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SHOULD CONGRESS BE ABOVE THE LAW?

"[Congress] can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society."

—James Madison, *Federalist* No. 57

"It has been said here many times tonight that... we want to treat Senators the same as everyone else.... Mr. President, not a single Senator believes that. Not a single Senator wants that."

—Senate Majority Leader George Mitchell's reply to a proposal to apply a major civil rights law to the Senate

"It's wrong [for Congress] to put new requirements on American business as employers and not follow that rule as employers themselves."

—President Bill Clinton

INTRODUCTION

If the average American were asked if Congress must comply with the laws it passes, he or she certainly would answer yes. That would be the wrong answer. In fact, Members of Congress are free to pass laws that affect everyone in America except themselves—and they have done so repeatedly.

Despite overwhelming public support (87 percent in one recent poll)[1] for the principle that Congress should be subject to the laws it passes—including its endorsement by all three major presidential candidates last year[2]—congressional leaders and many rank-and-

1 Gordon S. Black Corporation poll, June 1993.

2 "Gold in the Hill," *The Wall Street Journal* editorial, September 3, 1992 (President Clinton); Chuck Alston, "Bush Takes Congress To Task: Democrats Fire Right Back," *Congressional Quarterly*, October 26, 1991, p. 3106

file Congressmen argue that it is necessary for Congress to be above the law in order to preserve the constitutional separation of powers. Congressional insiders also argue that it would be too costly and time-consuming for Congress to comply with the detailed regulations and mandates it imposes on the private sector and the executive branch. The public's rejection of this claimed congressional privilege has led supporters of "congressional coverage"—as the concept of applying laws to Congress is often called—to the brink of success. H.R. 349, the Congressional Accountability Act, has been cosponsored by well over a majority of Representatives. The Joint Committee on the Organization of Congress, which is scheduled to produce a broad congressional reform plan late this year, has made congressional coverage a major focus of its work. Even congressional leaders—most recently Speaker of the House Thomas S. Foley—have begun to capitulate. The leadership, however, is striving to ensure that law enforcement involving Congress is conducted only by agencies under the control of Congress. Supporters of the Madisonian principle of the "full operation" of the law upon Congress reply that a separate, internal congressional enforcement regime fails to meet the requirement of equality under the law. Congressional coverage supporters also argue that Congress's habit of repeatedly exempting itself from laws that burden other citizens, businesses, and government bodies makes Congress careless about the regulatory and financial costs of legislation.

The practice of Congress exempting itself from the laws it writes emerged as Congress began to adopt broad social policy legislation. The National Labor Relations Act of 1935 is a notable early example. As the volume of employment and anti-discrimination law has grown, so too has the significance of congressional exemptions from it. They first drew national attention in the mid-1970s when it was revealed that the Congressional Placement Office accepted discriminatory placement requests from Congressmen routinely, and the exemptions from federal law that Congress enjoys have been a subject of continuing debate since then. While Congress has internal rules and procedures that impose requirements similar to those of many of the laws it is exempt from, many congressional employees are skeptical about Congress's ability to police itself. A February 1993 *Washington Post* survey of congressional employees found a large share unhappy with Congress's internal procedures for handling sexual harassment. Of those polled, 93 percent would be reluctant to file a claim against a Member, 83 percent would fear being fired for reporting it, 61 percent believe that current grievance procedures are ineffective, and 46 percent would be reluctant to report sexual harassment affecting someone else.[3]

That employment problems would occur in an organization of nearly 40,000 people is unsurprising, but it underscores the necessity for Congress to play by the same rules that it sets for the rest of the country. If congressional directives on health and safety standards, information disclosure, ethics requirements, and labor and civil rights law are for the good, then good standards for Congress have been consistently avoided. But if much federal legislation is hopelessly vague, unnecessarily burdensome, or even counterpro-

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(President Bush); H. Ross Perot, "How Stupid Do They Think We Are?", *The New York Times*, August 30, 1992, p. A15.

3 Richard Morin, "Female Aides on Hill: Outsiders Inside a Man's World," *The Washington Post*, February 21, 1993, p. A1.

ductive, then forcing Congress to bear those burdens would encourage re-examination of the costs and requirements imposed by federal policies. American businesses spend over half a trillion dollars each year complying with federal regulations and mandates from which Congress is largely exempt.[4] Giving Congress reason to review such measures to make sure that the achieved benefits surpass the attendant costs is sound public policy.

In the last several years, popular pressure has prompted Congress to apply to itself some recent social policy mandates—but Congress is still completely exempt from the majority of such laws, and different groups of congressional employees are covered unevenly. When coverage has been extended to Congress, the House and the Senate have insisted upon maintaining their own internal enforcement procedures. Unlike private citizens and executive branch officials who are judged by independent administrative agencies and courts, congressional employees must air their grievances in internal bodies that are closed to the public—with, in the House, no right of judicial review. Congress's refusal to subject itself to the same enforcement process that it applies to the rest of the country makes its claim to apply some laws to itself mostly irrelevant.

To be effective in establishing equality under the law and in making Congress sensitive to the costs and burdens of the mandates it imposes, a congressional coverage plan should:

- ✔ **make all laws that cover public agencies and private businesses apply to Congress;**
- ✔ **create coverage that applies equally to all congressional agencies and employees;**
- ✔ **make Congress's legal status as comparable to the private sector as possible with regard to liability, procedure (including trial by jury), and enforcement; and**
- ✔ **ensure that all employees have a full right of appeal in federal court.**

THE CONSTITUTIONAL CASE FOR CONGRESSIONAL COVERAGE

Those who oppose congressional coverage frequently put their objections in constitutional terms. Constitutional arguments are generally based in the Constitution's "speech or debate" clause[5] and the separation of powers doctrine, both of which have the same concern at root—the prevention of political interference by one branch of the federal government with another.

The central weakness of such claims lies in the fact that at least one author of the *Federalist Papers* believed congressional coverage to be not only permissible but manda-

4 Thomas Hopkins of the Rochester Institute of Technology estimates that the figure is $564 billion, although other experts say that it is higher. *The Wall Street Journal* editorial, "The Restrained Economy," September 5, 1993, p. A20. The Hopkins estimate does not include the cost of federally imposed mandates on state and local governments. Ohio alone estimates over $300 million in mandated spending for 1993. See *The Effect of Federal Mandates on Wisconsin State Government*, Wisconsin Policy Research Institute *Report*, Vol. 6, No. 8 (September 1993), p. 1.

5 U. S. Constitution, Article I, Section 6. "For any Speech or Debate in either House, [Members] shall not be questioned in any other place."

tory: Congress "can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society," wrote James Madison in *Federalist* No. 57. "This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together." If this link between the two is absent, Madison continued, "every government degenerates into tyranny." As a member of the First Congress in 1790, Madison discussed an "important principle" on the House floor: "all laws should be made to operate as much on the law makers as upon the people."

Thomas Jefferson's *Manual of Parliamentary Practice*, which remains part of the internal rules of the House of Representatives, states that "the framers of our constitution... [took] care to provide that the laws should bind equally on all, and especially that those who make them shall not exempt themselves from their operation." Such views eliminate any historical foundation for present-day theories that congressional coverage is somehow constitutionally problematic.

Nonetheless, it is the view of some federal legislators that their constitutional immunity from liability for legislative actions bars enactment of congressional coverage legislation. The Constitution's "speech or debate" clause has been interpreted to confer immunity from suit on Members of Congress when they are engaged in legislative activity. The clause is intended to deter intimidation and coercion by a hostile executive or judiciary; a further section prevents Congressmen from being harassed while in congressional session and traveling to or from a session. One Supreme Court explanation of the clause found that the immunity applies to any action that is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[6] Areas which courts have declared to be outside the ambit of the clause include communications with voters and attempts to secure government contracts for constituents.[7]

Only one Supreme Court case has directly addressed employment-related congressional immunities deriving from the speech or debate clause: *Davis v. Passman* (1978), in which a Congressman's administrative assistant claimed that she had been discriminated against because of her gender. The Court found that she was not barred from suing the Congressman so long as the speech or debate clause was not at issue. It remanded the case to a lower court to see if the clause applied. The case was settled before a ruling was made.

Two cases in the United States Court of Appeals for the District of Columbia Circuit have discussed in more detail the nature of the immunities granted by the speech or debate clause, finding that employees cannot make discrimination claims if their duties are "intimately cognate" to the legislative process.[8] When a House restaurant manager

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6 See *Gravel v. U.S.*, 408 U.S. 606, 625 (1972).

7 See *U.S. v. Brewster*, 408 U.S. 501, 512 (1972).

8 See *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984), *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986).

claimed that she was fired because she was a woman, she was able to press her claim, but when a House clerk who transcribed testimony claimed that she was fired because of her race, she was barred by the clause from suing. Although the breadth of the speech or debate clause's application is indistinct, it is clear that activities not directly related to the legislative process are not constitutionally shielded.

Protection of the principle of separation of powers has been held by the Supreme Court to be one of the aims of the speech and debate clause.[9] The doctrine's goal is the integrity of the different branches of government. Its origin lies in attempts by British monarchs to use the civil and criminal laws to block legislators with agendas opposed by the king. The modern analogue to such an occurrence would be politicized enforcement of, for example, health and safety regulations. Since much of the law at issue is enforced by agencies nominally under the control of the executive branch (for example, the Occupational Safety and Health Administration), overzealous enforcement against Members of Congress might disrupt the constitutional balance by hindering Congress in accomplishing its constitutionally assigned functions.[10]

Anyone genuinely concerned about the separation of powers, however, should note that current arrangements permit Congress to act as law enforcer and judge as well as legislator. True separation of powers will place such authority out of the hands of Congress. While maintaining the separation of powers is a legitimate concern, congressional coverage as such poses no threat to it. Congress already has procedures to deal with overzealous enforcement in any particular case. Congressional employees who are subpoenaed, for example, are required to submit the subpoenas to the House or Senate. In the majority of such cases, Congress determines that there are no separation of powers implications and instructs the employee involved to comply. If Congress determines that a case involves a constitutional issue, however, it can stop the employee from responding and go to court to press its claim. This procedure allows Congress to protect its legitimate rights, including protecting itself against overzealous or politically motivated prosecutions, without placing itself above the law in every case. Executive enforcement against Congress, under such review, does no more harm to the principle of separation of powers than the frequent legislative directives Congress issues to the executive branch.

Despite such protections, some Members of Congress remain fearful that an Administration could pressure opponents through discriminatory investigations or enforcement actions. Such fears should be mitigated, however, by the fact that Congress is already subject to normal tax and criminal laws, two of the areas most subject to potential political abuse. Further, Members would retain greater ability to counter inappropriate law enforcement actions than would corporations or private citizens. Ultimately, Congress even has the power to change the laws or enforcement procedures if they are abused. The personal experiences of many Members with tax compliance, for instance, has resulted in a codified set of taxpayer protections for all citizens.

The Department of Labor—part of the executive branch—currently manages workers' compensation cases by congressional employees, even holding internal administrative

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9 See *United States v. Johnson*, 383 U.S. 169, 178 (1966).

10 See e.g., *Morrison v. Olson*, 487 U.S. 654 (1988).

hearings to decide cases. And Members of Congress are not immune from civil or criminal proceedings. The constitutional balance remains stable when the judiciary decides cases concerning Congress or the executive enforces laws affecting it; such events are part of the constitutional balance, not in opposition to it.

Congressional coverage would, in fact, strengthen the separation of powers by limiting Congress from using extra-constitutional methods to bludgeon the executive branch. Although all deliberative functions of Congress would be shielded for constitutional reasons, communications having nothing to do with legislation would be available to the public. The Freedom of Information Act, for instance, would force Members of Congress to reveal such actions as communications to federal regulators made on behalf of favored constituents. The Privacy Act would prevent congressional committees from leaking derogatory information about political enemies who are executive branch employees or private citizens.

CONGRESSIONAL COVERAGE: TOO COSTLY?

Another argument often used against congressional coverage is that it would be far too expensive to implement. As Republican Senator Don Nickles of Oklahoma—a congressional coverage supporter—testified to the Joint Committee on the Organization of Congress, many Congressmen say privately that it would be too costly to bring Congress under the reach of laws that apply to the rest of the country.[11] A cost-based argument, however, cuts both ways: if fines really are so massive, that suggests that too many resources are being directed to unnecessary deterrence or imply a problem where none exists. Ohio Republican Congressman John Boehner invited an Occupational Safety and Health (OSHA) team to inspect his office in 1992 to demonstrate what private sector offices have to endure. He found that if OSHA covered Congress, his office could have been liable for $1,500 in penalties because of such hazards as carpets with ragged edges.[12] A follow-up audit of House and Architect of the Capitol offices by the General Accounting Office that Boehner and other Members requested found 140 Occupational Safety and Health Act violations, which would have warranted nearly $1 million in fines if Congress were covered by OSHA.[13]

Members of Congress are well aware that they enjoy privileges denied to the rest of the country. Kentucky Democrat Wendell Ford recently discussed the "tremendous costs" involved in legislation that would ban smoking in Senate rooms lacking separate ventilation. "This is going to affect each and every Member of this chamber, and the administrative confusion that this will cause for Members will be enormous. One day we will have an EPA administrator in our office... telling us our separate ventilation system for tobacco is inefficient. Then the next day the OSHA inspector is going to arrive and

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11 See *Application of Laws and Administration of the Hill*, Hearings Before the Joint Commitee on the Organization of Congress, S. Hrg. 103-115 (June 8, 1993), p. 27.

12 See John Dillin, "Congressmen Call for End to Special Exemptions," *Christian Science Monitor*, February 23, 1993, p. 3.

13 See Timothy Burger, "GAO Finds 140 OSHA Violations on Hill; Fines Are $1 Million, But Congress Exempt," *Roll Call*, October 8, 1992, p. 2.

tell us we do not have sufficient ventilation for fumes coming from the new carpeting, or the paint, or the varnish. Next thing you know we will have HHS coming in and telling us we cannot eat lunch at our desk," Ford argued.[14] Unlike Congress, those in the private sector are unable to decide whether they wish to be subject to legislation that creates such inconveniences. Congressional coverage in this instance could serve the useful purpose of educating Members of Congress that the sea of regulations produced by OSHA needs reform.

Indeed, Congress's experience with appropriating monies for internal compliance with the Americans with Disabilities Act likely has helped Congressmen to appreciate the difficulty and expense of ADA compliance that others must routinely shoulder. The Office of the Architect of the Capitol—which will carry out its compliance plan for the Capitol complex over seven years at a rough estimate of $24.5 million[15]—now annually presents its estimates on ADA costs to congressional appropriations committees. Although Congress did not appropriate the full amount for ADA compliance requested by the Architect's office, its brush with the unclear and unbounded liability that ADA presents was probably a useful learning exercise.

LAWS FROM WHICH CONGRESS IS WHOLLY OR PARTIALLY EXEMPT

- Civil Rights Act of 1964
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Rehabilitation Act of 1973
- Freedom of Information Act
- Privacy Act
- Ethics in Government Act
- National Labor Relations Act
- Federal Service Labor-Management Relations Statute
- Civil Service Reform Act of 1978
- Occupational Safety and Health Act of 1970
- Fair Labor Standards Act
- Equal Pay Act
- Employee Retirement Income Security Act
- Worker Adjustment and Retraining Notification Act
- Family and Medical Leave Act
- Employee Polygraph Protection Act
- Social Security Act

LAWS THAT DO NOT COVER CONGRESS

The development of a full-time federal legislature that regulates every workplace in the United States coupled with new ethics rules that prohibit Members of Congress from outside employment have insulated Congressmen from the pressure that federal regulations have placed on the private sector. The refusal of Congress to cover itself as an employer under the laws it writes for the rest of the country has produced a workplace radically different from any other in the United States.

14 Karen Foerstel, "Smoking Soon Taboo on Senate Side, Too," *Roll Call*, August 16, 1993, pp. 1, 10.

15 This estimate—supplied by the Office of the Architect of the Capitol—is subject to change.

The laws which Congress passes to apply to the rest of the country rarely exempt the legislature explicitly. Rather, the exemption is carried out through omission (that is, the list of entities covered by the law fails to include Congress) or implicit exemption (that is, a law covers "persons," which are then defined not to include Congress).

Both houses of Congress have improved this situation in some respects in the last few years, but their remedies are incomplete. First, there are still laws that are inapplicable to either body. Second, there is no parallel coverage: House and Senate employees are not covered by the rights and protections of the same laws. Third, laws that do cover Congress are internally enforced, a process which lacks the procedural safeguards found in courts and administrative hearings. Fourth, in the House there is no right of judicial review. House employees are entitled only to the remedies specified in the House Fair Employment Practices Resolution (FEPR) which applies anti-discrimination principles, but not the laws themselves, to House employers. House staffers must take all grievances to the internal Office of Fair Employment Practices (OFEP). Senate staffers fare a bit better: they must follow internal Senate procedure, but do have a right of appellate judicial review and to some remedies under the Civil Rights Act of 1991. Areas of law that fail to cover Congress include equal employment, anti-discrimination, information disclosure, ethics, campaign finance, and labor law.

Equal Employment and Anti-Discrimination Law. Laws in this category deter discrimination based on such characteristics as race, sex, religion, and national origin. A plaintiff in the private sector may bring a case to the Equal Employment Opportunity Commission (EEOC) and (if desired) pursue it in federal district court. Senate plaintiffs may bring their case to an internal OFEP office, and then pursue judicial appeal. House plaintiffs have no right of appeal from OFEP verdicts. (Neither Senate nor House plaintiffs can get a trial by jury.) Internal congressional rules govern the application of such anti-discrimination laws as the **Civil Rights Act of 1964**, the **Age Discrimination in Employment Act**, and the **Americans with Disabilities Act**. The **Rehabilitation Act of 1973**, which requires "each department, agency and instrumentality... in the Executive Branch" to submit an affirmative action plan for the disabled to the EEOC, exempts Congress from coverage.

Information Disclosure Law. Congress defined itself out of the scope of the **Freedom of Information Act**, which is designed to ensure that the business of public bodies is accessible to the public. The **Privacy Act**, which prevents the public release of private information about individuals held by federal agencies and mandates access to such information by the affected person, also fails to include Congress.

Ethics and Campaign Finance. The **Ethics in Government Act**'s provisions (now lapsed) which require an independent counsel to investigate certain allegations against executive branch officials do not apply to Congress.[16] A pending reauthorization proposal would permit (but not require, as is done in cases involving senior executive branch officials) the Attorney General to request an independent counsel to investigate Members of Congress. Other portions of the EIGA are enforced internally. Similarly, Congress claims that in some cases election laws can be

16 More specifically, the provisions for a mandatory independent counsel do not apply to Congress.

enforced against incumbent Congressmen only through internal congressional procedures,[17] even though non-incumbent candidates are subject to external judicial enforcement.

Labor Law. The **National Labor Relations Act**, which creates the ground rules for bargaining between management and labor, applies only in the private sector. Its public sector counterpart, the **Federal Service Labor-Management Relations Statute**, which governs the relationship between the federal government and public employee unions, does not apply to Congress. Neither does the **Civil Service Reform Act of 1978**, which further protects federal employees' right to organize. The **Occupational Safety and Health Act of 1970**, which was intended to create a safer workplace, applies to all "employers," but the legislation adds that the term "does not include the United States" and therefore fails to include Congress. The **Fair Labor Standards Act** establishes certain minimum workplace standards, such as pay floors for overtime work and prohibition of certain kinds of child labor. Amendments to the FLSA grant the Committee on House Administration authority to issue regulations for standards similar to other workplaces. However, there is no right of judicial review, and the Senate is not covered under the FLSA. The **Equal Pay Act**, which mandates pay nondiscrimination between employees of different sexes, has the same coverage as the FLSA. The **Employee Retirement Income Security Act** regulates employee benefit plans, but does not apply to those plans which are established or maintained by the federal government. **The Worker Adjustment and Retraining Notification Act**, which requires employers to give sixty days notice of any shutdown that ends fifty or more jobs, applies only to the private sector. The **Family and Medical Leave Act**, which mandates optional employee leave in certain situations, covers Congress only through OFEP regulations that attempt to mirror the legislation that covers the private sector. House employees have no right to appeal an OFEP judgment, and both chambers are exempt from the legislation's record-keeping requirements. The **Employee Polygraph Protection Act**, which regulates the use of lie detectors in the workplace, exempts public employees and some defense contractors. Finally, the **Social Security Act** treats some senior employees of the federal government—including some senior Congressmen—more generously because of several reforms in Social Security law in the early 1980s. Although most federal employees' Social Security benefits are reduced by the amount of their federal pensions, this is not true for those legislative and executive branch employees who were covered by Social Security at the beginning of 1984.

CURRENT CONGRESSIONAL ENFORCEMENT PROCEDURE

Even when Congress has acceded to coverage under various social policy laws, or their principles, the internal procedures for application and adjudication of laws to Congress are starkly different from those used for the rest of the country. Aggrieved non-congressional employees may bring a claim to such enforcement agencies as the Department of Labor or EEOC, and in most labor law matters they retain the eventual right to bring

17 See Appellant Brief, No. 92-5241, *U.S. v. Charles G. Rose*, U.S. Court of Appeals for the D.C. Circuit, pp. 32-45.

their cases to court with jury trials. Congressional employees, on the other hand, must undergo a lengthy five-step complaint process: counseling, mediation, internal hearing, internal review, and (for Senate employees) federal appeals court review—with all but the last internal procedure closed to the public. Although punitive damages frequently are requested and granted in the private sector (although not in the executive branch), Congress specifically exempts its Members from such liability.

Senate procedures. Internal congressional offices such as the Senate Fair Employment Practices (FEP) office lack the institutional competence and independence that disputants in other arenas rely on. Although the EEOC is required to investigate each charge filed, the Senate FEP office looks only at the evidence furnished by the parties before it, which makes the process a function of each side's investigative and legal skills. The EEOC is an independent agency consisting of presidentially appointed and Senate-confirmed directors who serve staggered terms. The Senate FEP office is funded by the Senate itself, and Senate leaders appoint and set the pay of its director, who can be fired at will. While the EEOC has years of experience in handling discrimination cases, the recently created Senate FEP office must choose three participants for each hearing board from a list of outside organizations, many members of which lack expertise and experience in handling employment discrimination claims.[18] The Senate Select Committee on Ethics, which has the power to review decisions of the FEP hearing boards, is staffed by Senators who, as employers, may lack the necessary neutrality. They also are rarely experts on employment discrimination. Finally, when cases are appealed in court, most plaintiffs receive a complete review of the particulars of cases. The Senate's internal appeals process is far more deferential to the conclusions of the hearing board—and court appeals, where allowed, are highly restricted in scope.

The confidential nature of Senate FEP procedure also varies sharply from other investigative agencies: the office may not reveal to the public the nature or even the number of claims filed, investigated, or adjudicated. Much Senate FEP internal procedure—all counseling, all mediation, and some hearings and reviews—is completely confidential, so that ultimate results may never be known by the public.

Republican Senator Charles Grassley of Iowa has been a leader in recent years in the attempt to make Congress subject to its own legislation. Although he ran into roadblocks when attempting to add congressional coverage amendments to the Americans with Disabilities Act in 1990 and the Civil Rights Act of 1990, he was more successful with his amendments to the Civil Rights Act of 1991 and the Family and Medical Leave Act passed in 1993: both provide for partial Senate coverage. Senator Grassley plans to continue amending legislation to extend coverage to the Senate.

The Americans with Disabilities Act of 1991 extended coverage of several civil rights laws to Senate employees, and provided for a review procedure much like that of the House OFEP that disallowed judicial review. The Civil Rights Act of 1991, however, repealed this section of the Americans with Disabilities Act, substituting a list of forbidden types of discrimination, such as by race or by sex, but creating a new appeal right: em-

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18 For example, one source of board members is the Federal Mediation and Conciliation Service, which assists commercial industries in settling labor disputes.

ployees could take discrimination complaints to the U.S. Court of Appeals for the Federal Circuit after the options for internal enforcement procedure were exhausted.[19] (Parties in such cases cannot request jury trials at any stage in this process, unlike similarly situated private parties.) However, the anti-discrimination rules explicitly allow Senate employers to make employment decisions based on such characteristics as domicile, party affiliation, and political compatibility.

House Procedures. The House of Representatives in 1988 passed the Fair Employment Practices Resolution (FEPR), which forbids personnel actions "based on race, color, national origin, religion, sex (including marital or parental status), handicap, or age."[20] FEPR interpretations must "reflect the principles of current law"[21]—that is, House employment practices prohibit discrimination that would be statutorily illegal in the private sector. FEPR established an Office of Fair Employment Practices (OFEP) that hears complaints and serves as a quasi-judicial body. OFEP may order such remedies as injunctive relief, reinstatement/promotion (with optional back pay), attorneys' fees, and cash compensation from House contingent funds or (in the case of a serious violation) from personal or committee clerk-hire accounts. FEPR appeals of decisions go to an internal review panel composed of Congressmen and congressional staff. There is no right of appeal to an outside court. (During the debate over the Civil Rights Act of 1991, some House members wanted to amend it to provide for the possibility of judicial appeals for House employees. However, the Rules Committee forced consideration of the bill under a closed rule, which prevents amendments to bills.)

Procedures of the House Office of Fair Employment Practices (OFEP) thus presents the same problems of self-policing as the Senate, including questions about whether the current process for resolution of grievances is neutral and reasonably rapid, and whether it provides for an appropriate standard of review. OFEP personnel are appointed by, and serve at the pleasure of, the chairman and ranking member of the Committee on House Administration; they are under the administrative direction of the Clerk of the House. Both the hearing and the review board consist of Members of the House and congressional staffers (most of the latter serving at the pleasure of party leaders), and there are no provisions for recusals for reasons of conflict of interest. Furthermore, House employees are denied even the limited rights of appeal that their counterparts in the Senate enjoy.

Does Self-Enforcement Work? OFEP has made little difference in the congressional workplace. On May 27, Democratic Representative Patricia Schroeder of Colorado testified in a Joint Committee on the Organization of Congress hearing that OFEP is in many respects unsuited for the job that it is assigned. Many congressional employees may not be aware of OFEP's existence, as congressional employers are not required to post notices about OFEP's powers, unlike workplaces in the private sector. Moreover, only three times in the past four years has OFEP sent out mailings that discuss employment rights and responsibilities. The employment review panels that OFEP sets up are composed entirely of sitting Congressmen and congressional staff, which may deter complaints from being filed. Such panels are likely to be even less professionally qualified

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19 See section 309 of the Civil Rights Act of 1991.

20 H. Res. 558, 100th Congress, Section 2(a).

21 *Ibid.*, Section 2(b).

for their duties than Senate panels which include outside experts. Republican Representative Olympia Snowe of Maine noted at the same hearing that OFEP had received over 1,200 contacts in the four years of the office's existence. One-third of them called to request an appointment or express a concern. Of these, only sixteen cases were filed, with four proceeding all the way through the OFEP process.[22] None of the cases filed involved sexual harassment, although the *Washington Post* survey of female Hill employees indicates that such harassment takes place at rates comparable to the private sector. Commenting on the low rate of complaints filed, Representative Schroeder said she was "reminded of the Maytag repairman, waiting in vain for someone to call."[23]

Several recent surveys have demonstrated that a startlingly high number of congressional employees have little confidence in the ability of Congress to police itself with regard to such matters as sexual harassment. Over four-fifths of congressional staffers surveyed by the *Washington Post* earlier this year would be reluctant to file a sexual harassment claim against a Member of Congress for fear of being fired because of it. A corroborating survey by the Joint Committee on the Organization of Congress found that Congress provides fertile soil for sexual harassment: a majority of congressional employees say that they would be unlikely to file a complaint against their employer for fear of putting their current job and future employment prospects in jeopardy.[24] This helps to explain why Congress regularly produces incidents that would be challengeable under law had they occurred in the private sector. In 1989, former Representative Jim Bates was accused of sexual harassment by two former employees who alleged that Bates made suggestive remarks and requested daily hugs. The House Ethics Committee found Bates at fault, but merely issued a letter of reprimand. In 1991, a top aide of then-Representative Roy Dyson was alleged to have commanded one employee to perform a striptease act at an office retreat, told another that he was prohibited from dating for a year, and fired a third when he refused to stay at an after-hours party. A more recent Senate case resulted in cash awards to two cafeteria workers, but only after a three-year process during which the harasser allegedly persisted in his unwelcome advances. Not only personnel decisions but political principles fall prey to expediency in legislative offices not subject to congressional coverage. In 1990, Democratic Representative William Ford of Michigan —who had earlier declared, in debate on a plant-closing bill, that "There isn't an American worker anywhere in this country who... doesn't deserve to be told 60 days before his or her job is eliminated"—gave six employees two weeks notice of their jobs' end.

In other contexts, Congress recognizes the inherent conflicts involved when a government organization polices and judges its own behavior. The proposed Federal Employee Fairness Act—which (as H.R. 1111) received a unanimously favorable vote by the House Post Office and Civil Service Committee in the last Congress and (as S. 404) is cosponsored in this Congress by fourteen Senators (including the chairman of the Senate Committee on Governmental Affairs)—would allow non-congressional federal employees to file claims of discrimination with the Equal Employment Opportunity Commis-

22 Of the four cases that made it all the way through the process, only one of them was decided in favor of the employee.

23 See *Application*, S. Hrg. 103-115, pp. 103-113.

24 See Kevin Merida, "Hill Staffers Wary of Boss's Retaliation," *The Washington Post*, September 17, 1993, p. A19.

sion (EEOC) rather than through internal administrative procedures in each agency. The need for credible external enforcement is as applicable to Congress as to any other organization. If mandatory external enforcement makes sense for executive branch agencies, it makes sense for Congress as well.

In *Federalist* No. 47, James Madison wrote that the "accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be announced the very definition of tyranny." It is impossible to imagine that he would be content with the current consolidation into Congress of diverse rule-making, investigatory, and judicial powers. No matter what laws or penalties are contained in any congressional coverage measure, it will be almost completely ineffective without the procedural requirements and the external enforcement that non-congressional employers and employees live under. The ideals of congressional coverage cannot coexist with separate but allegedly equal, secret, internal hearings; true congressional coverage requires external enforcement, public disclosure, and impartial adjudication—including jury trials.

PENDING PROPOSALS FOR CONGRESSIONAL COVERAGE

The start of the 103rd Congress promised renewed activism for congressional coverage. Public dissatisfaction with Congress and widespread desire for congressional reform led House freshmen of both parties to compile lists of desirable reforms. Congressional coverage was the only item common to both agendas. The Congressional Accountability Act, H.R. 349, which provides for partial congressional coverage, currently has 236 cosponsors. A hearing on congressional coverage held by the Joint Committee on the Organization of Congress (JCOC) featured Members testifying unanimously in favor of the concept, and Speaker Foley appointed a three-member task force in mid-June to examine possible legislation, noting that he supported bringing Congress under the reach of many laws.

The recommendations of the Foley task force, along with other popular congressional coverage proposals, will be examined by the JCOC, which has made congressional coverage one of the top priorities for its anticipated November reform mark-up. A number of members of the Joint Committee have emerged as forceful advocates of applying private sector standards to Congress, including Kansas Republican Senator Nancy L. Kassebaum and Democratic Delegate Eleanor Holmes Norton of the District of Columbia, a former EEOC chairman. The Congressional Accountability Act and the Congressional Employees Fairness Act are the two legislative packages most likely to form the basis of a JCOC proposal.

The Congressional Accountability Act. H.R. 349, sponsored by Republican Representative Christopher Shays of Connecticut, is the most broadly supported congressional coverage proposal. The original bill would apply fourteen specified laws to Congress, including the Civil Rights Act of 1964, the Occupational Safety and Health Act, the Americans with Disabilities Act, and the Freedom of Information Act. Congress would have up to 180 days to write its own regulations to comply with the laws or become subject to executive branch rulings. Employees could appeal decisions of an internal hearing board to federal district court. After the bill had achieved majority cosponsorship, Speaker Foley appointed a three-member task

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	H.R. 349	H.R. 349 (revised draft)	H.R. 2846	H.R. 2099	H.R. 2499	S. 103
Right of appeal	YES	YES	YES	YES	YES	YES
Right of appeal to district court (including jury trials)	YES	YES	no	YES	YES	YES
Appeal without additional review burden	YES	YES	no	YES	YES	YES
Presumption of congressional coverage for all future laws	no	no	no	YES	no	no
Board empowered to make other laws cover Congress	no	YES	YES	no	no	no
Punitive damages permitted	YES	no	no	YES	YES	YES
Victorious plaintiffs allowed to recoup attorneys' fees	no	YES	YES	YES	YES	YES
Laws cover congressional instrumentalities (example: the Office of the Architect of the Capitol)	YES	no	no	YES	YES	no

1) H.R. 349, Congressional Accountability Act
Sponsored By Rep. Shays (CT)
Applies 14 laws to Congress
237 cosponsors

2) H.R.349, Congressional Accountability Act (revised draft)
Sponsored by Rep. Shays (CT)
Applies 8 laws to Congress
Not yet released

3) H.R. 2846, Congressional Employees Fairness Act
Sponsored by Rep. Schroeder (CO)
Applies 5 laws to Congress
13 cosponsors

4) H.R. 2099, Equity for Congress Act
Sponsored by Rep. Klink (PA)
Applies 9 laws to Congress
23 cosponsors

5) H.R. 2499, Congressional Coverage for Discrimination and Family Leave Act
Sponsored by Rep. Goodling (PA)
Applies 4 laws to Congress
14 cosponsors

6) S. 103
Congressional and Presidential Accountability Act
Sponsored by Sen. Nickles (OK)
13 cosponsors

force, composed of Democratic Representatives Eva Clayton of North Carolina, Barney Frank of Massachusetts, and Barbara Kennelly of Connecticut, to examine and recommend changes in the bill. Despite majority support for their original position, Shays and other sponsors agreed to work with the task force.

The Newest Draft of the Congressional Accountability Act. The newest draft of the bill would apply eight laws to Congress: the Fair Labor Standards Act, Title VII of the 1964 Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination Act, the Family and Medical Leave Act, the Occupational Safety and Health Act, the Freedom of Information Act, and the Privacy Act. Additionally, the new draft specifies that all federal law that applies to terms and conditions of employment, protection from discrimination, and employee safety and health may be made applicable to Congress as well. Under the revisions, a thirteen-member board, appointed by the congressional leadership of both parties, would decide which additional laws ought to apply to Congress. The board would issue regulations that would "specify the manner in which" the laws that would cover Congress would apply, and "take into account the costs associated with the application" of such laws. Former Members and employees of Congress would be prohibited from serving on the board, as would lobbyists.

Employees would undergo obligatory counseling and mediation phases before they could file a formal complaint, which could delay action by up to 90 days. During these stages, aggrieved employees could be pressured to withdraw their claims. In addition, the Board of Directors of the Office of Compliance would be entitled to an additional 45-day delay before its staff recommends further disposition of the case.

During the new draft's waiting periods, all complaints would have to be kept strictly confidential, so that any aggrieved employee who wished to preserve his or her rights to continue the process would have to acquiesce in complete silence. This would prevent voters from being informed of pending charges against elected representatives for a substantial portion of the complaint process. Multiple delays before public hearings can take place make it all the more likely that aggrieved employees will simply give in by passively accepting improper treatment or seeking other jobs.

The revised draft's procedure does, however, permit *de novo* appeal to federal district court, which creates the opportunity for an entirely new public trial independent of anything that happened in internal hearings. It also grants the hearing board limited subpoena power. Although it permits the shifting of attorneys' fees from victorious plaintiffs to defendants, awarding punitive damages against congressional employers is explicitly prohibited—a prohibition that is mirrored in trials of executive branch officials, though not in the public sector. In short, the newest draft of the Congressional Accountability Act is a substantially stronger bill, although the provisions for initial internal enforcement of rules (that could differ significantly from the laws that cover the rest of the country) render it imperfect.

The Congressional Employees Fairness Act. H.R. 2846, sponsored by Representative Pat Schroeder, would place Congress under the coverage of five specific laws: the Fair Labor Standards Act, the Family and Medical Leave Act, and some parts of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. In addition, a Board of Directors would examine labor laws, health and safety laws, anti-discrimination laws, and information availability laws to recommend additional statutes that Congress should comply with. The Board would be empowered to consider "the costs associated with the application of such laws"—a factor that a private individual or group cannot consider when it decides whether to obey a law or regulation. This legislation also disallows award of punitive damages. Cases would be heard by an internal board. Although court appeals would be allowed, the legislation creates a standard of review so deferential to the original hearing that it is highly unlikely that many aggrieved appellants will be able to meet it: not only does an appeal have to meet a demanding standard of review,[25] but the error that permits the appeal must have harmed the party that lost at the hearing. The legislation includes a fallback appeals procedure if the provision for appeal to federal appellate court is found unconstitutional. Congresswoman

25 The only circumstances in which the appeals court is permitted to set aside a previous decision or order are if it "was (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence." Section 9(c).

Schroeder's view that such a procedure may violate the separation of powers[26] apparently persuaded her to provide an alternate appeal route to the Personnel Appeals Board of the General Accounting Office.

The Equity for Congress Act. H.R. 2099, sponsored by Democratic Representative Ron Klink of Pennsylvania, specifies portions of nine laws that would cover Congress in the same way that they cover the private sector: Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the National Labor Relations Act, the Fair Labor Standards Act, the Occupational Safety and Health Act, the Americans with Disabilities Act, the Freedom of Information Act, the Ethics in Government Act, and the Family and Medical Leave Act. The act covers congressional employees exhaustively by specifying numerous classes of employees that are often overlooked. In an improvement over other congressional coverage bills, employees could bypass the internal congressional enforcement bureaucracy by bringing an action in a court of law or administrative agency in the same manner as would a private sector employee. Remedies that are statutorily provided for include equitable relief, monetary damages, attorneys' fees, and court costs. Another improvement consists of an amendment to the House and Senate Rules which encourages Congress to bring itself into the reach of all future legislation by forcing it to vote on self-exclusion itself: the rules change mandates a three-fifths supermajority vote in order to pass any legislation which fails to cover Congress.

The Congressional Coverage for Discrimination and Family Leave Act. H.R. 2499, sponsored by Republican Representative William F. Goodling of Pennsylvania, would extend to the House laws now on the books covering age discrimination (already extended to the Senate) and provide for a private cause of action in federal court for violations of the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and Title VII of the Civil Rights Act. This cause of action would be identical to a private suit—identical procedures, damages, attorneys' fees, and court costs—with the exception that personal liability would be capped at $50,000 plus lost back pay and benefits. Initial complaints would still be filed with the existing House OFEP. Court appeals could be filed ninety days after OFEP procedures were exhausted or 180 days after an OFEP claim was filed.

Senate proposals. Action on congressional coverage in the Senate has focused primarily on proposals to amend individual bills to cover Congress. The Congressional and Presidential Accountability Act (S. 103), sponsored by Republican Don Nickles, currently has thirteen cosponsors. It puts Congress under the coverage of the Fair Labor Standards Act, the National Labor Relations Act, and the Occupational Safety and Health Act. It provides for the creation of internal rules to mirror the regulations that currently are applicable to employees outside of Congress, so that congressional employees will be eligible to receive the same compensation and appeal rights as their counterparts in the private sector. The bill provides for the transfer of awarded compensatory funds from clerk-hire or committee funds, or from the House contingent fund. S. 103 also

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26 See *Application*, S. Hrg. 103-115, p. 4.

would bring the Executive Office of the President, which is currently exempt from the specified laws, under their reach. Republican Senator Dan Coats of Indiana, who has decried the failure of the Senate Ethics Committee to carry out thorough and timely investigations of individual Senators, has attacked the problem in a different way: he has introduced legislation to replace the Committee with an independent counsel in order to ameliorate the Senate's self-regulation problem.

Prospects for Action. The Joint Committee on the Organization of Congress is considering these various congressional coverage proposals after receiving unanimous endorsements of the concept during its hearings. The Joint Committee may use one of the existing proposals as the basis of its work or it may devise a new approach. Reportedly, merging the House and Senate FEP offices, toughening procedures for handling civil rights violations, and broadening appeal rights are specific items that are high on the Committee's priority list.[27] While it is possible that one of the congressional coverage proposals could be considered independently by the House or Senate, it is more likely that the concept will be addressed as a part of the Joint Committee's overall reform plan. Should the Joint Committee fail to adopt a proposal satisfactory to congressional coverage supporters, however, House proponents have shown sufficient strength to bring a measure to the floor through the discharge process, under which a majority of Representatives can force consideration of a bill on the House floor. Senator Grassley and other congressional coverage proponents are almost certain to offer other amendments to individual legislation unless the Joint Committee adopts a comprehensive approach.

BASEBALL, APPLE PIE, AND CONGRESSIONAL COVERAGE

"I want Congress to live under the laws it passes for the rest of us." This was Republican Senator Kay Bailey Hutchison's crowd-pleasing line during the recent special election in Texas. Indeed, virtually all public figures who have taken a public position on congressional coverage favor it, and well they should: for the United States to be a government of laws and not of men, Congress must demonstrate that it does not consider itself above the law. The fundamental issue is that of the trust and confidence of the American people in their government. An approach that leaves the impression that Congress is favored in the application of laws will fail to meet the standard necessary to restore trust in Congress and in the American government. It is therefore crucial that a congressional coverage plan make Congress subject to the actual laws in question, rather than merely to the "spirit" of these laws or to ostensibly equivalent standards and requirements. Likewise, Congress should be subject to the same enforcement agencies and procedures as private sector or executive branch organizations, and must permit court appeals on the same basis. If uncertainty and even fear are the cause of complaints about laws or their enforcement, Members of Congress should share the experience of average Americans, from surprise inspections to seemingly irrational jury verdicts, in order to become better legislators.

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27 Merida, *op. cit.*

There is one respect in which Congress is different from most other employers: the political impact of a complaint or suit, even if entirely unjustified, could be significant. For this reason, it may be appropriate to require confidential procedures for some portion of the complaint process. Such strictures must not, however, extend to general descriptions of cases and their handling and disposition. Secrecy also should end when a competent agency has determined that a complaint has merit.

Although Senate attempts to amend bills individually so as to produce congressional coverage are commendable, an across-the-board solution is preferable. Experience demonstrates that a piecemeal approach to congressional coverage can be postponed, sometimes indefinitely. Any genuine congressional coverage bill will:

- ✔ **make all laws that cover public agencies and private businesses apply to Congress,** so that federal legislators can better appreciate the burdens they place on the rest of the country;
- ✔ **create coverage that applies equally to all congressional agencies and employees,** rather than giving different groups of employees different types of coverage;
- ✔ **make Congress's legal status as comparable to the private sector as possible with regard to liability, procedure (including trial by jury), and enforcement,** so that Members of Congress will—as nearly as possible—be subject to the same law enforcement and judicial proceedings, and the same sentences, as anyone else;
- ✔ **ensure that all employees have a full right of appeal in federal court,** so that congressional employees will have the same right to appeal decisions as any other litigant in the country.

Congress would be a very different institution if it were truly covered by the laws that apply to the rest of Americans. Congressional coverage would give congressional employees the same workplace and equal opportunity regulations as the private sector. Congressional offices would have the same duties of record-keeping and disclosure that executive agencies have, allowing the public greater access to information about Congress. Members of Congress would share directly in the burdens and impositions of the laws they pass. A greater sensitivity to those burdens and to the possibility of bureaucratic abuse or simple insensitivity would almost certainly result in better laws and better government. Most important, congressional coverage would begin to restore the confidence of the American people in Congress and in their government by assuring voters that legislators are fellow citizens of a constitutional republic and not a ruling class that places itself above the law.

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