

ANATOMY OF A WHITEWASH: HOW TO JUDGE THE ETHICS COMMITTEE REPORT ON THE HOUSE BANK SCANDAL

(Updating *Executive Memorandum*, No. 310, "Rubbergate": Five Steps to Avoid a Whitewash," October 9, 1991.)

After a five-month investigation, the House Ethics Committee¹ issued a report last week on the House Bank scandal. The House of Representatives may act on the report as early as this Wednesday, March 11. The Committee report, approved on a 10-4 vote, sets arbitrarily lax standards for judging and disciplining the over 300 Congressmen who wrote tens of thousands of bad checks during the past three years. The only penalty recommended is disclosure of the names of 24 Congressmen whose accounts were overdrawn by more than a month's take-home pay (\$2,300 to \$6,000) for at least eight months during the past three years. The House should reject the Ethics Committee report, order full disclosure of all bad checks written on the House Bank, and begin disciplinary proceedings against the most flagrant abusers.

Ethics Committee Members admitted when they released their report that their recommendations were based on subjective judgments.² But by objective standards their report is a whitewash.³ Rather than investigating violations of existing laws or House rules, the Committee devised a completely subjective definition of abuse that excuses Congressmen who wrote hundreds of bad checks worth hundreds of thousands of dollars, and failed completely to investigate specific rules violations.

The House should reject the Ethics Committee report and order the Committee to:

- ◆ fully disclose House Bank records;
- ◆ specify House rules and laws that may have been violated;
- ◆ set an objective, reasonable standard for occasional or inadvertent abuse;

1 The investigation was conducted by a specially selected subcommittee and approved by the full membership of the House Ethics Committee, which is formally known as the Committee on Standards of Official Conduct.

2 Transcript of Ethics Committee news conference, Thursday, March 5, 1992.

3 See Heritage Foundation *Executive Memorandum* #310, "Rubbergate": Five Steps To Avoid A Whitewash," October 10, 1991. The recommended steps were: hiring an outside counsel, investigating violations of specific laws and House rules, conducting public proceedings, setting a reasonable deadline and expanding the scope of the investigation.

- ◆ establish a process to discipline Congressmen guilty of violations of House rules and other applicable laws; and,
- ◆ clarify the official status of the House Bank.

The House Bank scandal came to light in September 1991 when a General Accounting Office audit found that Congressmen had written over 8,000 bad checks between July 1989 and June 1990, and that 34 Representatives had passed bad checks worth at least \$1,000 for twelve months in a row. Soon afterward, the House passed H.Res. 236, directing the Ethics Committee to undertake an investigation of the matter. Acting Committee Chairman Matthew McHugh, a New York Democrat, joined by several other Committee members, described the Committee's findings at a new conference on Thursday, March 5, though the written report was not immediately available.

McHugh mistakenly claims the Committee was limited by H.Res. 236,⁴ which directed them to determine whether Congressmen repeatedly and routinely overdraw their accounts by a significant amount. The Committee decided that Congressmen had to overdraw their accounts by more than their monthly salary, which ranged from \$2,300 to \$6,000, in at least 20 percent of the months covered (eight months for those in office for the entire period) to be classified as routine abusers. The Committee recommended that the names and account information of the 19 current and five former Congressmen who violated these standards be publicly disclosed, but decided not to initiate formal disciplinary proceedings. Other Congressmen who wrote bad checks may ask for a letter outlining their account activity.

Some 355 current and former Congressmen passed at least one bad check on the House Bank during the three years under investigation. Nearly 200 were overdrawn by more than a month's salary at least once. Several Congressmen each wrote hundreds of bad checks, totalling hundreds of thousands of dollars, some of whom would still fall below the eight-month standard established by the Committee.⁵

The Committee's report fails to answer many of the most significant questions about the House Bank scandal, such as what Congressmen did with the hundreds of thousands of dollars in floated funds, and falls far short of giving the public the complete picture it deserves.

What Laws Were Broken?

The most disturbing feature of the Ethics report is the implication that no violation of House rules or other laws took place. Despite the mandate in H.Res. 236 to explore potential violations of House rules or other applicable standards, McHugh's summary of the report did not mention specific House rules that may have been violated, and the recommended "penalty" of disclosure rests on no specific rule, law or precedent. Earlier, McHugh had claimed that there was no evidence that any Congressman "had a criminal intent or an intent to defraud."⁶ By failing to cite specific rules and laws, the Committee implies that while the behavior involved may look bad, be-

4 House Rule X, Clause 4(e) specifies that the Ethics Committee has authority to undertake investigations on its own initiative. That authority could have been used to expand the House Bank inquiry.

5 Ethics Committee news conference, statements of Representatives Fred Grandy and Jon Kyl, March 5, 1992.

6 *New York Times*, February 26, 1992.

cause there was no specific prohibition against writing bad checks on the House Bank, Congressmen had to be particularly flagrant abusers to deserve censure.

Contrary to this claim, specific House rules and other laws were likely broken by the Congressional check-bouncers, and the Ethics Committee had enough information to justify specific charges. House Rule XLIV (Financial Disclosure), for instance, requires reporting of liabilities that exceed \$10,000 at any time during a year. The Committee admits that some Congressmen breached the \$10,000 threshold, though McHugh cites the House Counsel's questionable claim that these loans are exempt. Rule XLIV also requires reporting of income. Interest-free loans are income under IRS regulations. That income, which may have amounted to over \$1,000 annually,⁷ was not reported on financial disclosure or tax forms, two further violations. Furthermore, the size of some bad checks leads to questions about whether Congressmen may have failed to report large financial transactions, also required by House rules. Finally, fraud may well have been committed, even if checks were made good eventually. The Ethics Committee would have to examine individual cases to see whether fraud standards may apply: a step they have not yet taken.

In addition, Congressmen who took advantage of the free House float probably violated Clauses 1, 3 and 4 of another House Rule (XLIII), the "Code of Official Conduct." Clause 1 is a catch-all admonition that Members' conduct "shall reflect creditably on the House of Representatives." Even that vague standard must cover fraud and tax evasion. Clause 3 prohibits Congressmen from collecting compensation "by virtue of influence improperly exerted from his position in the Congress." Those who resisted attempts to collect on their bad checks are almost certainly guilty of abusing their office. If income from forgone interest was not "compensation," then it would fall under Clause 4 of the same rule, prohibiting gifts above \$200.

The Ethics Committee's failure to identify violations of specific rules and laws is a prelude to excusing financial misconduct. The House should order the Ethics Committee to begin disciplinary proceedings against Congressmen who had more than \$10,000 in bad checks outstanding at any one time. All Congressmen should be required to amend financial disclosure statements and tax returns to account for income from interest-free loans. Those for whom the loan value exceeded the \$200 annual gift limit should also be subject to further disciplinary proceedings. Specific punishments should depend on the circumstances surrounding the shortages. Those who used the House Bank float for personal profit should receive particularly severe penalties.

Was the House Bank "Official"?

To excuse multi-thousand-dollar bad checks as improper, but beyond the reach of the law, the claim is made that the House Bank was a Members' cooperative involving no public funds. The distinction between official and unofficial status is critical in determining what penalties may be applied. If the House Bank was an official institution, then Congressmen who abused the Bank for personal gain violated Clause 3 of the House Code of Official Conduct. Public funds were involved in the operation of the House Bank in several ways: public funds were used to balance teller shortages at the bank, and the bank's balances were kept in a U.S. Treasury account. Though the

⁷ *Congressional Quarterly Weekly Report*, February 29, 1992, p. 451.

Treasury account was called "Members' Balances with Sergeant at Arms," courts have ruled that such Treasury funds remain public.⁸

Even if the funds involved were private, the bank itself was an official House organ, virtually indistinguishable from the Members' payroll office. It was run by House officers and staffed by employees on the public payroll (at a cost of nearly \$750,000 per year). Many of the bank's operations were carried on through an official Treasury account or through a government account at Riggs National Bank. Administration of the Treasury account and use of Riggs services (reimbursed by the Treasury) represent use of official government resources. Certainly, Treasury funds were at risk in the operation of the bank: had a Member left office owing large sums, other Members would not have been expected to make up for the losses. The GAO audit noted that the lack of losses from the lax practices was a fortunate accident.⁹

In its instructions to the Ethics Committee on further proceedings the House should stipulate that the House Bank was an official institution, misuse of which constituted abuse of the office of a Congressman.

How Much Was Too Much?

The Committee draws a line between Members who floated checks up to their next month's salary (between \$2,300 and \$6,000) and those who were in arrears by a greater amount. But neither private nor public employers routinely allow such salary advances. Further, the "salary advance" argument undermines the contention that the Bank was not an official institution. In order for the floated checks to have represented a salary advance, the funds would have had to come from the Congressmen's employer, not from other Members. If the Bank was a non-official institution, then there is no reason to make a distinction based on monthly pay. In neither case is there a justification for giving Congressmen a one-month salary advance, or excusing bad checks just because they were "only" \$6,000 in the hole. While it may be appropriate to forgive occasional small abuses, a standard of \$6,000 per month is simply unacceptable. And if salary advances were acceptable, why did the threshold have to be crossed eight times to deserve punishment?

The Ethics Committee's standards are both unacceptably arbitrary and lax. The limits of \$10,000 of debt and \$200 in gifts that are specified in House rules are more appropriate thresholds for disciplinary proceedings.

Why Not Full Disclosure?

The Ethics Committee failed to hold public hearings on the charges and practices of the House Bank. Since Congressmen's names were shielded by a coding system, the Committee should have been willing to open at least some of its proceedings. Non-committee Members and the public will be given only a few days before the vote on a report which took five months to complete. The failure to hold public proceedings makes it essential that Congressmen and the public have a reasonable amount of time to digest the report.

⁸ For a more complete description of the operation of the House Bank, see "Check-Kiting at the House Bank", *Congressional Quarterly Weekly Report*, February 29, 1992.

⁹ *Ibid*, p. 451.

The Ethics Committee does not answer important questions, such as whether Congressmen used floated checks for personal gain. Further investigations are needed into the financial activities of those who passed bad checks in significant amounts. Ultimately, however, the only way to clear the reputation of the House and its Members is to reveal the names and activities of all those who overdrew their accounts. Public disclosure would obviate the need for making the most difficult judgments about which Members should be punished. The House itself should punish flagrant abusers. More questionable cases are best judged by the voters. And the voters can make an informed decision only with all the facts. The primary argument against disclosure, that banking is a private matter, simply does not apply in the case of this Congressmen-only, tax-supported perk.

What Next?

Clearly, the House must direct the Ethics Committee to do what it should have done on its own in the first place: begin individual disciplinary proceedings against Congressmen who may have violated House rules or other laws. The House should also direct the Ethics Committee to hire an outside counsel and sufficient staff to complete proceedings prior to the November elections. Concerns about favoritism will be far greater once specific Members are accused, and the work load of dozens of cases will make it impossible for the permanent Committee staff to complete work in a reasonable time.

If the Ethics Committee is unable to investigate and punish its colleagues, or if the House has lost confidence in the Committee's ability to do a credible job, records should be turned over to the Internal Revenue Service for individual determinations on tax cases and to the Justice Department for other action.

The Ethics Committee report represents a whitewash of the House Bank scandal. Rather than applying specific laws and House rules, the Ethics Committee invented vague new standards to excuse the behavior of all but the most flagrant of abusers of the House Bank. After five months of covering up, nothing short of complete disclosure of bad checks is acceptable. In addition to full disclosure, the House should set specific standards, based on the \$10,000 debt reporting threshold and the \$200 gift limit, for further individual disciplinary proceedings, supervised by an independent counsel. Failure to do so would show that the House is incapable of policing itself, in which case the President should order the IRS and Justice Department to enforce federal ethics laws as they apply to other federal employees.

Failure to support complete disclosure and appropriate disciplinary proceedings can only be interpreted as excusing massive and systemic fraud in the House of Representatives.

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