Order Code RL33790

CRS Report for Congress

"Independent" Legislative Commission or Office for Ethics and/or Lobbying

January 10, 2007

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Prepared for Members and
Committees of Congress

“Independent” Legislative Commission or Office for Ethics and/or Lobbying

Summary

There have been proposals and discussions of constituting, by legislation or congressional rule, an “independent” body or “commission” in the legislative branch of the federal government, made up of persons who are not currently Members of either House of Congress, which would be tasked with overseeing, and perhaps “enforcing,” either lobbying regulations, disclosures, and reporting by outside, private individuals and groups (required under federal law — Lobbying Disclosure Act of 1995, as amended), or alternatively, or in addition, assigned to oversee or enforce in some manner congressional “ethics” rules, that is, reviewing the propriety of conduct of Members of Congress and congressional employees under current House and/or Senate Rules (as well as applicable federal law). The latter duty would necessarily involve receiving and investigating complaints of misconduct by Members and employees of the House or Senate, and recommending actions or referring for action apparent violations of law or Rule. Several policy issues are raised concerning the efficacy and desirability of the establishment and functioning of such a commission, as well as certain threshold constitutional questions.

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"Independent" Legislative Commission or Office for Ethics and/or Lobbying

Introduction

In the 110th Congress, it has been reported that a range of ethics-related matters could be considered.[1] Among these might be the creation of an independent ethics commission within the legislative branch with authority to receive disclosure reports (including congressional gifts, lobbying disclosure, and Member financial statements) required under law and congressional rule. Another option is the creation of an office of public integrity. Either entity could be created in the legislative branch or within each chamber, and could receive financial disclosure and other reports filed by Members, congressional officers, and their staff under the Ethics in Government Act of 1978,[2] and reports filed by registered lobbyists under the Lobbying Disclosure Act (LDA).[3] The office could be authorized to audit registration and disclosure forms, investigate any alleged violation of any rule or other standard of conduct, and present a case of probable violations to the Committee on Standards of Official Conduct of the House of Representatives, the Senate Select Committee on Ethics, or the Department of Justice, as appropriate. Other provisions could authorize any office created to provide information and guidance to Members, congressional officers, and their staff regarding any rules and other standards of conduct applicable in their official capacities, or to provide informal guidance to lobbying registrants of their responsibilities under LDA.[4]

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[1] Representative Nancy Pelosi, "Pelosi Announces Opening Session of 110th Congress," Nov 21, 2006; Ibid., "Pelosi: Democrats' First Order of Business in the New Congress Will Be Ethics Reform," press release, Nov. 27, 2006; Representatives Nancy Pelosi, Steny Hoyer, James Clyburn, Rahm Emanuel, John Larson, Rosa DeLauro, and George Miller, "Materials for Today's Members' Conference Call on Democratic Rules Package," Dear Colleague letter to Democratic Caucus, Dec. 14, 2006; Senators John McCain, Susan Collins, Russell Feingold, and Joseph Lieberman, and Representatives Christopher Shays and Martin Meehan, "Sens. McCain, Feingold, Collins, Lieberman, Reps. Shays and Meehan Hold News Conference on Lobbying Reform," transcript, Dec. 5, 2006; David Nather, "Democrats' First 100 Hours: New Rules Will Test Promise to Run 'Most Ethical Congress in History,'" *CQ Weekly*, Nov. 20, 2006; Senator Harry Reid, "Senate Minority Leader Reid Delivers Democratic Response to President Bush's Weekly Radio Address," transcript, Nov. 18, 2006, article and transcripts retrieved from [cq.com].

[2] Ethics in Government Act of 1978, 5 U.S.C. Appendix Sec. 401.

[3] Lobbying Disclosure Act of 1995, as amended, 2 U.S.C. 1601.

[4] In the 109th Congress (2005-2006), several measures were introduced that would have created an office of public integrity or similar entity vested with some or all of these responsibilities. These measures include H.R. 4682, the Honest Leadership and Open

(continued...)

Pro-Con Discussion

The potential consequences of reorganizing investigation and enforcement of ethics-related activities are unclear. For example, in regard to enhanced oversight of the interactions between lobbyists and Members of Congress and their staff, it is arguable that vesting administration oversight in the chamber ethics committees might provide more opportunity to monitor those interactions, because those panels already have jurisdiction over congressional ethics rules governing Members' interactions with lobbyists. On the other hand, it is not clear how those panels might oversee the disclosure of lobbying interactions with executive branch officials, or enforce laws governing the behavior of lobbyists. Similar concerns might affect ethics commissions or public integrity offices based in the legislative branch.

Regarding matters related to the enforcement of congressional ethics requirements, critics of current congressional disciplinary proceedings have argued that the inherent and structural "conflicts" in congressional self-discipline are the causes of what is seen by some to be an apparent reticence of Congress to enforce ethical standards against its own Members. Members seek to cooperate to a large extent with one another in the legislative process, and thus there is a natural reticence for Members to do something detrimental to one another. Many Members are now reluctant to serve on an ethics committee, where the proceedings may take a great amount of time, and where the Member may be subject to criticisms from the public if perceived as being too lenient, or from congressional colleagues if perceived as being too harsh.

Actual disciplinary actions by the full Senate or House have, in fact, been relatively rare. The Senate has "censured" eight Senators in its history, and has not expelled a Member of the Senate since the Civil War.[5] The House has censured 22 Members,[6] and "reprimanded" eight others, while expelling five of its Members in its history, three during the Civil War for disloyalty to the Union, and the most recent expulsion in 2002 after conviction of conspiracy to commit bribery, receipt of illegal

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[4] (...continued)
Government Act of 2006, introduced by Representative Nancy Pelosi; H.R. 4799, to establish a legislative branch office of public integrity, introduced by Representative Christopher Shays; H.R. 4696, the Restoring Trust in Government Act, introduced by Representative Mike Rogers of Michigan; S. 2180, the Honest Leadership and Open Government Act of 2006, introduced by Senator Harry Reid; and S. 2259, the Congressional Ethics Enforcement Commission Act of 2006, introduced by Senator Barack Obama. For analysis of these proposals, see CRS Report RL33065, *Lobbying Reform: Background and Legislative Proposals, 109th Congress*, by R. Eric Petersen, and CRS Report RL33234, *Lobbying Disclosure and Ethics Proposals Related to Lobbying Introduced in the 109th Congress: A Comparative Analysis*, by R. Eric Petersen.

[5] Fourteen Senators were expelled during the Civil War for disloyalty to the Union, and one other Senator expelled in 1797, also for disloyal conduct

[6] Actually, 21 Members and one Delegate.

gratuities, obstruction of justice, and other charges in connection with receipt of favors and money in return for official acts.[7]

The relatively low number of actual disciplinary actions may be attributable to some degree to the fact that many Members, facing such disciplinary action, prefer to resign from Congress rather than to pursue the matter. In other instances, the voters have taken care of the matter by either not re-nominating the Member in a primary, or voting the individual out of office in the general election before disciplinary action is completed. Many commentators feel that for conduct which does not affect the proceedings of the institution itself, the voters, by way of the ballot box, are the proper judges of the conduct and fitness of the Member, and Congress should not interfere with that judgment.

There has been some concern expressed about providing for an independent office of public integrity, possibly composed in part of non-Members, in that Congress might be abdicating a constitutional and institutional responsibility for self-protection. Although a potentially difficult task, it is one expressly assigned each House of Congress by the Constitution. There is also a fear that if non-Members more frequently recommend censures and/or reprimands, such actions may lose their importance and potency as a statement of strong congressional disapproval and "punishment." There is an additional practical problem of having an entity or organization involved in the "enforcement" and oversight of congressional ethics rules, such as one or more of the commissions proposed, which does not, and is not the same entity, that interprets and provides opinions based on those same ethics rules, a function which is, and has traditionally been, within the jurisdiction of the so-called "ethics" committees in the House and Senate (the House Committee on Standards of Official Conduct, and the Senate Select Committee on Ethics).

In addition to those concerns, some of the potential issues raised by current practices in congressional self-discipline, and reasons for a more "independent" office of public integrity that could arise, have been suggested to include:

- perceptions by the public that internal self-discipline presents inherent "conflicts" for Members who have difficulty judging their peers,

- perceptions that a collegial atmosphere pervades in the House and Senate to protect a Member from strong disciplinary recommendations;

- reluctance on the part of Members to serve on the ethics committees since, regardless of what ethics recommendation might be made, the public may perceive anything short of expulsion as only a minor penalty for a Member, while any action taken against another Member could have long term institutional consequences for collegiality, comity and the deliberative capacity of Congress;

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[7] See CRS Report RL31382, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, by Jack Maskell.

- perceptions that an independent office might reduce or eliminate the challenges of implementing current ethics enforcement regimes, which have at times been used as a tool of partisan conflict; and

- perception that independent examination of the evidence and the making of disciplinary recommendations may be more impartial in judging a Member's conduct.

On the other hand, some of the factors which may argue against having chamber-based or legislative branch commissions involved in the congressional disciplinary process might include:

- perception that by delegating some portion of the process for addressing alleged violations of chamber ethics rules, Members of Congress may be seen as shirking their constitutional duty and their institutional responsibility to investigate or punish their own Members;

- concern that disciplinary action may be left to those who do not have the working knowledge and appreciation of the factors and realities of congressional life, service as a Member of Congress, or the currently accepted norms of ethical behavior in Congress;

- increased application of sanctions, including more frequent censures or, in the House, censures or reprimands, which may dilute the impact of such actions taken by either chamber, and unnecessarily hamper certain conduct of chamber business;

- proceedings carried out by an independent commission may be more cumbersome, adding additional layers of procedure, that may be overly legalistic, technical, and costly to participants than more summary, collegial exercises of peer discipline; and

- enforcement of congressional ethics can not be entirely independent of either chamber, or else constitutional concerns related to "Speech or Debate clause" immunity issues may arise.

Constitutional Issues

Questions have been raised as to whether an "independent" commission or similar body in the legislative branch of Government which is concerned with congressional ethics enforcement would comport with the provisions of the U.S. Constitution. There are two initial, and interconnected constitutional questions concerning (1) the authority to discipline Members of each House of Congress, and (2) a Member of Congress's privilege for "Speech or Debate."

Authority To Discipline Members — Delegation

The U.S. Constitution expressly assigns the enforcement of internal ethics and disciplinary matters regarding their *own* Members to the Senate and to the House of Representatives, respectively, specifically authorizing and empowering each House of Congress to establish its own rules for proceedings and to punish its own Members for misconduct:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.[8]

One of the particular purposes of this express grant of rule-making and internal housekeeping authority to each House of Congress, as well as certain grants of particular privileges and immunities to the Members of Congress and the countervailing authority for self-discipline, was to ensure the independence of the legislature from executive and judicial influence, and to establish the Congress as an independent, co-equal branch of the federal government.[9]

The express constitutional language of Article I, Section 5, clause 2, and the principles behind this authority thus provide a significant indication that the final authority for internal congressional punishment of a Member *must* remain within the legislative body itself. That is, any "enforcement" of congressional ethics rules or federal law that involves a legislative "punishment" contemplated in and pursuant to Article I, Section 5, clause 2, such as, for example, a "censure," an expulsion, or loss of seniority, should be carried out by the House or Senate itself concerning one of its own Members.

However, even if the final authority to *punish* a Member by the legislature might not be delegated to non-Members, is there an impediment for each House of Congress to delegate the authority for fact-finding, information gathering and the making of preliminary recommendations within that process? The Constitution does not express the form, manner, or mechanism that internal ethics enforcement procedures, preliminary to a punishment of one of its own Members, must take in Congress.[10] As noted by the Supreme Court: "As a rule the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require...."[11]

The same language that provides to each House of Congress the express grant of authority to make its own rules, and the associated authority to discipline and

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[8] *United States Constitution,* Article I, Section 5, clause 2.

[9] *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also* discussion in *United States v. Johnson,* 383 U.S. 169 (1966); *United States v. Brewster,* 408 U.S. 501 (1972).

[10] The only express constitutional requirement is for a two-thirds concurrence of the Members of the House or the Senate for an expulsion from that body. Article I, Section 5, clause 2.

[11] *Dillon v. Gloss*, 256 U.S. 368, 376 (1921), cited in *Nixon v. United States*, 506 U.S. 224, 230 (1993).

punish its own Members, would appear to give to each House of Congress broad discretion and authority, within this constitutional framework, to fashion and direct its own internal operations and functioning, as befits a legislative assembly which is an independent, co-equal branch of Government under our governmental system of separated powers.[12] This broad authority in rule-making and discipline has been recognized in the considerable deference traditionally paid by the courts to the explication, application and definition of internal procedural matters in both Houses of Congress.[13]

That the Congress has a fairly wide range of discretion in establishing the particular procedures for fact finding, gathering evidence and information on matters which the Members themselves must finally judge, was clearly expressed by the Supreme Court in *Nixon v. United States*. In *Nixon*, the Supreme Court turned down a legal challenge to the internal procedures that the Senate had adopted for impeachment actions. The petitioner, an impeached federal judge, argued that the Senate may not delegate to a Committee the responsibility of holding an evidentiary hearing on an impeachment, and then merely receive a report for final action. Nixon argued that because the Constitution requires the "Senate" to "try" cases of impeachment, the actual hearing or adjudication on an impeachment in the Senate must be before the entire Senate. The Court, however, found that the Constitution did not seek to place such restrictions on the Senate's procedures for fact finding and receiving evidence in impeachment cases. The word "try" in the Constitution did not impart a particular procedure for the entire Senate to follow in considering the matter. Similarly, the use of the term "Senate" in the Constitution did not imply that the entire Senate must be involved in all of those functions, and did not require that preliminary matters be barred from being delegated and findings simply reported to the full body. As noted by the Court:

> Petitioner's interpretation would bring into judicial purview not merely the sort of claim by petitioner, but other similar claims based on the conclusion that the word "Senate" has imposed by implication limitations on procedures which the Senate might adopt.[14]

In *Nixon*, however, it should be noted the delegation of authority by the "Senate" was to one of its own, duly constituted committees, made up of Senators and staff employees answerable to Members of the Senate. The delegation was thus not to an

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[12] Story, *Commentaries on the Constitution*, at Vol. II, § 835: "No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impractical to transact the business of the nation...." *Note* also Thomas Jefferson: "Each house of Congress possesses this natural right of governing itself...." *The Papers of Thomas Jefferson*, Julian P. Boyd, editor, Vol. 17, at 195-196, (1950), at Kurland and Lerner, *The Founders' Constitution*, Vol. II, at 300 (1988).

[13] *United States v. Ballin*, 144 U.S. 1, 5 (1892); *Nixon v. United States*, 506 U.S. 224 (1993). With respect to the express authority of Congress also in Article I, Section 5, to judge the elections and returns of its own Members, the Supreme Court has similarly noted that these matters are not reviewable by a court. *See Roudebush v. Hartke*, 405 U.S. 15, 19 (1972), and *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613, 616 (1929).

[14] *Nixon v. United States*, *supra* at 232.

outside, "independent" commission or body made up of non-Members of the institution, and thus while the precedent is certainly important, it may not answer definitively the question raised.

Significantly, the Court in *Nixon* found that the claims of the petitioner were "nonjusticiable," that is, they were not proper subjects for judicial review because under the political question doctrine and its separation of powers implications, the Court found "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[15] Since these are matters specifically assigned in the Constitution to the Congress, Congress has broad discretion in establishing the procedures that it uses, and the courts would not review such procedures absent a conflict with another specific section of the Constitution. Internal ethics matters and procedures regarding enforcement of standards of official conduct and decorum, are similarly matters that have been expressly assigned within the Constitution to each House of Congress. Absent violations of other express constitutional guarantees, these matters and the procedures established by each House with respect to them are within the discretion of each House, and it is possible that the federal courts would similarly find that they involve such matters for which "there is no established right of review" by the courts.[16]

The specific procedures adopted by either House in investigating and fact-finding in disciplinary matters are, as noted above, undertaken as an exercise of the rule-making authority of each House. Under the rule-making authority, expressly committed to each House of Congress in the Constitution, the legislature has broad discretion for establishing for itself the particular procedures that it will use in its internal processes.[17] The Supreme Court has explained:

> The Constitution empowers each house to determine the rules of its proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. *But within these limitations all matters of method are open to the determination*

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[15] *Nixon v. United States, supra* at 229, 236-238, citing *Baker v. Carr,* 369 U.S. 186, 217 (1962).

[16] *United States v. Brewster,* 408 U.S. 501, 519 (1972). The Supreme Court noted in *dicta* that judicial review of congressional discipline of its own Members would not likely be available: "The process of disciplining a Member of Congress ... is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards, and is at the mercy of an almost unbridled discretion of the charging body ... from whose decisions there is no established right of review." *See also Powell v. McCormack,* 395 U.S. 486 (1969), where the Court did examine House "exclusion" proceedings because the congressional action there, ruling on a Member's extraneous "qualifications" for office, offended other express constitutional provisions establishing exclusive qualifications for congressional office. Justice Douglas, in his concurrence, expressly explained that if the matter before them had been a *disciplinary* matter, such as an expulsion, the case would be non-justiciable: "And if this were an expulsion case I would think that no justiciable controversy were presented...." 395 U.S. at 553.

[17] *United States v. Ballin,* 144 U.S. 1 (1892).

> *of the house*, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.... It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.[18]

Within the constitutional framework of each House's authority to punish its own Members and to make its own rules for its proceedings, it is not clear that either House of Congress, or both Houses, would be prohibited by the Constitution from assigning such tasks as initial investigations, fact finding, and the making of preliminary recommendations on behalf of Congress to non-Members, temporary or permanent staff, or independent "fact finders." That the exercise of investigatory functions for the Congress may be accomplished through legislative committees and staff properly delegated that authority has long been recognized.[19] Congressionally appointed entities, properly constituted and delegated, may also conduct fact-finding and advisory functions in a similar manner as congressional committees.[20] In *Buckley v. Valeo*, the Supreme Court explained that a congressionally-appointed commission may exercise "investigative and informative" duties "in the same category as those powers which Congress might delegate to one of its own committees...."[21] A lower federal court had earlier explained: "It is well established that Congress has the power to secure needed information relative to legislative action through registration and answers to questionnaires [citations omitted], as well as through congressional committees [citations omitted], or through administrative bodies existing or to be created in the manner prescribed by Congress ... *Sinclair v. United States, supra* [279 U.S. 263 (1929)]; *Townsend v. United States*, 95 F.2d 352, *certiorari denied* 303 U.S. 664...."[22]

In sum, the various independent investigatory or oversight bodies under consideration apparently may not be empowered to "punish" or discipline a Member of Congress, but might be able to be the repository for information and filings by and concerning Members of Congress, as well as outside entities such as lobbyists and lobbying organizations; apparently could investigate allegations of misconduct or noncompliance with Rules or laws; and could report to the appropriate standing committees in the House and Senate statements or findings concerning alleged ethical violations. Making findings, recommendations, or referrals concerning a Member of Congress and ethical violations appears not to be a punishment or discipline in this process, but rather merely a fact-finding exercise in a preliminary stage, that is, for example, a finding that sufficient evidence exists that there is a probability (e.g., "probable cause") that a particular Member has violated ethical standards. Any

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[18] *United States v. Ballin, supra* at 5. (Emphasis added). Once rules are established, however, Congress is obligated not to ignore or violate them. *Yellin v. United States*, 374 U.S. 109 (1963); *Gojack v. United States*, 384 U.S. 702 (1966).

[19] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Sinclair v. United States*, 279 U.S. 263 (1929).

[20] *Buckley v. Valeo*, 424 U.S. 1, 137 (1976); *see also United States v. Rappeport*, 36 F.Supp. 915, 917 (S.D.N.Y. 1941).

[21] 424 U.S. at 137.

[22] *United States v. Rappeport, supra* 917.

statement, findings, conclusions or referrals to the appropriate House or Senate Committee would then be adjudged by Members of Congress on the respective ethics Committee in the first instance, and then if any institutional discipline or punishment is to be given a Member of Congress, such action must be taken on the floor by the Members of the full House or Senate. Since the entire exercise of authority to actually "punish" Members for misconduct appears to be retained by each House of the Congress in this process, such a fact-finding and preliminary findings process employed would arguably entail a valid exercise of Congress's rule-making authority to adopt the procedures Congress feels are appropriate to carry out its express constitutional authority to discipline its own Members.

Speech or Debate Immunity

An even thornier question concerning the delegation of authority to an "outside" or "independent" entity for ethics investigations and enforcement, however, may be the practical issue of the Speech or Debate immunity of Members of Congress. Under Article I, Section 6, cl. 1, of the U.S. Constitution, "Senators and Representatives ... for any Speech or Debate in either House, ... shall not be questioned in any other place." Members of Congress may therefore not be questioned and made to answer in "any other place" for their official legislative activities which are covered by the Speech or Debate privilege, that is, generally, legislative conduct or activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House [or Senate] proceedings with respect to the consideration and passage or rejection of proposed legislation...."[23]

The framing within the Constitution of this absolute immunity for members of the national legislature with regard to their official legislative activities and conduct was to help assure that the legislature would be a co-equal, independent branch of government by "prevent[ing] intimidation [of legislators] by the executive and accountability before a hostile judiciary;"[24] and is seen within our representational form of government as performing the important function of ensuring "that legislators are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation."[25] The immunity granted in the Speech or Debate clause in Article I, Section 6, highlights the practical importance of the provision in the Constitution providing the specific, countervailing grant of authority to each House of Congress to discipline and punish its own Members in Article I, Section 5. This authority for each House to discipline its own Members would extend even to protected legislative conduct since an internal

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[23] *Gravel v. United States*, 408 U.S. 606, 625 (1972). For a discussion of legal developments concerning the Speech or Debate immunity, see CRS Report RL33668, *The Speech or Debate Clause: Recent Developments*, by Todd B. Tatelman.

[24] *United States v. Johnson*, 383 U.S. 169, 181 (1966). As noted by the Supreme Court in *United States v. Brewster*, 408 U.S.501, 507 (1972), the Speech or Debate privilege was not intended simply "for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *See also Kilbourne v. Thompson*, 103 U.S. 168 (1881).

[25] *Powell v. McCormack*, 395 U.S. 486, 503 (1969).

disciplinary matter in the House or Senate regarding a Representative or Senator, respectively, is not questioning "in any other place," but rather is in that place. As such, in addition to providing each House with a tool necessary to protect the integrity of its own proceedings, Article I, Section 5, clause 2, provides that there is some "place," other than merely the voting booth, that Members of Congress could be made to answer for misbehavior and misconduct in relation to internal official legislative activities.[26]

Since the clause refers to speech or debate "in either House," and then provides that for such speech or debate "in either House" Members are not able to be questioned in "any other place," there is an inference that such "other place" would be outside of (the previous referred to) "either House." If this were the case, then an entity which is *not* part of the structure of the House or the Senate (that is, which is not the institution itself or one of its duly constituted committees), might conceivably be "any other place" to which the immunity *would* apply. This would provide a substantial, and perhaps insurmountable obstacle to internal ethics investigations and enforcement actions dealing with any legislative activity of a Member of Congress which is covered by the clause, a problem that an internal ethics "committee" made up of either Representatives (in the House) or Senators (in the Senate) does not confront.

If, however, the "place" that the phrase "any other place" refers to is merely considered to be the entire legislative branch, under the theory that the purpose of the clause was to protect individual legislators, and thus the integrity of the national legislature, from intimidation and control of the *executive* and *judicial* branches of government, then it could be possible that a joint commission, or an independent entity in the legislative branch may be sufficiently "inside" as to overcome speech or debate challenges to its questioning of Members, and to the delivery and compilation of evidence that the entity might attempt to compel regarding what would otherwise be protected, covered legislative conduct. Certainly, however, the more "independent" an entity is from the House and the Senate, the greater the possibility would appear that the entity would be considered an "outside" entity, and not part of "either House" of Congress.

There appears to be no specific judicial decision or case law that is precisely on point as to this particular issue, that is, whether proceedings in a legislative entity *other* than a duly constituted committee of the House or the Senate, or the House or Senate itself, would be considered in "any other place" in which a Member could not be questioned concerning his or her protected, covered legislative conduct. In one federal court case involving an internal investigation of a United States Senator, however, the court there appeared to lend some credibility to the proposition that only a duly constituted committee of "either House," acting for the House or Senate itself,

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[26] *See* discussion in *Congress and the Public Trust*, Report of the Association of the Bar of the City of New York, Special Committee on Congressional Ethics, at 202 (1970): "This [Speech or Debate clause] was intended to free the Congress and individual Members from possible harassment and usurpations by other branches of the government. However, each Member of Congress would enjoy full license to misuse his congressional immunity if each house were not given correlative powers and responsibilities to police Members' behavior."

would have the authority to question and bring to task a Member of that body for official, legislative conduct. The United States District Court in that case denied a motion to suppress a subpoena from the Senate Ethics Committee to a Senator for the production of certain documents, noting that "the Ethics Committee is the Senate's tribunal of first resort responsible for enforcing the Senate's express constitutional power to discipline its members for misconduct."[27] The court then noted:

> It is also significant that the Senate may, with respect to certain kinds of senatorial misbehavior, be the only tribunal with the power to punish. The "Speech and Debate" clause declares, "[F]or any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, § 6, cl. 1, which has been held to confer immunity from prosecution on Senators for any "legislative acts," including those corruptly performed. *See United States v. Brewster,* 408 U.S. 501....[28]

The question of Speech or Debate immunity would thus not necessarily be an issue with regard to duties and functions of an "independent" commission or body in the legislative branch concerning the filing and oversight of lobbying disclosure reports and registrations by outside, private lobbyists who are required presently to file and register with the Clerk of the House and the Secretary of the Senate under the Lobbying Disclosure Act of 1995, as amended. Such a commission could be the repository for such reports and registrations, provide access to the reports by the public, give advice and interpretations concerning the registration and reporting requirements, and could refer possible violations of law to appropriate law enforcement authorities or congressional committees. With respect to "ethics" enforcement, that is, investigation and enforcement of congressional ethics standards and complaints concerning Members of the House and Senate, however, depending on the "independence" of such a commission from the House and Senate and from the direct control of Members of the House and Senate, the question of "Speech or Debate" immunity of Members of Congress may arise to provide a substantial impediment to enforcement, fact-finding, and ethics oversight activities when they concern protected legislative conduct. In such cases, the institution of the House or Senate itself, or one of its duly constituted committees, has historically conducted and been responsible, under Article I, Section 5, clause 2, for any such investigations and recommendations for "punishment" carried out by the full House or Senate.

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[27] *Senate Select Committee on Ethics v. Packwood,* 845 F.Supp. 17, 22 (D.D.C. 1994), *stay pending appeal denied,* 510 U.S. 1319 (1994).

[28] *Id.* at 22, note 11.