

The Office of Congressional Discipline: Reforming Congressional Misconduct Investigations by Bringing Investigations In-House

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INTRODUCTION

Congressional misconduct covers a wide variety of activities with varying degrees of legality. On one end is the minor and perfectly legal misconduct of violating the dress code of the chamber. On the other extreme lies insider trading, sexual harassment of staff, and accepting bribes. Currently, Congress rarely handles its own affairs when falling on the clearly legal end of the spectrum. In instances of potential criminal misconduct, the branch nearly always defers to the Department of Justice and state prosecutors.¹ However, this presents a series of problems that oftentimes shields members of Congress from accountability for misconduct. The majority of the American public appears to believe that most members of Congress are corrupt.² This diminishes Congress's standing relative to the other branches by making them appear less legitimate. Members of Congress are protected by the Speech and Debate Clause, which has been interpreted broadly by the Supreme Court to protect a wide variety of conduct and may soon be further expanded by the Court.³ Beyond just its formal restrictions for questioning "legislative acts or the motivation for actual performance of

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1. JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS, 255-57 (2017).

2. See Andrew Dugan, *Majority of Americans See Congress as Out of Touch, Corrupt*, GALLUP <https://news.gallup.com/poll/185918/majority-americans-congress-touch-corrupt.aspx> [<https://perma.cc/SN6N-XK6E>] (Last Visited Oct. 28, 2022). While the data is from 2015, polling on opinions about congressional corruption is scarce. However, recent polling on government corruption more broadly demonstrates an even more extreme agreement that the government is corrupt. See, e.g., Univ. Of Chi. Inst. Of Pol., *Our Precarious Democracy: Extreme Polarization and Alienation in Our Politics*, UNIV. OF CHI. INST. OF POL. <https://uchicagopolitics.opalstacked.com/uploads/homepage/Polarization-Poll.pdf> [<https://perma.cc/PN23-B4F9>] (Last Visited Oct. 28, 2022); *Americans more likely than others to say most politicians are corrupt*, PEW RESEARCH CENTER <https://www.pewresearch.org/global/2021/03/31/many-in-us-western-europe-say-their-political-system-needs-major-reform/> [<https://perma.cc/DKM4-JM7L>] (Last Visited Oct. 28, 2022). This broad agreement implies that congress is viewed as either more corrupt now than in 2015, or at similar levels to 2015.

3. J. Thomas granted a stay on a speech and debate clause claim from Senator Graham on his involvement in efforts to overturn the election results in Georgia. See Kyle Cheney et. al., *Fulton prosecutors to Supreme Court: Don't let Lindsey Graham get out of testifying*, POLITICO (Oct. 27 2022) <https://www.politico.com/news/2022/10/27/fulton-prosecutors-supreme-court-graham-00063875> [<https://perma.cc/8A7U-T35Y>].

legislative acts,”⁴ the possibility of violating the Speech and Debate Clause makes prosecutions of members much more difficult than they would be otherwise.⁵

As a result, a system for punishing misconduct that is unified entirely within Congress would be preferable. To make this a reality, such a system would require significant changes from current congressional standards. While both chambers do have ethics committees that ostensibly look into allegations of misconduct,⁶ these committees are blatantly partisan, cannot take outside referrals, and are wrought with incentives to be as ineffective and light on punishment as possible.⁷ Despite the House of Representatives’ recent ethics enforcement successes with the creation of the House Office of Congressional Ethics (OCE),⁸ the office has several key deficiencies. It lacks the ability to subpoena records and testimony from members who are under investigation. Enforcement decisions are still left up to the House Ethics Committee, with the OCE merely providing recommendations.⁹

This Note argues for a quasi-independent agency with many key investigatory and punishment powers instead of an advisory office. This Office of Congressional Investigations and Discipline (OCID) would supplant many areas of Federal Criminal and Civil law for members of Congress. OCID would have three key features (independent investigatory power, independent punishment power, and jurisdiction stripping for certain categories of claims) with myriad of benefits that will be discussed in more detail below. Keeping the OCID within Congress gives the agency more flexibility, as it would not be subject to any potential overruling from the judicial branch and would not have to deal with interbranch conflicts with the executive arising from partisan or constitutional disagreements. This flexibility allows the agency to be nimbler, responding to concerns that arise with much less rigidity than the other two branches would be capable of. Finally, an independent agency that Congress has authority over creates political costs for protecting other members of Congress from misconduct that do not exist under the current system. Along the way, this Note will discuss the intersection between these issues and Legal Ethics. Nearly a third of all members of Congress have J.D.s, and the vast

4. *United States v. Brewster*, 408 U.S. 501, 509 (1972) (Quoting *United States v. Johnson*, 383 U.S. 169, 183 (1966)).

5. See generally, TODD GARVEY, *UNDERSTANDING THE SPEECH AND DEBATE CLAUSE* (Dec. 1, 2017).

6. SEN. SEL. COMM. ON ETHICS, *About Us*, <https://www.ethics.senate.gov/public/index.cfm/aboutus#:~:text=The%20Committee%20has%20three%20main,Members%2C%20officers%2C%20or%20employees.> [https://perma.cc/4WFL-QF25] (Last Accessed Feb. 22, 2023); HOUSE COMM. ON ETHICS, *About*, <https://ethics.house.gov/about#:~:text=The%20Committee%20is%20charged%20with,senior%20staff%2C%20and%20shared%20staff.> [https://perma.cc/9QVQ-CPHW] (Last Accessed Feb. 22, 2023).

7. Meredith McGehee and William Gray, *The Ethics Blind Spot*, <https://issueone.org/articles/the-ethics-blind-spot-how-the-house-and-senate-ethics-committees-fail-to-foster-a-culture-of-high-ethical-standards-in-congress/> [https://perma.cc/7MSZ-U3FF] (Last Accessed Apr. 26, 2023).

8. See generally, Craig Holman, *The Case for Independent Ethics Agencies*, PUBLIC CITIZEN, Oct. 2014.

9. U.S. House of Reps., *FAQ*, OFFICE OF CONG. ETHICS <https://ethics.house.gov/faqs> [https://perma.cc/2H8W-2GDY] (Last Visited Feb. 22, 2023).

majority of those were practicing attorneys before becoming members of Congress.¹⁰ As a result, many of these members are bound by the Rules of Professional Conduct.

I. MISCONDUCT IN CONGRESS

A. TYPES OF MISCONDUCT

When discussing misconduct by members of Congress, we are typically discussing two categories of violations. First, there are breaches of each chamber's ethics rules (i.e., The Senate and House Codes of Official Conduct.¹¹) These rules typically cover behaviors relating to conflicts of interests, gift-giving, separation of their Official Office and their political campaigns, and general decorum within their chamber.¹² While there is overlap, these rules generally fall outside of the U.S. Criminal and Civil Codes.¹³ The second category is vaguer and covers conduct that falls squarely within ethics and legal codes but nonetheless creates a serious appearance of misconduct. For the purposes of this paper, this conduct will be referred to as *ethically dubious conduct*. To both highlight a real world example and pin down some specific characteristics of ethically dubious conduct, consider the common practice of members of Congress writing books.¹⁴ The FEC has long since ruled that candidates for office can use their campaigns to promote or purchase their own works so long as the candidate does not receive any commissions from the sale of the books.¹⁵ As for the ethics rules, it is hard to find any specific provisions that would be violated. Both the House and Senate rules put an outside income limit on certain income, but both explicitly exempt royalties from copyrighted works and make advance payments subject to outside earned income limits.¹⁶

While likely not a violation of ethics rules nor criminal law, this conduct is certainly ethically dubious and is likely to create a serious impression of misconduct

10. A.B.A., *Members of the 117th Congress with law degrees*, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/117-congress-jds.pdf [<https://perma.cc/RAF9-ZJ6D>].

11. U.S. SENATE SELECT COMM. ON ETHICS, *The Senate Code of Official Conduct* (2021); U.S. HOUSE OF REPS. COMM. ON STANDARDS OF OFFICIAL CONDUCT, *House Ethics Manual* (2008).

12. *See generally*, U.S. HOUSE OF REPS. COMM. ON STANDARDS OF OFFICIAL CONDUCT, *House Ethics Manual* (2008).

13. *See generally id.*; U.S. SENATE SELECT COMM. ON ETHICS, *The Senate Code of Official Conduct* (2021).

14. *See* Vanessa Gu, *Ted Cruz's campaign purchased \$153,000 in books from an online bookseller in the 2 months after his latest book came out*, BUSINESS INSIDER (Aug. 27 2021) <https://www.businessinsider.com/ted-cruz-may-have-spent-campaign-funds-buying-own-book-2021-8> [<https://perma.cc/NR4K-PXG8>]; J. Clara Chan, *GOP Groups Spent \$1 Million Bulk-Buying Candidates' Books – and Helping Make Them Bestsellers*, THE WRAP (Apr. 16 2021) <https://www.thewrap.com/gop-groups-spent-1-million-bulk-buying-candidates-books-and-helping-make-them-bestsellers/> [<https://perma.cc/P2Q9-7ZGD>].

15. *See* Fed. Elect. Comm., *Advisory Opinion 2006-18: committee may promote candidate's book sales* (2006).

16. *See* House Ethics Manual, *Requirement for Committee Approval of Publishing Contracts, and Prohibition Against Receipt of Any Advance Payment of Royalties*, 226-28; Senate Ethics Manual *What is Outside Earned Income?*, 97.

due to avenues available for corruption. First and most obviously, politically aligned organizations or individuals can simply mass purchase copies of a Senator or Representative's book, allowing them to collect royalties from outside organizations. Candidates can bulk purchase their own books using their campaigns as an intermediary. While there are theoretically checks on this sort of conduct, several recent examples show that House and Senate Ethics Committees are unwilling to punish it.¹⁷ As a result, this conduct takes on the form of legalized bribery that is tolerated by the Ethics Committees of each chamber.

B. HOW COMMON IS MISCONDUCT?

Over the last few decades, Congress has been viewed as increasingly corrupt by the public.¹⁸ While there are certainly many contributing factors, ethically dubious conduct that is highly visible drives some of this perception.¹⁹ Recently 97 members of Congress were widely reported to have made stock trades that intersected with the work they do on committees.²⁰ This was only exacerbated by similar reporting around stock trades early on in the COVID-19 pandemic.²¹ One analysis by Business Insider found 13 Congresspeople (or senior staff) who committed multiple or severe violations of the Stop Trading on Congressional Knowledge Act, or STOCK Act of 2012, and an additional 116 who committed a few STOCK Act violations or had conduct deserving of additional scrutiny.²² While it is possible that many of these "borderline" violations lack merit, without a serious investigation into the conduct, the public is primed to view these actions as corrupt and Congress as a whole is painted as negligent in dealing with the corrupt conduct of its members.²³

The available hard data, while scarce, paints a picture of commonplace misconduct. Since 1980, 1.2 members of Congress have been convicted of a criminal charge each year.²⁴ Outside of just convictions, investigations, resignations, and

17. Gu, *supra* note 14.

18. Dugan, *supra* note 2.

19. See GALLUP, *Congress and the Public*, Ques. 3 <https://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/5Y8F-9WUT>] (showing that trust and confidence in Congress is reduced following major public scandals).

20. Kate Kelly et. al., *Stock Trades Reported by Nearly a Fifth of Congress Show Possible Conflicts of Interest*, NEW YORK TIMES (Sept. 15, 2022).

21. Rebecca Ballhaus et. al., *As Covid Hit, Washington Officials Traded Stocks With Exquisite Timing*, THE WALL ST. J. (Oct. 19 2022).

22. Darren Samuelsohn et. al., *Personal Finances of Congressmembers: Uncovering Conflicts of Interest*, BUSINESS INSIDER (Oct. 2022) <https://www.businessinsider.com/financial-conflicts-congress-members-rated-2021-12> [<https://perma.cc/N7YB-XU2R>].

23. For one exploration of how this corruption effects public perception, see Yuliya V. Tverdova, *See No Evil: Heterogeneity in Public Perceptions of Corruption*, 44 CAN. J. OF POLI. SCI. 1 (2011).

24. WIKIPEDIA, *List of American federal politicians convicted of crimes* (Accessed Apr. 11, 2023) https://en.wikipedia.org/wiki/List_of_American_federal_politicians_convicted_of_crimes [<https://perma.cc/VC48-WNF8>] (Each individual was verified by author.).

reprimands by Congress have steadily increased in recent decades.²⁵ While this may at first suggest an increase in enforcement, nearly all repercussions that were not resignations (which typically result in no additional punishment) or criminal convictions were punished by small fines.²⁶ Some of their actions, such as Democrats being arrested at protests in the fallout of *Dobbs*²⁷ and Republicans defying mask mandates,²⁸ is undoubtedly conduct where small fines are appropriate. However, the small amount of data, combined with the relatively small number of investigations that led to any punishment at all, demonstrates one of the more prominent ways in which current Congressional misconduct policies are lacking: the total absence of transparency.

The House and Senate Ethics Committees are extremely scant with information they disclose. While the House Office of Congressional Ethics does require reporting of its referrals to the House Ethics Committee, the details and evidentiary findings of their investigations remain hidden.²⁹ Once referrals have been made, the process is shrouded in darkness as the Ethics Committee in both chambers has no responsibility to disclose anything related to the investigation.³⁰ This actually serves to push against the goal of transparency, since the lack of action or published updates following these public referrals may be perceived as inaction. Regardless, the OCE has increased the number of investigations,³¹ which would suggest that, at minimum, conduct worthy of investigation is being undercounted in the Senate.

There exists some pushback on the idea that Congress is especially corrupt.³² First, some papers have pointed to state-level legislative bodies to argue that, since bribery and other forms of financial corruption occur much more often there, Congress is relatively less corrupt.³³ While a worthwhile comparison, there are two important ways that using state legislative corruption as a comparative tool falls short. First, public awareness of local corruption is very different from federal corruption. Simply put, the public increasingly gets its news from national

25. GovTRACK, *Legislator Misconduct Database* (Accessed Dec. 14, 2022) <https://www.govtrack.us/misconduct> [<https://perma.cc/GCQ8-7QXB>].

26. *Id.*

27. Sean Philip Cotter, *Ayanna Pressley, Katherine Clark arrested at Supreme Court abortion protest, they say*, BOSTON HERALD (July 19, 2022).

28. Annie Grayer, Manu Raju, Kristin Wilson & Paul LeBlanc, *House GOP lawmakers fined after defying mask mandate*, CNN (May 18, 2021).

29. Office of Cong. Ethics, *Guide to the Office of Congressional Ethics* https://oce.house.gov/sites/congressionalethics.house.gov/files/documents/Citizens%20Guide%20to%20the%20Office%20of%20Congressional%20Ethics%20Draft%20-%20UPDATED_January%202022_FINAL_0.pdf [<https://perma.cc/2LHY-C5MW>] (Last Accessed Apr. 26, 2023).

30. *Id.* at 6-7.

31. Holman, *supra* note 8.

32. Richard L. Hasen, *Why isn't Congress More Corrupt?: A Preliminary Inquiry*, 84 *FORDHAM L. REV.* 429 (2018).

33. *Id.*

media or internet sources that are more interested in national news stories.³⁴ This makes the general population much more aware of federal corruption.³⁵

C. STRUCTURAL, POLARIZATION, AND PARTISAN EFFECTS

Structural issues, such as gerrymandering and decreasing competitiveness in House and Senate seats have major impacts on congressional misconduct.³⁶ These effects are exacerbated by increasing partisanship and polarization. When attempting to design a misconduct-punishing institution, awareness of how these factors play into the largest incentive for a member of Congress (reelection) can assist in creating an institution that works effectively. In current practice, partisanship in the enforcement of disciplinary actions within Congress, especially when combined with the other factors mentioned, makes it much less likely for members to be held accountable for their violations, which incentivizes misconduct and decreases public trust in the enforcement decisions themselves.³⁷

1. STRUCTURAL EFFECTS

Academic research into corruption and competitiveness in democracies has shown that higher levels of corruption are associated with low levels of competitiveness.³⁸ In the present U.S. political system, races are becoming less competitive, and therefore more polarized.³⁹ This is especially true in the House, which saw a 34% decrease in marginal elections (elections where the difference in vote share between the two parties was 10 points or less) from the periods of 1900 to 1948 and 1976 to 2000.⁴⁰ As a result, punishing corrupt or scandalous members through the electoral process has become more difficult.⁴¹ Most research suggests that incumbents who face serious scandals suffer a loss in vote share of between 5-10%.⁴² As

34. Linley Sanders, *Trust in Media 2022: Where Americans get their news and who they trust for information*, YOU GOV AMERICA (Apr. 6, 2022) <https://today.yougov.com/topics/politics/articles-reports/2022/04/05/trust-media-2022-where-americans-get-news-poll> [<https://perma.cc/2CQK-4B3N>].

35. For an explanation into the source of this phenomena, see Dan Hopkins, *All Politics is National Because All Media is National*, FIVETHIRTYEIGHT <https://fivethirtyeight.com/features/all-politics-is-national-because-all-media-is-national/> [<https://perma.cc/Y6VD-EF5L>] (Last Accessed Apr. 26, 2023).

36. The main check on corrupt officials in Congress is elections. Theoretically, members who engage in corrupt conduct will be punished by voters. However, as will be discussed below, increased polarization and decreased competitiveness make this check less powerful.

37. CHAFETZ, *Supra* note 1 at 241.

38. See generally PETRA SCHLEITER AND ALISA M. VOZNAYA, *Party System Competitiveness and Corruption*, 20 PARTY POL. 675, 675-686 (2014).

39. See James E. Campbell & Steve J. Jurek, *The Decline of Competition and Change in Congressional Elections*, CONG. RESPONDS TO THE TWENTIETH CENTURY, 43-72.

40. *Id.* at 53.

41. Punishing corruption through the electoral process becomes more difficult because it requires more crossover voting (or put another way, it requires more members of one party to vote for a candidate of the opposite party. As will be discussed, polarization has made this less likely to occur.

42. See Jeff Gulati & Lara M. Brown, *The Personal is Political: Reconsidering the Impact of Scandals on Congressional Incumbents*, 48 CONG. & THE PRES. 25, 40 (2021); Scott J. Basinger, *Scandals and Congressional Elections in the Post-Watergate Era*, 66 POL. SCI. QUART. 385, 390 (2012).

members begin to win with larger vote shares due to gerrymandering, they have less incentive to avoid misconduct, because even as their vote share in any given election is reduced due to scandal, it is less likely to result in a defeat as the effects of scandals become smaller than the inbuilt margins resulting from the gerrymander.⁴³

General elections are not the only way for a corrupt or scandal-laden incumbent to be punished. Within these safe seats, primary elections can sometimes still result in a loss for scandalous or corrupt incumbents.⁴⁴ The available research is relatively mixed, with some analyses finding that scandals do not significantly impact the chance of primary defeat in a non-marginal district, and some finding that there is an impact.⁴⁵ But even in analyses that do suggest scandals have an impact in primary elections, the impacts are typically too small to be seen as an effective check on such candidates. In one study, it was found that 18% of incumbents in a scandal lost primaries.⁴⁶ While significantly higher than incumbents in safe seats without scandals, the odds of survival are sufficiently high to not act as a deterrent. As a result, decreased state competitiveness and gerrymandering have greatly reduced incentives for members of Congress to avoid misconduct.

2. AFFECTIVE POLARIZATION

Affective polarization, meaning the gap between individuals' positive feelings towards their own party and negative feelings towards the opposing party, has been steadily increasing over the last several decades.⁴⁷ In particular, it has been recently demonstrated that hate for the outgroup has increased faster than, and has now exceeded, love for the in-group.⁴⁸ One of the major consequences of this increase in affective polarization is that "partisans care less about their own party's performance and instead focus on their distrust of the opposition party, elected officials no longer need to campaign on their own merits; instead, they have good reason to try even harder to denigrate the opposition."⁴⁹ One impact of not having to campaign on one's own merits is that incumbents are much less

43. See Gulati & Brown, *supra* note 42.

44. For a recent example, see Barbara Sprunt, *Scandal-plagued Rep. Madison Cawthorn is ousted in North Carolina primary*, NPR <https://www.npr.org/2022/05/17/1099502290/north-carolina-11th-congressional-district-results-madison-cawthorn> [<https://perma.cc/9CBW-XE55>] (May 17, 2022).

45. See generally Shigeo Hirano and James M. Snyder, Jr., *What Happens to Incumbents in Scandals?*, 7 QUART. J. OF PO. SCI. 447, 447-456 (2012) (discussing past research suggesting that scandal-laden incumbents are not typically damaged in primaries, then presenting their own analysis suggesting they are).

46. *Id.* at 455.

47. James Druckman and Jeremy Levy, *Affective Polarization in the American Public* (Northwestern Institute for Policy Research, Working Paper No. WP-21-27, 2001) <https://www.ipr.northwestern.edu/documents/working-papers/2021/wp-21-27.pdf> [<https://perma.cc/FSP5-ZUYZ>].

48. *Id.* at 2 (Citing Iyengar and Krupenkin 2018).

49. *Id.* at 11 (Citing Iyengar and Krupenkin 2018 at 214).

affected by scandal.⁵⁰ Members of both parties may be unhappy with their incumbent, but their strong dislike of the opposition makes them more likely to “hold their nose” when casting ballots.⁵¹ This adds another incentive for members of Congress to be unconcerned with possible scandal.

3. PARTISANSHIP

History demonstrates that Congress is extremely willing to use ethics investigations to punish partisan opponents and that majority parties will rarely go after their own members for ethics violations.⁵² Partisan use of ethics investigations trace all the way back to the era of the Framers, and party-line votes on decisions to punish members for misconduct are just as old.⁵³ Parties also have plenty of incentives to avoid punishing their own members to prevent scandals from becoming a national issue that may impact the party in national elections, especially in competitive seats, regardless of where the scandalous member is from.⁵⁴

The steady decrease in competitive seats means that control of the House and Senate comes down to a small number of hypercompetitive districts and states.⁵⁵ As a result, control of either chamber is much more likely to change than it was historically. From 1900 to 1990, the House of Representatives and the Senate changed party control 7 and 9 times respectively, averaging out to a bit less than 2 changes per decade across both.⁵⁶ In the subsequent 32 years, party control has changed 4 times in the House of Representatives and 5 times in the Senate, averaging over 3 changes per decade.⁵⁷ As control over the chambers becomes less consistent, stalemate becomes the optimal outcome for both parties.⁵⁸ The parties are essentially locked in a repeated prisoner’s dilemma. Should they choose to investigate their opposition, they are aware that the other party will be strictly better off returning the favor when they are in power to minimize political backlash

50. See generally Andrew Eggers, *Partisanship and Electoral Accountability: Evidence from the UK Expenses Scandal*, 9 QUART. J. OF POLI. SCI. 441 (2014) (showing that higher local polarization led to smaller levels of vote share change among UK voters during a nationwide scandal.).

51. *Id.*

52. CHAFETZ, *Supra* note 1 at 241.

53. *Id.* at 241-242.

54. See generally Samuel J. Best, Jeffery W. Ladewig & Danielle C. Wong, *Owning Valence Issues: The Impact of a “Culture of Corruption” on the 2006 Midterm Elections*, 40 CONG. & THE PRES. 129 (2013).

55. Collectively, these districts are known as “battleground districts,” which total somewhere between 55 and 70 districts per the analysis of most election forecasters. For an example see Amy Walter, *2024 House Ratings*, COOK POL. REP. <https://www.cookpolitical.com/ratings/house-race-ratings> [<https://perma.cc/LZ8H-PG2Q>] (Last Accessed Apr. 26, 2023). Notably, 85% of districts are viewed as completely uncompetitive.

56. See Charles Apple, *In Control*, THE SPOKESMAN-REVIEW (Accessed Dec. 14, 2022) <https://www.spokesman.com/stories/2020/jun/25/control-house-and-senate-1900/> [<https://perma.cc/L54Z-TEBF>].

57. *Id.*

58. See Joseph E. Harrington and Wei Zhao, *Signaling and tacit collusion in an infinitely repeated Prisoners’ Dilemma*, 64 MATH. SOC. SCI. 277, 277-79 (2012) (explaining how two parties may develop an optimal strategy of collusion in a repeated prisoner’s dilemma.).

to their own scandals.⁵⁹ As a result, the optimal strategy is to avoid investigations altogether.

II. EXECUTIVE AND JUDICIAL BRANCH INVOLVEMENT IN MISCONDUCT INVESTIGATIONS

With all these concerns in mind, it may at first feel like the solution is clear: Congress should get out of the way in all but the most trivial of affairs and allow the Executive and the Courts to investigate potential criminal violations. It may seem odd that the proposal in this Note runs exactly counter to this instinct. The reason it does so is simple. History shows that the Executive and Judicial branches are even worse at punishing much of the most common misconduct that occurs in Congress. Additionally, Congress ceding its ground on internal discipline has caused it to decline in the eyes of the public. The only remedy is to make Congress a *stronger* enforcer of its own internal conduct, rather than pushing it further and further to the sideline in regulating its own affairs.

A. HOW THE OTHER BRANCHES TOOK OVER

From the nation's founding, Congress was always viewed as being primarily responsible for regulating its own members' conduct.⁶⁰ This tradition for congressional self-discipline traced its roots back to the English Parliament, where this practice was developed and strengthened overtime to encourage free debate in the chamber and protect itself from overreaches by the King.⁶¹ When Section 5 of Article I of the Constitution was written, the only debate on its passage in the Committee of the Whole was a suggestion from James Madison to require 2/3rds vote to expel members, which was quickly adopted.⁶² While at first there was some experimenting with punishing members via impeachment, it was quickly decided that the punishment of a member of a chamber fell solely on that chamber.⁶³ Even from the beginning, the difficulty of actually punishing members was on full display. Prior to 1860, there was not a single successful expulsion, and the successful expulsions shortly after were all due to members participating in the secession of the southern states or as an incidental result of their state's secession.⁶⁴ Even in the heat of the Civil War, votes to expel members who were advocating for recognizing the Confederacy still failed.⁶⁵

Indeed, the history of Congressional Discipline is largely a history of Congress failing to discipline. Typically, this took the form of a chamber attempting to

59. *Id.*

60. *See, e.g.*, Justice Joseph Story, *Commentaries on the Constitution of the United States*, Vol. II, § 836 (Boston 1883).

61. CHAFETZ, *supra* note 1, at 232-40.

62. *Id.* at 241.

63. *Id.*

64. *Id.* at 244-46.

65. *Id.*

expel a member for misconduct, failing, and then instead passing a resolution to censure them. Very often, the members would then resign and immediately win reelection.⁶⁶ This reached its peak during the Gilded Age with a series of high-profile corruption scandals.⁶⁷ Unsurprisingly, this is also the point at which other branches began to assert themselves. In 1875, two members of Congress were indicted for bribery and obstruction. Congress referred the case to the Department of Justice, which indicted the pair but never prosecuted them.⁶⁸ Following this, a member would not be convicted for 30 more years.⁶⁹

Another crucial moment in the development of interbranch oversight of Congress was in 1924, when evidence had been found by a grand jury in Illinois that two congressmen had engaged in a bribery scheme.⁷⁰ Instead of asserting jurisdiction over the men, Congress instead backed off after a short dispute and allowed the prosecutor to proceed, leading to their indictments and the conviction of one.⁷¹ During the entire period of 1930-1950, there were no disciplinary investigations within Congress, even as indictments and convictions continued.⁷² It wasn't until 1966 that either chamber pursued a single member for ethics violations, even as they made ethics reforms in the mid-1960s.⁷³ Congress's internal disciplinary powers suffered another weakening in 1969 with *Powell v. McCormack*, where the Court restricted Congress's ability to judge the qualifications of its members to only the qualifications in the Constitution, forcing Congress to sit a member it had previously refused to sit due to misconduct (and important to note, likely also due to racism).⁷⁴ Soon after, in *United States v. Brewster*, the Court ruled that evidence that a bribe was taken for a vote was admissible, saying that it did not violate the Speech and Debate clause because illegal activity is not part of the official duty of a member of Congress.⁷⁵

The combination of *Brewster* and increasing indictments from the executive to prosecute criminals led to a complete takeover of Congressional misconduct questions outside of small ethical violations. At this point, Congress plays a relatively small role in disciplining and investigating its members for criminal conduct, preferring instead to defer to the executive branch and the courts for determinations about misconduct.⁷⁶

66. *See id.* at 240-50.

67. *Id.* at 249-50.

68. *Id.*

69. *Id.* at 250.

70. *Id.* at 256.

71. *Id.* at 256-57.

72. *Id.*

73. *Id.*

74. *Powell v. McCormack*, 395 U.S. 486 (1969).

75. *United States v. Brewster*, 408 U.S. 501, 520 (1972).

76. CHAFETZ, *supra* note 1, at 259-61.

B. THE SPEECH AND DEBATE CLAUSE AND THE WEAKNESS OF EXTERNAL INVESTIGATIONS

While the modern enforcement scheme that has developed may look like it has a credible ability to punish misconduct, it is severely hampered by the broad reading of the Speech and Debate clause that the Court has given. The clause generally covers any “legislative act,” and, while this has been narrowed to not include actions like assisting constituents or attempting to effect executive branch administration of statutes, the exact limits are both incredibly vague and seem to cover a lot of essential conduct for proving criminal violations.⁷⁷ Additionally, the Court has asserted that “in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it.”⁷⁸ Combined with the political costs of investigating members of Congress, which will only increase as partisanship becomes more extreme, these limitations by the Court act as strong incentives for the executive branch to not intervene.

The nature of the crimes that congresspeople would commonly be under investigation for makes their misconduct that much harder to prove. As the Supreme Court has established, the threshold question for any potential violation is “whether it is necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute.”⁷⁹ While the Court has said that conduct such as accepting a bribe, for obvious reasons, is not part of legislative conduct, this threshold is extremely limiting.⁸⁰ Only increasing these limits is the narrowing of bribery in court precedent. In *McDonnell v. U.S.*, the Supreme Court narrowed the meaning of “official acts” to exclude exercising influence.⁸¹ Instead, the Court determined that an official act must require the use of some formal government power and that the official must take action or agree to do so.⁸² This ruling, and subsequent attempts by lower courts to interpret it, has made it even more difficult to prove the sort of financial misdeeds that are a staple of Congressional Corruption.

III. THE POWER OF CONGRESS TO REGULATE ITSELF

A. DISORDERLY BEHAVIOR

Just because the other branches have a blind spot in regulating Congress does not mean there is no solution. The Constitution provides Congress with the power

77. See Library of Congress, *Art I. S 6. C 1.3.3 Activities to Which Speech or Debate Clause Applies*, https://constitution.congress.gov/browse/essay/artI-S6-C1-3-3/ALDE_00013302/ [https://perma.cc/EVQ3-4VHF] (Last Accessed Apr. 26, 2023).

78. See *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 508 (1975).

79. *Brewster*, 408 U.S. at 526.

80. See *McDonnell v. United States*, 579 U.S. 550 (2016).

81. *Id.* at 551-52.

82. *Id.* at 551.

to discipline its members for a variety of “disorderly [b]ehaviour[s].”⁸³ The exact nature of “disorderly behavior” is broad, not requiring that the behavior be a crime or misdemeanor.⁸⁴ Despite this, there are areas where the limits of disorderly behavior are sometimes debated. One common example is whether Congress can punish members for conduct that took place prior to the session where punishment is meant to be applied.⁸⁵ While this author finds the arguments in favor of an allowance of discipline for conduct that took place prior to the session more compelling, it is unnecessary for the purposes of this Note to come to a firm determination on the constitutionality of this practice.

B. PUNISHMENT FOR MEMBERS

The power to punish its members for disorderly behavior allows for a wide variety of punishments. These may include requiring an apology, censure, fines, suspension of voting rights, removal from committees, and upon 2/3rds majority, expulsion.⁸⁶ Beyond just these, Congress has the authority, at least under some circumstances, to imprison members of Congress who violate the Chambers’ rules.⁸⁷ Importantly, with the exception of expulsion, all punishments may be carried out by the sergeant-at-arms subject to House and Senate rules and do not require the chambers to vote on the punishments themselves once a resolution to create such rules has passed.⁸⁸

C. THE RULES POWER

Under Article I, Congress is given the power to “determine the Rules of its Proceedings.”⁸⁹ This power is extremely broad, allowing Congress to establish rules that are binding within the chambers and on members even outside of the

83. U.S. Const. Art. I § 5, cl. 2.

84. See Story, *supra*, note 60.

85. Library of Congress, *Art I. S 5.C 2.I.2.6 House of Representatives Treatment of Prior Misconduct*, CONSTITUTION ANNOTATED <https://constitution.congress.gov/browse/article-1/section-5/#:~:text=Clause%20%20Rules,two%20thirds%2C%20expel%20a%20Member> [https://perma.cc/P34L-XB5Y] (Last Accessed Oct. 29, 2022).

86. See generally U.S. GOV’T PUB. OFF., *HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE: CHAPTER 50. RULES AND PRECEDENTS OF THE HOUSE*, Sec. 1 (Apr. 2017).

87. Deschler’s Precedents, Volume 3, Chap.12 Sec. 12. (“Imprisonment is a form of punishment that is theoretically within the power of the House to impose, but such action has never been taken by the House against a Member.”). See also *Kilbourn v Thompson*, 103 U.S. 168, 189-190 (1880) (“[T]he Constitution expressly empowers each House to punish its own Members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be [for] refusal to obey some rule on that subject made by the House for the preservation of order”).

88. See, e.g., *Massie v. Pelosi*, 2022 WL 703942 (Dist. Ct. D.C. March 9, 2022) (The district court decides to dismiss a case challenging fine imposed by sergeant-at-arms for violating a House mask mandate under the Speech and Debate clause and does not question the underlying House procedure). While this was dismissed under Speech and Debate Clause grounds, the court’s declining to intervene effectively constitutionalizes such a practice. To paraphrase the President Jackson, the Constitution has stated its limits, not let it enforce them.

89. U.S. Const. Art. I § 5, cl. 2.

chambers.⁹⁰ These rules allow for ample flexibility, especially since they do not need to be passed by the other chamber or signed into law by the President and can be passed by simple majority.⁹¹ For example, Congress can establish rules that allow for punishing members of Congress for behavior that, “in the judgment of the [House or] Senate is inconsistent with the trust and duty of a member.”⁹² A statute with such a wide reach would almost certainly be ruled as too vague to be enforceable by a court, but within this context, it is acceptable.⁹³ Punishments may likewise be flexible and are not required to conform with the types of punishments that may be performed by the judiciary.⁹⁴ Congress has nearly unlimited creativity in deciding how to conduct business and police their members.⁹⁵ Up to this point, the chosen way to police members has been uninspired, but there is no requirement that Congress continue to operate under those rules.

IV. PROPOSING A NEW BODY

Given that Congress has these expansive powers to regulate its own conduct, what has it done in the modern day to do so? It established the Office of Congressional Ethics, an independent department that reports to the House Ethics Committee with limited powers to oversee ethics claims.⁹⁶ It is a nonpartisan, fact-finding entity that reviews allegations against members, staff, and senior legislative officials.⁹⁷ The OCE has some critical aspects that have made it successful in improving ethics disputes.⁹⁸ First, the OCE is able to take submissions from outside of Congress, which provides critical outlets that Ethics Committees currently lack.⁹⁹ Historically, potential allegations could be dodged by not having members submit evidence to the committee. Secondly, they are able to make recommendations for punishment to the full committee.¹⁰⁰ Finally, they generally require their findings to be made public at the conclusion of their time-limited investigations.¹⁰¹ This helps to provide transparency and increase public

90. See *Anderson v. Dunn*, 19 U.S. 204, 213-14 (1821).

91. *Supra*, note 77.

92. *In re Chapman*, 166 U.S. 661, 669 (1897).

93. See *Musser v. Utah*, 333 U.S. 95, 97 (1948).

94. See generally, JACK MASKELL, CONG. RSCH. SERV., RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES (2016).

95. *Id.*

96. OFFICE OF CONG. ETHICS, *About* (Accessed Dec. 14, 2022) <https://oce.house.gov/about> [<https://perma.cc/7DRH-5NBR>].

97. *Id.*

98. Holman, *supra* note 8.

99. See U.S. GOV'T PUB. OFF., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE: CHAPTER 25. ETHICS, Sec. 2 (Apr. 2017) and OFF. OF CONG. ETHICS, *Make a Submission*, (Accessed Apr. 26, 2023) <https://oce.house.gov/contact-us/make-a-submission> [<https://perma.cc/9XEK-WHYN>].

100. OFFICE OF CONG. ETHICS, *About* (Accessed Dec. 14, 2022). <https://oce.house.gov/about> [<https://perma.cc/7DRH-5NBR>].

101. *Id.*

confidence. As a result of the creation of this office, there were both more reports and more successful punishments in the Congresses following the enactment.¹⁰² However, the ultimate evidence of its success is that members of Congress tried (unsuccessfully) to get rid of the agency at the beginning of session in 2017.¹⁰³

Even with the department's success, it still has some major shortcomings. Most obviously, an equivalent department does not exist in the Senate, which just has its ethics committee. As many others have pointed out, the lack of subpoena power creates severe roadblocks in investigations.¹⁰⁴ On top of that, the inability to make enforcement decisions prevents the OCE from meaningfully affecting the outcome. While transparency is good for public legitimacy, very few members of the public will spend an evening parsing the OCE recommendations page on its website. They rely on the media and other third party intermediaries to distill the public releases, and these other parties seem to place a relatively high bar on what is worth transmitting to the public.¹⁰⁵ Additionally, there is an image problem resulting from the involvement of the other branches that has been mentioned before. Any serious misconduct will be investigated and punished by the other branches, so the public is able to reasonably assume any information coming out of the OCE is about relatively minor offenses. Finally, it has done little to address the general opinions on corruption in the American public.

A. SUGGESTIONS FOR IMPROVEMENT

There have been many suggestions for how to improve upon the systems that are currently in place for addressing congressional misconduct. One of the more promising solutions models itself after an existing body in the U.K.: the Commissioner for Standards.¹⁰⁶ In outlining his case for a Congressional Commissioner for Standards, Josh Chafetz gives some of what he believes to be the key features and ways the British system could be improved if implemented in the United States.¹⁰⁷ While mostly in agreement, this author believes there are a few areas of improvement in his recommendations. Chafetz argues that the

102. Holman, *supra* note 8.

103. Eric Lipton, *With No Warning, House Republicans Vote to Gut Independent Ethics Office*, N.Y. TIMES (Jan. 2, 2017) <https://www.nytimes.com/2017/01/02/us/politics/with-no-warning-house-republicans-vote-to-hobble-independent-ethics-office.html> [<https://perma.cc/R2FQ-4FM2>].

104. Robert Faturechi, *Members of Congress Have a New Strategy for Ethics Investigations: Stonewalling*, PROPUBLICA (Mar. 10, 2020) <https://www.propublica.org/article/members-of-congress-have-a-new-strategy-for-ethics-investigations-stonewalling> [<https://perma.cc/RU6T-365M>] (Last Accessed Apr. 26, 2023).

105. Exact data about this is extremely difficult to find. However, one recent example is that a June 2022 ethics referral by OCE regarding Representative Ocasio-Cortez, a well-known and much talked about member of Congress, went nearly unreported for six months until a statement was released by the Ethics Committee referencing the referral on December 7th, 2022. For members who receive less media scrutiny, the bar is likely even higher before reporting takes place.

106. See generally Josh Chafetz, *Cleaning House: Congressional Commissioners for Standards*, 117 YALE L.J. 165 (2008).

107. See generally *Id.*

ability to subpoena and publish findings and recommendations would put sufficient pressure on the ethics committee to ensure investigations in most contexts to ensure that they give punishments when necessary.¹⁰⁸ While it has made improvements in reporting and punishing minor infractions, the Office of Congressional Ethics has still not led to any significant punishments being carried out by the House.¹⁰⁹ And when they are, they are typically only a fine that is easily affordable with a Congressional Salary.¹¹⁰ Instead, a bolder solution may be required. This author proposes the following:

First, a new independent legislative office should be established that has full subpoena, investigatory, and adjudicatory powers over members of congress and senior staff. This body should have the ability to both conduct investigations into members and bring them to a separate organ within the body where the congressperson can defend themselves and adjudicate the allegations against them. The body should be able to render binding decisions on its members that use the full extent of Congress's power to punish its members, from mandatory apologies to imprisonment. As the Constitution requires, a 2/3rds vote would still be required to expel a member;¹¹¹ however, expulsion would be a strong recommendation that could be made to the chamber and would have a fast-track vote. Members who were convicted would be able to appeal their conviction to the full chamber to be overturned by a majority vote.

Second, appointment to this body would require a supermajority within congress, but when vacancies exist, Congress will be required to fill them within 120 days. Failure to do so would allow the current adjudicators and investigators to appoint a temporary replacement with their own, internal 2/3rds vote.¹¹² These temporary appointments become permanent at the end of the congressional term if no replacement has been approved by the chambers. The body would contain a defined number of adjudicators and investigators to ensure it is always properly staffed. The members would serve ten-year terms and would be subject to removal with another supermajority vote. To prevent potential conflicts of interest, both investigators and adjudicators would be disallowed to be appointed to the body for 5 years after they last worked within a Congressional Office or Congressional Campaign and would be required to recuse themselves from any investigation involving a member they worked for.

108. *Id.* at 170.

109. GOVTRACK, *supra* note 20.

110. Even the most extreme fines handed out by ethics bodies still are easily affordable. For examples of some of the largest fines given out by ethics bodies, see JACK MASKELL, CONG. RSCH. SERV., RL31382, EXPULSION, CENSURE, REPRIMAND, AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES (2016).

111. U.S. Const. Art. I § 5, cl. 2.

112. While the mechanism is different, there is precedent for agencies being allowed to temporarily appoint new members. *See* 5 C.F.R. § 316.301 (1968).

Third, the body would apply the ethics rules of their chambers but would not be restricted to punishing only violations of their ethics rules. Clear violations of the public trust, cases where an extremely high probability of misconduct or corruption occurred, or other scandals that reflect negatively on the chamber may be punished as appropriate.

Fourth, the jurisdiction of this body would be exclusionary with other branches with respect to conduct relating to members' involvement in the chamber.¹¹³ This would include non-official conduct that takes place within the capital, such as bribery and sexual harassment, as well as official conduct. While this would, under certain situations, give this body jurisdiction over criminal conduct, this is acceptable.¹¹⁴ If a member resigns, the body will be obligated to continue its investigation and may still have jurisdiction to adjudicate and punish the member for their misconduct.

Fifth, this body would be required to publicly report its findings and decisions, along with a statement of its reasoning if punishment is given. This allows both the public and members to understand the full scope of the investigation and understand how the body views certain behaviors. In cases where punishment is given, the body would be required to inform constituents of the member in question, typically by releasing advertisements on the conduct that the member will be required to sign off on.

B. DEFENDING EACH POINT

All of these features are essential to creating a body that can both effectively enforce the rules of the chamber and punish misconduct and help Congress improve its public image in the process. While there may certainly be criticism or possible counterarguments, this note will spend the rest of its duration discussing the importance of each component and responding to potential criticisms.

1. CREATING AN INDEPENDENT OFFICE

For an ethics enforcement body to truly be viewed as legitimate and operate effectively, it must have institutional independence from Congress. This requires giving them the power to subpoena, conduct investigations, and decide on punishments independent of the legislators who oversee them. The investigatory powers are likely self-evident in their necessity, but subpoenas in particular may require some further elaboration. Currently, the House Office of Congressional

113. Any attempt to do so by Congress would likely require jurisdiction stripping. To see a constitutional justification for such a practice, see CHRISTOPHER JON SPRIGMAN, PRES. COMM. ON SUPR. CT. OF U.S., JURISDICTION STRIPPING AS A TOOL FOR DEMOCRATIC REFORM OF THE SUPREME COURT, 7-10 (2021).

114. While there is not a formal mechanism to ensure this, failure to pursue potential criminal conduct would likely be viewed as corrupt and likely would create pressure on members in competitive seats to advocate for investigations within the branch.

Ethics lacks the ability to subpoena documents and testimony.¹¹⁵ This hole in its ability to investigate leads to situations where misconduct *may* be occurring, but evidence for it is impossible to find. This is likely an especially large problem in harassment cases or similar mistreatment of staff claims, since the testimony of other staffers, as well as the congressperson themselves, is likely required to make any conclusions. Additionally, staffers may be hesitant to speak out on their employers for fear of limiting opportunities on Capitol Hill.¹¹⁶ Being able to force testimony would solve this problem, as well as possible problems with financial crimes that may require the congressperson to turn over documents to get a clear picture of the situation.

Allowing the body to decide independently to punish is just as, if not more, important. Regardless of the evidence against a member, the current system does nothing to incentivize punishing them in accordance with their wrongdoings. Members are incentivized to protect each other for both partisan motivations and self-interest.¹¹⁷ If the public is to feel confident about the outcome of congressional misconduct investigations, it must feel confident that decisions were reached outside of any of these concerns. However, Congress still needs to have an active part in the process for the public to feel that Congress is responsible for more than just the creation of this department but is also responsible for the ongoing policing of conduct.

2. APPOINTMENTS

Another avenue through which Congress can be shown to take an active role in the process is through appointments. Appointments subject to a 2/3rds majority vote help to ensure that the positions are not filled by expressly political actors. But it is not enough to expect Congress to fill in the seats of its own regulator without any potential costs to not doing so. The results of this can be seen by the constant vacant seats and delays in appointments at the FEC.¹¹⁸ As a result, members are put on a bit of a time crunch. Either they agree to an appointment, or an appointment is made without them. This does put serious weight on the initial composition of the body, but, as will be discussed later, this should not be a concern.

Another key feature of the appointments is fixed, long terms that do not allow for reappointment. The possibility of reappointment may cause some of the

115. U.S. House of Reps., *FAQ*, OFFICE OF CONG. ETHICS, [<https://perma.cc/8MLP-WJSA>] (Last Visited Feb. 22, 2023).

116. See, e.g., Kathy Gurchiek, *Congressional Staffers Detail Toxic Workplaces, Poor Treatment*, S.H.R.M., <https://www.shrm.org/hr-today/news/hr-news/pages/congressional-staffers-detail-toxic-workplaces-poor-treatment.aspx> [<https://perma.cc/TB3T-QURS>] (Last Visited Mar. 13, 2023).

117. *Supra* II. C Structural, Polarization and Partisan Effects.

118. Arit John, *The federal agency that enforces campaign finance law can't even meet. Why?*, LA TIMES (Aug. 5 2020) <https://www.latimes.com/politics/story/2020-08-05/federal-election-commission-campaign-finance-enforcement> [<https://perma.cc/YUL5-2FXJ>].

officers within the body to attempt to “play nice” in order to secure another term.¹¹⁹ Having long terms allows for the officers to outlast some members and develop specific expertise in a unique career that will require training and practice to effectively navigate, which will be important since the practical understanding of the inner workings of Congress will be limited by bans on staff being appointed. This deficiency is necessary to prevent stacking the body with officers who are favorable to members or who are expressly interested in career progression on the Hill.

3. ADJUDICATORS AND THE QUASI-JUDICIAL SYSTEM

Some may have read the description of the process to determine guilt and felt that it sounded very similar to a court. While this is certainly true, there are a few key differences here. First, not being a court and instead being an officer of the legislative branch, these adjudicators have no need to be concerned with the strictness of civil and criminal procedural law, nor the requirements of the Speech and Debate clause. Secondly, the purpose of adjudicators within this context is very different from that of judges. Ethics rules, by their very nature and through the existence of manuals designed to make them understandable, have very different interpretive requirements than statutes. Statutes are meant to be generally applicable, and this requirement leads to the development of doctrines that enhance our sense of justice within the judicial system.¹²⁰

The adjudicators essentially act as a second opinion for the investigator. There is a cultural understanding that one should not act as both the prosecution and the ultimate decider, so having a neutral 3rd party helps to ensure legitimacy. They also allow a member an opportunity to try to put their actions into context before a punishment is decided on. In many ways, the adjudicators act more as arbitrators than judges. This is a necessity because the goal of creating a new body to oversee conduct is both to punish conduct *and* to ensure that Congress is seen as not corrupt. Occasionally, there will be situations where there are legitimate doubts about whether conduct committed by a member is wrongful, but significant damage may be done to Congress’s image if the member is not punished.¹²¹ While some may protest this as unjust, the possibility of punishing innocent conduct does not cut as harshly against the system here as it would in the judicial system. Being a member of Congress is a privilege that comes with important responsibilities and great amounts of power. Members may be unhappy taking

119. For a discussion of the benefits of fixed term limits, see *Term Limits* (Pres. Comm. On Supr. Ct. of U.S., 2021) <https://www.whitehouse.gov/wp-content/uploads/2021/10/TERM-LIMITS.pdf> [<https://perma.cc/9AES-LUY5>].

120. For an explanation and discussion of one such doctrine, see generally David S. Romantz, *Restructuring the Rule of Lenity*, 40 *CARDOZO L. REV.* 523 (2018).

121. See Pedro C. Magalhães, *When corruption investigations come to nothing: A natural experiment on trust in courts*, 1 (Dec. 13, 2022) (early access article) <https://onlinelibrary.wiley.com/doi/full/10.1111/gove.12754> [<https://perma.cc/37KS-9K7P>].

punishments they feel unjust; however, ensuring constituents believe Congress is functional is more critical to an effective Congress than members' feeling that they are treated fairly.¹²² Our republic relies on a general belief that representatives are acting in the best interest of their constituents.

4. JURISDICTION

The question of whether this body's jurisdiction would be exclusionary with federal courts is a difficult one. For a few reasons, this is the better decision. First, if the goal is to empower Congress to take over its own internal discipline, allowing other agencies to get involved leads to potential situations where Congress's internal body decides to defer to the investigations done by the Department of Justice, which ultimately defeats the central purpose of the body.¹²³ Second, if Congress is to have authority over its own affairs, it must truly have it. There are simply too many opportunities for both a congressional punishment and a judicial one, which could create significant liabilities for members. Finally, limiting this jurisdiction to only cases that are related to the chamber helps to ensure that all cases are dealt with by the body that has the strongest ability to investigate. Cases that involve actions in the Capital, whether they are directly related to official conduct or not, run into a myriad of constitutional questions that can distract from determining culpability.¹²⁴ Exclusive jurisdiction within this realm removes many of those questions and allows for easier enforcement.

5. INFORMING THE PUBLIC

While making the results of investigations public was an intelligent decision when creating the OCE, this could still be improved. When a member does something wrong, he should have to pay the cost that he would be most concerned about: his constituents finding out. Repeatedly in the history of Congress, members resigned after a censure or during an investigation and were shortly reelected.¹²⁵ This has been deemed a respectable practice. After all, if your constituents are still willing to give you another chance after your misdeeds, why should you be stopped?

122. While a balance between justice for the individual member and the legitimacy of proceedings to the public must be maintained, members have the ability to leverage their public position to attempt to explain their side to their constituents. As a result, the balance of interests should lean against protecting any individual member from punishment and should instead allow them to attempt to contextualize their punishment to their constituents.

123. CHAFETZ, *supra* note 1, at 259-61.

124. For an overview of the Speech and Debate Clause and the restrictions it creates on Judicial Inquiries into member conduct, see TODD GARVEY, CONG. RSCH. SERV., R45043, UNDERSTANDING THE SPEECH OR DEBATE CLAUSE (2017).

125. See CHAFETZ, *supra* note 1, at 245, 249 (detailing several examples of members being reelected following a censure).

There are reasons to doubt that this practice has historically been effective. Constituents may simply not know the full details, or any details at all if the misdeed is not flashy enough for the press to report. The congressperson may also present the misdeed to their constituents in a misleading way to minimize his wrongdoing. The solution to this is to force them to inform the public in an honest way. There are many discretionary options here. A preapproved speech may have to be given on the chamber floor, an article may have to be written in a local paper, or advertisements paid for by the member may have to be run in the district. All of these, however often they are used, will be much more effective in making sure the body is not just transparent, but open with the public.

C. INSIGHTS FROM THE MODEL RULES

While not applicable to every member of Congress, the *Model Rules* govern the behavior of a significant portion of the body.¹²⁶ As a result, an unexplored avenue for enforcement of ethics rules against some members is to adapt some of the *Model Rules of Professional Conduct* to deal with these members' unique position as both lawyers and policymakers. Lawyer members are theoretically still subject to Conflicts of Interest Rules.¹²⁷ For one, Rule 1.8's specific Conflict of Interest Rules could prove applicable to creating a more robust set of standards around potential conflicts of interest in legislation. Section 1(a) focuses on business transactions that are potentially adverse to the client, which could be analogized to govern the behavior between policymakers and third party organizations, and the "client" can be analogized to be the member's constituency.¹²⁸ Thus, the *Model Rules* allow us to create stricter disclosure requirements around potential business arraignments between interest groups, industry organizations, and members by forcing disclosure of these relationships and punishing members for conduct that appears to be a clear violation.

If the Office of Congressional Investigations and Enforcement is given authority to apply the *Model Rules* to lawyer members, this would allow investigations and potential punishments into one area where the current Congressional Ethics rules are lacking but is perceived by the public as clear corruption: members taking high-paying jobs in industries they were responsible for overseeing once they leave office.¹²⁹ Currently, there is no clear way to punish this conduct, so forcing disclosure around the timing and existence of these arrangements would make it easier to punish members for corrupt dealings. Additionally, lawyer members could have their right to accept positions as lobbyists restricted if the *Model*

126. See A.B.A., *supra* note 11.

127. MODEL RULES OF PROF'L CONDUCT R. 1.11(d) [*hereinafter* MODEL RULES].

128. . MODEL RULES R. 1.8(a)-(c).

129. For a recent example of this conduct, see Zachary Halaschak & Ryan King, *Retired Sen. Pat Toomey lands new gig at a private equity board*, WASH. EXAM'R, (Feb. 22, 2023) <https://www.washingtonexaminer.com/news/senate/pat-toomey-lands-private-equity-board-gig> [<https://perma.cc/F78U-CQKW>].

Rules were more vigorously enforced.¹³⁰ While there would still be ample room to lobby, members would at least be barred from involvement on matters that continue past their term in office.

Lawyer members are in a unique position among members of Congress. They have experience with the system that makes them naturally better suited for law-making, but this also should come with the responsibility of representing the legal profession even while in Congress. Applying the *Model Rules* to members would be a powerful aid to a potential Office of Congressional Investigations and Enforcement.

V. COULD THIS EVER PASS?

With all the theory crafting done, the most important question remains; would Congress ever agree to this kind of oversight? While there are certainly reasons to be skeptical, passing this sort of reform is certainly possible. For that to happen, a few conditions likely would need to be met. First, the Democrats would almost certainly need to be in control of both chambers of Congress. While this is not to say that Republicans are somehow more scandalous and corrupt than the Democrats, Republicans are the only party that has shown explicit interest in repealing past ethics reforms.¹³¹ While past behavior is not always indicative of future behavior, there is no evidence of a serious change in willingness for ethics reform from either party. Second, serious ethics reform requires the issues of Congressional Ethics to become more salient to the public so that delivering on reform is seen as helping member's odds or reelection. The OCE was created in the fallout of ethics scandals in 2006-2007,¹³² and similarly extreme scandals may be required for this change. Third, it would have to overcome the difficulty of the initial staffing of the body.

Under the proposed reforms, the new body would be unable to be created through a simple majority. Even if it passed the house with a narrow margin, the office would need to have its positions filled, which would require a 2/3rds vote. While it is easy to imagine a situation where these first appointments were just exempted, doing so would compromise the integrity of the institution at the start. One party stacking the office without the consent of the other will inevitably lead to charges of politicization, and such an institution survives mainly on its reputation of being a nonpartisan body. This means that initial appointments need to be bipartisan. This does make things more difficult, but the passage of the Chips and Science Act, CHIPS Act, the Respect for Marriage Act, and the yearly National Defense Authorization Act show that this is still possible. Bipartisanship, even in a hyper-partisan age, can be found when issues are viewed as sufficiently

130. See MODEL RULES R. 1.11(a)(2).

131. Lipton, *Supra* note 74.

132. Jacob R. Straus, CONG. RSCH. SERV., R40760, HOUSE OFFICE OF CONGRESSIONAL ETHICS: HISTORY, AUTHORITY, AND PROCEDURES, 2 (2022).

important to the member's constituents. Additionally, the individual people that will be appointed will undoubtedly be major conditions to the ultimate passage. Finding a sufficient number of adjudicators and investigators that are broadly liked by both parties would take effort, but it could certainly be done.

Another related concern is the question of why Congress would ever agree to this. After all, many members, especially the ones engaging in corrupt conduct, certainly would not want to just agree to be bound by a potentially much stronger oversight body. Assuming the above conditions are satisfied, I think Congress would be put in a situation where passage becomes extremely likely. The recent controversies around the STOCK Act and potential violations have led to broad support among both the public and in Congress itself for legislation that would completely ban members and their families from trading stocks.¹³³ As Research has shown, scandals involving finances generally have a smaller impact on incumbents than private scandals involving infidelity, sexual harassment, and other private misdeeds.¹³⁴ If support for STOCK Act reform can become that widespread, it seems likely that reform that could be triggered by the more salacious private scandals would manage to make it much further.

VI. CONCLUSION

Congress is in desperate need of reform. What was intended by the framers to be arguably the strongest of the three branches has slowly lost its place. While not the only factor, substantive reform to its misconduct-enforcement mechanisms will bolster the institution in the eyes of the public and allow it to work more efficiently. By creating an independent body within Congress, the legislative branch can seize the power to hold itself accountable back from the Executive and Judicial Branches, and in doing so, it will be able to police its conduct more effectively than the other branches were able to. While there is certainly a debate to be had about the details of this proposal, it is the strongest option available, and can hopefully serve as a preliminary guide for a better Congress.

133. Claire Williams, *Most Voters of All Parties Support Congressional Stock Trading Restrictions*, MORNING CONSULT (Jan. 19, 2022) <https://morningconsult.com/2022/01/19/ban-stock-trading-congress-poll/> [<https://perma.cc/59A7-SK3R>].

134. Gulati & Brown, *supra* note 42.