STATEMENT OF DONALD R. WOLFENSBERGER[1]
BEFORE THE HOUSE BIPARTISAN TASK FORCE
ON ETHICS ENFORCEMENT
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Mr. Chairman and Members of the Task Force:

I am grateful for this opportunity to testify today on ways to strengthen the House ethics enforcement process. I especially want to commend all of you for accepting this difficult and challenging assignment, as well as your parties' leaders for creating this informal, bipartisan mechanism for developing recommendations to improve the House ethics process.

You are following in the footsteps of other distinguished bipartisan reform groups that, over the years, were guided by the overriding goal of making the House a better place in which to conduct the people's business. Some of those efforts were more successful than others, but each has contributed to the long-term health and vitality of this body. By contrast, unilateral attempts by one party's majority or the other to alter House ethics rules and procedures have usually produced more problems and resentments than they have institutional improvements.

I appreciate that the central focus of your efforts has been to determine whether some type of independent entity is needed to investigate alleged violations of law or House ethics rules and standards of conduct, and, if so, what form it should take and what authority it should be given.

As many of you are by now aware from my writings and previous discussions with you, I strongly oppose the creation of any such entity because I think it would be a major abdication of your central obligation under the Constitution to punish your Members for disorderly behavior. That is not a responsibility you can partially delegate to someone else and still be faithful to your constitutional charge to discipline your own.

It is clear from the history and precedents surrounding this constitutional provision, dating back as it does to the British Parliament, that the central purpose for giving a legislative body this authority is not primarily to punish Members, but rather to purge and purify the body of those forces

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that would interfere with its core lawmaking function and processes. It is rooted in and closely tied to the privileges of Members from being arrested during a session (except for treason, felony or breach of the peace), and from being questioned in any other place for any speech or debate in Congress. Therefore, part of the purpose of internal disciplinary authority was to permit Congress to plug this loophole by dealing expeditiously with those who committed certain transgressions but were otherwise shielded from arrest or questioning elsewhere. The disciplinary authority is also closely tied to the legislative body's power to punish for contempt those who interfere with its proceedings, and that includes Members themselves. Some of the early punishments meted out to Members held those Members in contempt of Congress for their disruptive behavior or unparliamentary words spoken during debate. [I would ask that a recent research paper I wrote on the origins and early history of the Constitution's punishment clause be included in the hearing record.]

The bottom line is that the power of Congress to punish its Members is rooted in the need to protect the institution from actions and behavior that would bring the body into disrepute or disarray. It is not a power that can be properly exercised, even in part, by non-Members for the very reason that only Members have the institutional sense, instincts, and legitimacy to exercise it correctly and effectively for the good of the House. Others would tend to confine themselves to the question of justice for the individual Member accused.

I fully understand why some, including Members themselves, are advocating turning over at least part of the ethics enforcement process to non-Members. They see the House Committee on Standards of Official Conduct as being too reluctant at times to investigate alleged violations in the first place; too slow to produce timely results when they do investigate; and often too lenient in the punishments they do impose or recommend, if any. All of these complaints have a certain element of legitimacy in certain cases and at certain times. In fact, there have been times in the history of the House when these complaints have been blaringly, blatantly and embarrassingly true! My own experience in observing this process closely over three decades as a staff member in the House is that the pendulum swings: periods of lax enforcement are followed by periods of almost over-zealous enforcement, and are interspersed with periods of steady, moderate and conscientious enforcement.

I have come to the conclusion that these seasons of ethics attention and inattention are an

almost natural phenomenon–not necessarily good or commendable– but reflective of periodic public pressures and demands for the institution to right itself, clean itself up, and make itself worthy once again of the people's trust and confidence. Put another way, in the long run, the process works in achieving its principal objective of cleansing the institution without keeping it in a constant state of turmoil, disruption, and discord. After all, if you had an ethics enforcement process that was running full-bore, full-time, with the full focus of public and media attention, it would be defeating its original, historical purpose of allowing the institution to do its work with minimal disruption. In other words, the ethics process is and should be, a selective process, that deals with major threats to institutional integrity and effectiveness rather than with every little misdeed that might be blown out of proportion.

My fear is that if you turn the investigative responsibilities for internal ethics violations over to an independent entity, it will feel it must justify its existence by waging a full-court press on every minor transgression. By now we are all too familiar with the abuses of independent counsels and special prosecutors in the Executive Branch, and even of special counsels hired by ethics committees. It has practically become a "gotcha" exercise in which people are being caught-up in and charged for making contradictory statements about crimes they did not commit.

Having said all that, I do have five suggestions for strengthening the House ethics enforcement process that you may wish to include as part of your final recommendations:

1. <u>The chairman and ranking minority member should keep the full committee membership fully and currently apprised of the status of all complaints filed with the committee.</u> Currently, the two members alone may decide to dismiss a complaint without informing the full committee of either the complaint or their determination, let alone allowing it to reverse a decision. While House Rules specify that the committee may determine by majority vote that a complaint is frivolous and take such actions as it deems appropriate; it does not have opportunity to make such a determination if the chairman and ranking member dismiss a complaint without notifying the full committee. The legitimacy of a complaint, to begin with, is not subject to review or determination by the full committee. If the chair and ranking member decide a complaint does not meet the requirements as legitimate, they can either send the complaint back to the complainant so stating, or recommend that the full committee establish an investigative subcommittee anyway.

2. <u>Creation of an investigative subcommittee should always be made by determination of the</u>

full committee. Currently, if the chairman and ranking minority member do not decide how to handle a valid complaint within 45 calendar days or 5 legislative days, whichever is later, then they alone may appoint an investigative subcommittee. If, on the other hand, they schedule a meeting of the full committee within that time frame to decide on the matter, then the full committee may determine by affirmative vote to authorize an investigative subcommittee.

3. An investigative subcommittee, after it adopts a statement of alleged violation, should not be able to enter into an agreement with a respondent "to settle a complaint on which that statement [of alleged violations] is based...." [Rule XI, clause 3(p)(6)]. Instead, the subcommittee should be limited to recommending a proposed settlement, but the full committee must retain ultimate authority to finalize, modify, or reject it, and not be expected merely to accept it passively. Under the current rule a settlement agreement must be signed by the subcommittee chairman, ranking member, respondent and counsel, unless the respondent requests otherwise. Presumably, the settlement agreement involves admitting to the statement of alleged violation in return for a committee (as opposed to House) sanction. It also enables the respondent to waive the public adjudicatory hearing and go straight to the public sanction hearing. However, a subcommittee settlement would seem to limit the flexibility of the full committee to impose a harsher sanction. While plea bargains are part of our judicial system to avoid a trial, this approach applied to the House overlooks the fact that the House should have ultimate authority to decide on a punishment.

4. The report of an investigative subcommittee to the full committee, that does not adopt a statement of alleged violation, should automatically be made to the House (and public) and not be subject to the discretion of a full Committee vote (especially considering that a vote is not even required; i.e., the Committee can suppress the report simply by taking no vote on its release). The full House should have the full report and facts of the case, since it ultimately is charged with the responsibility of punishing members for disorderly conduct and thus should have the opportunity to reverse the committee and subcommittee determination that no violation meriting House action has occurred. [The original 1989 Fazio-Martin Task Force made such reports to the House mandatory.]

5. The Committee's authority to issue "a Letter of Reproval or take other appropriate committee action" (e.g., an admonishment) in lieu of a recommendation of punishment to the House should be available for possible House action as a matter of privilege. The Committee must vote on

any letter of reproval and include it as part of its report to the House on the final disposition of an investigation. Not only is no action required by the House to accept such a report, but no direct action is permitted. This is because House Rules give privileged status only to those ethics committee reports that recommend disciplinary action by the House. The prohibition on privileged consideration for non-disciplinary action reports seems to defy the residual constitutional authority each House retains to punish its members for disorderly behavior–notwithstanding the committee's recommendation that the Member not be punished by the House.

It is unlikely that the Founders intended for the House to delegate this responsibility to a subunit without opportunity for full House review and reversal. At the least, a report containing a letter of reproval should be subject, as a privileged matter, to a resolution of acceptance of the reproval by the House, which in turn could be amended by a harsher penalty or a rejection of the report. [Note: While it is true that it is always in order for any Member to call-up as a question of constitutional privilege a resolution imposing punishment on a Member, it would seem more responsible to allow it to be directly linked to a report of the Standards Committee than having to explain on a separate resolution how it is related to an investigation already conducted, and report already issued.]

In conclusion, Mr. Chairman, I think this Task Force can produce a set of meaningful ethics enforcement provisions that will strengthen the process without having to go so far as to recommend that part of the process be turned over to an outside or independent entity. This is clearly a responsibility of each house under the Constitution for the simple reason that only senators and representatives have the institutional sense and legitimacy to act in the best interests of their house. And that is, after all, the main purpose of the power to punish. That means that each house must retain full ownership of the ethics process from start to finish if Members are to act in a responsible and conscientious manner. To delegate any part of that responsibility to someone else would break that chain of responsibility and prevent Members from fully and faithfully discharging their duties of office under the Constitution, as they are sworn by oath to do. Thank you for your attention.