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NEW LEADERSHIP PROPOSALS STILL LEAVE CONGRESS ABOVE THE LAW

(Updating *Backgrounder* No. 965, "Should Congress Be Above the Law?" November 2, 1993.)

> *One might plausibly contend that Congress violates the spirit, if not the letter, of the constitutional doctrine of separation of powers when it exonerates itself from the impositions of the laws it obliges people outside the legislature to obey.*
>
> Supreme Court Justice Ruth Bader Ginsburg[1]

Ending congressional self-exemptions from laws governing civil rights, labor, health and safety, and information disclosure is a central goal of congressional reformers. Most Members of Congress have now conceded that all laws should cover them, but new coverage proposals by congressional leaders attempt to retain such special rights and privileges as:

- ✓ **Making application of laws to Congress optional and incomplete;**
- ✓ **Applying different rules to Congress than to the rest of the country; and**
- ✓ **Omitting jury trials, making court appeals nearly impossible, and evading independent, impartial enforcement.**

The most popular congressional coverage proposal, H.R. 349, the Congressional Accountability Act, currently has 245 House cosponsors. Its chief sponsors conceded that the bill needed improvement, however, and entered into negotiations with House leaders on a compromise. House Members of the Joint Committee on the Organization of Congress, the bicameral committee designated to produce comprehensive congressional reform legislation, recommended a congressional coverage approach based on H.R. 349, which is now being considered in the House Rules Committee. Separately, the Senate appointed a Bipartisan Task Force on Senate Coverage. When the Joint Committee split into House and Senate components, the Senate group deferred to its Task Force, whose recommendations were transmitted to Senate leaders in November 1993. Rather than delivering genuine coverage reforms, both the House Joint Committee and the Senate Task Force have proposed half-measures filled with qualifications and loopholes. Representative Wayne Allard (R-CO) pointed out numerous defects in the Joint Committee's congressional coverage legislation during its markup; Senators Charles E. Grassley (R-IA) and Don Nickles (R-OK), members of the Senate Task Force, released a strongly-worded dissent to the Task Force's recommendations, arguing that it failed to go far enough. Major problems in these leadership proposals include the following:

1 Remarks at the 92nd Street Y, New York City, March 12, 1987.

The leadership proposals would make congressional coverage optional and incomplete. The Joint Committee's congressional coverage proposals apply only five labor and civil rights laws to Congress from among nearly a score of existing exemptions. A new Office of Compliance—under congressional control—would review other labor, anti-discrimination, and health and safety laws to decide if any additional ones should apply to Congress. The office would be barred from recommending application of laws, such as the Freedom of Information Act, which fall outside of the specified areas.

The Joint Committee's proposal also requires the Office of Compliance to "take into account the costs associated with the application" of laws to Congress. Taking costs of compliance into account could provide a convenient justification for postponing or eliminating congressional coverage of, for instance, the Americans With Disabilities Act or the Occupational Safety and Health Act. Congress should not be so allowed to escape the complex and costly mandates it imposes on the rest of the country, which drain over a half-trillion dollars from the American economy every year.[2]

Like the Joint Committee, the Senate Task Force also would exclude large categories of federal law from congressional coverage. The Task Force recommended that the Senate be covered by laws related to labor, anti-discrimination, and health and safety, but failed to cite the specific laws that should cover Congress or recommend any procedure for determining what statutes should be included. The Task Force recommends against recognizing Senate employees' collective bargaining rights; it also argues that information disclosure laws like the Freedom of Information Act should not apply, on the grounds that the Senate is already in "substantial compliance" with that law's "spirit" because of (for example) televised Senate proceedings and the *Congressional Record.*

The leadership proposals would apply different laws to Congress than to the rest of the country. If the Joint Committee's envisioned Office of Compliance decides that a law should cover Congress, it would then issue regulations that prescribe "the manner in which laws made applicable... shall apply." The Office of Compliance would thus be free to apply to Congress (or, for that matter, to discard) whatever parts of whatever laws it chose. Furthermore, the regulations that office would draft would not necessarily be mirror images of laws applying to the private sector or the executive branch. Since the specific requirements of these laws are contained largely in regulations or established by judicial decisions, this approach would leave Congress operating under different rules than the rest of America.

The Senate Task Force's proposal shares this problem. It also recommends the establishment of two new internal bureaucracies under Senate control (modeled on the existing Office of Senate Fair Employment Practices)—the Office of Senate Employment Standards and the Office of Senate Occupational Safety and Health—to issue rules and regulations and to hear employee complaints. Such offices would design and enforce labor, anti-discrimination, and health and safety regulations, although the Task Force recommendations are not explicit about which laws those regulations would be based on. The offices would establish new standards and rules, rather than enforcing specific statutes, established regulations, and settled case law. These approaches guarantee that regulations written by Congress and for Congress will differ substantially from the laws that apply to other Americans.

The leadership proposals would omit jury trials, make court appeals nearly impossible, and evade independent, impartial enforcement. Under both leadership proposals, congressional employees would have to undergo an involved and time-consuming process before receiving an open hearing. The first three required steps in this process—counseling, mediation, and hearings—are internal congressional proceedings that are closed to the public. Congressional staffers who conduct hearings and choose hearing officers could be fired at the will of their employers, which jeopardizes their independence and

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2 Thomas Hopkins of the Rochester Institute of Technology estimates that such regulations and mandates cost the private sector $564 billion yearly. That figure omits the costs of federally imposed mandates on state and local government. See "The Restrained Economy," *The Wall Street Journal* editorial, September 5, 1993, p. A20.

provides a gateway for political meddling by congressional leadership. Any appeal after this process must go to the U.S. Court of Appeals for the Federal Circuit; this neatly circumvents any opportunity for jury trials, which are conducted only by lower courts. If the Joint Committee gets its way, however, most judgments will never be appealed to real courts: its proposal requires a gross procedural abuse to take place before an appeal can be heard. Commendably, the Senate's Task Force recommends that judicial review should be permitted "to the extent... that such review is available in similar cases in other private or public institutions." But both the Joint Committee and the Task Force would perpetuate pointlessly drawn-out procedures that would evade both jury trials and independent enforcement of the law.

Both the Joint Committee's and the Task Force's recommendations would continue to insulate Congress from the laws that it imposes on the rest of the country. James Madison wrote that the "spirit which nourishes liberty" would prevent Congressmen from passing any law "which will not have its full effect on themselves and their friends, as well as on the great mass of society."[3] He added: "If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature as well as on the people, the people will be declared to tolerate anything but liberty." Madison's belief that congressional coverage would produce a "communion of interests" between representatives and the represented deserves attention in an age where Congress routinely exempts itself from both the procedures and the penalties that federal legislation assigns to the rest of the country. Congressional self-exemption from the laws it writes is doubtless a source of the widespread resentment and distrust of the federal legislature by citizens today.

In late February, Senators Grassley and Joseph Lieberman (D-CT) announced plans to introduce a significantly stronger congressional coverage bill. Although no legislation has been released, their summary suggests that such legislation would come far closer to real congressional coverage than the leadership proposals discussed above. Representatives Christopher Shays (R-CT) and Dick Swett (D-NH), the sponsors of H.R. 349, acknowledged that the Senators' recommendations represent considerable improvement over their original bill and the Joint Committee legislation. Shays and Swett pledged to help the House produce a bill with similar improvements in the same directions, and to push such a bill through the House with a discharge petition if necessary. The Grassley-Lieberman proposal would apply eight major federal laws to Congress—including the Americans With Disabilities Act and the Occupational Safety and Health Act—and apply information disclosure laws such as the Freedom of Information Act to congressional administrative offices. Congress would still retain an internal compliance office, but compliance administrators could be removed only for cause, which would grant them some degree of political independence. Hearing boards would be guided by precedents of other courts, and prospects for jury trials and grounds for appeal would be broadened to approach the standards of other courts. Although the Office of Compliance their plan envisions would keep law enforcement under internal congressional administration, the Grassley-Lieberman recommendations represent a long stride toward real congressional coverage.

Both to educate Congress about the effects of the laws it passes and as a matter of simple fairness, it is time for congressional coverage. This means that Congress and its employees should face the same regulations, the same regulators, the same judges, the same juries, the same procedures, the same precedents, and the same costs as everyone else. If the recommendations of the House Joint Committee and the Senate Task Force are implemented, however, real congressional coverage will continue to be denied.

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3 See *Federalist* No. 57.