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PAUL M. THOMPSON

First, Do No Harm: Why a Commissioner for Standards Is Unhealthy for the American Body Politic

INTRODUCTION

Recently, Senator Robert Bennett expressed a sentiment that aptly summarizes my reaction to Josh Chafetz's call to change ethics enforcement in Congress.¹ "Washington is the only place I know where, when people break the law, our reaction is . . . [to] make the law tougher."² In recent years, several members of Congress have violated ethics rules,³ and a few have broken the law.⁴ Unlike Chafetz, however, I don't view these events as evidence of a system in disrepair. Instead, they are proof of one that works. Like the fever that accompanies a virus, they are a sign that our body politic can heal itself.

In his Comment, Chafetz calls for a dose of new medicine when it comes to congressional ethics: an enforcement mechanism modeled on the British Parliamentary Commissioner for Standards.⁵ This Commissioner would be an independent counsel of sorts with the mandate to investigate, issue subpoenas,

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1. Josh Chafetz, Comment, *Cleaning House: Congressional Commissioners for Standards*, 117 YALE L.J. 165 (2007).
 2. 152 CONG. REC. S2450-51 (daily ed. Mar. 28, 2006) (statement of Sen. Bennett) (quoting Sen. Ben Nelson).
 3. See, e.g., Charles Babington & Jonathan Weisman, *Rep. Foley Quits in Page Scandal*, WASH. POST, Sept. 30, 2006, at A1 (resignation of Rep. Mark Foley); Jonathan Weisman & Chris Cilizza, *DeLay To Resign from Congress*, WASH. POST, Apr. 4, 2006, at A1.
 4. See, e.g., *Convicted Lawmaker Ney Resigns His House Seat*, WASH. POST, Nov. 4, 2006, at A9 (resignation of Rep. Bob Ney); Charles R. Babcock & Jonathan Weisman, *Congressman Admits Taking Bribes, Resigns*, WASH. POST, Nov. 29, 2005, at A1 (resignation of Rep. Randy "Duke" Cunningham).
 5. Chafetz, *supra* note 1, at 171.

and publicize wrongdoing by members of Congress.⁶ Ultimately, the congressional ethics committees would retain the power to punish members.⁷ But, in all cases, the Commissioner *must* go public, creating pressure that will, according to Chafetz, strengthen enforcement and increase public confidence.⁸

The proposal is hardly new. In the past two years, the United States Senate has twice rejected a proposal to create an Office of Public Integrity (OPI)⁹—an office that would perform the same function as Chafetz’s Commissioner.¹⁰ A bipartisan group of Senators successfully opposed the measure, arguing that the ethics committees already serve as an effective way to enforce the ethics rules.¹¹

I worked for the Senate when it first rejected the OPI. At the time, I thought that the proposal would make ethics enforcement worse, not better. Though Chafetz gives the OPI a different name, he does little to alter my thinking. First, I fear that he has misdiagnosed the patient, proposing a solution to a problem that does not exist. Second, in my view, Chafetz’s Commissioner will do more to harm the ethics enforcement process than to help it.

I. THE DIAGNOSIS

At the core of Chafetz’s thesis is a simple premise: the rules governing the ethical conduct of members of Congress are “largely meaningless without a stronger enforcement mechanism.”¹² I disagree. The ethics enforcement process is not perfect, but it is not in a state of complete disrepair. Recent history shows that Congress, the executive branch, and the voting public take ethical rules seriously.

Take, for example, the work done by Congress. Over the past twenty-five years, the Senate has moved to sanction eleven of its members.¹³ For three of

6. *Id.* at 172.

7. *Id.*

8. *Id.* at 171-73.

9. 152 CONG. REC. S2459 (daily ed. Mar. 28, 2006) (roll call vote No. 77: 30 Yeas, 67 Nays); 153 CONG. REC. S744 (daily ed. Jan. 18, 2007).

10. 152 CONG. REC. S2443-46 (daily ed. Mar. 28, 2006) (statements of Sen. Lieberman and Sen. Collins).

11. 152 CONG. REC. S2445-47 (daily ed. Mar. 28, 2006); *id.* at S2448-49 (statement of Sen. Voinovich) (statement of Sen. Johnson).

12. Chafetz, *supra* note 1, at 165.

13. SUSAN J. TOLCHIN & MARTIN TOLCHIN, GLASS HOUSES: CONGRESSIONAL ETHICS AND THE POLITICS OF VENOM app. a, at 158 (2004) (chart containing the results of ten investigations spanning from 1982 to 1995); Tim Golden, *Ethics Committee Faults Torricelli on Gifts*

them, the action led to the end of their careers.¹⁴ The House, too, has a solid record of sanctioning members.¹⁵ Action by the House Ethics Committee led to the resignation of Speaker Jim Wright in 1989¹⁶ and marked the beginning of the end for Newt Gingrich.¹⁷ The congressional ethics committees train members on their obligations,¹⁸ provide confidential advice,¹⁹ and obtain compliance through the threat of publicity.²⁰ For every member who has received a public sanction, there are many more who have worked with the committees to avoid missteps. The point is simple: Congress' own internal systems are effective at identifying, deterring, and punishing offenders.

If the ethics committees do not act, others fill the gap. In the most serious cases, the Department of Justice (DOJ) prosecutes members who violate federal statutes.²¹ Unlike the British system on which Chafetz bases his proposal,²² in the United States, members of Congress can be and are

Violations, N.Y. TIMES, July 31, 2002, at A1 (detailing severe admonishment of Sen. Robert Torricelli).

14. TOLCHIN & TOLCHIN, *supra* note 13, app. a, at 158 n.5 & 7; *Torricelli Drops Out of N.J. Race*, CNN.COM, Oct. 1, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/09/30/elec02.nj.s.torricelli.race/index.html> (reporting Torricelli's decision to drop out of the New Jersey Senate race).
15. Committee on Standards of Official Conduct, Historical Summary of Conduct Cases in the House of Representatives (Nov. 9, 2004), *available at* http://www.house.gov/ethics/Historical_Chart_Final_Version.htm; *see also* TOLCHIN & TOLCHIN, *supra* note 13, app. b, at 159-64.
16. George J. Church, *Bombshell in the House*, TIME, May 1, 1989, at 33, 33 (Unanimous House Ethics Committee found "reason to believe" that Wright "had violated House ethics rules by failing to avoid 'even the appearance of impropriety.'"); Roberto Suro, *Jim Wright as Speaker for Texans*, N.Y. TIMES, Sept. 18, 1989, at A14 (stating that Wright's "political career crashed to a close amid charges of unethical conduct").
17. John E. Yang & Helen Dewar, *Ethics Panel Supports Reprimand of Gingrich, \$300,000 Sanction for House Rules Violations*, WASH. POST, Jan. 18, 1997, at A1.
18. *See, e.g.*, Letter from Senators Barbara Boxer and John Cornyn, Senate Select Comm. on Ethics (Sept. 25, 2007), *available at* http://ethics.senate.gov/downloads/pdffiles/dear%20colleague_new%20rules.pdf.
19. *See, e.g.*, COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, RULES OF THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT rule 7.
20. House Speaker Jim Wright, for instance, resigned rather than face a damaging public ethics report. Church, *supra* note 16, at 33 (Unanimous House Ethics Committee found "reason to believe" that Wright "had violated House ethics rules by failing to avoid 'even the appearance of impropriety.'").
21. Brian Bennett & Timothy J. Burger, *Would Justice Clean the House?* TIME, Feb. 25, 2006, <http://www.time.com/time/nation/article/0,8599,1167705,00.html>.
22. JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 106-07 (2007); Chafetz, *supra* note 1, at 168-69.

investigated, tried, and convicted for violating the public trust.²³ Such outside enforcement is essential to a healthy body politic. While Congress has fined and even expelled wayward members,²⁴ such punishments alone are hardly adequate for violators like “Duke” Cunningham, the former Congressman who accepted \$2.4 million in bribes.²⁵ In such cases, DOJ is best suited to investigate wrongdoing.

So too, the public plays a role in policing Congress’s ethical standards. The 1994 and 2006 elections prove the point. In June 1994, forty-nine percent of Americans believed that Congress was more corrupt than it was during Watergate.²⁶ In that year, the public gave control of Congress to a new party, ousting thirty-six incumbents.²⁷ A similar mood permeated the 2006 election, with more than half of independents believing that their own member of Congress had taken a bribe.²⁸ The result was the same: thirty-three incumbents lost and a new party gained control.²⁹ In both cases, the result was more of a blunderbuss than a laser beam, as many of the ousted members were

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23. *United States v. Brewster*, 408 U.S. 501 (1972) (holding that the Speech and Debate clause of the United States Constitution does not bar the prosecution of a Member of Congress for bribery). Despite clear law to the contrary, in his comment and elsewhere, Chafetz has argued that the Speech and Debate Clause of the Constitution, U.S. CONST. art I, § 6 cl. 1, should shield members of Congress from prosecution, even, in some instances, for acts of bribery. CHAFETZ, *supra* note 22, at 106-07; Chafetz, *supra* note 1, at 166.
 24. Jack Maskell, *Expulsion, Censure, Reprimand, and Fine: Legislative Discipline in the House of Representatives*, CRS REPORT FOR CONGRESS, Apr. 16, 2002, available at <http://www.rules.house.gov/archives/rl31382.pdf>.
 25. Babcock & Weisman, *supra* note 4, at A1 (resignation of Rep. Randy “Duke” Cunningham).
 26. Jeffrey M. Jones, *Congress Approval Rating Matches Historical Low*, GALLUP POLL, Aug. 21, 2007, <http://www.gallup.com/poll/28456/Congress-Approval-Rating-Matches-Historical-Low.aspx> (collecting congressional approval ratings from 1974 and showing that, before the 1994 election, only twenty-three percent of voters approved of the job that Congress was doing); Scott Shepard, *Decline in Respect Hampers Congress in Job, Experts Say*, ATLANTA J. CONST., June 10, 1994, at A6.
 27. *Morning Edition: Bob Edwards Interviews Haley Barbour*, (National Public Radio broadcast Nov. 9, 1994) (noting thirty-four incumbent losses in the House); *Who Won Where—the Races for the U.S. Senate*, N.Y. TIMES, Nov. 10, 1994, at B5 (identifying two incumbent losses in the Senate).
 28. Michael Dimock, *Independents Sour on Incumbents*, PEW RESEARCH CENTER PUBLICATIONS, Mar. 7, 2006; Jones, *supra* note 26 (twenty-six percent approval rating for Congress on November 2-5, 2006); Jeff Zeleny & Megan Thee, *Exit Polls Show Independents, Citing War, Favored Democrats*, N.Y. TIMES, Nov. 8, 2006, at P9 (corruption was “extremely important” or “very important” to seventy-four percent of voters).
 29. Adam Nossiter, *Republican Hangs On to Frist’s Senate Seat*, N.Y. TIMES, Nov. 8, 2006, at P4, (identifying five incumbent losses in the Senate); *The Races for the House*, N.Y. TIMES, Nov. 9, 2006 (identifying twenty-eight incumbent losses in the House).

not involved in scandals. Nonetheless, voters showed that ethics mattered, and they took it upon themselves to clean house.

All of this—the congressional sanctions, the prosecutions, and the elections—is evidence of an enforcement system that works, not one in need of major surgery. Any diagnosis to the contrary is not completely accurate.

II. THE PROPOSED CURE

Second, Chafetz proposes a cure that, in truth, is worse than the ethics disease itself. His proposal for a Commissioner of Standards would replace a system that works with one that is redundant, at best, and prone to partisanship and gridlock, at worst.

At best, the Commissioner will take on a job that is already being done by the staff of the ethics committees. The Senate Ethics Committee staff already has the power to open investigations, consider public complaints, and issue subpoenas.³⁰ What Chafetz casts as “independence” is just a new gloss on existing structural protections. The staff of the Senate Ethics Committee is already required under the Senate rules to be nonpartisan;³¹ it cannot be hired or fired for political reasons, and it does not change when control of Congress changes.³² By creating a Commissioner with the same tools and attributes, Chafetz simply adds another layer of bureaucracy—hardly a means to strengthen enforcement.³³

What, then, is new about this Commissioner? In a word: publicity. Under Chafetz’s proposal, the Commissioner *must* publicize his or her decisions.³⁴ Current ethics enforcement already has a very public element to it. Contrary to Chafetz’s assertion, the public can freely file ethics complaints with Congress³⁵

30. 152 CONG. REC. S2445-47 (daily ed. Mar. 28, 2006) (statement of Sen. Voinovich).

31. SENATE SELECT COMM. ON ETHICS, RULES OF PROCEDURE rule 15(a)(1); *see also* 152 CONG. REC. S2446 (Mar. 28, 2006) (statement of Sen. Voinovich).

32. SENATE SELECT COMM. ON ETHICS, *supra* note 31, rule 15(c)-(d). Indeed, under the Rules of the Senate Ethics Committee, the Committee is already empowered to appoint an independent counsel in those cases where it deems one necessary. *Id.* rule 15(b)(3).

33. 152 CONG. REC. S2445-47 (daily ed. Mar. 28, 2006) (statement of Sen. Voinovich).

34. Chafetz, *supra* note 1, at 172.

35. SENATE SELECT COMM. ON ETHICS, SENATE ETHICS MANUAL rule 2(a)-(b), app. c, at 371 (2003) (“Any member or staff member of the Committee . . . and any other person may report to the Committee, a sworn complaint or other allegation or information, alleging that any Senator, or officer, or employee of the Senate has violated a law, the Senate Code of Official Conduct, or any rule or regulation of the Senate . . . or has engaged in improper conduct which may reflect upon the Senate. . . . Complaints, allegations, and information to be reported to the Committee may be obtained from a variety of sources, including but not limited to . . . anonymous or informal complaints . . . [or] information reported by the news

and the media and watchdog groups closely monitor the process.³⁶ In addition, under current law, members are required to file exhaustive public disclosures, including disclosures of personal financial information, receipt of gifts, and travel.³⁷ As a general rule, this kind of public disclosure is important as it keeps members accountable. But the publicity requirement in Chafetz's proposal is altogether different—a requirement that all *investigations*, meritorious or not, receive a public airing. In my opinion, this requirement will have two adverse effects on the ethics process.

First, it will eliminate confidentiality. Under the present process, the greatest tool in ferreting out and enforcing ethics violations is *not* publicity. It is confidentiality. The ability of the ethics committees to investigate in confidence encourages candor, protects the rights of the accuser and the accused, and allows the committees to use the *threat* of publicity to obtain compliance.³⁸ With a Commissioner compelled to make findings public, however, these benefits will disappear. The accused may be more likely to conceal and deny. It will be harder to protect the rights of all involved. And, the ethics committees will lose the threat of publicity as a compliance tool. With confidentiality gone, the ethics committees will find it harder to investigate wrongdoing and enforce the rules.

Second, a more publicized process will become a more political process. With the guarantee of publicity, those filing complaints may lodge them for purely political reasons. Every complaint, as Senator Diane Feinstein correctly noted, “will be a 30-second spot in someone’s campaign.”³⁹ The Commissioner, too, may use his position to forward his own political agenda.⁴⁰

media.”); THE HOUSE RULES AND MANUALS, H.R. Doc. No. 109-157 rule XI-3(b)(2) (“[T]he committee may undertake an investigation relating to the official conduct of an individual Member, Delegate, Resident Commissioner, officer, or employee of the House . . . upon receipt of information offered as a complaint, in writing and under oath, from a person not a Member, Delegate, or Resident Commissioner provided that a Member, Delegate, or Resident Commissioner certifies in writing to the committee that he believes the information is submitted in good faith and warrants the review and consideration of the committee.”).

36. See, e.g., Laura Mansnerus, *Critics Say Senate Ethics Investigation of Torricelli Lacks Necessary Scope*, N.Y. TIMES, July 27, 2002, at B5 (noting two watchdog groups, the Congressional Accountability Project and Judicial Watch, planned to take independent action if the Senate Ethics Committee closed its investigation of Senator Torricelli in 2002).
37. SENATE SELECT COMM. ON ETHICS, *supra* note 35, ch. 2 (requiring disclosure of gifts and travel) & ch. 5 (requiring disclosure of financial statements).
38. 152 CONG. REC. S2445 (daily ed. Mar. 28, 2006) (statement of Sen. Voinovich).
39. 153 CONG. REC. S744 (daily ed. Jan. 18, 2007) (statement of Sen. Feinstein).
40. Gerard E. Lynch & Phillip K. Howard, *Special Prosecutors: What’s the Point?*, WASH. POST, May 28, 1995, at C7 (“High officials are the most tempting targets for young prosecutors. Fame and glory . . . come from handling cases in the headlines.”); Julie O’Sullivan, *The*

Indeed, precisely such a claim was made against those acting under the Independent Counsel Statute (think Ken Starr of congressional ethics).⁴¹ Finally, with allegations made public, members of the ethics committees will focus less on the merits of each allegation and more on the political risks and benefits of their votes.⁴² For all three actors—the accusers, the Commissioner, and the members of Congress—publicity will lead to a more political process. The result will be more in-fighting and political attacks, causing enforcement to grind to a halt.

What, then, is the justification for this proposal? According to Chafetz, the Commissioner will increase public confidence.⁴³ This quest for public adulation, however, is a futile one. Fear of corruption is at the core of our political culture.⁴⁴ Our ethics enforcement mechanism is more sophisticated, formalized, and transparent today than it has ever been.⁴⁵ Yet, with each advance, the public perception of Congress does not markedly improve.⁴⁶ A recent example proves the point. In the summer of 2007, Congress passed the most expansive ethics reform legislation in a decade. By late October 2007, however, such sweeping ethics reform had done little to increase the public's confidence, with only twenty-two percent approving of the job that Congress was doing.⁴⁷ Like reform efforts in the past, a Commissioner for Standards will not increase public confidence. If anything, the opposite may occur. With

Independent Counsel Statute: Bad Law, Bad Policy, 33 AM. CRIM. L. REV. 463, 477 (1996) (explaining that, if “ambition plays a role,” an independent counsel is “better served by indicting a big name official than by exonerating him.”).

41. H. Geoffrey Moulton, Jr. & Daniel C. Richman, *Of Prosecutors and Special Prosecutors: An Organizational Perspective*, 5 WIDENER L. SYMP. J. 79, 79 (2000) (“[D]esigned to restore public trust in the impartial administration of criminal justice after Watergate,” the statute “ultimately fueled rather than quieted the perception that partisan politics drives the investigation of high-ranking government officials.”).
42. 152 CONG. REC. S2447 (daily ed. Mar. 28, 2006) (statement of Sen. Voinovich).
43. Chafetz, *supra* note 1, at 172-73. The same defense was offered by supporters of the Office of Public Integrity. See, e.g., 152 CONG. REC. S.2442 (daily ed. Mar. 28, 2006) (statement of Sen. Obama).
44. David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 REV. LITIG. 85, 128 (1999) (“Concerns with corruption and its eradication represent a long-standing tradition or practice that dates back to the origins of the American republic.”).
45. Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 455-56 (1990) (tracing the history of ethics rules in the United States Congress); TOLCHIN & TOLCHIN, *supra* note 13, at ix, 70.
46. Jones, *supra* note 26 (collecting congressional approval ratings from 1974).
47. Sasha Johnson & Paul Steinhauser, *Poll: 75 Percent Disapprove of Congress' Performance*, CNN.COM, Oct. 26, 2007, <http://www.cnn.com/2007/POLITICS/10/26/poll.congress/index.html>.

added publicity and partisanship on matters of ethics, the public's perception of Congress will likely decline.⁴⁸

CONCLUSION

No doubt, there are a host of reforms that Congress could adopt to enhance the ethics process and improve the health of our body politic. A Commissioner for Standards, however, is not one of them. Though Chafetz has given his proposal a thoughtful defense, a Commissioner for Standards is a prescription for more partisanship in the congressional ethics process. In my view, it is best to leave this prescription, as they say, on the shelf.

Paul M. Thompson is a partner at the law firm of McDermott Will & Emery. He is a former Assistant United States Attorney and, from 2005-2006, served as counsel to the United States Senate Judiciary Committee. Special thanks to Kelly Falls, Jeffrey Mikoni, and Joseph Thai for their assistance with this piece.

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48. TOLCHIN & TOLCHIN, *supra* note 13, 69-70 (stating that “when ethical lapses bec[o]me a partisan issue, they reflect[] more negatively on the institution of Congress than on individual members”).