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# Gradual Institutional Change in Congressional Ethics: Endogenous Pressures toward Third-Party Enforcement

**Denis Saint-Martin,** *Université de Montréal*

*Ethics reform in Congress is expected to display extensive instability and "cycling." Members hold conflicting views about ethics, and parties have weak capacities to order their preferences. The trend is for legislators to resist change until a scandal erupts and forces them to act. As a result, ethics reforms in Congress have typically developed through a layering of short-term and piecemeal institutional responses to the scandal of the moment. But the accumulation over time of seemingly small adjustments to the ethics process has been more path-dependent than anticipated in theories of disjointed pluralism. Legislators have had to commit to more open and collaborative forms of self-enforcement because of the feedback effects of ethics rules on Congress and the "tight-coupling" of standards of conduct between the executive and legislative branches of government. With each new scandal and partisan abuse of the process, pressures for a more independent mechanism to enforce ethics rules has grown stronger over time. The more ethics became governed by impersonal rules, the more it undermined Congress's past trajectory of political self-discipline. It is in this changing balance between positive and negative feedback effects that we can locate the mechanism that is gradually transforming ethics self-regulation in Congress into a new form of "co-regulation" with outsiders in the Office of Congressional Ethics (OCE).*

## INTRODUCTION

After taking control of the House of Representatives in the 2006 midterm election, Democrat leaders stated that they were committed to running "the most ethical Congress in history."[1] Citing the mandate from voters to clean up a "culture of corruption," House Speaker Nancy Pelosi promised to strengthen the internal rules and procedures that govern the conduct of House members. "The ethics process has lost the confidence of the American people," Pelosi said shortly before announcing the creation of a bipartisan task force to study the establishment of an independent ethics office to enforce standards of conduct in the House.[2] The well-publicized failures of the House ethics process over the years—the ethics wars, partisan abuse of the process and failure to deal with cases of obvious misconduct—have led to growing demands for an independent ethics enforcement mechanism.[3] Lawmakers have long resisted such a move, however, preferring their traditional system of ethics self-regulation in which members enforce their own rules through internal congressional committees.[4] As the task force was completing its work in June 2007, Pelosi announced her intention to delegate part of the ethics enforcement process to an external entity. On March 11, 2008, the House passed a resolution to create the Office of Congressional Ethics (OCE).

The OCE is led by a board of six "outsiders"[5] jointly appointed by the Speaker and Minority Leader for a four-year term. It has the power to initiate and conduct preliminary investigations of potential ethical violations and to make referrals and recommendations to the House Ethics Committee. The committee may then decide whether to start its own

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1. William Branigin, "Democrats Take Majority in House; Pelosi Poised to Become Speaker," *The Washington Post*, November 8, 2006.

2. Gail R. Chaddock, "First Steps toward Ethics Reform in Congress," *The Christian Science Monitor*, December 15, 2006.

3. Mildred Amer, *History of Congressional Ethics Enforcement* (Washington, DC: Congressional Research Service, Report RL30764, 2006).

4. Robert M. Rhodes, "Enforcement of Legislative Ethics: Conflict within the Conflict of Interest Laws," *Harvard Journal on Legislation* 10 (1973): 373–406.

5. Four former House Representatives, one former House Chief Administrative Officer, and one academic.



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investigation. It can also choose to take no action, issue a formal letter of reproval criticizing unethical conduct, or vote to send the matter to the full House for a possible vote on stronger punishment, such as expulsion. In reporting and referring matters to the House Ethics Committee, the OCE is restricted to stating only findings of fact and a description of relevant information it was unable to obtain. It is expressly prohibited from stating "any conclusions regarding the validity of the allegations" upon which the referral is based, and it has to remain silent as to the "guilt or innocence of the individual who is the subject of the review."[6] Only the House itself can make this judgment.

Analysts of Congress have raised serious doubts about the OCE's independence.[7] In their views, the Office is "toothless." It has no subpoena power and it can only refer matters to the House Ethics Committee, which is under no obligation to act, and has sole authority to find elected officials guilty and to punish them.[8] Others argue that it is easy for the only standing committee in the House whose membership is equally divided by party to agree to do nothing.[9] They point toward the continued "leniency" of the House Ethics Committee, which has launched only eight formal investigations out of the thirty-two cases it was sent by the OCE three years after its creation.[10]

In these interpretations, not much has changed. Ethics reforms have basically left Congress's traditional power of self-discipline untouched. Political support for the Office is fragile. This is why it is simply the creation of a House resolution, not a permanent statutory ethics entity.[11] Despite those limitations, and with a budget of just $1.5 million and a staff of nine, the OCE has conducted more investigations in the first three years of its existence than the House Ethics Committee has in more than a decade, sending more than thirty public referrals for future action.[12] Even when the House Ethics Committee has disregarded the Office's recommendations, its scrutiny has had an impact. For example, after an OCE investigation into members' misuse of their travel per diems in 2010, the House Ethics Committee cleared all the members involved—but House leaders tightened the interpretation of the travel rules.[13] An analysis by a watchdog group finds that the work of the Office has had a "dramatic impact on the activity and accountability of the House Ethics Committee."[14] From 1997 through 2008, the House Ethics Committee issued ten recorded disciplinary actions against members or staff of the House. But from 2009 to 2012, assisted by the OCE, the House Ethics Committee has issued sixteen disciplinary actions. Politicians can still reject the advices given by "outsiders" in the OCE. The difference is that the House Ethics Committee must now provide a public response to justify its decision. This makes the OCE's work more difficult to ignore.

These changes may seem small but as a growing body of work suggests, incremental shifts often add up to fundamental transformations.[15] Members have come a long way in their opposition to the inclusion of "outsiders" in the ethics process.[16] The idea first emerged in 1951 when Senator Fulbright presented a resolution proposing the establishment of an ethics commission to be composed of ten private citizens. This body was to make recommendations to both the executive and legislative branches. When asked why he wanted the commission to be staffed by outsiders, Senator Fulbright responded, "If we undertake to discipline our own members and that sort of thing, we will really bog down in recrimination and will not accomplish anything."[17] Legislators rejected Senator Fulbright's proposal, arguing that their conduct should not be subjected to the authority of any external body or person.[18] Politicians invoke ancient authority for their intransigence. The constitutional provision (art. I §5) granting Congress authority to punish members, they claim, implies that only members should discipline other members for ethics violations.[19] Whether led by a Democratic or

6. Jack Maskell and Eric R. Petersen, *"Independent" Legislative Commission or Office for Ethics and/or Lobbying* (Washington, DC: Congressional Research Service, Report RL 33790, 2008), 14.

7. Eric Lichtblau, "Congressional Ethics Inquiries Drag On, Despite Vows to End Corruption," *The New York Times*, October 18, 2009.

8. Ruth Marcus, "A Toothless Ethics Panel," *Herald Tribune*, March 5, 2010, A11; Sylvia A. Smith, "Ethics Upgrade Cleaning House," *The Journal Gazatte*, October 3, 2010.

9. Brody Mullins,"Leak Offers Rare Peek at Congressional Ethics Probes," *The Wall Street Journal*, October 31, 2009.

10. Jordy Yager, "Ethics Panel Has Track Record of Leniency," *The Hill*, July 18, 2012.

11. Scott Higham, "Congressional Ethics Committees Protect Legislators, Critics Say," *The Washington Post*, October 7, 2012.

12. Susan Crabtree, "Small Office Has Big Job as Monitor of Ethics in the House," *Washington Times*, March 19, 2012.

13. Brody Mullins and John F. McKinnon, "House Travel Stipends Probe," *The Wall Street Journal*, August 3, 2010.

14. Craig Holman, *Making the Congressional Ethics Process Work: Independent Panel Helps Ethics Committee Build a Track Record* (Washington, DC: Public Citizen, 2012), 3.

15. Orion Lewis and Svend Steinmo "How Institutions Evolve: Evolutionary Theory and Institutional Change," *Polity* 44 (2012): 314–39; James Mahoney and Kathleen Thelen (eds). *Explaining Institutional Change: Ambiguity, Agency and Power* (New York: Cambridge University Press, 2010); Wolfgang Streeck, *Re-forming Capitalism. Institutional Change in the German Political Economy* (Oxford: Oxford University Press, 2009.)

16. Theresa A. Gabaldon, "The Self-Regulation of Congressional Ethics," *Administrative Law Review* 48 (1996), 39–68.

17. Robert S. Getz, *Congressional Ethics: The Conflict of Interest Issue* (Princeton, NJ: D. Van Nostrand Company, Inc., 1966), 25.

18. Jim Sasser, "Learning from the Past: The Senate Code of Conduct in Historical Perspective," *Cumberland Law Review* 8 (1977): 357–84.

19. Robert Williams, "Conduct Unbecoming: The Regulation of Legislative Ethics in Britain and the United States," *Parliamentary Affairs* 55 (2002): 611–25.

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Republican majority, this is a position the House has consistently defended over the years.[20]

In 1989, the idea of an independent ethics office reemerged and was again rejected by the Task Force on Ethics on the "grounds that such a mechanism ignores the basic responsibility of Congress under the Constitution to discipline its own Members for disorderly behavior."[21] In 1997, after hearing evidence that the inclusion "of 'outsiders' would enhance public trust and confidence in the standards process," the Ethics Reform Task Force decided "to forego the recommendations that non-House Members participate in disposing of misconduct allegations."[22] Task Force members came to that conclusion because they were:

> concerned with the explicit Constitutional responsibility of the House. They expressed the view that House Members better understand the rules, customs, and practices of the House, and they expressed the strong preference that House Members accused of misconduct be judged by their peers.[23]

## Collective Action Problems in Congressional Ethics

This "strong preference" was reaffirmed in 2008 in the final vote (229 to 182) on the resolution to create the OCE. Opponents (159 Republicans and 23 Democrats) argued that it represented an abdication of constitutional responsibility and a new layer of useless bureaucracy.[24] Continued support for self-discipline over time—and the fact that most reforms are described as superficial and "toothless"—suggests that actors in Congress face no strong pressures or have little incentives to commit to more independent forms of ethics enforcement. According to conventional rational choice theory, ethics is an area where Congress should display extensive instability. Members hold multiple and conflicting views about legislative ethics.[25] Ethics issues are multidimensional and parties have weak capacities to order the multiple preferences of legislators.[26] The rules governing the conduct of members should be particularly prone to "cycling" because they are self-enforced and controlled by legislators themselves.[27] As Elinor Ostrom writes, "The question of how a set of principals can engage in mutual monitoring of conformance to a set of their own rules is not easily addressed within the confines of collective action theory. In fact, the usual theoretical prediction is that they will not do so."[28]

The regulation of ethics in Congress is plagued by collective action problems.[29] Members do not like ethics rules.[30] They find them intrusive and feel that they do not need an ethics process with more "teeth" to strengthen their accountability.[31] They believe they are already more accountable than other professionals who exercise power over others because they are subject to the most fatal form of discipline of all: loss of office. Members also strongly resist sitting in judgment of their peers on the House Ethics Committee.[32] What's in it for them, they ask? As Jon Elster reminds us, "Punishment almost invariably is costly to the punisher, while the benefits from punishment are diffusely distributed."[33]

On the ethics front, members are only able to overcome their divisions and act collectively when forced by scandals.[34] "Legislators enact ethics legislation to regulate their own behavior primarily when public pressure becomes an irresistible force they can no longer ignore."[35] Ethics reform in these analyses is a scandal-driven process.[36] The trend is for legislators to resist ethics reform until a scandal erupts and forces them to act.[37] Change, as a result, is marked by long periods of institutional inertia, punctuated

20. Richard A. Baker, "The History of Congressional Ethics," in *Representation and Responsibility. Exploring Legislative Ethics*, ed. B. Jennings and D. Calaghan (New York: Plenum Press, 1985), 3–27.

21. United States Congress, *Report of the Bipartisan Task Force on Ethics on H.R. 3660 to Amend the Rules of the House of Representatives and the Ethics in Government Act of 1978 to Provide for Government-Wide Ethics Reform, and for Other Purposes* (Washington, DC, 1989), 19.

22. United States Congress, *Report of the Ethics Reform Task Force on H. Res. 168 Recommending Revisions to the Rules of the House and the Rules of the Committee in Standards of Official Conduct* (Washington, DC, 1997), 6.

23. Ibid.

24. Jonathan Weisman, "House Creates New Panel on Ethics," *The Washington Post*, March 12, 2008.

25. Dennis F. Thompson, *Ethics in Congress* (Washington, DC: Brookings, 1995).

26. Joseph N. Patten, "Congressional Ethics: The Fox and the Henhouse," *Politics & Policy* 35:2 (2007): 192–220.

27. William Riker, "Implications from the Dis-equilibrium of Majority Rule for the Study of Institutions," *American Political Science Review* 74 (1980), 432–37.

28. Elinor Ostrom, *Governing the Commons* (New York: Cambridge University Press, 1990), 45.

29. Glenn R. Parker, *Self-Policing in Politics: The Political Economy of Reputational Controls on Politicians* (Princeton, NJ: Princeton University Press, 2004).

30. Rebekah Herrick, *Fashioning the More Ethical Representative: The Impact of Ethics Reforms in the US House of Representatives* (Westport, CT: Praeger Publishers, 2003).

31. Baker, "The History of Congressional Ethics."

32. Roger H. Davidson, "Socialization and Legislative Ethics," in *Representation and Responsibility. Exploring Legislative Ethics*, ed. B. Jennings and D. Calaghan (New York: Plenum Press, 1985), 109–28.

33. Jon Elster, *The Cement of Society: A Study in Social Order* (New York: Cambridge University Press, 1989), 41.

34. Robert Williams, *Political Scandals in the USA* (London: Routledge, 1998).

35. Lawrence Dodd, quoted in Beth A. Rosenson, *In the Shadowland of Conduct: Ethics and State Politics* (Washington, DC: Georgetown University Press, 2005), back cover.

36. Beth A. Rosenson, *In the Shadowland of Conduct: Ethics and State Politics* (Washington, DC: Georgetown University Press, 2005).

37. Williams, "Conduct Unbecoming."

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by moments of crisis and rapid innovation.[38] Change is discontinuous and disjointed rather than cumulative. This is typical of a pattern of institutional development in Congress that Eric Schickler calls "layering," which involves the gradual addition of new arrangements on top of preexisting structures intended to serve different purposes.[39] This layering process is "in some ways path-dependent."[40] Layers add up in a disjointed rather than self-reinforcing way because in Congress, "losers in one round of institutional reform do not go away; instead they (or successors with similar interests) typically remain to fight another day."[41] As Paul Pierson notes, Congress is a "political setting where 'cycling' dynamics among institutional arrangements are likely to be prevalent, and strong path-dependent effects will be modest—which is exactly what Schickler demonstrates."[42]

The institutional evolution of ethics in Congress, as we shall see, broadly follows the model of disjointed pluralism. Ethics reforms have typically developed through a layering of short-term and "piecemeal" institutional responses to the scandal of the moment.[43] But in pointing to scandal as an exogenous force that brings about rapid institutional change, these explanations overlook shifts based on endogenous developments that often unfold gradually. The accumulation over time of seemingly small adjustments to the ethics process has been more path-dependent than anticipated in theories of disjointed pluralism. Rather than the "more wayward, oscillatory" trajectory of disjointed pluralism,[44] slow-moving, incremental changes have been pushing Congress toward a single organizational model of an outside ethics agency, such as the one developed in 2008.

## The Argument in Brief

I argue that legislators have faced growing pressures to commit to more open and collaborative forms of self-enforcement with non-members in the OCE because of the feedback effects of ethics rules on Congress and the "tight-coupling" of standards of conduct between the executive and legislative branches of government. By opting for a system in which members are both judges and parties and that excluded the presence of outsiders as Senator Fulbright had first suggested in 1951, the self-regulation approach to ethics in the House cultivated the seeds of its own demise. With each new scandal and partisan manipulation of the process, pressures for a more independent mechanism to enforce ethics rules grew stronger over time. The more ethics became institutionalized—in Polsby's[45] sense of being governed by impersonal, bureaucratic and universalistic rules—the more it undermined Congress's past trajectory of political self-discipline. It is in this changing balance between "positive" and "negative" feedback effects[46] that we can locate the mechanism that is gradually transforming ethics self-regulation in Congress into a new form of "co-regulation" with outsiders in the OCE.

The historical and empirical evidence reviewed to substantiate this argument in the following pages focus on four types of feedback effects. First, I show how ethics rules provide resources and incentives for the formation and activity of multiple networks of good government groups campaigning for changes to Congress's ethics process. The ethics process has created niches for political entrepreneurs in groups like Common Cause, Public Citizen, the League of Women Voters, and many others who, for years, have used various institutional levers to push for a more transparent and effective ethics process.[47] Second, I look at how, once adopted, ethics rules and institutions become what Benjamin Ginsberg and Martin Shefter[48] call "weapons of political combat" that politicians use to attack and discredit their opponents. A third type of feedback effect I examine is the impact of this new form of "gotcha politics" on public opinion. Public policies, such as ethics rules, produce not only resource effects but interpretative effects as well: they convey meanings and information to citizens. Ethics rules affect public opinion because they make violations (or allegations of violations) known.[49] The fourth type of feedback effect I look at is connected to processes of institutional diffusion or "institutional isomorphism."[50] Since Congress adopted its first formal

38. Alan Rosenthal, *Drawing the Line: Legislative Ethics in the States* (New York: Twentieth Century Fund, 1996).

39. Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress* (Princeton, NJ: Princeton University Press, 2001), 15.

40. Ibid., 16.

41. Ibid., 255.

42. Paul Pierson, *Politics in Time* (Princeton, NJ: Princeton University Press, 2004), 154.

43. Calvin G. Mackenzie, *Scandal Proof: Do Ethics Laws Make Government Ethical?* (Washington, DC: Brookings, 2002), 52.

44. Schickler, *Disjointed Pluralism*, 16.

45. Nelson Polsby, "The Institutionalization of the U.S. House of Representatives," *American Political Science Review* 62:1 (1968): 144–68.

46. Kent Weaver, "Paths and Forks or Chutes and Ladders? Negative and Positive Feedbacks and Policy Regime Change," *Journal of Public Policy* 30 (2010): 137–62.

47. Denis Saint-Martin, "Path Dependence and Self-reinforcing Processes in the Regulation of Ethics in Politics," *International Journal of Public Management* 8:2 (2005): 4–22.

48. Benjamin Ginsberg and Martin Shefter, *Politics by Other Means. The Declining Importance of Elections in America* (New York: Basic Books, 1990).

49. Mary Ann Feldheim and XiaoHu Wang, "Ethics and Public Trust: Results from a National Survey," *Public Integrity* 4:6 (2003): 63–75; Alan Rosenthal, "The Effects of Legislative Ethics Law," in *Public Ethics and Governance: Standards and Practices in Comparative Perspective*, ed. Denis Saint-Martin and Fred Thompson (Oxford: Elsevier, 2005), 155–78.

50. P. J. DiMaggio and W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields," *American Sociological Review* 48:2 (1983): 147–60.

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ethics rules in 1958, most American state legislatures have followed through with the institutionalization of various codes of conduct. As of 2006, more than twenty states had established independent commissions, boards, or offices to oversee enforcement of ethics rules for their state legislators.[51] Experts and bureaucrats working in these agencies have increasingly come to define third-party enforcement as the appropriate "institutional technology" to regulate legislative ethics. These groups of professionals are densely networked and have considerable resources and incentives to disseminate models of appropriate action. As a result, arrangements that fall outside the consensus (such as Congress's self-enforcement system) have suffered a decline in legitimacy and faced strong pressures to adjust. In conclusion, I emphasize the *institutional complementarities of ethics standards between the executive and legislative branches of government*. Congress and the President may well be constitutionally separated, but in the ethics area, their institutional development is not. In the competition to win support for pushing ethics standards to higher levels, the executive does not have the collective action problem created by the presence of multiple principals in Congress. The executive is more able to act as a unified actor and take the lead in developing standards and enforcement mechanisms that Congress is subsequently under pressure to follow.

## THE FEEDBACK EFFECTS OF ETHICS RULES ON CONGRESS

Given the division of powers and institutional rivalry between the executive and legislative branches of government, Congress has generally been more interested in imposing stricter ethics standards on executive branch officials than on its own members.[52] Legislators have usually felt that government employees—because they are not elected—should be subject to tougher ethics standards to compensate for their lack of direct public accountability. This is why, on the ethics front, Congress was the "first mover"—ahead of the executive branch—enacting a ten-point general Code of Ethics for Government Service in 1958. Adoption of the new code came as a result of a House committee investigation of influence-peddling charges involving President Eisenhower's chief of staff and a Boston industrialist. The rules adopted by lawmakers for government officials soon "bounced back" on Congress however, raising questions about whether similar standards should also apply to legislators. Senator Jacob Javits declared in 1963 that it was "completely incongruous for Senate committees to question executive appointees vigorously on their financial affairs when those of us in Congress are not subject to similar standards". He concluded, "We cannot continue to function on this double standard of ethics—a complete set for executive branch but none for the legislative branch."[53]

Concerns about the lack of specific congressional standards of conduct gathered momentum in the 1960s in the wake of ethical allegations against Secretary to the Senate Majority Bobby Baker and Representative Adam Clayton Powell. As a result of these two cases, the Senate Select Committee on Standards and Conduct was created in 1964, and the House Committee on Standards of Official Conduct in 1967.[54] In 1968, the House adopted a code of conduct with rules for administering gifts, outside earned income and employment, and financial disclosure requirements. House members were required to disclose publicly financial interests of more than $5,000 and income of more than $1,000 from companies doing business with the government. The House Ethics Committee was given the authority to investigate allegations of wrongdoing by members, officers, and employees; to adjudicate evidence of misconduct; to recommend penalties, when appropriate; and to provide advice on actions permissible under congressional rules and law. The rules stipulated that investigations could be undertaken "only upon receipt of a complaint, in writing and under oath, from a Member of the House." However, the question of how much initiative the committee itself should take in launching an investigation was left open.[55]

For several years, the House Ethics Committee was reluctant to undertake any public investigation of misconduct. In May 1976, eight years after its creation, it undertook its first investigation of a member—Rep. Robert L. F. Sikes (D-FL). In 1975, investigative reporting disclosed that Sikes had used his influence as chair of the Military Construction Appropriations Subcommittee for purposes of self-interest. The House Ethics Committee would not investigate the affair because no complaint had been lodged by a member. The political atmosphere changed dramatically after *60 Minutes* broadcast a story about Sikes that was based on information provided by Common Cause, a "good government" group created by liberal Republican John Gardner in 1970. Common Cause worked behind the scenes on a letter-writing campaign in key districts and assembled a group of forty-four House members to complain about Sikes's behavior to the House Ethics Committee.[56] The

51. N. Casal Moore and P. Kerns, "State Ethics Commissions," *LegisBrief* 14:23 (2006).

52. Robert Roberts, "History of the Legalization of Executive Branch Ethics Regulation," *Public Integrity* 9:4 (2007): 313–32.

53. Baker, "The History of Congressional Ethics," 24.

54. Bruce Jennings, "The Institutionalization of Ethics in the U.S. Senate," *The Hastings Center Report* (February 1981).

55. Jacob R. Straus, *House Committee on Ethics: A Brief History of Its Evolution and Jurisdiction* (Washington, DC: Congressional Research Service, Report 7-5700, 2011).

56. Andrew S. McFarland, *Common Cause: Lobbying in the Public Interest* (Chatham, NJ: Chatham House Publishers, Inc., 1984), 185.

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Committee held hearings and recommended that Sikes be reprimanded by the full House, which did so in July 1976 with a 381 to 3 vote.

### The Institutionalization of Ethics and the Development of Good Government Groups

The House members who worked with Common Cause were part of the "Watergate babies" who came to Congress following Nixon's resignation. Elected on the promise to clean up Washington, the Watergate babies put forward an ambitious program of institutional reform to foster ethics and transparency in government.[57] Like the Progressives before them and the vast networks of social groups that Elisabeth Clemens described as the "people's lobby,"[58] the Watergate babies and their allies in civil society mobilized to limit the influence of money on politics.

From this new reform coalition emerged a series of rules in the 1970s about conflict of interest, financial disclosure, new ethics codes and processes for regulating the conduct of lawmakers in Congress, provisions on gift bans, as well as diverse restrictions on post-government employment.[59] These measures were part of the new "ethics edifice"[60] or the "anticorruption apparatus"[61] created in the aftermath of Watergate. The development of a policy area devoted to strengthening integrity and detecting unethical behavior in politics provided fertile institutional ground for the growth of public interest groups in the 1970s.[62] Organizations like Common Cause and Public Citizen, founded by Ralph Nader in 1972, constituted the prototype for this new activism.[63] In the 1970s, "at the national level alone, over one hundred citizen organizations representing more than six million dues-paying members formed to press for change in the political process."[64] Common Cause made congressional reform a central feature of its campaign activities in the 1972 elections through "Operation Open Up the System," in which members mobilized popular engagement and submitted questions to congressional candidates on key reform issues related to financial disclosure, ethics, and lobbying.[65] Common Cause, the League of Women Voters, the National Committee for an Effective Congress and more than forty other good government groups subsequently joined forces to form the Committee for Congressional Reform. In the wake of the 1976 Sikes scandal, the reform coalition stepped up its pressure to strengthen ethics regulations. At the same time, Jimmy Carter was campaigning on a platform that promised to restore public trust in government by adopting far-reaching ethics standards against conflict of interest. In the post-Watergate atmosphere, no politician wanted to be on the side of less ethics: "fuelled by the constant pressure of public interest groups such as Common Cause, ethics became the motherhood issue of its time. Everyone was for ethics, the more the better."[66]

When Congress convened in January 1977, both chambers had new leaders. Tip O'Neill made passage of stronger ethics rules a condition for approving the pay increases for Congress that the quadrennial Commission on Executive, Legislative, and Judicial Salaries had proposed a few months earlier. Adopted in March 1977, the new House ethics rules significantly strengthened the requirements for disclosing a member's and spouse's financial interests, limited honoraria and other earned income to 15 percent of a member's salary, and abolished office accounts funded by private contributions. The disclosure provisions were codified in law when the 1978 Ethics in Government Act replaced the House rules on financial disclosure. The Act created the Office of Government Ethics (OGE) to enforce ethics rules in the executive branch and provided complementary procedures for its enforcement in Congress, by delegating to the House Ethics Committee the power to review the financial disclosure reports that members file with the Clerk of the House.[67]

The new disclosure rules were the same for government and Congress. They required members to make public data on their income, gifts received, financial holdings, debts, securities, commodity transactions, and real estate dealings. Similar requirements applied to spouses as well. For good government groups, this information provided resources and institutional levers they could activate to sound the alarm and to play the role of a public "watchdog" that "barks" when rules are not respected, or when they need to be modified to adapt to unforeseen situations. Specialized public interest groups, such as Congress Watch, focus full-time on exposing corruption and documenting cases of wrongdoing. They

57. Julian E. Zelizer, *On Capitol Hill* (Cambridge, MA: Cambridge University Press, 2004).

58. Elisabeth S. Clemens, *The People's Lobby* (Chicago, The University of Chicago Press, 1997).

59. Andrew Stark, *Conflict of Interest in American Public Life* (Cambridge, MA: Harvard University Press, 2000).

60. Mackenzie, *Scandal Proof,* 83.

61. Frank Anechiarico and James B. Jacobs, *The Pursuit of Absolute Integrity* (Chicago: The University of Chicago Press, 1996), 12.

62. Jeffrey M. Berry, *Lobbying for the People: The Political Behavior of Public Interest Groups* (Princeton, NJ: Princeton University Press, 1977).

63. Lawrence S. Rothenberg, *Linking Citizens to Government: Interest Group Politics at Common Cause* (New York: Cambridge University Press, 1992).

64. Michael W. McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Ithaca, NY: Cornell University Press, 1986), 15.

65. McFarland, *Common Cause,* 69.

66. Mackenzie, *Scandal Proof,* 34.

67. Michael J. Malbin, "Legislative Ethics," in *Encyclopedia of the American Legislative System, Vol. II* (New York: Charles Scribner's Sons, 1994), 1155–70.

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scrutinize disclosure forms and publicize any unsavory financial ties they find.

### The Politics of Ethics and Its Self-Reinforcing Character

Policies not only create feedback effects that facilitate the organization and mobilization of social groups, but they also produce new types of politics. By the late 1970s, there were more rules to violate and a more developed institutional infrastructure to enforce ethical conduct.[68] In the ten years that followed the 1977 reform, four members were reprimanded, four were censured, and one was expelled. This is a higher rate than for the previous one hundred years, which saw a total of only five disciplinary actions.[69] More cases of ethics violations also meant an increase in congressional scandal coverage.[70]

New ethics policies generated a new kind of politics in Washington in at least two ways. First, they produced a new politics of ethics where the goal was to win credit for raising the "ethics bar" to constantly higher levels.[71] The development of good government groups in this context created an "interest" among those seeking to gain political capital by championing causes defended by those groups. As Andrew McFarland indicates in his history of Common Cause, with people becoming more distrustful of government following Watergate, politicians were "eager to show the electorate a dynamic response to governmental decay by sponsoring a Common Cause proposal."[72] Throughout the 1970s, "150 to 175 members of the House of Representatives were typically in initial agreement with a major Common Cause lobbying position."[73]

Second, new ethics policies led to what has been described as the "politics of scandals"[74] or "gotcha politics."[75] Once adopted, ethics rules become politicized and are used as "weapons of institutional combat" that politicians mobilize to attack their adversaries.[76] Nowhere was this new form of combat more obvious than in the case that led to the resignation of Speaker Jim Wright in June 1989.[77] In May 1988, following several complaints filed by Newt Gingrich, Common Cause called for the House Ethics Committee to inquire into the financial arrangements surrounding the publication of a book by Wright. Under intense pressure and press scrutiny, the committee voted to appoint an outside counsel to investigate the allegations against Wright. This unusual step was justified by the position of power that Wright occupied in the legislature. As the House Ethics Committee chair (Julian C. Dixon) said, "The American people will feel more comfortable if the Speaker is investigated by someone who is not on the congressional payroll."[78] Common Cause urged the committee to give the public assurance that the special counsel would be given enough "authority and independence" to conduct a credible inquiry. "The House Ethics Committee has run into serious problems in the past when this was omitted," said Archibald Cox, former Watergate special prosecutor and Common Cause chair in a letter to the House Ethics Committee.[79] Cox was referring to two previous cases where the committee retained the services of outside counsel. In the 1978 "Koreagate" influence-peddling investigation, the special counsel quit after a dispute with the committee chair over the conduct of the inquiry. In the 1981 investigation of the "Abscam" bribery scandal, the outside counsel resigned after the committee decided not to recommend disciplinary action against Representative John P. Murtha.[80]

In the Wright case, special counsel (Richard Phelan) did not resign. As he subsequently argued, in cases involving powerful members of Congress, "justice can only be done when an outside counsel—a lawyer with independence and stature who can investigate allegations of wrongdoings and stand up to a powerful Congressman—is assigned to the case."[81] When the House Ethics Committee first hired an outside counsel to investigate the Korean lobbying scandal in 1977, members of Congress and the press described it as a "symbol of credibility."[82] The goal was to inject a certain degree of independence into the ethics process. Of course, that independence appears to have been limited, as the two

68. Allan Katz, "The Politics of Congressional Ethics," in *The House at Work*, ed. Joseph Cooper and G. Calvin McKenzie (Austin: University of Texas Press), 97–117.

69. Jack Maskell, *Expulsion, Censure, Reprimand and Fine: Legislative Discipline in the House of Representatives* (Washington, DC: Congressional Research Service, Report RL31382, 2005).

70. Herrick, *Fashioning the More Ethical Representative*, 3.

71. Michael M. Atkinson and Gerald Bierling, "Politicians, the Public and Political Ethics Worlds Apart," *Canadian Journal of Political Science* 38:4 (2005): 1003–28; Denis Saint-Martin, "The Watergate Effect: Or Why Is the Ethics Bar Constantly Rising?" in *Conflict of Interest and Public Life*, ed. Christine Trost and Alison L. Gash (New York: Cambridge University Press), 35–55.

72. McFarland, *Common Cause*, 69.

73. Ibid., 110.

74. Thomas E. Mann and Norman Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (New York: Oxford University Press, 2006), 75.

75. Lanny Davis, *How "Gotcha" Politics Is Destroying America* (New York: Palgrave Macmillan, 2007).

76. Ginsberg and Shefter, *Politics by Other Means*, 1.

77. Marion T. Doss and Robert N. Roberts, *From Watergate to Whitewater: The Public Integrity Wars* (Westport, CT: Praeger, 1997).

78. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1988), 38.

79. Common Cause, "An Outside Counsel Is Needed for the DeLay Investigation," press release, June 2005.

80. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1988), 38.

81. Common Cause, "An Outside Counsel Is Needed," 2.

82. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1977), 822.

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instances of resignation suggest. But this nevertheless was a key institutional move that departed from the traditional system of congressional self-regulation. It paralleled similar institutional changes that Congress was making as part of the 1978 Ethics in Government Act and its independent counsel provisions.[83] Those provisions were meant to ensure the appearance of independence for a special prosecutor charged with investigating the executive branch, but they also set similar standards for the legislative branch, with the House Ethics Committee subsequently relying on outside counsel in more than ten instances to investigate possible ethics violations.[84]

This illustrates how ethics regulation in the U.S. system of divided government is characterized by "tight institutional coupling": Adoption of ethics rules in one branch often raises questions of parallelism or comparison with the other branch, which is then under pressure to adopt complementary or similar rules. It is precisely this type of connection that Vice-President Bush tried to make in 1988 when he fired back in response to questions regarding the special prosecutor investigation of Attorney General Edwin Meese by calling for an independent counsel to investigate charges of wrongdoing by House Speaker Jim Wright. "Talk about ethics," Bush said. "You talk about Ed Meese—how about talking about what Common Cause raised about the Speaker the other day? Are they going to look into it? Are they going to go for an independent counsel so the nation will have this full investigation? Why don't people call out for that? I will right now. I think they ought to."[85]

In 1989, the House Ethics Committee found Wright guilty of having circumvented limitations on honoraria and outside earned income by selling large numbers of copies of his book, *Reflections of a Public Man*, to lobbyists who had invited him to speak. After the Wright scandal, both houses introduced a complete honoraria ban as part of the 1989 Ethics Reform Act, which further expanded the responsibilities of the House Ethics Committee. These included enforcement of the Act's ban on honoraria, limits on outside earned income, and restrictions on the acceptance of gifts. The Act also established the Office of Advice and Education. The office provides guidance and recommendations to members, officers, and employees of the House on standards of conduct applicable to their official duties. The bipartisan task force that developed the 1989 ethics package had mentioned in its report that it was not its intention "that such an office be an autonomous entity."[86] Instead, the office director is appointed by the House Ethics Committee chair, in consultation with the ranking minority member.

During its hearings, the bipartisan task force heard complaints "relating to the due process rights of the accused."[87] The most commonly heard was that the same persons conducting the investigation were also in charge of determining guilt and recommending sanctions to the House. Although the task force considered proposals for an independent investigative office or special prosecutor for Congress, it decided instead to divide the investigative and adjudicative functions of the House Ethics Committee into two sets of subcommittees—the so-called bifurcation approach. Under this new approach, whenever the House Ethics Committee votes to undertake an investigation, a subcommittee on investigation consisting of four to six members (with equal partisan representation) is appointed to conduct the inquiry. If the investigative subcommittee issues a Statement of Alleged Violations, the statement cannot be released to the public until the accused has been afforded an opportunity to respond. A subcommittee on adjudication, consisting of the remaining members of the House Ethics Committee is then constituted to hear evidence and determine guilt. The 1989 reform also included a right to counsel, allowing an accused member to be accompanied by counsel on the House floor when facing a House Ethics Committee's investigation, as well as a statute of limitation prohibiting the Committee from undertaking an investigation involving a matter that occured prior to the third previous Congress.

The bifurcation approach came as a direct response to criticism by Speaker Wright in his resignation speech.[88] The goal was to strengthen due process and create a distance between investigation and adjudication, a space for "independent judgment."[89] It was intended to lessen the problem of prejudgement

83. Katy J. Harriger, *The Special Prosecutor in American Politics*, 2nd ed. (Lawrence, KS: University Press of Kansas, 2000).

84. Meredith McGehee, *Testimony Before the Special Ethics Task Force* (Washington, DC: The Campaign Legal Center, April 19, 2007), 3.

85. David Hoffman, "Bush, Queried on Meese, Urges Probe of Wright," *The Washington Post*, May 26, 1988.

86. United States Congress, *Report of the Bipartisan Task Force on Ethics*, 21.

87. Ibid., 18.

88. "Maybe the committee – as it's currently required to sit as kind of a grand jury and petit jury both – ought to have a different composition, rather than those who issue the statement of alleged violations being the same people who have to judge them. I think it clearly is difficult to expect members who've publicly announced a reason to believe there's a violation to reverse their position at a hearing stage and dismiss charges against a member. Maybe once a report of alleged violations is issued, the committee rules ought to allow the member to respond expeditiously. You know, to deny a member the opportunity to reply quickly can cause serious political injury. It's unfair. Once alleged violations are announced, the committee ought to just immediately release to the member all the evidence that it could have to indicate that that's happened. In my case, for example, the committee has yet to release any witness testimony or documents that it obtained during the investigation" (May 31, 1989).

89. Thompson, *Ethics in Congress*, 149.

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when the committee deciding whether there is sufficient evidence to go forward with a case is the same one that decides whether the accused member is guilty and should be punished.

### The Ethics Wars and Declining Public Trust

In his 1989 resignation speech, Wright denounced the "mindless cannibalism" of ethics investigations and portrayed himself as a casualty of a partisan war being fought through attacks on politicians' ethics.[90] As payback for Gingrich's attacks on Wright, Democratic leaders launched a fusillade of charges against Gingrich. The House Ethics Committee received several complaints against Gingrich, involving either the financing behind a 1984 book he co-authored with his wife or allegations that he gave bonuses to his Hill staff for campaign work. In March 1990, the Committee decided to drop the proceedings but reprimanded Gingrich for relatively minor violations: an omission from his financial disclosure form and misuse of congressional stationery by an aide.[91] The following year, as the House banking scandal unfolded following a GAO report showing that in 1989–1990, 8,331 "bounced" checks had been written against members' House bank accounts, Gingrich pressured the House Ethics Committee to reveal the name of members who abused the system.[92] In 1992, the committee released the names of 325 current and former members of the House, and singled out twenty-two as the worst offenders. The scandal contributed to a perception of corruption and malfeasance that eroded trust in government.[93]

"Congress Hits Bottom" read a headline in the October 28, 1991, issue of the *Polling Report*, a compilation of survey data. A New York Times/CBS News poll indicated that three out of five respondents said they considered half or most members of Congress "financially" corrupt.[94] Survey data indicated that public trust in government in the early 1990s reached a new nadir for the era of survey research.[95] This highlights how public policies also have feedback effects in terms of the meaning and information they convey to political and social actors. Policies generate interpretative effects and provide meanings that help actors make sense of the social world.[96] Policies produce "framing" effects that influence how actors see and think about political issues.[97] In much the same way, ethics rules that seek "to clean up" politics also affect public opinion by making public cases where rules have (or allegedly) been violated.[98] The expansion of ethics rules has not produced, as expected, a concomitant rise in public trust in politics.[99] In fact, they have usually had the reverse effect.[100] As Calvin Mackenzie argues, the more ethics regulations were designed and implemented:

> the more personnel assigned to enforce them, the more air has filled with news—often caustic and depressing news—about government ethics … Whatever the new ethics regulations may have accomplished in cleaning up government, they have done little to reduce publicity and public controversy in the behavior of public officials.[101]

A good example of how this dynamic operates is provided by the House Ethics Committee's decision to release the names of those involved in the House banking scandal, which in the 1992 elections led to the greatest turnover in the House of Representatives in more than forty years.[102] Concerned with public perceptions about their conduct, legislators launched an intense self-examination effort. During the first half of 1993, the Joint Committee on the Organization of Congress, a bipartisan committee of House and Senate members, held hearings on eight different areas of possible institutional reform, including ethics and integrity. The Committee held two hearings on the ethics process in February 1993.

In his opening statement, the committee chair, Representative Lee H. Hamilton, said "on the question of ethics reform, one of our key goals is to look

90. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1989), 39.

91. Ibid., 44.

92. Clifford Krauss, "The House Bank: Gingrich Takes No Prisoners in the House's Seas of Gentility," *The New York Times*, March 17, 1992.

93. Shaun Bowler and Jeffrey A. Karp, "Politicians, Scandals, and Trust in Government," *Political behavior* 2:3 (2004): 271–87.

94. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1991), 39.

95. Gary Orren, "Fall from Grace: The Public's Loss of Faith in Government," in *Why People Don't Trust Government*, ed. Joseph S. Nye Jr., Philip D. Zelikow, and David C. King (Cambridge, MA: Harvard University Press, 1997).

96. Suzanne B. Mettler, "Bringing the State Back In to Civic Engagement: Policy Feedback Effects of the G.I. Bill for World War II Veterans," *American Political Science Review* 96:2 (2002): 351–65; Joe Soss and Sanford F. Schram, "A Public Transformed? Welfare Reform as Policy Feedback," *American Political Science Review* 101:1 (2007): 111–27.

97. Suzanne Mettler and Joe Soss, "The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics," *Perspectives on Politics* 2 (March 2004): 55–73.

98. D. C. Kimball and S. C. Patterson, "Living Up to Expectations: Public Attitudes toward Congress," *Journal of Politics* 59 (1997): 701–29.

99. Rebecca Herrick, "Who Will Survive? An Exploration of Factors Contributing to the Removal of Unethical House Members," *American Politics Quarterly* 28 (2000): 96–109.

100. Nathalie Behnke, "Public Trust, Path Dependence, and Powerful Interests: A Model for the Emergence of Ethics Measure," *Public Integrity* 10:1 (2007–2008): 11–36.

101. Mackenzie, *Scandal Proof*, 112.

102. Michael Dimock and Gary C. Jacobson, "Checks and Choices: The House Bank Scandal's Impact on Voters in 1992," *The Journal of Politics* 57:4 (1995): 1143–59; John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes toward American Political Institutions* (New York: Cambridge University Press, 1995), 70.

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at the public image of the institution. All of us want to improve the public confidence in Congress … No other part of our agenda is more crucial to public confidence in Congress than the way we consider cases of alleged misconduct by sitting members."[103] The most discussed topic for reform was including nonmembers as part of the ethics process. The committee held thirty-six hearings and took testimony from more than two hundred witnesses, including academic experts such as Dennis Thompson from Harvard University and good government groups like Common Cause, all arguing in favor of an independent ethics entity.[104] As one committee member (John M. Spratt, D-SC) stated, "in the eyes of the public, we will never be seen as impartial and disinterested, and as able to discipline our own and consequently, to redeem the public's esteem for Congress and our own reputation, we have got to have a completely outside body of citizens who would sit in judgment."[105] Conversely, other members wanted to keep the system of self-regulation intact. Former House Ethics Committee chair Louis Stokes said he was "particularly troubled by a proposal to shift some of Congress's constitutional enforcement responsibilities to outsiders … Why would an outside group not accountable to members or voters do a better job of convincing the public of the wisdom of their decisions?"[106]

Another concern was that outsiders might not understand the norms of Congress and the competing duties and roles of members. But in the end, it was recommended that "the Committee on Standards of Official Conduct should be authorized to use, on a discretionary basis, a panel of non-members in ethics cases." Allowing "outside individuals to be used in the ethics process," according to the report's drafters, "should enhance the public's confidence in Congress. The public believes that internal self-discipline presents inherent conflicts for Members who have difficulty judging their peers."[107] That proposal was never implemented, but as Table 1 indicates, support for similar ideas subsequently grew stronger, with members introducing more bills and resolutions that would establish some version of an independent ethics commission. The public opinion environment that prevailed when Congress first decided *not* to create an independent ethics

Table 1. Bills and resolutions calling for the creation of an independent ethics watchdog

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Bills* | 0 | | 3 | | 4 | | 1 | | 0 | | 0 | | 2 | | 1 | | 7 | | 8 |
| *Resolutions* | 1 | | 1 | | 1 | | 1 | | 1 | | 4 | | 3 | | 2 | | 1 | | 4 |
| *Congress* | 93rd | | 94th | | 95th | | 96th | | 100th | | 102nd | | 103rd | | 104th | | 105th | | 109th | | 110th |
| | 1973–74 | | 1975–76 | | 1977–78 | | 1979–80 | | 1987–88 | | 1991–92 | | 1993–94 | | 1995–96 | | 1997–98 | | 2005–06 | | 2007–08 |

103. United States Congress, *Hearing Before the Joint Committee on the Organization of Congress. The Ethics Process*, 103rd Cong. (February 25, 1993).

104. United States Congress, *Hearing Before the Joint Committee on the Organization of Congress. Open Days for Members and Outside Groups*, 103rd Cong. (June 16 and 29, 1993).

105. United States Congress, *Hearing Before the Joint Committee on the Organization of Congress. The Ethics Process*, 103rd Cong. (February 25, 1993), 21.

106. Ibid., 4.

107. United States Congress, *Final Report of the House Members of the Joint Committee on the Organization of Congress* (Washington, DC, 1993).

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commission in the 1950s changed radically with the Watergate scandal and the development of the ethics machinery that followed it. Congress decided to enforce ethics rules through self-regulation *before* the Watergate scandal, when public confidence in politics was stronger and had not yet begun to unravel as it did afterward.[108]

Growing political recognition of declining public trust as a "problem" requiring institutional solutions made it increasingly popular for politicians to promise tougher ethics rules in the name of more accountability. Proposals to create independent ethics commissions became, in this context, a useful way to win political credit by raising ethics standards to new levels.[109] When House members opted for self-regulation in adopting their first ethics rules, they might have claimed they were defending the Constitution by upholding the principle of legislative autonomy that allows representatives of the people in Congress to be free of outside interference.[110] Over time, however, self-regulation came to be described as "a system of quiet collusion that both parties practice in an effort to conceal their own members' mistakes."[111] This more negative "framing" of self-discipline was largely the result of the politicization of the ethics process, which grew stronger after the 1994 Republican takeover of Congress and the election of Newt Gingrich as House Speaker.

During Gingrich's term as Speaker, eighty-four ethics charges were filed against him, most of which were leveled by the House Democratic Whip. The fist charges involved a book advance of $4.5 million that he had accepted (two weeks before he was to be sworn in as Speaker) from a publishing company owned by Rupert Murdoch, who had spent the previous year lobbying Congress for deregulation of the broadcast industry. Gingrich returned the money, but in December 1995, the House Ethics Committee unanimously found him guilty of violating House rules. The committee imposed no punishment but said that it "strongly questions the appropriateness of what some could describe as an attempt to capitalize on your office."[112] At the same time, the ethics panel announced that it had retained outside counsel to investigate charges that Gingrich violated federal tax laws by using a tax-exempt college course for political purposes. The committee subsequently found that Gingrich had brought discredit to the House and provided the committee with "inaccurate, incomplete and unreliable information" about the role of a political action committee in a college course he taught. On January 21, 1997, the House voted to reprimand Gingrich. It was the first time in the House's history that the Speaker had been disciplined for ethics violations.

## Independent Ethics Commissions and Institutional Isomorphism

The highly partisan atmosphere surrounding the investigation of Speaker Gingrich prompted the House to review its ethics process. In February 1997, House leaders announced the creation of a bipartisan ethics task force. The announcement was accompanied by a two-month moratorium on the filing of new ethics cases. "After the past few tumultuous months, I think we must have a brief cooling-off period where members can sit back and examine where the ethics process works, where it does not and how it might be improved," said Majority Leader Dick Armey.[113]

The task force held public hearings and heard testimonies from good government groups, such as Common Cause and the Congressional Accountability Project, and from experts in think tanks such as the Brookings Institution, the Heritage Foundation, and the American Enterprise Institute.[114] All recommended proposals for the involvement of outsiders as a way to strengthen the legitimacy of the ethics process. Although similar recommendations had been made before, in 1997 they gained new political traction, making Congress increasingly look like a "laggard" when compared to what was happening during the 1990s on the ethics front, at both the state and international levels and in professional organizations.

In 1995, the Brookings Institution funded and supported the publication of *Ethics in Congress* in which Dennis Thompson defined the independent commission as the appropriate institutional "model" for governing legislative ethics.[115] As Thompson argued, "Many state legislatures have set up independent ethics commissions ... Some city councils have created similar commissions ... Most other professions and institutions have come to appreciate that self-regulation of ethics is not adequate and have accepted at least a modest measure of outside discipline. Congress should do the same."[116] Thompson became one of the leading academic voices and "policy entrepreneurs"

108. Virginia A. Chanley, Thomas J. Rudolph, and Wendy M. Rahn, "The Origins and Consequences of Public Trust in Government," *Public Opinion Quarterly* 64 (2000): 239–56.

109. Saint-Martin, "The Watergate Effect."

110. Josh Chaftez, "Cleaning House: Congressional Commissioners for Standards," *Yale Law Journal* 117 (2007): 165–73.

111. Martin Tolchin and Susan Tolchin, *Glass Houses: Congressional Ethics and the Politics of Venom* (Boulder, CO: Westview Press, 2003).

112. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1995), 1–22.

113. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1997), 1–32.

114. United States Congress, *Report of the Ethics Reform Task Force on H. Res. 168*, 2–3.

115. Thompson, *Ethics in Congress*, 160.

116. Ibid., 159.

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on ethics reform. His proposal to create an independent body to regulate congressional ethics gained strong support among good government groups and was widely disseminated through their publications and advocacy work.

Thompson's ideas about the creation of an independent ethics commission did not "fall from the sky." With its emphasis on creating neutral, objective bodies outside politics, the independent commission is a direct legacy of the Progressive Era.[117] More specific ideas and "blueprints" about independent commissions in the area of legislative ethics developed largely in the context of institutional changes taking place at the state level throughout the 1970s and 1980s. In a book published in 1996 by another think tank, the Twentieth Century Fund, Alan Rosenthal from Rutgers University documented the development of ethics rules in state legislatures. Louisiana was the first state to establish an independent ethics commission in 1964, and more than twenty other states followed suit in the aftermath of Watergate. "The states rather than the federal government" concludes one study, "were the pioneers of a new ethics enforcement mechanism to oversee legislators."[118]

Timing and sequence matter in the politics of ethics policy making. Most states began to regulate ethics *after* Watergate. Although Congress maintained its original decision of *not* delegating enforcement to a third party, as it did when it rejected Senator Fulbright's proposal in the 1950s, states—which had not yet begun to institutionalize ethics—were less constrained and thus more able to experiment with more independent forms of ethics regulation. The new "ethics bureaucracy," as it developed at the state level, sought to gain public support and legitimacy by acquiring organizational capacities and a reputation for efficiency and expertise. These are key attributes of bureaucratic autonomy,[119] but in the case of independent ethics commissions and agencies, they are often difficult to develop, as numerous accusations of being mere "toothless tigers" suggest. These entities generally have weak support from those they are supposed to regulate.[120] The creation of national associations and professional networks of state ethics commissions and agencies became in this context a crucial source of external support for building capacities.

One such association is the Council on Governmental Ethics Laws (COGEL), created in 1974 following a meeting of forty-three representatives of newly formed federal and state ethics agencies seeking to exchange information and practices. COGEL organizes discussions, lectures, training sessions, and workshops on topics of concerns to ethics administrators. It compiles and publishes annual data about existing ethics agencies. The Blue Book, as it is known, includes information about statutory and regulatory functions, budgets, and best practices. COGEL disseminates a model ethics law to help states craft their own legislation and sponsors annual ethics education seminars for legislators. COGEL's model state ethics law is similar to that sponsored by Common Cause since the 1970s.

The influence of Common Cause on state legislative ethics regulation is, according to Rosenson, "evident when we compare the text of the group's model ethics law and the conflict-of-interest statutes that have been enacted since 1972. Common Cause clearly sets the standard that state policy-makers have followed in crafting their ethics laws."[121] Another place where ethics commissions and agencies have been acquiring knowledge to build capacities is the National Conference of State Legislatures (NCSL) and its Center for Ethics in Government created in the late 1990s.

COGEL and NCSL, together with other think tanks, good government groups, and bureaucrats and experts working in ethics commissions, constitute a form of "epistemic community" that has helped to build up the independent ethics commission model.[122] The process has not been disinterested, as these actors increase their own social power and influence in the process. They have developed strong corporate or professional interests in the work of ethics agencies and commissions. Their work facilitates institutional isomorphism, and arrangements that fall outside the consensus, such as Congress's self-regulation system, have suffered a decline in legitimacy and faced strong pressures to adapt over time.

Those pressures were clearly at work in 1997, when the bipartisan task force decided against the institutional model of independent regulation developing at the state level. Rather than follow the direction of the states, the task force instead weakened the ethics process by deciding to bar nonmembers from filing complaints with the House Ethics Committee.[123] Under the 1977 ethics rules, outsiders' ethics complaints could either be introduced by a member of the House or by providing

117. Stephen Skowronek, *Building the New American State* (New York: Cambridge University Press, 1982).

118. Rosenson, *In the Shadowland of Conduct*, 118.

119. Daniel Carpenter, *The Forging of Bureaucratic Autonomy* (Princeton, NJ: Princeton University Press, 2001).

120. Frederick M. Herrmann, "Bricks without Straw: The Plight of Governmental Ethics Agencies in the United States," *Public Integrity Annual* 2 (1997): 13–22.

121. Rosenson, *In the Shadowland of Conduct*, 145.

122. Peter M. Haas, "Epistemic Communities and International Policy Coordination," *International Organization* 46:1 (1992): 1–35.

123. Allison Mitchell, "New Ethics Rules Are Approved, Including a Ban on Outsiders' Complaints," *The New York Times*, September 19, 1997.

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three formal letters from members refusing to sponsor the complaint. In voting to repeal the so-called three refusal rule, task force members from both parties said it had been abused and the change was needed to protect members from frivolous ethics complaints.[124] Outside complaints in the past had provided an important impetus for launching investigations, especially in the case of powerful members whose colleagues feared they might retaliate against them.

The power to use ethics rules to lodge a complaint against a member allowed good government groups to exercise a "fire-alarm" form of control over the ethics process, as this type of monitoring is described by Mathew McCubbins and Thomas Schwartz.[125] Good government groups became institutionalized co-partners in the governance of congressional ethics with the support of their allies in the House, especially liberal Democrats in the Democratic Study Group.[126] At the same time, good government groups have been equally zealous in their attacks against the perceived ethical lapses of both Democrats and Republicans, as when they led the charges against Jim Wright in 1989 and Newt Gingrich in 1997. So when the House decided to bar outside groups from filing complaints with the House Ethics Committee, it created a major catalyst for the mobilization of the good government community. The director of the Congressional Accountability Project, a Ralph Nader-affiliated organization, warned that repeal of the "three refusal rule" would leave watchdog groups shut out of the ethics process. "We are calling this the Corrupt Politicians Protection Act," he said.[127]

With outside organizations no longer able to file complaints, watchdog groups and the press accused the House Ethics Committee of not doing its job of looking into alleged violations of ethics rules. During the 105th Congress, "the House has operated without any ethics process," complained Common Cause in a letter to House majority and minority leaders (July 29, 1997). The moratorium on the filing of new ethics cases announced in February 1997—though understood to end in April of that same year—dragged on for months, even as serious complaints were accumulating against several members, including the majority whip, Tom DeLay.[128] The moratorium was eventually lifted, but the House Ethics Committee later recognized that this period had been followed by an unwritten "ethics truce" in which Democrats and Republicans agreed not to file complaints against the leadership of either party.[129]

As the "truce" persisted, good government groups joined their efforts by creating in 2003 the Congressional Ethics Coalition consisting of: Public Citizen, Common Cause, Democracy 21, the Center for Responsive Politics, the Campaign Legal Center, the League of Women Voters, Citizens for Responsibility and Ethics in Washington (CREW), Judicial Watch, Public Campaign, and U.S. PIRG. The Coalition's first move was to mount a public campaign urging the House Ethics Committee to investigate alleged ethics violations by Majority Leader Tom DeLay. In 2004, the Coalition helped put an end to the seven-year ethics truce by assisting Rep. Chris Bell (D-TX) in drafting an ethics complaint against Delay. Pressures grew even stronger in 2005 after the House Ethics Committee chair Joel Hefley (R-CO) was removed from his position, reportedly because of his aggressive posture toward DeLay on ethics matters.[130] The independence of the ethics process became a major campaign issue in preparation for the 2006 midterm election, and as details of what was to become the Abramoff scandal unfolded. Following the election, a task force on ethics enforcement was created to study the creation of a new OCE. Members of the Congressional Ethics Coalition played a key role in this process. U.S. PIRG produced a detailed study of state ethics commissions and agencies entitled *Honest Enforcement: What Congress Can Learn from Independent State Ethics Commissions* (2007). The study argued that:

> States are far ahead of Congress in understanding the inherent conflict of interest of colleagues overseeing colleagues. In fact, as of January 2007, at least 23 states had established independent commissions … Congress is almost alone in choosing to self-police. If members are serious about honest and open government, they should follow the lead of almost half of the states and establish an independent ethics enforcement commission (pp. 2–3).

Other groups appearing before the 2007 task force, such as the Campaign Legal Centre, recommended that lawmakers "create an outside entity, based on examples in state legislatures."[131]

124. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1997), 1–32.

125. Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols v. Fire Alarms," *American Journal of Political Science* 28:1 (1984): 165–79.

126. McFarland, *Common Cause*, 111.

127. *Congressional Quarterly Almanac* (Washington, DC: CQ Press, 1997), 1–32.

128. Katharine Q. Seeley, "After Months without Ethics Committee, House May Resurrect It This Week," *The New York Times*, September 7, 1997.

129. Joel Hefley and Alan B. Mollohan, *Letter to House Colleagues from Chair and Co-Chair of the House Ethics Committee*, March 11, 2004.

130. Sheryl G. Stolberg, "Job of Ethics Panel Head Is Even More Thankless That Usual These Days," *The New York Times*, October 7, 2004.

131. Testimony of Meredith McGehee, Policy Director, Campaign Legal Center. Before the Special Task Force on Ethics, April 19, 2007.

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State ethics commissions sent letters to Speaker Pelosi and the chair of the ethics task force to "share our experience and to encourage you to establish an independent ethics oversight body for Congress . . . As you consider how best to handle ethics enforcement, we urge you to look to the success of the state ethics commissions and to adopt the time-tested best practices of each."[132]

## CONCLUSION: TOWARD CO-REGULATION

In March 2008, the House voted to create the OCE with a vote of 229 to 182. A majority of GOP lawmakers—feeling that the Office was a ploy to exploit the scandal surrounding Republican lobbyist Jack Abramoff—voted against the Office's creation. With the Republican takeover of the House after the 2010 elections, speculation was rampant that they would terminate the OCE.[133] This is exactly what Schickler's theory of disjointed pluralism predicts: that successful reforms in Congress generate reactions rather than self-reinforcement. This means that most reforms only have weak prospects for political survival. In other words, actors are not forced to adjust to institutions, as they can always defeat them. To date, however, Republicans have left the OCE largely intact.[134] Despite being elected on a platform to slash government spending, they even voted against a plan that called for a 40 percent cut in the OCE's budget.[135]

This suggests that rather than actors remaking institutions that are not in line with their preferences, the process works in the opposite fashion. Actors in Congress have had to adapt to the new OCE. The House Ethics Committee has issued more disciplinary actions since the creation of the Office. Of course, the OCE is still far from being an independent third party. But its creation adds a new layer of transparency and quasi-independence that various scandal-led reforms have incrementally made stronger over time, as the growing use of outside counsels, the bifurcation approach, and the right of outside groups to lodge complaints indicate. The accumulation of these small adjustments has been more self-reinforcing than anticipated in theories of disjointed pluralism. Gradual institutional changes have been pushing Congress toward a single model of an outside ethics agency, such as the one created in 2008. In the race to win political credit for pushing ethics standards to new plateaus, the executive does not have the collective action problem of Congress. The executive can act as a unified actor and initiate new ethics rules that Congress is then under pressure to follow. In the ethics area, the complementarities of standards of conduct between the executive and legislative branches of government make "disjointed pluralism" a less central feature of institutional development in Congress.

Ethics self-regulation in Congress is gradually evolving into a new form of "co-regulation" with outsiders in the OCE. By studying the feedback effects of ethics rules on Congress, this article has sought to uncover the slow-moving, endogenous sources of change that models of discontinuous institutional change tend to obscure. There are many shades of grey between the black-and-white, dichotomous view of self-regulation and third-party enforcement. The shift from the former to the latter does not involve a breakdown of one set of institutions and its replacement with another.[136] It is more a matter of slow and incremental change that adds up to a fundamental transformation.

132. Letter from Norman M. Ostrau, Chairman, Florida Commission on Ethics, to Speaker of the House Nancy Pelosi and Minority Leader John Boehner, April 25, 2007.

133. Susan Crabtree, "House GOP Leaders Dodge Questions on the Future of Ethics Office," *The Hill*, August 9, 2010.

134. Ron Nixon, "GOP Grants Reprieve to House Ethics Office," *The New York Times*, January 21, 2011.

135. Eric Lipton, "Plan to Cut Budget of Ethics Office Fails House Vote," *The New York Times*, July 22, 2011.

136. Avner Greif, *Institutions and the Path to the Modern Economy* (New York: Cambridge University Press, 2006); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 1990).

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