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# Curing Congress's Ills: Criminal Law as the Wrong Paradigm for Congressional Ethics

Josh Chafetz

*Cornell Law School*, [jc2284@cornell.edu](mailto:jc2284@cornell.edu)

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JOSH CHAFETZ

## Curing Congress's Ills: Criminal Law as the Wrong Paradigm for Congressional Ethics

Paul M. Thompson's reply<sup>1</sup> to my Comment proposing the creation of Congressional Commissioners for Standards<sup>2</sup> proceeds in two steps. First, he argues that our current system of ethics enforcement, dominated by the ethics committees<sup>3</sup> and the Department of Justice, is working just fine. And second, he argues that the establishment of Congressional Commissioners would create, rather than solve, problems. Both of these claims suffer from the same basic defect: they assume that congressional ethics enforcement should be just like criminal law enforcement. I suggest, however, that this assumption is fundamentally misguided. Congressional ethics is not simply about punishing rulebreakers; rather, it aims to promote public trust in Congress and its members. With this very different goal in mind, it is clear not

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1. Paul M. Thompson, *First, Do No Harm: Why a Commissioner for Standards Is Unhealthy for the American Body Politic*, 117 *Yale L.J. Pocket Part* 230 (2008), <http://thepocketpart.org/2008/04/17/thompson.html>.
  2. Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 *YALE L.J.* 165 (2007).
  3. It should be noted that our current system—at least in the House of Representatives—is about to change to something roughly similar to what was suggested in my Comment. See H.R. Res. 895, 110th Cong. § 1 (2007) (enacted pursuant to H.R. Res. 1031, 110th Cong. (2008)) (establishing the Office of Congressional Ethics); H.R. Res. 895, 110th Cong. § 4 (2007) (enacted pursuant to H.R. Res. 1031, 110th Cong. (2008)) (providing that the Office of Congressional Ethics shall not undertake any investigations until 120 days after the passage of the Resolution). See generally Jonathan Weisman, *House Considers New Panel on Ethics*, *WASH. POST*, Mar. 12, 2008, at A3 (describing the new Office and the debates surrounding its creation). While the new Office of Congressional Ethics is a welcome start, to the extent that it differs in composition from the Congressional Commissioners proposed in my Comment, I continue to believe that the institutional design I proposed is preferable. A full analysis of the new Office and comparison with my proposal is, however, beyond the scope of this piece.

only that our current system is in shambles, but also that the creation of Congressional Commissioners would be a useful corrective.

## I. THE DISEASE

Thompson begins with a quote from Senator Robert Bennett: “Washington is the only place I know where, when people break the law, our reaction is . . . [to] make the law tougher.”<sup>4</sup> Tangentially, whether or not this is true of “Washington” generally, it certainly is not true of congressional ethics specifically, as anyone familiar with the collapse of Enron and WorldCom and the subsequent enactment of Sarbanes-Oxley<sup>5</sup> can attest.<sup>6</sup> More fundamentally, however, this presupposes that the purpose of congressional ethics is limited to the detection and punishment of those who violate a list of enumerated rules. Thompson makes this clear when he writes that the current system of enforcement by the ethics committees and the Department of Justice is “effective at identifying, deterring, and punishing offenders.”<sup>7</sup> I would note, first, that the data offered by Thompson to support this claim—the number of people censured, expelled, and prosecuted under the current system—do not prove his point. After all, to show punitive effectiveness, one would need to know not the absolute number of people punished but rather the percentage of actual offenders who are punished, as well as the fit between the severity of the crime and the seriousness of the punishment. And to show that the current system is effective at deterring, one would have to show that it actually deters. Thompson has not made any of these showings.<sup>8</sup>

More centrally, however, even if Thompson had made all of those showings, he would not, I submit, have made a persuasive defense of the current system of congressional ethics enforcement. In the criminal law context, one of the goals of the system is to prevent people from being punished for behavior that appears to be—but, in fact, is not—improper. This explains the requirements of not only proof beyond a

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4. 152 CONG. REC. S2450-51 (daily ed. Mar. 28, 2006) (statement of Sen. Bennett).

5. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

6. See generally Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357 (2003) (noting that Sarbanes-Oxley toughened corporate governance law in the wake of corporate scandals including Enron and WorldCom).

7. Thompson, *supra* note 1.

8. Indeed, he does not even attempt a response to the criticisms of the ethics committees' inactivity discussed in Chafetz, *supra* note 2, at 167 (2007). See also Editorial, *Partying On*, N.Y. TIMES, Feb. 4, 2008, at A22 (noting that the House ethics committee “usually sits mute as a mesa”). Nor does he discuss my arguments against executive branch enforcement of congressional ethics. See JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 92-93, 105-09 (2007); Chafetz, *supra* note 2, at 165-66.

reasonable doubt<sup>9</sup> and jury unanimity,<sup>10</sup> but also doctrines like the impermissibility of ex post facto laws,<sup>11</sup> the rule of lenity,<sup>12</sup> and the impermissibility of common law crimes.<sup>13</sup> In other words, the criminal justice system requires a rigorous showing that someone violated a rule of which he had clear advance notice. The appearance of impropriety will not suffice.

We have a wholly different standard for those in whom the public trust is reposed. They, like Caesar's wife,<sup>14</sup> must be above reproach.<sup>15</sup> For example, consider impeachment. "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>16</sup> As Charles Black persuasively argued, it must be the case that certain offenses are impeachable, although not criminally punishable.<sup>17</sup> Consider, for example, President Nixon's infamous "Saturday Night Massacre."<sup>18</sup> Although the President undoubtedly has the legal authority to demand that his subordinates carry out his orders and to ask for their resignation—or even fire them—if they do not,<sup>19</sup> it would be odd indeed were Nixon's firings in an

9. See *In re Winship*, 397 U.S. 358 (1970).
10. See FED. R. CRIM. P. 31(a).
11. See U.S. CONST. art. I, § 9, cl. 3.
12. See WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 191-93 (2007).
13. See *United States v. Wiltberger*, 18 U.S. (1 Wheat) 76, 95 (1820).
14. See PLUTARCH, THE LIVES OF THE NOBLE GRECIANS AND ROMANS 859-61 (John Dryden trans., Arthur Hugh Clough ed., Modern Library 1932) (1864) (recounting Caesar's divorce of his third wife, Pompeia, because of the appearance of impropriety created by Clodius's pursuit of her).
15. See *Buckley v. Valeo*, 424 U.S. 1, 29-30 (1976) (noting Congress's legitimate interest in "safeguarding against the appearance of impropriety" in elections to federal office); *Gay v. United States*, 411 U.S. 974, 977 (1973) (Douglas, J., dissenting) (noting that the canons of judicial conduct are designed to prevent the appearance of impropriety, as well as actual impropriety); *Reeder v. Kan. City Bd. of Police Comm'rs*, 733 F.2d 543, 547 (8th Cir. 1984) ("It is proper for a state to insist that the police be, and appear to be, above reproach, like Caesar's wife."); Jeni L. Lassell, Comment, *The Revolving Door: Should Oregon Restrict Former Legislators from Becoming Lobbyists?*, 82 OR. L. REV. 979, 987 (2003) (noting that a federal ban on lobbying by former members of Congress for one year after they leave Congress was implemented to prevent the appearance of impropriety); cf. Julia Driver, *Caesar's Wife: On the Moral Significance of Appearing Good*, 89 J. PHIL. 331 (1992) (arguing that we can have a moral duty to avoid actions which appear immoral). See generally Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653 (2001) (approving the appearance of impropriety standard in regulating public life).
16. U.S. CONST. art. II, § 4.
17. CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK 33-41 (rev. ed. 1998) (1974).
18. See Carroll Kilpatrick, *President Abolishes Prosecutor's Office; FBI Seals Records*, WASH. POST, Oct. 21, 1973, at A1.
19. See *Myers v. United States*, 272 U.S. 52 (1926).

attempt to stymie the Watergate investigation not an impeachable offense.<sup>20</sup> Similarly, the Constitution allows punishment of a member of Congress for “disorderly Behaviour,”<sup>21</sup> without specifying that only illegal behavior is disorderly or even that punishable behavior must violate a previously promulgated rule of the house.<sup>22</sup>

The reason that the ethics regulation of public officials does not include many of the protections of criminal law is that in addressing the ethics of public officials we are concerned not only with punishing the guilty but also—and, I would suggest, more importantly—with both the reality and the public perception of clean government. And on this account, the current system clearly fails. As Thompson himself notes, a perception of institutional corruption is widespread, and indeed was in large part responsible for the Democrats’ takeover of Congress in 2006.<sup>23</sup> Thompson remarks that the 2006 election results were “more of a blunderbuss than a laser beam, as many of the ousted members were not involved in scandals.”<sup>24</sup> In other words, Thompson assumes that many voters who voted on the corruption issue intended to vote against a corrupt member and were simply too ignorant to know that their member was not, in fact, corrupt. But this runs counter to the conventional polling wisdom that voters tend to think more highly of their own congressman than they do of Congress as a whole.<sup>25</sup> I suggest, instead, that voters rejected incumbents in unusually large numbers in 2006 because they considered Congress *as an institution* to be corrupt—that is, they perceived fault not only in the individual members who took bribes or behaved inappropriately with House pages, but also in the institution which failed in its constitutional duty to

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20. Indeed, the first article of impeachment against Nixon voted by House Judiciary Committee accused him of, *inter alia*, “interfering or endeavouring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the office of Watergate Special Prosecution Force, and Congressional Committees.” Articles of Impeachment, H.R. REP. 1305, 93rd Cong., 2d Sess. (1974).

21. U.S. CONST. art. I, § 5, cl. 2.

22. See CHAFETZ, *supra* note 8, at 210 (noting that there are no substantive limitations on offenses for which members may be punished by their chamber).

23. Thompson, *supra* note 1.

24. *Id.*

25. The classic formulation of this principle is that we “love our congressmen so much more than our Congress.” Richard F. Fenno, Jr., *If, as Ralph Nader Says, Congress Is “the Broken Branch,” How Come We Love Our Congressmen So Much?*, in CONGRESS IN CHANGE: EVOLUTION AND REFORM 277, 286 (Norman J. Ornstein ed., 1975); see also Glenn R. Parker & Roger H. Davidson, *Why Do Americans Love Their Congressmen So Much More Than Their Congress?*, 4 LEGIS. STUD. Q. 53 (1979).

regulate the ethics of its members.<sup>26</sup> And in that failure, every member was equally culpable.<sup>27</sup>

In short, our current ethics system has failed in one of its most fundamental duties: it has failed to maintain public trust in Congress. Thompson's conclusion that the current system works just fine completely ignores this function of the system.

## II. THE PRESCRIPTION

Thompson then goes on to suggest that my proposal for Congressional Commissioners for Standards is "worse than the ethics disease itself."<sup>28</sup> Curiously, Thompson never notes the success of the British Parliamentary Commissioner for Standards, on which my proposal is based—one would think that a well-functioning analogue in another country<sup>29</sup> would be a compelling consideration when assessing the merits in this country. Thompson's central objection to this proposal is its requirement of publicity.<sup>30</sup> He argues that a publicity requirement will have two deleterious effects: it will eliminate confidentiality,<sup>31</sup> and it will make the process "more political."<sup>32</sup>

Thompson argues that confidentiality "encourages candor, protects the rights of the accuser and the accused, and allows the committees to use the *threat* of publicity to obtain compliance."<sup>33</sup> The claim that secrecy encourages candor on the part of the accused is an odd one. After all, we generally think that a lie told to a great many people is more likely to be discovered than a lie told only to a few. And given that lying

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26. See Shaun Bowler & Jeffrey A. Karp, *Politicians, Scandals, and Trust in Government*, 26 POL. BEHAV. 271 (2004) (arguing that scandals by individual members of Congress cause a decline in the public perception of Congress as an institution).

27. See *id.* at 284 (suggesting that the easiest way to increase public trust in Congress is for members of Congress to improve their own collective behavior).

28. Thompson, *supra* note 1.

29. See Peter Riddell, *The Lords Lag Behind in Keeping Their House in Order*, TIMES (London), July 17, 2007, at 6 (noting the success of the Parliamentary Commissioner in ethics enforcement).

30. Thompson also argues that, "[a]t best, the Commissioner will take on a job that is already being done by the staff of the ethics committees." Thompson, *supra* note 1. But this ignores the fact that the ethics committee staff cannot do anything on its own—it simply serves as staff to the committee members, who are notoriously reluctant to act. See Chafetz, *supra* note 2, at 167. The Commissioner, on the other hand, would investigate and publicize allegations of wrongdoing on her own. Further investigation and punishment would be left to the ethics committee, thus preserving the houses' institutional control, but the Commissioner's report would pressure the committee members to act in ways that will meet with public approval. See Chafetz, *supra* note 2, at 172.

31. Thompson, *supra* note 1.

32. *Id.*

33. *Id.*

to the Commissioner would open a Member (or, for that matter, a non-Member) to charges of contempt of Congress, it would stand to reason that, the greater the chance of a lie being discovered, the less likely the potential liar is to utter it. As far as protecting the privacy of the accuser goes, my proposal allows the Commissioner to redact portions of her report if they pose a threat to the privacy of third parties.<sup>34</sup> But as far as protecting the rights of the accused, I would submit that this, again, betrays a criminal law mindset where it is not appropriate. Running for office entails accepting increased scrutiny of your ethical dealings, and we should demand of our public officials a willingness to openly confront allegations against them.

I note also that my proposal calls for publicizing the Commissioner's investigations *after* she has completed them;<sup>35</sup> thus, a baseless allegation will be released to the public along with the Commissioner's conclusion that it is baseless. This gets to Thompson's second worry—that “those filing complaints may lodge them for purely political reasons” and that every complaint will become a campaign ad.<sup>36</sup> But given that accusations of ethical transgressions will—and should—be campaign issues, anyway, isn't it better to have a regular, transparent process for investigating them? Put differently, wouldn't an innocent Member prefer to have those rumors decisively and officially rejected, rather than having them continue to fester without any official public repudiation?

Insofar as Thompson worries that a publicity requirement will deprive the ethics committees of the threat of publicity, I confess that I have trouble seeing how this is a bad thing. In essence, Thompson is arguing that there is virtue in a system which actively promotes the ability of the ethics committees to extort accused Members in order to get whatever it is that they—the ethics committee members—want from them. There is, of course, no way of ensuring that what the ethics committee members want is actually in the public interest, because that would require publicity, which is precisely what Thompson seeks to avoid.

### III. CONCLUSION

Thompson misses the primary value of publicity for the same reason that he misses the extent of the failure of our current ethics enforcement mechanisms. He thinks that the purpose of congressional ethics enforcement, like the purpose of criminal law, is to punish wrongdoers. But it is not. The purpose of congressional ethics enforcement is to promote clean government and public trust in government. An ethics enforcement regime that is slow to uncover wrongdoing, even slower to punish it, and conducts its business with a presumption of secrecy does not accomplish these goals—and the

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34. Chafetz, *supra* note 2, at 172 n.41.

35. *Id.* at 172.

36. Thompson, *supra* note 1.

public has noticed. Seeking to restore confidence in the ethics of public officials is not a “futile” “quest for public adulation,”<sup>37</sup> as Thompson would have it. It is a fundamental condition of democratic governance, and it is one that the creation of Congressional Commissioners for Standards would help foster.

*Josh Chafetz is a law clerk to the Hon. Guido Calabresi of the United States Court of Appeals for the Second Circuit. Beginning in July, he will be Assistant Professor of Law at Cornell Law School.*

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37. *Id.*