

Congressional Ethics: In the Spirit // By the Letter // of the Law
Arthur Holland Lecture on Ethics in Government
Rutgers University Eagleton Institute
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Thanks very much for the kind introduction and for the invitation to deliver this year's Holland Lecture on Ethics in Government. It is an honor to be selected to follow in the footsteps of my friend, former Congressman and now NEH Chairman Jim Leach, and of distinguished author and professor Michael Sandel. I worry that I run the serious risk of lowering the average quality of these proceedings.

It is a treat to be back home in the Garden State, where I grew up – up the road in Cranford. I first spent a little time at Rutgers as one of Cranford High School's 1959 delegates to New Jersey Boys State. In case you doubt my New Jersey bona fides, I am still able to sing what was once the New Jersey State Song, as well as the truly corny Alma Mater of Cranford High School. I'll save those renditions for Q&A, in case things get really desperate.

Giving a talk like this is a welcome occasion for some reflection and modest analysis of what I know spend a good deal of time on – the ethical environment of the United States Congress, in particular the U S House of Representatives.

I don't know about you, but I know I am often immersed in some activity which deserves more contemplation before and during undertaking it, and I only get around to thinking it through with some sort of conceptual framework after the fact. Such may be the case this evening – depending on whether the House of Representatives decides to continue the Office of Congress Ethics for another two years – or not. More on that a little later.

I want to recognize the family of Mayor Arthur Holland and honor his legacy, both in his record as Mayor of Trenton and an exemplar of ethics in government and the gift in his honor that established the Holland Program at Rutgers. I had left NJ before Mayor Holland was elected and did not know of his remarkable record until doing some homework for this evening.

I welcome the chance to reaffirm what I have learned was one of *his* tenets in public life – that politics should be, and be seen as, an honorable calling. I hope there are several of you in the audience who are thinking that some day you might run for office. I hope you pursue that ambition. We desperately need an infusion of purposeful idealism into the political ranks.

We should not shy away from seeing politics as a profession of public service that ought again to attract the best and the brightest. There may be an aversion to public life because there are a few in it who tarnish it in the eyes of the public. If so, then all the more reason to focus on bolstering ethics in government so that the tarnish can be removed.

In its origins, design and architecture, the United States was and is intended to be a *good* country. The development of government here has been an enterprise with an ethical dimension from the start – although concededly our national enterprise has always had flaws and imperfections.

For us, the exercise of government authority has always been grounded on a sense of and demand for fairness and legitimacy. This sense is part of our culture, our moralistic politics and it is a legacy of claimed national virtue and exceptionalism – however much that may also involve a convenient re-coloring of our history.

We could start with the Boston Tea Party and its protest against taxation without representation. It was a claim that government had to be fair and legitimate in the exercise of power.

The core statement of principle in the Declaration of Independence infused our founding with moral assumptions:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,

“[C]reated equal,” “unalienable rights,” “Liberty,” “just powers,” “consent of the governed” – all are precepts that are weighted with moral and ethical principle.

The Preamble to the Constitution is, among other things, a statement of organizing principles for a new political order that also have a moral tone:

. . . to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty . . .

And even Madison’s explanation and justification of a Republic, that is of representative democracy, in *Federalist 10*, speaks in what sound like ethical terms in explaining the differences between a pure democracy and a Republic:

The effect of the first difference is . . . to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. . . . it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

Well, of course, moving from the moral and ethical *premises* of our government to its moral and ethical *operations* in practice is a big step. Madison recognizes this in wanting to structure government so as to limit the opportunity for the more self-serving aspects of human nature to have too much influence.

How, then, do we fashion a government with employees and agents that behave ethically? Or, for tonight's topic, how do we encourage and enforce ethics in Congress?

Encourage and enforce. I hope those words start to define the problem. To *encourage* might literally be understood as "giving heart to." Similarly, if we examine the idea of following the law *in spirit*, we can segue to *in-spiration*. If we could succeed in *inspiring* people to conduct themselves well, they would be impelled internally and naturally to do the right thing.

Madison advises us to have gloomier expectations. And so we must not only encourage, but also enforce.

Let's remember that Congress is a *representative* institution – and in more ways than the merely political. It reflects American society more generally.

As a people, we tend both to expect and to chafe at rules. Think of driving behavior or paying taxes. We know speed limits are designed for our own good, yet we like to push the envelope to where we anticipate and don't want to risk enforcement. We know we're supposed to pay our fair shares of taxes, but many are prone to test the boundaries of what the IRS prescribes, stopping short of inviting an audit.

So there is all around us a tension between willing adherence and enforced compliance. This tends to reveal the differences and the gap between what is intended and what is allowed.

Is the general rule that, if it's not right, don't do it? Or, is it if it's not *impermissible*, it's permissible? It's the difference between the spirit and the letter of the law.

We would like to believe that we can have a Congress internally driven by the spirit of an ethical system, inspired and encouraged to do the right thing. But we know from sad experience that there are a few there who do need some help.

We expect our elected leaders to be better than that. We rightly hold them to a higher standard than mere compliance. But the news reminds us that they are, like all of us, the product of society, and at least a few are prone to its temptations and have to be disciplined. What the news rarely conveys, however, is that the vast majority of Congress-men and -women conduct themselves honorably.

Just as the tax code and regulations have become ever more complex, so too have the rules prescribing what Members of Congress may and may not do. And as taxpayers want to pay what they owe but not a penny more, so a few members of Congress want to know exactly what's off limits, so that they may edge right up to the limit.

Let me pause for a minute and admit I'm not sure exactly how I would distinguish between ethics and morals. There may be something more here than a semantic difference. Some philosophers suggest it's a difference between an external system of rules of conduct reflecting societal norms (e.g., professional ethics of doctors and lawyers) and an internal, often religiously-derived system of personal standards reflecting a sense of what is good or bad (e.g.,

the Ten Commandments; the Golden Rule). Anyway, to me it makes more intuitive sense to talk about a system of government ethics (not government morals).

We strive to instill and enforce ethical behavior by public servants and officials. To believe in and to insist on congressional ethics should not obscure the fact that it is an area that is inherently aspirational and always can stand improvement.

We ought to credit the vast majority of Members of Congress who endeavor to adhere to ethical precepts and not merely comply with ethical rules. Most are people who want to do the right thing, not just not get caught doing the wrong. And their behavior occurs against an inherently complex backdrop of sometimes conflicting expectations and rules.

But, what about those rules? How are Members of Congress supposed to figure out what's right? Or, more in point, to know what the rules require?

The Code of Ethics for Government Service, adopted by the Congress in 1958, provides a starting place in its first instruction: "Any person in Government service should: 1. Put loyalty to the highest moral principles and to country above loyalty to Government persons, party or department." (That language suggests an interesting confusion of "ethics" and "morals.")

Article I section 5 of the Constitution vests in the House and the Senate the plenary authority to judge the qualifications of their respective Members and to decide on their discipline. Yet, for the first 178 years of the Republic, there was no standardized approach to disciplinary matters. In 1964 the Senate established its Select Committee on Standards of Conduct and in 1967 the House established its Committee on Standards of Official Conduct – both committees generally referred to as the Ethics Committees.

The *House Ethics Manual* starts out with a simple mandate: "Members should conduct themselves at all times in a manner that reflects creditably on the House." What more is needed?

Perhaps if we and the Congress were part of a culture of adherence and rather than compliance, those words would be all it takes – along with trust in the wisdom of colleagues to apply fairly that broad standard in judging possible discreditable conduct.

But, we are part of a culture of rules and compliance. The rules have become ever more stringent over the last 40 years – and the mechanisms for enforcement ever more (and appropriately?) intrusive. So now we have a *House Ethics Manual* that started with that simple mandate but also now has gotten to the size of a small phone book [*show Manual*].

The development of political law and ethics representation as a legal specialty in Washington over the last few decades has striking parallels with the growth of the Internal Revenue Code and tax law practice. Sadly, just as it is often the work of tax lawyers to find loopholes and ways to skirt around the edges of what are taxable transactions, so that has become a more prevalent attitude in the practice of congressional ethics. The D.C. ethics bar insists more and more on precise pleadings and the same sort of due process that obtains in criminal proceedings.

For the few who are so inclined, congressional ethics have turned into a matter of complying with rules more than adhering to principles. The letter too often has eclipsed the spirit. And since cases involving enforcement and compliance are those that receive press attention, the public is left with the impression that that's the way Congress is.

It may be some comfort for you to know that compared to other developed democracies, Congress has imposed on itself far more stringent rules and enforcement. Parliamentarians from other countries often express amazement at the extent to which we attempt to constrain and restrict conduct of Members of Congress.

As with the U.S., in other countries it often takes scandals to prompt reforms. This happened last year in London with the scandal that hit after the disclosure of absurd expenses that Members of Parliament submitted for reimbursement. My personal favorite was the peer who asked the British taxpayers to pick up the tab for cleaning out the moat around his estate. Then there is Italy & Berlusconi, or the Russian Duma. So, while there's always room for improvement in the conduct of our politicians, you may find it comforting to know that we're probably leading the way internationally.

With that background, the action taken by the House in 2008 to create the Office of Congressional Ethics, *or OCE*, is pretty remarkable. The impetus for creating OCE was a judgment by many Members and most outside observers that the then existing system of ethics enforcement was inadequate. It depended entirely on the work of the "inside" Ethics Committee. The jurisdiction and operation of that committee was generally regarded as flawed in several respects.

The Ethics Committee can only accept complaints from sitting Members of the House. Often there has been an unstated truce – really a kind of disarmament pact – that prevented Members from one party from filing a complaint against the other, lest it provoke retaliation. And even when it received a complaint, there was a good deal of skepticism about the rigor with which the Ethics Committee pursued matters. It often looked like the Committee was reluctant to hold Members to the high standards that they espoused.

After a lengthy review by a special task force, H. Res. 895, the measure to creating OCE, passed the House in March, 2008 by one vote. OCE was reauthorized in the Rules package at the beginning of the 111th Congress and is subject to reauthorization for the 112th Congress.

OCE's mission is to assist the House in upholding the ethical standards of its Members and helping restore public trust in the institution. Appointments to the eight-member Board were made (four each) by the Speaker and Minority Leader in July, 2008, with the unique requirement that the appointees of the Speaker had to be approved by the Minority Leader, and vice versa. One crusty Hill staffer described it as being like a trade of prisoners in Berlin during the Cold War. Six of the eight board members are former Members of the House.

H. Res. 895 directed OCE to function as an independent body to undertake preliminary investigations of allegations of ethical misconduct and rules violations by Members, Officers and staff of the House. It can look into questionable conduct brought to its attention from any source.

OCE has very limited time (maximum 90 days) to develop and review a factual record in a case before making a decision to dismiss a matter or refer it to the Ethics Committee for further review. Its role is strictly one of preliminary fact-finding and a determination of whether substantial factual basis exists to believe a violation may have occurred.

Our work is analogous to a grand jury function. If the “substantial reason” standard is met, the case goes to the Ethics Committee. That committee retains full constitutional authority to investigate further, reach its own conclusions of fact, and assess whether any sanction should be imposed.

Except in cases where OCE recommends dismissal, the OCE case report must eventually be made public. And that requirement for eventual publication is essential to insuring that the Ethics Committee does its job as intended – it must either take up the matter or explain why it has chosen to disregard OCE’s recommendation for further review.

OCE has a staff of nine and a budget this year of \$1.5 million. All OCE Board and staff are required to take a strict oath of confidentiality.

In the interest of increased transparency and accountability, OCE has published quarterly statistical summaries of its work. Through the end of the third quarter of 2010, the OCE has:

- Initiated preliminary reviews in 69 matters
- Terminated 28 matters at the end of preliminary review
- Commenced 2nd phase review in 41 matters
- Transmitted 17 matters to Ethics for dismissal
- Transmitted 21 matters to Ethics for further review

Reflecting the carefulness of OCE’s investigative process, the vast majority of its cases either have been dropped after a preliminary review or have been recommended to the Ethics Committee for dismissal.

The case statistics do not account for the hundreds of inquiries and “complaints” that have come into the office that do not meet OCE’s jurisdictional requirements or are obviously frivolous or insubstantial. Nor does the data include the scores of matters and allegations that may have initially appeared substantive, but, following an initial assessment by the OCE staff, were dismissed without the need for even a preliminary review.

Thus, of the matters that appeared to meet OCE’s threshold standard for preliminary review, about 30% have been forwarded to the Ethics Committee for further review. Of those 21 matters, the Ethics Committee empanelled investigative subcommittees under its rules in seven matters and took action to sanction a Member in one matter. Adjudicatory action is pending in one matter, and the Ethics Committee deferred consideration of one matter at the request of the Department of Justice. In eight other matters referred to Ethics, the committee has not yet announced any action. Of the remaining five matters, it is conducting a review in two matters,

the subject of one matter resigned, and in two matters it determined after varying internal reviews not to take action against the subject.

Some of you may be wondering about the connection between OCE and the case of Congressman Charlie Rangel. The adjudicatory subcommittee established by the Ethics Committee began its hearing today. This proceeding stems from complaints that Congressman Rangel filed against himself in the wake of scrutiny by the press and NGOs. This case did not originate with OCE. Another case initiated by OCE, involving Congresswoman Maxine Waters, awaits an adjudicatory hearing by another Ethics subcommittee.

It would be improper for me to make any comments about this or other matters pending before the Ethics Committee. The public record in this and other cases investigated by OCE is available at our website, oce.house.gov, and at the website of the Ethics Committee, ethics.house.gov.

As I mentioned earlier, the ethics process in the House has become more and more codified and structured as an exercise in compliance, with all the attendant legalism. You won't be surprised therefore that OCE adopted its own Rules for carrying out its work enforcing the rules. Our Rules are fairly modest in length [show *OCE Rules*]. I brought along several copies for any of you who might like to have one. I understand Michael Sandel did a book signing last year. The best I can do is a pamphlet signing – and at no charge.

The resolution creating OCE was the product of a legislative process that did its best to anticipate and provide for contingencies in what would be a new process. OCE's first two years' experience has revealed several ways in which our authority and process might be improved. We have some recommendations not only to streamline OCE's internal operations but also to enable us better to insure confidentiality and respect for the innocent.

I mentioned earlier that OCE is subject to reauthorization for the 112th Congress. With its record of achievement over the past two years, you may wonder why reauthorization wouldn't be automatic.

In part because Speaker Pelosi insisted on moving ahead in 2008 despite Republican objections, and in part because of what they saw as serious policy concerns, almost all Republican House Members (and also several Democrats) voted 'no' on H. Res. 895. The 'no' votes included those of now Speaker-designate John Boehner. And over our first two years in operation, even as we have tried to be very careful, we have upset some Members on both sides of the aisle.

Mr. Boehner will be primarily responsible for deciding what goes into the proposed package of rules for the 112th Congress, a package that will be voted on when the new Congress convenes in January. Mr. Boehner and others in the new GOP leadership have been keeping their own counsel about what the package will say about OCE. I hope they will conclude that the benefits of OCE's work and continuation sufficiently outweigh any perceived costs.

In closing, let me anticipate and reject any suggestion that the concept of "Congressional Ethics" is as oxymoronic as, say, "military music." First, as a Marine who celebrated the 235th birthday

of the Marine Corps last Wednesday and who thinks John Philip Sousa wrote good stuff, I don't buy into the slander of military music. But, less facetiously, I do believe in congressional ethics.

If we had more adherence to the *spirit* of ethics (congressional and otherwise), we'd need to worry less about compliance with the *letter*. But in reality, as I hope is demonstrated by the creation of OCE and the subsequent work we've done, the House *is* making progress.

Nothing is more important to me than helping to restore the trust of the American people in our form of government and in those who serve in it. It is a challenge we simply have to meet.

Thank you for the opportunity to be with you.