressing some of these important concerns.

An IEC that balances the goal of achieving greater independence in the ethics process with the need to preserve constitutional principles is not beyond the reach of Congress. As detailed within, a commission can be created that assumes some of the functions of the congressional ethics committees without disturbing Congress's final authority to determine whether to discipline a Member and what form that discipline should take. Simply put, constitutional concerns alone do not appear to be a bar to the creation of an IEC.

Although the potential objections to an IEC are numerous, we believe those objections must be measured against the danger of the continuing erosion of public trust in the institution of Congress and the weaknesses of the current system. The structural reforms inherent in the creation of an IEC offer the best, if imperfect, means to both enhance the ethics process and public trust in government ethics.

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Key Features	S. 2259 (Obama)	SA 3176 (Collins/McCain/ Lieberman/Obama)	H.R. 4799 (Shays/Meehan)	S. Con. Res. 82 (Kerry)
Creation of independent ethics office	Establishes Office of Public Integrity and vests authority of office in a newly-created Congressional Ethics Enforcement Commission	Establishes Senate Office of Public Integrity to be headed by a Director	Establishes Office of Public Integrity to be headed by a Director	Yes – Congressional Ethics Office to be headed by Congressional Ethics Officer
Applies to both houses of Congress	Yes	No – applies to Senate only	Yes	Yes
Appointment process	Commission consists of 9 members: 2 appointed by Senate Majority Leader; 2 appointed by Senate Minority Leader; 2 appointed by House Speaker; 2 appointed by House Minority Leader; and last member chosen by agreement of at least 3 of the leaders mentioned above	Director appointed by President Pro Tempore of Senate upon joint recommendation of Senate majority and minority leaders	Director appointed jointly by Speaker of House, majority leader of Senate and minority leaders of House & Senate	Congressional Ethics Officer shall be nominated jointly by the Senate majority and minority leaders, House Speaker and House minority leader, the chairman and ranking member of the Committee on Standards of Official Conduct of the House and chairman and ranking member of the Select Committee on Ethics of the Senate;

Key Features	S. 2259 (Obama)	SA 3176 (Collins/McCain/ Lieberman/Obama)	H.R. 4799 (Shays/Meehan)	S. Con. Res. 82 (Kerry)
				Congressional Ethics Officer shall be confirmed by both the Senate & the House
Term of office **(for Commission Member/Director/Officer)**	Initial 2-year term after act passage; 4-year terms thereafter; Chair and Vice Chair elected by majority of Commission to 1-year terms	5 years (may be reappointed)	5 years (may be reappointed)	2 years (may be reappointed for 2 additional terms)
Selection criteria for Director/Commission members/Officer	Commission members must be U.S. citizens; out of the 8 members appointed by Senate & House leaders without need for agreement, at least 1 member must be a former judge and 1 a former member of Congress.	Director must have training or experience in law enforcement, the judiciary, civil or criminal litigation, or as a member of a Federal, State or local ethics enforcement agency	Director cannot be a former registered lobbyist within prior 5 years; Director "may not have been" a Member of Congress	None
Initiation of investigation	Sworn complaint filed by any U.S. citizen (including Commission member)	Complaint by Member of Congress, "outside complainant" or by the Office on its own initiative	Complaint by Member of Congress, "outside complainant" or by the Office on its own initiative	Request for Review by any person accompanied by a sworn statement

Key Features	S. 2259 (Obama)	SA 3176 (Collins/McCain/ Lieberman/Obama)	H.R. 4799 (Shays/Meehan)	S. Con. Res. 82 (Kerry)
Congressional check on power to investigate	No – Commission must conduct preliminary inquiry and has power to commence an adjudicatory proceeding to determine whether to "present case" to congressional ethics committee; bill explicitly takes away preliminary investigative authority from existing congressional ethics committees	Yes – whenever Director determines there are "sufficient grounds to conduct an investigation" Director must notify the Senate Ethics Committee and committee has power to overrule the Director's determination upon (i) 2/3 roll-call vote of committee members; (ii) public report on the matter; and (iii) vote of each member listed in report.	Yes – whenever Director determines there are "sufficient grounds to conduct an investigation" Director must notify the congressional ethics committee and committee has power to overrule the Director's determination upon (i) 2/3 roll-call vote of committee members; (ii) public report detailing reasoning; (iii) vote of each member listed in report; and (iv) dissenting members allowed to issue own report. Note: Director may still publish report detailing grounds for his determination	No – Congressional Ethics Officer may conduct full investigation; however, subpoena power (as detailed below) is limited

Key Features	S. 2259 (Obama)	SA 3176 (Collins/McCain/ Lieberman/Obama)	H.R. 4799 (Shays/Meehan)	S. Con. Res. 82 (Kerry)
Investigatory powers	Administer oaths; issue subpoenas; compel attendance of witnesses, documents; take depositions.	May be exercised only if Director's determination is not overruled by Senate Ethics Committee – then Director can administer oaths; issue subpoenas; compel attendance of witnesses, documents; take depositions.	May be exercised only if Director's determination is not overruled by congressional ethics committee – then Director can administer oaths; issue subpoenas; compel attendance of witnesses, documents; take depositions.	Powers not listed – gives Congressional Ethics Officer power to conduct informal inquiry, and if Officer determines a full investigation is warranted, to conduct the investigation and provide full public report to Congressional Ethics Committee; **Note: Subpoena power limited** - Officer may bring a civil action to enforce a subpoena only when directed to do so by the adoption of a resolution by Senate or House

Key Features	S. 2259 (Obama)	SA 3176 (Collins/McCain/ Lieberman/Obama)	H.R. 4799 (Shays/Meehan)	S. Con. Res. 82 (Kerry)
Congressional check on determination that "probable cause" exists to believe that ethics violation has occurred	No - if Commission (presumably, by majority vote) finds "probable cause" to believe that an ethics violation has occurred, Commission may *either* (a) due to mitigating circumstances (*e.g.*, no economic gain to violator) confidentially reprimand violator in writing w/ copy to presiding officer of Senate or House *or* (b) initiate an adjudicatory proceeding to determine whether to present a case to existing ethics committees for ultimate determination	Yes - Senate Ethics Committee may overrule Director's determination upon (a) 2/3 of call vote of committee members (b) committee issues a public report on matter; and (c) vote of each member listed in report. If Director's determination not overruled, Director presents the case and evidence to Senate Ethics Committee	Yes - congressional ethics committee may overrule the Director's determination upon (i) 2/3 roll-call vote of committee members; (ii) public report detailing reasoning; (iii) vote of each member listed in report; and (iv) dissenting members allowed to issue own report. If Director's determination is not overruled, Director presents the case and evidence to congressional ethics committee Note: Director may still publish report detailing grounds for a determination rejected by congressional committee	Yes – if, after making preliminary inquiries, Congressional Ethics Officer finds probable cause that violation of ethics rules has occurred, the Officer shall submit detailed report to members of Senate, members of House and DOJ **Note: After submission of the report, "*no action may be taken in the Senate or the House of Representatives to impose a sanction on a person who was the subject of the Congressional Ethics Officer's inquries on the basis of any conduct that was alleged in the request for review and sworn statement."***

Key Features	S. 2259 (Obama)	SA 3176 (Collins/McCain/ Lieberman/Obama)	H.R. 4799 (Shays/Meehan)	S. Con. Res. 82 (Kerry)
Sanctions of members	Congressional ethics committees retain final authority; commission, upon majority vote of its members at the conclusion of an adjudicatory proceeding, can present case with evidence to congressional ethics committees; no mention of commission's authority to make recommendations regarding sanctions	Congressional ethics committees retain final authority – but when Senate Ethics Committee finds that an ethics violation has occurred, Director "shall *recommend* appropriate sanctions to the committee and whether a matter should be referred to the DOJ for investigation"	Congressional ethics committees retain final authority – but when congressional ethics committee finds that an ethics violation has occurred, Director "shall *recommend* appropriate sanctions to the committee and whether a matter should be referred to the DOJ for investigation"	Congressional ethics committees retain final authority - *see also* "No Action" rule detailed above
Responsibility for receiving, monitoring and auditing filings under the Lobbying Disclosure Act ("LDA") of 1995	Yes – Commission would assume various responsibilities relating to lobbying disclosures, lobbying restrictions and audits of LDA filings	No - responsibility remains with Clerk of the House and Secretary of the Senate	Yes – responsibility transferred to Office of Public Integrity Note: also transfers power with respect to Ethics in Government Act of 1978 and reforms internal congressional rules accordingly	No - responsibility remains with Clerk of the House and Secretary of the Senate

Key Features	S. 2259 (Obama)	SA 3176 (Collins/McCain/ Lieberman/Obama)	H.R. 4799 (Shays/Meehan)	S. Con. Res. 82 (Kerry)
Additional responsibilities	Conduct research on governmental ethics and implement any educational programs it considers necessary to give effect to the Act; annual report to the congressional ethics committees summarizing Commission determinations and advisory opinions and any recommendations	Powers limited to ones outlined above except that Director, subject to review by Senate Ethics Committee, also has power to approve or deny privately-funded travel by Members and staff	Provide information and informal guidance to Members and staff, provide advisory opinions, conducts audits to ensure compliance with all laws and rules; provide informal guidance to registrants under LDA Note: This bill, with its explicit transfer of jurisdiction for ensuring compliance with the LDA and Ethics in Government Act of 1978, gives the Director significant oversight responsibilities	Periodically report to Congress any changes to ethics law and regulations that Officer determines will improve investigation & enforcement; annual report to Congress on number of ethics complaints and descriptions of ethics investigations undertaken
Ban on filings prior to election	30 days prior to primary election for which Member under investigation is a candidate; 60 days prior to general election	Within 60 days of an election involving such Member under investigation	Within 60 days of an election involving a Member under investigation	30 days prior to primary election for which Member under investigation is a candidate; 60 days prior to

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	for which Member is a candidate			general election for which Member is a candidate
Penalties for frivolous complaints/false statements	Up to $10,000 fine or costs of investigation, whichever is greater and up to 1-year in prison for knowingly filing false complaint or aiding another to do same; any person penalized for false complaint barred from filing future complaints	If Senate Ethics Committee determines complaint is frivolous (after referral by Director for that determination), committee may notify Director not to accept future filings from such person and person may be required to pay costs of investigation; Director may refer matter to DOJ	If Director determines complaint is frivolous, Director shall not accept future complaints from such person and person shall be required to pay costs for investigation and Director may refer matter to DOJ	Up to $10,000 fine or cost of preliminary review, whichever is greater, and up to 1-year in prison for knowingly filing false complaint or aiding another to do same; Congressional Ethics Officer can refer matter to Attorney General if he finds that any part of sworn statement was a false statement made willingly and knowingly; any person penalized for false complaint barred from filing future complaints