"The Constitutional Framework for Congress's Ability to
Uphold Standards of Member Conduct"

Hearing Before the Subcommittee on the Constitution, Civil Rights,
and Civil Liberties of the House Judiciary Committee

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Chairman Cohen, Ranking Member Johnson, and Distinguished Members of the Subcommittee:

Thank you for the opportunity to testify today regarding the constitutional bases, history, and scope of the congressional chambers' powers to discipline their own members. My name is Josh Chafetz, and I am a Professor of Law at Georgetown University Law Center and an Affiliated Faculty Member of both the Government Department and the McCourt School of Public Policy at Georgetown. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics. Much of my testimony today will draw on research conducted for my book, *Congress's Constitution: Legislative Authority and the Separation of Powers*, published in 2017 by Yale University Press, and I have appended a chapter from that book to this testimony.

CONSTITUTIONAL AUTHORITY

The constitutional text authorizing the congressional chambers to discipline their members is Article I, sec. 5, cl. 2: "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member." It is noteworthy that the punishment provisions are tightly linked to the Rules of Proceedings Clause: Keeping order in the chambers was understood to be inextricably linked to the houses' broader power to structure their own business.

HISTORICAL DEVELOPMENT

This constitutional text was not drafted on a blank slate. Instead, it reflected hard-won experience under the British Crown and the colonial legislative systems. The English Parliament's origins were as an advisory body to the Monarch;[1] it was therefore understood to be one element among many of *royal* government.[2] As a result, disciplining misbehavior among members of Parliament was initially understood as an appropriate function of Crown officials.

[1] *See* J.R. MADDICOTT, THE ORIGINS OF THE ENGLISH PARLIAMENT, 924-1327, at 1 (2010); CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 16-17 (1910).

[2] Josh Chafetz, *"In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation": Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 YALE J.L. & HUMAN. 181, 183-84 (2013).

However, as Parliament began to come into its own as a power in the English state, one capable of not simply advising the Crown but pushing back against it and shaping policy, it also began to assume greater control over its internal affairs, including its power to punish its members. This shift can be traced to the mid-Tudor period, roughly the middle of the sixteenth century.[3]

Indeed, we first see the House of Commons exercising its internal disciplinary powers in 1549 against a member who spoke insultingly of the eleven-year-old King Edward VI. The House had the member arrested and held in the Tower of London for over five weeks until he apologized and was released. This is an interesting transitional moment: although the House was exercising its disciplinary power to protect the honor of the Monarch, it insisted on doing so itself, rather than allowing Crown officials to punish a member.[4] Indeed, for the next six decades, although the House was jealous to maintain control over the disciplining of its own members, it generally did so in the service of causes congenial to the Crown.[5]

This began to change as the House of Commons came into increasing conflict with the Stuart monarchs.[6] Beginning in the 1620s, the House punished several members for being too sympathetic toward the Crown.[7] In the same period, it also began using cameral discipline in the service of what we would today understand as enforcing members' ethical obligations, including punishing members for taking bribes and for witness tampering.[8]

There are three features of this early history worth emphasizing. First, the House of Commons was developing its own law governing the ethical standards of its members. This included, for instance, important and protracted debates over the line between (permissible) patronage and (impermissible) bribery, as well as questions about whether a member could be expelled for extra-parliamentary activities. Second, the House was especially vigilant in using its disciplinary powers to protect its institutional power. Members whose behavior undermined Parliament vis-à-vis the Crown were expelled from the House on several occasions.[9] And third, the House was insistent on maintaining its disciplinary power itself. To allow the Crown to police the behavior of members of Parliament would itself threaten to make the legislature subservient to the Monarch.

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[3] *Id*. at 186-87.

[4] JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 232-33 (2017).

[5] *Id*. at 233-34. This is consistent with the traditional view that the House was "very submissive" toward the late-Tudor Monarchs. F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 242 (H.A.L. Fisher ed., Cambridge Univ. Press 1963); *see also* ALAN CROMARTIE, THE CONSTITUTIONALIST REVOLUTION: AN ESSAY ON THE HISTORY OF ENGLAND, 1450-1642, at 92, 98 (2006); WALLACE NOTESTEIN, THE WINNING OF THE INITIATIVE BY THE HOUSE OF COMMONS 13 (1926); LAWRENCE STONE, THE CAUSES OF THE ENGLISH REVOLUTION, 1529-1642, at 59 (rev. ed. 2002).

[6] As I have argued elsewhere, the "submissive" attitude of Parliament toward late-Tudor Monarchs on matters of policy, *see supra* note 5, masked an increasing assertiveness on matters of procedure, which in turn would allow parliamentary pushback toward early-Stuart Monarchs on matters of policy. *See generally* Chafetz, *supra* note 2.

[7] CHAFETZ, *supra* note 4, at 234-35.

[8] *Id*. at 235-37.

[9] This was most prominent in the expulsions in the 1620s for abusing royal patents. *See id*. at 235.

Although concerns about royal domination of Parliament waned in the aftermath of the Glorious Revolution and the rise of ministerial responsibility to Parliament in the first decades of the eighteenth century,[10] the House continued to keep a jealous eye on its power. In 1716, three members were expelled for supporting or participating in the 1715 Jacobite rebellion, which sought to restore the Stuarts to the throne and thereby threatened to roll back the gains made by Parliament.[11] Again, we see the disciplinary power being used with an eye toward protecting institutional power. The House also remained active in policing the ethics of its members across the eighteenth century.[12]

Perhaps the most famous use of the power in eighteenth-century Britain was in the case of John Wilkes.[13] In 1763, Wilkes, then a member of Parliament for the borough of Aylesbury, published the *North Briton No. 45*, attacking the foreign policy of the Tory Prime Minister, the Earl of Bute. The government was not amused, accusing Wilkes of seditious libel. The ransacking of Wilkes's house on a general warrant and his subsequent victories in two trespass suits became a paradigm case for the constitutionalization of a prohibition on unreasonable searches and seizures, embodied in our Fourth Amendment.[14] For our purposes, more important is that Wilkes was expelled from Parliament in 1764 (while in self-imposed exile in Paris) for the publication. After he returned from Paris in 1768, he stood for reelection to Parliament and won the most votes, but the House refused to seat him and called for a new election. He won that one, too—indeed, he won four times, and on the fourth occasion, the House simply seated his opponent. The public rallied increasingly behind Wilkes, and when he was elected again in 1774, he was finally seated. After eight more years of efforts, he succeeded in having all records of his case expunged from the House of Commons Journals "as being subversive of the rights of the whole body of electors of this kingdom."[15] The Wilkes saga was well-known in the American colonies, where "Wilkes and Liberty!" served as a rallying cry for those who saw in him a fellow antagonist of the government in London.[16]

But the colonists did not take from the Wilkes controversy the lesson that legislative discipline was itself problematic. Indeed, colonial American legislatures were quick to discipline their members for offenses ranging from absenteeism to unparliamentary conduct.[17] Even Patrick Henry's famous 1765 maiden speech in the Virginia House of Burgesses, in which he suggested that George III might "profit by [the] example" of Julius Caesar and Charles I, was followed by a less-famous "beg[ging] the speaker and the house[']s pardon" for his unparliamentary language,[18] lest he be subject to punishment by the house.

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[10] *See id*. at 89-92.

[11] *Id*. at 238.

[12] *Id*. at 237-38.

[13] *See generally* ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY (2006).

[14] *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994).

[15] *See* CHAFETZ, *supra* note 4, at 238-39; JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 155-58 (2007).

[16] *See* Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 WM. & MARY Q. (3d ser.) 373 (1963). The Revolutionary-era American interest in Wilkes is perhaps best captured by the "Wilkes Fund Controversy" in South Carolina beginning in 1769. *See* CHAFETZ, *supra* note 4, at 53-54; Jack P. Greene, *Bridge to Revolution: The Wilkes Fund Controversy in South Carolina, 1769-1775*, 29 J. SOUTHERN HIST. 19 (1963).

[17] *See* MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 184-90 (1943).

[18] *See Journal of a French Traveler in the Colonies, 1765, I*, 26 AM. HIST. REV. 726, 745 (1921).

Instead, the lesson the American colonists seem to have taken from the Wilkes controversy was twofold. First, a member should generally not be expelled multiple times for the same offense. If the member was reelected by his constituents with full knowledge of the conduct that got him expelled, that reelection should be understood as a democratically superior judgment that the conduct was not, in fact, disqualifying. On this point, it is instructive that, of the five early republican state constitutions that explicitly mentioned a power of expulsion, four prohibited either a second expulsion for the same offense or an expulsion for any reason known to the member's constituents at the time of election.[19] (The other state legislatures very likely understood themselves to have a power to discipline their members arising from their general power to control their proceedings.[20]). The second lesson that the Americans took from the Wilkes case was that expulsion could be dangerously abused to allow a legislative majority to entrench itself in power.[21]

Both points arose in the Constitutional Convention itself. A draft from the Committee of Detail provided that "Each House shall have Authority … to punish its own Members for disorderly Behaviour. Each House may expel a Member, but not a second Time for the same Offence."[22] But by the time the Committee reported to the full Convention, the language had been pared back: "Each House … may punish its members for disorderly behavior; and may expel a member."[23] When it came up for debate, James Madison raised a Wilkes-inflected concern: he "observed that the right of expulsion … was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused. He moved that 'with the concurrence of 2/3' might be inserted between may & expel." With very little additional debate, both Madison's amendment and the underlying provision secured the assent of the Convention.[24] We thus see the Constitutional Convention aware of both of the main takeaways of the Wilkes controversy, but choosing to encode only one of them in constitutional text.

One of the first congressional disciplinary cases raised both concerns. Owing to backlash against the Citizen Genêt affair, Federalist Humphrey Marshall won a Senate seat in Democratic Republican-dominated Kentucky in 1795. The state's Democratic Republican governor and House delegation asked the Senate to investigate charges (leveled by two Democratic Republican judges) that Marshall had committed perjury in a lawsuit a year and a half before being elected to the Senate. Marshall requested that a Senate committee be impaneled to investigate to clear his name; the committee concluded both that Marshall had done nothing wrong and that it lacked jurisdiction over matters that occurred before the member was elected and having nothing to do

[19] CHAFETZ, *supra* note 4, at 239-40.

[20] *See id*. at 240.

[21] As Edmund Burke (then a Whig member of Parliament representing the borough of Wendover) put it in defending Wilkes, "The House of Commons can never be a control on other parts of government, unless they are controlled themselves by their constituents; and unless these constituents possess some right in the choice of that House, which it is not in the power of that House to take away." Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770), *in* 1 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 435, 503 (3d ed., Boston, Little, Brown 1869).

[22] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 156 (Max Farrand ed., rev. ed. 1966).

[23] *Id*. at 180.

[24] *Id*. at 254.

with his official duties. The full Senate accepted the committee's conclusions on a straight party-line vote.[25]

Of course, there were also early instances of misconduct that was recognized as such across party lines. Senator William Blount was expelled by a vote of 25-1 when it was discovered in 1797 that he had been promoting a scheme to help the British and Native American tribes seize Spanish Florida and Louisiana.[26] But even in the early days of the Republic, serious charges often failed to clear the two-thirds bar for expulsion: In 1798, a motion to expel Democratic Republican Representative Matthew Lyon for spitting in the face of Federalist Representative Roger Griswold failed to clear the supermajority bar,[27] and in 1808, a motion to expel Senator John Smith for participating in Aaron Burr's conspiracy to set himself up as ruler of a new nation carved out of the Louisiana Territory came up one vote short when every Federalist in the chamber voted against it.[28] In the mid-nineteenth century, sectional differences manifested in physical violence between members with some regularity,[29] and yet on no occasion was a brawling or dueling member expelled, even when one House member killed another in a duel.[30]

It thus quickly became clear that the Constitution's two-thirds threshold did not just prevent the majority from unwarrantedly ridding itself of minority members; it also allowed a minority faction to shield a member who truly did engage in serious misconduct, especially if that misconduct was in the service of factional, rather than purely personal, goals. Fortunately, the Constitution also contemplates punishments short of expulsion, and those are not subject to the two-thirds bar. In 1810, Federalist Senator Timothy Pickering became the first member of Congress to be censured by his chamber after he violated a Senate rule by reading aloud a confidential document in open session.[31] The House first censured a member in 1832 for using unparliamentary language toward the Speaker.[32] In 1842, Representative Joshua Giddings was censured for introducing a series of resolutions approving of the revolt of enslaved persons on the ship *Creole*, which had been carrying them from Richmond to New Orleans. Giddings's resolutions violated the House's infamous "gag rule," which prohibited the receipt of anti-slavery petitions. Giddings resigned his seat after being censured, was immediately reelected by his Ohio constituents, and took his seat again.[33] Indeed, in the nineteenth century it was not at all uncommon to see censured members resign and seek reelection, as a means of demonstrating that their conduct, while criticized by their colleagues, nevertheless had the support of their constituents.[34]

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[25] CHAFETZ, *supra* note 4, at 241-42.

[26] *Id*. at 242. Blount was also impeached by the House, but the Senate dismissed the impeachment on the grounds that members of Congress were not "civil Officers of the United States," U.S. Const., art. II, sec. 4. No member of Congress has been impeached since. CHAFETZ, *supra* note 4, at 148-49, 242.

[27] CHAFETZ, *supra* note 4, at 242-43.

[28] *Id*. at 243.

[29] *See generally* JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR (2018).

[30] CHAFETZ, *supra* note 4, at 244-45.

[31] *Id*. at 243-44.

[32] *Id*. at 244.

[33] *Id*. at 245.

[34] To take one other example, after Representative Preston Brooks, assisted by Representatives Laurence Keitt and Henry Edmundson, caned Senator Charles Sumner on the Senate floor, a motion to expel Brooks failed.

The outbreak of the Civil War brought the issue of cameral discipline front and center. In the House, two members and one member-elect were expelled for fighting for the Confederacy;[35] in the Senate, six seats of members whose states had seceded were declared vacant, while another ten members were explicitly expelled.[36] The Senate also expelled four members from non-seceding states for either fighting for or supporting the Confederacy.[37] The chambers were not indiscriminate, however: the Senate defeated attempts to expel two members for being insufficiently pro-war. In the House, attempts to expel two members for advocating recognition of the Confederacy failed, but both were declared "unworthy Member[s]" and censured.[38]

Cameral discipline was also increasingly used in the mid-nineteenth century to address corruption. In 1857, for instance, three House members resigned after a select committee recommended that they be expelled for offering and taking bribes. The ringleader, Orsamus Matteson, was censured even after he resigned—but he then ran for reelection, won, and was seated.[39] Both the Crédit Mobilier scandal and the Pacific Mail Steamship Line scandal occasioned extensive congressional investigations, but led to no expulsions. Two Representatives were, however, censured in connection with the former.[40]

Importantly, throughout this period, cameral discipline was the sole method of policing the ethics of members of Congress. I am unaware of any member who was indicted for conduct tied to his behavior as a member before 1875, and I am unaware of any member convicted for such behavior until 1904.[41] Until the twentieth century, the chambers' power to discipline their members was understood to be exclusive, so as to prevent executive and judicial meddling in the affairs of Congress. And, indeed, in the first two prosecutions of members under the criminal law, accusations that the prosecutions were politically motivated loomed large.[42]

As the use of criminal law to police members' behavior grew in the twentieth century, the houses' use of their own disciplinary powers increasingly took a back seat. It gradually became the norm for the chambers to wait on the criminal process before beginning internal disciplinary proceedings, thus ensuring that the executive branch and the courts took primary responsibility for policing members' conduct.[43] As an indication of how far this advanced, there were no disciplinary proceedings at all in the House between 1926 and 1967, and none in the Senate between 1929 and 1951—even though a number of members were indicted and convicted during

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Keitt was censured, but neither Brooks nor Edmundson was. Brooks and Keitt resigned their seats; both were reelected and seated. *Id*.

[35] The reason the number wasn't higher in the House is that the seceding states did not send members to the Thirty-Seventh Congress, and controversies over members purportedly returned by seceding states were settled via the House's separate power to judge the elections, returns, and qualifications of its members, U.S. Const. art. I, sec. 5, cl. 1. CHAFETZ, *supra* note 4, at 246; CHAFETZ, *supra* note 15, at 181-89.

[36] CHAFETZ, *supra* note 4, at 246.

[37] *Id*.

[38] *Id*.

[39] *Id*. at 248-49.

[40] *Id*. at 249-50.

[41] *Id*. at 250-51.

[42] *Id*. at 251-52.

[43] *Id*. at 256-57.

this period.[44] Although both chambers returned to the ethics field following these hiatuses, including by creating the Ethics Committees and promulgating formal codes of ethics in the mid-1960s,[45] they have continued to treat criminal prosecutions as the main means of dealing with serious ethical violations by members, often invoking cameral discipline only after criminal proceedings had wrapped up (in those rare cases where the members involved did not resign first) or for matters failing to rise to the notice of the criminal law.[46] Perhaps not coincidentally, during this period when much of the work of disciplining members has been outsourced to the executive, those matters that do give rise to internal discipline have increasingly made use of fines and other monetary assessments.[47]

One final important use of congressional discipline is worth noting. In 1954, in the aftermath of the Army-McCarthy hearings, the Senate censured Joseph McCarthy. The censure was nominally for his abuse of two Senate committees that had investigated his conduct in successive Congresses, but it was clear that it represented a broader rejection of his conduct as a senator.[48] This rejection was both perceived and celebrated in the press—the *Washington Post*, for instance, called it a "vindication of the Senate's honor."[49]

CONTEMPORARY CONCERNS

While the primary purpose of my testimony has been to provide a sense of the constitutional basis and historical development of the authority of each house of Congress to discipline its members, I would like to close with two thoughts about the power as it exists today.

First, the power to discipline members is both broad and substantively relatively unencumbered. The Constitution does not specify what constitutes "disorderly Behaviour," and the historical development suggests only a few limited constraints. The Wilkes case highlighted for the Founding generation the dangers of allowing a majority to use the disciplinary powers to rid itself of its ideological opponents, but the Constitution's solution to this problem was not to specify substantive limits on punishable conduct, but rather to create a high procedural bar—a two-thirds vote—for the most aggressive form of discipline, expulsion.

Also responsive to the Wilkes case, the Constitutional Convention considered a bar on re-expulsion for the same offense but rejected it. Both houses have been sensitive to the underlying concern, repeatedly seating members who had resigned under threat of expulsion or after censure but then been reelected, on the grounds that the reelection demonstrates a democratically powerful reaffirmation of constituent support for the member. Nevertheless, the Convention's rejection of a specific prohibition on re-expulsion might suggest that there are certain highly unusual situations in which expulsion for conduct known to constituents before election might nonetheless be expellable. One outlier district may be full of people who approve, say, of their

[44] *Id*. at 257.
[45] *See id*.
[46] *See id*. at 257-64.
[47] *See* Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, CRS Report for Cong. No. RL31382, at 13-15 (2016).
[48] *Id*. at 264-65; Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529, 581-96 (2020).
[49] Editorial, *Judgment of the Senate*, WASH. POST, Dec. 3, 1954, at 20.

member offering bribes to site a federal building in their district, but that does not mean that the chamber should be stuck with a briber in its membership.

Importantly, as well, expulsion is not the only form of punishment contemplated by the Constitution. As we have seen, censure[50] has been in use since the early-nineteenth century, and in recent years the use of fines and other monetary assessments has become an increasingly prominent form of discipline, as well. Moreover, the stripping of committee assignments—although perhaps better located under the houses' power to structure the rules of their proceedings rather than under their disciplinary power—can also be understood as an important tool of member discipline. These punishments do not require a two-thirds vote.

While the chambers should of course be careful in what they deem "disorderly Behaviour"—just because the two-thirds bar does not apply does not mean that anything goes—they should also understand that it is within their discretion to make that determination, and punishable offenses need not be spelled out in advance. This is not the domain of the criminal law. Behavior that corrupts or disrupts the chamber, in the view of its members, should be understood as disorderly and therefore punishable. So too should behavior that undermines the constitutional role of the chamber vis-à-vis the other branches, or that undermines the constitutional order itself. We have seen cameral discipline used this way in the Anglo-American tradition from the expulsion of the Jacobite sympathizers in 1716 to the expulsion of Confederates in 1861 to the censure of Joseph McCarthy in 1954.

Second, and related, the disciplinary power is a means of not only institutional self-protection, but also institutional empowerment. It is not a coincidence that the House of Commons began taking responsibility for its members' conduct at the same moment at which it began asserting itself as an independent power in the English state. To allow the executive and the judiciary to be the primary engines policing member conduct is to surrender power in two distinct ways. Most immediately, it gives the president and the judges a lever with which to control member conduct, and to the extent that the other branches are operating at cross-purposes to Congress, that lever can be used to advance their interests against Congress's. Longer term, giving the other branches responsibility for cleaning up Congress's messes means that the public will come to trust the other branches more—to see them as the organs of rectitude and responsible stewardship of the public trust, while Congress is increasingly seen as hopelessly corrupt and incapable of keeping its own houses in order.

But Congress *is* capable of disciplining itself. It has the constitutional tools to do so and a historical tradition of using them, under the right circumstances. It should strongly consider reclaiming for itself the mantle of primary enforcer of member standards of conduct. Doing so would be in both the institutional interests of the chambers and in the public interest.

Thank you.

[50] I use "censure" to include "reprimands," as well. The two terms have often been used synonymously, although in recent years the latter may have come to connote a slightly lesser degree of disapproval. *See* Maskell, *supra* note 47, at 12-13.

JOSH CHAFETZ

Congress's Constitution

LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS

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7
Internal Discipline

WITH GREAT POWER, OF COURSE, comes great responsibility.[1] Accordingly, provisions like the Speech or Debate Clause that empower the houses and members of Congress should be read *in pari materia* with a provision that encourages them to exercise that power responsibly: the authority granted to each house to "punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[2] Self-policing is often viewed as a duty of legislatures (one that they may carry out more or less assiduously). But it can also be a source of soft power: when exercised responsibly, it can build or restore public trust in the institution, thus enhancing its ability to engage successfully in the public sphere.[3]

Historical Development

As with many of the legislative powers discussed in the preceding chapters, it was around the mid-sixteenth century that Parliament began taking responsibility for disciplining its own members. On January 21, 1549—the same day that the House of Commons passed the Act of Uniformity, establishing the Book of Common Prayer as the form of worship in England[4]—John Story spoke out against the Book. Story, who was both a well-regarded civil-law scholar and a notoriously difficult person,[5] paraphrased Ecclesiastes on the House floor: "Wo unto thee, O England, when thy king is a child."[6] The king at the time was the eleven-year-old Edward VI. As soon as Story made those remarks, the House ordered him arrested by its sergeant and held incommunicado;[7] three days later,

it sent him to the Tower.[8] He remained there for more than five weeks, until he apologized and the House released him.[9] Importantly, even though Story's insult had been directed at the king (or perhaps more precisely, at the king's uncle, the Duke of Somerset, the Protector), it was the House itself that both punished and released him; indeed, the House's resolution releasing Story even purported to assert authority over the Crown, "requir[ing] the King's Majesty to forgive him his Offences in this Case towards his Majesty and his Council."[10]

A number of early cases of parliamentary discipline likewise dealt with positions taken or words spoken or written by members. In 1581, Arthur Hall became the first member to be expelled from the House of Commons,[11] when he was held in contempt for publishing a book containing "Matter of Infamy of sundry good particular Members of the House, and of the whole State of the House in general; and also of the Power and Authority of this House."[12] When Hall was brought to the bar of the House, the *Journals* noted, he did not behave "in such humble and lowly wise, as the State of One in that Place to be charged and accused requireth."[13] For his contempt, he was not only expelled; he was also imprisoned in the Tower for more than seven weeks and fined five hundred marks.[14]

Just a few years later, cameral discipline was once again a hot issue. William Parry, who had spent parts of the 1570s and 1580s as a government agent on the Continent, spying on English Catholics in exile, was elected to the House of Commons from Queensborough in Kent in 1584. His dealings with Continental Catholics were convoluted, and there is a high likelihood that he was a double, and perhaps a triple, agent.[15] Shortly after taking his seat, Parry was the only member of either house to speak against the Bill Against Jesuits, Seminary Priests, and Such Like Disobedient Subjects,[16] the gist of which is apparent from its title. Parry declared the act to be "full of blood, danger, despair and terrour or dread to the English Subjects of this Realm," and he intimated that its passage was motivated by the desire of members of both houses to acquire the property of exiled priests and other Catholics. He further insisted that he would explain his reasons only to the queen herself, not to the House.[17] The House ordered him into the sergeant's custody; the following day, he was brought to the bar of the House, where he knelt and acknowledged that he had "very undutifully misbehaved himself, and had rashly and unadvisedly uttered those Speeches he used, and was with all his heart very sorry for it," blaming his inexperience and unfamiliarity with parliamentary procedures for the lapse

(and promising that "if ever after he should give any just cause of offence again to this House or any Member thereof, he would then never after crave any more favour of them").[18] The House, after some debate, readmitted him.[19] Alas, the harmony was not to last: Parry was found in February 1585 to be plotting the assassination of the queen.[20] The House immediately expelled him and petitioned the queen (even before his trial began) for permission to make a law "for his Execution after his Conviction, as may be thought fittest for his so extraordinary and most horrible kind of Treason."[21] No such law was passed, and after Parry's conviction, he was hanged, drawn, and quartered—the usual punishment for treason.[22]

This tradition of using internal discipline to punish members for unpopular positions (especially when intemperately expressed) certainly continued through the seventeenth century. In a 1607 debate over a possible union with Scotland, Christopher Pigott, a member from Buckinghamshire, "entered into By-matter of Invective against the *Scotts* and the *Scottish* Nation, using many Words of Scandal and Obloquy."[23] This did not sit well with James I, only recently arrived from Scotland, who communicated his displeasure to the House. After substantial debate, in which it was "resolutely" resolved that "he might not in this Case be punished by any other means," he was expelled and committed to the Tower,[24] where he remained for twelve days.[25] It is worth noting that, even while acceding to royal wishes that Pigott be punished, the House first insisted on vindicating its speech or debate privilege that he not be punished anywhere else. We can thus see this first Parliament of the Stuart reign using its disciplinary power to carefully position itself vis-à-vis the Crown: it punished Pigott for his enmity toward James but also went out of its way to insist (with James as the clearly intended audience) that *only* it could punish Pigott for his words on the floor.

As opposition to James increased over the next two decades, the particular sentiments for which a member might get into trouble began to shift: in 1621, Thomas Sheppard was expelled for his vehement opposition to a bill for keeping the Sabbath, in which he referred to the member who introduced the bill as "a perturber of the peace, and a Puritan."[26] The Puritans and their friends in the House were not amused, with John Pym leading the charge in his first recorded speech, and Edward Coke chiming in with points both theological ("Whatsoever hindereth the observation of the sanctification of the Sabbath is against the scripture") and procedural (expressing his desire "to have such birds crushed in

the shell; for, if it be permitted to speak against such as prefer [that is, introduce] bills, we should have none preferred").[27] Likewise, at the end of the century, four members were expelled for being insufficiently anti-Catholic: Edward Sackville was expelled (and briefly committed to the Tower) in 1679 for (correctly, as it turned out) denying the existence of the Popish Plot and calling Titus Oates "a lying rogue,"[28] and three others were expelled in 1680 for being too sympathetic toward the Duke of York (the future James II).[29]

But the seventeenth century also saw a broadening of the uses of parliamentary discipline. Three expulsions in 1621 mark this phenomenon. John Bennet was expelled for taking bribes and excessive fees in his simultaneous role as a judge in prerogative courts;[30] Robert Lloyd was expelled for zealously exercising and promoting his royal patent for the engrossing of wills;[31] and Giles Mompesson was expelled after he had fled to France while under arrest by the House for his use and abuse of royal patents.[32] These expulsions actually partake of two distinct trends: first, they mark the beginning of expulsions for conduct that was not undertaken as part of the members' parliamentary duties, and, second, they mark the beginning of a turn toward something like modern ethical standards. As to the first, although Bennet, Lloyd, and Mompesson were all clearly punished for activities taking place outside their parliamentary duties, the ties to parliamentary concerns are actually closer than they appear at first glance, especially in the cases of Lloyd and Mompesson. As we saw in previous chapters, Parliament in the 1620s was increasingly concerned that the Stuart kings sought to rule without it. The granting of patents was a source of revenue for the Crown independent of parliamentary taxation; patents were therefore a threat to parliamentary power, which partially explains why Parliament was so diligent in attacking their abuse. Patentees were, in some sense, undermining Parliament as an institution, so it is not entirely surprising that the House of Commons objected to some of the most egregious patentees sitting as its members. Still, the expulsions of Bennet, Lloyd, and Mompesson came to serve as precedent for the proposition that one could be expelled for conduct "external" to Parliament.[33]

Perhaps more importantly, they represent the beginning of the practice of the House of Commons' taking responsibility for the ethical standards of its own members. In 1628, while the House was looking into the participation of Edmund Sawyer, one of its members, in the drawing up of a new book of rates, Sawyer went to the home of a witness and told him that, since the House would

not examine him under oath, "he should not need to speak of any thing which had passed between them." For witness tampering, Sawyer was expelled, sent to the Tower, and declared "unworthy ever to serve as a Member of this House."[34] After the Restoration, the House even began—cautiously, of course—navigating the line between (unacceptable) bribery and (acceptable) patronage in relation to parliamentary duties. In 1667, John Ashburnham was expelled for receiving £500 "from the *French* Merchants" (who were, in fact, English merchants seeking a license to import prohibited French wines).[35] In an illustration of how fuzzy the ethical lines between patronage and bribery remained, Ashburnham's defenders asserted that he took the money "not . . . as a member of the House of Commons but as a Courtier."[36] The House didn't buy it, and he was expelled. A little more than a decade later, when contemplating the expulsion of Thomas Wancklyn for selling parliamentary protections,[37] Henry Coventry remarked of Ashburnham: "There was no law against his taking that bribe. . . . He was a worthy Gentleman, and yet you expelled him the House. He was no Judge, and you judged that taking a bribe."[38] Coventry, at least, perceived the disapproval of bribery to be a judicial standard that had been, perhaps improperly, imported into the legislative realm. In the end, though, Wancklyn too was expelled.[39]

Three bribery cases in 1695 brought the issue squarely to the forefront of the House's attention. First, Henry Guy, a member of the Tory inner circle responsible for managing the court's business in the Commons, was sent to the Tower in mid-February for accepting a bribe from the officers of a certain army regiment, in exchange for help in passing a bill securing back pay for the regiment.[40] A vote to expel Guy narrowly failed two months later,[41] but he remained in the Tower until the end of the parliamentary session in early May.[42] Simultaneously, some members were increasingly concerned that the City of London and the East India Company were both using their considerable financial resources to advance legislation that they favored.[43] While Guy was in the Tower, John Trevor, the Speaker of the House, was expelled for taking a thousand guineas from the City in order to aid the passage of the 1694 Orphans Act, which resulted in a much-needed infusion of money into the City's coffers.[44] Ten days later, John Hungerford was expelled for receiving a (mere) twenty-guinea bribe from the City for the same purpose.[45] The House clearly perceived bribery to be a significant enough problem in mid-1695 that, the day before it was prorogued (thus releasing Guy from the Tower), it resolved that "the Offer

of any Money, or other Advantage, to any Member of Parliament, for the promoting of any Matter whatsoever, depending, or to be transacted, in Parliament, is a high Crime and Misdemeanor, and tends to the Subversion of the *English* Constitution."[46]

As we saw in chapter 4, the beginning of the eighteenth century marked the rise of responsible government, with the leadership of the party with a parliamentary majority increasingly determining state policy. As a result, there was little benefit in bribing a member who did not also hold some office of state. Many eighteenth-century cases of parliamentary discipline, therefore, dealt with members who had received bribes in their capacities as such officers. To take just a few examples, Richard Jones, the Earl of Ranelagh (an Irish title which neither entitled him to sit in the House of Lords nor disqualified him from the House of Commons), was expelled from the House in 1703 for "misappl[ying] several sums of the public money" in his role as paymaster-general of the army;[47] and Robert Walpole was expelled and sent to the Tower in 1712 for allegedly orchestrating a kickback scheme for army foraging contracts when he was secretary of war.[48] Walpole had been a key player in the Whig government that was ousted by the Tories (with Queen Anne's support) in 1710, and his expulsion and imprisonment were seen as partisan in their motivation. His imprisonment made him a celebrity, and he was reelected the following year and held his seat for nearly three decades more, including two decades as prime minister.[49] Even as the transition to responsible government was proceeding, some backbenchers did continue to get caught up in parliamentary scandals: in 1721, for instance, seven members were expelled (one even after he had attempted to resign) for their roles in improprieties related to the South Sea Company. Of the seven, five were disqualified from future public service; six were heavily fined; and two were sent to the Tower.[50]

But parliamentary discipline maintained a broader scope than just bribery or abuse of office. In 1675, John Fagg, a member of the House of Commons, was the defendant in a lawsuit. In the normal course of appeals, the suit came before the House of Lords; the lower house believed that it was a breach of privilege for any of its members to be made to answer before the upper. Fagg appeared in the Lords to defend himself, leading his own house to have him arrested and sent to the Tower for breach of privilege.[51] Two days later, Fagg apologized and was released.[52] In 1707, John Asgill was expelled from the House for blasphemy, for arguing in a pamphlet that true Christians could be "translated" into

eternal life without the necessity of dying first.[53] And in 1716, three members were expelled for participating in or supporting the Jacobite rebellion of the previous year.[54] Parliamentary discipline thus continued to be used for a wide variety of purposes, including speech that the House disdained (Asgill), actions that might damage the House's standing vis-à-vis other institutions (Fagg), or supporting a pretender to the throne (the Jacobites).

Undoubtedly the most prominent use of parliamentary discipline in the eighteenth century concerned John Wilkes, the notorious troublemaker whom we met briefly in chapter 3's discussion of the Wilkes Fund Controversy. Wilkes had incensed both the Tory prime minister, the Earl of Bute, and his patron, George III, with his attacks on Crown policy in the *North Briton No. 45* in 1763.[55] Wilkes was arrested and his house ransacked on a general warrant, and he was charged with seditious libel; he was subsequently released from the Tower after asserting the parliamentary privilege against arrest, and he won two trespass suits arising out of the search of his home. He soon became a folk hero, with "Wilkes and Liberty!" serving as a rallying cry for many, especially in London—and in the American colonies.[56] After Samuel Martin, an ally of Bute's whom Wilkes had also attacked in print, referred to Wilkes as "a coward, and a malignant scoundrel" in debate on the floor of the House of Commons, Wilkes challenged him to a duel.[57] Injured in the resulting duel, Wilkes fled to Paris. The House ordered him to attend upon it; when he sent his regrets from Paris, he was held in contempt.[58] He was then, in January 1764, expelled by the House for having published the *North Briton No. 45*, which the House concluded was "a false, scandalous, and seditious libel, containing expressions of the most unexampled insolence and contumely towards his Majesty, the grossest aspersions upon both Houses of Parliament, and the most audacious defiance of the authority of the whole legislature; and most manifestly tending to alienate the affections of the people from his Majesty, to withdraw them from their obedience to the laws of the realm, and to excite them to traitorous insurrections against his Majesty's government."[59] After returning from France in 1768, Wilkes stood for election to Parliament from Middlesex, and he received the most votes for the seat. But the House declared him ineligible for membership and refused to seat him, instead issuing a writ for a new election. Wilkes got the most votes in that election, and in the subsequent two reruns as well. After the fourth round of voting, the House simply seated his opponent.[60] As his conflicts with the House (and the Crown) grew, so too did his popularity, with Burke

concluding that Wilkes "is the object of persecution. . . . [H]e is pursued . . . for his unconquerable firmness, for his resolute, indefatigable, strenuous resistance against oppression."[61] Finally, in 1774, when Wilkes was again returned for Middlesex (and after sixty thousand people had petitioned on his behalf), he was seated.[62] And, after moving the resolution every year for eight years, in 1782 he finally succeeded in having the records of his repeated exclusions expunged from the House's *Journals*, "as being subversive of the rights of the whole body of electors of this kingdom" to have their choice of representative respected.[63]

As we have already seen with the Wilkes Fund Controversy, the Wilkes saga was followed avidly in the colonies, where he was seen as a fellow struggler against an oppressive ministry.[64] But the colonists did not take from Wilkes the lesson that parliamentary discipline was inherently problematic. After all, as Mary Patterson Clarke has noted, the power of the colonial assemblies to discipline their members was sufficiently pervasive that it was "more or less assumed" to exist everywhere, although a number of colonies also made it explicit in one way or another.[65] Moreover, this assumption did not lie dormant: colonial assemblies "over and over again" disciplined their members for offenses ranging from absenteeism to "scandalous" papers to unparliamentary conduct, and the assemblies' power to do so went largely unquestioned.[66] Indeed, as Clarke pointed out, the famous 1765 speech in which Patrick Henry suggested that George III might "profit by [the] example" of Caesar and Charles I, who had their Brutus and Cromwell, respectively,[67] was immediately followed by Henry's begging the pardon of the Speaker and the House.[68] Even the hotheaded Henry recognized that his language had been unparliamentary and might subject him to cameral discipline.[69] And punishments by the assembly chambers frequently involved not only expulsion but also refusing to seat expelled members who had been reelected.[70]

But it should not be thought that the Wilkes case did not make a significant mark on American legislative procedure. Of the five early republican state constitutions that explicitly mentioned a power of expulsion, four prohibited either a second expulsion for the same offense or an expulsion for any reason that was known to the member's constituents at the time of his election,[71] and, given the prominence of the Wilkes affair in the colonial constitutional imagination only a decade earlier, it seems highly likely that these provisions were written with his case in mind.[72] Moreover, the provision in the fifth instance—that of South Carolina in 1776—makes it clear that the power of disciplining

members was understood to be one of the privileges that Anglo-American legislative houses were assumed to possess even in the absence of such provisions: the two legislative houses "shall enjoy all other privileges which have at any time been claimed or exercised by the commons house of assembly, but the [upper house] shall have no power of expelling their own members."[73] This made sense, because the membership of the upper house was chosen by the lower house;[74] when, two years later, the state's new constitution created an elected upper house, the prohibition on its expelling its own members was dropped.[75] The provision that the houses would enjoy "all other privileges" that their colonial ancestors had enjoyed clearly, at least in the case of South Carolina, included a power to expel. And a number of other states included general provisions protecting the privileges of their legislative houses and/or allowing those houses to determine the rules of their own proceedings.[76] These provisions almost certainly would have sufficed to empower the legislative houses to make use of disciplinary powers up to and including expulsion. Moreover, unlike members of the British Parliament, whose terms could last as long as seven years under the 1716 Septennial Act,[77] members of the Revolutionary state legislatures served extremely short terms,[78] which may have made recourse to expulsion seem unnecessary. After all—and especially if an intervening election washed away most punishable offenses—the voters would have their say soon enough.

At the Constitutional Convention, the delegates clearly had the state constitutional provisions regarding expulsion in mind. An early draft out of the Committee of Detail gave the "house of delegates . . . power over its own members" but also contained a question for further discussion: "quaere. how far the right of expulsion may be proper."[79] In a subsequent draft, the committee came to a tentative conclusion: "Each House shall have Authority . . . to punish its own Members for disorderly Behaviour. Each House may expel a Member, but not a second Time for the same Offence."[80] The provision had become less detailed, however, by the time the committee reported to the full convention: "Each House . . . may punish its members for disorderly behaviour; and may expel a member."[81] When it came up for debate, Madison "observed that the right of expulsion . . . was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused. He moved that 'with the concurrence of 2/3' might be inserted between may & expel."[82] With very little subsequent debate, Madison's proposed addition passed

overwhelmingly, and the provision, thus amended, passed as well.[83] Without any further debate in the Philadelphia Convention, the state ratifying conventions, or the press,[84] the provision assumed its final form: "Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[85]

Two influential early commentators made brief mention of the provision for legislative discipline. In his 1791 *Lectures on Law*, James Wilson tied the houses' disciplinary powers to their free-speech privilege: "When it is mentioned, that the members shall not be questioned in any *other* place; the implication is strong, that, for their speeches in either house, they may be questioned and censured by that house, in which they are spoken. Besides; each house . . . has an express power given it to 'punish its members for disorderly behavior.' "[86] Wilson went on to note that one of the available punishments was expulsion, but that the federal Constitution, unlike the constitution of his home state of Pennsylvania, did not explicitly prohibit reexpulsion for the same offense.[87] Joseph Story, in his 1833 *Commentaries on the Constitution*, tied the disciplinary power, not to the free-speech privilege, but rather to the power of each house to determine its own rules of proceeding (which is discussed in the next chapter): "[T]he power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behaviour, or disobedience to those rules."[88] Moreover, for those situations in which a member is "so lost to all sense of dignity and duty, as to disgrace the house by the grossness of his conduct, or interrupt its deliberations by perpetual violence or clamour," expulsion is available as a last resort.[89] The two-thirds requirement for expulsion serves to ensure that the power—"so summary, and at the same time so subversive of the rights of the people"—could not be "exerted for mere purposes of faction or party, to remove a patriot, or to aid a corrupt measure."[90]

As Story suggested, Madison had been prescient about faction: almost as soon as partisan conflict began to emerge under the Constitution, so too did issues of congressional discipline. In 1795, backlash against the Citizen Genêt affair allowed Federalist Humphrey Marshall (who was both the first cousin and the brother-in-law of future chief justice John Marshall) to win a Senate seat in Republican-dominated Kentucky. Unhappy with the results, Kentucky's governor and House delegation in 1796 asked the Senate to investigate charges by two Republican judges that Marshall had committed perjury in a lawsuit eighteen months before being elected to the Senate. At Marshall's request, the

matter was referred to a committee, which reported that no evidence had been presented to the Senate that showed any fault on Marshall's part. In addition, the committee concluded that the Senate had no jurisdiction over matters occurring before a member was elected and having nothing to do with his congressional service. The full chamber agreed with its committee on a straight party-line vote.[91]

Of course, clear instances of misconduct could swamp partisan considerations. In 1797, President Adams transmitted to Congress evidence that Senator William Blount, a Republican from Tennessee, was promoting a scheme to help the British and Native American tribes seize Spanish Florida and Louisiana. The select committee impaneled by the Senate to investigate recommended that he be expelled. The following day, the Senate received an impeachment of Blount from the House, and the day after that, the Senate expelled Blount by a vote of twenty-five to one. Although Blount promised he would remain in town for his impeachment trial, he in fact hightailed it back to Tennessee. The Senate sent its sergeant-at-arms after him, but Blount's home-state supporters dissuaded the sergeant from attempting to take him back to Philadelphia. In January 1799, the Senate concluded that Blount was not an impeachable officer, and there has never been any attempt since to impeach a member of Congress.[92] Discipline by one's own house, rather than impeachment, which has a role for both, has thus been the sole mechanism of congressional control over members' behavior.

In January 1798, while the House was selecting managers for the Blount impeachment, Roger Griswold, a Federalist from Connecticut, and Matthew Lyon, a Republican from Vermont, began arguing. Griswold referred to allegations that Lyon had behaved in a cowardly manner during the Revolutionary War; Lyon responded by spitting in Griswold's face. While a committee was considering what to do about this, the House passed a resolution declaring that it would "consider it a high breach of privilege if either of the Members shall enter into any personal contest until a decision of the House shall be had thereon."[93] A vote to expel Lyon garnered a majority but fell short of two-thirds. Shortly thereafter, Griswold attacked Lyon with a cane on the floor of the House; Lyon grabbed the tongs from the fireplace and fought back. While a motion to expel both men was pending before a committee, they pledged themselves before the Speaker to keep the peace. The committee then recommended against expelling them, and the House concurred.[94] As we saw in the previous chapter, Lyon again narrowly escaped expulsion the next year, following his

Sedition Act conviction. In addition to the free-speech arguments noted in the previous chapter, several of Lyon's defenders suggested that, since his conviction had been public knowledge prior to his most recent election to the House, it would be inappropriate to expel him for it.[95] Although there was once again a majority to expel Lyon, it was a smaller majority than there had been to expel him for spitting at Griswold, and, in any case, far short of two-thirds.

The difficulty of meeting the two-thirds threshold was again on display in 1807–1808, when Senator John Smith, a Republican from Ohio, was implicated in Aaron Burr's treason conspiracy. Burr had allegedly sought to carve an independent nation, which he would rule, out of the newly acquired Louisiana territory. The ensuing trial was presided over by John Marshall riding circuit, with President Jefferson micromanaging the prosecution from afar. Burr was acquitted after Marshall issued a ruling excluding much of the government's evidence.[96] The charges against Smith, who had been indicted for providing supplies to Burr, were dropped after Burr's acquittal. Nevertheless, Samuel Maclay introduced a resolution calling for his expulsion, and John Quincy Adams authored the select committee report, which began by noting that, the verdict in the Burr trial notwithstanding, the existence of the Burr Conspiracy was "established by . . . a mass of concurring and mutually corroborative testimony"; moreover, the report stated, participation in the conspiracy should be incompatible with service in the Senate.[97] The report was at pains to differentiate expulsion proceedings from criminal ones: whereas the latter err on the side of acquitting the guilty, the presumption flips for the former: "It is not better that ten traitors should be members of this Senate than that one innocent man should suffer expulsion."[98] The committee also submitted to the Senate evidence that Smith was indeed part of the conspiracy. After extensive debate, including allowing Smith to be heard by counsel (Francis Scott Key, as it turned out), the final Senate vote was nineteen to ten for expulsion—one vote short of the requisite two-thirds. Republicans were split, and no Federalist voted to expel.[99] (Adams, who had been kicked out of the Federalist Party the previous year for his support of various Jeffersonian policies, did vote to expel.) Two weeks later, Smith resigned his seat.[100]

Expulsion, however, was not the only option available to the houses, and lesser punishments did not have to clear the two-thirds bar. Thus, in 1810, Massachusetts Federalist Timothy Pickering violated a Senate rule by reading a confidential document aloud in public session. On the motion of Republican

Henry Clay, the Senate passed a resolution declaring that Pickering had "committed a violation of the rules of this body," thus making Pickering the first member of Congress to be censured by his chamber.[101] The House followed suit, censuring its first member in 1832. William Stanbery, while criticizing a ruling from the chair, said: "[T]he eyes of the Speaker are too frequently turned from the chair you occupy toward the White House."[102] For his unparliamentary language, Stanbery was censured by his colleagues.[103]

Members could also take advantage of disciplinary procedures as a way of clearing their name. In 1835, President Jackson was nearly assassinated while attending a funeral in the House chamber. Although the attempted assassin was clearly mentally ill, reactions to the attempt were immediately and divisively partisan.[104] Rumors soon began circulating that Senator George Poindexter, a former Jackson ally who had a dramatic falling out with the president, had engineered the attack—and Jackson indicated that he found the rumors plausible. Poindexter requested that the Senate impanel a committee to investigate him and expel him if the charges were found to be accurate. After taking extensive testimony, the select committee concluded that the charges were baseless, and the full chamber unanimously exonerated Poindexter.[105] This official cameral determination of Poindexter's innocence played publicly to Jackson's opponents, "as the entire affair seemed to offer additional proof of the incompetence and corruption of the Jackson administration."[106]

These partisan tensions would become increasingly violent as sectional rivalry grew in intensity through the middle of the nineteenth century. Between 1838 and 1856, the chambers (especially the House) began small-scale dress rehearsals for the Civil War, with at least ten violent physical altercations between members. Seven of these conflicts pitted a Democrat against a Whig (or a Unionist or Opposition Party member, between the collapse of the Whigs and the rise of the Republicans).[107] These included the 1838 killing of Democratic representative Jonathan Cilley by Whig representative William Graves in a duel[108] and the infamous 1856 caning of Opposition Party senator Charles Sumner by Democratic representative Preston Brooks, aided by fellow Democrats Laurence Keitt and Henry Edmundson, in retribution for Sumner's "Crime against Kansas" speech on the Senate floor.[109] And at least one of the intraparty fights was clearly sectional: after Missouri Democratic senator Thomas Hart Benton said on the floor in 1850 that "the country has been alarmed without reason and against reason; . . . there is no design in the

Congress of the United States to encroach upon the rights of the South, nor to aggress upon the South," his Democratic colleague from Mississippi Henry Foote called it "a direct attack upon myself, and others with whom I am proud to stand associated." Benton then approached Foote, who responded by drawing and cocking a loaded pistol.[110]

Of these ten physical altercations, no punishment at all was meted out in nine (including the fatal Graves-Cilley duel, which led to the enactment of an anti-dueling law for the District of Columbia in 1839[111] but never resulted in any punishment for Graves). An expulsion resolution against Brooks for the attack on Sumner failed, but Keitt was censured by the House (a censure resolution against Edmundson also failed). Brooks and Keitt then resigned their seats, and both were immediately reelected and seated.[112] In the Benton-Foote imbroglio, the special committee, which recommended that no action be taken against either senator, laid blame at the feet of the entire Senate, which, "for some time past, and, until very recently, departed in its practice from the strict rules of order in debate, and tolerated [personal verbal attacks], which were increasing in frequency and violence."[113]

One member who was punished by the House during this period was Joshua Giddings, an Ohio Whig and staunch abolitionist. In violation of the House's "gag rule," a cameral rule adopted in 1840 providing that the House would refuse to receive any petition seeking the abolition of slavery or of the interstate slave trade,[114] Giddings offered a series of resolutions in 1842 approving of the slave revolt on the ship *Creole*, which had been carrying its human cargo from Richmond to New Orleans, and declaring that the "persons on board the said ship, in resuming their natural rights of personal liberty, violated no law of the United States, incurred no legal penalty, and are justly liable to no punishment."[115] A resolution, authored by Virginia Whig John Botts, was then passed declaring Giddings's conduct in offering the resolutions "altogether unwarranted and unwarrantable, and deserving the severe condemnation of the people of this country, and of this body in particular."[116] The day after receiving this censure, Giddings resigned his seat. He was immediately reelected and took his seat again.[117] In that same session, John Quincy Adams pressed the limits of the gag rule by presenting a petition from constituents calling for the peaceful dissolution of the Union, on the grounds that "a vast proportion of the resources of one section of the Union is annually drained to sustain the views and course of another section without any adequate return."[118] Several resolutions were

offered censuring Adams; after much debate, the whole matter was tabled.[119] In 1844, Adams succeeded in having the gag rule repealed.[120]

The Civil War itself naturally led to a number of disciplinary cases. In the House, because of the biennial election schedule, many Southern states simply did not return any members for the Thirty-seventh Congress, and what controversies there were (as, for instance, when Unionists in seceding states held their own elections and sent members to Washington) were settled through the chamber's power to judge the elections, returns, and qualifications of members.[121] The border states, however, presented the expulsion problem squarely: two House members (one from Missouri and one from Kentucky) were expelled from the Thirty-seventh Congress for "having taken up arms against" and being "in open rebellion against" the federal government; one other member-elect from Missouri was expelled for the same reason.[122] The Senate, of course, had to deal with a number of members from seceding states whose terms had not expired. After some debate as to how to deal with the announced "withdrawals" of a number of members, the new Republican-dominated Senate declared six seats vacant (including that previously held by Jefferson Davis) when it met in special session in March 1861.[123] After Fort Sumter, the language hardened: when the Senate expelled ten more members from seceding states that July, it declared that they were "engaged in [a] conspiracy for the destruction of the Union and Government, or, with full knowledge of such conspiracy, have failed to advise the Government of its progress or aid in its suppression," and it explicitly used the word "expelled."[124] Over the next year, the Senate expelled four members from non-seceding states as well, because of their support of the Confederacy: John Breckinridge of Kentucky (formerly vice president under Buchanan) was declared a "traitor" and expelled after becoming a general in the Confederate Army; both Missouri senators were expelled after backing the secessionist forces in their state; and Jesse Bright of Indiana was expelled for writing a letter of introduction to "His Excellency Jefferson Davis, President of the Confederation of States," on behalf of a Texas arms dealer.[125] But the chamber was not indiscriminate: attempts to expel Benjamin Stark of Oregon and Lazarus Powell of Kentucky (both Democrats) for their insufficiently pro-war views both failed.[126] Likewise, attempts to expel Democrats Alexander Long of Ohio and Benjamin Harris of Maryland from the House failed, and both were instead declared "unworthy Member[s]" and censured for their speeches advocating recognition of the Confederacy.[127]

Unsurprisingly, the contentiousness of the Civil War spilled over into the Reconstruction Congresses. In May 1866, Democratic Representative John Chanler of New York was censured for introducing a resolution lauding President Johnson's vetoes of the "wicked and revolutionary acts of a few malignant and mischievous men"—that is, the Reconstruction bills passed by the Republican-dominated Congress.[128] The following month, Representative Lovell Rousseau of Kentucky—who had been a Union general during the war and was a self-described "Andrew Johnson man"[129]—gave a long speech chastising the Republican majority for foot-dragging in readmitting the Southern states.[130] In the course of the speech, he referred derisively to "some northern non-combatants, stay-at-home patriots."[131] In response, Josiah Grinnell, a Republican from Iowa, described Rousseau as "assum[ing] the air of a certain bird that has a more than usual extremity of tail, wanting in the other extremity," and asked, "[H]is military record, who has read it? In what volume of history is it found?"[132] Three days later, Rousseau attacked Grinnell with a cane on the portico of the Capitol.[133] The committee appointed to look into the matter recommended that Rousseau be expelled for the assault and that Grinnell be censured for improperly imputing cowardice to Rousseau.[134] The motion to expel Rousseau failed to garner the necessary two-thirds supermajority, and the motion to censure Grinnell was then tabled. A subsequent motion to censure Rousseau passed; Rousseau resigned but was censured at the bar nonetheless.[135] He was then reelected to fill his own vacancy.[136] Over the next decade, several other Democrats were censured for unparliamentary language in opposition to Reconstruction measures.[137] As the sectional conflict receded, the use of discipline for unparliamentary language or brawling dissipated, although it did not completely die out.[138] Indeed, a 1902 brawl between Senators John McLaurin and Benjamin Tillman, both Democrats from South Carolina, triggered by the debate over Philippine annexation, led to both men being censured and to a change in Senate rules governing decorum. Thenceforth, it was a violation of cameral rules to impute to a colleague "any conduct or motive unworthy or unbecoming a Senator" or to "refer offensively to any State of the Union."[139]

Of course, issues surrounding the Civil War and Reconstruction were not the only matters for which members of Congress faced discipline in the mid-nineteenth century. For instance, in 1844, Senator Benjamin Tappan of Ohio, like Senator Pickering three decades earlier, was censured for publicly releasing secret information—in this case, a message from President Tyler describing the

terms of an annexation agreement with Texas.[140] The issue that would come to dominate congressional discipline in postbellum America, however, was corruption. Although federal statutes regulated corruption by officers and employees of the other branches from the earliest days of the Republic,[141] it was not until the middle of the nineteenth century that a law regulating the conduct of members of Congress was passed. An 1853 statute both forbade members of Congress to receive pay for prosecuting any claim against the United States and forbade them to receive anything of value that was given with intent to influence their vote or decision on any matter before them (or potentially before them) in their official capacity. Punishment for both offenses involved fines and imprisonment; punishment for receiving a bribe also involved disqualification from holding "any office of honor, trust, or profit, under the United States" in the future.[142] An 1862 law expanded the scope of the antibribery provision, no longer requiring that the compensation be given with "intent to influence [the member's] vote or decision," but now encompassing also compensation accepted for "attention to, [or] services, action, vote, or decision [on]," any actual or potential matter pending before Congress, as well as "procuring, or aiding to procure, any contract, office, or place, from the government of the United States or any department thereof, or from any officer of the United States, for any person or persons whatsoever."[143] And an 1864 law tightened the prohibition on lobbying by legislators, forbidding compensation for any services rendered "in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever."[144] No further statutes regulating corruption by members of Congress were passed for nearly a century.[145]

But the paucity of criminal provisions did not mean that the chambers themselves were inattentive to corruption. In 1857, a House select committee recommended that four members be expelled for various acts of corruption, ranging from agreeing to support various bills in exchange for bribes to attempting to bribe other members to support bills.[146] The worst of the bunch was Orsamus Matteson of New York, who not only recommended that the president of a railroad company bribe a number of members (to the tune of $100,000 total) to secure the passage of a bill but also stated that twenty to thirty members of the House had agreed with one another not to vote for any bill granting money or

lands unless they were all bribed to do so.[147] The committee reported that it could find no evidence of such a widespread conspiracy, but it noted that it was in the interests of certain people ("broker[s] in congressional corruption") to spread such rumors, which were then disseminated by a sensationalizing press (whose members were "particularly anxious to be the first in giving to the public some piece of 'startling intelligence' or 'astounding development' ").[148] The committee also reported out a bill that would have banned any lobbying for compensation[149]—which, perhaps needless to say, failed to pass. The recommended expulsions, however, had more traction: the House found insufficient evidence to proceed against William Welch of Connecticut, but the other three, including Matteson, all resigned while the expulsion resolutions were pending.[150] Even after his resignation, however, the House passed two resolutions censuring Matteson and declaring him "unworthy to be a Member" of the chamber.[151] Matteson (but not the other two resigners) ran for and was reelected to his seat; after some debate as to whether he should be expelled for his previous offense, a select committee decided that expulsion would be "inexpedient," and he was seated.[152] None of the four members ever faced criminal proceedings. Similarly, in 1862, Senator James Simmons, a Republican from Rhode Island, resigned while facing an expulsion resolution for using his influence to secure a war contract for two rifle manufacturers in exchange for a promised $50,000. Simmons's case led to the passage of the 1862 law described above, but Simmons, too, faced no judicial proceeding after leaving office.[153] And in 1870, three representatives were censured for taking money in exchange for appointments to the academies at West Point and Annapolis (two of the three were censured even after they had resigned),[154] but no action was taken against them in the courts.

The great scandals of the Gilded Age were also handled altogether internally. The Crédit Mobilier scandal centered on Representative Oakes Ames, a Republican from Massachusetts who was also an officer of Crédit Mobilier, a dummy construction company designed to skim off profits from government grants to build the Union Pacific Railroad. Ames distributed shares of the company to fellow members of Congress at below-market-value prices, in exchange for votes that would keep the money flowing into the Union Pacific coffers.[155] The stock had been handed out in 1867, but the gifts did not come to light until the *New York Sun* broke the story in 1872. A number of members of both houses (as well as Treasury Secretary George Boutwell and Vice Presidents

Schuyler Colfax and Henry Wilson) were implicated, but most were exonerated by the congressional committees set up to investigate. (Many of these members had made negligible profits and had returned the stock when the scandal became public.)[156] However, the House committee recommended the expulsion of both Ames and James Brooks, a Democrat from New York.[157] The committee majority was not troubled by the fact that the gifts had been received before the election of the investigating Congress, since they had theretofore remained secret, and thus the members' reelections could not be regarded as approbation or forgiveness on the part of their constituents.[158] The House Judiciary Committee, however, came to the opposite conclusion, arguing that members could never be punished by the House for actions prior to their most recent election.[159] In the end, the chamber split the difference, "absolutely condemn[ing]" the behavior of Ames and Brooks but not expelling either.[160] The Congress ended shortly thereafter, and both men passed away within months of their censure.[161] In the Senate, the select committee recommended the expulsion of James Patterson, Republican of New Hampshire, and the censure of James Harlan, Republican of Iowa, but their terms expired before any action was taken.[162] No formal action was taken against any other senators, although Vice President Colfax was so thoroughly implicated and disgraced that his career was effectively ended.[163]

The other major congressional scandal of the Gilded Age involved the payment of bribes by the Pacific Mail Steamship Line in 1872 in a (successful) attempt to increase its annual subsidy from Congress for carrying mail. The scandal began to come to light in late 1874, and the House Ways and Means Committee investigation of it ran right up to the end of the Forty-third Congress in March 1875. The committee issued a report noting that William King, who had been the postmaster of the House in the Forty-third Congress (thus putting him in a uniquely good position to distribute bribes) and had been elected as a Republican from Minnesota to be a member of the Forty-fourth Congress, and John Schumaker, a Democrat from New York, had obstructed its investigation. The committee recommended both that the evidence it had collected be laid before the new House when it convened and also that it be sent to the federal district attorney for Washington, D.C.[164] Both men were indicted in 1875,[165] although apparently never prosecuted. Meanwhile, the House Judiciary Committee of the Forty-fourth Congress reported that it had no jurisdiction over offenses in previous Congresses, and the matter was apparently left to lie there.[166]

Schumaker may have been the first person indicted for conduct directly tied to his behavior as a member (as opposed to, say, Matthew Lyon or John Smith, who were indicted for what was understood to be extracurricular activity), but it would still be three decades before a member would be convicted for such behavior. In 1904, Senator Joseph Burton, a Republican from Kansas, became the first member of Congress to be convicted of a crime stemming from his legislative service. He had taken money for interceding with postal officials regarding an ongoing mail-fraud investigation, thereby violating the 1864 statute forbidding members to receive compensation for services rendered before governmental agencies.[167] In appealing his conviction to the Supreme Court, he argued that the statute was unconstitutional insofar as it interfered with the disciplinary powers of his house; the Court, per Justice Harlan, disagreed, noting that the Senate still had all of its disciplinary powers intact.[168] The Senate, which had held expulsion proceedings in abeyance while Burton's appeals were pending, ordered its Committee on Privileges and Elections to resume consideration of the matter after the Supreme Court's decision; Burton short-circuited the issue by resigning.[169] He then served five months in prison, at the end of which he was welcomed back to his Kansas hometown with a celebration that the *New York Times* described as being "in the nature of a triumphal procession."[170] The night of his return, Burton gave a speech to a sold-out auditorium seating nine hundred people (with proceeds going to support the local library), in which he excoriated his fellow Republican President Theodore Roosevelt. Burton insisted that Roosevelt had persecuted him because he had stood up for the domestic beet sugar industry and opposed Roosevelt's attempts to lower the tariffs on Cuban cane sugar, which Burton portrayed as having been undertaken at the behest of the powerful Sugar Trust.[171] In Burton's words, "I mortally offended Roosevelt. . . . Roosevelt never forgave me." Burton claimed that Roosevelt had told Kansas's other senator, Chester Long (also a Republican), "I may indict Senator Burton." His political disagreements with Roosevelt, Burton claimed, were "why I was first struck down; why I was hounded for years for a crime I never committed; why all the vast energy of the Government was brought against me; . . . why every crime that can surround a court of justice was committed to hunt me to death."[172]

The second conviction of a senator, under the same statute, led to similar accusations. John Mitchell, Republican of Oregon, was convicted in 1905 of violating the 1864 statute by receiving money to intercede with the General

Land Office (headed by fellow Oregonian Binger Hermann) on behalf of the key players in the Oregon Land Frauds scandal. He died while the case was on appeal, and while he remained a member of the Senate.[173] Although the press largely considered the verdict to be just, there were dissenters. The Salem *Capital Journal*, for instance, evinced "profound sympathy" for Mitchell: "For two years the Government secret service men have followed on his trail and pursued the methods of the Russian spies and detectives. . . . The *Journal* does not believe in the methods that are being employed by the Government. . . . It believes the jurors are terrorized by the press and the Government."[174] Friends of Mitchell's would assert that the prosecution was payback from President Roosevelt for Mitchell's insistence that the Interoceanic Canal Committee, which he chaired, not be rushed in its consideration of the Panama Canal (Mitchell had supported a Nicaraguan route). As one friend put it, Roosevelt had "concluded to get Senator Mitchell out of the way—no matter how." From this vantage, the appointment of a special prosecutor in the Oregon Land Frauds case was not an assurance of independence from local patronage networks but rather an assurance that the prosecution would be handled by a "generalissimo," aided by a "gang of jury-fixing detectives," who, at the behest of the president, assembled a "packed jury, everyone of whom was for years a bitter political enemy of Senator Mitchell, and thereby ma[de] sure of a verdict of guilty."[175] Likewise, the fact that the trial was presided over by a California-based district judge sitting by designation, after the only Oregon-based federal district judge (who had been seen as reluctant to go after Mitchell) had died, was viewed as a form of fixing the trial.[176]

In contrast to the alleged use of prosecution to sully the reputations of members, some members continued actively seeking internal investigations as a way of clearing their own names. In 1904, Senator Charles Dietrich, a Republican from Nebraska, submitted a resolution asking that a committee be appointed to investigate allegations that he had behaved corruptly as governor of Nebraska (allegations on which he had been indicted, but the charges had subsequently been dismissed).[177] In approving the resolution, the Senate appeared to take the position that it could investigate matters occurring before a member was elected; the select committee impaneled to investigate reported that there was no basis to the allegations.[178] As illustrated by the headline in the next day's *Washington Post*—"Dietrich Free From Guilt"—he received the public exoneration that he sought.[179]

Several issues are particularly salient in the history of the congressional disciplinary power traced thus far. First, partisanship has clearly been important—although by no means determinative—in who got punished and how. Second, members who believed themselves to be innocent of wrongdoing have sometimes actively sought investigations as a means of clearing their names. Third, members whose behavior subjected them to the disciplinary procedures of their houses have often resigned before the houses could act. These resignations fall into two broad categories: some members have slunk away, effectively admitting guilt but largely avoiding the official judgment of their peers, while others have resigned and then stood for reelection, effectively taking their case to the people. Finally, prosecution in the courts for violations of congressional ethical standards is a relatively late development, and its early uses were marked by accusations of political payback and interbranch meddling. Each of these issues in one way or another makes salient the functioning of congressional discipline in the public sphere.

Congressional Discipline and Congressional Ethics

One of the most prominent trends in the development of the congressional disciplinary power is its increasing use for what we would today call "ethics" matters—that is, attempts to prevent members from being influenced by factors that are believed to corrupt their judgment.[180] Studies have consistently shown that involvement in a publicized scandal harms a member's reelection chances.[181] Recent work has also indicated that the effects of scandals cut a wider swath, decreasing trust in government generally,[182] as well as harming all candidates from the party most closely identified with the scandal.[183] Importantly, studies have also found that scandals cause more negative public evaluations of Congress as an institution.[184]

How politicians *respond* to these scandals can be quite important in shaping the subsequent public reaction. (Indeed, in some cases their response will determine whether certain actions get publicly coded as "scandals" at all.) Between 2004 and 2006, there was a steadily increasing drumbeat of news about the lavish gifts that lobbyist Jack Abramoff had provided to certain members of Congress in exchange for their support on issues important to his clients. Even though the scandal implicated members of both parties, Democrats made concerted efforts to publicize Republicans' roles in the scandal and to make

ethics reform a central plank of their 2006 midterm elections platform. As a result of this successful engagement in the public sphere, they forced Republicans to "own" the Abramoff scandal, with one study finding that voters punished Republican incumbents who received money from Abramoff but not Democratic incumbents.[185] Another study of the same election found that Republicans were harmed by the Mark Foley scandal (as a member, he had sent sexually suggestive messages to underage House pages). The study speculated that the incident harmed the party as a whole because "evidence surfaced to implicate a substantial number of party members of sheltering Mark Foley for political gain."[186] Scandals, then, have the potential to cause a significant amount of collateral damage—particularly if the public perceives the scandalous behavior to have been tolerated or facilitated by other members. As we saw in chapter 1, institutional trust is a significant source of institutional power; insofar as scandals damage public trust in Congress as an institution—as the studies cited above strongly suggest that they do—then they are damaging to congressional power as well. It is thus in the collective, institutional interests of the houses of Congress for their members to "[e]ngag[e] in fewer scandals."[187]

But, of course, this presents a collective action problem: the benefits of remaining largely scandal free are diffuse and can be undermined by just a few members. By contrast, the benefits of engaging in scandalous behavior (at least, in the period before it becomes publicly known) accrue entirely and immediately to the individual. What is needed, then, is a coordinating mechanism, whereby the chamber as an institution can enforce cooperation with a no-scandal norm and thereby ensure that it receives the institutional benefits that come with being (relatively) scandal free. Properly structured and properly functioning, the congressional disciplinary power can serve as such a mechanism.

This mechanism would, at the very least, have to involve the houses' taking primary responsibility for policing the ethics of their members. As we have seen, this was the case for quite some time. The House of Commons was long jealous of its exclusive ability to police its members; indeed, the law courts did not have jurisdiction over members of Parliament accused of bribery until 2010.[188] In America, as we have seen, no member was indicted for conduct related to service as a member until John Schumaker in 1875, and no one was convicted until Joseph Burton in 1904. Moreover, the first two members convicted—Burton and John Mitchell the following year—both asserted, persuasively to many, that their prosecution was political payback from

President Roosevelt. Regardless of the truth of those assertions, they point to two important concerns with the other branches' policing of members' ethics: first, there is the possibility that the president and the courts will use that authority as a means of influencing legislators, and, second, even if they are not in fact doing so, they are likely to be accused of it, making it harder to figure out who has acted improperly.

But even (or perhaps especially) where there is no plausible claim of improper interbranch meddling, greater involvement of the other branches in congressional ethics has significant soft-power implications. When congressional ethics violations are prosecuted by the executive and adjudicated by the courts, those branches get to play the heroes as they ferret out corruption by powerful actors in the name of the public interest. Meanwhile, congressional enforcement is relegated to the status of an also-ran, coming either after the other branches have acted or when the issue is too minor to warrant their attention. The message sent to the public is that Congress protects its own, handing out slaps on the wrist at most, and that only the executive and the courts can be trusted to keep politics clean. And to the extent that this lesson is internalized by the public, it fosters a narrative that Congress is *institutionally* corrupt. To the extent that only the executive and the judiciary act to root out corruption, the public will come to see them as trustworthy and Congress as untrustworthy. In refusing to clean up its own messes, then, Congress sacrifices its soft power.

This is precisely what has happened in recent decades. Beginning with the convictions of Burton and Mitchell in the first decade of the twentieth century, primary responsibility for ethics enforcement began steadily shifting away from the houses and into the executive and the courts. This transition was not immediate; for instance, when allegations surfaced in 1913 that the National Association of Manufacturers had bribed a number of members of Congress, the House appointed a special committee to investigate. The committee exonerated all but one of the accused members; it recommended that Representative James McDermott, Democrat of Illinois, be censured, although McDermott resigned before the House could vote on the resolution.[189] McDermott was subsequently reelected to his seat, and he was never indicted. In 1929, the Senate censured Hiram Bingham, a Republican from Connecticut, for placing on his Senate staff a lobbyist who was simultaneously being paid by the Manufacturers' Association of Connecticut.[190] And members convinced of their innocence continued for some time to seek vindication through cameral disciplinary processes. Senator

Burton Wheeler, Democrat of Montana, had been harshly critical of Attorney General Harry Daugherty's failure to prosecute officials involved in the Teapot Dome scandal, leading to Daugherty's resignation in March 1924. The next month, Wheeler learned that he had been indicted by a Montana grand jury for violating the 1864 law prohibiting members of Congress from representing paying clients before federal agencies. Wheeler insisted that he was being framed as a matter of political payback from the Justice Department, and he asked for a Senate investigation. The special committee appointed to investigate, consisting of three Republicans and two Democrats, voted four to one (with South Dakota Republican Thomas Sterling in the minority) to exonerate Wheeler, finding that he had handled only state litigation for a client while a senator-elect. The Senate overwhelmingly agreed with the committee, and the following year the Montana jury acquitted Wheeler as well.[191]

But this proactive congressional role was already in decline when Wheeler sought exoneration from his colleagues. That same year, it came to the House's attention that a grand jury in Illinois had reported to the court that it had evidence involving the payment of money to two members of Congress. The House resolved to ask the attorney general to name the members and specify the charge against them, but the attorney general refused. Meanwhile, the two members (John Langley of Kentucky and Frederick Zihlman of Maryland, both Republicans) were identified in the press and took to the House floor to deny the charges. Rather than continue to press the attorney general or proceed on its own, the House simply requested that the attorney general proceed with the case expeditiously. Both members were subsequently indicted, and Langley was convicted of using his influence with federal officials as part of a conspiracy to violate the Prohibition Act. Even after his conviction, he remained in the House (although he took no part in any official business) until all of his appeals were exhausted. Only then did he resign, the House never having taken any action against him; Zihlman was acquitted and remained in the House.[192]

It is certainly a long way from John Quincy Adams's claim in 1807–1808 that the Senate could expel John Smith for participation in the Burr conspiracy even after the court case against him had been dropped to the House's determination in 1924 that a convicted member would simply be held in limbo until all of his appeals were exhausted. The predictable consequence was that members who had engaged in serious improprieties often did not face any proceedings at all in their chambers. Thus, Harry Rowbottom of Indiana was sentenced to a

year in Leavenworth in 1931 for taking bribes from people seeking postal appointments,[193] but, because Rowbottom lost his seat in the 1930 election, one searches the *Congressional Record* and committee reports in vain for any mention whatsoever of his illicit behavior. Indeed, there were no disciplinary proceedings at all (not even ones resulting in no action being taken) in the House between 1926 and 1967 and none in the Senate between 1929 and 1951,[194] and yet a substantial number of members were indicted and convicted during this period.[195]

Congress was not wholly silent on the ethics of its members during this period: in 1958, prompted by an influence-peddling scandal in the Eisenhower administration, the two houses adopted a one-page "Code of Ethics for Government Service" that applied to its own members as well as other government officials and employees.[196] As the Senate committee report accompanying it noted, the code "creates no new law; imposes no penalties; identifies no new type of crime; and establishes no legal restraints on anyone. It does, however, etch out a charter of conduct against which those in public service may measure their own actions and upon which they may be judged by those whom they serve."[197] In 1962, Congress, for the first time in a century, updated the bribery, unlawful gratuity, and conflict-of-interest laws as they applied to members, giving them the form that they largely retain today.[198] In 1964 and 1966, the Senate and House, respectively, created standing Ethics Committees for the first time.[199] And in 1968, both chambers, at the behest of their new Ethics Committees, adopted formal ethics codes.[200] But it had still been decades since either chamber had actually pursued any member for ethical violations. This was the context in which muckrakers Drew Pearson and Jack Anderson, in their 1968 book *The Case against Congress*, wrote that "Washington's neoclassic temples of government shelter petty thieves and bold brigands—the political Pharisees of modern America."[201]

Exhibit A for Pearson and Anderson was Senator Thomas Dodd, Democrat of Connecticut,[202] who became the subject of the first investigation by the Senate Ethics Committee in 1966–1967.[203] The committee found that Dodd had used campaign funds for personal expenses, and it recommended censure. Although there was widespread agreement that Dodd had not broken any laws, the Senate voted ninety-two to five to censure him.[204] The *New York Times* the next day applauded the Senate's performance of this "necessary, if disagreeable, public service" and noted that members of the Ethics Committee "ha[d]

earned respect for a difficult job well done."[205] In particular, the *Times* noted that, "[e]ven though they are not explicitly forbidden in any code or statute book, there are some things that a man in public life knows he should not do," and it voiced its approval of the Senate's decision to punish Dodd for doing them, while simultaneously recommending the adoption of such a code.[206] The paper also noted that, despite the fact that the censure imposed no additional punishment, Dodd "is now finished as a useful member of the body. . . . No member can hope to survive such condemnation of his peers, and although Mr. Dodd has said he will run again, it is doubtful whether the Connecticut Democrats will let him."[207] Indeed, Dodd was denied the Democratic nomination in 1970; he then ran as an independent and finished third.[208]

The House also returned to the ethics field in 1966–1967 with the Adam Clayton Powell case. Powell, a Democrat from New York, had faced widespread accusations of financial improprieties and other misconduct during the Eighty-ninth Congress (1965–1967). (It should be noted that Powell was an African American and a civil rights leader, and, while he was likely guilty of misconduct, it is also undoubtedly true that some of his antagonists were motivated by racism.) At the opening of the Ninetieth Congress in 1967, a resolution was introduced to appoint a special committee to consider whether Powell was entitled to his seat.[209] The committee recommended that Powell be censured, fined, and stripped of seniority, but when the committee's proposed resolution came to the floor, it was amended to exclude Powell from membership in the Ninetieth Congress, and the amended resolution passed by an overwhelming vote of 307 to 116.[210] Importantly, this was done, not as an exercise of the House's power to expel, but rather as an exercise of its power to judge the qualifications of a member, which it decides by simple majority vote.[211] In the 1969 case *Powell v. McCormack*, the Supreme Court, per Chief Justice Earl Warren, held that the House had acted improperly because the ability to judge qualifications (and therefore to exclude from the body anyone lacking the requisite qualifications) was limited to those qualifications spelled out in the Constitution itself—in short, that the House could not circumvent the supermajority requirement for expulsion by purporting to exclude instead.[212] The Court also held that the fact that the exclusion vote passed the two-thirds bar was immaterial; it would not read an exclusion vote as a constructive expulsion vote.[213] Regardless, the damage to Powell was done: although he was reelected to the Ninetieth Congress (to fill the vacancy caused by his own exclusion), he did not seek to be sworn in; he was

then elected to the Ninety-first Congress while his case was pending, but he lost the 1970 Democratic primary to Charlie Rangel, who had challenged Powell's long absences (and, implicitly, the cause for them) from the Capitol.[214]

But the houses' return to the ethics field in the late 1960s came too late to prevent the courts from stepping up and reaping the public relations benefits of serving as the primary ethics enforcers. The Supreme Court initially expressed some reticence to involve itself in such matters: in the 1966 *United States v. Johnson* case, the Court held that the Speech or Debate Clause barred the government from introducing evidence about why former representative Thomas Johnson had made a floor speech—a holding that made it rather difficult for the government to prove that he made the speech because he had been bribed.[215] But the Court quickly changed course, holding in *United States v. Brewster* in 1972 that evidence that former senator Daniel Brewster had solicited and received bribes in exchange for his vote on postage-rate legislation was admissible. Chief Justice Burger, for the Court, wrote that "[t]aking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator."[216] Accordingly, evidence of bribe taking was not barred by the Speech or Debate Clause. In dissent, Justice White (joined by two colleagues) argued that this was not a job for the judiciary: "The Speech or Debate Clause does not immunize corrupt Congressmen. It reserves the power to discipline in the Houses of Congress. I would insist that those Houses develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process."[217] But White's call has not been heeded—since *Brewster*, although the courts have recognized that the Speech or Debate Clause imposes some limits on admissible evidence in such cases,[218] they have nevertheless been broadly willing to treat criminal proceedings as the primary forum for enforcement of congressional ethics.[219]

The houses have largely accepted this role for the courts. Consider a resolution reported out by the House Ethics Committee in 1972: it expressed the sense of the House that a member who had been convicted of a crime that carried a sentence of at least two years' imprisonment should refrain from participating in committee or floor business until either the conviction was overturned or the member was reelected.[220] The report accompanying the proposed resolution noted that it was the Ethics Committee's stated position to take a back seat on ethics enforcement: "[W]here an allegation involves a possible violation of statutory law, and the

committee is assured that the charges are known to and are being expeditiously acted upon by the appropriate authorities, the policy has been to defer action until the judicial proceedings have run their course."[221] (The proposed resolution failed to pass in 1972, but a nearly identical resolution passed in 1975.)[222] This, of course, is precisely the opposite of Justice White's argument that the houses should develop their own procedures for dealing with corruption; instead, the House Ethics Committee explicitly declared the executive branch and the courts to be the "appropriate authorities" to deal with congressional corruption.

It will come as little surprise, then, that in recent major ethics scandals the other branches have routinely acted first, with action by the chambers themselves coming later, if at all. Consider the "Abscam" scandal, which played out from 1978 to 1982. It began as an FBI sting operation designed to ensnare forgers and art thieves and subsequently, based on information from informants, expanded to include political corruption. It culminated with undercover agents, posing as Arab sheiks, attempting to bribe legislators. In 1980, the media reported that the FBI had video evidence of seven members of Congress—six House members and one senator, all Democrats except Representative Richard Kelly of Florida—agreeing to accept bribes in exchange for various favors, ranging from introducing special immigration bills to steering government contracts.[223] All seven were indicted in 1980 and convicted between 1980 and 1982, but only one ever faced discipline from his house. Four of the seven were defeated in reelection bids in November 1980, "in large part because of Abscam."[224] Representative Raymond Lederer of Pennsylvania won his reelection bid in 1980 while under indictment and was convicted in January 1981. After the House Ethics Committee recommended expulsion in April, Lederer resigned.[225] Likewise, Senator Harrison Williams of New Jersey was convicted in May 1981; the Ethics Committee recommended expulsion in August; and he resigned in March 1982, once it became apparent that the Senate would vote to expel him.[226] Only Representative Michael Myers of Pennsylvania was actually disciplined by his chamber—he was expelled a month after being convicted on bribery charges.[227]

Nor is Abscam an outlier. Indeed, the only member of Congress to have been expelled since Myers is Representative James Traficant, Democrat of Ohio, who was expelled in 2002 after he had been convicted on ten counts of bribery, racketeering, and corruption.[228] Other members charged with or even convicted of crimes have been allowed to resign or have lost their seats with no formal action by the House.[229] For instance, Representative Mario Biaggi, Democrat

from New York (and a former New York City police officer), was convicted in two separate corruption trials in 1987 and 1988, one of which carried a thirty-month prison sentence and the other of which carried an eight-year sentence. He resigned in 1988, as colleagues were preparing to expel him.[230] In 1994, powerful Illinois Democrat Dan Rostenkowski was indicted on seventeen counts, including misuse of official funds and obstruction of justice. At the request of the Justice Department, the House Ethics Committee deferred proceedings;[231] Rostenkowski lost his seat in the 1994 Republican wave, and he pled guilty to two counts of mail fraud in 1996.[232] The same pattern holds for Duke Cunningham, Republican of California, who resigned from the House in 2005 and was sentenced to more than eight years in prison for accepting millions in bribes,[233] and for the two House members (Bob Ney, Republican of Ohio, and Tom DeLay, Republican of Texas) convicted in the Jack Abramoff scandal in 2006–2007:[234] none of them was subject to any sort of formal cameral discipline. Similarly, Representative William Jefferson, Democrat of Louisiana, was indicted in 2007 on sixteen corruption charges—the evidence against him included $90,000 in cash that was found stuffed in frozen-food containers in his home freezer. He lost his reelection bid in 2008 and was convicted on eleven counts in 2009.[235] Again, the Ethics Committee held its own investigation in abeyance while the criminal investigation was ongoing.[236] The pattern largely holds even for scandals that do not give rise to criminal charges: in the 1989–1991 "Keating Five" Senate scandal, although the Ethics Committee found that all five senators involved (four Democrats and one Republican) were guilty of at least "poor judgment" in intervening with regulators on behalf of a savings and loan, the worst punishment handed out was a "reprimand" to Senator Alan Cranston (three of the five, including Cranston, retired at the end of their term). The lack of any more severe punishments led to significant public criticism.[237] Likewise, although the House took no formal action against any of the members who had overdrawn their accounts in the 1991–1992 House banking scandal, Republican leaders pressured Democratic Speaker Tom Foley to ensure that the names of the members who had overdrawn their accounts were made public. Subsequently, a huge number of House members either retired or lost their seats in the 1992 elections, at least in part due to the scandal.[238]

Insofar as trust in Congress as an institution is significantly affected by how Congress *reacts* to ethics violations—and I have argued above that it is—this pattern is a problem for the institution. The chambers have so thoroughly ceded

the ethics-policing role to the other two branches that they are willing to allow members to remain in the chamber for years after they have been indicted on serious ethical violations—indeed, in some cases even after they have been convicted, while the convictions are on appeal. Only members who have the poor manners to refuse to resign once their convictions have become final seem to face discipline from their chambers. Indeed, the ethics committees even hold fact-finding in abeyance while criminal proceedings play out. The inevitable appearance is that Congress has almost no interest in policing its members; only the executive and the courts appear to have the will to keep politics clean. To the extent that this lesson is received by the public, it furthers the narrative that Congress is *institutionally* corrupt, which, in turn, decreases public trust in Congress, while increasing trust in the executive and the courts. In failing to keep its own houses in order, Congress sacrifices its soft power.

Of course, it is understandable why many members are reluctant to pursue their colleagues. Some might have good reason to fear that the scrutiny would subsequently be turned on them; others may simply feel uncomfortable investigating and punishing their colleagues and friends. Still, incentives cut the other way, too: from Theodore Roosevelt to Newt Gingrich, politicians have made national reputations as corruption fighters. And, of course, there are always partisan motivations to bring the misdeeds of one's political opponents to light. So, what institutional reforms might make the houses more likely to pursue wrongdoing vigorously, which would, in turn, redound to the institution's benefit?

In 2008, the House took a tentative step in that direction, creating the Office of Congressional Ethics (OCE), an internal entity charged with reviewing allegations of misconduct and recommending action to the House Ethics Committee.[239] The OCE's board is made up of nonmembers, with an equal number appointed by the Speaker and the minority leader. Lobbyists and officers and employees of the federal government are prohibited from serving as OCE board members.[240] The OCE receives complaints from the public and also takes notice of press reports and other sources of information about potential wrongdoing; if two board members agree that there is a reasonable basis to proceed, it can then open a thirty-day preliminary review into allegations of misconduct. At the end of the preliminary review, if at least three board members find probable cause to believe that there has been a violation, then the investigation proceeds to a second-phase review. Whether the investigation proceeds to a second-phase review or not, the OCE must notify both the Ethics Committee and the individual under inves-

tigation of its decision. If the investigation does proceed, then the OCE has forty-five days (extendable for an additional fourteen days) to conduct the second-phase investigation, at the end of which it must transmit its findings and recommendation to the Ethics Committee.[241]

The Ethics Committee remains responsible for making any recommendations to the full House. But it must act on any recommendations received from the OCE within forty-five days. At the end of forty-five days, the committee must publicly release both its own actions and the OCE report and findings, unless the chair and ranking member jointly agree, or a majority of the committee votes, to withhold the information for an additional forty-five days. However, if the committee agrees with an OCE recommendation to dismiss the complaint, or if the committee dismisses it when the OCE left the case unresolved, then the committee need not (although it can) make a public disclosure. A deadlocked committee results in the disclosure of the OCE report and findings. And at the end of each Congress any theretofore undisclosed OCE reports are released.[242]

The structure of the OCE is important. Unlike the Ethics Committees, it receives complaints from nonmembers, so someone with knowledge of wrongdoing need not get the attention of a member in order to begin the ethics process. Moreover, any time the OCE recommends further inquiry by the Ethics Committee, that recommendation will become public. Even though all final decisions are made by the Ethics Committee and then by the full House, the knowledge that an OCE recommendation of further inquiry must be publicly released will necessarily put pressure on the Ethics Committee either to recommend disciplinary action or to have a very good reason why such action is not necessary. At the same time, since any disciplinary action will, in fact, be taken by the House itself, the institutional benefits of keeping one's own house in order will accrue to the chamber. Given these institutional features, it is unsurprising that the OCE has received highly favorable reviews, both in the press and from the public-watchdog groups that pressed for its creation.[243] A report for Public Citizen found that the OCE had "unquestionably . . . helped boost the case record of the Ethics Committee" in punishing wrongdoing.[244] Moreover, the office has sufficient public cachet that a surprise move by the Republican majority to eliminate it at the opening of the 115th Congress in January 2017 sparked substantial backlash and was hastily abandoned.

The OCE is unquestionably a move in the right direction, but its structure could be improved still further.[245] First, and most basically, the OCE exists only for the House; attempts to create a similar institution in the Senate have failed

to gain traction so far. Insofar as the office works well in the House, an analogue would likely work well in the Senate.[246] Second, the OCE currently lacks subpoena power, and one of the most frequent recommendations is that it be given that power.[247] Third, the public-disclosure requirements could be strengthened: any investigation making it to second-phase review should be disclosed, even where the OCE recommends dismissal and the Ethics Committee concurs. The requirement that it make it to second-phase review would serve to weed out the most frivolous complaints, and the expanded disclosure would demonstrate, at the very least, that all complaints are taken seriously.

Finally, both the OCE and the Ethics Committees lack jurisdiction over former members.[248] As a result, members frequently resign (or simply run out the clock and do not seek reelection) and thereby escape any discipline from their chambers. The forcing of resignations is not trivial—indeed, we have seen that one outcome of a vigorous cameral disciplinary process has long been that the wrongdoer slinks away in shame. In many cases, this will suffice to show that the house has effectively policed itself. In still other cases, resignation has been used as a means of submitting members' conduct to their constituents—when a member resigns and immediately seeks reelection, the people can decide whether his conduct makes him unworthy to be a member or not.[249] But there may well be certain cases in which allowing a member to slink quietly away is insufficient. I have argued elsewhere that the House has the authority to refuse to accept the resignations of members and that it might wish to do so in circumstances in which it wants to send a message by expelling them instead.[250] But even if it chooses not to go that far (and in the case of the Senate, from which resignations are explicitly contemplated in the Constitution's text), the chambers could still censure or (using their contempt powers) even imprison former members who had violated ethical rules and then resigned to escape cameral punishment.

Congressional Discipline and Cameral Order

Cameral discipline is not only appropriate for what we would today call ethics violations; it is also an important means of preventing members from unilaterally hijacking or otherwise disrupting the proceedings of their chamber. Recall, in this regard, that Joseph Story treated the disciplinary power as necessary to give effect to the houses' rule-making powers. For an instance of this sort of use of the houses' disciplinary powers, consider the Senate's censure of

Joseph McCarthy in the aftermath of the 1954 Army-McCarthy hearings. After Ralph Flanders, Republican of Vermont, introduced a censure resolution (declaring a broad swath of McCarthy's conduct "unbecoming a Member of the United States Senate, . . . contrary to senatorial traditions, and tend[ing] to bring the Senate into disrepute"),[251] the Senate impaneled a special committee, composed of three Democrats and three Republicans, all of them éminences grises of the chamber, and chaired by Republican Arthur Watkins of Utah. The committee reviewed more than forty allegations of misconduct by McCarthy[252] and ultimately boiled them down to thirteen allegations, grouped into five general categories. These categories ranged from his noncooperation with and contempt of a subcommittee that had investigated him in the previous Congress for misconduct,[253] to his improper use of classified information,[254] to his "abuses of colleagues in the Senate."[255] After taking substantial amounts of testimony and issuing detailed findings, the committee reported mere days after the 1954 midterm elections, which swung control of both houses to the Democrats, a result partially attributable to public disgust with McCarthy.[256] The Watkins Committee report concluded that two of the five categories of charges justified censure: those dealing with contempt of the previous investigation and those dealing with his abuse of Army General Ralph Zwicker when Zwicker testified before McCarthy's Permanent Subcommittee on Investigations.[257] When the resolution came to the Senate floor, the charge relating to Zwicker was dropped and replaced with a charge that McCarthy had abused the Watkins Committee itself. By a vote of sixty-seven to twenty-two, the Senate censured McCarthy for his abuse of the two committees in two successive Congresses.[258]

The next day, the *New York Times* editorialized that, in voting overwhelmingly to censure McCarthy, "the Senate of the United States has done much to redeem itself in the eyes of the American people and to give new assurance of its faithfulness to the principles of orderly democratic government and individual liberty under law."[259] The *Washington Post* declared the censure "a vindication of the Senate's honor."[260] Writing the following year, anti-McCarthyite journalist Alan Barth celebrated the Watkins Committee hearings as "in almost every important respect the antithesis of the procedure followed" by McCarthy himself in conducting Permanent Subcommittee on Investigations hearings.[261] The Senate's censure "reflected a sense of honor on the part of the Senate, and a revived regard for that honor. It revealed a recognition, too long suppressed, that the Senate as an institution is the inheritor and the trustee of a great

tradition. . . . 'The honor of the Senate' may be undefined and undefinable, but it is nonetheless real; and it was essentially for the violation of this honor, rather than for any breach of specific rules, that McCarthy was at last called to account. The Senate's action bespoke an awareness of the moral obligation that inescapably accompanies authority."[262] The censure effectively ended McCarthy's political prominence, with his attempts at provocation increasingly ignored. Within three years, he drank himself to death.[263]

The McCarthy censure was publicly effective in large part because of the bipartisan nature of both the Watkins Committee and the final Senate vote. Contrast this with the 2009 "resolution of disapproval" passed against South Carolina Representative Joe Wilson, a Republican, for shouting "You lie!" at President Obama while the president was addressing a joint session of Congress.[264] The House was under Democratic control at the time, and, although the resolution of disapproval was intended to be a milder measure than a censure, only seven Republicans voted in favor of the resolution (and twelve Democrats voted against). Press reports described the vote as "largely party-line,"[265] and there was no widespread editorializing in support of the chamber's action. Indeed, the whole incident raised Wilson's profile in his party, making him a highly sought-after fundraiser for fellow Republicans.[266] He was handily reelected in 2010.

Maintaining public trust on an institutional level requires that the houses combat—and be seen to combat—abuses in their midst. This is true both for ethical violations, like bribery, and for significant violations of cameral order and decorum. The houses have at times used their disciplinary powers over their members in ways that enhance their soft power with the public. But far too frequently, they have failed to do so, and in recent decades, in particular, they have far too readily ceded this form of soft power to the other branches. Still, recent developments like the House's creation of the Office of Congressional Ethics offer some hope that the chambers will begin to take more advantage of this means of building public trust.

200. *Id*. at 133.
201. Jefferson, *supra* note 84, at 322.
202. For arguments along similar lines, see Chafetz, *supra* note 2, at 91–92, 98–105; Michael L. Shenkman, *Talking about Speech or Debate: Revisiting Legislative Immunity*, 32 Yale L. & Pol'y Rev. 351, 384–98 (2014).
203. Open Letter from 47 Senators to the Leaders of the Islamic Republic of Iran (Mar. 9, 2015), *available at* https://s3.amazonaws.com/s3.documentcloud.org/documents/1683798/the-letter-senate-republicans-addressed-to-the.pdf.
204. *Id*.
205. Statement by the Vice President on the March 9 Letter from Republican Senators to the Islamic Republic of Iran (Mar. 9, 2015), *available at* https://www.whitehouse.gov/the-press-office/2015/03/09/statement-vice-president-march-9-letter-republican-senators-islamic-repu.
206. *See* Editorial, *Un-Patriot Games: GOP Senators' Letter to Iran is a Treacherous Betrayal of the U.S. Constitutional System*, N.Y. Daily News, Mar. 10, 2015, http://www.nydailynews.com/opinion/editorial-un-patriot-games-article-1.2143378.
207. *See* Peter Spiro, *GOP Iran Letter Might Be Unconstitutional. Is It Also Criminal?*, Opinio Juris, Mar. 9, 2015, http://opiniojuris.org/2015/03/09/gop-iran-letter-might-be-unconstitutional-is-it-also-criminal/.
208. Logan Act, ch. 1, 1 Stat. 613 (1799), codified as amended at 18 U.S.C. § 953.
209. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).
210. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 486–87 (1940).
211. Legal Authorities Supporting the Activities of the National Security Agency Described by the President, 2006 WL 6179901, at *7, *15, *28 (O.L.C. Jan. 19, 2006).
212. 299 U.S. 304 (1936). For a more recent example, see Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).
213. *See, e.g.*, Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 Pres. Stud. Q. 139 (2007); Michael P. Van Alstine, *Taking Care of John Marshall's Political Ghost*, 53 St. Louis U. L.J. 93 (2008).
214. *See* Sarah H. Cleveland, Crosby *and the 'One-Voice' Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975, 984–89 (2001).

Chapter 7. Internal Discipline

1. *Cf*. Stan Lee et al., *Amazing Fantasy No. 15*, at 11 (1962), *reprinted in* 1 *The Essential Spider-Man* (2004) ("[W]ith great power there must also come—great responsibility!").
2. U.S. Const. art. I, § 5, cl. 2.
3. My argument here may be viewed as a loose congressional analogue to the claims that some administrative law scholars have made about the ways in which "executive self-binding" can, in the long run, enhance presidential power. *See* Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 137–50 (2010); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 Harv. L. Rev. 512, 573–77 (2013).

4. 2 & 3 Edw. 6, c. 1 (1549). On the House's passage, see 1 H.C. Jour. 6 (Jan. 21, 1549).
5. *See* 3 S. T. Bindoff, *The House of Commons, 1509–1558*, at 386–87 (1982).
6. 2 Gilbert Burnet, *The History of the Reformation of the Church of England* 517–18 (Nicholas Pocock ed., Oxford, Clarendon Press rev. ed. 1865); *see also* Ecclesiastes 10:16.
7. 1 H.C. Jour. 6 (Jan. 21, 1549).
8. *Id*. (Jan. 24, 1549).
9. *Id*. at 9 (Mar. 2, 1549).
10. *Id*.
11. On his status as the first expellee, see 2 P. W. Hasler, *The House of Commons, 1558–1603*, at 241 (1981).
12. 1 H.C. Jour. 125 (Feb. 14, 1581). For more details about the contents of the book, see *id*. at 122 (Feb. 4, 1581).
13. *Id*. at 125 (Feb. 14, 1581).
14. *Id*. at 125–26 (Feb. 14, 1581); 2 Hasler, *supra* note 11, at 241.
15. For as much detail as can be sussed out of the available sources, see 3 Hasler, *supra* note 11, at 180–84.
16. 1 William Cobbett, *Parliamentary History of England* 822–23 (London, Hansard 1806); Simonds D'Ewes, *The Journals of All the Parliaments During the Reign of Queen Elizabeth* 340 (Paul Bowes ed., London, Starkey 1682). For the act itself, see 27 Eliz., c. 2 (1584).
17. D'Ewes, *supra* note 16, at 340–41.
18. *Id*. at 342.
19. *Id*.
20. *See* 3 Hasler, *supra* note 11, at 183.
21. D'Ewes, *supra* note 16, at 352, 355.
22. 3 Hasler, *supra* note 11, at 184.
23. 1 H.C. Jour. 333 (Feb. 13, 1607).
24. *Id*. at 335–36 (Feb. 16, 1607).
25. *Id*. at 344 (Feb. 28, 1607) (ordering Pigott to be freed from the Tower but not readmitted to the House).
26. 1 Cobbett, *supra* note 16, at 1190.
27. *Id*. at 1191–92.
28. 9 H.C. Jour. 576 (Mar. 25, 1679); *id*. at 581 (Apr. 1, 1679); 4 Cobbett, *supra* note 16, at 1118.
29. *See* 4 Cobbett, *supra* note 16, at 1174–75 (noting the exclusions of Robert Cann for denying the existence of the Popish Plot and asserting the existence of a Presbyterian Plot and of Francis Wythens for petitioning against the summoning of the Exclusion Bill Parliament); *id*. at 1233–34 (noting the expulsion of Robert Peyton for associating with York).
30. 1 H.C. Jour. 586–88 (Apr. 23, 1621).
31. *Id*. at 565–67 (Mar. 21, 1621).
32. *Id*. at 535–36 (Mar. 3, 1621).
33. *See* 1 Andrew Thrush & John P. Ferris, *The House of Commons, 1604–1629*, at 62 (2010).

34. 1 H.C. Jour. 917 (June 21, 1628).
35. 9 H.C. Jour. 24 (Nov. 22, 1667); 1 Basil Duke Henning, *The House of Commons, 1660–1690*, at 552–53 (1983).
36. *The Diary of John Milward* 132 (Caroline Robbins ed., 1938).
37. Freedom from civil arrest is one of the traditional privileges of Parliament, and that privilege extended to members' servants until 1770. A "protection" was a document issued by a member—usually sold—claiming another person as his servant, and thus offering that person immunity from civil arrest. The sale of protections was a problem for the House throughout the seventeenth and eighteenth centuries. *See* Josh Chafetz, *Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions* 124–30 (2007).
38. 5 Anchitell Grey, *Debates of the House of Commons* 53–54 (London, Henry, Cave & Emonson 1763).
39. 9 H.C. Jour. 430–31 (Feb. 1, 1678).
40. 11 *id*. at 236 (Feb. 16, 1695); 4 Eveline Cruickshanks, Stuart Handley & D. W. Hayton, *The House of Commons, 1690–1715*, at 127–28 (2002).
41. 11 H.C. Jour. 307 (Apr. 17, 1695).
42. *Id*. at 333 (May 3, 1695) (proroguing Parliament); 4 Cruickshanks et al., *supra* note 40, at 128–29 (noting that Guy remained in the Tower until the end of the session).
43. *See* 5 Cruickshanks et al., *supra* note 40, at 685.
44. For the expulsion, see 11 H.C. Jour. 274 (Mar. 16, 1695). For the Orphans Act, see 5 & 6 W. & M., c. 10 (1694). For a brief description of the act, see Francis Sheppard, *London: A History* 141–42 (1998).
45. 11 H.C. Jour. 283 (Mar. 26, 1695).
46. *Id*. at 331 (May 2, 1695).
47. 6 Cobbett, *supra* note 16, at 126.
48. *Id*. at 1067–68.
49. *See* 5 Cruickshanks et al., *supra* note 40, at 780–84.
50. *See* 1 Romney Sedgwick, *The House of Commons, 1715–1754*, at 409, 534–35, 541–42 (1970) (John Aislabie, George Caswall, and Robert Chaplin); 2 *id*. at 20, 171–72, 409–10, 499 (Francis Eyles, Theodore Janssen, Jacob Sawbridge, and Thomas Vernon).
51. The incident is recounted in more detail in Chafetz, *supra* note 37, at 30–31.
52. 9 H.C. Jour. 352 (June 3, 1675).
53. 6 Cobbett, *supra* note 16, at 600–601.
54. 1 Sedgwick, *supra* note 50, at 531 (John Carnegie); 2 *id*. at 45–46, 371–72 (Thomas Forster and Lewis Pryse).
55. The discussion of Wilkes that follows relies on Chafetz, *supra* note 37, at 155–58.
56. *See* Pauline Maier, *John Wilkes and American Disillusionment with Britain*, 20 Wm. & Mary Q. (3d ser.) 373 (1963).
57. 15 Cobbett, *supra* note 16, at 1356–57 n.*; 3 Lewis Namier & John Brooke, *The House of Commons, 1754–1790*, at 116 (1964).
58. 15 Cobbett, *supra* note 16, at 1388–91.
59. *Id*. at 1393.
60. Chafetz, *supra* note 37, at 157.

61. Edmund Burke, *Thoughts on the Cause of the Present Discontents* (1770), in 1 *The Works of the Right Honorable Edmund Burke* 433, 501 (Boston, Little, Brown 3d ed. 1869).
62. *See* Chafetz, *supra* note 37, at 158.
63. 22 Cobbett, *supra* note 16, at 1407–11.
64. *See generally* Maier, *supra* note 56.
65. Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* 184 (1943).
66. *Id*. at 185–90.
67. As often related, the quotation is "Caesar had his Brutus—Charles the first his Cromwell, and George the third . . . *may profit by their example*. If *this* be treason, make the most of it." *Yale Book of Quotations* 355 (Fred R. Shapiro ed., 2006). A likely more accurate rendition was discovered in the 1920s. *Journal of a French Traveler in the Colonies, 1765, I*, 26 Am. Hist. Rev. 726, 745 (1921) [hereinafter *Journal of a French Traveler*]. On the importance of the assassinations of Caesar and Charles I for the founding generation generally, see Josh Chafetz, *Impeachment and Assassination*, 95 Minn. L. Rev. 347, 347–88 (2010).
68. *Journal of a French Traveler*, *supra* note 67, at 745 (Henry "said that if he had afronted the speaker, or the house, he was ready to ask pardon, and he would shew his loyalty to his majesty King G. the third, at the Expence of the last Drop of his blood, . . . [and] again, if he said any thing wrong, he beged the speaker and the houses pardon.").
69. *See* Clarke, *supra* note 65, at 191–94.
70. *See id*. at 194–96.
71. Del. Const. of 1776, art. 5 (prohibiting reexpulsion for the same offense); Md. Const. of 1776, art. 10 (same); Penn. Const. of 1776, Frame of Gov't, § 9 (same); Vt. Const. of 1786, ch. 2, § 9 (prohibiting expulsion for "causes known to their constituents antecedent to their election").
72. Peter Hoffer has recently insisted that the Wilkes case "was not seen as a legal precedent for any of the revolutionary acts and died with the death of the imperial connection." Indeed, if anything, the Wilkes case would have been considered "a negative precedent, for the state constitutional writers and the delegates to the federal constitutional convention regarded the Parliament of the 1760's as thoroughly corrupt—bought and paid for by the crown." Peter Charles Hoffer, *The Pleasures and Perils of Presentism: A Meditation on History and Law*, 33 Quinnipiac L. Rev. 1, 2–3 (2014). But, of course, that's precisely why the colonists were so interested in Wilkes—as Maier demonstrated, they viewed Wilkes as a fellow struggler against the thoroughly corrupt Parliament and ministry. *See* Maier, *supra* note 56. Wilkes's constituents' struggle to be represented by the person of their choice in Parliament mirrored the colonists', and it seems highly implausible that a group of people so thoroughly invested in Wilkes in the 1760s, as Maier has shown, would have forgotten him—and yet still written constitutional provisions embodying the principle for which he had fought—the following decade. Hoffer's standard of proof—a "smoking gun" or it didn't happen!, Hoffer, *supra*, at 5—is simply too strict. Wilkes had foregrounded the issue of repeated expulsions and exclusions being used to thwart the will of the people, and the issue clearly remained salient for Americans of the early Republican period. Of course, it would be a mistake to assume too much familiarity—the exact twists and turns of the Wilkes struggle were

likely not on the Americans' minds. But it is equally mistaken to assume too little familiarity.

73. S.C. Const. of 1776, art. 7.
74. *Id*. art. 2.
75. S.C. Const. of 1778, arts. 12, 16.
76. For general legislative privilege protections in addition to the two South Carolina provisions mentioned above, see Mass. Const. of 1780, pt. 2, ch. 1, § 3, art. 11; N.Y. Const. of 1777, art. 9. For rules-of-proceedings provisions, see Del. Const. of 1776, art. 5; Ga. Const. of 1777, art. 7; Mass. Const. of 1780, pt. 2, ch. 1, § 2, art. 7; *id*. § 3, art. 10; N.H. Const. of 1784, pt. 2, Senate, para. 12; *id*. House of Representatives, para. 12; Va. Const. of 1776, para. 4.
77. 1 Geo. 1, stat. 2, c. 38 (1716).
78. *See* Akhil Reed Amar, *America's Constitution: A Biography* 75 (2005) (noting that, under their Revolutionary constitutions, "[t]wo states held elections for the lower house twice a year, ten others ran annual elections, and only one—South Carolina—gave lower-house members two-year terms. Although several state upper houses featured multiyear terms, none exceeded five years."); *see also* Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 241–43 (Rita & Robert Kimber trans., Rowman & Littlefield, expanded ed. 2001) (1973) (describing the brief legislative terms in the Revolutionary state constitutions).
79. 2 *The Records of the Federal Convention of 1787*, at 140 (Max Farrand ed., rev. ed. 1966).
80. *Id*. at 156. The first sentence quoted originally ended with "punish its own Members." The committee added "for disorderly and indecent Behavior." It then crossed out "and indecent." Textual notations of these insertions and deletions have been omitted from the quotation above.
81. *Id*. at 180.
82. *Id*. at 254.
83. *Id*.
84. *See* Chafetz, *supra* note 37, at 208.
85. U.S. Const. art. I, § 5, cl. 2.
86. James Wilson, *Lectures on Law, Part Two: Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department* (1791), in 1 *The Works of James Wilson* 399, 421 (Robert Green McCloskey ed., 1967).
87. *Id*.
88. 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835, at 298 (Boston, Hilliard, Gray 1833).
89. *Id*.
90. *Id*.
91. *See* 5 Annals of Cong. 58–60 (Mar. 22, 1796); Anne M. Butler & Wendy Wolff, *United States Senate Election, Expulsion and Censure Cases, 1793–1990*, at 8–9 (1995); 2 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 1288, at 858–60 (1907); Harry M. Ward, *Marshall, Humphrey*, Am. Nat'l Biog. (2000), http://www.anb.org/articles/03/03-00306.html.

92. *See* 7 Annals of Cong. 33–45 (July 3–10, 1797); 8 *id*. at 2245–2416 (Dec. 17, 1798–Jan. 14, 1799); Butler & Wolff, *supra* note 91, at 13–15; Chafetz, *supra* note 37, at 218.
93. 2 Hinds, *supra* note 91, § 1642, at 1115. *See also* Joanne B. Freeman, *Affairs of Honor: National Politics in the New Republic* 173–75 (2001).
94. *See* 2 Hinds, *supra* note 91, §§ 1642–43, at 1114–16; Chafetz, *supra* note 37, at 214; David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 263–65 (1997); Freeman, *supra* note 93, at 173–75.
95. *See* Chafetz, *supra* note 37, at 221; 2 Hinds, *supra* note 91, § 1284, at 850.
96. United States v. Burr, 25 F. Cas. 55, 159–81 (1807).
97. 2 Hinds, *supra* note 91, § 1264, at 816.
98. *Id*. at 818.
99. *Id*. at 821–22; 17 Annals of Cong. 164–324 (Mar. 15–Apr. 9, 1808).
100. 17 Annals of Cong. 324 n.* (Apr. 25, 1808).
101. 22 *id*. at 65–83 (Dec. 31, 1810–Jan. 2, 1811); Butler & Wolff, *supra* note 91, at 26–28.
102. 2 Hinds, *supra* note 91, § 1248, at 799.
103. *Id*. at 799–801.
104. *See generally* Richard C. Rohrs, *Partisan Politics and the Attempted Assassination of Andrew Jackson*, 1 J. Early Repub. 149 (1981).
105. Butler & Wolff, *supra* note 91, at 38–39.
106. Rohrs, *supra* note 104, at 159.
107. 2 Hinds, *supra* note 91, § 1644, at 1116–19 (Jonathan Cilley (D) and William Graves (W) in 1838); *id*. § 1648, at 1121–22 (John Bell (W) and Hopkins Turney (D) in 1838); *id*. § 1649, at 1122–23 (Rice Garland (W) and Jesse Bynum (D) in 1840); *id*. § 1651, at 1125–26 (George Rathbun (D) and John White (W) in 1844); *id*. § 1652, at 1126–27 (Albert Brown (D) and John Wilcox (Unionist) in 1852); *id*. § 1621, at 1090–94 (Preston Brooks (D), Laurence Keitt (D), and Henry Edmundson (D) against Charles Sumner (Opposition) in 1856); *id*. § 1645, at 1119–20 (Fayette McMullen (D) and Amos Granger (Opposition) in 1856). The three intraparty fights are *id*. § 1650, at 1123–24 (Henry Wise (W) and Edward Stanly (W) in 1841); *id*. § 1647, at 1120–21 (Hugh Haralson (D) and George Jones (D) in 1848); Butler & Wolff, *supra* note 91, at 57–59 (Thomas Benton (D) and Henry Foote (D) in 1850).
108. *See* Chafetz, *supra* note 37, at 214–15.
109. *See id*. at 215–16; 2 Hinds, *supra* note 91, §§ 1621–23, at 1090–96.
110. Cong. Globe, 31st Cong., 1st Sess. 1480 (July 30, 1850).
111. Anti-Dueling Law, ch. 30, 5 Stat. 318 (1839).
112. 2 Hinds, *supra* note 91, §§ 1621, 1211–12, at 1093–94, 779.
113. Cong. Globe, 31st Cong., 1st Sess. 1480 (July 30, 1850).
114. *See* David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861*, at 21–23 (2005).
115. Cong. Globe, 27th Cong., 2d Sess. 342 (Mar. 21, 1842).
116. *Id*. at 345–46 (Mar. 22, 1842).
117. 2 Hinds, *supra* note 91, § 1256, at 808.
118. Cong. Globe, 27th Cong., 2d Sess. 168 (Jan. 25, 1842).
119. 2 Hinds, *supra* note 91, § 1255, at 805–07.
120. Currie, *supra* note 114, at 22.

121. *See* Chafetz, *supra* note 37, at 181–89.
122. 2 Hinds, *supra* note 91, §§ 1261–62, at 812–13.
123. *See* Butler & Wolff, *supra* note 91, at 89–91.
124. *Id*. at 97.
125. *Id*. at 102–08.
126. *Id*. at 109–14.
127. 2 Hinds, *supra* note 91, §§ 1253–54, at 803–05.
128. Cong. Globe, 39th Cong., 1st Sess. 2572–75 (May 14, 1866).
129. *Id*. at 3092 (June 11, 1866).
130. *Id*. at 3090–95.
131. *Id*. at 3094.
132. *Id*. at 3096.
133. *Id*. at 3818–19 (July 14, 1866).
134. *Id*.
135. 2 Hinds, *supra* note 91, § 1656, at 1134–35.
136. Cong. Globe, 39th Cong., 2d Sess. 5 (Dec. 3, 1866).
137. *See, e.g.*, 2 Hinds, *supra* note 91, § 1249, at 801 (John Hunter in 1867); *id*. § 1247, at 798–99 (Fernando Wood in 1868); *id*. § 1251, at 802 (John Brown in 1875).
138. *See, e.g.*, *id*. § 1259, at 810–12 (Rep. William Bynum censured in 1890 for calling a fellow member "a liar and a perjurer").
139. Butler & Wolff, *supra* note 91, at 269–71.
140. *See id*. at 47–48.
141. *See* Duties Act, ch. 5, § 35, 1 Stat. 29, 46–47 (1789) (bribing a customs officer); Crimes Act, ch. 9, § 21, 1 Stat. 112, 117 (1790) (bribing a judge); Crimes Act, ch. 65, §§ 12, 16, 24, 4 Stat. 115, 118–19, 122 (1825) (extortion by an "officer of the United States," embezzlement by an employee of the Bank of the United States, theft by an employee of the mint).
142. An Act to Prevent Frauds Upon the Treasury, ch. 81, §§ 3, 6, 10 Stat. 170, 170–71 (1853); *see* Butler & Wolff, *supra* note 91, at xxvi (noting that this was the first statute "specifically govern[ing] the behavior of members of Congress").
143. An Act to Prevent Members of Congress and Officers of Government of the United States from taking Consideration, ch. 180, 12 Stat. 577 (1862).
144. An Act Relating to Members of Congress, Heads of Departments, and Other Officers of Government, ch. 119, 13 Stat. 123 (1864).
145. *See* Butler & Wolff, *supra* note 91, at xxvi (noting that the next statute governing the conduct of members of Congress was passed in 1958).
146. *Alleged Corrupt Combinations of Members of Congress*, H.R. Rep. No. 34-243, at 3–26 (1857) (reporting the findings against, and recommending the expulsion of: William Gilbert of New York, William Welch of Connecticut, Francis Edwards of New York, and Orsamus Matteson of New York).
147. *Id*. at 24, 26.
148. *Id*. at 32.
149. *Id*. at 38a.
150. 2 Hinds, *supra* note 91, § 1275, at 835–36.
151. *Id*.

152. *See* Chafetz, *supra* note 37, at 221.
153. *See* Butler & Wolff, *supra* note 91, at 115–16.
154. 2 Hinds, *supra* note 91, §§ 1239, 1273–74, at 796, 829–33 (noting the censures of John Deweese of North Carolina (even after his resignation), B. F. Whittemore of South Carolina (also after resigning), and Roderick Butler of Tennessee).
155. *See* Robert V. Remini, *The House: The History of the House of Representatives* 219–21 (2006).
156. *Id*. at 221; *see also* Butler & Wolff, *supra* note 91, at 189–95.
157. 2 Hinds, *supra* note 91, § 1286, at 852–53.
158. *Id*. at 853–54.
159. *Id*. at 855–56.
160. *Id*. at 857. Remini mistakes the voting sequence and therefore erroneously suggests that the censure votes were tinged with partisanship, with many more voting to censure the Democrat Brooks than the Republican Ames. *See* Remini, *supra* note 155, at 221. In fact, Ames was censured by a larger margin than Brooks. *See* 2 Hinds, *supra* note 91, § 1286, at 857; Cong. Globe, 42d Cong., 3d Sess. 1832–33 (Feb. 27, 1873).
161. *See* Remini, *supra* note 155, at 221.
162. Butler & Wolff, *supra* note 91, at 189–95.
163. *Id*. at 194.
164. 2 Hinds, *supra* note 91, § 1283, at 848–49.
165. *See The Indictment of Congressman Schumaker*, Brooklyn Daily Eagle, Mar. 31, 1875, at 2.
166. 2 Hinds, *supra* note 91, § 1283, at 849–50.
167. Butler & Wolff, *supra* note 91, at 275–76.
168. Burton v. United States, 202 U.S. 344, 366–69 (1906).
169. Butler & Wolff, *supra* note 91, at 276.
170. *Roosevelt Plotted to Ruin Me—Burton*, N.Y. Times, Mar. 24, 1907, at 16.
171. *Id*.
172. *Id*.
173. *See generally* John Messing, *Public Lands, Politics, and Progressives: The Oregon Land Fraud Trials, 1903–1910*, 35 Pac. Hist. Rev. 35, 40–57 (1966); Jerry A. O'Callaghan, *Senator Mitchell and the Oregon Land Frauds, 1905*, 21 Pac. Hist. Rev. 255 (1952).
174. Reprinted in *The Verdict in the Mitchell Case*, Morning Oregonian (Portland), July 7, 1905, at 8.
175. William H. Galvani, *Recollections of J. F. Stevens and Senator Mitchell*, 44 Or. Hist. Q. 313, 320–21 (1943).
176. *Id*. at 321 (suggesting that the administration believed that Judge DeHaven "could be more easily managed by [Roosevelt's] generalissimo"); *see also* Messing, *supra* note 173, at 51 (noting that Judge Bellinger, the recently deceased District of Oregon judge, had been "reluctant to tackle the prominent citizens of Oregon").
177. Butler & Wolff, *supra* note 91, at 277.
178. *Charges Affecting the Hon. Charles H. Dietrich*, S. Rep. No. 58-2152, at i–vii (1904).

179. *Dietrich Free From Guilt*, Wash. Post, Apr. 15, 1904, at 4; *see also Dietrich Exonerated by Fellow-Senators*, N.Y. Times, Apr. 15, 1904, at 9.
180. For two insightful recent treatments of the concept of corruption, see Zephyr Teachout, *Corruption in America* (2014), and Laura S. Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (2013).
181. *See, e.g.*, Alan I. Abramowitz, *Incumbency, Campaign Spending, and the Decline of Competition in U.S. House Elections*, 53 J. Pol. 34, 42 (1991); Alan I. Abramowitz, *Explaining Senate Election Outcomes*, 82 Am. Pol. Sci. Rev. 385, 392, 397 (1988); Scott J. Basinger, *Scandals and Congressional Elections in the Post-Watergate Era*, 66 Pol. Res. Q. 385 (2013); Harold D. Clarke et al., *More Time with My Money: Leaving the House and Going Home in 1992 and 1994*, 52 Pol. Res. Q. 67 (1999); Carolyn L. Funk, *The Impact of Scandal on Candidate Evaluations: An Experimental Test of the Role of Candidate Traits*, 18 Pol. Behav. 1 (1996); Gary C. Jacobson & Michael A. Dimock, *Checking Out: The Effects of Bank Overdrafts on the 1992 House Elections*, 38 Am. J. Pol. Sci. 601 (1994); Rodrigo Praino et al., *The Lingering Effect of Scandals in Congressional Elections: Incumbents, Challengers, and Voters*, 94 Soc. Sci. Q. 1045 (2013); *see also* Eric Lipton, *Ethics in Play, Voters Oust Incumbents under Inquiry*, N.Y. Times, Nov. 9, 2012, at A20 (noting how many members under ethical scrutiny lost reelection bids in 2012).
182. *See, e.g.*, Marc J. Hetherington, *Why Trust Matters: Declining Political Trust and the Demise of American Liberalism* 16, 65 (2005); Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government: A Time Series Analysis*, 64 Pub. Op. Q. 239, 251, 254 (2000).
183. Two recent articles agree that scandals significantly harmed congressional Republicans in the 2006 midterm elections, although they disagree as to whether the relevant scandal was the Abramoff corruption scandal or the Foley sex scandal. *Contrast* Samuel J. Best et al., *Owning Valence Issues: The Impact of a "Culture of Corruption" on the 2006 Midterm Elections*, 40 Cong. & Presidency 129 (2013), *with* Michael D. Cobb & Andrew J. Taylor, *Paging Congressional Democrats: It Was the Immorality, Stupid*, 47 PS: Pol. Sci. & Pol. 351 (2014).
184. John R. Hibbing & Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes Toward American Political Institutions* 70–71, 96–97 (1995); Shaun Bowler & Jeffrey A. Karp, *Politicians, Scandals, and Trust in Government*, 26 Pol. Behav. 271, 278–80 (2004).
185. Best et al., *supra* note 183.
186. Cobb & Taylor, *supra* note 183, at 354.
187. Bowler & Karp, *supra* note 184, at 284.
188. *See* Bribery Act, 2010, c. 23, § 12(8). For the treatment of bribery up until the passage of that act, see *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* 254–56 (Malcolm Jack ed., 24th ed. 2011). *See also* Yvonne Tew, *No Longer a Privileged Few: Expense Claims, Prosecution, and Parliamentary Privilege*, 70 Cambridge L.J. 282 (2011).
189. 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* §§ 396–98, at 551–60 (1935).

190. Butler & Wolff, *supra* note 91, at 336–38.
191. *Id*. at 309–10; *Senator Burton K. Wheeler*, S. Rep. No. 68-537 (1924).
192. 6 Cannon, *supra* note 189, §§ 238, 402–03, at 405–07, 573–77.
193. *See Rowbottom Guilty in Postal Job Sales*, N.Y. Times, Apr. 16, 1931, at 52.
194. For the House, see Staff of H.R. Comm. on Standards of Official Conduct, *Historical Summary of Conduct Cases in the House of Representatives, 1798–2004*, at 11 (2004), *available at* https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf; for the Senate, see Butler & Wolff, *supra* note 91, at 452.
195. *See Indictments—A Grand Congressional Tradition Since 1798*, L.A. Times, June 5, 1994, at M2 [hereinafter *Indictments*].
196. H.R. Con. Res. 175, 85th Cong. (1958); on the impetus for the code, see Richard Allan Baker, *The History of Congressional Ethics*, in *Representation and Responsibility: Exploring Legislative Ethics* 3, 23–24 (Bruce Jennings & Daniel Callahan eds., 1985).
197. *Code of Ethics for Government Service*, S. Rep. No. 85-1812, at 1 (1958).
198. Bribery Act, Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified as amended at 18 U.S.C. §§ 201–27).
199. 110 Cong. Rec. 16939–40 (July 24, 1964) (establishing the Senate Select Committee on Standards and Conduct); 112 Cong. Rec. 27713–30 (Oct. 19, 1966) (establishing the House Select Committee on Standards and Conduct).
200. *See* Baker, *supra* note 196, at 25–26.
201. Drew Pearson & Jack Anderson, *The Case against Congress* 11 (1968).
202. *See id*. at 27–97.
203. Butler & Wolff, *supra* note 91, at 413.
204. *Id*. at 414–17.
205. *Censure for Mr. Dodd*, N.Y. Times, June 24, 1967, at 28.
206. *Beyond the Dodd Case*, N.Y. Times, June 25, 1967, at 8E.
207. *Dodd Verdict: 'Dishonor and Disrepute,'* N.Y. Times, June 25, 1967, at 2E.
208. Butler & Wolff, *supra* note 91, at 418.
209. *See* Staff of the Joint Comm. on Cong. Operations, 93d Cong., *House of Representatives Exclusion, Censure and Expulsion Cases from 1789 to 1973*, at 93–94, 104–05 (Comm. Print 1973).
210. *Id*. at 106–09.
211. *See* U.S. Const. art. I, § 5, cl. 1 (making each house "the Judge of the Elections, Returns and Qualifications of its own Members"). I have discussed the houses' power to judge the elections, returns, and qualifications of their members at length in Chafetz, *supra* note 37, at 162–92.
212. 395 U.S. 486 (1969).
213. *Id*. at 506–12.
214. *See* Lawrence Van Gelder, *New York Congressman on the Move: Charles Bernard Rangel*, N.Y. Times, Dec. 12, 1974, at 38.
215. 383 U.S. 169 (1966).
216. 408 U.S. 501, 526 (1972).
217. *Id*. at 563 (White, J., dissenting).
218. *See, e.g.*, United States v. Helstoski, 442 U.S. 477 (1979) (holding that the government could not introduce evidence of past legislative acts in a bribery case); United States v.

Rayburn House Office Bldg. Room 2113, 497 F.3d 654 (D.C. Cir. 2007) (holding that a search of a member's files in his congressional office violated the Speech or Debate Clause and required the return of privileged legislative materials); In re Grand Jury Subpoenas, 571 F.3d 1200 (D.C. Cir. 2009) (holding that statements made by a member to the Ethics Committee could not be subpoenaed).

219. *See, e.g.*, United States v. Renzi, 769 F.3d 731 (9th Cir. 2014); United States v. Renzi, 651 F.3d 1012 (9th Cir. 2011); United States v. Jefferson, 546 F.3d 300 (4th Cir. 2008); United States v. Williams, 644 F.2d 950 (2d Cir. 1981); United States v. Murphy, 642 F.2d 699 (2d Cir. 1980); United States v. Myers, 635 F.2d 932 (2d Cir. 1980).
220. H.R. Res. 933, 92d Cong. (1972).
221. *Sense of the House of Representatives with Respect to Actions by Members Convicted of Certain Crimes*, H.R. Rep. No. 92-1039, at 2 (1972).
222. 121 Cong. Rec. 10339–45 (Apr. 16, 1975).
223. Julian E. Zelizer, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences, 1948–2000*, at 200–202 (2004).
224. *Id*. at 204.
225. *Id*.; *In the Matter of Representative Raymond F. Lederer*, H.R. Rep. No. 97-110 (1981).
226. Butler & Wolff, *supra* note 91, at 434–37.
227. Martin Tolchin, *Myers Is Ousted from the House in Abscam Case*, N.Y. Times, Oct. 3, 1980, at A1.
228. Alison Mitchell, *House Votes, with Lone Dissent from Condit, to Expel Traficant from Ranks*, N.Y. Times, July 25, 2002, at A13.
229. *See Indictments*, *supra* note 195 (listing the members indicted and the outcome of their cases up to 1994).
230. Robert D. McFadden, *Mario Biaggi, 97, Official Undone by Scandals, Dies*, N.Y. Times, June 26, 2015, at A25.
231. *See* Staff of the H.R. Comm. on Standards of Official Conduct, *Summary of Activities*, H.R. Rep. No. 103-873, at 8 (1994).
232. Keith Schneider, *Dan Rostenkowski, 82, Powerful Congressman Touched by Scandal, Is Dead*, N.Y. Times, Aug. 12, 2010, at A29.
233. Randal C. Archibold, *Ex-Congressman Gets 8-Year Term in Bribery Case*, N.Y. Times, Mar. 4, 2006, at A1.
234. Carl Hulse, *DeLay is Quitting Race and House, Officials Report*, N.Y. Times, Apr. 4, 2006, at A1; Philip Shenon, *Ex-Congressman Is Sentenced to 2½ Years in Abramoff Case*, N.Y. Times, Jan. 20, 2007, at A8.
235. David Stout, *U.S. Jury Convicts Ex-Lawmaker of Bribery*, N.Y. Times, Aug. 6, 2009, at A14.
236. *See* Staff of the H.R. Comm. on Standards of Official Conduct, *Summary of Activities*, H.R. Rep. No. 110-938, at 17–18 (2009).
237. Zelizer, *supra* note 223, at 243.
238. *See* Remini, *supra* note 155, at 479–82; Zelizer, *supra* note 223, at 243–44; Clarke et al., *supra* note 181, at 80–82; Jacobson & Dimock, *supra* note 181, at 605–19.
239. H.R. Res. 895, 110th Cong. § 1 (2007).
240. Jacob R. Straus, *House Office of Congressional Ethics: History, Authority, and Procedures*, CRS Report for Cong. No. R40760, at 12, 14 (2015).

241. *Id*. at 18–20.
242. *Id*. at 21.
243. *See, e.g.*, Editorial, *An Ethics Watchdog Survives*, Wash. Post, Dec. 30, 2010, at A14; Eric Lipton, *House Ethics Office Gains, Dismissals Aside*, N.Y. Times, Mar. 23, 2010, at A18; Craig Holman & Victoria Hall-Palerm, Pub. Citizen, *The Case for Independent Ethics Agencies: The Office of Congressional Ethics Six Years Later, and a History of Failed Senate Accountability* (2014).
244. Holman & Hall-Palerm, *supra* note 243, at 7.
245. Shortly before the OCE came into being, I proposed a similar body. While the OCE does indeed incorporate many of the features I recommended, in cases where the two diverge, I continue to believe that the institutional structure I proposed was preferable. *See* Josh Chafetz, *Cleaning House: Congressional Commissioners for Standards*, 117 Yale L.J. 165 (2007); *see also* Josh Chafetz, *Politician, Police Thyself*, N.Y. Times, Dec. 2, 2006, at A15.
246. *See* Holman & Hall-Palerm, *supra* note 243, at 9–14.
247. *See id*. at 14.
248. Straus, *supra* note 240, at 20.
249. Indeed, I have suggested this course of action in the case of a member whose conduct was slimy, but perhaps not so slimy as to be disqualifying. *See* Josh Chafetz, *Run, Anthony, Run*, Slate, June 15, 2011, http://www.slate.com/articles/news_and_politics/politics/2011/06/run_anthony_run.html.
250. Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177 (2008).
251. 100 Cong. Rec. 12729 (July 30, 1954).
252. *Report of the Select Committee to Study Censure Charges*, S. Rep. No. 83-2508, at 2 (1954) [hereinafter *Report*].
253. *See id*. at 5–31; for a description of the earlier investigation, see Butler & Wolff, *supra* note 91, at 394–98.
254. *See Report*, *supra* note 252, at 39–45.
255. *See id*. at 45–46.
256. *See* Neil MacNeil & Richard A. Baker, *The American Senate: An Insider's History* 257 (2013); Thomas C. Reeves, *The Life and Times of Joe McCarthy* 654 (1982).
257. *See Report*, *supra* note 252, at 47–61, 67–68.
258. Butler & Wolff, *supra* note 91, at 406.
259. Editorial, *Censure*, N.Y. Times, Dec. 3, 1954, at 26.
260. Editorial, *Judgment of the Senate*, Wash. Post, Dec. 3, 1954, at 20.
261. Alan Barth, *Government by Investigation* 210 (1955).
262. *Id*. at 216.
263. MacNeil & Baker, *supra* note 256, at 257; Reeves, *supra* note 256, at 671.
264. H.R. Res. 744, 111th Cong. (2009).
265. Paul Kane, *House Votes to Rebuke Wilson for Interruption*, Wash. Post, Sept. 16, 2009, at A8; *see also* Carl Hulse, *House Formally Rebukes Wilson for Shouting 'You Lie'*, N.Y. Times, Sept. 16, 2009, at A14 ("mainly party line").
266. *See* Assoc. Press, *No Lie, Wilson Is Now a GOP Star*, L.A. Times, Sept. 26, 2009, at 16.