

# CREW | citizens for responsibility and ethics in washington

May 24, 2010

The Honorable Harry Reid  
Majority Leader  
United States Senate  
S-221, The Capitol  
Washington, DC 20510

The Honorable Mitch McConnell  
Minority Leader  
United States Senate  
S-230, The Capitol  
Washington, DC 20510

## VIA FAX

Re: Scheduling Vote on Elimination of Secret Holds

Dear Majority Leader Reid and Minority Leader McConnell:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that you schedule a vote on S. Res. 502, the resolution introduced by Senators Ron Wyden (D-OR) and Charles Grassley (R-IA) to eliminate secret holds. CREW also suggests that the legislation be strengthened by providing the Senate Select Committee on Ethics with jurisdiction to investigate and penalize those senators who persist in using secret holds.

As you know, the Honest Leadership and Open Government Act of 2007 (HLOGA) allegedly dealt with the issue of secret holds. Section 512 of the Act specified that an objecting senator must place his or her name and objection in both the Senate Calendar of Business and the Senate Executive Calendar in a new “Notice of Intent to Object to Proceeding” section, established by the Secretary of the Senate. CREW inspected the Senate Calendar of Business for each day since HLOGA passed in 2007 and discovered that the new procedure has only been followed twice since the creation of the law.<sup>1</sup> Despite the fact that the Senate voted overwhelmingly in favor of HLOGA (83-14), the use of secret holds continued unabated.

On December 2, 2009, CREW sent a letter to the Senate Select Committee on Ethics asking for an investigation of members who had violated the anti-secret hold provision in HLOGA.<sup>2</sup> On May 4, 2010, Majority Leader Reid echoed our call by suggesting that senators who violate the HLOGA provision may

---

<sup>1</sup> The Senate Executive Calendar does have an entry for several holds placed by one senator on May 5, 2010, but there is no corresponding entry in the Calendar of Business as called for by the law.

<sup>2</sup> Letter from CREW Executive Director Melanie Sloan to Ethics Committee Chair Barbara Boxer and Vice Chair Johnny Isakson, December 2, 2009 (attached as Exhibit 1).

The Honorable Harry Reid  
The Honorable Mitch McConnell  
May 24, 2010  
Page Two

be referred to the Ethics Committee.<sup>3</sup> Unfortunately, in response to CREW's request for an ethics inquiry, on April 9, 2010, the Ethics Committee explained that violations of Senate parliamentary procedure are "outside the limited jurisdiction of the Committee."<sup>4</sup> Given this view, whether a complaint is referred by an outside group or a senator, it appears the committee would not investigate a senator who imposed a secret hold. Further, it appears that even if S. Res. 502 were enacted, the jurisdictional issue would still prevent the committee from disciplining members who continue to use secret holds. Therefore, CREW suggests that S. Res. 502 be amended to specifically provide the Ethics Committee with jurisdiction to investigate secret holds should a senator attempt to use the procedure despite the ban.

On May 13<sup>th</sup> of this year, a bipartisan amendment to further reform the holds procedure was brought to the floor by Senators Wyden and Grassley, but was defeated by the procedural maneuvers of a single senator, Jim De Mint (R-SC). Twice more last week, Senator Wyden attempted to have the measure brought to the floor, but his efforts again were thwarted by Senator DeMint.

The Wyden-Grassley provision, first introduced as S. Res. 502 on April 27, 2010, is considerably stronger than section 512 of HLOGA. Unlike section 512, this provision would amend the standing rules of the Senate. Senators who fail to follow the new procedures would violate Senate rules and, therefore, parliamentary procedure. As a result, the parliamentarian could rule any such holds out of order and the nomination or legislation would be able to move forward. CREW strongly supports the provisions in the Wyden-Grassley measure and advocates for bringing it to the floor as an independent bill for an "up-or-down" vote.

Despite the increased attention to this issue, both Democrats and Republicans have continued to blatantly disregard the rules. Senator Claire McCaskill (D-MO) recently estimated that as many as 80 executive branch nominees are being held up by secret holds.<sup>5</sup> This is in addition to the numerous bills CREW discovered being held up anonymously, as detailed in our December 2<sup>nd</sup> letter, and potentially countless other bills as well. The secret hold is so pervasive that senators sometimes forget they even placed a hold.<sup>6</sup>

---

<sup>3</sup> See <http://thehill.com/blogs/blog-briefing-room/news/95971-reid-hints-at-referring-anonymous-holds-to-ethics-committee> .

<sup>4</sup> Letter from Ethics Committee Chief Counsel and Staff Director John C. Sassman to Melanie Sloan, April 9, 2010 (attached as Exhibit 2).

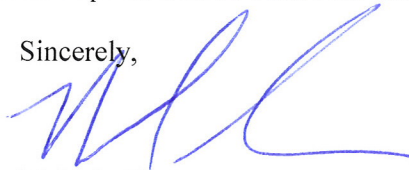
<sup>5</sup> Alexander Bolton, McCaskill Presses GOP to Reveal Holds, *The Hill*, April 20, 2010.

<sup>6</sup> J. Taylor Rushing, At Least Three Senators Who Oppose Secret Holds Have Holds of Their Own, *The Hill*, May 17, 2010.

The Honorable Harry Reid  
The Honorable Mitch McConnell  
May 24, 2010  
Page Three

The use of secret holds is the type of activity that convinces so many Americans that Congress is broken. While senators may be entitled to hold nominees and legislation, in a Democratic society there is no place for them to be able to engage in such conduct in secret. Voters must be able to hold senators accountable for not only their legislative records, but for the legislation and nominations they kill or delay. S. Res. 502 is a sensible approach to dealing with a long standing problem. At least sixty-three senators agree, having signed a letter pledging to personally stop using secret holds.<sup>7</sup> As positive a step as this pledge may be, it is not binding. Only legislative action will serve to put a stop to secret holds once and for all. CREW urges you to schedule a vote on this important issue before the August recess.

Sincerely,



Melanie Sloan  
Executive Director

Encls.

---

<sup>7</sup>See [http://mccaskill.senate.gov/?p=press\\_release&id=894](http://mccaskill.senate.gov/?p=press_release&id=894).

**EXHIBIT 1**

# CREW | citizens for responsibility and ethics in washington

December 2, 2009

The Honorable Barbara Boxer, Chair  
The Honorable Johnny Isakson, Vice Chair  
Select Committee on Ethics  
United States Senate  
Room 220 Senate Hart Office Building  
Washington, D.C. 20530

**BY FAX: 224-7416**

Re: Request for Investigation of Continued Use of Secret Holds

Dear Chairwoman Boxer and Vice Chairman Isakson:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests that the Senate Select Committee on Ethics investigate senators’ failure to abide by the provision in the Honest Leadership and Open Government Act of 2007 prohibiting the use of secret holds. CREW further requests that the committee discipline senators who have violated the ban and issue guidance on this matter for senators’ future conduct.

## Background

In September 2007, Congress passed the Honest Leadership and Open Government Act of 2007 (HLOGA).<sup>1</sup> The bill included a requirement that senators reveal when they are “intending to object to a proceeding” – a parliamentary maneuver more commonly known as a “hold,” which is used to slow down or stop legislation. A senator may use a hold for a variety of reasons. In addition to using this tool to block votes they don’t want to make or indefinitely stall legislation they oppose, senators also may place a hold as a bargaining tactic to extract concessions from leadership or the opposition. Most benignly, a senator may use a hold to buy more time to study the effects of a piece of legislation.

The hold has been used in the Senate since the mid-19<sup>th</sup> century.<sup>2</sup> It became official in 1914, but only rose in prominence in the 1960s.<sup>3</sup> There have been numerous efforts to stem the use of holds over time,<sup>4</sup> but enactment of section 512 of HLOGA is the first time the Senate has agreed to reform the “secret” aspect of the holds process.<sup>5</sup>

---

<sup>1</sup> <http://www.govtrack.us/congress/bill.xpd?bill=s110-1>.

<sup>2</sup> Daniel Engber, The Senate’s Darkest Secret, *Slate.com*, September 1, 2006.

<sup>3</sup> *Id.*

<sup>4</sup> Congressional Research Service, Proposals to Reform “Holds” in the Senate, RL31685, December 20, 2007.

<sup>5</sup> Congressional Research Service, Senate Policy on “Holds”: Action in the 110<sup>th</sup> Congress, RL34255, March 14, 2008.

Honorable Barbara Boxer  
Honorable Johnny Isakson  
December 2, 2009  
Page Two

Section 512 of HLOGA works as follows: (1) a colleague objects to a unanimous consent request on behalf of an unnamed senator; (2) that senator must then submit a “notice of intent to object” letter to leadership explaining his objection; (3) within six days the senator must place the notice, with his name, on the appropriate Senate calendar, under a newly created section.<sup>6</sup> The law did not create, however, a new Senate rule, a standing order of the Senate, or provide for any enforcement mechanisms.<sup>7</sup> Instead, it relies on self-compliance by members.<sup>8</sup> In addition, the law has two major loopholes.<sup>9</sup> First, if a senator has publicly admitted to the hold, she need not place her name on the calendar, based on the logic that the hold is not “secret.”<sup>10</sup> Second, if a senator tells her party leader she intends to block floor consideration of a measure and the majority leader never calls the matter up, the objecting senator can remain anonymous.<sup>11</sup>

There are also ways for senators to avoid this new procedure entirely. There are, for example, “functional holds.”<sup>12</sup> If the majority leader is attempting to secure unanimous consent on a bill, staffers may ask for, and be granted, time to check with their senators before deciding not to object on their senators’ behalf.<sup>13</sup> A hold also can be placed informally. A senator could whisper his objections to a colleague effectively warning of a hold, or pass a note to the majority leader who might decide to not bring up a measure, effectively holding it.<sup>14</sup> One scholar noted, “senators are always going to find a way to signal their concerns to leadership.”<sup>15</sup> These and other work-arounds, along with the fact that the section 512 process starts only after another senator formally objects on behalf of the “secret holder” suggest the Senate was not serious about limiting secret holds.

### **Holds in Practice**

To determine how often this new procedure has been used, CREW undertook a day-by-day review of the Senate Calendar of Business.<sup>16</sup> CREW only found two bills that had “a notice of intent to object” placed in the calendar since HLOGA was signed into law:

- On October 2, 2007, a “notice of intent to object to proceeding” appeared regarding S. 223, attributed to Sen. Dianne Feinstein (D-CA). That bill would have required senators

---

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Congressional Research Service, Senate Policy on “Holds”: Action in the 110<sup>th</sup> Congress, RL34255, March 14, 2008.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Senate Process and Procedures, Section 5, chapter 1 of 4, Committee on Rules and Legislative Process Program, January 15, 2008 (hereinafter “Senate Process and Procedures”).

<sup>13</sup> Brian Friel, Wrestling With Holds, *National Journal*, January 13, 2007.

<sup>14</sup> Senate Process and Procedures; Friel, *National Journal*, Jan. 13, 2007.

<sup>15</sup> Friel, *National Journal*, Jan. 13, 2007.

<sup>16</sup> [http://www.gpoaccess.gov/calendars/senate/2009/browse\\_sc.html](http://www.gpoaccess.gov/calendars/senate/2009/browse_sc.html).

Honorable Barbara Boxer  
Honorable Johnny Isakson  
December 2, 2009  
Page Three

to file campaign finance reports electronically.<sup>17</sup> Sen. Feinstein, then-chair of the Senate Rules Committee where this bill was stalled, appears to have placed the hold after Sen. John Ensign (R-NV) threatened to offer a poison pill amendment to the bill.<sup>18</sup>

- On September 27, 2008, “notice of intent to object to proceeding,” attributed to Sen. Russ Feingold (D-WI) appeared regarding S. Res. 626. This resolution was intended to express “the sense of the Senate that the Supreme Court of the United States erroneously decided *Kennedy v. Louisiana*,”<sup>19</sup> a case that ruled using the death penalty in cases of child rape was unconstitutional. Sen. Feingold has long been an opponent of the death penalty.<sup>20</sup> He was joined on the hold two days later by Sen. John Kerry (D-MA), also a death penalty opponent.<sup>21</sup>

CREW has identified several bills and nominations that appeared to have had secret holds placed on them, but for which no objections were placed in the Senate Calendar of Business and there does not appear to have been a public statement from the “holder.”

### Nominations

- Neil Barofsky, President Bush’s nominee for Special Inspector General for the Troubled Asset Relief Program (SIGTARP), was blocked from a floor vote by “at least one Republican member” from November 21, 2008<sup>22</sup> until December 4, 2008.<sup>23</sup>
- Secretary of Labor Hilda Solis’s Senate confirmation was held up by a variety of tactics including, for at least “several days,” by a hold placed by an anonymous Republican senator.<sup>24</sup>
- John Holdren, Director of the White House Office of Science and Technology, and Jane Lubchenco, Administrator of the National Oceanic and Atmospheric Administration, were blocked by anonymous holds in March 2009. There was speculation the holds

---

<sup>17</sup> Sen. Feinstein’s Effort to Pass Senate Campaign Electronic Filing Bill Blocked for Third Time, *US Fed News*, September 24, 2007.

<sup>18</sup> Steve Tetreault, Bid to Reveal Ethics Critics’ Funding Draws Opponents, *Las Vegas Review-Journal*, September 28, 2007.

<sup>19</sup> <http://www.govtrack.us/congress/bill.xpd?bill=sr110-626>.

<sup>20</sup> [http://feingold.senate.gov/issues\\_death\\_penalty.html](http://feingold.senate.gov/issues_death_penalty.html).

<sup>21</sup> Sen. Kerry was “a longtime opponent of capital punishment” but “now favors the death penalty for terrorists.” Joel Roberts, Kerry’s Top Ten Flip Flops, *CBS News*, September 29, 2004.

<sup>22</sup> Press Release, Office of Sen. Chris Dodd, Dodd Statement on Nomination of Special Inspector General Neil Barofsky, November 21, 2008.

<sup>23</sup> [http://www.politico.com/blogs/thecrypt/1208/Hold\\_on\\_TARP\\_watchdog\\_lfited\\_Schumer\\_says.html](http://www.politico.com/blogs/thecrypt/1208/Hold_on_TARP_watchdog_lfited_Schumer_says.html).

<sup>24</sup> Hilda! Hilda! Hilda!, *New York Times – The Board Blog*, January 28, 2009.

Honorable Barbara Boxer  
Honorable Johnny Isakson  
December 2, 2009  
Page Four

were placed by Sen. Robert Menendez (D-NJ) as leverage with the administration over Cuba policy, but his office refused to comment.<sup>25</sup>

- Once Sen. Menendez's alleged holds were released, the nominees were blocked by "multiple anonymous objections," one of which was believed to have been placed by Sen. David Vitter (R-LA). The holds were eventually cleared, but those initiating the holds remained anonymous.<sup>26</sup>
- U.S. Census Bureau Director Robert Groves had not received a confirmation vote 40 days after passing out of committee as a result of an anonymous hold.<sup>27</sup>
- On October 16, 2009, the *Washington Post* cited anonymous holds as a major reason why some of President Obama's judicial nominees have not been confirmed.<sup>28</sup>

#### **Bills**

- On September 26, 2007, 12 days after the passage of HLOGA, Sen. Ensign revealed he was responsible for a hold on a bill to require senators to file campaign finance reports electronically.<sup>29</sup> In October, Sen. Feinstein placed a hold on the same bill in the calendar when Sen. Ensign changed tactics and proposed a poison pill amendment.<sup>30</sup>
- The Presidential Records Act Amendments of 2007, a transparency bill with bipartisan support, was held in late 2007. After passage of HLOGA, Sen. Jim Bunning (R-KY) took public credit for the hold, which had been anonymous.<sup>31</sup> In December of that same year, Sen. Bunning lifted his hold only to have it replaced by an, at the time, unidentified Republican senator.<sup>32</sup> In January 2008, it was reported that Sen. Jeff Sessions (R-AL) was the senator behind the hold.<sup>33</sup> This bill passed in the House in January 2009, but has not moved in the Senate, likely because it is still held.

---

<sup>25</sup> Lesley Clark, Cuba Policy Provision Could Stall Obama Appointments, *Miami Herald*, March 3, 2009.

<sup>26</sup> <http://tpmdc.talkingpointsmemo.com/2009/03/the-mystery-of-the-science-holds-whys-vitter-so-mum.php?ref=fp2>

<sup>27</sup> Ed Brayton, Census Nominee Has Anonymous Hold Preventing Confirmation, *Michigan Messenger*, June 24, 2009.

<sup>28</sup> Michael A. Fletcher, Obama Criticized as Too Cautious, Slow on Judicial Posts, *Washington Post*, October 16, 2009.

<sup>29</sup> Manu Raju, Ensign Scrambles to Explain Objections to Disclosure Bill, September 26, 2007.

<sup>30</sup> Tetreault, *Las Vegas Review-Journal*, Sept. 28, 2007.

<sup>31</sup> <http://blog.sunlightfoundation.com/2007/09/27/presidential-records-in-the-dark/>;  
<http://blog.sunlightfoundation.com/2008/01/25/government-secrets/#more-4386>.

<sup>32</sup> Todd J. Gillman, Records Bill Still Blocked, *Dallas Morning News*, December 22, 2007.

<sup>33</sup> <http://blog.sunlightfoundation.com/2008/01/25/government-secrets/#more-4386>;  
<http://blog.sunlightfoundation.com/taxonomy/term/Presidential-Records-Act/>.

Honorable Barbara Boxer  
Honorable Johnny Isakson  
December 2, 2009  
Page Five

- In February 2008, S. 1693, a bill to require the use of electronic health records, was held up by two anonymous holds. One allegedly was placed by Sen. Tom Coburn (R-OK) – though at the time his office refused public comment -- and the other remains unknown.<sup>34</sup>
- A US-India nuclear agreement was held up for a month after it passed out of committee, partly because of at least one anonymous hold.<sup>35</sup>
- In June 2009, when Sen. Amy Klobuchar (D-MN) and 43 co-sponsors tried to pass a bill condemning the use of violence for political ends in the wake of Dr. George Tiller's murder, a senator used an anonymous hold to block what could have been an uncomfortable abortion-related vote.<sup>36</sup>
- On November 3, 2009, veterans groups tried to force the release of a secret hold on a veterans health bill (S. 1963). The groups identified Sen. Coburn as having placed the hold, but the senator's office did not publically confirm that fact.<sup>37</sup>

These are just a few of the bills, nominations or resolutions blocked by anonymous holds since the passage of HLOGA, but there are likely others that have not been reported upon. A bill might not have garnered sufficient attention from the media to begin to flush out the senator placing the hold.

### Conclusion

The Senate Ethics Manual provides that “[c]ertain conduct has been deemed by the Senate in prior cases to be unethical and improper even though such conduct may not necessarily have violated any written law, or Senate rule or regulation. Such conduct has been characterized as “improper conduct which may reflect upon the Senate.”<sup>38</sup> This rule is intended to protect the integrity and reputation of the Senate as a whole.<sup>39</sup> The Ethics Manual explains that “improper conduct” is given meaning by considering “generally accepted standards of conduct, the letter

---

<sup>34</sup> Stephen Langel, Gregg: Senate Close to Passing Health IT Bill, *CongressNow*, February 14, 2008.

<sup>35</sup> David R. Sands, Senate Poised For Debate on Nuclear Pact, *Washington Times*, October 1, 2008.

<sup>36</sup> Andy Birkey, Klobuchar Bill Condemning Tiller Murder Faces GOP Opposition, *Minnesota Independent*, June 22, 2009.

<sup>37</sup> Rick Maze, Coburn Named as Senator Holding Up Vets Bill, *Marine Corps Times*, November 3, 2009.

<sup>38</sup> *Improper Conduct Reflecting Upon the Senate and General Principles of Public Service*, Senate Ethics Manual, Appendix E, p. 432 (108<sup>th</sup> Cong. 2003 ed.).

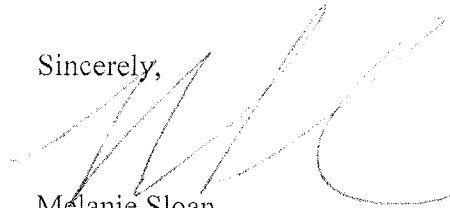
<sup>39</sup> *Id.*

Honorable Barbara Boxer  
Honorable Johnny Isakson  
December 2, 2009  
Page Six

and spirit of laws and Rules . . ."<sup>40</sup> Notably, the Senate may discipline a member for any misconduct, including conduct or activity that does not relate to official duties when that conduct unfavorably reflects upon the Senate as a whole.<sup>41</sup>

HLOGA was designed to promote ethics and transparency, yet from nearly the moment of enactment, the limitation of the use of secret holds has been disregarded by senators of both parties. Having adopted this limitation, however, the Senate ought to be bound by it. Failing to abide by the provision -- particularly in light of the fact that it was passed as part of an ethics overhaul -- does not reflect creditably on the Senate. Therefore, the Senate Select Committee on Ethics should investigate whether senators have violated section 512 of HLOGA, and if so discipline them for their conduct. The committee also should offer senators guidance as to when the procedures outlined by section 512 must be followed. If, however, the committee finds that senators are never required to comply with the hold notification procedures adopted by the Senate as part of HLOGA, the committee should say so, revealing that the Senate's enactment of this measure was nothing more than a public relations stunt.

Sincerely,

A handwritten signature in black ink, appearing to read 'MS', is written over a light blue horizontal line.

Melanie Sloan  
Executive Director

---

<sup>40</sup> *Id.* at 433; *see also* fn. 10, citing a 1964 investigation into the activities of Bobby Baker, then-Secretary to the Majority of the Senate, in which the Committee on Rules and Administration issued a report stating, "It is possible for anyone to follow the 'letter of the law' and avoid being indicted for a criminal act, but in the case of employees of the Senate, they are expected, and rightly so, to follow not only the 'letter' but also the 'spirit' of the law." S. Rep. No. 1175, 88<sup>th</sup> Cong., 2d Sess. 5 (1964).

<sup>41</sup> Senate Ethics Manual, p. 13 (*citing* S. Rep. 2508, 83<sup>rd</sup> Cong., 2d Sess. 20, 22 (1954)).

**EXHIBIT 2**

## United States Senate

SELECT COMMITTEE ON ETHICS  
HART SENATE OFFICE BUILDING, ROOM 220  
SECOND AND CONSTITUTION AVENUE, NE  
WASHINGTON, DC 20510-6425

April 9, 2010

Ms. Melanie Sloan  
Executive Director  
Citizens for Responsibility and Ethics in Washington  
1400 Eye Street, N.W., Suite 450  
Washington, DC 20005

Dear Ms. Sloan:

The Committee is in receipt of your correspondence dated December 2, 2009 requesting an investigation of certain Members' failure to abide by section 512 of the Honest Leadership and Open Government Act of 2007 ("HLOGA"), prohibiting the use of "secret holds."

Senate Resolution 338, section 2(a)(1), which sets forth the jurisdiction of the Select Committee on Ethics, vests the Committee with the authority to –

receive complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of the rules and regulations of the Senate relating to the conduct of individuals in the performance of their duties as Members of the Senate or as officers or employees of the Senate, and to make appropriate findings of fact and conclusions with respect thereto . . . .

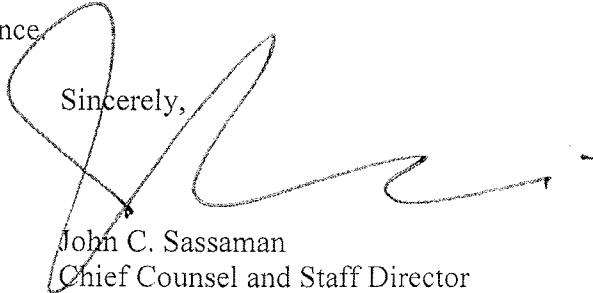
You acknowledge in your correspondence that section 512 of HLOGA "did not create . . . a new Senate rule, a standing order of the Senate, or provide for any enforcement mechanisms." Furthermore, it appears that section 512 provides no role for the Committee in enforcing the measure. Instead, as described on p. 3 of the *Congressional Research Service* report cited at length in your correspondence, it appears that section 512 was intended as a "directive" to Senate leadership, and management of the Senate calendar is explicitly delegated to the Secretary of the Senate. Therefore, investigation of the implementation of section 512 does not appear to be within the limited jurisdiction of the Committee.

You contend that despite the absence of any Senate rule or regulation, the Committee should find that violations of the section constitute "improper conduct which may reflect upon the Senate." We are unaware of any precedent whereby the Committee has investigated, or recommended "discipline," based on an alleged violation of a Senate procedural rule, let alone a mere directive. The argument that it is within the Committee's jurisdiction to investigate, remedy, and discipline violations of Senate parliamentary procedure does not appear to have been based upon any reading of the Committee's organic jurisdiction or Committee precedent. Moreover, a finding that a violation of section 512 constitutes "improper conduct reflecting upon

the Senate” could effectively turn the Committee into a policing agency for alleged departures from Senate parliamentary procedure, a matter which is outside the limited jurisdiction of the Committee. Thus, Committee inquiry into the matter you have presented does not appear to be merited.

Thank you for your correspondence.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Sassaman". The signature is fluid and cursive, with a large initial "J" and "C".

John C. Sassaman  
Chief Counsel and Staff Director