

## ETHICAL OBLIGATIONS OF CONGRESSIONAL LAWYERS†

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What are the ethical obligations of congressional lawyers? Despite the significant number of lawyers elected to Congress and employed by members, committees, and other congressional offices and agencies, this question has received relatively little attention. Those who have discussed the issue seem largely to have assumed that congressional lawyers are not subject to any formal ethical rules, beyond those applicable to all congressional staffers.<sup>1</sup>

Many congressional lawyers perform functions largely indistinguishable from those performed by their non-lawyer colleagues. Though many of these activities—including conducting routine oversight of executive agencies, drafting proposed legislation, and negotiating the language of bills within Congress and with the executive branch—may be better performed by someone with a legal background, they nonetheless can be and often are performed by non-lawyers. This may lead to the conclusion—or to the tacit assumption—that congressional lawyers are not practicing law and need not concern themselves with the professional rules of ethics.

This, however, does not seem to be the view of the District of Columbia Bar, which has indicated that the congressional practice of law should be governed by its Rules of Professional Conduct.<sup>2</sup>

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1. See Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS. 31, 36 (Spring 1998) (“If a legislative lawyer looked to the American Bar Association’s Model Rules of Professional Conduct for guidance, she could be led very badly astray.”); Michael J. Glennon, *Who’s the Client? Legislative Lawyering Through the Rear-View Mirror*, 61 LAW & CONTEMP. PROBS. 21, 21 (Spring 1998) (“Traditional notions of attorney-client relations do not really apply on Capitol Hill . . .”).

2. See D.C. BAR SPECIAL COMMITTEE, REPORT ON GOVERNMENT LAWYERS AND THE MODEL RULES OF PROF’L CONDUCT R. 17 (1988) (“[L]awyers employed in the judicial and legislative branches of government . . . who are in fact employed and

Thus, Rule 1.6 of the D.C. Rules of Professional Conduct, which restricts a lawyer's ability to reveal or use a client's confidence or secret, provides that "[t]he client of a government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order."<sup>3</sup> The comments to the rule explain that the term "agency" includes "committees of the legislature [and] agencies of the legislative branch such as the General Accounting Office."<sup>4</sup>

Moreover, in 1977, a Legal Ethics Committee of the D.C. Bar, interpreting the Code of Professional Responsibility (the predecessor to the Rules of Professional Conduct), advised that the ethics rules applied to lawyers acting as attorneys to congressional committees.<sup>5</sup> The panel, while noting that the "Code is directed to the conduct of attorneys in its usual manifestation and is not specifically oriented toward the conduct of attorneys acting as counsel for congressional committees," nonetheless concluded that the disciplinary rules prohibited a committee counsel from requiring a witness to appear at televised hearings when the committee had been notified in advance that the witness would refuse to answer questions based upon the constitutional right against self-incrimination.<sup>6</sup>

Apart from this, there appears to be little guidance on the ethical obligations of congressional lawyers.<sup>7</sup> Neither the House nor Senate Ethics Manual suggests that congressional ethics rules impose any special ethical obligations on congressional lawyers. With the exception of a reference to "professional standards and responsibilities" in the statute establishing the Senate Legal Counsel, Congress does not appear to have addressed how, if at all, professional ethics apply to its attorneys.<sup>8</sup>

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functioning as lawyers in the Judicial and Legislative branches should be governed by the same Rules as Executive branch lawyers."), *quoted in* D.C. Bar Op. No. 231 n.2 (1992).

3. D.C. RULES OF PROF'L CONDUCT R. 1.6(j) (2007).

4. *Id.* R 1.6, cmt. 37.

5. D.C. Bar Op. No. 31 (1977).

6. *Id.*

7. The same is evidently true with respect to lawyers for state legislatures. *See* Robert J. Marchant, *Representing Representatives: Ethical Considerations for the Legislature's Attorneys*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 439, 439 (2002) ("It is unclear what professional ethical constraints, if any, apply to such lawyers."). Marchant, who focuses his analysis on attorneys who provide drafting services for state legislatures, argues that despite the lack of much direct authority on the subject, it is most likely that courts would conclude that they have the authority to regulate such attorneys as they do other government attorneys under the various professional ethics rules. *Id.* at 450.

8. *See* 2 U.S.C. § 288i(a) (2000).

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In short, congressional lawyers operate with very little in the way of formal guidance on their ethical responsibilities, and they do so in an often-frenzied atmosphere that leaves little time for reflection on such matters. While they may assume that their activities are largely beyond the reach of the professional ethics rules, this may prove to be a dangerous assumption. Absent some clarification of the rules applicable to the congressional practice of law, a future clash between the congressional culture and that of the professional bar organizations is likely.

To explore further the issues involved in attempting to apply professional ethics standards to congressional lawyers, I will consider two different types of lawyers: (1) those who serve on the staff of congressional committees; and (2) those who provide legal services to a variety of congressional offices.<sup>9</sup> In so doing, I will draw upon my experience both as a committee counsel and as a lawyer for an institutional congressional legal office.<sup>10</sup>

## I. COMMITTEE LAWYERS.

Attempting to apply existing professional ethics rules to committee lawyers creates a host of problems. First, the D.C. Bar's assertion that a committee counsel's client is the committee itself does not square with the understanding or conduct of most committee counsel. In many cases, committee lawyers are loyal solely to a single member, usually (but not always) the chairman or ranking member of the committee. For example, when I served as Deputy Staff Director for Investigations of the Senate Homeland Security and Governmental Affairs Committee ("HSGAC"), committee staff would typically identify themselves at meetings with outsiders by the name of the senator for whom they worked, rather than by the name of the committee or subcommittee that technically employed them.<sup>11</sup> A staffer's loyalty was expected to be to the individual senator, not to the "committee."

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9. These are by no means the only types of congressional lawyers, and other types of congressional lawyers may face issues that are different in some respects from those discussed herein. Examples of other roles played by congressional lawyers include serving as experts for the Congressional Research Service, which provides Congress with information and analysis on a wide range of legal issues, working as in-house counsel for legislative agencies such as the Government Accountability Office, and advising House and Senate officers as administrative counsel.

10. See *supra* note \*.

11. This appears to be the experience of other Senate committee staffers as well. As Kathleen Clark, a former Senate Judiciary Committee attorney, notes,

Other committees operate in a more collegial fashion, with committee staff advising multiple members of the committee. A committee lawyer might work directly for a subcommittee chairman but be appointed by—and ultimately responsible to—the full committee chairman. In that case, the lawyer may view both members as his or her “clients.” Some committee staffers—whether or not lawyers—may view themselves as owing duties to all committee members of their own party, though these duties would almost certainly be secondary to the duties owed to the chairman or member for whom the lawyer works directly.<sup>12</sup> Moreover, except for those committees with unified, non-partisan staffs, it is very unlikely that a lawyer would view committee members not of his or her own political party in any sense as his or her “clients.” On the contrary, majority committee staffers are more likely to view the minority committee members and staff as adversaries, and vice versa.

Take, for instance, the case of Manuel Miranda, who served as senior counsel on the majority staff of the Senate Judiciary Committee. Miranda was accused of improperly accessing, reading and disseminating documents of the minority party that were stored, unprotected, on a shared network.<sup>13</sup> Miranda acknowledged accessing and reading some of the documents, but contended that the minority had been negligent in failing to protect the documents in “an obviously adversarial context.”<sup>14</sup> He further stated:

I determined for myself that no unlawful, unauthorized hacking was involved in reading these unprotected documents. I knew that in law the duty falls on the other party to protect their [sic] documents. I also considered and studied the propriety or ethics of reading these documents. I knew that in

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“[F]or the purpose of identifying the employer of a staff lawyer, there is essentially no such thing as ‘the Senate Judiciary Committee itself.’” Clark, *supra* note 1, at 32.

12. To make matters even more complicated, some committee lawyers (like other staff) may owe (or feel) loyalty to members other than those for whom they formally work. For example, it is not unheard of for committee counsel to take some direction from the House or Senate leadership, even without the express or implicit permission of the committee chairman or other member to whom they formally report. This may reflect party loyalty, personal self-interest, or some other motivation.

13. See, e.g., Neil A. Lewis, *Democrats Suggest Inquiry Points to Wider Spying by G.O.P.*, N.Y. TIMES, Feb. 10, 2004, at A23; Neil A. Lewis, *Report Finds Republican Aides Spied on Democrats*, N.Y. TIMES, Mar. 5 2004, at A14; Walter Pincus, *Senate Opens Inquiry into Leaked Memos; Computer Files Discussed Democrats’ Strategy on Bush Judicial Nominations*, WASH. POST, Nov. 29 2003 at A10.

14. Departure Statement of Manuel A. Miranda, <http://nationalcenter.org/Miranda204.html> (last visited Apr. 13, 2007).

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legal ethics there is no absolute prohibition on reading *opposition documents* inadvertently disclosed and that these ethics are stricter than our situation in government service. . . . *I knew that I was not in a relation of confidence to the Senators or documents in question.*<sup>15</sup>

Whatever one's views of Miranda's conduct, few on Capitol Hill would claim that the senators of the minority party were his "clients" or that he owed them a duty to promote their interests and protect their confidences. On the contrary, it was precisely because Miranda was not in a relationship of trust and confidence with these senators that many viewed his accessing the documents in question as improper.<sup>16</sup>

The D.C. Bar's identification of a committee lawyer's client is not only inconsistent with the prevailing culture and norms on Capitol Hill, but it is also flawed as a legal matter. A congressional committee is, after all, merely the creature of the body that created it. Although committees are treated for some purposes as entities with independent legal existences,<sup>17</sup> the House or Senate can, at any time, change the name, jurisdiction, and membership of any committee, or abolish it outright. Moreover, House committees, like the House itself, are not continuing entities, so each committee technically terminates at the end of each Congress and is succeeded by a new committee in the next Congress.<sup>18</sup> Is a committee lawyer

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15. *Id.* (emphasis added).

16. This is not to say that Miranda's description of an "obviously adversarial" context describes the atmosphere of every congressional committee. For example, on the HSGAC the relationship between majority and minority staff was generally good, and we worked quite closely together on a number of matters. This was largely because the chairman and ranking member had a cordial personal relationship and were generally in agreement on many of the issues that came before the committee. Even on the HSGAC or other committees with similar working relationships, however, majority staff lawyers were not expected to act as if they had a duty of loyalty to minority members, nor were minority staff lawyers expected to view majority members as their clients.

17. For example, a committee is treated as an "employing office" under the Congressional Accountability Act, 2 U.S.C. § 1301(9)(B) (2000), and may be sued for violating employment rights under that statute, 2 U.S.C. § 1408(a)-(b). Some special or select committees have been given authority by resolution to appear in judicial proceedings in support of their mandates. *See* CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, CONGRESSIONAL OVERSIGHT MANUAL 54-55 (2007). Certain standing committees have special statutory authorities and responsibilities. *See, e.g.*, 2 U.S.C. §§ 381-96 (providing for procedures to govern election contest proceedings before the Committee on House Administration).

18. *See* *Gojack v. United States*, 384 U.S. 702, 707 n.4 (1966) ("Neither the House of Representatives nor its committees are continuing bodies."); CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, THE FIRST DAY OF A NEW CONGRESS: A

required to treat the new committee as a separate client for purposes of maintaining confidences and avoiding conflicts?

These are not just theoretical concerns. A number of years ago a counsel to a House committee raised a question as to whether he would violate attorney-client privilege or the applicable bar rules if he disclosed, to a successor committee, sensitive information he had received from a former committee member when the latter served on the prior committee. The House Office of General Counsel (OHC), where I served as senior counsel, analyzed the issue and concluded that the counsel could not invoke attorney-client privilege to withhold information from the House or its members. We concluded that the House is the equivalent of a “parent corporation” of any House committee and thus, assuming that the attorney-client privilege is applicable at all, the House itself retains the ultimate authority to decide whether or not to assert or waive that privilege.

Treating either the committee or an individual member as the counsel’s client also raises a number of issues with regard to potential conflicts of interest. It is not unusual for a committee lawyer to move from one committee to another, or to move from working for one member to another. Under the D.C. Rules of Professional Conduct, treating either the member or the committee as the lawyer’s client would seem to create difficult, if not insuperable, issues for the lawyer.

Assume that a lawyer works first for Committee A, chaired by Chairman Smith, and later for Committee B, chaired by Chairman Jones. Under the D.C. Rules, the lawyer would be precluded from using any confidence or secret of Committee A or Chairman Smith (depending on which is the client) to his or her disadvantage or to the advantage of Committee B or Chairman Jones. Thus, if the lawyer knew a non-public piece of information about how Chairman Smith might vote on an issue of importance to Chairman Jones or Committee B, or if he knew of strategies that Committee A or Chairman Smith might use to expand his or her jurisdiction at the expense of Committee B, he could neither share this information with nor use it to the advantage of his new employer. The lawyer might also be barred from working at all on a legislative or investigative matter that he had handled in his prior employment if the

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GUIDE TO PROCEEDINGS ON THE HOUSE FLOOR I (2004) (observing that “because it is not a continuing body,” the House must reconstitute itself at the beginning of each Congress by adopting rules, forming committees, and electing officers).

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interests of his new client could be considered “materially adverse” to those of his former client.<sup>19</sup>

These rules are almost certainly unworkable in the fluid and messy world of Congress, in which every member has or represents a series of interests—political, ideological, geographic, economic and social—that to a greater or lesser extent are in conflict with the interests of any other member. Certainly they do not reflect how congressional lawyers actually operate. One former Senate committee counsel recounts how he actively worked to defeat a resolution that he believed to be misguided even though it was supported by a majority of the members of the committee: “In the morass that is the legislative process, the formal canons of professional responsibility seem to be of little help. . . . Sometimes it seems acceptable to act as a free agent, and other times it does not.”<sup>20</sup>

The explanation here may be that the congressional lawyer’s true client is the legislative body itself. While he may owe loyalty—and his or her job—to a particular member or group of members, his or her professional ethical duty is to the institution as a whole. It is perfectly appropriate for him to be a zealous advocate of his principal’s policy agenda, but in doing so he acts as any other congressional staffer would. It is when he advises a member to temper or re-frame policy objectives in light of legal considerations that affect the legislative body as a whole that he carries out a function that is uniquely that of the congressional lawyer.

## II.

### INSTITUTIONAL LEGAL OFFICES.

#### A. *House Office of General Counsel.*

Counsel in institutional legal offices, such as the Office of Senate Legal Counsel and OHC, operate differently than do committee counsel.<sup>21</sup> In some respects, these offices operate like small law

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19. D.C. RULES OF PROF’L CONDUCT R. 1.10(b) (2007).

20. Glennon, *supra* note 1, at 29.

21. For a detailed discussion of these two offices and the differences between them, see Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 LAW & CONTEMP. PROBS. 47 (Spring 1998). Professor Tiefer, a veteran of both offices, rightly notes that OHC and Senate Legal Counsel see themselves as charged with representing institutional interests, as opposed to partisan or individual political interests. The problem, however, is that there are often very different views as to what constitutes an institutional interest. Identifying such an interest only helps the offices avoid conflicts (not to mention survive politically) if they can persuade their diverse “clients” to agree on one concept of the institutional interest.

firms representing a series of congressional clients. For example, the OHC represents individual members who receive subpoenas for testimony or documents related to the official functions of the House, assists committees in issuing subpoenas and carrying out oversight and investigatory activities, and advises the Clerk and other House officers on carrying out responsibilities such as administration of the Lobbying Disclosure Act. In performing these tasks, attorneys in the OHC often refer to the particular member or office as their “client.” But deeming these various individuals and offices as separate “clients” within the meaning of the Rules of Professional Conduct would be inconsistent with how the OHC actually functions.<sup>22</sup>

For example, the OHC has defended officers of the House in lawsuits brought by individual members.<sup>23</sup> If one views the officers and members as actual or potential “clients,” the Rules of Professional Conduct would prohibit the OHC, while such lawsuits are pending, from representing the individual members on *any* matter absent informed consent of both the member(s) and the officers.<sup>24</sup> A similar analysis would be required when the OHC advises the Committee on Standards of Official Conduct (the House Ethics Committee) on matters related to the committee’s investigations, since these investigations are invariably adverse to one or more members of the House. Moreover, the OHC could be disqualified from defending the lawsuits or advising the Ethics Committee if it had previously provided advice to the members in question on the same matter.<sup>25</sup>

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22. This problem is not confined to the legislative branch. Thus, although “[e]xecutive branch lawyers have the habit of referring to the agencies and people with whom they directly interact as their ‘clients,’” this practice “depends on a metaphorical use of the term ‘client.’” Nelson Lund & Douglas R. Cox, *Executive Power and Governmental Attorney-Client Privilege: The Clinton Legacy*, 17 J.L. & POL. 631, 640–41 (2001). As the authors explain, these “clients” must answer to higher authority—i.e., the President—and so do not have ultimate control over issues such as whether an attorney-client privilege should be asserted with respect to communications with the lawyer. *Id.* at 642.

23. *See, e.g., Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997) (suit by House members challenging constitutionality of House rules, where the clerk of the House was represented by General Counsel for the House of Representatives); *see also Boehner v. Anderson*, 30 F.3d 156 (D.C. Cir. 1994) (Senate Legal Counsel defending clerk of the Senate).

24. *See* D.C. RULES OF PROF’L CONDUCT R. 1.7(b)(1), (c).

25. *See id.* R. 1.9 (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client . . .”).



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Perhaps one could surmount these difficulties by saying that the OHC represents members only in their official capacities, and that the OHC is adverse to them only when they act in their personal capacities. Alternately, one could postulate an implied waiver of conflicts by virtue of a member's decision to request representation by the OHC. It is not clear, however, what these legal fictions, which are not in themselves terribly convincing, add to the straightforward conclusion that the OHC simply does not represent "clients" in the sense that the term is used in the Rules of Professional Conduct.

House Rule II(8), which establishes OHC, provides that the office exists,

for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships.<sup>26</sup>

This language, which constitutes essentially all of the legal authority defining the scope of the OHC's functions and obligations, provides only limited guidance as to the OHC's ethical responsibilities. It could be read to suggest that the OHC's responsibilities run primarily, if not exclusively, to the House as an institution, rather than to individual members or offices. On the other hand, it requires that the OHC provide assistance and representation without regard to political affiliation, a directive that seems unintelligible except in the context of providing advice or representation to particular members. Finally, it implies that questions about the OHC's responsibilities, including issues relating to the House's institutional legal interests and positions, are to be resolved by the Speaker of the House after consultation with the Bipartisan Legal Advisory Group (BLAG).

In practice, the OHC provides routine representation (e.g., moving to dismiss a suit or quash a subpoena from a disgruntled constituent) to individual members or other House entities without any involvement of the Speaker's office. In the event that a representation either involves sensitive matters or implicates institutional interests, the Speaker's office is notified or consulted, depending on the situation. In most, if not all cases, this occurs with the express or implied consent of the member in question. However, as

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26. H.R. Doc. No. 108-241, R. II(8), at 372 (2005).

there is no formal procedure to govern the matter, there is little assurance as to how difficult cases are to be handled.

Suppose, hypothetically, that then-Representative Mark Foley or his staff had approached the OHC for legal advice and had disclosed to the OHC that Foley had made inappropriate communications to current or former House pages, information that they did not want disclosed to the Speaker or anyone else.<sup>27</sup> Suppose further that knowledge of such information arguably triggered a duty under the Rules of the House to inform others in order to protect the pages.<sup>28</sup> Would the OHC be permitted or obligated to disclose the information? If not, suppose the OHC were later consulted by the Speaker or some other House office on the same matter. Would the OHC provide them with assistance or representation while withholding potentially significant information it had received from Foley? Would the OHC recuse itself based on a potential conflict of interest?

While there are no clear answers to these questions, my experience suggests that OHC would not recuse itself and would likely treat Foley's interests as subordinate to those of the House as a whole, as determined by the Speaker, BLAG, or the House itself.<sup>29</sup> Such an approach would be consistent with congressional norms. However, if Foley were deemed a "client" of the OHC, these norms would conflict with the Rules of Professional Ethics, which would presumably require the OHC to refrain from taking any action on the matter that would be adverse to Foley's interests.

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27. Representative Mark Foley, a six-term Republican Congressman from Florida, resigned his office in September 2006 after it was revealed that he had sent sexually explicit internet messages to underage Congressional pages. See Charles Babington & Jonathan Weisman, *Rep. Foley Quits in Page Scandal; Explicit Online Notes Sent to Boy*, 16, WASH. POST, Sep. 30, 2006, at A1.

28. See Investigation of Allegations Related to Improper Conduct Involving Members and Current or Former House Pages, H.R. REP. NO. 109-733, at 53 (2006) ("At a minimum, House Members and officials are obligated not to withhold any information from any appropriate governmental or supervisory authority that relates, or even possibly relates, to the education, care, or safety of House pages.").

29. In all likelihood, the OHC would approach these questions essentially as political, not legal or ethical, issues. As a practical matter, this would mean choosing the course of action that would preserve its relationship with the Speaker's office, since this relationship is vital to the OHC's interests, while making as few enemies as possible on either side of the aisle.

B. *Office of Senate Legal Counsel.*

The Office of Senate Legal Counsel (OSC) operates under a more formal system than does the OHC.<sup>30</sup> Unlike the OHC, the OSC operates pursuant to statutory authority, and its governing statute provides that the office can undertake a representation only with the approval of the Senate or the Joint Leadership Group.<sup>31</sup> Although not explicitly stated in the statute, it appears that the senator, committee, officer or employee for whom representation is approved becomes the “client” of the OSC. The statute does provide that “[t]he Counsel and other employees of the Office shall maintain the attorney-client relationship with respect to all communications between them and any Member, officer, or employee of the Senate.”<sup>32</sup>

By limiting the number of representations, the statute limits the potential for conflicts and, moreover, provides a specific mechanism for resolving conflicts. In the event that the OSC identifies a conflict between providing representation to any party or person, on the one hand, and “the carrying out of any other provision of this chapter or compliance with professional standards and responsibilities,” on the other, it is required to notify the Joint Leadership Group, which is to advise the OSC as to how to resolve the conflict.<sup>33</sup> For example, in a case where the OSC had been, or was expected to be, involved in a matter before the Senate Ethics Committee, the OSC faced a conflict in representing staffers who had received grand jury subpoenas related to the same matter. To resolve the conflict, the Joint Leadership Group recommended, and the Senate approved, a resolution authorizing the staffers to retain private counsel paid for with Senate funds.<sup>34</sup>

In addition to its responsibilities to its immediate clients, however, the OSC is required by statute to represent the institutional interests of the Senate. Specifically, in carrying out any of its responsibilities under the statute, including the representation of Senate clients, the OSC is required to “defend vigorously” the con-

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30. See Rebecca Mae Salokar, *Legal Counsel for Congress: Protecting Institutional Interests*, 20 CONG. & PRESIDENCY 131, 138–39 (1993).

31. 2 U.S.C. § 288(b)(a) (2000). Where representation is authorized by the Joint Leadership Group, which consists of the president pro tempore, the majority and minority leaders, and the chairman and ranking members of the Judiciary and Rules and Administration Committees, the vote to authorize must be by a two-thirds supermajority, thereby assuring bipartisan support. *Id.*

32. 2 U.S.C. § 288(f).

33. 2 U.S.C. § 288i(a).

34. S. Res. 156, 102d Cong., 137 CONG. REC. 19152–53 (1991) (enacted).

stitutional powers and responsibilities of the Senate and Congress as well as the constitutionality of acts and joint resolutions of Congress.<sup>35</sup> In the event that a client's interests conflict with this duty, the OSC is presumably required to resolve the conflict in accordance with the statutory conflict provision.

The OSC thus operates under an ethical regime that allows it to provide representation to individual clients while ensuring that its activities remain consistent with institutional interests and under the ultimate control of the Senate as a whole. While this regime may not entirely supplant the regulation of the Rules of Professional Conduct, it places the Rules more in the nature of an advisory role. Thus, the OSC might look to the Rules of Professional Conduct or other state law sources for guidance on "professional standards and responsibilities," as instructed by the statute,<sup>36</sup> but it ultimately has to make its own judgment on ethical issues based on the language and structure of its governing statute. Moreover, it looks for guidance or instruction from internal Senate sources, such as the Joint Leadership Group, and not from the bar counsel of D.C. or any other jurisdiction.<sup>37</sup>

### C. *Senate Chief Counsel for Employment.*

The approach of the OHC and the OSC contrasts with that of the Office of Senate Chief Counsel for Employment (SCCE), a non-statutory office established to represent Senate offices in employment cases. The SCCE is charged with providing legal advice and representation related to the Congressional Accountability Act (CAA), the statute that makes employment laws applicable to Congress.<sup>38</sup> Under the CAA, a congressional employee who claims that his or her rights have been violated under the federal anti-discrimination or other employment laws may file an administrative claim and subsequently a lawsuit in federal court.<sup>39</sup> The SCCE represents Senate employing offices (i.e., the particular Senator, committee or other Senate office for whom the employee works) in these cases.

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35. 2 U.S.C. § 288h.

36. 2 U.S.C. § 288i(a).

37. While the statute makes reference to professional ethics and requires that attorneys in the OSC be "member[s] of the bar of a State or the District of Columbia," it does not require membership in any particular bar. 2 U.S.C. § 288(a)(2), (b)(1). Presumably, therefore, it was not envisioned that the office would look to a particular bar counsel for guidance.

38. 2 U.S.C. §§ 1301–1438 (2000).

39. 2 U.S.C. § 1401.

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The SCCE considers that “each of the 180 offices of the Senate is an individual client of the SCCE, and each office maintains an attorney-client relationship with the SCCE.”<sup>40</sup> The SCCE is staffed with experienced employment lawyers who previously practiced in private law firms representing corporate clients, and the SCCE provides “the same legal services the attorneys provided to their clients while in private practice.”<sup>41</sup>

Perhaps as a result, the SCCE follows a private client model of representation. Thus, in defending several lawsuits brought under the CAA, the SCCE has moved for dismissal on the grounds that the Speech or Debate Clause of the Constitution prohibits Congress from authorizing such lawsuits.<sup>42</sup> In one recent case, the SCCE argued before the Court of Appeals for the D.C. Circuit that a disability discrimination lawsuit against a Senate employing office must be dismissed under the Speech or Debate Clause.<sup>43</sup> After the D.C. Circuit, sitting en banc, ruled that the case could proceed, the SCCE sought Supreme Court review, which the Court subsequently denied.<sup>44</sup>

The SCCE’s efforts have greatly irritated the chief sponsors of the Congressional Accountability Act<sup>45</sup>—passed in 1995 with overwhelming support—who have accused the office of seeking to undermine and eviscerate the CAA. For instance, Senator Charles Grassley was quoted as saying that “[t]he Senate Chief Counsel for Employment is acting like a lawyer, and as most lawyers do, she’s going overboard.”<sup>46</sup> The head of SCCE, Jean Manning, maintained however that the decision to raise the constitutional defense belonged ultimately to her senatorial client: “He’s the client, and al-

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40. *Legislative Branch Appropriations for Fiscal Year 2005: Hearings on H.R. 4755 and S. 2666 Before the Subcomm. on the Legis. Branch of the S. Comm. on Appropriations*, 108th Cong. 176 (2004) (statement of Emily J. Reynolds, Sec’y of the Senate).

41. *Id.* at 187.

42. See *Fields v. Office of Johnson*, 459 F.3d 1, 7 (D.C. Cir. 2006) (en banc), *appeal dismissed sub nom.*, *Office of Dayton v. Hanson*, 127 S. Ct. 2018 (2007); *Bastien v. Office of Campbell*, 390 F.3d 1301, 1305 (10th Cir. 2004); *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 31 n.5 (D.D.C. 2001). See generally U.S. CONST., art. I, § 6, cl. 1 (“[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.”).

43. See *Fields*, 459 F.3d at 7.

44. See *Hanson*, 127 S. Ct. at 2021.

45. See Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301–1438 (2006).

46. Suzanne Nelson, *Chambers Split on CAA Cases*, ROLL CALL, June 15, 2004, at 1, 20.

ways the attorneys take their direction from the client. He agrees with this tactic.”<sup>47</sup>

The SCCE’s approach, according to which decisions of individual clients are determinative—even with respect to matters that impact the overall interests of the institution—is clearly distinguishable from those of the OHC and the OSC, which are ultimately responsible for protecting the institutional interests of the House and Senate respectively, as determined by those bodies or their elected leadership.

#### *D. House and Senate Legislative Counsels.*

The Offices of the House and Senate Legislative Counsels compose another type of institutional counsel and are charged with assisting their respective bodies in the drafting of legislation.<sup>48</sup> Like the OSC, the House Legislative Counsel is explicitly instructed by statute to “maintain the attorney-client relationship with respect to all communications between it and any Member or committee of the House.”<sup>49</sup> However, since legislative counsel routinely provide their services to legislators on different sides of the same issue, this creates a considerable tension with the D.C. Rules of Professional Conduct.<sup>50</sup> As a practical matter, legislative counsel may face relatively few genuine conflicts due to the technical nature of their services; in other words, there is not necessarily a conflict between drafting a bill for Member A that says one thing and drafting a bill for Member B on the same subject saying the opposite. Nonetheless, when difficult cases do occur—as presumably they must from time to time—the professional ethics rules would seem to provide little guidance on how they should be handled.

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47. *Id.* at 20.

48. *See* 2 U.S.C. §§ 271–82 (2000).

49. 2 U.S.C. § 281a. Although the Senate Legislative Counsel lacks a statutory command in this regard, it follows a similar practice. *See* CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS, OFFICE OF LEGISLATIVE COUNSEL: SENATE (2004).

50. In the context of legislative counsel for state legislatures, a commentator has suggested that “[t]his problem is avoided entirely if the institution of the legislature is viewed as the legislative attorney’s client and the institution specifically authorizes its attorneys to provide services to competing legislators.” Marchant, *supra* note 7, at 450. While this proposal seems consistent with how congressional institutional counsel operate, it does not solve the problem of genuine conflicts among competing legislators.

### III. PROMOTING A SYSTEM OF CONGRESSIONAL LEGAL ETHICS.

The discussion above demonstrates that many congressional lawyers sail in ethically uncharted waters. There is very little in the way of specific guidance as to what interests congressional lawyers should represent, how they should deal with ethical issues such as handling confidential information and resolving potential or actual conflicts, and what role, if any, the D.C. Rules of Professional Conduct or other bar ethics rules should play in resolving these issues.

It should be noted that there is no requirement that congressional lawyers be members of the D.C. Bar or, in most cases, any bar at all. The District of Columbia explicitly exempts the activities of a federal government lawyer from the prohibition against the unauthorized practice of law.<sup>51</sup> Moreover, with the exception of attorneys working for the OSC, there is no requirement, either by statute or by rule, that congressional attorneys be members of any bar at all.<sup>52</sup> Thus, it is entirely possible for a congressional lawyer, despite serving in a “legal sounding” job, neither to be an active member in any bar nor even to have sat for the bar exam.<sup>53</sup>

Moreover, in my experience, many congressional lawyers assume—to the extent that they think about it at all—that they are not engaged in the practice of law because they are performing functions that are largely indistinguishable from those of non-lawyer congressional staff. Most congressional lawyers do not appear in court and will rarely, if ever, provide formal legal opinions. Although their work necessarily involves a degree of legal analysis—such as determining the current state of the law as it has been interpreted by agency regulations and court decisions—the same can be said of many of their non-lawyer colleagues.

However, the fact that non-lawyers perform the same work is not determinative of whether an activity constitutes the practice of law when conducted by attorneys. For example, although lobbying of Congress and other legislative bodies by non-lawyers is generally

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51. The prohibition against unauthorized practice, Rule 49 of the Rules of the D.C. Court of Appeals, exempts “providing authorized legal services to the United States as an employee thereof.” RULES OF THE D.C. CT. OF APP. 49(c)(1) (revised effective Mar. 1, 2007), *available at* [http://www.dccappeals.gov/dccourts/docs/DCCA\\_Rules.pdf](http://www.dccappeals.gov/dccourts/docs/DCCA_Rules.pdf).

52. While some congressional offices, such as the OHC, require bar membership as a matter of policy, this is not generally the case.

53. *See* Clark, *supra* note 1, at 35 (noting that “the Chief Counsel of the Senate Judiciary Committee during the early 1990s had never taken a bar exam”).

permissible and does not constitute unauthorized practice of law, lawyers who perform the same types of lobbying activities may nonetheless be engaged in the practice of law and subject to rules of professional conduct.<sup>54</sup> As many lobbyist attorneys perform functions similar to those of congressional lawyers, including identifying problems in current law, drafting and analyzing proposed legislative solutions, and negotiating the adoption of such solutions by relevant committees and other interested parties, it is arguable that congressional lawyers are also practicing law when they perform such functions.

Moreover, it is difficult to see how many of the functions performed by congressional lawyers could be distinguished from those performed by their counterparts in the executive branch. For example, congressional lawyers are often called upon to analyze and research separation of powers issues and to provide advice regarding the authorities of the legislative branch versus those of the executive. Since it seems to be widely accepted that executive branch lawyers are practicing law when they perform precisely the same tasks,<sup>55</sup> it would seem logical to conclude that the same is true of congressional lawyers.

Although less common than the type of institutional legal advice referred to above, congressional lawyers are also sometimes called upon to provide advice for the purpose of enabling members to conform their own conduct to applicable laws and rules. This may occur in the form of a blend of political/legal/ethical advice designed to help members avoid conduct that might push the boundaries of acceptable legal or ethical standards, and so risks generating unflattering publicity, if not actual jeopardy before

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54. See *Gmerek v. State Ethics Comm'n*, 751 A.2d 1241, 1257 (Pa. Commw. Ct. 2000) (noting that “it is clear that there are activities that may properly be performed by nonlawyers which are considered to be the ‘practice of law’ when performed by lawyers”), *aff’d by an equally divided court*, 807 A.2d 812 (Pa. 2002); see also D.C. RULES OF PROF’L CONDUCT R. 1.0(h) (2007) (defining “matter” as including “lobbying activity”).

55. See 28 U.S.C. § 530B (2000) (discussed in note 61, *infra*); see also Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455, 463–64 (2005) (noting that lawyers in the Justice Department’s Office of Legal Counsel, which provides legal advice to the executive branch, are subject to professional ethics rules in providing that advice); Andrew C. Mayer, *The Lawyer in the Executive Branch of Government*, 4 LAW & SOC’Y REV. 425, 428 (1970) (describing the functions of executive branch lawyers as participating in “the practice of law”).



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courts or the ethics committees.<sup>56</sup> Such legal advice seems strikingly similar to that provided by private lawyers to their clients.

In short, most congressional lawyers cannot safely assume that their work does not involve the practice of law for purposes of applying the professional ethics rules. Thus, for an individual lawyer who happens to be a member of the D.C. Bar, there is no assurance that his or her conduct, though perfectly acceptable under congressional norms, would not be alleged to violate the Rules of Professional Conduct in a bar disciplinary proceeding. The risk is probably lower for congressional lawyers licensed in jurisdictions other than D.C., jurisdictions that traditionally do not address issues relating to congressional legal practice, but it exists nonetheless.

This state of affairs may harm Congress as well. To the extent that rules of professional ethics improve the quality of legal services that lawyers provide, the absence of such rules arguably disadvantages Congress with respect to the legal advice and representation that it receives. Moreover, the lack of clarity as to what rules, if any, apply to congressional lawyers is likely to lead to misunderstandings between these lawyers and their “clients.” In my experience, there is wide variation among members as to how they view congressional lawyers, from those who see them as no different from any other congressional staffers, on the one hand, to those who view them essentially as personal counsel, on the other. The absence of any definitive guidance on professional ethics for congressional lawyers undoubtedly contributes to this problem.

There is also a substantial risk that either the D.C. Bar or a state bar might use its authority over professional ethics to infringe upon Congress’ constitutional functions. This risk is most clearly exemplified by the D.C. Bar’s 1977 opinion purporting to prohibit a committee counsel, under some circumstances, from requiring a witness to appear before the committee when it was known the witness would assert the privilege against self-incrimination.<sup>57</sup> Although the opinion acknowledges that the bar lacks the power to regulate the conduct of members of Congress (even if they are li-

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56. Thus, former Speaker Hastert described his counsel as “the first red flag guy on anything. . . . [H]e would be the first person I would go ask a question of what is proper to do or what is not proper to do.” Investigation of Allegations Related to Improper Conduct Involving Members and Current or Former House Pages, H.R. REP. NO. 109-733, at 15 (2006).

57. D.C. Bar Op. No. 31 (1977).

censed attorneys), it attempts to achieve the same result indirectly through directives to committee counsel.<sup>58</sup>

I will not discuss here the serious constitutional objections to any attempt by the D.C. Bar or any other bar organization to regulate, directly or indirectly, the functioning of the legislative branch, nor will I address objections to attempts to discipline congressional lawyers who are acting in accordance with congressional norms or at the direction of members of Congress.<sup>59</sup> Suffice it to say that these objections did not prevent the D.C. Bar from issuing its 1977 opinion, nor have they prevented this opinion from being routinely cited and relied upon in proceedings before congressional committees ever since.<sup>60</sup>

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58. *See id.*

59. *See* John Yoo, *Lawyers in Congress*, 61 *LAW & CONTEMP. PROBS.* 1, 6 & n.30 (Spring 1998) (arguing that the Supremacy Clause prohibits state bar organizations from interfering with the due functioning of Congress by, for example, restricting the types of legal arguments that congressional lawyers can advance). While the issues would be somewhat different with respect to the D.C. Bar, which exercises its authority by virtue of delegation from an Article I court (the D.C. Court of Appeals), a court which itself is established pursuant to Congress's legislative authority over the District of Columbia under Article I, § 8 of the Constitution, it seems unlikely that the D.C. Bar would have any more authority to regulate Congress than would a state bar organization.

Even attempts by state bar associations to regulate the practice of law within state legislatures raise separation of powers issues (under state constitutions) because state bar rules are normally issued pursuant to the authority of the judicial branch. *See* Marchant, *supra* note 7, at 448–53 (reviewing separation of powers and comity arguments against applying professional ethics rules to state legislative attorneys). Marchant concludes that these arguments should not prevent the rules from applying to legislative attorneys, at least so long as the rules do not unreasonably intrude into the legislative process. He also predicts that if faced with a separation of powers objection to judicial regulation of the legislative branch, the courts would likely rule in their own favor. *But see* Thomas B. Sheffey, *Gov't Counsel Picks Raise UPL Concerns*, 30 *CONN. L. TRIB.* 1 (2004) (discussing whether unauthorized practice of law statute in Connecticut could be applied to prohibit out-of-state attorneys from representing the governor and the legislative panel considering his impeachment; one member of the state UPL panel is quoted as saying “I believe the legislature is the keeper of its own forum, and can determine the qualifications of people who appear before it to represent committees of the legislature.”).

60. For example, the 1977 legal ethics opinion was raised during an investigation conducted by the House Committee on Banking, Finance and Urban Affairs during the late 1980s, prompting the Congressional Research Service to note that the “recommendations” of the D.C. Legal Ethics Committee, while “deserving of respect and consideration,” were “not binding on the Congress.” *CONG. RESEARCH SERV.*, Memorandum of April 3, 1990, re “Requiring the Testimony in Open Hearing of a Witness Who Intends to Invoke the Privilege Against Self-Incrimination” (on file with author). The 1977 opinion was also cited by attorneys for Beth

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Moreover, while Congress has not explicitly required congressional attorneys to comply with bar rules or, in most cases, even to be licensed to practice, Congress also has not explicitly prohibited bar organizations from regulating congressional attorneys.<sup>61</sup> Indeed, the House Ethics Manual notes that “other professional standards . . . may apply to particular Members and employees,” and

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Dozoretz, a Democratic fund-raiser who invoked the Fifth Amendment before COGR (then named the Committee on Government Reform), in an unsuccessful attempt to avert her personal appearance before the committee in its 2001 investigation of presidential pardons. It was raised on multiple other occasions in investigations by the COGR during the 1990s, as well in investigations by, inter alia, the House Education and Workforce Committee and the House Energy and Commerce Committee.

61. To illustrate the type of institutional culture shock that can result from an unexpected application of the professional ethics rules, one need look no further than the experience of the U.S. Department of Justice (DOJ) with Rule 4.2 of the American Bar Association’s Model Rules of Professional Conduct. This “anti-contact rule,” which has been adopted in one form or another by all states and the District of Columbia, prohibits lawyers from contacting represented parties without permission from their counsel. Prior to the Second Circuit’s decision in *United States v. Hammad*, 858 F.2d 834, 836–37 (2d Cir. 1988), it was believed or assumed by DOJ that this rule did not restrict the activities of federal prosecutors. After the Second Circuit held that the federal prosecutors were required to comply with the rule, DOJ reacted by attempting to exempt itself from the rule through the “Thornburgh Memorandum,” in which Attorney General Thornburgh asserted that any attempt to use the rule to prohibit ex parte contacts by DOJ lawyers would violate the Supremacy Clause. Subsequently, Attorney General Reno attempted to reach the same essential result by use of a DOJ regulation issued under the department’s “housekeeping” statute. See generally Nina Marion & Richard Kaplan, *The McDade Amendment: Moving Towards a Meaningful Limitation on Wrongful Prosecutorial Contact with Represented Parties*, 4 RICH. J.L. & PUB. INT., No. 1 (1999).

These attempts by DOJ to exempt itself unilaterally from the professional ethics rules met with the disfavor of the courts, state bar organizations, and commentators. See *id.* Ultimately, Congress stepped in by enacting the “McDade Amendment” (named after a congressman who was less than pleased about having been prosecuted by the Justice Department), which overrules DOJ’s position and requires its lawyers to comply with the professional ethics rules. See 28 U.S.C. § 530B (2000) (“An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”). While the matter is not entirely free from doubt, it appears that the McDade Amendment does not cover attorneys outside of the Justice Department. See Memorandum from Assistant Attorney General Jay Bybee for William J. Haynes, II, General Counsel, Department of Defense (Feb. 26, 2002) reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 29 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (asserting that the McDade Amendment does not cover Department of Defense lawyers). Although the provision almost certainly does not apply to congressional lawyers, one can imagine it could be used in support of the argument that Congress intends or assumes that its own lawyers are subject to professional ethics rules.

specifically refers to Disciplinary Rule 8-101, which prohibits a lawyer holding public office from using his position for the benefit of himself or his client.<sup>62</sup> This suggests that both members and staff could be subject to professional discipline for official conduct, at least so long as this discipline is not inconsistent with congressional rules.<sup>63</sup>

In addition, it could be argued that where Congress requires certain functions be performed by “counsel,” it has implicitly authorized some degree of professional regulation. For example, the Rules of the House contain a new provision, adopted by the 110th Congress, providing that the Committee on Oversight and Government Reform (COGR) “may adopt a rule authorizing and regulating the taking of depositions by a member or counsel of the committee.”<sup>64</sup> Although the rule does not specify what qualifies one as a “counsel,” it could be inferred that a “counsel” must be licensed to practice law in some jurisdiction. Moreover, by restricting the taking of depositions to counsel, it could be argued that the House has recognized the need to ensure that deposition authority not be used to deprive witnesses of due process.<sup>65</sup> As Professor John Yoo has suggested, “the congressional lawyer’s role as a check on the power of the institution he serves comes to the fore when Congress employs its powers of investigation and oversight” because there is no other immediate check on these powers.<sup>66</sup>

One can imagine that this provision could lead to claims that counsel for COGR have a professional ethical obligation to ensure fair rules that protect basic rights and due process. Suppose that a committee lawyer is conducting a deposition and that the witness asserts a non-frivolous attorney-client privilege objection to a question. Under the COGR rule adopted to implement its deposition

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62. THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, 102D CONG., ETHICS MANUAL FOR MEMBERS, OFFICERS AND EMPLOYEES OF THE U.S. HOUSE OF REPRESENTATIVES (Comm. Print. 1992). The Manual also cites Canon 9, which states “[a] lawyer should avoid even the appearance of professional impropriety.” *Id.*

63. *See id.* In addition, of course, attorney members and staff are subject to professional discipline for non-official conduct. For example, professional ethics rules can limit the extent to which members and staff are permitted to engage in the private practice of law. *See, e.g.,* Michael D. Shear, *Va. Bar Could Reverse Limits on Firms Hiring Legislators*, WASH. POST, Feb. 16, 2007, at A1 (discussing a proposal to ease restrictions on Virginia state legislators—who serve part-time—that prohibited them from joining law firms that have state lobbying practices).

64. RULES OF THE HOUSE OF REPRESENTATIVES R. X.4.c.3.A (2007).

65. By contrast, the House Rule which permits questioning by “committee staff” at hearings does not distinguish between counsel and other staff members. *See* RULES OF THE HOUSE OF REPRESENTATIVES R. XI.2.J.2.C.

66. *See* Yoo, *supra* note 59, at 16–18.

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authority, the chairman may rule on any objection and the witness may be sanctioned for refusing to answer once the ruling is made.<sup>67</sup> This places the witness in the unenviable position of facing the risk of sanction for seeking to preserve a privilege claim that might be ultimately upheld by the full committee. Moreover, it deprives the witness of the opportunity to have a hearing before the committee prior to being faced with sanctions, an opportunity which some have argued is required by due process.<sup>68</sup>

In such a situation, a witness could conceivably seek the intervention of the D.C. Bar, arguing that committee counsels should provide a check on the unrestrained exercise of congressional power and that, like prosecutors, they have an obligation to ensure procedural justice.<sup>69</sup> The witness might also allege that a committee counsel who uses this deposition procedure to invade a privileged communication violates Rule 4.4 of the Rules of Professional Conduct, which provides that “a lawyer shall not . . . knowingly use methods of obtaining evidence that violate the legal rights of [a third person].”<sup>70</sup> This allegation might particularly resonate with the D.C. Bar if the violation involved the attorney-client privilege.<sup>71</sup> This is because the D.C. Bar (like other bar organizations) tends to be discomforted by congressional attempts to obtain information that is arguably protected by the attorney-client privilege and even more so by persistent congressional claims of authority to ignore the privilege altogether.<sup>72</sup>

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67. RULES OF THE COMM. ON OVERSIGHT AND GOV'T REFORM R. 22 (2007). The chairman's ruling may be appealed, but only by a member of the committee, not by a witness. Moreover, even if the ruling is appealed, the witness is subject to sanction if the chairman's ruling is upheld.

68. For example, during the 1996 investigation of the White House Travel Office by the House Committee on Government Reform (COGR's predecessor), “there was disagreement within the Committee itself as to whether the unilateral decision by the Chair, standing alone, was sufficient to overrule the [attorney-client] privilege claims and trigger any contempt.” *Commonwealth v. Philip Morris Inc.*, No. 95-7378, 1998 WL 1248003, at \*8 n.8 (Mass. Super. Ct. July 30, 1998). The committee reported a resolution of contempt against three individuals, but the dissenters argued that the failure to hold a hearing deprived the individuals of due process and that the committee should have accepted “[a]n amendment in the nature of a substitute offered by Rep. Waxman [which] would have honored the requirements of law and precedent that a hearing be held prior to any House action to hold an individual in contempt.” H.R. REP. NO. 104-598, at 103 (1996).

69. See D.C. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2007) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

70. See *id.* R. 4.4.

71. See *id.* R. 4.4 cmt. 1.

72. See D.C. Bar Op. No. 288 (1999) (noting “the disturbing increase in incidences of Congressional subpoenas being sent to lawyers in their professional ca-

## CONCLUSION

While a potential conflict with bar rules might be merely a nuisance for Congress, or, at worst, a source of embarrassment, it would nonetheless benefit Congress to consider developing ethical guidelines for the practice of law by congressional attorneys. By clarifying the duties and obligations of congressional lawyers, such guidelines would minimize the risk of unwanted intervention by bar organizations into congressional affairs. By identifying the different types of legal services provided by congressional lawyers and the standards governing these services, the guidelines could also reduce uncertainty for congressional lawyers, their colleagues and supervisors, and the elected representatives they serve. This, in turn, should encourage the seeking and rendering of competent legal advice and assistance, which is one of the core purposes of a professional ethics regime.<sup>73</sup>

These ethical guidelines might also address specific issues that face congressional lawyers but which are overlooked or covered inadequately by existing bar rules. For example, the D.C. Rules of Professional Conduct address the subject of successive government and private employment in order to ensure that government lawyers do not use their positions or confidential information to the advantage of their new or prospective private employers.<sup>74</sup> How-

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capacity seeking information relating to the activities of their clients and legal services provided to them.”). In this opinion, which discusses the question of when a lawyer is required by law to comply with a congressional subpoena so as to be relieved of the ethical obligation of protecting her client’s confidences and secrets, the panel indicates its concern as to how congressional practices may impact the privilege. *Id.* (“While we have no doubt that the salutary purposes of the attorney-client privilege and work-product doctrine . . . would be severely undermined if they were not fully applicable in Congressional proceedings, individual senators and representatives have repeatedly suggested that these privileges may not apply, or not apply with full force, in Congressional hearings.”).

73. *See* Marchant, *supra* note 7, at 442 (“Competency is another example of a core concern of the rules of professional ethics that applies with equal force to legislative attorneys.”).

74. *See* D.C. RULES OF PROF’L CONDUCT R. 1.11. Another issue that could be addressed concerns the obligations of lawyers who move from the private sector to Congress. It has been observed that congressional rules and conflict of interest statutes do not prohibit a congressional staffer (whether or not a lawyer) from taking actions that might benefit their former private clients or employers. *See* Jeffrey H. Birnbaum, *The Hill’s Revolving-Door Rules Don’t Work in Both Directions*, WASH. POST, Jan. 16, 2007, at A17. It may be less known that, for lawyers, professional ethics rules may actually encourage them to take such actions. *See* D.C. Bar Op. No. 308 (2001) (“Lawyers who leave private practice to enter government service must be vigilant to protect the interests of former clients while representing their new clients with diligence and zeal.”).

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ever, perhaps an even greater issue for congressional lawyers is the degree to which they may be influenced by the prospect of future employment in the executive branch. Any congressional lawyer who has accepted, is seeking, or has a near-term interest in employment with the executive branch faces a potentially serious conflict of interest that could compromise his loyalty to his congressional employer. This may contribute to a disconcerting willingness by congressional lawyers to defer to their executive branch counterparts on certain issues.<sup>75</sup>

Finally, promulgation of ethical guidelines for congressional attorneys could have additional salutary effects. It might cause Congress to focus on the tradeoffs between establishing more well-defined procedures for resolving issues such as a witness's claim of privilege, on the one hand, and maintaining its own flexibility to act, on the other. While self-limiting rules and procedures involve costs, they also benefit the institution by enhancing the perceived fairness of its processes and making the use of its powers more palatable. By defining the obligations of its lawyers, Congress could renew its own commitment to procedural justice and the rule of law.

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75. See Glennon, *supra* note 1, at 25–26 (noting that during his time on Capitol Hill in the late 1970s “[t]he House Committee on Foreign Affairs worked hand-in-hand with State Department lawyers and shamelessly accepted their help”). I do not mean to suggest that it is inherently unethical for a congressional attorney to interview for a job in the executive branch. Undoubtedly there are many other reasons besides personal interest why congressional staffers may defer to the executive branch, including following explicit instructions or perceived interests of their congressional principals. Nonetheless, one cannot help but suspect that the desire for executive branch employment sometimes plays a role.

