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Congress Should Police Itself on Ethics Violations

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Both chambers of Congress currently are considering whether to delegate to an independent entity part of their constitutional responsibility to police Members' ethical conduct. Surprisingly, they are being pressured by many of the same people who fault Congress for abdicating too many of its constitutional powers to the executive branch. Wouldn't a little logical consistency, on the side of the Constitution, be refreshing about now?

My argument is not that such a delegation is unconstitutional. The Constitution only says, "Each House may ... punish its Members for disorderly behavior and, with the concurrence of two thirds, expel a Member." Technically, Congress could outsource the whole process to a private board of judicious gray-beards, say, Virtue Inc., to investigate complaints and make determinations of guilt or innocence, so long as the chamber involved votes on the final punishment. But in so doing it would be straying from the spirit, if not the letter, of the Constitution. My argument is that Congress must take full ownership of such an important decision from the very start.

I understand why many "good government" groups, newspaper pundits, editorial writers and even some Members of Congress favor an independent commission or "grand jury" approach to Congressional ethics investigations. They are frustrated that the ethics committees created by Congress do not seem to be consistent, conscientious, capable or concerned enough to investigate and prosecute all the allegations of criminality or ethical misconduct that appear in the popular press.

That's a fair criticism if you think Congress should have a full-time ethics squad tracking down every charge made by anyone; should patrol Capitol corridors, back rooms and nearby watering holes to sniff out improper behavior; or should maintain a 24/7 emergency hotline to take anonymous tips on perceived ethical lapses by Members or staff. But that's not really what Congress had in mind when it created its ethics committees. Nor, I suspect, is it what the framers had in mind when they empowered Congress to punish its Members.

This is where it is very difficult to convince some that Congress' self-policing obligation is not about investigating and punishing every imaginable infraction. What it is about primarily is protecting, purging and cleansing the institution in cases that bring discredit on it.

The 1989 House Bipartisan Leadership Task Force on Ethics, on which I served as minority staff director, acknowledged in its final report: "This internal authority to discipline and even expel Members for misconduct is one which Congress has historically been reluctant to use. Not only is it difficult for Members to sit in judgment of their peers, but there is a strong belief that such matters should be left to the courts and the people to decide." The report continued, "The House has recognized that the principal purpose of its disciplinary authority is not so much to punish an offending Member as it is to protect the institution."

In support of this, the report cites an 1873 House precedent in which a select committee recommended the expulsion of two Members. The select committee's report concluded that the continued presence of the two Members "tends to bring the body into contempt and disgrace," and that the purpose of their expulsion "is a power of purgation and purification to be exercised for the public safety and ... for the protection and character of the House."

Our 1989 task force similarly concluded that "The same is true of lesser forms of discipline: the House has a right and responsibility to protect the dignity and integrity of the institution if the people are to retain confidence in it."

The task force acknowledged criticism that the existing ethics process entrusted to the same 10 committee members the dual responsibilities of investigating and adjudicating complaints. However, it rejected suggestions for an independent, outside investigative office or special prosecutor "on grounds that such mechanisms ignore the basic responsibility of Congress under the Constitution to discipline its own Members for disorderly behavior."

Instead, the task force recommended, and the House approved, a bifurcated process in which separate

subcommittees of the Committee on Standards of Official Conduct investigate and adjudicate complaints. In 1997, the House adopted another option, and that is to draw the investigative subcommittee from a random pool of Members.

I keep coming back to James Madison's famous lines in Federalist No. 51, which effectively said that if men were angels, we would not need government, and if we were governed by angels, we wouldn't need external and internal controls on government. These lines often are cited to explain our internal system of separated powers and checks and balances.

In Federalist No. 59, Alexander Hamilton observed, "Every government ought to contain in itself the means of its own preservation." This is why, for instance, we have a Public Integrity Section in the Justice Department and internal ethics processes in all three branches to deal with those who would undermine and bring discredit on our legal system and institutions of government.

Too, often, though, we overlook the main external check that Madison had in mind: "A dependence on the people is, no doubt, the primary control on the government." Elaborating on this in Federalist No. 52, Madison wrote, "Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured."

Rather than create a fourth branch of government to substitute for existing, internal self-policing mechanisms (remember the Independent Counsel Act?), Members should be held accountable to their sworn oath to "support and defend the Constitution ... and faithfully discharge the duties of the office." That includes the institutional obligations of preserving and protecting the first branch of government — the people's branch — in which they serve. If Members are not faithful to that charge, then the people will exercise their ultimate control at the polls. The results of the November elections demonstrate that the people are quite capable of doing so.

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