

# CRS Report for Congress

## Independent Investigations Of Allegations Of Wrongdoing By Members Of Congress

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INDEPENDENT INVESTIGATIONS OF ALLEGATIONS  
OF WRONGDOING BY MEMBERS OF CONGRESS

SUMMARY

Allegations concerning the violation of federal criminal laws by Members of Congress are investigated, and prosecuted if needed, by the Department of Justice and its United States Attorneys, under the control of the Attorney General. The Department of Justice, the Attorney General, and the United States Attorneys are independent from the direct control and the supervision of Congress. The Department of Justice is in the executive branch of government, and not the legislative branch, and its officers and employees are neither appointed nor removable (other than by impeachment for high crimes and misdemeanors) by Congress. Such investigations by the Department of Justice of Members of Congress are therefore considered to be independent investigations.

Since there is not considered to be any structural, inherent, or practical conflict of interest in the Attorney General controlling an investigation of Members of Congress (such as might arise in an investigation of the Attorney General of himself, his colleagues, or of his superior, the President), Members of Congress were not "automatically" included in the coverage of the independent counsel provisions of the Ethics in Government Act of 1978. The Attorney General may, however, request the appointment of an independent counsel for any person, including a Member of Congress, if the Attorney General determines that an investigation by him or the Department of Justice would result in a personal, financial or political conflict of interest.

The Attorney General of the United States is the only person under the law who may request and petition for the application of an independent counsel. Separation of powers principles would prevent any Member of Congress or officer of the legislative branch from having the authority to petition for the appointment of an independent counsel who enforces federal criminal laws.

Investigations of alleged ethical improprieties and alleged violations of standards of conduct for legislators are conducted internally by the "ethics" committees in either House of Congress. The Constitution specifically assigns to each House of Congress the authority over the conduct and discipline of its own Members. Because of this constitutional grant of authority to each House, the subjective nature of ethics guidelines, and the constitutional immunity of Members of Congress from being questioned about official legislative conduct by anyone outside of Congress, there are both constitutional and practical reasons for having internal legislative ethics investigations being conducted "in house". The ethics committees in either House of Congress (the House Committee on Standards of Official Conduct and the Senate Select Committee on Ethics) are designed to be bipartisan committees with an equal number of members from both parties. These committees may, and have in the past, employ or contract for outside, "special" counsels to conduct the investigations and proceedings in a particular ethics matter.

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This report discusses briefly information concerning the procedures and provisions for the investigation of allegations of wrongdoing on the part of a Member of Congress by sources "independent" of Congress. In any discussion concerning allegations of wrongdoing or misconduct by federal officials, a preliminary and important distinction must be made between allegations of misconduct which would constitute violations of federal criminal laws, and those allegations of wrongdoing which concern behavior in derogation of ethics rules, guidelines and principles.

The general authority for the investigation and prosecution of violations of federal criminal laws is lodged by statute within the Department of Justice under the direction of the Attorney General of the United States. 28 U.S.C. §§516, 509, 519, 533. The Attorney General and employees of the Department of Justice, including the United States Attorneys in the various federal districts who act as federal prosecutors, are independent from the direct control and/or supervision of Congress. These officials, who are in the executive branch of government and not the legislative branch, and who exercise executive law enforcement duties, are not, and may not under the separation of powers doctrine of the Constitution, be appointed by Congress or removed from office by Congress (other than through impeachment for high crimes and misdemeanors). Buckley v. Valeo, 424 U.S. 1 (1976); Bowsher v. Synar, 478 U.S. 714 (1986). Investigations and prosecutions of federal criminal laws by the Department of

Justice and the United States Attorneys are, therefore, as far as government structure, law, and in practice, "independent" from Congress.

Unlike the problems discussed in the "Watergate" hearings and those that followed which led to the enactment of the independent counsel provisions of the Ethics in Government Act, that is, the inherent conflicts of interest and problems of "serving two masters" when the Attorney General has to investigate himself, his own colleagues or his superior, the President,<sup>1</sup> there have not appeared to have been substantial or serious allegations or suggestions raised that the United States Attorneys or other officials of the Department of Justice have difficulties, because of any structural conflict of interest or connection with Congress, in seeking and obtaining indictments against Members of Congress who have allegedly committed federal criminal offenses. See H.R. Rpt. No. 100-316, 100th Cong., 1st Sess. at 33 (1987). In fact, there have been allegations and complaints of just the opposite problem, that is, that the Department of Justice and the United States Attorneys have been overly zealous in pursuing and targeting Members of Congress in criminal investigations. See S. Rpt. No. 97-682, 97th Cong., 2d Sess. (1982).

In addition to investigation and prosecution by the Department of Justice and the United States Attorneys, it is possible, however, for the Attorney General of the United States to request the appointment of an independent counsel (formerly "special prosecutor") to investigate allegations of criminal conduct by a Member of Congress. Because of the independence of the Department of Justice, its officials and employees from control or direction of Congress, and its structural separation from the legislative branch under the separation

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<sup>1</sup> For general background information, see CRS Report No. 87-192A, "Legislative History and Purposes of Enactment of the Independent Counsel (Special Prosecutor) Provisions of the Ethics in Government Act of 1978", May 4, 1987.

of powers doctrine, officials in the legislative branch including Members of Congress are not "automatically" covered by the independent counsel provisions of the Ethics in Government Act. See 28 U.S.C. §591(b); H.R. Rpt. No. 100-316, supra at 33. There was believed to be no inherent or structural "conflict of interest" in the Justice Department prosecuting Members of Congress. However, the Ethics in Government Act was amended in 1982 to allow the Attorney General to request an independent counsel to investigate any person, even if not covered automatically by the Act, if the Attorney General determines that an investigation of that person by him or the Department of Justice would result in a "personal, financial, or political conflict of interest." 28 U.S.C. §591(c).

The Attorney General of the United States is the only person authorized by law to request and petition the Special Division of the Court of Appeals for the appointment of an independent counsel. 28 U.S.C. §592(c). The separation of powers doctrine and established constitutional principles would not permit the Congress, or any Member of Congress or official of the legislative branch, to have the authority to petition on their own for the appointment of an independent counsel to prosecute federal offenses. See Morrison v. Olson, \_\_\_ U.S. \_\_\_, No. 87-1279 (June 29, 1988); Buckley v. Valeo, 424 U.S. 1, 118-143 (1976).

In the area of the investigation of allegations concerning conduct which might breach ethical and standards of conduct rules (including allegations of conduct which might also constitute violations of federal criminal law), such matters are handled internally by each House of Congress. As a general matter, the enforcement of internal ethics and disciplinary standards and guidelines in Congress is expressly assigned by the Constitution to each House itself. Article I, Section 5, clause 2 of the Constitution specifically

authorizes each House of Congress to "determine the Rules of its proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."

Permanent committees have been established in both the House and the Senate with the authority to investigate alleged conduct violations of Members, officers, and employees, and to recommend punishment to the full body. The House Committee on Standards of Official Conduct is the entity within the House of Representatives with authority over conduct of Members and staff. See House Rule X, clause 4(e). In the Senate, the Senate Select Committee on Ethics is the comparable body. See Standing Orders of the Senate, Senate Manual, S. Doc. No. 98-1, 98th Congress, 2d Session, §79. Unlike other committees of Congress, the majority of whose members come from the majority party in that House, the ethics committee memberships in both the House and the Senate are expressly required to be evenly divided among the majority and minority party to attempt to ensure a more non-partisan and apolitical consideration of the ethics matters before it. See House Rule X, cl.6(a)(2); Standing Orders of the Senate, Senate Manual, supra at §79.

Because the authority over behavior and conduct of Members of Congress is specifically and textually assigned by the Constitution to each House itself, arguments have been raised that an entity independent from and outside of the legislative branch could not permissibly enforce legislative ethical standards since to do so would impermissibly interfere with a function assigned in the text of the Constitution to another branch of government. (Note separation of powers doctrine, generally, Nixon v. Administrator of General Service, 433 U.S. 425 (1977); INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 106 S.Ct. 3181 (1986)). It has thus been contended that the final authority for internal legislative ethics and disciplinary matters would be required to be kept within

each House of Congress under the Constitution, and not delegated outside of each House to an "independent" entity not in the legislative branch.

Standards of conduct and ethical guidelines and principles may be very subjective in nature, often based on "perceptions" and "appearances" that certain conduct may give, and need not conform to the precision and specificity required of criminal law provisions. Because of their subjective nature and their dealing with matters within the experience and expertise of the body itself, enforcement in the federal government of ethical guidelines, standards, and principles is generally left to the discretion of each agency involved. See, for example, Wathen v. United States, 527 F.2d 1191, 1200-1201, 1203 (Ct. Cl. 1975), reh'g denied, January 30, 1976; Wild v. HUD, 692 F.2d 1131, 1133 (7th Cir. 1982); note also Center for Auto Safety v. Federal Trade Commission, 586 F.Supp. 1245 (D.D.C. 1984).

Since Members of Congress are provided within the Constitution with immunity from prosecution and being "questioned in any other Place" concerning their official legislative conduct (that is, "for any Speech or Debate in either House", Constitution, Article I, Section 6), there exists a cogent and practical reason for keeping legislative ethics enforcement "in house". If a commission, investigating unit or other enforcement body were in fact "independent" from the House or Senate, there exists a real possibility that Members could successfully argue that they may not be investigated or otherwise "questioned" about any official legislative conduct by that "independent" body. See United States v. Johnson, 383 U.S. 169 (1966); United States v. Brewster, 408 U.S. 501 (1972); United States v. Helstoski, 442 U.S. 477 (1979). As discussed by the Special Committee on Congressional Ethics of the Bar Association of the City of New York in its work Congress and the Public Trust, New York (1970), at 203:

... [E]ach house was given those powers and privileges necessary to constitute Congress as a separate, independent, co-equal branch of the Federal government. Among these are the Congressional immunity provisions, the principal one being the Speech and Debate Clause, which protects Members from being "questioned" elsewhere about their official conduct. This was intended to free the Congress and individual Members from possible harassment and usurpations by other branches of government. However, each Member of Congress would enjoy a license to misuse his Congressional immunity if each House were not given correlative powers and responsibilities to police Members' behavior. For instance, the previously mentioned action of former Representative Thomas Johnson of Maryland, who allegedly accepted a bribe for delivering a speech on the House floor, was immune from criminal prosecution. Such conduct is not absolutely privileged, but lies instead within the jurisdiction of Congress itself to punish. Bribery has been the basis for Congressional discipline on several occasions. The duty of each house to discipline its Membership is a burden made necessary by the prerogatives of high office. If Congress did not police itself, its Members would be above all law in the areas protected by Congressional immunity, a concept alien to our legal system and never intended by the framers of the Constitution.

The precise form and manner of congressional investigation and discipline of Members of Congress for internal legislative ethics matters are not expressly set out in the Constitution, other than the requirement for a two-thirds majority for an expulsion. The ethics committees in both the House and Senate would thus not be prohibited either on their own accord, or as directed by the House or Senate in a simple resolution, to hire or retain on their staff "outside" or "special" counsel or investigators on a particular matter, who could then make preliminary findings and/or recommendations on internal legislative ethics matters to the committees or directly to Congress, as long as the final disciplinary action on any matter were taken by the House or Senate itself. The "independence" of such a system, however, would of necessity be only a matter of degree, since the outside or special counsel would be appointed by and removable by the Members of Congress who were the

appointing or contracting authority for the outside counsel, and the authority for any final disciplinary decisions would be retained by each House of Congress.

Outside, "special" counsels have been employed in congressional ethics investigations on several occasions in the recent past. Such counsel may apparently be retained by the committees upon their own motion, under their authority to hire staff, without further authorization from the Congress. Although not intended to be a complete list, recent examples of the use of outside special counsels being employed by the House or Senate ethics committees include the following: the "Korean Influence Investigation" in the House (see H.R. Rpt. No. 95-1817, 95th Cong., 2d Sess., at 2-3 (1978));<sup>2</sup> investigations of the various matters implicating Members of Congress in the so-called "ABSCAM sting" operation (note H.R. Rpt. Nos. 96-1387, 96th Cong., 2d Sess. (1980); 96-1537, 96th Cong., 2d Sess. (1980); 97-110, 97th Cong., 1st Sess. (1981); see also S. Rpt. No. 97-187, 97th Cong., 1st Sess. (1981)); and the investigation of allegations concerning drug use and illicit sex by Members, officers or employees of the House. H.R. Rpt. No. 98-559, 98th Congress, 1st Session (1983). The Senate Select Committee on Ethics and the House Committee on Standards of Official Conduct have employed special counsels in various other investigations of allegations of misconduct of individual Members of Congress. Note S. Comm. Print (to accompany S. Res. 249), 96th Congress, Senate Select Committee on Ethics (1980); H.R. Rpt. No. 96-351, 96th Cong., 1st Sess. (1979); H.R. Rpt. No. 96-856, 96th Cong., 2d Sess. (1980);

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<sup>2</sup> The Committee to "ensure that its own investigation would be thorough and impartial in both appearance and in fact" adopted a resolution under which the investigation would be conducted by "an outside independent special counsel". H.R. Rpt. No. 95-1817, *supra* at 2. The Committee initially hired Phillip Lacovara, who in turn hired John Nields, Jr. to supervise the staff work. After the resignation of Phillip Lacovara, the Committee retained Leon Jaworski on July 19, 1977 to act as special counsel.

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H.R. Rpt. No. 98-891, 98th Cong., 2d Sess. (1984); H.R. Rpt. No. 100-46, 100th  
Cong., 1st Sess. (1987).

  
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