

1-1-2008

## Independent of the Constitution?--Issues Raised by an Independent Federal Legislative Ethics Commission with Independent Enforcement Authority

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### Recommended Citation

Paul Taylor, *Independent of the Constitution?--Issues Raised by an Independent Federal Legislative Ethics Commission with Independent Enforcement Authority*, 42 U. Rich. L. Rev. 543 (2008).

Available at: <https://scholarship.richmond.edu/lawreview/vol42/iss3/2>

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# ESSAY

## INDEPENDENT OF THE CONSTITUTION? — ISSUES RAISED BY AN INDEPENDENT FEDERAL LEGISLATIVE ETHICS COMMISSION WITH INDEPENDENT ENFORCEMENT AUTHORITY

*Paul Taylor* \*

### I. CONGRESSIONAL ETHICS SELF-ENFORCEMENT AND THE POLITICAL QUESTION DOCTRINE

To date, Congress has consistently kept its committees with jurisdiction over the ethical behavior of its members internal to the operations of the House of Representatives and the Senate.<sup>1</sup> Because it has done so, the federal courts have generally refrained from becoming involved in the internal decisions and operational details of such congressional ethics committees under what has become known as the “political question doctrine.”

Black’s Law Dictionary defines a political question as “[a] question that a court will not consider because it involves the exercise of discretionary power by the executive or legislative branch of

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1. See MILDRED AMER, ENFORCEMENT OF CONGRESSIONAL RULES OF CONDUCT: AN HISTORICAL OVERVIEW 1–5 (Congressional Research Service 2007). In 1964, the Senate created the Select Committee on Standards and Conduct and in 1967, the House established the Committee on Standards of Official Conduct. *Id.* at 5. Conduct and financial disclosure regulations for Members, officers and certain employees were adopted in 1968. Since then, the two ethics committees have “authority to investigate allegations of wrongdoing by Members, officers, and employees; adjudicate [ ] evidence of misconduct and recommend penalties, when appropriate; and provide advice on actions permissible under the congressional codes of conduct.” *Id.*

government.”<sup>2</sup> Under the political question doctrine, a court will not hear a case—that is, a case will be non-justiciable and not proper for judicial determination—if sufficient separation of powers concerns are raised. This was the case in *Baker v. Carr*, where the Supreme Court found the political question doctrine applicable when there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department . . . or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . .”<sup>3</sup>

Such a “textually demonstrable constitutional commitment . . . to a coordinate political department” is found in article I, section 5, clause 2 of the Constitution, which states that “[e]ach House may determine the Rules of its Proceedings . . . .”<sup>4</sup> Consequently, the political question doctrine protects each house’s decisions regarding the implementation of the rules governing the non-criminal behavior of members of Congress from judicial interference, as long as such rules are implemented by each house of Congress, and not an independent entity.

## II. PROPOSALS TO CREATE AN INDEPENDENT FEDERAL LEGISLATIVE ETHICS COMMISSION WITH INDEPENDENT AUTHORITY TO ENFORCE INVESTIGATORY RULES

Following the recent criminal investigations of a few members of Congress, there have been renewed calls in some quarters for the creation of an independent federal legislative ethics commission an (“independent commission”) that would be empowered with independent enforcement authority. This independent commission could exercise authority, at its own initiative without prior approval by a house of Congress, to conduct investigations of alleged unethical behavior by members of Congress. A letter signed by the leading private organizations supporting the creation of such an independent commission states:

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2. BLACK’S LAW DICTIONARY 1197 (8th ed. 2004).

3. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

4. U.S. CONST. art. 1, § 5, cl. 2.

An Office of Public Integrity should be created with the following essential elements:

....

The Office should have the powers necessary to conduct investigations, including the authority to administer oaths, and to issue and enforce subpoenas . . . [and] [t]he Office should have the authority to dismiss frivolous complaints expeditiously and to impose sanctions for filing such complaints.

....

The Office's Director or panel members . . . should not be Members or former Members.<sup>5</sup>

Proponents consider these two enforcement features—subpoena authority and the power to sanction frivolous complaints—essential to the success of any such independent commission. Subpoena enforcement authority is necessary to allow an independent commission to follow investigations wherever it desires, free from political pressures. Without enforcement authority, such a commission would come to be seen as a paper tiger. The power to sanction frivolous complaints is necessary to deter filing of all types of irresponsible charges against members. Such meritless ethics charges, if undeterred, would generate ethical probe headlines for months and inevitably tarnish the images of innocent members whose claim to office relies on their good reputation among their voting constituents.

The subpoena power and the authority to sanction frivolous complaints were granted to the Kentucky Legislative Ethics Commission,<sup>6</sup> which proponents of a federal independent commission hold as a model Congress should follow.<sup>7</sup>

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5. See, e.g., Letter from the Campaign Legal Center, et al., to all Members, U.S. House of Representatives (Dec. 21, 2006), available at <http://www.campaignlegalcenter.org/press-2305.html> (last visited Nov. 7, 2007).

6. The statute creating the Kentucky Legislative Ethics Commission, for example, provides that "[a]ny person who knowingly files with the commission a false complaint of misconduct on the part of any legislator or other person shall be guilty of a Class A misdemeanor," KY. REV. STAT. ANN. § 6.686(6) (LexisNexis 2003), which carries a maximum penalty of a \$500 fine. See KY. REV. STAT. ANN. § 534.040(2)(a) (LexisNexis 1999). It also provides that the commission can issue subpoenas enforceable in court. See KY. REV. STAT. ANN. § 6.666(3) (LexisNexis 2003) ("The commission may administer oaths; issue subpoenas; compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony; and have the deposition of witnesses taken in the manner prescribed by the Kentucky Rules of Civil Procedure for taking depositions in civil actions. If

### III. LOSING THE SAFE HARBOR AGAINST JUSTICIABILITY UNDER THE POLITICAL QUESTION DOCTRINE

Assuming for the moment that either house of Congress could constitutionally create an independent commission, an immediate result would likely be that such commission's enforcement actions would be justiciable in federal court—whereas the actions of congressional committees composed of elected members generally are not.

In *Baker*, the Supreme Court enumerated a list of six factors that should be evaluated on a case-by-case basis before a court will determine whether the political question doctrine precludes it from hearing a case:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>8</sup>

These factors are vague to some extent, but none clearly preclude a court from considering challenges to enforcement actions taken by a commission composed of non-members acting independently of the House or Senate and its own ethics committees. A decision by the Court of Appeals for the District of Columbia Circuit indicates that federal courts would consider such challenges.

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a person disobeys or refuses to comply with a subpoena, or if a witness refuses to testify to a matter regarding which he may be lawfully interrogated, the Franklin Circuit Court may, on application of the commission, compel the obedience by proceedings for contempt as in the case of disobedience of a subpoena issued from the Circuit Court or a refusal to testify in Circuit Court. Each witness subpoenaed under this section shall receive for his attendance the fees and mileage provided for witnesses in Circuit Court, which shall be audited and paid upon the presentation of proper vouchers sworn to by the witness.”).

7. See *Lobby and Ethics Reform: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) [hereinafter Dufendach] (testimony of Sarah Dufendach, Chief of Legislative Affairs, (Common Cause) (“In Kentucky, for example, a Legislative Ethics Commission established 14 years ago now has the resounding support of legislators.”)).

8. 369 U.S. at 217.

In *Consumers Union v. Periodical Correspondents' Ass'n*, the D.C. Circuit considered a claim by Consumer Reports that it was unconstitutionally denied Capitol press credentials and gallery access by a private organization, the Executive Committee of the Periodical Correspondents' Association, which acted under the supervision of the Speaker of the House and the Senate Committee on Rules and Administration.<sup>9</sup> In that case, the court held the issue was nonjusticiable under the political question doctrine because "beyond declining to accredit *Consumer Reports*, none of the [Periodical Correspondents' Association] took any action or enforced any orders against [*Consumer Reports*]." <sup>10</sup> Such would not be the case, of course, if an independent federal legislative ethics commission acted to enforce its sanctions orders or subpoenas. Because such a commission would take such actions independently of each house of Congress, the political question doctrine would no longer insulate the commission's decisions from the involvement of federal courts. This raises the possibility that courts could impose additional procedures, rights, and duties unintended by Congress on the commission.

The experience in Rhode Island provides an example. In Rhode Island the state's independent ethics commission fined then-Governor DiPrete for ethical violations.<sup>11</sup> In *DiPrete v. Morsilli*, the Rhode Island Supreme Court upheld the commission's fine against Governor DiPrete for selecting a business associate to perform work for the state.<sup>12</sup> The court, however, reversed a second fine the Commission assessed against Governor DiPrete for influencing the award of a contract to a campaign contributor's

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9. 515 F.2d 1341, 1342 (D.C. Cir. 1975). The relevant Congressional rules provided that:

The [press] applications required . . . shall be authenticated in a manner that shall be satisfactory to the executive committee of the Periodical Correspondents' Gallery who shall see that the occupation of the galleries is confined to bona fide and accredited resident correspondents, newsgatherers, or reporters of reputable standing who represent one or more periodicals which regularly publish a substantial volume of news material . . . .

The Periodical Press Galleries shall be under the control of an executive committee elected by members of the Periodical Correspondents' Association, subject to the approval and supervision of the Speaker of the House of Representatives and the Senate Committee on Rules and Administration.

*Id.* at 1344–45 (emphasis omitted).

10. *Id.* at 1346–47.

11. *DiPrete v. Morsilli*, 635 A.2d 1155, 1158 (R.I. 1994).

12. *Id.* at 1162–64, 1167.

engineering firm.<sup>13</sup> The Rhode Island Supreme Court held that the Commission could not find a conflict of interest unless it first established that the parties entered into a quid pro quo agreement in which the engineering contract was promised in exchange for the contribution.<sup>14</sup> While the court's decision was couched as an interpretation of the statutory Rhode Island Code of Ethics, the result prevented the Ethics Commission from enforcing a categorical ban on public officials awarding contracts to campaign contributors.

Just as ethical rules must be applied on a case-by-case basis, judicial interpretations of their various applications under a governing statute would also be applied case-by-case by the courts. As one commentator summarized the legal dynamic in Rhode Island:

There is much uncertainty regarding how, in the long run, the [Rhode Island] Ethics Commission will co-exist among the three branches of state government. At this time, however, one thing is clear: when Rhode Island created an "independent" Ethics Commission through constitutional amendment, the resulting agency's clashes with the other branches of state government have led to significant dislocation of traditional separation of powers principles.<sup>15</sup>

As the Rhode Island experience shows, courts can become involved in the operation of independent ethics commissions in unexpected ways, with unexpected results.<sup>16</sup> This would likely occur regardless of whether such independent commission were created by statute or by a rule of either house of Congress.

There would, however, be differences in a statutorily based, and a rule-based commission. With a statute-based independent ethics commission the Court of Appeals for the District of Columbia Circuit has held that the separation of powers doctrine would not prevent federal courts from asserting jurisdiction over the statute. In *United States v. Rose*, a congressman argued that his prosecution by the Department of Justice under the Ethics in Government Act, which statutorily codified parts of the Rules of

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13. *Id.* at 1165-67.

14. *See id.* at 1166.

15. Samuel D. Zurier, *Rhode Island's Ethics Laws: Constitutional and Policy Issues*, R.I. BAR J., June 1996, at 9, 54.

16. Of course, Rhode Island state law precedents, like all state law precedents, are not binding on federal courts regarding the interpretation of federal law, so no state legal precedents can predict how federal courts might rule in similar situations.

the House of Representatives, violated the separation of powers doctrine.<sup>17</sup> In that case, the court held:

We do not think the DOJ's action against Congressman Rose offends the separation of powers doctrine. The DOJ brought this action under section 706 of the Ethics Act, which authorizes it to investigate and prosecute "knowing and willful" violations of the Act. It is true that the disclosure requirements of the Ethics Act applicable to Members of Congress have been incorporated into the House Rules, . . . which are enforced by the House pursuant to its constitutional power to discipline its Members. *But by codifying these requirements in a statute, Congress has empowered the executive and judicial branches to enforce them*; in bringing this action, then, the DOJ was fulfilling its constitutional responsibilities, not encroaching on Congress's.<sup>18</sup>

Even if House or Senate rules alone created an independent ethics commission, any punishment of private citizens who are not members of Congress would likely lead to federal court involvement. The Court of Appeals for the District of Columbia Circuit has held that "judicial intervention may be appropriate where rights of persons *other than members of Congress* are jeopardized by Congressional failure to follow its own [internal] procedures."<sup>19</sup>

The Supreme Court itself has intervened when private citizens were punished as a result of actions taken by a House committee. Early on, the Supreme Court noted the importance of protecting nonparticipants in the political process. In *United States v. Smith*, the Court noted that, "[a]s the construction to be given to the [Senate] rules affects persons *other than members of the Senate*, the question presented is of necessity a judicial one."<sup>20</sup> In *Christoffel v. United States*, the Supreme Court continued to demonstrate its willingness to take an active role when procedural rules affect people outside of Congress.<sup>21</sup> In that case,

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17. 28 F.3d 181, 181–82 (D.C. Cir. 1994) (congressman defending against a civil penalty action for filing false financial reports with the Clerk of the House in violation of the Ethics in Government Act of 1978).

18. *Id.* at 190 (emphasis added) (internal citations omitted).

19. *Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (emphasis added). And in *United States v. Cisneros*, 169 F.3d 763, 770 (D.C. Cir. 1999), the same court held that separation of powers concerns did not prevent a federal court from addressing the validity of an indictment where the defendant was not a member of any branch of government. *Id.*

20. 286 U.S. 6, 33 (1932) (emphasis added).

21. 338 U.S. 84 (1949).



Christoffel testified before the House Committee on Education and Labor and was later convicted of perjury based on his testimony.<sup>22</sup> Christoffel claimed that, insofar as the statute required "an oath or affirmation before a competent tribunal," the conviction could not stand because at the time of the alleged perjury, a quorum of the Committee was not present.<sup>23</sup> Christoffel argued that the lack of a quorum deprived the Committee of its status as a competent tribunal.<sup>24</sup> He further asserted that it was irrelevant that a quorum was present when testimony began three hours before the perjurious statements were actually made.<sup>25</sup> The Court acknowledged that, as a matter of legislative procedure, where no point of order is raised, a quorum is presumed to continue.<sup>26</sup> But Christoffel, as a nonmember, had no capacity to raise a point of order.<sup>27</sup> As the Court stated, "[i]n a criminal case affecting the rights of one not a member, the occasion of trial is an appropriate one for petitioner to raise the question."<sup>28</sup>

Another example is *Yellin v. United States*, which involved the effect of a congressional procedural rule on the interests of a private party.<sup>29</sup> In that case, petitioner Yellin refused to answer questions put to him by a Subcommittee of the House Committee on Un-American Activities.<sup>30</sup> Yellin's refusal to answer led to his conviction on four counts of contempt of Congress.<sup>31</sup> Yellin contended that the committee failed to comply with its own rules and therefore his conviction could not be sustained.<sup>32</sup> The rule at issue was committee Rule IV, which required the committee to consider injury to the witness's reputation when deciding whether to hold the interrogatory session in a public or an executive session.<sup>33</sup> Yellin's claim centered on the fact that the committee apparently failed to consider reputational injury in response to his request

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22. *Id.* at 85.

23. *Id.* at 85-86, 85 n.2.

24. *Id.* at 85-86.

25. *Id.* at 86.

26. *Id.* at 87-88.

27. *See id.* at 88.

28. *Id.*

29. 374 U.S. 109 (1963).

30. *Id.* at 111.

31. *Id.*

32. *Id.* at 112-14.

33. *Id.* at 114-15.

for an executive session.<sup>34</sup> The Court reversed the conviction, noting that where Congress clearly intended the rule as a protective measure for the benefit of witnesses, “the most logical person to have the right to enforce those protections is the witness himself” in federal court.<sup>35</sup>

These cases indicate that those who are fined by an independent ethics commission under whatever procedures are deemed by Congress to be most conducive to eliminating and deterring frivolous complaints, or those who face enforcement actions to compel compliance with subpoenas issued by such a commission, might not only have their fines reversed or modified, but they may also be granted due process procedural protections not contemplated by the legislators who enacted the commission. The more independent a commission is from Congress, the more likely federal courts will be able to insert themselves into the workings and proceedings of the commission and reorganize its operations, as the federal courts—composed of lifetime-appointed unelected judges—deem appropriate.

#### IV. CONSTITUTIONAL ISSUES RAISED BY THE DELEGATION OF A HOUSE OF CONGRESS’S AUTHORITY TO ENFORCE CONTEMPT CHARGES

The Supreme Court has held that although Congress has the inherent authority to investigate, when Congress assumes the investigatory function, the authority to conduct the investigation must be set forth in a specific congressional resolution.<sup>36</sup> In *Watkins v. United States*, the Supreme Court rejected the validity of a congressional investigation on the grounds that the resolution creating the inquiry was overly vague.<sup>37</sup> The Court stated:

An essential premise in this situation [the enforcement of contempt of Congress charges] is that the House or Senate shall have instructed the committee members on what they are to do with the power delegated to them . . . . That requires that the instructions to an investigating committee spell out that group’s jurisdiction and purpose with sufficient particularity. Those instructions are embod-

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34. *Id.* at 111–12.

35. *Id.* at 116.

36. *See Watkins v. United States*, 354 U.S. 178, 201 (1957).

37. *See id.* at 201–04.

ied in the authorizing resolution. That document is the committee's charter. Broadly drafted and loosely worded, however, such resolutions can leave tremendous latitude to the discretion of the investigators.

....

Combining the language of the resolution with the construction it has been given, it is evident that the preliminary control of the Committee exercised by the House of Representatives is slight or non-existent. No one could reasonably deduce from the charter the kind of investigation that the Committee was directed to make. As a result, we are asked to engage in a process of retroactive rationalization. Looking backward from the events that transpired, we are asked to uphold the Committee's actions unless it appears that they were clearly not authorized by the charter. As a corollary to this inverse approach, the Government urges that we must view the matter hospitably to the power of the Congress—that if there is any legislative purpose which might have been furthered by the kind of disclosure sought, the witness must be punished for withholding it. No doubt every reasonable indulgence of legality must be accorded to the actions of a coordinate branch of our Government. But such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms.

The Government contends that the public interest at the core of the investigations of the Un-American Activities Committee is the need by the Congress to be informed of efforts to overthrow the Government by force and violence so that adequate legislative safeguards can be erected. From this core, however, the Committee can radiate outward infinitely to any topic thought to be related in some way to armed insurrection. The outer reaches of this domain are known only by the content of "un-American activities." Remoteness of subject can be aggravated by a probe for a depth of detail even farther removed from any basis of legislative action. A third dimension is added when the investigators turn their attention to the past to collect minutiae on remote topics, on the hypothesis that the past may reflect upon the present.

... An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference.<sup>38</sup>

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38. *Id.* at 201, 203–06; see also *Wilkinson v. United States*, 365 U.S. 399, 407–08 (1961) (noting that House Rule XI does not state the subject under inquiry in a given hear-

Such principles seem to require that Congress issue individualized and specific authorizing resolutions before initiating individual ethics investigation enforcement actions. It also seems that if either house of Congress created an independent commission charged with something as broad as rooting out political corruption or the appearance of such corruption, it would not be a sufficiently specific authorizing charter—just as the Supreme Court found an authorization for a general investigation into un-American activities unconstitutionally vague.<sup>39</sup>

Currently, the full House of Representatives or the full Senate must approve a contempt of Congress enforcement action before the issue can be handed to the Department of Justice for potential prosecution.<sup>40</sup> The constitutional basis for the statutory authority flows at least in part from Congress' authority under article I, section 5, clause 2 of the Constitution, which states that "[e]ach House may determine the Rules of its Proceedings . . . ."<sup>41</sup> This constitutional provision allows each house to enforce those very rules outlined in Section III within the constitutionally prescribed means Congress has to punish its members and within the limitations in place to protect the rights of private parties.<sup>42</sup> But, the further removed an independent commission with enforcement authority becomes from direct control by each house of Congress, the weaker becomes such commission's claim to constitutional authorization.

The Supreme Court has given strong indications that Congress may not be able to outsource its subpoena power and other enforcement authority regarding ethics investigations to an independent commission. By doing so, Congress would be delegating

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ing with adequate precision).

39. See *Watkins*, 354 U.S. at 209.

40. See 2 U.S.C. § 192 (2000) ("punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months"); 2 U.S.C. § 194 (requiring after a contempt of Congress claim is brought, the appropriate United States attorney must bring the matter to the grand jury for action); S. SELECT COMM. ON ETHICS, 108TH CONG., SENATE ETHICS MANUAL app. at 378 (Comm. Print 2003) (describing how Senate committees must issue subpoenas and initiate civil and criminal enforcement proceedings); see also H. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 105TH CONG., RULES 17 (Comm. Print 1997) (describing how House of Representatives committees and sub-committees must issue subpoenas and allege violations). The Senate may also bring a civil contempt action directly to federal court. See 2 U.S.C. § 288b(b) (2000).

41. U.S. CONST. art. 1, § 5, cl. 2.

42. *Id.*

to people who are not federal legislators the power to decide which congressional ethics issues to pursue. In *Watkins*, the Court made clear that a charge of contempt of Congress will stand only when the delegation of investigatory authority to members of Congress is sufficiently specific because "[t]he more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are *not in conformity with the will of the parent House of Congress*."<sup>43</sup> The committee that delegated authority to issue subpoenas without congressional approval, of course, could not be said to be in conformity with Congress's will.<sup>44</sup>

The Court in *Watkins* emphasized the need to keep compulsory processes within the strict control of the legislative branch in order to ensure that the legislature itself would be responsible for whatever actions it took or did not take.<sup>45</sup> The Court stated:

*The legislature is free to determine the kinds of data that should be collected. It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses.*<sup>46</sup>

The legislature, and individual legislators, can only be held responsible for their actions in the constitutional sense if they retain tight enough control over the decisionmaking process to al-

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43. *Watkins*, 354 U.S. at 201 (emphasis added).

44. *See id.*

45. *See id.* at 215.

46. *Id.* (emphasis added). In an earlier case defining each House's authority to enforce contempt charges, the Supreme Court also made clear that such authority could only be exercised under the direct supervision of the people's elected legislature. *See Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 228-29 (1821). In *Anderson*, the Court stated:

That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And, accordingly, to avoid the pressure of these considerations, it has been argued, that the right of the respective Houses to exclude from their presence, and their absolute control *within their own walls*, carry with them the right to punish contempts committed in their presence . . . .

*Id.* (emphasis added).

low voters to assign legislators individual responsibility for their actions.<sup>47</sup> This would include actions taken to further congressional ethics enforcement. No case has held that either house of Congress may delegate any of its constitutional authority to an independent entity to “determine the Rules of its Proceedings” under article I, section 5, clause 2 of the Constitution.

Congress, of course, also has “[a]ll legislative powers” under article 1, section 1 of the Constitution. When the Supreme Court upheld Congress’s power to issue subpoenas, it stated such authority could be exercised as a function of Congress’s legislative power.<sup>48</sup> Regarding Congress’s authority to delegate its legislative power, the Supreme Court historically has held that Congress may not delegate such power to another branch of government.<sup>49</sup> But, as Congress increasingly allocated regulatory powers to executive agencies following the New Deal, the Supreme Court, in order to ensure that the delegation of authority was constitutional, held that Congress must legislate an intelligible principle

47. See *Tenney v. Brandhove*, 341 U.S. 367, 377–78 (1951) (“Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.”).

48. See *McGrain v. Daugherty*, 273 U.S. 135, 160–61, 174–75 (1927)

The first of the principal questions . . . is . . . whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress consisting of a Senate and House of Representatives and invests it with “all legislative powers” granted to the United States, and with power “to make all laws which shall be necessary and proper” for carrying into execution these powers and “all other powers” vested by the Constitution in the United States or in any department or officer thereof. Other provisions show that . . . each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. But there is no provision expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively . . .

....  
We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function . . .

....  
... Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

*Id.*

49. See *Field v. Clark*, 143 U.S. 649, 692 (1892).

to which the agency must conform.<sup>50</sup> This intelligible principle was found absent recently in *Whitman v. American Trucking Ass'ns*.<sup>51</sup> In *Whitman*, the Court explained that of the two statutes analyzed, one "provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'"<sup>52</sup> Consequently, it is questionable whether Congress can delegate subpoena power derived from its legislative authority to an independent commission charged with the regulation of something so broad as, for example, congressional ethics on the basis of no more precise a standard than "reducing corruption or the appearance of corruption."

It may be argued that each individual ethics inquiry would be part of Congress's ongoing efforts to gather information before crafting generally applicable lobbying reform and ethics legislation. But, this argument would be akin to the proposition that Congress could use its subpoena power to investigate crimes committed by individuals as part of its ongoing efforts to gather information before crafting generally applicable criminal laws. In *McGrain v. Daugherty*, the Court rejected such arguments and made clear that subpoena authority would not extend to investigations of a purely personal nature:

It is quite true that the [congressional] resolution [at issue in the case] directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants are all subject to regulation by congressional legislation . . . .

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50. *Hampton v. United States*, 276 U.S. 394, 409 (1928).

51. 531 U.S. 457, 474–76, 486 (2001).

52. *Id.* at 474.

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating . . . .

. . . .

*We think the resolution and proceedings give no warrant for thinking the Senate was attempting or intending to try the Attorney General at its bar or before its committee for any crime or wrongdoing.*<sup>53</sup>

In the case of an independent federal legislative ethics commission, however, investigations into individual member misconduct would be conducted explicitly to “try the [member] at its bar or before its committee” for wrongdoing on the part of the individual member.

### V. *MORRISON V. OLSON*

The degree of control that each house of Congress would be constitutionally required to have over the enforcement decisions of an independent commission must also be considered under the Supreme Court’s decision in *Morrison v. Olson*.

In *Morrison*, the Court upheld the part of the Ethics in Government Act (“Act”) insofar as it permitted the appointment of an independent counsel to investigate and potentially prosecute high-ranking government officials for violations of federal criminal laws.<sup>54</sup> Under the Act, the Attorney General is required to conduct a preliminary investigation after receiving information he or she determines is “sufficient to constitute grounds to investigate whether any person [covered by the Act] may have violated any federal criminal law.”<sup>55</sup> After completion of the investigation or ninety days have passed, whichever date is earlier, the Attorney General must report to a Special Division, a special court created “for the purpose of appointing independent counsels.”<sup>56</sup> The Attorney General must also report a finding of “no reasonable grounds to believe that further investigation is warranted” to the Special Division.<sup>57</sup> As a result, the Special Division would not have the “power to appoint an independent counsel.”<sup>58</sup> On the

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53. *McGrain v. Daugherty*, 273 U.S. 135, 177–79 (1927) (emphasis added).

54. 487 U.S. 654, 660, 696–97 (1988).

55. *Id.* at 660–61 (quoting 28 U.S.C. §§ 591–592 (2000)).

56. *Id.*

57. *Id.* at 661.

58. *Id.* (quoting 28 U.S.C. § 592(b)).



other hand, if the Attorney General determines that reasonable grounds exist to continue the investigation or prosecution, then he or she must apply to the Special Division for the appointment of an independent counsel.<sup>59</sup> The Special Division is then required to appoint an independent counsel and define the counsel's prosecutorial jurisdiction.<sup>60</sup>

The degree of control the Supreme Court required the Attorney General to have over the independent counsel was crucial to determining that the independent counsel did not "violate[ ] the principle of separation of powers by unduly interfering with the role of the Executive Branch."<sup>61</sup> The Court determined that the independent counsel law was constitutional under the separation of powers because it did not unduly interfere with the role of the Executive Branch.<sup>62</sup> But, it held as it did only because under the Act:

No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted" is committed to his unreviewable discretion. The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by Justice Department policy unless it is not "possible" to do so.<sup>63</sup>

If the same analysis were applied to an independent federal legislative ethics commission, the commission would have to be constrained by the following: (1) it could only initiate investigations pursuant to a specific request by a house of Congress; (2) a prior decision by a house of Congress "not to request appointment if [it] finds no reasonable grounds to believe that further investigation is warranted" would have to be "committed to [the] unreviewable discretion" of such house; (3) each house would have to retain "a degree of control over the power to initiate an investigation by the independent [commission];" and (4) the jurisdiction of

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59. *Id.*

60. *Id.*

61. *Id.* at 693.

62. *Id.* at 696-97.

63. *Id.* at 696.

the independent commission would have to be “defined with reference to the facts submitted by [the house of Congress].”<sup>64</sup>

Without these safeguards to protect the supervisory authority of Congress, an independent commission with independent enforcement authority would likely be seen under Supreme Court precedents as unduly interfering with the role each house of Congress has in punishing its own members.<sup>65</sup>

## VI. CONCLUSION

The preceding analysis strongly suggests that Supreme Court precedents would require each house of Congress to retain so much authority to initiate ethics investigations into its members and so much authority to define the scope and direction of the inquiries, that any congressionally created independent ethics commission ultimately would not be able to serve its intended purpose. If such a commission is constitutionally required to seek permission from a house of Congress before proceeding with investigations and enforcement actions, the utility of the commission would be questionable as the commission itself would be perceived as a paper tiger. Such utility would be further questioned if federal courts imposed a host of rights and duties on such a commission that Congress did not intend.

It becomes more difficult to see the utility of creating an independent federal legislative ethics commission if courts will prevent it from independently, promptly, and reliably dismissing frivolous complaints under rules established by Congress or if the Constitution prevents it from independently issuing subpoenas to compel testimony. Under such circumstances, the “independent” commission would be reduced to doing essentially no more than what other private organizations already do—namely recommending that Congress initiate its own investigation regarding matters the private organization uncovered through its own capacity.

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64. See *id.* This latter requirement is consonant with the Supreme Court’s decisions requiring that congressional investigations be authorized by sufficiently specific authorizing resolutions. See *Wilkinson v. United States*, 365 U.S. 399, 407–08 (1961); *Watkins v. United States*, 354 U.S. 178, 201, 203–04, 206 (1957).

65. See U.S. CONST., art. I, § 5, cl. 2.

Stanley Brand, a former General Counsel to the House of Representatives, has said:

I have no doubt that Congress can constitutionally delegate to an outside body the initial steps of investigating and making recommendations for disciplinary cases . . . Congress itself has to approve or ratify, or review those recommendations, because the Constitution says it's their job to do that. But . . . this is not an exclusive process.<sup>66</sup>

That seems true enough. The initial steps of investigating and making recommendations for disciplinary cases, however, is one thing—currently, all types of private organizations perform this function by bringing to Congress's attention the information it has gathered through its own resources. It is quite another thing to grant an independent entity the enforcement authority to fine people and issue subpoenas for their compelled testimony in a congressional ethics investigation.

While public opinion may support the creation of some sort of independent commission,<sup>67</sup> public opinion cannot trump constitutional separation of powers principles that form the basis of our system of checks and balances that ultimately rests on the people's determinations at the voting booth regarding whether their elected representatives should remain in office.<sup>68</sup>

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66. Transcript of Independent Ethics Committee Panel Discussion at 31–32 (Jan. 23, 2006) (quoting Stanley Brand, Brand Law Groups, *How Congress Can Create An Independent Ethics Commission*) (quoted in Dufendach, *supra* note 7).

67. A January 2007 poll conducted by the Washington Post and ABC News found that 84% of the adults surveyed supported “establishing a permanent, independent commission to investigate and enforce ethics rules for members of Congress and their staffs.” Washington Post-ABC News Poll, *available at* [http://www.washingtonpost.com/wp-srv/politics/polls/postpoll\\_012007.htm](http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_012007.htm) (last visited Nov. 7, 2007).

68. The Supreme Court itself said generally in dicta, in *United States v. Brewster*, 408 U.S. 501, 518–19 (1972), that “[a]n accused Member is judged by no specifically articulated standards,” and that “Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process.”