Testimony of Sarah Dufendach
Chief of Legislative Affairs

Common Cause

Before the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights and Civil Liberties

Hearing on Lobby and Ethics Reform

March 1, 2007

Chairman Nadler, Ranking Minority Member Franks, and members of the Subcommittee, Common Cause welcomes this opportunity to testify on ethics and lobby reform. For 37 years, Common Cause has worked for an open, accountable and ethical Congress. This issue matters greatly to our 300,000 members and supporters.

It also matters greatly to the American public as a whole. Last fall, voters demonstrated that last year's Congressional scandals greatly disturbed them. One member of this chamber resigned in disgrace and was recently sentenced to 30 months in prison for making false statements and conspiracy to commit fraud, charges related to his acceptance of lavish trips and other favors from disgraced lobbyist Jack Abramoff. Another member pled guilty to accepting $2.4 million in bribes from a defense contractor, and is serving a prison term of eight years and four months. A third member made questionable advances to House pages, and left office under an ethical cloud.. Yet another member remains the subject of a federal investigation examining whether he accepted or solicited bribes from a foreign business interest for his efforts to gain them contracts with U.S. firms.[1]

There is no mistaking the cumulative impact of last year's headlines. The public made clear its distaste for what appeared to be a culture of corruption in Washington at the polls last November.

- Responding to an Oct. 6-8 USA Today/Gallup pre-election poll before the 2006 mid-term elections, likely voters ranked government corruption among their top three issues, along with Iraq and terrorism.[2]

- Exit polls bore out the same conclusions, with more than four in ten voters stating that official corruption was extremely important to their vote.[3]

By turning out so many incumbents, this "wave election" should have sent a clear signal to Congress: The public does not want "business as usual" at the Capitol. The voters want to be able to rely on the integrity and high ethical standards of their elected officials.

Speaker Pelosi is to be commended for her very strong response to the public by strengthening the ethics rules as the first order of business when the 110th Congress convened. The Speaker also promised to consider lobby reform legislation at a later date.
The Senate responded to the public's concerns with the passage of *The Legislative Transparency and Accountability Act of 2007*, S.1, on January 18. This legislation includes very strong provisions that will help restore the public's faith in Congress. Its strong bipartisan passage, approved by a vote of 96 to 2, represents an historic and ground-breaking first step to improve the ethical climate in Washington.[4]

---

[1] Jonathan Allen, "Former Rep. Ney Sentenced to 30 Months," Congressional Quarterly Today, 19 Jan. 2007.
[2] Jeffrey M. Jones, "Democratic Edge on Issue Extends to Terrorism, Morality," Gallup Poll News Service, 13 Oct. 2006.
[3] Steve Inskeep, Renee Montagne, "Iraq Not The Only Issue to Sway Voters," *Morning Edition*, National Public Radio, 8 Nov. 2006.
[4] David D. Kirkpatrick, "Senate Passes Vast Ethics Overhaul," *The New York Times*, 19 Jan. 2007.

In addition to an overall review of the Senate's efforts, the Subcommittee has asked us to specifically address the bundling and revolving door provisions of S.1 and to comment on one provision the Senate rejected: the disclosure of what is termed "Astroturf" lobbying expenditures.

**Common Cause strongly supports the Senate's provision on "bundling."**

The bundling provision in S.1, put forward by Senators Russell Feingold (D-WI) and Barack Obama (D-IL) will require lobbyists and lobbying organizations to disclose the contributions they collect or arrange for federal officeholders and candidates, leadership PACs and party committees.

Currently, campaign finance disclosure laws ensure that the public knows how much an individual lobbyist gave in political contributions to federal candidates.

But merely to know how much an individual lobbyist gave to a Member's campaign vastly underestimates the efforts that lobbyist may have made to solicit funds on behalf of that Member.

Disclosure of the total amount of contributions that a lobbyist solicited on behalf of a Member is absolutely critical if the public is to have a full understanding of the role of lobbyists in election fundraising, and the extent to which their elected representatives depend on lobbyists to assist in the solicitation of donations crucial to their election campaigns.

**S.1 also contains a strong revolving door provision.**

This provision would extend the "cooling off period" during which Members of Congress must refrain from lobbying after leaving public service from one year to two years. The provision expands the definition of lobbying to include not only direct contacts with legislators and staff, but also those activities that facilitate lobbying contacts. Senior Congressional staff – those currently earning $111,000 or more -- must wait one year before making lobbying contacts with any Members or Congressional staff.

According to our colleagues at Public Citizen, about four out of ten Members of Congress move directly from their jobs in the public sector to become lobbyists, often making millions of dollars. Nearly one in 5 senior Congressional staffers, according to some estimates, make the same transition, and also earn far more generous salaries from their lobbyist employers.[5]

If we do not slow the revolving door, there could be an ever increasing presence and influence on public policy of the special interests with money enough to obtain the services of well-connected and savvy former Members and senior staffers. This makes for a very uneven lobbying playing field, and does not work to ensure that our elected representatives get all possible arguments on important legislative issues.

[5] Craig Holman, "Time for Congress To Slow The Revolving Door," *Roll Call*, 12 Feb. 2007.

We also take the risk that Members or powerful staffers will negotiate job agreements with powerful special interests while they are still in Congress overseeing issues that affect the very parties they are negotiating with.

And we risk creating a culture where people ultimately seeking high-paid lobbying jobs look at public service as a stepping stone to their "real" careers.

While we respect the right of former Members and staff to leave office and pursue the careers of their choice, we believe that increasing the "cooling off" period from one to two years, and expanding the definition of lobbying to capture more of the real work that lobbyists, do are both good and necessary reforms.

**Astroturf lobbying should be disclosed.**

It is called Astroturf lobbying because it looks like authentic grass roots activity but in fact is the result, not of concerned citizens petitioning their government, but rather of lobbying firms paid to generate everything from paid media and phone banking to direct mail and other paid public communications campaigns aimed at influencing the public to contact their members of Congress on specific legislative proposals.

We regret that the Senate failed to pass a disclosure provision for Astroturf lobbying. For those who think we do not need this type of disclosure, we have three words, "Harry and Louise." Healthcare insurers, according to media accounts, spent $17 million to pay for TV ads attacking the Clinton healthcare plan.[6] Those ads were credited with playing a large role in killing the proposal. But not one penny of this multi-million dollar campaign had to be publicly disclosed.

The aim of Astroturf lobbying disclosure is not to impose reporting burdens on legitimate groups that do grassroots lobbying. We urge the House to propose and pass an Astroturf lobbying provision that would require disclosure by a lobbying firm or a firm that does not presently file federal lobbying reports but that earns at least $100,000 a quarter to engage in paid efforts to stimulate Astroturf lobbying. This provision would impose no additional disclosure requirements on an organization that lobbies. Only firms that do paid Astroturf lobbying would have to file lobbying reports that include the names of each client, the issues they work on for each client, and an estimate of the income they earned from that client for paid efforts to stimulate Astroturf lobbying. (The firm would not have to report income from a particular client that did not exceed $50,000 for the reporting period.)

The public and our elected officials have the right to know who is behind major ad campaigns stirring up public opinion on legislative issues, and how much money a client has invested in these campaigns.

When the public and Congress are not able to distinguish between genuine grassroots campaigns and Astroturf lobbying, citizen-generated efforts to communicate with their elected officials are devalued. That hurts genuine citizen advocates most of all and is a disservice to Members of

[6] Peter Overby, "Senate Bill Ignores 'Astroturf' Lobbying," *Morning Edition*, National Public Radio, 25 Jan. 2007.

Congress genuinely trying to assess what most Americans and most importantly, their constituents, really think.

**It is time for independent ethics enforcement.**

While S.1 is indeed landmark ethics legislation, it falls far short in one very important area and that is enforcement of Congressional ethics rules. Stricter rules mean nothing if they are not enforced, and the record of the House Ethics Committee does not give us much faith that the Committee is up to enforcing new rules.

There has been a barrage of one scandal after the other at the highest levels of Congress and a stunning lack of response by the House Ethics Committee. There is a public perception that Ethics Committee members, including the Chairman, were punished for voting to reprimand a Congressional leader. The public no longer trusts the Congress to police itself.

In fact, the public overwhelmingly supports independent ethics enforcement. More than eight out of ten adults who were surveyed in a Washington-Post ABC News poll January 16-19, 2007, replied that they supported establishing a "permanent, independent commission to investigate and enforce ethics rules for members of Congress and their staffs."[7]

Congressional self-policing has inherent problems:

- Judging colleagues' ethical conduct is always difficult, but even more so in legislative bodies where members depend on good will from other members to get things done. As Harvard University professor Dennis Thompson has observed: "Members depend on one another to do their job. The obligations, loyalties and civilities that are necessary, even admirable, in a legislature, make it difficult to judge colleagues objectively or to act on the judgments even when objectively made." [8] It is a system, Thompson said, that contains an inherent conflict of interest. "[T]he members are not just judging other members, they are judging the institution. So more than in other professionals or other kinds of places, where self-regulation applies, their institutional norms are on trial …"

- The dual pressures of working with one another and avoiding partisan mutually assured destruction leads Congress either to agree to ethics "truces" when no Member files complaints against any other Member, or to wage an "ethics war" where both parties file charges indiscriminately to gain political advantage. Neither approach creates accountability or gains the public's trust.

**Independent ethics enforcement is a proven, effective alternative to the current system.**

Instead of struggling to judge their colleagues, Members of Congress should be guided by a professional, nonpartisan body tasked with receiving ethics complaints, doing preliminary investigations, and making recommendations to the Ethics Committees in their respective chambers about moving forward.

---

[7] "Washington Post-ABC News Poll," washingtonpost.com., question 35, 20 Jan. 2007.
[8] Dennis Thompson, "Congressional Ethics System Creates A Conflict of Interest," *Roll Call*, 17 Jan. 2007.

State legislatures in 23 states have adopted some form of this model. In some states, it has worked exceptionally well.[9]

In Kentucky, for example, a Legislative Ethics Commission established 14 years ago now has the resounding support of legislators. When surveyed, 97 percent of state legislators responded that an independent ethics commission does a better job overseeing compliance with state ethics rules than committees of legislators such as the House or Senate Ethics Committees.[10]

**Independent ethics enforcement is constitutional.**

The Constitution gives the House and Senate the power to punish their Members for disorderly behavior. But legal scholars believe that Congress has the power to delegate the receipt and investigation of complaints to an independent body, provided that each chamber retains its power to make the final decision about disciplining a member. Stanley Brand, a former general counsel to the House of Representatives, and ethics expert notes: "I have no doubt that Congress can constitutionally delegate to an outside body the initial steps of investigating and making recommendations for disciplinary cases. … Congress itself has to approve or ratify, or review those recommendations, because the Constitution says it's their job to do that. But … this is not an exclusive process."[11]

**Independent ethics enforcement benefits both the public and legislators.**

Two of the most effective state ethics committees are in Kentucky and Florida. Both were created as a result of a major legislative scandal. Both initially met with some reluctance and opposition by legislators. Both have been successful because of the high standards, nonpartisanship and professionalism of their respective staffs. The biggest contribution each has made, according to their current executive directors, is their ability to depoliticize ethics enforcement and to approach their role as helping legislators avoid ethical transgressions, rather than playing "gotcha" after ethical violations occur.

**To be effective, an independent ethics enforcement entity must include the following qualities:**

This list of essential elements for an Office of Public Integrity is supported by the Campaign Legal Center, Common Cause, Democracy 21, the League of Women Voters, Public Citizen and U.S. PIRG.

---

[9] "Honest Enforcement: What Congress Can Learn from Independent State Ethics Commissions," U.S. PIRG Federation of State PIRGs, Feb. 2007.

[10] George C. Troutman and Romano L. Mazzoli, "Congress Should Look to Ky For Ethics Laws," *The Lexington Herald Leader*, 5 Feb. 2007.

[11] Stanley Brand, transcript, "Restoring Ethics in Washington: How Congress Can Create An Independent Ethics Commission," panel discussion, 23 Jan. 2006, pp. 31-32.

It is essential to establish a nonpartisan, professional enforcement entity with real authority to help enforce the House ethics rules. This reform is the lynchpin for all other ethics reforms. An Office of Public Integrity should be created with the following essential elements:

- The Office of Public Integrity should have the authority to receive and investigate outside complaints and to initiate and conduct investigations on its own authority, where the Office determines that a matter requires investigation.

The Office should have the powers necessary to conduct investigations, including the authority to administer oaths, and to issue and enforce subpoenas. The subject of any investigation should have the opportunity to present information to the Office to show that no violation has occurred. The Office should have the authority to dismiss frivolous complaints expeditiously and to impose sanctions for filing such complaints.

- The Office of Public Integrity should be headed by a Director or by a three-member panel, should have a professional, impartial staff and should have the resources necessary to carry out the Office's responsibilities.

If the Office is headed by a Director, the Director should be chosen jointly by the Speaker and Minority Leader. If the Office is headed by a panel, the panel should consist of three members, with one member chosen by the Speaker, one member chosen by the Minority Leader and the third member chosen by the other two members.

- The Office's Director or panel members should be individuals of distinction with experience as judges, ethics officials or in law enforcement, should not be Members or former Members, should have term appointments and should be subject to removal only for cause by joint agreement of the Speaker and Minority Leader.

- The Office should have the authority to present a case to the House Ethics Committee for its decision, based on the same standard that is currently used to determine when a case should be presented to the Committee. The Ethics Committee would be responsible for determining if ethics rules have been violated and what, if any, sanctions should be imposed or recommended to the House. A public report should be issued on the disposition of a case by the Ethics Committee. The Office should have the authority to recommend sanctions to the Committee, if the Committee determines an ethics violation had occurred.

- The Office should receive, monitor and oversee financial disclosure, travel and other reports filed by Members and staff, to ensure that reports are properly filed and to make the reports public in a timely and easily accessible manner. The Office should have the same authority for lobbying reports filed under the Lobbying Disclosure Act.

Thank you for giving Common Cause this opportunity to testify. We look forward to working with you on strong ethics and lobbying legislation and strong ethics enforcement in the weeks to come.

# M E M O R A N D U M

**DATE:** February 3, 2006

**TO:** Common Cause

**FROM:** Stanley M. Brand, Esq.[1]
Brand Law Group

**RE:** Power of the House and Senate to Create Independent Ethics Commission

---

**You have asked whether the power conferred upon the House (and Senate) to punish its Members for disorderly behavior, U.S. Const., Art. I, § 5, cl.2, prevents the House from delegating certain responsibilities to an independent body outside the House to investigate ethical conduct of Members and make recommendations regarding punishment for breaches thereof to the full House for disposition. While there is no judicial authority directly deciding this question, in my view there is no textual constitutional impediment to doing so and analysis of jurisprudence interpreting collateral matters lends support to the conclusion that the House may enlist the aid of an outside independent body when exercising its powers under Art. I, § 5, cl. 2.**

**The provision at issue provides, in pertinent part, that "[e]ach House may…punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member." The first point to note is that the power is phrased in discretionary ("may") not mandatory terms. This contrasts with the other provisions respecting internal matters placed within the power of the House, such as the power to judge the elections, returns and qualifications of its Members, U.S. Const., § 5, cl.1, or the constitutional protection for speech or debate, *id.*, § 6, cl.1, or the disqualification clause of Art. I, § 6, cl.2, all of which specify that those powers "shall " be exercised. This is not a distinction without significance given the considerable judicial gloss which establishes that generally the use of the word "may" is a term of permission and the use of the word "shall" is a term limiting discretion. Black's Law Dictionary 883 (5th ed. 1979).**

**Beyond the textual analysis, there is a heavy presumption that the means Congress chooses to implement its constitutional powers are legitimate unless they directly impinge upon the express powers of a coordinate branch, *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)(Congress' statutory disposition of presidential papers) or**

---

[1] **Mr. Brand served as General Counsel to the House of Representatives from 1976 to 1984. He was counsel of record on behalf of Speaker O'Neill as *amicus curiae* and argued on his behalf in *United States v. Helstoski*, 442 U.S. 477 (1979) and *Helstoski v. Meanor*, 442 U.S. 500 (1979), cases involving the self-disciplinary powers of Congress. He was also counsel in *INS v. Chadha*, 462 U.S. 919 (1983).**

**implicate the rights of persons outside the legislative branch upon whom its enactments or actions impinge. *United States v. Watkins*, 354 U.S. 178, 216 (1957)("By making the Federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to prosecution of offenses…").**

**The delegation of investigative powers respecting Members to an outside body impinges on neither of these interests; its compass is purely internal. The Supreme Court has concluded that the stringent constitutional requirements for law making -- bicameralism and presentment[2] -- do not apply to matters that are wholly internal to the Houses of Congress. *INS v. Chadha*, 462 U.S. 919, 955 n. 21 (1983)(noting that each House has power to act alone in determining certain internal matters).**

**The House's judgment as to the appropriate procedures for exercising its self-disciplinary power is not cabined by the requirements imposed on law-making, or on the contempt procedures established to enforce its subpoenas because it only affects Members of the House. And in this regard, the Courts have uniformly refused to interfere in or review the exercise of the self disciplinary power. *Williams v. Bush*, Memorandum Opinion (unpublished)(court will not enjoin Senate proceeding to expel Member based on a claim of threatened violation of his constitutional rights), Civ. Action No. 81-2839 (D.D.C. 1982).**

**There is one respect only in which the House's power to discipline its Members is limited by the Constitution, and that is the requirement to obtain a two-thirds supermajority to expel a Member. This power was construed by the Supreme Court in *Powell v. McCormack*, 395 U.S. 486 (1969). There the Court was faced with the claim that Representative Adam Clayton Powell has presented himself as duly elected from the 19th Congressional District of New York but was excluded by the House based on findings of impropriety despite the fact that he possessed the standing qualifications for office specified in the Constitution. Powell challenged his exclusion asserting that since the House determined he possessed the standing qualifications, it has no choice but to seat him and then if it determined he had breached House rules, to expel him by a two-thirds vote. The Court agreed and held that the House exceeded its power. It did so after canvassing the English and colonial antecedents to the qualifications clause and concluding that the Framers intended to give the greatest deference to the will of the people in electing their representatives and that permitting the legislature to, in affect, add to the standing qualifications by allowing the House to exclude a Member for any reason other than those specified in the Constitution would undermine the electorate's choice.**

**The analysis of the Court in *Powell* underscores the discretion which the House has to utilize any procedures it deems appropriate in disciplining its Members save in those instances where it seeks to expel – because when it imposes punishments short of expulsion,**

---

[2] **U.S. Const. art. I, § 7, cl.3 requires that all legislation be presented to the President for his approval, or veto and Art. I, §§ 1, 7 requires that the concurrence of a majority of both Houses of Congress.**

**whether that be censure, reprimand or fine, it does not deprive the electorate of its free choice.**

**In interpreting the powers of the House in this area, the Courts are likely to accord substantial deference to its choice of the means to implement its Art. I, § 5, cl.1 self-disciplinary power particularly if that legislative judgment is supported by a finding that the self-disciplinary process is not functioning in an orderly and efficient manner. By now, it is apparent to most observers and even Members themselves that the ethics process is in dire need of repair. The Supreme Court itself has remarked on the problems inherent in exercise of the self-disciplinary power in stating that "Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process." *United States v. Brewster*, 408 U.S. 501, 518 (1972). The Court noted that the process of disciplining a Member in the Congress is not without "countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case." *Id.* And perhaps more relevant to the current ethical vacuum in the House, the Court noted that Congress "has shown little inclination to exert itself in this area." *Id.*, at 519. It is this last consideration that the Court could find persuasive in deferring to a mechanism chosen by the House to diminish the arbitrariness recognized by the Court in *Brewster*. Surely, a system designed to vest the initial judgment of whether and under what objective standards to review allegations of Member misconduct in an independent Commission would address many of the concerns articulated by the Court in *Brewster*.**

**Finally, it is difficult to conceive of grounds upon which the Court would void a delegation of investigative authority to an outside commission when the Congress has already vested broad jurisdiction in the Department of Justice over the investigation and prosecution of Members for a vast array of criminal offenses. *See e.g.*, 18 U.S.C. § 201 (Members of Congress within definition of public officials prosecutable under statute for bribery). The Supreme Court laid to rest any suggestion that Members of Congress were outside the reach of the criminal laws when it held that the immunity from arrest clause[3] (Members "shall in all cases, except Treason, Felony and Bread of the Peace be privileged from Arrest during their attendance at the Session of their respective Houses…") of the Constitution did not shield Members from prosecution for subornation of perjury. In *Williamson v. United States,* 207 U.S. 425 (1908), the Court rejected a claim made by a Member convicted of subornation of perjury in proceedings for the purchase of public lands that he could not be arrested, convicted or imprisoned for any crime other than treason, felony or breach of the peace.**

**In conclusion, nothing in the text of the Constitution or the jurisprudence interpreting the separation of powers embodied therein offers any basis for asserting that Congress lacks the power to structure its self-disciplinary as it sees fit, including the creation of an outside independent body to investigate ethical breaches and recommend appropriate discipline to the House.**

---

[3] **U.S. Const., art. I, § 6, cl.1.**

U.S. PIRG
Federation of State PIRGs

For immediate release
February 6, 2007

Contact: Gary Kalman
202-546-9707 (office)
215-439-7090 (cell)

# States Can Teach Congress About Ethics, Study Finds

The states are far ahead of Congress in establishing independent ethics enforcement for legislators according to a study released today by the U.S. Public Interest Research Group (U.S. PIRG). The report, *Honest Enforcement: What Congress Can Learn From Independent State Ethics Commissions*, found that twenty-three states have created commissions, boards or offices that operate largely free of partisan interference to oversee the ethics rules that apply to elected officials.

Responding to widespread voter concern about corruption in Congress, the House and Senate passed strong new restrictions on gifts and travel paid for by lobbyists in the first weeks of the new Congress. "It's an encouraging first step, but the new rules will only be as effective as the will to enforce them," said Gary Kalman, Democracy Advocate with U.S. PIRG.

The report separated out states that allow legislators to review complaints and decide whether to investigate allegations against their colleagues. Those state bodies were not determined to be independent.

"Under these basic criteria, Congress would not even make the cut," noted Kalman. "In contrast to these states, Congress currently relies on self-policing. Conflict of interest rules are optional and ethics committee members can and have been removed because they dared to enforce the rules against a powerful colleague."

The report also reviewed oversight procedures in the private sector and found that public businesses and professional licensing boards incorporate many of the conflict of interest elements favored by independent ethics commissions. "Congress is almost alone in choosing to police itself," concluded Kalman.

In the report, states in which a citizen's panel is authorized to review complaints and proceed with investigations were determined to be independent. States were further divided into four categories by the level of independence. States were scored by how well they fared under the following criteria:

- whether outside panelists who oversee a professional director and a staff of impartial investigators;
- if there are clear and mandatory conflict of interest guidelines limiting service to those who are not covered by the ethics rules or closely involved in partisan activities;
- if panelists serve set terms and cannot be removed for any reason other than cause;
- if panelists have the power to receive complaints from the general public;
- if panelists have the ability to launch investigations without legislative or outside approval and recommend or enforce sanctions against those who have violated the rules;
- the degree to which there is appropriate disclosure of the panel's actions.

Speaker of the House Nancy Pelosi last week appointed a bipartisan task force to look into revising the ethics enforcement rules in Congress. U.S. PIRG encourages the special congressional task force on ethics enforcement to follow the lead of the states and adopt honest enforcement.

*U.S. PIRG, the federation of state Public Interest Research Groups (PIRGs), takes on powerful interests on behalf of the American public, working to win concrete results for our health and our well-being.*

# Honest Enforcement:

## What Congress Can Learn From Independent State Ethics Commissions


February 2007

## Executive Summary

Some argue that last year's scandals, which led to the conviction of two congressmen and several top aides, are evidence that ethics enforcement in Congress works. The actual facts leading up to the convictions, however, are more an indictment of the current process than a testament to its success. A whistleblower who took his case to the media and the U.S. Department of Justice—not the House and Senate ethics committees—uncovered the dealings of lobbyist Jack Abramoff. Neither the House nor the Senate ethics committee has indicated publicly that they looked into the matter or considered if other members of Congress broke any Senate or House rules, regardless of whether outside laws were broken. Among the many concerns, the secrecy of the process provides no assurance to the American people that members take these scandals seriously.

Although Congress recently passed strong new rules to limit undue access by powerful interests, the federal ethics enforcement process is flawed in many ways. The House and Senate ethics oversight committees are comprised of colleagues who know and work with one another and who rely on one another's support for legislation or campaign contributions, creating both the appearance and practice of a conflict of interest. Committee members have no guaranteed terms and can and have been removed as recently as 2006 for taking actions in the course of their work of which their colleagues disapprove. Complaints in the House can only be filed by other colleagues, limiting the ability of outside and more impartial observers to make their concerns heard.

While not every state has experienced the level of corruption uncovered in Congress last year, state legislatures face similar challenges. How should legislative ethics rules be enforced? How can lawmakers identify and hold accountable colleagues who cross the line and reassure skeptical voters that they are honest brokers of public policy and taxpayer money?

We decided to examine if state governments have had any success in creating an important layer of independence between the investigators and those being investigated—the state legislators. We found that the states are far ahead of Congress in understanding the inherent conflict of interest of colleagues overseeing colleagues. In fact, as of January 2007, at least 23 states had established independent commissions, boards or offices to oversee enforcement of ethics rules for their state legislators.

State commissions vary in how they were created, who participates and how they operate, but those that are independent from the legislature have, for the most part, several features in common:

- The commissions include outside panelists who oversee a professional director and a staff of impartial investigators;
- The commissions have clear and mandatory conflict of interest guidelines limiting service to those who are not covered by the rules or closely involved in partisan activities;
- Commissioners serve set terms and cannot be removed for any reason other than cause (i.e. neglect of duty, gross misconduct or other specified actions);
- The commissions have the power to receive complaints from the general public; and
- The commissions may launch investigations without legislative or outside approval and recommend or

enforce sanctions against those who have violated the rules.

Some independent commissions also enjoy guaranteed funding outside of legislative appropriations and offer better disclosure of ethics complaints. In a few cases, to protect against partisan abuses, commissions will not release publicly or act on any complaint filed within 60 days of an election.

We can divide the states with independent ethics commissions or offices into roughly three categories. All of these states have taken steps to remove the inherent conflicts of interest when colleagues investigate colleagues. States in Categories 1 and 2 meet all of the independence criteria listed above including outside oversight, meaningful conflict of interest rules, protection against arbitrary removal of commissioners, an open complaint process, full investigative authority and full disclosure of complaints filed and actions taken. They are strong commissions with model design features that provide for significant independence. States in Category 1, however, also include features that provide additional checks on the system. The commissions in Category 3 states include most of the design elements necessary for independence from the legislature, but they fall short in one or more of the areas. For example, most of these commissions only disclose ethics complaints if the commission finds a violation.

| Category 1 | Category 2 | Category 3 |
|---|---|---|
| Connecticut | Alabama | California |
| Kentucky | Arkansas | Louisiana |
| | Florida | Maine |
| | Kansas | Massachusetts |
| | Missouri | Minnesota |
| | Montana | Nebraska |
| | Oklahoma | Nevada |
| | Oregon | North Carolina |
| | Rhode Island | Pennsylvania |
| | West Virginia | Tennessee |
| | | Wisconsin |

The states not listed either allow legislators to sit on their ethics commissions or do not have commissions that oversee ethics rules for state legislators. Other states have ethics commissions that only oversee compliance with campaign finance and lobby disclosure laws but not ethics rules or enjoy jurisdiction only over state executive branch officials, the judiciary or other non-legislative elected or appointed officials and their staff.

Congress is almost alone in choosing to self-police. If members are serious about honest and open government, they should follow the lead of almost half of the states and establish an independent ethics enforcement commission.

1133 19th Street, NW, 9th Floor Washington, DC 20036
T 202.833.1200 F 202.659.3716 www.commoncause.org

COMMON CAUSE
*Holding Power Accountable*

**Establishment of Kentucky Legislative Ethics Commission—Membership**

(1) The Kentucky Legislative Ethics Commission is established as an independent authority and shall be an agency of the legislative department of state government.

(2) The commission shall be composed of nine (9) members, not less than three (3) of whom shall be members of the largest minority party in the state. The members shall be appointed in the following manner: four (4) members shall be appointed by the President of the Senate, four (4) members shall be appointed by the Speaker of the House, and one (1) member shall be appointed by the Legislative Research Commission. No member of the General Assembly shall be eligible for appointment to the commission.

(3) The members of the commission shall be appointed within sixty (60) days of February 18, 1993. The Speaker of the House shall appoint one (1) member for an initial term of one (1) year, one (1) for a term of two (2) years, one (1) for a term of three (3) years, and one (1) for a term of four (4) years; the President of the Senate shall appoint one (1) member for a term of two (2) years, one (1) member for an initial term of three (3) years, and two (2) members for a term of four (4) years. The Legislative Research Commission shall appoint one (1) member for an initial term of three (3) years. Thereafter all appointments shall be for a full four (4) years.

(4) Vacancies shall be filled by appointment by the original appointing authority in the same manner as the original appointments.

(5) Each member shall be a citizen of the United States and a resident of this Commonwealth. A member of the commission shall not be a public servant, other than in his capacity as a member of the commission or in his capacity as a special judge; a candidate for any public office; a legislative agent; an employer of a legislative agent; or a spouse or child of any of these individuals while serving as a member of the commission. In the two (2) years immediately preceding the date of his appointment, a member shall not have served as a fundraiser, as defined in KRS 121.170(2), for a candidate for Governor or the General Assembly.

(6) Except as provided in subsection (4) of this section, a member of the commission shall serve a term of four (4) years and may be reappointed.

(7) While serving on the commission, a member shall not:

(a) Serve as a fundraiser for a slate of candidates for Governor and Lieutenant Governor, or candidate for Attorney General, Auditor of Public Accounts, or the General Assembly;

(b) Contribute to a slate of candidates for Governor and Lieutenant Governor, or candidate for Attorney General, Auditor of Public Accounts, or the General Assembly;

(c) Serve as an officer in a political party; or

(d) Participate in the management or conduct of the political campaign of a candidate.

(8) A member shall be removed only by the Legislative Research Commission, and only for cause.

**Chair and vice chair—Meetings—Compensation of members.**

(1) The chair and the vice chair of the commission shall be elected by a majority vote of the members of the commission. The chair and the vice chair shall serve terms of one (1) year and may be reelected. The chair shall preside at meetings of the commission. The vice chair shall preside in the absence or disability of the chair.

(2) The commission shall meet within ninety (90) days of February 18, 1993. The time and place of the meeting shall be determined by the chair. Thereafter, the commission shall meet at such times deemed necessary at the call of the chair or a majority of its members. A quorum shall consist of five (5) or more members. An affirmative vote of five (5) or more members shall be necessary for commission action.

(3) A member of the commission shall receive one hundred dollars ($100) per day and reimbursement for actual and necessary expenses incurred in the performance of his official duties as a member of the commission for meeting days and for a maximum of two (2) nonmeeting days per month devoted to commission-related work.

**Powers of commission—Authority to promulgate administrative regulations -- Lists of legislative agents—Trust and agency account.**

(1) The commission shall have jurisdiction over the administration of this code and enforcement of the civil penalties prescribed by this code.

(2) The commission shall have jurisdiction over the disposition of complaints filed pursuant to KRS 6.686.

(3) The commission may administer oaths; issue subpoenas; compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony; and have the deposition of witnesses taken in the manner prescribed by the Kentucky Rules of Civil Procedure for taking depositions in civil actions. If a person disobeys or refuses to comply with a subpoena, or if a witness refuses to testify to a matter regarding which he may be lawfully interrogated, the Franklin Circuit Court may, on application of the commission, compel the obedience by proceedings for contempt as in the case of disobedience of a subpoena issued from the Circuit Court or a refusal to testify in Circuit Court. Each witness subpoenaed under this section shall receive for his attendance the fees and mileage provided for witnesses in Circuit Court, which shall be audited and paid upon the presentation of proper vouchers sworn to by the witness.

(4) The commission may render advisory opinions in accordance with KRS 6.681.

(5) The commission shall promulgate administrative regulations in accordance with KRS Chapter 13A to implement this code.

(6) The commission shall prescribe and provide forms for reports, statements, notices, and other documents required by this code.

(7) The commission shall determine whether the required statements and reports have been filed and, if filed, whether they conform with the requirements of this code. The commission shall promptly give notice to the filer to correct or explain any omission or deficiency.

(8) Unless otherwise provided in this code, the commission shall make each report and statement filed under this code available for public inspection and copying during regular office hours at the expense of any person requesting copies of them and at a charge not to exceed actual cost, not including the cost of staff required.

(9) The commission may preapprove leases or contracts pursuant to KRS 6.741.

(10) The commission shall compile and maintain a current index organized alphabetically by name of legislative agent and name of employer of all reports and statements filed with the commission in order to facilitate public access to the reports and statements.

(11) The commission shall preserve all filed statements and reports for at least two (2) years from the date of receipt.

(12) The commission shall provide to the Legislative Research Commission and each member of the General Assembly a list of every legislative agent and employer registered with the commission, including the name of each entity he represents and the date of his registration. The list shall be furnished on or before the tenth day of every month. Changes in the lists shall be furnished on Friday of each week that the General Assembly is convened in regular or extraordinary session.

(13) Upon the sine die adjournment of a regular session of the General Assembly, the commission shall provide to the Registry of Election Finance a list of each person who was registered as a legislative agent or employer at any point during the period in which the General Assembly was convened in regular session. Upon the convening, and within fifteen (15) days after the sine die adjournment of, any extraordinary session, the commission shall provide to the Registry of Election Finance a list of each person who was registered as a legislative agent or employer at any point during that period.

(14) In order to carry out the provisions of this code, the commission may contract with any public or private agency or educational institution or any individual for research studies, the gathering of information, the printing and publication of its reports, consulting, or for any other purpose necessary to discharge the duties of the commission.

(15) The commission may conduct research concerning governmental ethics and implement any public educational programs it considers necessary to give effect to this code.

(16) No later than December 1 of each year, the commission shall report to the Legislative Research Commission on the commission's activities in the preceding fiscal year. The report shall include, but not be limited to, a summary of commission determinations and advisory opinions. The report may contain recommendations on matters within the commission's jurisdiction.

(17) No later than July 1 of each odd-numbered year, beginning July 1, 1995, the commission shall submit a report to the Legislative Research Commission which shall contain recommendations for any statutory revisions it deems necessary.

(18) All funds received by the commission from any source shall be placed in a trust and agency account for use by the commission in the administration and enforcement of the provisions of this code. Funds in the trust and agency account shall not lapse.

**Advisory opinions.**

(1) The commission may render advisory opinions concerning matters under its jurisdiction, based upon real or hypothetical circumstances, when requested by:

(a) Any person covered by this code;

(b) Any person who is personally and directly involved in the matter; or

(c) The commission upon its own initiative.

(2) An advisory opinion shall be requested in writing and shall state relevant facts and ask specific questions. The request for the advisory opinion shall remain confidential unless confidentiality is waived, in writing, by the requestor.

(3) Advisory opinions shall be based on the Kentucky Revised Statutes as written and shall not be based on the personal opinions of commission members as to legislative intent or the spirit of the law.

(4) The commission shall promulgate administrative regulations to establish criteria under which it may issue confidential advisory opinions. All other advisory opinions shall be published except that before an advisory opinion is made public, it shall be modified so that the identity of any person associated with the opinion shall not be revealed.

(5) The confidentiality of an advisory opinion may be waived either:

(a) In writing by the person who requested the opinion; or

(b) By majority vote of the members of the commission, if a person makes or purports to make public the substance or any portion of an advisory opinion requested by or on behalf of the person. The commission may vote to make public the advisory opinion request and related materials.

(6) (a) A written advisory opinion issued by the commission shall be binding on the commission in any subsequent proceeding concerning the facts and circumstances of the particular case if no intervening facts or circumstances arise which would change the opinion of the commission if they had existed at the time the opinion was rendered. However, if any fact determined by the commission to be material was omitted or misstated in the request for an opinion, the commission shall not be bound by the opinion.

(b) A written advisory opinion shall be admissible in the defense of any criminal prosecution or civil proceeding for violations of this code for actions taken in reliance on that opinion.

**Complaint procedure—Preliminary investigations—Penalty for false complaint of misconduct.**

(1) (a) The commission shall have jurisdiction to investigate and proceed as to any violation of this code upon the filing of a complaint. The complaint shall be a written statement alleging a violation against one (1) or more named persons and stating the essential facts constituting the violation charged. The complaint shall be made under oath and signed by the complaining party before a person who is legally empowered to administer oaths. The commission shall have no jurisdiction in absence of a complaint. A member of the commission may file a complaint.

(b) Within ten (10) days of the filing of a complaint, the commission shall cause a copy of the complaint to be served by certified mail upon the person alleged to have committed the violation.

(c) Within twenty (20) days of service of the complaint the person alleged to have committed the violation may file an answer with the commission. The filing of an answer is wholly permissive, and no inferences shall be drawn from the failure to file an answer.

(d) Not later than ten (10) days after the commission receives the answer, or the time expires for the filing of an answer, the commission shall initiate a preliminary inquiry into any alleged violation of this code. If the commission determines that the complaint fails to state a claim of an ethics violation, the complaint shall be dismissed.

(e) Within thirty (30) days of the commencement of the inquiry, the commission shall give notice of the status of the complaint and a general statement of the applicable law to the person alleged to have committed a violation.

(2) All commission proceedings, including the complaint and answer and other records relating to a preliminary inquiry, shall be confidential until a final determination is made by the commission, except:

(a) The commission may turn over to the Attorney General, the United States Attorney, Commonwealth's attorney, or county attorney of the jurisdiction in which the offense allegedly occurred, evidence which may be used in criminal proceedings; and

(b) If the complainant or alleged violator publicly discloses the existence of a preliminary inquiry, the commission may publicly confirm the existence of the inquiry and, in its discretion, make public any documents which were issued to either party.

(3) The commission shall afford a person who is the subject of a preliminary inquiry an opportunity to appear in response to the allegations in the complaint. The person shall have the right to be represented by counsel, to appear and be heard under oath, and to offer evidence in response to the allegations in the complaint.

(4) If the commission determines by the answer or in the preliminary inquiry that the complaint does not allege facts sufficient to constitute a violation of this code, the commission shall immediately terminate the matter and notify in writing the complainant and the person alleged to have committed a violation. The commission may confidentially inform the alleged violator of potential violations and provide information to ensure future compliance with the law. If the alleged violator publicly discloses the existence of such action by the commission, the commission may confirm the existence of the action and, in its discretion, make public any documents that were issued to the alleged violator.

(5) If the commission, during the course of the preliminary inquiry, finds probable cause to believe that a violation of this code has occurred, the commission shall notify the alleged violator of the finding, and the commission may, upon majority vote:

(a) Due to mitigating circumstances such as lack of significant economic advantage or gain by the alleged violator, lack of significant economic loss to the state, or lack of significant impact on public confidence in government, confidentially reprimand, in writing, the alleged violator for potential violations of the law and provide a copy of the reprimand to the presiding officer of the house in which the alleged violator serves, or the alleged violator's employer, if the alleged violator is a legislative agent. The proceedings leading to a confidential reprimand and the reprimand itself shall remain confidential except that, if the alleged violator publicly discloses the existence of such an action, the commission may confirm the existence of the action and, in its discretion, make public any documents which were issued to the alleged violator; or

(b) Initiate an adjudicatory proceeding to determine whether there has been a violation.

(6) Any person who knowingly files with the commission a false complaint of misconduct on the part of any legislator or other person shall be guilty of a Class A misdemeanor.

**Program of ethics education and training for legislators—Program of ethics education and training for legislative agents.**

(1) The commission shall establish and supervise a program of ethics education and training including, but not limited to, preparing and publishing an ethics education manual, designing and supervising orientation courses for new legislators, and designing and supervising current issues seminars for legislators.

(2) The commission shall establish, supervise, and conduct a program of ethics education and training designed specifically for and made available to legislative agents.

The Lexington Herald Leader (Kentucky)

February 5, 2007 Monday

# Congress should look to Ky. for ethics laws

George C. Troutman And Romano L. Mazzoli

As the new Congress gets to work, there is much debate about ethics rules that will apply to U.S. senators and representatives. Many provisions under consideration are similar to legislative ethics laws that have been in place in Kentucky since 1993.

We encourage members of Congress to look to Kentucky for a model of a comprehensive ethics law and, more important, for an outstanding example of an independent ethics agency that works.

After 14 years of ethics oversight and enforcement, the Kentucky Legislative Ethics Commission received a resounding endorsement from state legislators.

In a recent survey, Kentucky legislators were asked: "Which do you think is more effective in overseeing legislative ethics rules: committees of legislators such as those in the U.S. Senate and House of Representatives or an independent commission such as Kentucky's?"

More than 97 percent of Kentucky's lawmakers said the independent commission is more effective than committees controlled by legislators.

Before the Kentucky General Assembly established the independent commission in 1993, our legislature had an in-house ethics process similar to the system in Congress, in which senators and representatives are asked to investigate allegations and resolve ethics questions involving other members.

When Kentucky legislators were debating the creation of the independent ethics commission, the most effective proponents of the idea were legislators who had served on the old ethics committee. These legislators understood how difficult it can be to sit in judgment of colleagues on ethics issues, then walk out of the meeting and ask those same colleagues for support on a bill or amendment.

Just as important, state legislators knew the public wanted ethics rules to be enforced by an independent, bipartisan group of citizens. In the years since, the General Assembly's wisdom in this matter has been proven conclusively.

Over the past 14 years, the Legislative Ethics Commission has been led by a strong group of public-spirited citizens, including retired legislators such as Sen. Georgia Powers and Sen. Doug Moseley, along with Rep. Pat Freibert and Rep. Lloyd Clapp. Retired jurists, including Court of Appeals Judges Charles Lester and Paul Gudgel, brought years of judicial experience to the commission.

These and many other retired public officials and civic-minded private citizens have consistently interpreted and enforced Kentucky's strong ethics laws with fairness and a notable absence of partisanship or politics.

Including retired elected officials along with private citizens assures a balance of views, with some members understanding the perspective of elected legislators, while the majority represents an outsider's perspective.

Kentucky legislators regularly seek guidance from the independent commission, asking the types of questions that members of Congress may be reluctant to bring to a committee that includes members from the other political party.

All lobbyists and their employers in Kentucky are required to register with the ethics commission and to regularly report on their activities in a format that the commission makes available to the public.

Lobbyists are prohibited from making or delivering campaign contributions to legislators and legislative candidates, and lobbyists and their employers may not give "anything of value" to a legislator or a member of the legislator's family.

The General Assembly deserves immense credit for enacting effective ethics laws and creating this strong, independent commission to monitor those laws, to make available a tremendous amount of information about ethics and lobbying and to assure the public that the laws are being followed.

Some members of Congress appear reluctant to embrace independent ethics oversight, but after working with the independent Legislative Ethics Commission since 1993, state legislators overwhelmingly believe the commission works better than in-house committees.

We hope Congress will take note of Kentucky's experience: Independent ethics oversight makes sense, members will support it and it works.

George C. Troutman of Louisville is chairman of the Legislative Ethics Commission. Former U.S. Rep. Romano L. Mazzoli of Louisville is a member of the commission.