

The Office of Congressional Ethics: Purpose, Efficacy, and Reforms

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As a part of the systems of checks and balances, the founding fathers made the Congress the only body of government with the power to regulate the official behavior of congresspeople. James Madison famously argued against systems like this in Federalist Paper 10, stating that “a body of men are unfit to be both judge and parties at the same time”, due to the obvious conflict of interest.<sup>1</sup> Regardless, this system persisted until the establishment of the Office of Congressional Ethics (OCE) in 2008. The OCE was created as an external body that was tasked with investigating ethics violations, in the absence of partisan interference. The Office of Congressional Ethics has been effective in increasing the extent to which the House is willing to self-regulate, but there are several reforms that could improve the office’s functionality.

### 1. Identifying the Problem

It could be argued that concerns over governmental ethics date back to the founding of the United States itself; and the debate over how to perfect governmental ethics would certainly support that claim. Because the only institution that can regulate Congress is Congress itself, there have long been concerns over members’ willingness to hold other members accountable. In recent memory, Congress has investigated the prospect of external oversight as a solution to this problem twice as a complete body, and the separate houses have also considered the prospect.<sup>2</sup>

In 1951, the Senate held hearings to consider a proposal to create a Commission on Ethics in Government that would have investigative power over the entire Congress. The Senate Committee on Labor and Human resources established a special subcommittee to investigate the proposal.<sup>3</sup> This subcommittee recommended that the Commission be established to report on the

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<sup>1</sup> James Madison, “Federalist No.10,” Federalist 10, accessed May 2, 2022.

<sup>2</sup> Jacob R Straus, “House Office of Congressional Ethics: History, Authority, and Procedures,” Congressional Research Service, February 3, 2022.

<sup>3</sup> Straus, “House Office of Congressional Ethics.”

ethical behavior of members and continue to recommend ethics reforms as the needs arose.<sup>4</sup> The recommendations, however, were never debated within the committee or the full Senate, and no reforms were adopted.<sup>5</sup>

In 1993, the Joint Committee on the Organization of Congress held hearings on the general ethics process in Congress, where similar recommendations were given. The report of these hearings summarizes that “most witnesses who testified believed that ethics reform should be a priority for the committee, but there were differing opinions of what constituted reform”.<sup>6</sup> The testimony offered in these hearings ranged from advocating for an outside organization to investigate, with final authority still resting with the Congress, to stricter interpretations of the Constitution which would not allow any body other than Congress to investigate the ethical behavior of members. The Committee recommended that the Ethics Committee be allowed to incorporate panels of non-members in ethics cases, at their discretion, but no further action was taken.<sup>7</sup>

Although there is clear evidence for a long-standing concern over Congress’ unwillingness to regulate itself, it took a national scandal to translate that concern into action. The arrest of Jack Abramoff, and more importantly his plea deal with the Department of Justice, inspired quick action in the House of Representatives.<sup>8</sup> Following the scandal, public perception of government ethics was incredibly poor, with 58% of those polled saying that the scandal was

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<sup>4</sup> Straus, “House Office of Congressional Ethics.”

<sup>5</sup> Straus, “House Office of Congressional Ethics.”

<sup>6</sup> “Enforcement of Ethical Standards in Congress,” House Committee on Rules Archive, accessed May 2, 2022.

<sup>7</sup> Straus, “House Office of Congressional Ethics.”

<sup>8</sup> Donald R. Wolfensberger, “Reforming the Modern Congress,” in *Congress*, ed. BENJAMIN GINSBERG and KATHRYN WAGNER HILL, The First Branch--Companion Readings (Yale University Press, 2020), 60–78,

evidence of widespread corruption in Washington.<sup>9</sup> The accompanying calls for reform were also strong, with 90% of those polled at the time stating that lobbyists should not be able to give gifts or trips to elected officials.<sup>10</sup> With compelling evidence that Congress had a severe lack of oversight on ethics, and a public that was furious at the current conditions, reform finally began.

## 2. The Goals of Reform

Amending the issue of self-regulation is a process that does not easily lend itself to quantitative goals. The obvious goal is for a government free of corruption, but that is both difficult to achieve and difficult to measure. The ethics reforms of the late 2000s did not have quantitative goals, but rather aimed to reduce certain areas of concern by as much as possible.<sup>11</sup>

The area of such concern for the creation of the OCE was the hesitancy of members to investigate other members. Congress had long been accused of not investigating its own members, as the act of initiating an investigation would come with serious political backlash for the member who issued accusations.<sup>12</sup> This environment, which seems to disincentivize ethical behavior from members of Congress, is also not one that inspires a great degree of public confidence. As was evidenced by the public reaction to Abramoff's arrest, perceived corruption can easily undermine faith in the entire government, not only in the individuals involved.

Proponents of the creation of the OCE argued that the office would not only address the House's unwillingness to self-regulate, but it would also increase public trust in government. Mike Capuano, the Representative that headed the task force investigating the possibility of

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<sup>9</sup> Logan Dancey, "Reform on My Terms: Partisan and Ideological Responses to a Corruption Scandal," *PS: Political Science and Politics* 47, no. 2 (2014): 367–71.

<sup>10</sup> Dancey, "Reform on My Terms."

<sup>11</sup> Isaac Arnsdorf, "The Lobbying Reform That Enriched Congress," *POLITICO*, July 3, 2016.

<sup>12</sup> Wolfensberger, "Reforming the Modern Congress."

creating the office, said of the resolution that “the key component here is transparency” with the end goal of increasing trust in government.<sup>13</sup> The hope being that through providing the House Committee on Ethics with an organization that would initiate and investigate cases independently, they would be less hesitant to take action against members that had committed violations of Code of Official Conduct. The OCE was created to be that organization, to increase the investigations conducted by the House, and increase public trust in the ethics process.

### 3. Reform

While the Abramoff scandal was the impetus for many congressional ethics reforms, including the Honest Leadership and Open Government Act of 2007, the creation of the OCE was the one best positioned to address the problem of self-regulation.<sup>14</sup> The office was created through a House Resolution and has not been cemented as a statutory institution, meaning that the office must be re-authorized every congressional term.

The Office of Congressional Ethics is led by a board of 6 directors and 2 alternates.<sup>15</sup> This board authorizes and oversees the investigations that are carried out by office staff, most of whom are lawyers with special training in governmental ethics.<sup>16</sup> These board members are appointed by the Speaker of the House and the Minority Leader, and are not allowed to be members of Congress, or lobbyists. In fact, neither board members nor staff are allowed to work for the federal government in any other capacity, and cannot have been registered lobbyists within one year of taking their position in the OCE.<sup>17</sup> This ensures that the board members are

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<sup>13</sup>Jennifer Yanchin and Rachel Von Dongen, “Ethics Office Draws Critics,” Roll Call, November 16, 2007.

<sup>14</sup> Arnsdorf, “The Lobbying Reform That Enriched Congress.”

<sup>15</sup> Office of Congressional Ethics, “About,” Office of Congressional Ethics, June 26, 2013.

<sup>16</sup> Office of Congressional Ethics, “About

<sup>17</sup> Straus, “House Office of Congressional Ethics.”

private citizens uninvolved with partisan politics but includes former members of Congress familiar with the ethics process, as is the case with seven of the current eight board members.<sup>18</sup>

The OCE is tasked with investigating claims brought to them by members of Congress, their staff, or the public.<sup>19</sup> The office has jurisdiction over the investigation of violations of the House Code of Official Conduct committed by members of Congress and their staff that occurred after the office was created on March 11, 2008. The committee is tasked with investigating, and eventually referring those investigations to the House Committee on Ethics, if they find convincing evidence of a violation.

The process of investigation is initiated with a complaint or tip being submitted to the OCE. This evidence is presented to the board, who decide if the evidence constitutes a reasonable basis to launch an investigation.<sup>20</sup> The evidence is presented alongside a “reasonable initial investigation” to ensure the information is accurate, and not the result of a group attempting to influence politics.<sup>21</sup> One majority member and one minority member are required to approve the proposed investigation before it enters preliminary review.<sup>22</sup> If reasonable basis is established, OCE staff are given 30 days to investigate the matter before it is presented to the board again to determine probable cause.<sup>23</sup>

If the evidence presented to the board constitutes probable cause, then a 45-day period of further review begins. This review period can be extended by up to 14 days, with approval from the board if needed.<sup>24</sup> At the end of this period of further review, the board votes on whether to

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<sup>18</sup> Office of Congressional Ethics, “Board and Staff,” Office of Congressional Ethics, October 23, 2022.

<sup>19</sup> Office of Congressional Ethics, “About.”

<sup>20</sup> Straus, “House Office of Congressional Ethics.”

<sup>21</sup> Office of Congressional Ethics, “About.”

<sup>22</sup> Office of Congressional Ethics, “About.”

<sup>23</sup> Office of Congressional Ethics, “About.”

<sup>24</sup> Office of Congressional Ethics, “About.”

refer the matter to the House Committee on Ethics, who have the authority to investigate further, and possibly punish the subject of the investigation.<sup>25</sup>

During these investigations, all information uncovered is kept confidential. However, if the investigation is referred to the House Subcommittee on Ethics, then the contents of the investigation become public.<sup>26</sup> This confidentiality serves as a mechanism to protect those being investigated until it has been determined by the board that there is probable cause for investigation. This helps to encourage reporting of possible ethics violations, as there will not be unnecessary publicity associated with any person reported, unless they have been determined to have likely committed a violation.

The OCE must also conduct these investigations without subpoena power. Witness cooperation with the office is completely voluntary. The only tactic that the OCE has at its disposal is the fact that the office can draw negative inference about individuals in their report, and the person's refusal will be noted in the referral to the House Committee on Ethics.<sup>27</sup> The lack of subpoena power has been critiqued as an unnecessary limitation on the office, but also could be considered a further incentive for members and staff to report violations, as the process will be relatively unintrusive.<sup>28</sup>

#### 4. Impact of the Office of Congressional Ethics

The goal of establishing the Office of Congressional Ethics was to increase the degree to which the members of Congress would police the ethics violations of other members. To evaluate the extent to which this has happened, data was compiled from the Office of

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<sup>25</sup> Straus, "House Office of Congressional Ethics."

<sup>26</sup> Straus, "House Office of Congressional Ethics."

<sup>27</sup> Office of Congressional Ethics, "About."

<sup>28</sup> Straus, "House Office of Congressional Ethics."

Congressional Ethics' quarterly reports, and the Summary of Activities from each Congressional session of the House Committee on Ethics. The dataset consisted of all investigations initiated and referred by the OCE since its inception, as well as the Investigative Subcommittees (ISCs) created by the House Committee on Ethics since 1997, organized by quarter. The mean number of ISCs created by the House Committee on Ethics before the establishment of the OCE was compared to the mean number of ISCs created after the OCE was created. A T-test for significance accompanied the comparison of means, to determine statistical significance.<sup>29</sup>

The results of this study show that the mean number of ISCs established per legislative quarter did indeed increase after the establishment of the OCE. The House Committee on Ethics went from creating an average of 0.92 ISCs per year to 1.76 ISCs per year after the OCE was created.<sup>30</sup> The associated p-value for this comparison was 0.047, meaning the results are statistically significant. The House Committee on Ethics has conclusively created more Investigative Subcommittees after the OCE was able to refer reports to them.

The number of cases that get investigated by the OCE is also significantly larger than the number of cases investigated by the House Committee on Ethics before the OCE was established. While the House Committee on Ethics would only investigate an average of 0.23 cases per quarter on its own, the OCE investigates an average of 4.42 cases, and refers an average of 1.81 cases, every quarter.<sup>31</sup> Not only does the OCE encourage more investigation from the House Committee, but it also conducts more investigations independently than the Committee was able to conduct on its own. This combined effect increases the degree to which

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<sup>29</sup> Full results in Appendix A

<sup>30</sup> These values are calculated from the quarterly data of 0.23 ISCs per quarter and 0.44 ISCs per quarter, respectively.

<sup>31</sup> Full results in Appendix B



members that violate the ethics rules can be held accountable, and increases the number of alleged violations that are investigated.

The effect of the OCE is plainly visible, but the degree of this effect is smaller than some would like. While there are more cases investigated by the House Committee on Ethics, there has only been one censure resulting from these investigations in the past five years.<sup>32</sup> While the OCE can encourage more investigation, they cannot force the Committee to punish the subjects of these investigations. Increased investigation becomes slightly less appealing when it is not accompanied by those investigated being held accountable.

The loftier aim of increasing public trust has not been achieved by the creation of the OCE. A 2021 Pew Research study found that 67% of Americans still think that “most politicians are corrupt”.<sup>33</sup> This trend is clearly caused by a multitude of factors, many of which are outside of the jurisdiction of the OCE. Many attribute most of this distrust to the Trump campaign and presidency, as well as global trends regarding authoritarianism.<sup>34</sup> Due to the multifaceted nature of trust in government, this does not serve as evidence that the OCE is ineffective, but rather that there is still much work to be done regarding good government in the United States.

## 5. Future Reform and Recommendations

The Office of Congressional Ethics has been a marked success in increasing the extent to which the House is willing to regulate the behavior of its members. However, there are still several recommended reforms to the structure of the OCE.

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<sup>32</sup> History, Art & Archives, U.S. House of Representatives, “List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives | US House of Representatives: History, Art & Archives”.

<sup>33</sup> Richard Wike et al., “Many in U.S., Western Europe Say Their Political System Needs Major Reform,” *Pew Research Center’s Global Attitudes Project* (blog), March 31, 2021.

<sup>34</sup> Wike et al., “Many in U.S., Western Europe Say Their Political System Needs Major Reform.”

The most important and most obvious of these changes is creating a statutory OCE. As it stands currently, the OCE needs to be reauthorized every congressional session to continue operation.<sup>35</sup> The office has been reauthorized every year thus far, but in 2017 House Republicans came close to greatly reducing the powers of the office at the beginning of the legislative session.<sup>36</sup> Their proposal would have put the office under the direct supervision of the House Ethics Committee and prevented them from taking anonymous tips.<sup>37</sup> The move inspired incredible levels of backlash, and was not carried out, but there is no guarantee that a similar attempt would be blocked in the future.

Governmental ethics, and ethics reform, is deeply linked to partisan politics, and to continue to keep the OCE in operation on a session-by-session basis is to continue to risk its existence. While good government is an inherently bipartisan concern, reforms to address it often get bundled with more partisan ideologies, resulting in ethics reform becoming a divisive issue. In the wake of the Abramoff scandal in the 2000s, both parties were calling for ethics reform, but the Democratic party focused those calls on lobbying, while the Republican party focused on the earmarking process.<sup>38</sup> The partisan divide associated with ethics rules has shown the potential to challenge the survival of the OCE, and keeping the office a part of the House rules package as opposed to a statutory office only decreases its chances of survival further.

The next most popular proposed reform to the OCE is granting the office subpoena power for use in its investigations. This would require witnesses to cooperate with OCE investigations, giving the office additional tools to use when looking into accusations. According to comment

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<sup>35</sup> Straus, "House Office of Congressional Ethics."

<sup>36</sup> Kyle Cheyney and John Bresnahan, "What Is the Office of Congressional Ethics and Why Does It Matter?," POLITICO, January 3, 2017.

<sup>37</sup> Cheyney and Bresnahan, "What Is the Office of Congressional Ethics and Why Does It Matter?"

<sup>38</sup> Dancey, "Reform on My Terms."

from Jeffrey Brown, senior investigative counsel for the OCE, the investigations are usually able to operate just fine without use of subpoena, but there are cases in which it would be useful.

However, concerns of timeliness make this reform unlikely. The OCE operates with very short turnarounds, primary investigations take 30 days, with a 45-day period of further review. Challenges to any subpoenas issued would likely take up the majority of that timeframe, and may prevent the office from getting any information from a witness that would have been willing to cooperate otherwise.<sup>39</sup> The OCE also can request subpoenas from the House Committee on Ethics if they are needed, though it rarely exercises that power.<sup>40</sup>

The problem of Congress' unwillingness to self-regulate has existed since the institution's beginnings, but the OCE is doing important and effective work to combat this issue. By delegating the beginning of the investigation process to an institution that does not need to involve itself with House politics, the OCE can encourage more investigations into possible violations of the ethics code. This allows the OCE to cover more cases than the House Committee on Ethics was willing to investigate, and even increases the investigations undertaken by the Committee. The office should be cemented as a statutory institution within the House, to ensure that it can continue to function regardless of the direction of partisan politics at the time.

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<sup>39</sup> Straus, "House Office of Congressional Ethics."

<sup>40</sup> Straus, "House Office of Congressional Ethics."

## Appendix A

<b>Group Statistics</b>				
	Before or after OCE established?	N	Mean	Std. Deviation
ISCs established by Committee per quarter	Before OCE established	48	.23	.515
	After OCE established	48	.44	.681

<b>Independent Samples Test</b>		
	t-test for Equality of Means	
	df	One-Sided p
ISCs established by Committee per quarter	87.517	0.047

<b>Independent Samples Test</b>	
t-test for Equality of Means	
95% Confidence Interval of the Difference	
Lower	Upper
-.453	.036
-.453	.037

## Appendix B

<b>Descriptive Statistics</b>					
	N	Minimum	Maximum	Mean	Std. Deviation
OCE investigations initiated	48	0	23	4.42	5.786
OCE investigations referred	48	0	10	1.81	2.247
ISCs established before OCE created	48	0	2	.23	.515

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