Congressional Ethics and Constituent Advocacy in an Age of Mistrust

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CONGRESSIONAL ETHICS AND CONSTITUENT ADVOCACY IN AN AGE OF MISTRUST

Ronald M. Levin*

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* Professor of Law, Washington University. B.A. 1972, Yale; J.D. 1975, University of Chicago. — Ed. This article is based on a study prepared by the author as a reporter for the Committee on Congressional Process of the Section of Administrative Law and Regulatory Practice of the American Bar Association. Members of that committee contributed countless valuable insights as the study developed; special thanks for diligent and thoughtful participation should be expressed to Louis Fisher, Ernest Gellhorn, Patti Goldman, Linda Gustitus, Abner Mikva, Sallyanne Payton, Stephen Ryan, Peter Strauss, Thomas Susman, and the committee chair, Harold Bruff. Also helpful were the research assistance of Edmund C. Baird, III, and the suggestions of Stuart Banner, Robert Bauer, Kathleen Clark, John Gilmour, Eric Lane, Richard Lazarus, Daniel Lowenstein, Ronald Mann, Thomas Morgan, Roy Simon, and Dennis Thompson. Of course, the opinions expressed in this article should be attributed to no one but the author. As an outgrowth of the committee’s work, however, the ABA House of Delegates endorsed a set of recommended ethics guidelines for congressional constituent service on February 5, 1996. These guidelines are reprinted as an appendix to this article.
Like lawyer-bashing, Congress-bashing seems never to go out of style. As every newspaper reader knows, and as public opinion surveys confirm,¹ the public’s regard for the legislative branch has been discouragingly low for years. One of the incidents that has done most to fuel this mood is the Keating Five affair.² The Senate Ethics Committee’s
decision in the Keating case, which has been called “the ultimate metaphor for political corruption,” provides a fitting prologue for this article’s theme: the ethical dimensions of intervention by members of Congress into administrative agency proceedings.

Charles H. Keating, Jr., was the controlling figure in Lincoln Savings and Loan, a California thrift institution that was under investigation by officials of the Federal Home Loan Bank Board in the mid-1980s. He successfully prevailed on five senators — Alan Cranston, Dennis DeConcini, John Glenn, John McCain, and Donald Riegle — to press Bank Board officials to take his concerns more seriously, or at least to expedite their handling of the Lincoln case. The pressure reached its climax at two meetings held in April 1987 between the five senators and Bank Board officials, including the Board chairman, Edwin Gray. When regulators disclosed that Lincoln would be the subject of a criminal investigation, most of the senators curtailed their involvement in the matter.

What made the case sensational was that Keating had raised around $1.5 million for the senators’ campaigns and political causes. Senator Cranston and his affiliated groups had received most of this money, but all of the other senators, or organizations associated with them, had received $70,000 or more. The country’s growing awareness of the costs of bailing out failed savings and loan associations made the events seem all the more scandalous.

In the fall of 1989, after the press had reported many of the facts about the five senators’ interventions, the Ohio Republican Party, Common Cause, and others filed complaints against the senators with the Senate Ethics Committee. That committee launched preliminary inquiries against the five senators. In February 1991 the Committee announced that it would take no further formal action against DeConcini, Glenn, Riegle, and McCain, although it criticized them for poor judgment and, in Riegle’s and DeConcini’s cases, unseemly appearances. At the same time the Committee concluded that it had enough evidence

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4. Except as otherwise specified, all facts in the following account are taken from the Senate Ethics Committee’s report on the Keating case. See Senate Select Comm. on Ethics, Investigation of Senator Alan Cranston, S. Rep. No. 102-223 (1991) [hereinafter Keating Report]. For an engaging account of the proceedings by the Committee’s vice chairman, see Warren B. Rudman, Combat: Twelve Years in the U.S. Senate 195-241 (1996).
of impropriety by Senator Cranston to warrant further proceedings. When the Committee finally rendered its decision on Cranston in November of 1991, it stopped short of recommending censure. It devised an unprecedented intermediate sanction: a "reprimand" issued on the Committee's authority but delivered in the presence of the full Senate.\(^7\) The Committee explained that Cranston had "engaged in an impermissible pattern of conduct in which fund raising and official activities were substantially linked."\(^8\) The Committee based its decision on no specific acts of misconduct, but rather on "the totality of the circumstances."\(^9\)

Editorial reactions to the Committee's decisions in the Keating case were caustic. The dominant view was that the Committee had been far too lenient.\(^10\) Commentators also were troubled by the vagueness of the Committee's explanation.\(^11\) The Committee seemed far more ready to acknowledge that congressional intervention in agency proceedings has ethical limits than to specify what they are. Each of the five senators had depicted his conduct as fundamentally similar to the "constituent service" that all senators and representatives provide to individuals who have disputes with federal agencies. The Committee's failure to set forth a clear explanation for its actions suggested that it did not know quite how to respond to that claim.

The Committee's decision in 1995 to recommend expulsion in the case of Senator Robert Packwood suggests that a pattern of leniency in congressional ethics adjudication may now be nearing an end. If so, however, the lack of clarity as to the substance of congressional ethics rules can only become more troublesome. Nevertheless, post-Keating proceedings in Congress have made little further progress in defining

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7. See Phil Kuntz, Cranston Case Ends on Floor with a Murky Plea Bargain, 49 CONG. Q. WKLY. REP. 3432, 3433 (1991). Senator Jesse Helms did not join in the report, relying instead on a public statement that he had released the previous August, calling for Cranston's censure. See KEATING REPORT, supra note 4, at 2, 76 (separate views of Sen. Helms). That statement was, in fact, a slightly revised version of a draft that Robert S. Bennett, the Committee's special counsel, had prepared as a proposed committee report. See Richard L. Berke, Cranston Censure Urged by Counsel, N.Y. TIMES, Aug. 5, 1991, at A1.

8. KEATING REPORT, supra note 4, at 20.

9. Id. at 35. For elaboration, see infra section IV.B.

10. See, e.g., Kuntz, supra note 7, at 3436 (quoting the Long Beach Press-Telegram: "The wholly unsatisfying message is that in the Senate, the enforcement of ethical standards is loose and lax and roundheeled."); Senator Riegle's Duty, N.Y. TIMES, Nov. 26, 1991, at A20 ("The committee's spineless response . . . damaged its reputation, as well as that of the Senate."); infra note 20.

11. See, e.g., The Keating Outcome, WASH. POST, Nov. 22, 1991, at A24 (contending that the committee left "the dividing line between right and wrong . . . as blurry as before").
the legitimate limits of constituent service. Meanwhile, new, if less dramatic, controversies continue to arise.12

Given the manifest lack of a consensus on the issue, now seems an auspicious time for an inquiry into the proper limits of intervention by members of Congress into administrative proceedings. To that end, this article offers a survey and critique of Congress's past and possible future responses to ethics issues in constituent service.13 One of the principal conclusions of the article is that those issues are much closer — and less amenable to easy answers — than most editorial writers seem to have assumed.

Part I offers a theoretical framework, revolving around the conflicting responsibilities inherent in the legislator's role: members of Congress are supposed to pursue the public interest, but they also are supposed to act as advocates for individuals. This conflict helps to account for the difficulty of the ethics issues in the constituent service realm. Part II offers a more empirical perspective on the realities of congressional advocacy of constituents' interests before administrative agencies. It delves into the political science literature in order to provide a factual description of the casework system. This Part also reviews the debate in the literature over the intrinsic value of that system, noting the views of defenders as well as detractors.

With that conceptual and empirical groundwork laid, Part III addresses the ethics questions that arise out of claims that an individual legislator's advocacy of constituent interests in an administrative forum embodies an element of "pressure" or "undue influence." The Keating case did not turn directly on this issue, but in other recent ethics cases the theme has played a quite prominent role, most notably in the proceedings brought against Speaker Jim Wright in the House of Representatives a few years earlier. A considerable body of administrative law bears indirectly on this issue, and a major objective of this Part is to treat judicial doctrine on undue influence as a basis for principles that the congressional ethics committees could employ for guidance and enforcement purposes.

Finally, Part IV turns to the narrower but more visible issue of money influence on congressional constituent service. The discussion analyzes the Keating case and its aftermath in Congress, as well as the criminal law's role in reconciling the need to permit legitimate cam-

12. See, e.g., infra notes 358-61 (concerning Speaker Gingrich), 362-69 (concerning Sen. Lautenberg), 375 (concerning Sens. Daschle and Dole) and accompanying text.

13. This article will focus primarily on legislative ethics at the national level. For a roundup of state ethics reform developments, see Garry Boulard, Pluperfect Purity, STATE LEGISLATURES, Jan. 1995, at 29.
campaign finance with the need to curtail corruption of legislators. Against that background, this Part evaluates some of the most visible proposals for reducing the risks of congressional favoritism toward campaign contributors. Part IV also critiques the beguiling but troublesome notion of regulation based on an "appearance of impropriety."

This article concentrates on the substantive rules of congressional conduct and does not inquire into the related question of how, if at all, the House and Senate should reform the procedural machinery by which they administer these rules. The latter theme is a highly topical matter, having been the subject of a task force appointed by the House and Senate leadership during the last Congress. One commonly discussed proposal, for example, is to entrust major portions of the enforcement process to former members of Congress or other individuals who are not currently serving in the legislature. Any procedural reforms, however, should complement, not displace, continued attention to fundamental substantive questions. It is too easy to argue that the problems of the Keating scandal would take care of themselves if only the cases were placed in the hands of adjudicators with sufficient fortitude. Philosophical questions about the proper roles of members of Congress as constituent advocates remain deeply controversial today, and only if Congress and the country can reach something approaching a consensus on those questions will the ethics committees be able to discharge their responsibilities in this area in a coherent and credible fashion.

I. CONGRESSIONAL ADVOCACY AND LEGISLATIVE ETHICS

THEORY

On first inspection, the vagueness, defensiveness, and caution marking the Senate's response to the Keating problem do not seem surprising. One might shrug them off as just more evidence of the corrupting power of incumbency. After all, congressional ethics enforcement has historically been known for its leniency, with serious sanctions imposed only when unavoidable. Any number of explana-

14. Those issues have been addressed by other scholars contributing to the project for which this study was prepared. See Congressional Process Symposium, 48 ADMIN. L. REV. 33 (1996).
tions for this heritage have been offered, including the practical need of members to work together over time and the human difficulties inherent in disciplining one's peers. A perhaps more principled justification is that Congress regards the accountability of members to the public as something of a substitute for vigorous enforcement activities by the ethics committees.\(^\text{18}\)

But no explanation rooted in generic characteristics of congressional ethics regulation can be entirely satisfactory, because from time to time the ethics committees have overcome these obstacles and endorsed stiff punishments.\(^\text{19}\) Moreover, the Senate committee certainly had no reason to be surprised by the bad press it received over the Keating incident. Vehement denunciations of the five senators, and calls for severe punishment, had been prominent for months.\(^\text{20}\) One might wonder, therefore, whether any distinctive characteristics of the Keating case help to account for the Senate committee's hesitant and equivocal response to the issues in that case.

Part of the explanation may be that the problem in the Keating case was itself a hard one. In certain ways, it was more analytically challenging than most questions the ethics committees have confronted through the years. More specifically, the case highlighted a tension between conflicting responsibilities of the senators involved. In the particular context, the conflict was between their responsibility to promote effective enforcement of the banking laws and their responsibility to act on behalf of an aggrieved citizen. In retrospect, most observers have concluded that at least some of the senators struck the balance insensi-

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\(^{19}\) See CONGRESSIONAL ETHICS, supra note 17, at 15-45 (summarizing Pre-Packwood cases in which severe sanctions have been imposed).

\(^{20}\) See, e.g., Robert F. Bauer, Law and Ethics in Political Life: Considering the Cranston Case, 9 J.L. & Pol. 461, 482-83 n.52 (1993) (noting that the Committee's decision to drop proceedings against four of the senators elicited such editorial page epithets as "a farce," "a political charade from its inception," and "a craven abdication of responsibility, a contemptible white-wash, a self-serving, tortured exoneration").
tively, perhaps corruptly; but this consensus does not itself belie the difficulty of pinning down the precise differences between the senators' conduct and more legitimate varieties of congressional intervention in agency proceedings. This Part explicates some of the complexities in the very concept of representation that the case exposed: first by framing the issue in theoretical terms, and then by tracing the general failure of the literature dealing with the practical problems of legislative ethics enforcement to come to grips with that issue.

A. Legislators as Advocates

Theorists of legislative ethics widely agree on a premise that lies at the heart of the difficulty: although members of Congress have a duty to articulate and promote the interests of the nation as a whole, they also have a duty to speak and act for more limited constituencies at times.\(^\text{21}\) This role has been described as a "broker" function.\(^\text{22}\) Members of the House and Senate spend their time mediating among competing social interests, "representing" a bewildering variety of interests in diverse ways. Residents of the state or district that elected a given member may be the most common beneficiaries of this broker function, but the function can legitimately be extended to people who are not constituents in a literal sense.\(^\text{23}\) In a sense, this role is built into the structure of our government, which presupposes that the clash of interest against interest, faction against faction, will be conducive to the public good, or at least will minimize the risk of domination by any particular interest.\(^\text{24}\)

\(^{21}\) See, e.g., Ethics of Legislative Life, supra note 17, at 15-16; Robert S. Getz, Congressional Ethics: The Conflict of Interest Issue 5, 45, 54-56 (1966); Amy Gutmann & Dennis Thompson, The Theory of Legislative Ethics, in Representation and Responsibility, supra note 17, at 167, 168, 170-71; Harry W. Jones, Political Behavior and the Problem of Sanctions, in The Ethic of Power: The Interplay of Religion, Philosophy and Politics 193, 201-02 (Harold D. Lasswell & Harland Cleveland eds., 1962); John D. Saxon, The Scope of Legislative Ethics, in Representation and Responsibility, supra note 17, at 197, 204. But see Edmund Burke, Speech to the Electors of Bristol, in 1 Burke's Works 442, 448 (1854) ("If the local constituent should have an interest, or should form an hasty opinion, evidently opposite to the real good of the rest of the community, the member [of Parliament] for that place ought to be as far, as any other, from any endeavour to give it effect.").

\(^{22}\) Getz, supra note 21, at 54-56.

\(^{23}\) See Ethics of Legislative Life, supra note 17, at 30-31; Gutmann & Thompson, supra note 21, at 170.

\(^{24}\) See The Federalist No. 10 (Madison); Bruce Jennings, Legislative Ethics and Moral Minimalism, in Representation and Responsibility, supra note 17, at 149, 158-60.
To be sure, people who have a serious interest in public policy—a description with which most readers of this article would probably associate themselves—tend to mistrust this role. When members of Congress angle for funding of highway projects in their districts, or denounce proposals to close military bases there, or press for subsidies for the locally grown crop, the normal response of the intellectual community is that these legislators really ought to try to rise above parochial politics and put the national interest first. This attitude is certainly apt in particular contexts, but an across-the-board dismissal of the legitimacy of the advocacy role is simply not in keeping with the nature of our government.

On the other hand, most readers of this article are probably also lawyers by training, and in that regard they may be particularly able to empathize with the legislator’s advocacy role. Those schooled in the norms of an adversarial legal system are in a good position to recognize that a legislator who by turns articulates the sometimes conflicting perspectives of a variety of interest groups is not necessarily a hypocrite. To be sure, in both the legal and political arenas, some methods of advocacy do lack integrity and deserve condemnation; but an effort to make the strongest defensible case on behalf of a “represented” party can also possess a kind of professionalism that members of the bar should find familiar.

The advocacy dimension of the legislator’s responsibilities comes to mind most readily in connection with lawmaking, the most familiar and visible role a senator or representative plays. But, as the next Part will discuss, it also finds important and appropriate expression when members intervene before administrative agencies on behalf of individuals. The “broker” function takes on a different coloration in this context, because in lawmaking one legislator’s factional advocacy is offset by that of others, while in constituent service the legislator normally

25. Much may depend on whose ox is gored, however. See Legislators Against the Arts, N.Y. Times, July 19, 1995, at A18 (editorial declaring it “astonishing” that House members from the New York area, the home of many struggling artists, would vote to terminate the National Endowment for the Arts, thus “selling their constituents down the river”); see also infra note 125.


27. This is not to overlook significant differences between the representative roles of lawyers and legislators. For example, an attorney is generally expected to refrain from simultaneously representing multiple clients who have directly adverse interests, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1995), but that obligation could never be imposed on members of Congress.
acts alone. Thus, the checks and balances implications of congressional intervention in agency proceedings must instead be weighed in terms of the competitive relationship between the legislative and executive branches. The general point, however, is that proposed ethics rules to regulate members’ contacts with agencies should be assessed from the perspective of whether they might prevent members from acting effectively as constituent advocates.

That constraints on congressional intervention have a potential to suppress legitimate advocacy is not, of course, a reason for Congress to eschew all ethical regulation in this area. By itself, it does not even argue for leniency. Subsequent sections of this article will argue that the Keating affair, although far from commonplace in its factual details, does highlight some dangers in the sphere of constituent service that the ethics committees ought to police. After all, congressional constituent advocacy can serve both public and private ends simultaneously. A legislator who intervenes in the affairs of an administrative agency on a citizen’s behalf may be performing a public service, but he can also be seen as cultivating the beneficiary’s gratitude, which the latter can express through her vote or, as in Keating’s case, through campaign contributions. Moreover, to the extent that the member’s tactics for garnering political support are in question, a characterization of the situation as involving a conflict of public responsibilities looks overly argumentative — or at the very least debatable — because his campaign for re-election serves the public interest in one sense but in another sense serves his own. Ethics regulation is a logical tool for counteracting the temptations stemming from the self-interested aspects of constituent service. Nevertheless, any proposals for new proscriptions in this area should be studied carefully to gauge their impact on representation.

In a thoughtful commentary on the Keating case, Professor Dennis F. Thompson has proposed a mode of analysis that resembles the one advanced here. Thompson offers the notion of “institutional corruption,” which he defines as “the improper use of public office for private purposes [in a manner that] undermines institutional purposes or damages the democratic process.”28 He wishes to look beyond a simple conclusion that constituent advocacy is either always corrupt or never corrupt: “The individual member’s contribution to the corruption is filtered through institutional practices that are otherwise legitimate and may even be duties of office.”29 Thus, when a form of political behavior is called into question as possibly constituting “institutional corrup-

29. Id.
tion," one must assess its impact on Congress and the democratic process in order to decide whether to condemn it.

Applying this frame of reference, Thompson finds much to criticize in the behavior of the Keating Five. Indeed, as we shall see, he ultimately does not seem to believe that stricter controls on constituent service would suppress legitimate practices, and thus he does not discern a serious problem with conflicting responsibilities in this context. Nevertheless, Thompson's conceptual framework helpfully draws attention to the need for analysts in this area to engage in a wide-ranging and discriminating inquiry that scrutinizes the specific manner in which political activities such as constituent service are conducted and avoids condemning legitimate political advocacy. Although institutional corruption may reveal a "dark side of American politics," he says, "we can still try to recognize degrees of darkness. We should aim for a kind of moral chiaroscuro."30

B. The Ethics Enforcement Background

Because it implicates competing claims on legislators' allegiances, the task of devising ethical rules to govern congressional contacts with agencies calls for a more complex analysis than one usually encounters in discussions about the practical issues of ethics enforcement. Most of the House and Senate ethics rules aim to prevent members from exploiting the powers of their office for their private benefit - usually financial gain.31 Familiar examples are statutes and rules regulating members' acceptance of gifts, honoraria, paid travel, outside earned income, or employment subsequent to their service in Congress.32

30. Id. at 170; cf. Kathleen Clark, Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory, 1996 U. ILL. L. REV. 57, 78 (arguing that although governmental ethics regulation should in general track private-law concepts of fiduciary responsibility, "[p]ragmatic concerns about the actual consequences of imposing fiduciary duties will limit their application in ways that cannot easily be explained on a purely theoretical level"); Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. REV. 784, 784-85, 805-06 (1985) (arguing that "corrupt intent," as used in the bribery laws, should be determined in light of "intermediate political theory" evaluating the consequences of the defendant's conduct for the political system).

31. See Jennings, supra note 24, at 151.

By their nature, such provisions will usually not give rise to conflicts of responsibilities such as those suggested in the preceding section. No one would condemn a member for being too scrupulous to avoid making a personal profit from public service, nor would anyone suggest that the member’s failure to engage in the proscribed activity would harm society in any direct fashion. Debates about such restrictions as bans on gifts or honoraria typically center on questions such as whether the rule is unnecessary, overly stringent, or clumsily drafted, rather than on whether the rule proscribes conduct that affirmatively serves the public interest. For this reason, the questions of representation theory that scholars have broached on an academic level, and that were highlighted in the previous section, have rarely been explored in this context.

For essentially the same reasons, the questions of representation theory in the Keating case are normally not presented by ethics cases raising so-called “lifestyle” issues — sexual improprieties, drug or alcohol abuse, and so forth. The most prominent current example involves the sensational sexual harassment allegations that led to the fall of Senator Packwood. Such cases may involve difficult issues, but they generally do not involve conflicting responsibilities. Perhaps the standards of sobriety, sexual ethics, and so on, that a senator must observe are higher than those applicable to other citizens, but they certainly are not lower. No one would argue that a member of Congress is supposed to take sexual liberties as part of the job.

In at least one context, however, a type of ethics rule that is intended to prevent officials from exploiting their official positions for private financial gain does directly implicate the process of representation. That context, which obviously deserves particular attention here, involves the House and Senate disqualification rules. Those rules, if not can be lumped together with rules proscribing primary activity in pursuit of those interests.

33. Arguably, stringent efforts to curb the personal benefits of public service do cause harm to society — they can deter good people from entering government work, drive other good people out of government, or dampen the morale of those who remain. See A.B.A. Comm. on Govt. Standards, Keeping Faith: Government Ethics and Government Ethics Regulation, 45 ADMIN. L. REV. 287, 294 (1993) (Cynthia Farina, Reporter) [hereinafter Keeping Faith]; Beth Nolan, Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials, 87 NW. U. L. REV. 57, 84-88 (1992). That result, however, would be only an incidental and unintended consequence of such rules; they should be distinguished from rules that by their terms forbid members of Congress from engaging in advocacy activities that are deemed unethical but arguably ought to be preserved.

34. See generally CONGRESSIONAL ETHICS, supra note 17, at 85-96 (summarizing past cases involving sex or alcohol abuse).
completely toothless, are certainly far narrower in scope than the corresponding rules governing the executive and judicial branches. Basically, a member *is permitted* to cast a vote that will directly enhance the value of an investment asset she owns, if she is one of a large number of investors who also own that type of asset.\(^{35}\) Legislators, defending their reluctance to endorse more stringent conflict of interest principles, have argued that if every member of Congress were forbidden to vote on bills that could affect any of his or her financial interests, it would be impossible to muster a quorum on numerous measures on which Congress must act.\(^{36}\)

The responses of students of legislative ethics to Congress's disqualification rules are revealing. Two contrasting reactions are nicely illustrated by a pair of reports prepared by committees composed of eminent members of the Association of the Bar of the City of New York (NYCBA). One committee, reporting over three decades ago in an influential book-length study on *Conflict of Interest and Federal Service*, made numerous recommendations to clarify the rules regarding prohibited conflicts of interest in the executive branch. But the committee declined to propose anything regarding Congress, in part because it

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35. Rule VIII of the House of Representatives states that a member should not vote on an issue if he has "a direct personal or pecuniary interest" in the matter. Despite the facial breadth of this language, Speaker James G. Blaine ruled in 1874 that the rule applies only to measures that would affect a representative as an individual — such as loss of a seat. Thus, a representative may vote on matters that would affect his interests as a member of a class. See Getz, supra note 21, at 57-59. This interpretation has stood for over a century. Moreover, when the Senate codified its ethics rules in 1977, it expressly adopted the essence of the Blaine position. See Senate Rule XXXVII(4) (providing that a senator shall not introduce or promote legislation "a principal purpose of which is to further only his pecuniary interest [or that of] a limited class of persons [to which he belongs]"). The drafters of this rule explained that it does not, for example, prevent a senator who owns a dairy farm from promoting a bill that provides price supports for dairy farmers generally; the "limited class" language refers only to the sort of very small classes that might typically be the subject of a private bill. See S. Rep. No. 95-49, at 42 (1977).

36. See Getz, supra note 21, at 58-59. This reasoning is similar to the "rule of necessity" that permits judges or administrators to decline to recuse themselves in a case if the result would be that no one could hear the case. See United States v. Will, 449 U.S. 200 (1980) (holding that Justices could hear a challenge to validity of law that increased all judicial salaries). An interesting but logical exception to the general pattern occurred in the Keating case itself: Senator Jeff Bingaman recused himself from participating in the Ethics Committee's proceedings because his wife's law firm had worked for associates of Cranston. See Phil Kuntz, Cranston Decision Delayed by Conflict of Interest, 49 Cong. Q. Wkly. Rep. 2051 (1991). Congressional recusal is less problematic in this situation than in most others, because members of the ethics committees sit in an adjudicative capacity and do not "represent" constituencies in any significant sense.
thought the notion of conflicts of interest was so different in the legislative sphere:

We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry — though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.37

A subsequent NYCBA committee, specifically established to address issues of congressional ethics, tried more assiduously to devise a workable formula for regulation of congressional conflicts of interest, but in the end drew back from urging Congress to extend the ideal of conflict avoidance to the limits of its logic. The committee ultimately endorsed a rule that would urge legislators to consider voluntary recusal on a discretionary basis, but at the same time acknowledged that a rule of mandatory disqualification would be unworkable.38

Similar ambivalence is evident in a very recent report by another distinguished ad hoc panel, the Committee on Government Standards of the American Bar Association. This committee made detailed recommendations for reform of the standards for financial disqualification for officials in the executive branch. As to members of Congress and their staffs, however, the committee limited itself to urging that these officials be held to the same conflicts standards as other government employees "to the greatest extent practicable."39 One of the reasons for the cautious tone of this recommendation was the committee's belief that a broad recusal requirement would cause problems of its own: "to disable an elected official from acting on a matter is effectively to silence the voice of the constituents who chose him as their representative."40

This brief discussion is not intended to take sides on the difficult issue of congressional disqualification because of financial interest —

38. See Special Comm. on Cong. Ethics, Assn. of the Bar of the City of New York, Congress and the Public Trust 71-72 (1970) [hereinafter Congress and the Public Trust].
39. Keeping Faith, supra note 33, at 302-03.
40. Id. at 301. The committee did, however, maintain that members of Congress should make broad public disclosure of potentially compromising financial interests. See id. at 302, 304.
an issue that remains controversial in its own right. The point is simply that, in a subject area that is not too far removed from this article’s principal concerns, the literature on legislative ethics has recognized the tension between ethics regulation and the process of representation, but has seemed decidedly perplexed about how to resolve that tension. In view of the hesitation these authorities have shown where the tension has involved economic self-interest, one should hardly be surprised that the Senate Ethics Committee had such trouble reaching consensus in the far murkier area of political self-interest, in which the spheres of public and private responsibility are even harder to separate. Subsequent Parts of this article will attempt to shed at least some light on that problem.

II. CONSTITUENT SERVICE

Part I of this study suggested that any attempt to place ethics limits on the conduct of legislative business must take into account the multiple and conflicting responsibilities that are the essence of legislative life. If this premise is correct, one cannot expect to devise sound ethical principles to govern the constituent service process without a reliable understanding of the nature and significance of that process. In general, however, the services that senators and representatives perform for individual constituents are far less visible and less familiar to the public than, say, congressional lawmaking. It will be useful at this point, therefore, to investigate the realities of constituent service — or casework, as it is also known.

This Part has both a descriptive and a normative component. The descriptive aspect will provide the factual underpinnings for all of the analyses to follow. The normative aspect is necessary because consideration of potential restrictions on congressional casework inevitably pre-

41. See Clark, supra note 30, at 91 (arguing that current congressional rules are “entirely inadequate”); Bernie Sanders & Maurice Hinchey, Divest Now! Members Should Purge Stock Portfolios of Conflicts, ROLL CALL, July 13, 1995, available in LEXIS, Legis Library, Rolcl File (discussing bill to require members to divest most assets or put them into blind trusts).

42. See also Nolan, supra note 33, at 62 n.8 (choosing, in article about restrictions on government officials’ outside income, to confine discussion to executive branch issues, in part because of complications attributable to legislators’ representative functions).

43. Indeed, the NYCBA Special Committee on Congressional Ethics avoided that subject completely, defining conflicts of interest exclusively in terms of members’ economic interests. See CONGRESS AND THE PUBLIC TRUST, supra note 38, at 38-39, 42-43. Moreover, the committee specifically declined to give any attention in its 238-page study to the questions of legislative ethics that arise out of congressional intervention in administrative proceedings. See id. at xxii.
supposes background assumptions about the intrinsic value of constituent service. Those who approve of this function will presumably want to ensure that ethical rules or other restrictions leave ample breathing room for it. Those who are more skeptical of the value of casework will presumably be readier to impose restraints, notwithstanding risks that it might be chilled. In other words, if the congressional practice of doing favors for constituents does not serve the public interest anyway, one would not need to worry about the possibility that the imposition of new ethical norms could impair the performance of this practice.

The universe of scholarship available on constituent service is fairly small. The major empirical study in the political science literature was published by John R. Johannes in 1984. He presents a largely flattering picture. Bruce Cain, John Ferejohn, and Morris Fiorina have provided a more skeptical book-length study addressing this issue, although their work focuses primarily on the electoral and policy implications of constituent service. Both of these books draw upon broad-based surveys of members, congressional staff, and the general public, supplemented by extensive interviews in congressional offices. Several works published in the 1960s and 1970s are also helpful, provided one keeps in mind that the passage of time may have impaired the validity of their findings. From these accounts, and from a small number of additional articles and journalistic pieces, a realistic depiction of constituent service begins to emerge.

A. Description of the Process

Congressional offices are continuously engaged in providing a variety of services for constituents who claim that administrative agencies are treating them improperly or are not giving them what they deserve. The subjects of these interventions range from individual complaints —


45. BRUCE CAIN ET AL., THE PERSONAL VOTE: CONSTITUENCY SERVICE AND ELECTORAL INDEPENDENCE (1987). These authors also provide detailed analysis of casework in Britain, but only their findings regarding the United States Congress will be discussed here.

regarding, for example, social security benefits, veterans' benefits, or unemployment compensation — to larger-scale matters such as helping state and local authorities with grant applications.47 Although the majority of requests, like the ones just mentioned, involve efforts to obtain affirmative benefits from the federal government, congressional offices also handle many cases in which a constituent wants help resisting efforts by agencies to enforce regulatory statutes. Typical of this category are cases in the tax, immigration, and environmental protection areas.48

In short, the institution of congressional casework covers much of the same terrain as might be handled through an "ombudsman" system in other nations.49

The magnitude of this enterprise is not easy to gauge, but Johannes has estimated that in the Ninety-fifth Congress the workload exceeded four million cases per year.50 All agree that casework has grown dramatically since the 1960s and early 1970s.51 The growing size of the federal welfare state is commonly cited as a contributing factor in this increase; another is the growing sophistication among citizens about the availability of programs for which they might qualify.52

47. See CAIN ET AL., supra note 45, at 58-59, 71; JOHANNES, supra note 44, at 18-24. Constituent service performed for employers, state or local governments, or other large institutions is sometimes called "high-level casework." See Westen, supra note 46, at 68-70. Others describe such favors as "federal projects assistance," preferring to limit the term "casework" to activities on behalf of individuals. See JOHANNES, supra note 44, at 2. One theme of this article is that for purposes of ethics regulation the two varieties of constituent service shade into each other, and ethics rules must recognize this continuity. Generally, therefore, this article uses both "casework" and "constituent service" in a broad sense, referring to any actions that congressional offices take as intermediaries between federal agencies and constituents. This usage does not, however, include efforts by a senator or representative to promote constituent or district interests through legislation.


49. The ombudsman is an institution frequently used in other countries, and increasingly used in this country, as a means of inquiring into citizen grievances about administrative acts or failures to act and, in suitable cases, to criticize or to make recommendations concerning future official conduct. . . . In cases involving the agencies of the government, an ombudsman may deal with complaints arising from maladministration, abusive or indifferent treatment, tardiness, unresponsiveness, and the like.


50. See JOHANNES, supra note 44, at 35.

51. See id. at 36; cf. GELLHORN, supra note 46, at 93 (estimating 200,000 cases annually in 1996).

52. See CAIN ET AL., supra note 45, at 217; JOHANNES, supra note 44, at 36-39. One measure of the expansion in constituent service is the increase in the number of
Most casework is handled at the staff level. The caseworker typically forwards a constituent's letter to the agency involved, accompanied by a cover letter, or perhaps only a "buck slip" — a form letter requesting that the agency take prompt action. More significant or difficult cases may dictate contacting the agency by telephone instead. Agencies usually respond quickly to "congressionals." Relations between staff at the agency and the congressional offices are usually cooperative, but prolonged negotiation, cajolery, and browbeating are by no means unheard of. Sometimes, especially if the agency seems to be acting unreasonably, the casework staff will appeal to higher authorities in the agency before giving up.

Senators and representatives spend relatively little time contacting agencies themselves. They do, however, spend time supervising and conferring with staff about how to handle cases, and intermittently they will participate personally. They are especially likely to do so on major cases — for example, a project that could benefit many residents of the home district — or when an aide feels that the member's personal clout will be helpful in overcoming bureaucratic resistance. Finally, Johannes, an average of seven staff members were regularly involved in casework in House offices, and about ten in Senate offices; half of each group were casework specialists. See id. at 63. By 1990, the number of House staff positions in district offices, which are primarily service-oriented, had increased to 3027 from a 1972 level of 1189; the comparable increase for Senate staff was 1293, compared with a 1972 level of 303. See Larry Liebert, Hill's Growth Industry: Constituent Service, 52 CONG. Q. WKLY. REP. 1758 (1994). The shortage of office space in Washington is one reason for this dispersal of staff. See id.

53. For discussions of routine casework procedures, see, for example, Johannes, supra note 44, at 98-100; Richard H. Shapiro et al., Cong. Mgmt. Found., Frontline Management: A Guide for Congressional District/State Offices 98-131 (1989) [hereinafter Frontline Management]; Klonoff, supra note 46, at 704-08.

54. See Johannes, supra note 44, at 99-100; see also Cain et al., supra note 45, at 67 (suggesting that caseworkers sometimes use an "informal signaling system" to let agency officials know which cases the congressional office thinks deserve the closest attention).

55. See Johannes, supra note 44, at 100, 114.

56. See id. at 101-05.

57. See id. at 110-11.

58. See Cain et al., supra note 45, at 62 ("When asked to estimate the amount of time the congressman personally spends on casework, 47% of the administrative assistants said that the Congressman rarely spends any time on casework, and only 9% said that the Congressman spends more than 10% of his time on casework."). The findings of other researchers are similar. See Johannes, supra note 44, at 109, 151-53; Klonoff, supra note 46, at 708 & n.28.

59. See Johannes, supra note 44, at 153; see also id. at 139 ("Usually the goal [of personal action by the member] is to impress on an administrator that the matter is, in fact, important.").
nes notes, "one in six respondents [in the author's Capitol Hill interviews] indicated that congressmen handle cases personally when the constituent is important: a relative, friend, or local VIP." 60 We shall return later to the equity questions implicit in this last comment. The guiding assumption, however, is that even when the member is not personally involved, credit or blame for the staff's work will reflect on the member himself or herself.

B. Positive Appraisals of Constituent Service

Casework is a benign and valuable institution — or at least that is what members of Congress would have us believe. Members themselves are among the strongest boosters of constituent service. They and other proponents of casework maintain that the ombudsman role is basic to the job of being a member of Congress — an essential aspect of what it means to "represent" one's constituents, and a direct outgrowth of the constitutional right to petition Congress for redress of grievances. The comments of former Speaker Jim Wright are typical:

We can disparage the ombudsman function [of the congressman] if we will, but I am absolutely convinced that it is an altogether honorable function. For many millions of private citizens, their elected representative is the only person whom they remotely know in the federal government. He is their only intercessor when they encounter difficulties. This particular relationship between a congressman and the individual constituent, struggling for opportunity, is a very sacred one, not to be despised. It is, in fact, essential if we are to keep government accessible and to keep government human. 61

One might at first be inclined to discount these remarks as uniquely self-serving, because former Speaker Wright was himself a target of ethics committee proceedings because of his alleged abuse of the constituent service role. 62 Other legislators, however, say much the same thing — usually less floridly — in their own writings 63 or when surveyed. 64 A few scholars have also joined in the positive portrayal that

60. Id. at 154.
62. See infra Part III.
64. See CAIN ET AL., supra note 45, at 88; JOHANNES, supra note 44, at 16; KRAVITZ, supra note 46, at 29-33 (quoting several members of Congress); Klonoff, supra note 46, at 709 & nn.30-31.
Wright's statement evokes. The idea that citizen access to a congressional troubleshooter "humanizes" government recurs frequently in these accounts. They depict the congressional office as the champion of ordinary citizens who cannot effectively protect themselves against the occasionally arrogant bureaucracy.

Just how much benefit constituents actually derive from casework is difficult to gauge. Caseworkers and agency staff almost uniformly agree that a congressional inquiry will probably induce the agency to expedite the constituent's case and to give the case a closer look, perhaps at a higher level in the bureaucracy. Whether constituents receive more favorable substantive outcomes when a member of Congress intervenes is more controversial. Typically, members and their staffs vigorously assert that their participation does help, but agency staff sometimes assert the contrary. Independent analysts tend to favor the congressional side of this argument, although estimates of the extent of the benefit vary widely. Even when the legislative intervention is unsuccessful, casework generally serves the useful function of giving the constituent a feeling that someone has taken action on his or her behalf. When asked, most requesters report favorable assessments of the congressional office's assistance.

Members also claim that the practice of casework keeps them in touch with the real-world concerns of their constituents. Casework can serve as an early warning system for problems that might not come to their attention through the usual political channels. As an example, Representative Barney Frank has noted that the human costs of the Reagan administration's intensive review of social security disability claims became clear to Congress because of complaints reaching members' offices.

66. See GELLHORN, supra note 46, at 70-71; JOHANNES, supra note 44, at 132.
67. See JOHANNES, supra note 44, at 134.
68. See CAIN ET AL., supra note 45, at 68 (congressional estimates range from 10% to 90%); GELLHORN, supra note 46, at 79-80 (reporting, and calling plausible, interviewees' consensus that 10% of cases led to better outcomes for constituents involved); JOHANNES, supra note 44, at 128 (stating that legislators and caseworkers claim success rates between 28% and 40%, although "these numbers could be inflated and self-serving").
69. See CAIN ET AL., supra note 45, at 52; JOHANNES, supra note 44, at 206-07.
70. See JOHANNES, supra note 44, at 161-68; Hamilton, supra note 63, at 14.
71. See Agency Door, supra note 65 (remarks of Rep. Frank).
Finally, members say that they engage in constituent service because they enjoy helping people. In contrast to the lawmaking process, with all its frustrations, constituent service is a domain in which members can regularly get results and know that someone is better off as a result of their efforts.\footnote{See Price, supra note 63, at 119.}

C. Criticisms

For the most part, the academic community has been far less generous in its appraisal of constituent service than members of Congress have been. Moreover, the Keating scandal has given rise to scathing appraisals of casework in the popular press.\footnote{See, e.g., Mark B. Liedl, The Bloated Disservice of Congress's Constituent Service, WASH. POST, Feb. 5-11, 1990, at 24 (natl. wkly. ed.); Robert Palmer, The Issues Behind the Keating Five Case, S.F. CHRON., Jan. 24, 1991, at A21; Michael Waldman, Quid Pro Whoa, NEW REPUBLIC, Mar. 19, 1990, at 22.} The three principal criticisms in the literature are that casework (1) is better seen as self-serving than as altruistic, (2) serves to entrench incumbents and thereby subverts the political system, and (3) is an inefficient method of improving the administration of justice. These critiques will be examined in this section. A fourth criticism is that casework induces legislators to engage in ethically questionable behavior. Issues relating to that point will be considered in subsequent Parts in connection with the particular ethical lapses that have been alleged.\footnote{As later discussion will attempt to demonstrate, improper behavior by members does not appear to be nearly prevalent enough to constitute, in and of itself, a strong argument against the institution of casework. See infra notes 244-50, 300-05 and accompanying text.}

1. Casework as Reelection Stratagem: The Question of Motives

Although some members of Congress may suggest that they engage in constituent service solely because of a selfless desire to serve the public, contemporary political scientists, influenced by the "rational choice" school of scholarship,\footnote{For overviews of the rational choice school, which also goes by names such as "public choice" and "positive political theory," see Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 12-33 (1991); Daniel B. Rodriguez, The Positive Political Dimensions of Regulatory Reform, 72 WASH. U. L.Q. 1, 52-80 (1994).} point to another incentive: legislators' expectation that casework will enable them to reap political advantages from appreciative constituents. Indeed, many members and staff themselves acknowledge that they regard an efficient constituent service op-
eration as critical to securing their political base.\textsuperscript{76} Morris Fiorina, a political scientist who is closely associated with this analysis, has noted that part of the special appeal of casework is that it offers political rewards without political risk. That is, taking stands on controversial issues can result in both political gains and losses, but constituent service is "basically pure profit."\textsuperscript{77} Moreover, a politician who claims credit for helping a constituent may be more credible than one who claims to have been instrumental in securing passage of a bill: most voters realize that the enactment process requires the concurrence of numerous legislators and that no single individual is responsible for a given statute.\textsuperscript{78}

This is not to say that members are \textit{solely} motivated by political self-interest when they engage in constituent service. In the words of Fiorina and his collaborators — who have done the most to uncover evidence of the reelection motive behind casework — "only the most hardened cynic" would make so broad a claim.\textsuperscript{79} The relative influence of altruistic and selfish motives is impossible to investigate in a serious way, or perhaps the issue is better described as meaningless.\textsuperscript{80} For pres-

\textsuperscript{76} See CAIN ET AL., supra note 45, at 78-80; CLAPP, \textit{supra} note 46, at 52-53; JOHANNES, \textit{supra} note 44, at 13-14. An orientation manual for new House members once advised: "as viewed by most Congressmen, job security and constituency service are like love and marriage — you can't have one without the other." DONALD G. TACHERON \& MORRIS K. UDALL, \textit{THE JOB OF THE CONGRESSMAN} 62 (1966). More recently, 56\% of House administrative assistants who responded to a 1989 survey identified constituent services as "the most important factor in solidifying your Member's political base," compared with only 11\% (1) who chose the member's legislative record. See \textit{FRONTLINE MANAGEMENT}, \textit{supra} note 53, at 94.

\textsuperscript{77} MORRIS P. FIORINA, \textit{CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT} 35-36, 42-43 (2d ed. 1989); \textit{see also} JOHN HART ELY, \textit{DEMOCRACY AND DISTRUST} 131-32 (1980) (arguing that legislators delegate too many of their lawmaking duties to agencies, because doing errands for constituents is easier and politically safer than resolving divisive policy issues themselves).

\textsuperscript{78} See FIORINA, \textit{supra} note 77, at 43.

\textsuperscript{79} CAIN ET AL., \textit{supra} note 45, at 84-85. One could, of course, beg this question by simply positing that members of Congress are motivated solely by a desire to be reelected. Much academic writing by the so-called public choice scholars rests on just that premise. \textit{See, e.g.}, DAVID R. MAYHEW, \textit{CONGRESS: THE ELECTORAL CONNECTION} 13 (1974). The premise has, in turn, been debunked as reductionist by other writers. \textit{See, e.g.}, FARBER & FRICKEY, \textit{supra} note 75, at 21; MIKVA, \textit{supra} note 26, at 168-70. This article does not inquire into how much explanatory power the public choice school's root premise may possess as a general matter, because it relies on direct evidence from empirical investigators who have studied constituent service in particular. Their work confirms what common sense would suggest: that the electoral motive is a significant factor but not the whole story.

\textsuperscript{80} To make a confident statement about even one case, one would have to resort to circumstantial evidence, or else decide how seriously to take the assurances of people who are in the business of putting the best face on things. Even if an individual were to be judged sincere, one would have to allow for the possibility of self-deception and rationalization. Then one would have to consider the fact that individuals can have differ-
ent purposes it is enough to posit that, in general, reelection is at least a significant motivating factor behind members' casework activity.

The evidence for that relatively cautious proposition is quite strong, even putting aside the admissions of members themselves. The electoral incentive seems to be the best explanation of why some members go out of their way to solicit cases, thus multiplying the number of constituents whom they can serve and who will be in a position to remember their protectors' efforts on election day. Moreover, several studies have found that congressional representatives from vulnerable districts do more constituent service than those from safe districts. The obvious explanation is that these members feel they need more protection against defeat and believe that casework will provide that protection.

The electoral incentive to engage in constituent service is highly relevant to the concerns of this article, because it suggests that members' favorable evaluations of the practice may be a rationalization, or at least colored by self-interest. Legislators who believe they profit from casework may overlook, or be too quick to dismiss, some of the costs that casework imposes on our political system, and — more to the point — some of the ethical hazards it poses. In fact, the electoral incentive increases the resemblance between the ethical pitfalls of the casework system and the traditional subjects of legislative ethics regulation, which, as we have seen, generally implicate claims that a member has elevated self-interest over the public interest. Thus, disinterested observers should be prepared to look skeptically at members' own perceptions about the proper limits of casework.

On the other hand, political motives are not evil in themselves. They are indispensable to democratic government, because the very notion of congressional accountability assumes that legislators must take actions that they believe will engender political support. In the end, therefore, the question of the extent to which ethical rules should accommodate an institution such as constituent service should turn prima-

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81. See CAIN ET AL., supra note 45, at 63-64; JOHANNES, supra note 44, at 39-42.

82. See CAIN ET AL., supra note 45, at 95-96; FIORINA, supra note 77, at 89-90; JOHANNES, supra note 44, at 45-47. On the other hand, the fact that all offices, including those of members with safe seats, do some casework suggests that politics is not the only consideration.

83. See supra notes 31-34 and accompanying text.

rily on the value of that institution to society, not on the political motives that may underlie it. If casework is worthwhile on its own terms, the expectation of political gain is not, by itself, a reason to condemn the practice — any more than the existence of popular support for a bill is a reason for criticizing a legislator who votes for the measure. If a case against constituent service is to be made, it must rest on a showing that casework has harmful consequences for society, not on the mere fact that a member's pursuit of political interests could conflict with those of the public.

2. **Casework as an Unhealthy Political Influence**

The linchpin of the rational-choice scholars' argument that constituent service is detrimental to the body politic is that legislators not only intend to use casework as a reelection tool, but also are successful in using it for that purpose. In the 1989 edition of his book *Congress: Keystone of the Washington Establishment*, Fiorina suggested that an incumbent's track record as an effective provider of constituent service can improve the member's electoral support by five or more percentage points. That much payoff would go far toward turning a marginal congressional district into a safe one. Fiorina argued that, insofar as casework renders members less vulnerable to electoral defeat, it dampens the political responsiveness of Congress as a whole because national trends in public opinion about policy issues are less likely to be reflected in turnover of legislative seats.

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85. Although the discussion at this point considers only whether casework in general should be condemned because of the motives that normally lie behind it, one should also keep in mind the desirability of constructing rules that do not require proof of motives in particular cases. Issues regarding an actor's state of mind, which usually must be established through circumstantial evidence, are an uncomfortable basis for ethics regulation in any context, and even more so in a political arena in which the adjudicators have their own partisan reasons to want to exonerate or condemn the accused.

86. Conversely, of course, the fact that a member "means no harm" is not an adequate excuse for acts that do more to subvert than to nourish the democratic process. See Thompson, supra note 28, at 23-24 (arguing that an ethical standard that identifies corruption on the basis of objective circumstances, without undue attention to motives, is essential to democratic accountability).

87. See Fiorina, supra note 77, at 87, 99.

88. See id. at 50-51, 98-99.

89. See id. at 93-94. Fiorina acknowledges that members are highly attuned to currents in public opinion and constantly in search of ways to adapt to it. In that sense, they are highly responsive. See id. Nevertheless, he argues, individual members rarely alter their political philosophies drastically over time. Thus, only turnover in seats can effectively bring the views of the legislature into line with the views of the country. See id. at 14, 134-35.
Fiorina did not attempt to extrapolate this critique into a broad assertion that constituent service does more harm than good, and any such use of his thesis would be open to question on several levels. First, and most conspicuously, recent political developments make his indictment of Congress less compelling than it once seemed. Writing in 1989, he directed his critique most pointedly at the House of Representatives, which at that time had remained under the control of the Democratic Party for almost forty years, despite many ebbs and flows in political opinion during that interval. But, of course, in 1994 the Republican Party did win control of both the House and Senate — and did so largely by highlighting national issues, thus overcoming the erstwhile truism that “all politics is local.” Indeed, the image of the “permanent Congress,” which was so rhetorically appealing only a few years ago, has lost much of its force now that half of all members of Congress have won their offices within the last three election cycles.

Even in the 1980s, when reelection rates seemed to lend so much more support to his argument, Fiorina took pains not to exaggerate the strength of the causal relationship he had identified. He freely acknowledged that he could not rigorously demonstrate that casework actually does improve a legislator’s chances of reelection. He also noted that his thesis did not apply very forcefully to senators, whose campaigns for reelection generally depend much more on incumbents’ issues, accomplishments, and personal characteristics than on their records of favors for individual constituents. In addition, he cautioned against any

90. See id. at 134-39.
91. See id. at 94-95. Fiorina addresses this difficulty most comprehensively in his collaboration with Cain and Ferejohn. See Cain ET AL., supra note 45, at 121-23. Reluctant to dispute the politicians’ broad consensus that a connection between casework and electoral success does exist, see id. at 123, the authors point to reasons why such a connection is inherently difficult to investigate rigorously. One problem is that all congressional offices engage in some casework; no one can test empirically what would happen to a member who did none. An additional complication is that members who feel electorally threatened tend to engage in casework more assiduously than those who believe themselves safer. See supra note 82 and accompanying text. Thus, high levels of casework correlate poorly with electoral success because the most active offices are those of members who were unusually vulnerable from the outset. See Cain ET AL., supra note 45, at 123-34; Fiorina, supra note 77, at 95-97. According to the authors, reliable data does at least demonstrate that casework contributes to a favorable image of the member in the public’s mind. See Cain ET AL., supra note 45, at 148-53. They argue, not implausibly, that such an image is somewhat helpful on election day. But see Johannes, supra note 44, at 187-211 (questioning the asserted connection between casework and votes).
92. See Fiorina, supra note 77, at 116.
assumption that casework is the only source of House incumbents' electoral advantages.93

This is not to say that the tendencies that Fiorina discerned are nonexistent. Indeed, he could argue that the newly dominant Republicans are now in a position to exploit constituent service to perpetuate their own reign.94 However, changing political circumstances have tended to blunt the force of the normative premise underlying his critique: that the incumbent-protective effects of constituent service are excessive. As anyone who has paid attention to the ongoing national debate over term limits can attest, the argument over the claimed need for increased turnover has two sides: Fiorina's side emphasizes the need for responsiveness and fresh ideas; the other side argues that the ability of incumbents to survive in office improves the legislature by virtue of their experience, institutional knowledge, and ability to develop relationships of mutual trust. That debate continues, but the waning fortunes of the term limits movement95 suggest that society is unlikely to turn its back on constituent service because of a desire to promote greater congressional turnover.

In their book on constituent service, Cain, Ferejohn, and Fiorina offer a more subtle, but perhaps more broadly acceptable, version of the political entrenchment argument. They claim that, because it strengthens a member's electoral base, casework contributes to the ability of legislators to be independent entrepreneurs who have weak ties to their party leaders and who, therefore, have little incentive to work together in the development of coherent national policy.96 "Once members can assure their return to office independently of the course of national events and national performance, the parties must rely on shared views and moral suasion — which are better than nothing, but not much to depend on when the chips are down."97 Similarly, the electoral support that casework generates makes members less likely to cooperate with the President, because their own survival depends less on his.98 Decentrali-

93. See id. at 99-101. Other contributing factors include the ability to ascertain and adapt to voters' issue stands and the superior access of incumbents to campaign financing. These factors not only strengthen the incumbent's own campaign, but also serve to ward off strong challengers. See id.

94. See Eric Felton, The Siren Song of Constituent Service, WASH. TIMES, Nov. 17, 1994, at A21 (warning against this possible development).

95. Both the House and Senate have rejected term limits proposals during the current Congress. See Vote Blocks Term-Limit Bill; Political Echoes May Linger, N.Y. TIMES, Apr. 24, 1996, at A18; see also U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995) (holding state limits on congressional terms unconstitutional).

96. See CAIN ET AL., supra note 45, at 3, 13-14.

97. Id. at 14.

98. See id. at 16, 205-06.
zation makes it “more difficult to formulate decisive, coherent policy.”99 In short, the autonomy that legislators derive from cultivating a personal electoral base, independent of party, contributes to parochialism and fragmentation in Congress.100

Much in this appraisal has the ring of truth, but the extent to which constituent service must bear the blame for congressional fragmentation is debatable. Certainly, as Cain, Ferejohn, and Fiorina note, other forces contribute to the same result, including the simple fact that members represent territorially defined districts.101 In any case, the authors do not contend that the impact of casework on fragmentation in national policymaking justifies a condemnation of the constituent service system as a whole. They acknowledge that citizens have a legitimate need for an advocate in Washington, and that legislators must fill that role. In short, constituents make a variety of valid demands on the political system, ranging from personal and locally important needs to genuinely national ones, and “[i]n the end, some tension is inescapable.”102

3. Casework as a Flawed Grievance System

Criticisms of constituent service on public administration grounds tend to fall into two categories. The first is that casework is a waste of time, distracting legislators from their “primary,” or at least constitutionally prescribed, task of lawmaking. In the words of Walter Mondale, who served twelve years as a senator before his term as Vice President, “There are only 100 of you in the Senate that can deal with (national) issues. There’s thousands who can deal with Social Security.”103 In concept, this argument opens up interesting theoretical issues about the relative importance of various ways in which a legislator can serve as a “representative.” In reality, however, the criticism seems ill-founded for a simple reason: casework is primarily a staff function, and most

99. Id. at 21.
100. See id. at 197-98; ETHICS OF LEGISLATIVE LIFE, supra note 17, at 44-45 (casework and other forces have “made the legislative environment less supportive of legislative duties of institutional responsibility”).
102. Id. at 229.
103. Karen Foerstel, Reform Panel Moves to Next Stage, ROLL CALL, July 5, 1993, at 2; see, e.g., CLAPP, supra note 46, at 54-55; KRA VITZ, supra note 46, at 13-15; Liedl, supra note 73, at 24; cf. Liebert, supra note 52, at 1758 (quoting Rep. Don Edwards’s comment, in mild reproof of representatives’ current priorities, that “going home [to tend the grass roots] is wonderful, but the work’s here. We’re getting paid to be here.”).
members spend little time on it. The “waste of time” argument may have had more validity a generation ago than it has now. The amount of time that members spend on constituent service seems to have decreased in the past few decades, even though caseloads themselves have increased sharply during the same time period. The expansion of staff resources devoted to casework has apparently allowed members to use their time more efficiently.

The second, more substantial criticism is that casework is a clumsy and haphazard approach to improving the administration of federal programs. One of the nation’s foremost administrative law scholars, the late Walter Gellhorn, made a strong case for this position in his 1966 book *When Americans Complain.* When a member of Congress obtains a result that is satisfying from a particular constituent’s perspective, Gellhorn argued, the member has not necessarily promoted the national interest. The legislator’s intervention does not improve the overall delivery of services to the public and may well cause a delay in the processing of other, equally deserving citizens’ cases. Moreover, to the extent that a congressional inquiry causes the agency to use its discretion to favor the citizen about whom the request was made, it undermines the evenhandedness of the particular agency’s system. Instead of focusing on individual cases, Gellhorn maintained, legislators should

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104. See Fiorina, *supra* note 77, at 91 (conceding that he had previously erred in arguing that congressional offices’ increased emphasis on casework is at the expense of legislative work); Johannes, *supra* note 44, at 156-59; supra note 58. *But see* Fred Barnes, *The Unbearable Lightness of Being a Congressman*, NEW REPUBLIC, Feb. 15, 1988, at 18, 18 (describing how one idealistic “Reagan revolutionary” was transformed, after his election to the House, into “a workaholic with little time for what he calls ‘macro issues’ and an obsession with the parochial interests of his district . . . like nearly everyone else in the House”).


106. To be sure, casework does take at least some of members’ time — including the time they spend supervising their staff — and a minority of representatives do choose to spend significant amounts of time on constituent service. See *supra* note 58. Still, no one really knows how much of the time currently spent on casework would otherwise be devoted to studying and resolving great questions of national policy, as opposed to being spent on other forms of advocacy of local district interests, see Barnes, *supra* note 104, or on self-promotional activities such as campaigning, fundraising, or “show-horse” position-taking.


concentrate on getting agencies to do their work right the first time, or to fix problems themselves when the need arises.\textsuperscript{110}

Not surprisingly, the idea that casework is actually an impediment to effective administration finds favor with more than a few agency officials.\textsuperscript{111} What looks like "overcoming bureaucratic arrogance" from the standpoint of congressional caseworkers will, of course, often look like "legislative interference" from the agency's standpoint. Nonetheless, these are relatively isolated voices. Casework has in general been a popular and effective practice that serves with some frequency to rectify genuine problems in administration. One can readily appreciate the logic of Gellhorn's central insight that the casework system is founded on advocacy; the objective of improving the overall system is at best incidental to the more central objective of securing relief for the requester.\textsuperscript{112} In this sense, there might very well be more efficient ways to upgrade deficient administrative operations. Congressional constituent service is, however, surely better than nothing. Agencies do make mistakes, after all, and the dilemma of the citizen who does not know where to turn for relief is not a fictitious one. Indeed, Johannes reports that a majority of the agency officials he interviewed had a favorable view of the present system.\textsuperscript{113} It is unlikely that either Congress or the public would accept the abandonment of the extant casework system unless some other form of external grievance machinery were made available to citizens.\textsuperscript{114}

To be sure, Gellhorn did not favor such an abandonment. On the contrary, he, like others who have argued in a similar vein, paired his critique with a suggestion that Congress should explore the possibility of instituting an ombudsman program that would substitute, at least in part, for the congressional role.\textsuperscript{115} Indeed, over the past thirty years a

\begin{footnotesize}
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\item\textsuperscript{110} See Gellhorn, supra note 46, at 80-81, 124-25, 128.
\item\textsuperscript{111} See also Johannes, supra note 44, at 94 (indicating that program administrators sometimes look upon casework inquiries as a headache). A more benign view, however, prevails in congressional relations offices in the larger agencies. See id. at 87-89.
\item\textsuperscript{112} See Gellhorn, supra note 46, at 216-17.
\item\textsuperscript{113} See Johannes, supra note 44, at 89-92.
\item\textsuperscript{114} This assumes that judicial review, standing alone, is not a sufficient check on administrative agencies. Congressional casework serves many citizens who do not have the nerve or the money to resort to the courts, or who have grievances that the judiciary, with its limited scope of review, will not rectify. See Klonoff, supra note 46, at 718-19. In any event, even if one accepts the criticism that congressional intervention helps the fortunate few without improving administration for the many, one should also recall that judicial review has been criticized for doing exactly the same thing. See Mashaw, supra note 108, at 138-39, 185-86.
\item\textsuperscript{115} See, e.g., Gellhorn, supra note 46, at 128-30, 218-32; William B. Gwyn, Transferring the Ombudsman, in Ombudsmen for American Government? 37,
few members of Congress themselves have offered a variety of proposals for an "office of constituent assistance" or another ombudsman-like entity that would be located in the legislative branch but detached from individual member offices. These proposals, however, have been almost entirely ignored. As already explained, members believe that the current system serves their political interests, a perception that may help to account for Congress's hesitation to try something new. Regardless of the reasons, however, no movement toward adoption of such a proposal can be discerned.

The general lack of interest in ombudsman plans as an alternative to constituent service does not, of course, prove that the idea is not worth pursuing. Nevertheless, if the purpose of seeking reform is to minimize the possibility of incidents like the Keating episode, this is almost certainly not the right solution. All of the most visible proposals for a congressional assistance office have contemplated that the ombudsman would receive cases only by voluntary referral from a member's office. Members would remain entirely free to handle cases in the traditional way if they chose. Presumably, ethical lapses such as favoritism or the exercise of undue influence are most likely to occur in cases in which a member has decided, for whatever reason, to make an unusual display of clout. Almost by hypothesis, members would be unlikely to view such cases as good candidates for referral to an ombudsman. Accordingly, although an ombudsman arrangement may

58-59 (Stanley V. Anderson ed., 1966). For a definition of the ombudsman concept, see supra note 49.


117. See Gellhorn, supra note 46, at 87 (describing proposal by Rep. Henry Reuss); Kaiser, supra note 116, at 4-5 (describing plans proposed by Rep. Wayne Owens and Sens. Vance Hartke and Dennis DeConcini); Klonoff, supra note 46, at 723 (Reuss plan), 725 (author's plan). The political logic behind this aspect of the plans is that members value their ability to claim credit for casework activities. See supra notes 76-82 and accompanying text. Such credit-claiming contributes to their image as helpful, effective representatives, but could not occur if constituents were free to bring cases directly to the ombudsman. For this and other reasons, observers have agreed that an ombudsman system that would totally displace congressional offices' constituent service could never be enacted. See Gellhorn, supra note 46, at 93-94 (arguing that both political realities and caseload volume preclude transfer of all casework business to ombudsman); Johannes, supra note 44, at 214, 216); Klonoff, supra note 46, at 723-24.

118. The only visible congressional proponent of an ombudsman plan in recent years has been Senator DeConcini, one of the Keating Five respondents. He argued that the creation of a constituent assistance office would enable benignly motivated legislators to refer politically sensitive inquiries to the ombudsman office and thereby avoid being accused of excessive partisanship or favoritism. See 137 Cong. Rec. S12,205
well be worth a try for the sake of such public administration values as efficiency, coordination, and breadth of vision in routine cases, its utility as a tool of ethics reform is much more questionable.\textsuperscript{119}

Proposals to replace congressional constituent service with a more neutral ombudsman would also face bona fide objections on the merits. Johannes reports that both congressional caseworkers and agency officials are deeply skeptical about the idea.\textsuperscript{120} Possible managerial problems aside, they doubt it would be very effective without the "personal touch," the sense of commitment to the constituent's cause that congressional offices bring to their work.\textsuperscript{121} Indeed, one suspects that the American temperament finds something distinctly more attractive about placing one's trust in an adversarial system than in what would inevitably be perceived as "another bureaucracy."\textsuperscript{122} Members of the public recognize the same political realities as Congress does — that legislators are more immediately responsible to \textit{them} than an ombudsman could ever be. While the overall desirability of an ombudsman scheme cannot be analyzed in any depth here, the widely held perception that an ombudsman office would not succeed because it would lack the elected official's sense of advocacy deserves emphasis, because it highlights the close connection between casework and our culture's conceptions of a member's role as advocate.

\textbf{D. Interim Conclusions}

The discussion in this Part suggests why rules of ethics that would circumscribe the constituent service function have the potential to create a dilemma for the conscientious member of Congress. Casework is now a deeply entrenched element of congressional life. It responds to legitimate interests of citizens who have grievances against an administrative agency and in many cases have no other readily available advocate to champion their interests. It functions fairly smoothly most of the time and improves agency accountability in many cases.

Critics make valid points when they call attention to the resource costs that casework imposes on both agencies and congressional offices,

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\textsuperscript{120} See Johannes, supra note 44, at 214.

\textsuperscript{121} See id. at 214-15, 218.

\textsuperscript{122} See Douglas, supra note 63, at 87-88.
or when they note the ways in which casework can aggravate tendencies toward opportunism, parochialism, and fragmentation. Yet none of these critiques appears to rise to the level of showing that casework is on balance detrimental to society's interests. Furthermore, the option of establishing an institutional alternative to casework, such as an ombudsman office, seems remote and perhaps not even a good idea.

This appraisal of the constituent service system provides a background perspective with which we can evaluate contemporary pressures on Congress to reform itself in the wake of the Keating scandal. As a practical matter, external pressure to clean house is surely the main factor spurring current interest in ethics reform. Ethics reform is touted as a means by which Congress can combat cynicism and restore public confidence in the legislative branch.

Public opinion, however, is a two-edged sword. Studies have consistently shown broad public support for congressional casework. In a 1978 survey, an overwhelming majority of citizens considered casework important, and about eleven percent considered it a representative's most important function—a figure in the same ballpark as the nineteen percent who said the representative's lawmaking function was most important. To be sure, these findings predated the Keating scandal, but there is little evidence that the current high levels of disillusionment with Congress have significantly eroded this support for casework. Talk show hosts continually deride Congress, but rarely if ever do they condemn its constituent service function. One hears various politicians pledge to oppose salary increases, decline PAC money, or serve no more than a few terms, but seldom does one hear a candidate for Congress pledge not to go to bat against recalcitrant agencies in behalf of his constituents.

123. See CAIN ET AL., supra note 45, at 38.

124. Fulfilling a pledge in the "Contract with America," the House of Representatives in the 104th Congress reduced the size of its committee staffs by a third; but reductions in representatives' personal staffs, which handle most casework, were neither promised nor adopted. See Gabriel Kahn, House Votes Overwhelmingly to Slash Committee Budgets, Staff by One-Third, ROLL CALL, Mar. 16, 1995, available in LEXIS, Legis Library, Rollcl File.

125. One who did was ex-Representative Michael Huffington, in his unsuccessful 1994 race to unseat Senator Dianne Feinstein of California. A defense contractor, in applying for a waiver from the State Department that would allow it to sell equipment to Taiwan, had sought Huffington's assistance; when he refused to help, the contractor enlisted Feinstein's aid and ultimately received the waiver. Huffington's campaign boasted of his principled stand against special interest government, pointing out that Feinstein had accepted a political contribution from the contractor at about the time of her intervention. Press comment, however, praised Feinstein's efforts (which had preserved California jobs), dismissing Huffington's stance as peculiar and contrary to the state's best interests. Editorialists remembered, but chose not to be swayed by, the experiences of
At most, one might describe the public as ambivalent about constituent service in the wake of the Keating scandal. Citizens may want "Congress" to be more restrained in pressuring administrative agencies, but at the same time they presumably want their own senators and representatives to continue to be vigorous advocates for local interests.\textsuperscript{126} It is not clear whether a significant curtailment of the role of members as advocates would cause greater satisfaction or dissatisfaction among the electorate. Indeed, to articulate the dilemma in its starkest terms, the public has come to expect its representatives to provide generous casework services. Members believe, with good reason, that voters will retaliate if they do not run an effective constituent service operation.\textsuperscript{127}

Ethics reformers would likely argue that this discussion is beside the point, because their goal is not to revamp routine casework functions but to curb the actions of legislators who display undue influence or favoritism on behalf of wealthy special interests.\textsuperscript{128} Even to define those evils, however, one needs to take account of the role that congressional constituent advocacy plays in our system of government. This Part's analysis of the casework system as a whole has been designed to illuminate the nature of that role. Furthermore, any new restrictions that may be proposed should be evaluated not only in terms of the corruption they would suppress, but also in terms of the legitimate activity that they would incidentally prevent. To the extent the reader accepts the proposition that the social benefits of constituent service outweigh its costs, the grounds for concern about possible overbreadth in any suggested reform measure will be augmented.

This Part's elaboration of some of the potential complications attending this branch of congressional ethics reforms is not intended to make the case for doing nothing. Indeed, even if the Keating scandal and the public clamor resulting from it had never occurred, there would have been good reasons for Congress to reappraise the ethics of constituent service. Casework has burgeoned in recent years, and with expanded activity comes a greater risk of misconduct. Moreover, in view of the political payoffs that members expect to reap from aggressive

\textsuperscript{126} Political scientists have frequently pointed out that voters tend to have a far higher opinion of their own representative than of Congress as a whole. See, e.g., CAIN ET AL., \textit{supra} note 45, at 198-203.

\textsuperscript{127} See \textit{id.} at 85-86, 211.

\textsuperscript{128} See, e.g., Waldman, \textit{supra} note 73, at 23.
and vigorous pursuit of casework activities, one has to wonder whether legislators are likely to give the ethical pitfalls in the process the attention they deserve.

The real task is to identify principles that will address the temptations that create ethics problems in constituent service without any real impairment of members' legitimate functions as advocates. To that task we now turn.

III. IMPROPER CONTACTS AND UNDUE INFLUENCE

Narrowly viewed, the Keating case dealt with the ethical problems that arise when a member of Congress intervenes in an administrative proceeding on behalf of a campaign contributor. Those problems will be considered in Part IV. This Part, however, will address an antecedent question: whether, and under what circumstances, congressional constituent service can be improper because it acts as an "undue influence" on an agency, even in the absence of money as a complicating factor. This question was not a contentious issue during the Keating proceedings, apparently because no one on the Senate Committee was prepared to argue that the five senators' behavior would have been improper if campaign contributions had not been involved. Nevertheless, undue influence problems — which have been controversial in other cases — will be examined here in order to clarify the boundaries of accepted practice and set the stage for consideration of the issues of money influence that were central to the Keating scandal.

The discussion looks initially to authorities that have directly addressed the undue influence issue in the context of legislative ethics. However, because ethics committees have rarely addressed this topic, the discussion will turn to judicial doctrine. Indeed, the subject of undue influence has generated an extensive case law, much of which is fa-
miliar to administrative lawyers.\textsuperscript{130} These surveys of past cases will then provide a basis for analysis of possible new ethics rules.

A. Ethics Enforcement Cases

Undue influence is a relatively new subject on the agendas of the congressional ethics committees. As recently as a decade ago, there had never been a disciplinary case raising the issue, and even advisory guidance was quite limited.

For many years, the most authoritative pronouncement on point was Advisory Opinion No. 1 of the House Ethics Committee.\textsuperscript{131} Issued in 1970, the advisory opinion seemed largely devoted to setting forth a strong defense of congressional casework. The Committee added only a few qualifying admonitions; for present purposes, the most relevant of these was that “[d]irect or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.”\textsuperscript{132} The House has subsequently published and periodically updated an ethics manual, which primarily summarizes existing legal limitations on casework, but also contains brief advice as to its proper exercise.\textsuperscript{133}

In addition, Congress has long had available the highly regarded and thoughtful writings of the late Senator Paul H. Douglas. The senator initially published his ideas in a report that he wrote in 1951 on behalf of a special subcommittee looking into ethical problems of government at large.\textsuperscript{134} He elaborated on the subject in lectures published...
under the title Ethics in Government the following year. In these writings he vigorously defended the practice of constituent service, but also commented on the ethical obligations that he thought should accompany the practice, including trying to find out the merits of the case, avoiding financial conflicts of interest, and showing respect for agency officials. A number of the senator's suggestions will be noted in the discussion that follows. For now it may simply be observed that these unofficial and highly personal reflections were, until the 1990s, the closest thing the Senate had to a code of ethics for constituent service.

The undue influence issue came into much sharper focus in 1989, in conjunction with a complaint filed with the House Ethics Committee against then-Speaker Jim Wright. The special outside counsel appointed to investigate the case identified several assertions of "undue influence" as probable violations of House rules. He accused Wright of having gone beyond permissible bounds in pressing officials of the Federal Home Loan Bank Board to be less aggressive in proceeding against Texans who were suspected of unsound practices in the management of savings and loan institutions. According to the special counsel, Wright had pestered bank regulators with numerous telephone calls and meetings, demanded the ouster of hard-line regulators, and induced the chairman of the Bank Board to appoint independent counsel to investigate whether a particular respondent — a prominent fundraiser for the Democratic Party of Texas — had been mistreated. Most strikingly, perhaps, Wright was accused of having placed a "hold" on a savings and loan bailout bill in order to pressure the Bank Board chairman to replace an official whom Wright considered "inflexible" in dealings with one of Wright's constituents.

The Ethics Committee refused to proceed with the undue influence charges (although it did find reason to believe that Wright had violated several financial conflict of interest rules, and these findings led directly to Wright's resignation from the House). It gave the following brief explanation:

"It is clear that under our constitutional form of government there is a constant tension between the legislative and executive branches regarding the desires of legislators on the one hand and the actions of agencies..."

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IN THE FEDERAL GOVERNMENT 28-30 (Comm. Print 1951) [hereinafter DOUGLAS REPORT]. Although published for a subcommittee of five, the report is commonly associated with Douglas, the subcommittee chair.

135. See DOUGLAS, supra note 63, at 85-92.

on the other in carrying out their respective responsibilities. The assertion that the exercise of undue influence can arise based upon a legislator’s expressions of interest jeopardizes the ability of Members effectively to represent persons and organizations having concern with the activities of executive agencies.

Accordingly, while it may well be that Representative Wright was intemperate in his dealings with representatives of the Federal Home Loan Bank Board, the Committee is not persuaded that there is reason to believe that he exercised undue influence in dealing with that agency. In sum, such a finding cannot rest on pure inference or circumstance or, for that matter, on the technique and personality of the legislator, but, instead, must be based on probative evidence that a reprisal or threat to agency officials was made.137

The states have made very few formal efforts to deal with the ethical dimension of legislators’ “undue influence” on administration,138 but one exception is In re Tuttle, an advisory opinion by the Maine Ethics Commission.139 There, three state legislators had written to the Maine real estate commission, urging it to dismiss a pending license suspension proceeding against an individual. The Ethics Commission concluded that the letter had constituted an exercise of undue influence, particularly because the legislators, in seeking dismissal, had also committed themselves to seeking an expansion of the real estate commission’s statutory authority.140 The opinion found that the senator who had drafted the letter had been motivated “purely to assist a friend by having a case against the friend dismissed,” a motive that the Commission.

137. HOUSE COMM. ON STANDARDS OF OFFICIAL CONDUCT, 101ST CONG., 1ST. SESS., STATEMENT IN THE MATTER OF REPRESENTATIVE JAMES C. WRIGHT, JR. 84 (1989).

138. See Mark W. Lawrence, Comment, Legislative Ethics: Improper Influence by a Lawmaker on an Administrative Agency, 42 ME. L. REV. 423 (1990). The author of this exceptionally thorough and thoughtful Comment reports that he sent inquiries to legislative ethics authorities in all fifty states, the District of Columbia, and several territories, municipalities, and Canadian provinces. Out of forty-five responses, the Maine Legislature and the U.S. House were the only entities that reported having dealt with the undue influence issue in any formal manner. See id. at 432 n.65. In 1993, however, the Kentucky legislature amended its ethical misconduct statute by adopting the second sentence of the following provision: “A legislator, by himself or through others, shall not use or attempt to use any means to influence a state agency in direct contravention of the public interest at large. Absent an express or implied threat of legislative reprisal, nothing in this subsection shall prevent a legislator from contacting a state agency on behalf of a person” KY. REV. STAT.-ANN. § 6.744(1) (Michie Supp. 1994) (emphasis added).


140. See In re Tuttle at 4.
considered inappropriate. The other two legislators were deemed to have exercised poor judgment by signing the letter without knowing the specifics of the case.

The Ethics Commission referred the matter to the legislature for possible disciplinary action; however, neither the House nor the Senate took any further action. It is worth noting here that the commission members were apparently not legislators themselves. Just as in the Wright matter, one observes in Tuttle a revealing disparity in perception between those who serve in the legislature and those who do not: "outsiders" see an abuse where "insiders" see none. That same pattern replicated itself in the Keating case: although outsiders have viewed the case as an example of improper pressure tactics even apart from the senators' financial ties to Keating, the Senate Ethics Committee, as noted above, firmly rejected that view. In fact, to this day neither the Committee nor the full Senate has adopted any limits on the manner in which senators may intervene in administrative proceedings, although the Committee has "encouraged" senators to "use House Advisory Opinion No. 1 as a source of guidance."

B. Judicial Case Law

One line of analysis that could help to bridge the gap between "outsider" and "insider" perceptions is to examine how the legal system has responded to allegations of undue influence in legislative intervention in agency proceedings. The courts have never had occasion to weigh the merits of the casework system as a whole, as might be necessary if a serious separation of powers challenge to the system were mounted. They have, however, dealt tangentially with aspects of con-

141. In re Tuttle at 6.
142. See In re Tuttle at 5.
143. See Lawrence, supra note 138, at 445-46. One reason may have been that the senator who wrote the letter was defeated for reelection soon after the commission decision. Id.
144. See ME. REV. STAT. ANN. tit. 1, § 1002(2) (West 1989).
145. See, e.g., Palmer, supra note 73, at A21; Waldman, supra note 73, at 22.
146. See supra note 129 and accompanying text.
147. See infra section IV.C. (discussing the Senate's new Rule XLIII).
148. See KEATING REPORT, supra note 4, at 11.
149. A full-scale attack on congressional constituent service on separation of powers grounds would probably not succeed. The most likely basis for a challenge would be the premise that, under our constitutional system, the executive branch alone should implement the laws and the legislative branch should do nothing but write them. This highly formal model of the constitutional allocation of powers would find a degree of support in modern cases in which the Court has struck down what it regarded as congressional efforts to exceed a lawmaking role. See Metropolitan Wash. Airports Auth. v.
constituent service in the course of reviewing agency actions that stem from the proceedings in which the interventions occurred. Much of this case law deals with congressional contacts that might more naturally be described as "legislative oversight" than as "constituent service." As the following analysis will show, however, those two components of legislative life are closely intertwined and can be considered together for purposes of discussion.

1. **Formal Proceedings**

The state of the law is most easily described in the context of so-called "formal" administrative proceedings — those decided on the basis of trial-type, "on-the-record" hearings. In this setting, discussion of congressional intervention has long been dominated by *Pillsbury Co. v. FTC*,\(^{150}\) decided by the Fifth Circuit in 1966. The case is so well known that the entire case law on undue influence is often known as the *Pillsbury* doctrine.


On closer inspection, however, all of these cases dealt with actual or threatened congressional attempts to override executive actions through nonstatutory controls that purported to have the force of law, or at least were deemed equivalent to de facto control. Thoughtful analysts have recognized that the formalist model of separation of powers cannot plausibly be extended to condemn all informal congressional "influences" on the execution of the laws. *See* Susan Low Bloch, *Orphaned Rules in the Administrative State: The Fairness Doctrine and Other Orphaned Progeny of Interactive Deregulation*, 76 GEO. L.J. 59, 118-22 (1987); H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1061-63 (1975). Their work need not be duplicated here, but one could add that the Justices have taken note of casework on several occasions without intimating that these activities are all unconstitutional. *See*, e.g., United States v. Brewster, 408 U.S. 501, 512 (1972); *Brewster*, 408 U.S. at 557 (White, J., dissenting); Johnson v. Avery, 393 U.S. 483, 491 (1969) (Douglas, J., concurring).

Alternatively, one could imagine a more subtle challenge to constituent service, predicated on the so-called "functional" approach to separation of powers analysis, which requires a highly contextual judgment about whether a given practice unduly strengthens or weakens one of the branches of government. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (using functional analysis). In this vein one could argue that casework — at least in some manifestations — upsets the checks and balances system by intruding *too far* on the executive branch's ability to execute the law. Defenders of constituent service, however, would likely reply that such intervention *promotes* checks and balances by curbing overreaching by the executive branch. The clash between these two views replicates the policy debate over the merits of casework; just what insight would be gained by conducting that debate in constitutional terms is not apparent.

150. 354 F.2d 952 (5th Cir. 1966).
The case began in 1953, when the FTC rendered an interlocutory decision in a merger case brought against the Pillsbury Company, endorsing a "rule of reason" approach to mergers under the Clayton Act. Soon afterwards, the chairman of the FTC attended an oversight hearing at which senators took him to task for the FTC's failure to adopt a rule of "per se" illegality instead. The senators repeatedly criticized the Pillsbury ruling by name during the hearing. Five years later, after trial on the merits, the Pillsbury case again reached the Commission, which ordered divestiture. The chairman who had been questioned during the oversight hearing had long since left the Commission, but other commissioners who had attended the hearing joined in the order.

The court set the order aside, asserting that the oversight hearing had tainted the agency as a whole. The panel acknowledged that Congress may properly use oversight hearings to examine agency members on the positions they adopt pursuant to their "quasi-legislative" function, such as in policy statements or interpretative rules.\(^{151}\) However, the court continued:

> when such an investigation focuses directly and substantially upon the mental decisional processes of a Commission in a case which is pending before it, Congress is no longer intervening in the agency's legislative function, but rather, in its judicial function. At this latter point, we become concerned with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.\(^ {152}\)

Strikingly, the court seemed little interested in whether the interrogation had actually caused the Commission to reach a conclusion it would not otherwise have reached; indeed, the circumstances strongly suggested that there had been no such influence.\(^ {153}\) As far as the court was concerned, such an inquiry was apparently irrelevant; the main concern was to preserve the integrity of the Commission's processes when it acted in a "judicial" capacity.

\(^{151}\) See 354 F.2d at 963-64.

\(^{152}\) 354 F.2d at 964.

\(^{153}\) In particular, (1) five years elapsed between the oversight hearing and the challenged decision; (2) the chairman had already disqualified himself, and the commissioners who joined in the final agency order (and whose "appearance of impartiality" was in question) had not spoken or been questioned at the oversight hearing; (3) the FTC had already spoken on the antitrust issue that the senators raised, and this issue was not even in controversy in the FTC decision after remand; and, most important, (4) the FTC did not adopt the senators' view at all, but instead adhered to the same position on the "per se" issue as it had taken originally. See 354 F.2d at 955-56; Pillsbury Mills, Inc., 57 F.T.C. 1274, 1390 n. 70, 1399 n. 71 (1960) (decision below).
In a sense, the Pillsbury holding has been subsumed within a broader statutory prohibition of ex parte contacts in formal agency proceedings. In 1976, as part of the Government in the Sunshine Act, Congress added a new section 557(d) to the Administrative Procedure Act. According to this provision, “interested persons” outside an agency may not make any ex parte communication “relevant to the merits” of a formally adjudicated case to any agency official who will be involved in deciding the case.\footnote{5 U.S.C. § 557(d) (1994).} The term “interested person” was specifically intended to include members of Congress, according to the legislative history.\footnote{“While the prohibitions on ex parte communications relative to the merits apply to communications from Members of Congress, they are not intended to prohibit routine inquiries or referrals of constituent correspondence.” H.R. Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 21-22 (1976), reprinted in 1976 U.S.C.C.A.N. 2183, 2203; see also Portland Audubon Socy. v. Endangered Species Comm., 984 F.2d 1534, 1544-46 (9th Cir. 1993) (holding that the President was an interested person). The latter half of the quoted statement reflects the fact that § 557(d) applies only to communications “relative to the merits,” and perhaps also the fact that the Act defines “ex parte communications” to exclude “requests for status reports.” 5 U.S.C. § 551(14) (1994).} Whether the Sunshine Act would apply directly to the facts of Pillsbury is debatable, because the Act defines “ex parte communications” to mean contacts that are “not on the public record” — a phrase that might not apply to an oversight hearing, which would not routinely be memorialized in the record of the agency proceeding, but which certainly occurs in public. At a minimum, however, section 557(d) reaffirms Pillsbury’s fundamental premise that formal proceedings deserve a high degree of procedural regularity. Since the formal adjudicative process is often used to resolve accusations of wrongdoing and other highly particularized allegations about individuals, much can be said for congressional caution in this area.

Yet, even in the realm of formal adjudication, the legal system has shown more flexibility than one might have expected from the Pillsbury opinion. Under section 557(d), prohibited ex parte contacts do not lead automatically to invalidation of an agency order; the court is expected to decide the scope of relief “to the extent consistent with the interests of justice and the policy of the underlying statutes.”\footnote{5 U.S.C. § 557(d)(1)(D) (1994); see Professional Air Traffic Controllers Org. v. FLRA, 672 F.2d 109, 112-13 (D.C. Cir. 1982) (per curiam) (holding that ex parte contact by private citizen violated § 557(d), but did not warrant immediate reversal because it did not prejudice the petitioner and had no apparent effect).} Pursuant to this directive, courts have sometimes found congressional intervention in formal adjudication to be too marginal or inconsequential to justify set-
ting the agency action aside. Some such cases can be seen as adopting a sort of harmless error analysis: the congressional contact was improper, although it did not warrant judicial intervention. Even that posture is a considerable departure from Pillsbury. Other cases, however, go further: they stress the importance of congressional oversight and treat it as another factor that justifies judicial flexibility.

More particularly, it has come to be understood that many agencies do some of their most important policymaking through the adjudicative process, and Congress needs some latitude to carry on oversight of this policymaking. A pragmatic principle of etiquette has emerged in the context of oversight hearings: Members who wish to question the legal positions that agency officials take during adjudication should, if possible, avoid referring to the individual cases by name; and in any event they should not discuss the facts of the cases, but only the legal principles announced there. A recent case illustrates the practice. In Monieson v. CFTC, the Commodities Futures Trading Commission (CFTC) revoked a commodities broker's registration and ordered him to pay a $500,000 fine; thus, the proceedings had an accusatory flavor that

157. See ATX, Inc. v. United States Dept. of Transp., 41 F.3d 1522, 1528-30 (D.C. Cir. 1994) (upholding DOT's denial of certification to airline despite heavy congressional pressure, including letters from 125 senators and representatives; the court noted that agency decisionmakers had distanced themselves from the congressional contacts and had written a decision that the record strongly supported); Power Auth. v. FERC, 743 F.2d 93, 109-10 (2d Cir. 1984) (ruling that ex parte contact did not pose "a serious likelihood of affecting the agency's ability to act fairly and impartially," because it contained no new facts and opposing parties were able to rebut it); Gulf Oil Corp. v. FPC, 563 F.2d 588, 611-12 (3d Cir. 1977) (relying on, inter alia, the facts that only a few representatives commented, that the FPC did not alter its views as the representatives had urged, and that the issue was purely legal and thus subject to plenary judicial review), cert. denied, 434 U.S. 1062, and cert. dismissed, 435 U.S. 911 (1978); cf. Paragon Cable Television Inc. v. FCC, 822 F.2d 152, 156 (D.C. Cir. 1987) (per curiam) (finding that ex parte letters from senators and others, submitted before adjudication began, were harmless because they were promptly disclosed to petitioners).

158. See Power Auth., 743 F.2d at 110 (criticizing letter and public statements in which four House members urged FERC to consider deleterious economic consequences of reallocation of electric power). But see Municipal Elec. Utilis. Assn. v. Conable, 577 F. Supp. 158, 164 (D.D.C. 1983) (opining that the same letter was "within permissible bounds of legislators who validly sought to represent the views of their constituents").

159. See supra note 153 and accompanying text.

160. See Gulf Oil, 563 F.2d at 610, 612 (giving weight to "the importance and need for Congressional oversight").

161. See Peter L. Strauss, Disqualification of Decisional Officials in Rulemaking, 80 COLUM. L. REV. 990, 1026-27 (1980). As a practical matter, staff members for the executive and congressional participants in the hearing can usually reach agreement in advance on the bounds of legitimate inquiry, because the two sides share a common interest in avoiding sabotage of the underlying legal proceedings.

162. 996 F.2d 852 (7th Cir. 1993).
warranted the utmost in procedural regularity. Nevertheless, the court brushed aside the petitioner’s complaint that the senator who chaired the committee overseeing the CFTC had written to the agency expressing concern about its enforcement policy. The court noted that the senator did not “take an interest in this case above all others,” nor did he “lean on the CFTC to decide this case in a particular way.” He only asked the chair “to respond to some general questions.” Thus, his letter was “legitimate oversight, not overreaching.” 163

For members of Congress to proceed by indirection in this fashion may seem a superficial solution to the due process problems presented by legislative oversight; but if one accepts the legitimacy of oversight itself, etiquette may well be considered the right level on which to “solve” this problem. Moreover, the principle is not entirely artificial: members who avoid direct references to pending cases are likely to avoid addressing themselves to disputes of adjudicative fact, as to which their prerogative to offer political guidance is much more questionable.

In sum, neither the fame of Pillsbury nor the adoption of section 557(d) has prevented the courts from seeking pragmatic ways to reconcile the principle of due process with Congress’s interest in supervising administrative decisionmaking, even in the fairly strict domain of formal adjudication. This accommodation, however, is overshadowed by the much greater degree of flexibility usually found in “informal” administrative proceedings, to which this analysis now turns.

2. Informal Proceedings

As has been mentioned, Pillsbury arose in the context of the Administrative Procedure Act’s framework for formal adjudication. For the most part, courts have confined its holding to that context. The key decision explaining the basis for this limitation is D.C. Federation of Civic Assns. v. Volpe. 164

D.C. Federation involved a House subcommittee chairman who threatened to withhold funding for construction of the Washington, D.C., subway system until the Secretary of Transportation approved a bridge connecting Virginia with the District of Columbia. After the Secretary granted the requested approval, citizens’ groups petitioned for review in the District of Columbia Circuit. The court remanded for reasons unrelated to the present discussion, but it also addressed the issue of the congressman’s threat. Judge Bazelon, writing for the court, rec-

163. 996 F.2d at 865.
164. 459 F.2d 1231 (D.C. Cir. 1971).
ognized that according to Pillsbury the mere appearance of bias or pressure could be fatal to certain administrative decisions. The Pillsbury reasoning did not come into play in this case, however, because the Secretary's approval of the bridge "was not judicial or quasi-judicial."165 By this the court meant that the Secretary "was not required to base it solely on a formal record established at a public hearing."166 The APA uses virtually the same criterion in delimiting the realm of formal adjudication.167

Nevertheless, the court continued, the inapplicability of Pillsbury did not detract from the elementary proposition that an agency must not, in acceding to congressional pressure, decide a case on the basis of "'considerations that Congress could not have intended to make relevant.'"168 In the court's view, the chairman's stance was not a factor that the agency could permissibly consider under the legislation involved there; thus, the court admonished the Secretary that on remand he must reevaluate the bridge proposal without reference to congressional pressure.169

D.C. Federation has become the dominant judicial authority on congressional intervention into informal agency proceedings. Subsequent cases have adhered almost uniformly to Judge Bazelon's refusal to give an expansive scope to the Pillsbury position that congressional pressure in agency adjudication violates due process in and of itself. While the contours of the Due Process Clause may not depend directly on the APA's definition of formal proceedings, adjudications have not been considered "judicial" within the meaning of Pillsbury unless they involve highly structured, adversary litigation.170 Only a small fraction of administrative actions can be deemed "judicial" under this approach.

165. 459 F.2d at 1246.
166. 459 F.2d at 1247.
167. See 5 U.S.C. § 554(a) (1994). Some have read the court's language as meaning that the Pillsbury rule does apply to all proceedings that are "'judicial or quasi-judicial' in the sense of being adjudication as opposed to rulemaking. See, e.g., Keating Report, supra note 4, at 9; Thompson, supra note 28, at 89. This is an untenable reading of the D.C. Circuit's opinion, because the agency action reviewed in D.C. Federation itself was adjudication, not rulemaking.
168. 459 F.2d at 1247 (quoting United States ex rel. Kaloudis v. Shaughnessy, 108 F.2d 489, 491 (2d Cir. 1950)).
169. Judge Bazelon was the only member of the panel who concluded that the Secretary had in fact been influenced by congressional pressure during the prior proceedings. The swing voter on the panel, Judge Fahy, expressed no opinion on that point, although he joined in the court's opinion insofar as it held that the Secretary would be required to eschew any such reliance during the remand proceedings to come. See 459 F.2d at 1246.
170. See DCP Farms v. Yeutter, 957 F.2d 1183, 1187 (5th Cir. 1992); cf. Koniag, Inc., v. Andrus, 580 F.2d 601, 609, 611 (D.C. Cir. 1978) (applying Pillsbury to adjudi-
For all other agency proceedings, the critical questions have become, as in *D.C. Federation*, whether the legislative contact actually influenced the decision, and, if so, whether the administrator's reliance on that contact was incompatible with the decisional criteria specified in the underlying statute.\(^{171}\)

The evidentiary burden of showing that congressional intervention had an actual impact on the agency decision has proved formidable. Usually courts are disinclined to find that a congressional contact has had such influence.\(^{172}\) In fact, with one arguable exception,\(^{173}\) no appellate decision has sustained such a contention in the twenty years since *D.C. Federation* was decided. This evidentiary hurdle has been criticized as having made it too difficult for litigants to challenge agency decisions by alleging congressional interference.\(^{174}\) To be sure, part of the basis for this burden of proof is the courts' tradition of presuming the regularity of administrative action.\(^{175}\) More fundamentally, however, the criticism reflects a misunderstanding of the underlying legal standard. *D.C. Federation*'s actual impact test reflects a view that, except in cases that are "judicial" within the meaning of *Pillsbury*, the evil to be addressed is *not* congressional intervention as such, but rather a breakdown of the rule of law if the agency relies on it to reach an unauthorized result.\(^{176}\)

\(^{171}\) See, e.g., Chemung County v. Dole, 804 F.2d 216, 222 (2d Cir. 1986) (holding that the test is whether political pressure was intended to and did influence agency to act for irrelevant reasons).

\(^{172}\) See Peter Kiewit Sons' Co. v. U.S. Army Corps of Engrs., 714 F.2d 163, 170 (D.C. Cir. 1983) (finding no proof that ex parte contacts by senator came to the attention of the actual administrative decisionmaker); Sierra Club v. Costle, 657 F.2d 298, 409 n.539 (D.C. Cir. 1981) (concluding that single newspaper report of senator's hint that concessions in EPA rulemaking could bolster his support for administration's other policies was not substantial evidence of impropriety); American Pub. Gas Assn. v. FPC, 567 F.2d 1016, 1068-70 (D.C. Cir. 1977) (finding no direct evidence that hostile interrogation of agency chairman affected agency's decision, particularly since the Commission adhered to the specific proposition that the representatives had challenged).

\(^{173}\) See Koniag, 580 F.2d at 610-11 (stating, in the context of *rejecting* plaintiff's request to disqualify Secretary of Interior from rendering a decision on remand, that a congressman's letter to the Secretary had compromised the appearance of impartiality); see also SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 130 (3d Cir. 1981) (en banc) (remanding on the question of whether an SEC investigation had been prompted by legitimate concerns and not merely by a senator's pressure).

\(^{174}\) See Kappel, *supra* note 130, at 154.


At least part of the reason why *D.C. Federation* has been followed so consistently is that some courts appear to entertain a distinctly sympathetic attitude toward congressional participation in the administrative process. This support has been particularly evident in the context of agency rulemaking. In *Sierra Club v. Costle*, environmental groups complained that Senator Robert Byrd had "strongly" expressed certain concerns to the Environmental Protection Agency during its development of regulations that would profoundly affect the coal mining industry. The court responded with a ringing endorsement of congressional participation in the rulemaking process:

Americans rightly expect their elected representatives to voice their grievances and preferences concerning the administration of our laws. We believe it entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking, so long as individual Congressmen do not frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure. Where Congressmen keep their comments focused on the substance of the proposed rule — and we have no substantial evidence to cause us to believe Senator Byrd did not do so here — administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources. To hold otherwise would deprive the agencies of legitimate sources of information and call into question the validity of nearly every controversial rulemaking.

To be sure, intervention by members of Congress in rulemaking does not fall within the narrowest definition of "casework." Nevertheless, such intervention can certainly have constituent service implications. The rulemaking proceeding in *Sierra Club* itself is illustrative. Although it was concerned with a general policy issue, not an individual constituent's situation, the D.C. Circuit did recognize in the above-quoted language that the senator was promoting his home state's interests. In any event, judicial expressions of support for legislators' roles as representatives of district interests may be found in both rulemaking

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regardless of whether the legislator's view of the statute is sustainable. See 408 F. Supp. at 306-07, 310, 313. Those statements rest on a misreading of *D.C. Federation*. The holding of the case, however, was completely consistent with *D.C. Federation*: the court vacated professional standards review regulations because it found that a senator's pressure on HEW officials to alter the regulations had a major impact on their ultimate contents and was predicated on an erroneous interpretation of legislative intent. See 408 F. Supp. at 313-14.


and adjudication contexts.\textsuperscript{179} For example, a senator's effort to induce the Commerce Department to approve a commercial development grant for his home state would by no means implicate rulemaking, but this situation led one court to remark: "There is . . . nothing improper in an elected federal official attempting to secure for his constituents a federally funded project for the area that he represents. Indeed, this is one reason why we send Representatives and Senators to the United States Congress.\textsuperscript{180}

It would be an exaggeration to say that these sentiments are universally shared within the judiciary. One can find an occasional decision in which, although a plaintiff's challenge may be rejected for failure to meet the \textit{D.C. Federation} standard, the court opines that congressional intervention was unseemly if not inappropriate.\textsuperscript{181} Nevertheless, it seems fairly well settled that, in informal proceedings, courts will tolerate or even endorse congressional contacts, so long as these contacts do not undermine the agency's adherence to the substantive law.

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\textsuperscript{179} See Blum, 458 F. Supp. at 662-63 (noting that representatives who "vigorously" supported their state's request for regulation allowing use of pesticide "largely came from areas where the . . . problem is severe and properly brought to the agency's attention the concerns of their respective constituencies"); accord Municipal Elec. Utils. Assn. v. Conable, 577 F. Supp. 158, 164 (D.D.C. 1983), quoted at supra note 158. Some of the literature takes a much more tolerant view toward congressional intervention in rulemaking, in which an agency acts in its "legislative" capacity, than toward intervention in adjudication, in which the agency's role is said to be "judicial." See, e.g., THOMPSON, supra note 28, at 98-99. Pillsbury itself rested heavily on this distinction. See supra notes 151-52 and accompanying text. The distinction has some force, inasmuch as a member of Congress can claim to speak with greater authority on issues of law and policy, the typical subjects of rulemaking, than on the facts of individual cases. Yet the importance of the distinction should not be exaggerated. See ROSENBERG & MASKELL, supra note 130, at 35-36. Administrative adjudications frequently implicate unsettled legal and policy issues that are seriously disputed and may even be the dominant controversy in the case. Moreover, many of those issues are unlikely ever to become the subjects of rulemaking proceedings. These realities help to account for the courts' unwillingness to bar members of Congress from intervention in all adjudicative cases. See supra notes 164-71 and accompanying text.

\textsuperscript{180} National Ctr. for Preservation Law v. Landrieu, 496 F. Supp. 716, 745 (D.S.C.), affd. per curiam, 635 F.2d 324 (4th Cir. 1980).

\textsuperscript{181} See American Pub. Gas Assn. v. FPC, 567 F.2d 1016, 1068 (D.C. Cir. 1977). This 1977 case was decided during the heyday of judicial efforts to bring rulemaking proceedings into greater conformity with the procedural expectations traditionally associated with formal adjudication. Since \textit{Vermont Yankee Nuclear Power Corp. v. National Resource Defense Council}, 435 U.S. 519 (1978), the trend has run strongly in the opposite direction.
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C. Reform Proposals and New Approaches

The public scrutiny being directed at constituent service in the wake of the Keating scandal gives impetus to the question of whether the Houses of Congress should take new steps to discourage their members' "undue influence" on administrative proceedings. The subject does not, however, lend itself to many easy answers. One must take seriously the House Ethics Committee's suggestion in the Wright case that the very concept of undue influence is in constant tension with the affirmative duty of a member to vigorously represent his or her constituents' interests. It would be incongruous to acknowledge that duty and then complain merely because a legislator fulfilled it effectively. The consequence of imposing an overly strict standard could be to deter members from effective performance of their representative roles.

It does not follow, however, that legislators' advocacy must go completely unregulated. The legal profession exhorts attorneys to advocate their clients' interests zealously within the limits of the law, yet also manages to circumscribe that duty with various ethical obligations. So, too, there may well be ways to identify excesses in congressional constituent service without impairing the core of the activity. At least, the idea that further reforms in this area might be helpful should not be dismissed without scrutiny of some of the specific proposals that have been offered in recent years.

1. Formal Agency Proceedings and Other Sensitive Cases

A logical place to begin the inquiry is with limitations pertaining to "formal" administrative proceedings, because the legal restrictions on congressional intervention are most clearly defined in that context. As previously explained, the ex parte contact provisions of the Sunshine Act, as well as the Pillsbury doctrine, make strong statements against legislative interference with formal agency proceedings. Those pronouncements, however, will be effective only to the extent that members are informed about them. Research indicates that, in general, legislators and their staffs are aware of the governing principles.182 In view

182. A survey of House members in the Ninetieth Congress (just after Pillsbury and well before the Sunshine Act) found broad awareness of the basic ground rules. See EDMUND BEARD & STEPHEN HORN, CONGRESSIONAL ETHICS: THE VIEW FROM THE HOUSE 76 (1975) ("Congressmen appear to appreciate the judicial nature of the work of the commissions; consequently, they hesitate to interfere. The impropriety of ex parte communications in these cases was mentioned often" in the authors' survey). Significantly, the same respondents claimed to be much more aggressive in nonjudicial cases. See id. at 74-76. For more recent evidence, see JOHANNES, supra note 44, at 109, 126; Charles R. Babcock, Ex-Regulators: Few Improper Contacts, WASH. POST,
of the considerable growth in size of the legislative establishment in recent decades, however, it is important for Congress to ensure that existing limitations on ex parte communications are clearly communicated to all. The *House Ethics Manual* contains fairly clear warnings on this score.\(^{183}\) The Senate, however, has no equivalent document compiling and synthesizing recognized ethical principles for the guidance of its members and their staffs. It ought to have one.\(^{184}\)

The logical next question is whether any other types of agency proceedings should normally be exempt from the intrusions of congressional constituent advocacy. Proceedings that involve a criminal prosecution might be one such category. In the Keating Five case, the Senate Ethics Committee found that it was not improper, in and of itself, for three of the senators to have continued to intervene on Keating's behalf even after learning of the criminal referral in his case. At worst, said the Committee, this persistence reflected poor judgment.\(^{185}\) Others have taken a less generous view of such contacts. In fact, the Keating scandal has given rise to the suggestion that members of Congress should simply avoid "interfer[ing] with ongoing individual criminal investigations or prosecutions."\(^{186}\) Moreover, Senator Douglas strongly recommended against congressional involvement in individual criminal matters.\(^{187}\)

Several strong arguments militate in favor of an ethics rule that would forbid legislators from intervening in ongoing criminal proceedings. In important respects, criminal proceedings resemble the formal, on-the-record administrative proceedings covered by section 557(d) of

Nov. 29, 1990, at A25 (quoting former agency heads who recalled receiving improper communications from members of Congress occasionally but not frequently).


184. The Senate Ethics Committee has provided this sort of guidance in response to individual requests. See, e.g., *Senate Select Comm. on Ethics, 103d Cong., 1st Sess., Interpretative Rulings of the Select Comm. on Ethics No. 237* (Comm. Print 1993) [hereinafter *Interpretative Rulings*] (advice to senator not to communicate with bankruptcy judge on constituents' behalf, other than through formal procedures). But a collection of individualized rulings is unlikely to be as effective an orientation tool as a clearly written synthesis of the controlling principles would be.

185. *Keating Report*, supra note 4, at 17, 56 (concerning Sen. DeConcini); *id.* at 18, 54-55 (concerning Sen. Glenn); *id.* at 16, 56 (concerning the same two plus Cranston).

186. Waldman, supra note 73, at 22.

187. There are some fields of administrative action which legislators would, on the whole, do well to avoid. The first is the field of criminal action. Unless legislators are deeply convinced of the justice of their position, they certainly should not make any inquiries or recommendations about possible indictments or criminal prosecutions.

*DOUGLAS*, supra note 63, at 91-92.
the APA — both are cases in which society’s concern for procedural regularity is high. Since Congress has already accepted a diminution in the scope of permissible constituent service with respect to formal adjudications, it should likewise be amenable to such a curtailment with respect to criminal matters. A prohibition of this kind would also seem to be reasonably workable, because it would be triggered by relatively clear-cut, objectively determinable events. The prohibition might be framed in terms of directing members to refrain from pressing a constituent’s cause with prosecutors (which apparently was Douglas’s specific point), as well as with administrators who are handling an enforcement matter that will also be the subject of a criminal investigation, as the facts of the Keating case might suggest.

Yet, just as practical approaches have evolved to reconcile the Pillsbury doctrine with the congressional interest in oversight, so too might the suggested ethical rule be framed or applied in a manner that leaves some scope for congressional constituent advocacy on behalf of what a member believes may be unjustified prosecution. General oversight activities that make no reference to the facts of particular cases, and preferably do not refer to specific cases at all, are presumably valid. Additionally, perhaps ethics rules should address only those situations in which members or their staffs contact agencies directly. Some leeway for political dialogue in the public arena must be allowed. After all, senators and representatives commonly use floor speeches and committee hearings to demand criminal investigations of suspected violators. Speeches urging an opposite outcome would seem to be equally legitimate. If one legislator can legitimately accuse the executive branch of being too soft on flag burners or abortion protesters, should not other legislators, with different ideological commitments, be permitted to accuse the executive of being too harsh? Public pronouncements of this kind, which would not ordinarily be considered “ex parte contacts” and

188. In marginal cases, however, ethics authorities might face difficulty determining just when a member actually learned that an alleged regulatory violation had been referred for criminal investigation.

189. One of the most contentious of recent confrontations between Congress and Justice Department prosecutors involved efforts by Representative John D. Dingell, former Chairman of the House Energy and Commerce Committee, to expose what he considered the Department’s mishandling of environmental criminal cases. Representative Dingell’s office insisted, however, that the investigating subcommittee was interested only in closed cases, not open ones. See Jerry Seper, ‘Partisan’ Grab Seen in Environment Cases, WASH. TIMES, June 6, 1994, at A1. This claim appears to reflect an acknowledgment that pressure regarding a pending case would be improper.

190. See supra notes 161-63 and accompanying text.
deprive no one of an opportunity to respond with an opposing point of view, presumably do not contravene principles of legislative ethics.

Perhaps the trickiest problem in this area is to determine the circumstances in which a legislator may intervene in an administrative proceeding that might ripen into either a criminal investigation or a formally adjudicated enforcement proceeding, but has not yet done so. When the possibility of enforcement action is on the horizon but not imminent, legislators have a relatively strong claim that their "representative" duties compel them to intercede on their constituents' behalf; as the likelihood of formal action looms larger, rule-of-law values press with increasing force toward restraint on the legislator's part. Where are the lines to be drawn?

Section 557(d) of the APA suggests one guideline: the ex parte contact rule in formal adjudication generally comes into play at "the time at which a proceeding is noticed for hearing unless the person responsible for the [ex parte] communication has knowledge that it will be noticed." Reasonable minds might conclude, however, that a broader prohibition should apply to members of Congress and their staffs — commencing, for example, when the congressional office becomes aware that formal proceedings are under active consideration. Whatever standard may be chosen, the sensitivity of enforcement proceedings, both civil and criminal, justifies special caution from members and their staffs who propose to intervene in them. Even where intervention as such is not deemed improper, legislators should be particularly careful in these cases to make sure that they have checked out the facts and are not making untoward threats. Those are sound guidelines under all circumstances, as will be discussed shortly, but they are especially good advice in the enforcement context, because of the public's special concern that these matters should be resolved according to law.

192. In DCP Farms v. Yeutter, 957 F.2d 1183, 1187 (5th Cir. 1992), the Agriculture Department made an initial determination of abuse in the farm subsidy program, and the respondent appealed and requested a hearing. The court stated that Pillsbury restrictions would not come into play until the time of that hearing. That dictum seems incompatible with § 557(d)(1)(E), but the court was justified in refusing to apply Pillsbury to a legislator's intervention that had occurred during the early stages of the department's investigation, even though an inspector general's report had left little doubt that the respondent might ultimately face formal proceedings.
193. In the period prior to a criminal referral or notice of the commencement of formal proceedings, legislators should have relatively broad freedom to make contacts that take no position on the merits but merely prod the agency to reach a speedy conclusion in the constituent's case. Although, strictly speaking, such statements can be legitimate even after enforcement activities have reached a more formal stage, see supra
2. Indiscriminate Advocacy

We turn now to consider what substantive prohibitions should apply to legislative intervention outside the realm of formal adjudication. One simple guideline that bears exploration would be that a member should not intervene on behalf of a constituent unless the constituent's claim has some merit.194 Much of the literature suggests that members are not always so restrained — that many feel that their job is to advocate the constituent's cause, right or wrong.195 Senator Douglas argued against this attitude: "A legislator should not immediately conclude that the constituent is always right and the administrator is always wrong, but as far as possible should try to find out the merits of each case and only make such representations as the situation permits."196

To the extent it exists, the attitude that every constituent's case deserves to be pursued, regardless of its merits, seems at odds with the House Advisory Opinion's teaching that "the overall public interest ... is primary to any individual matter."197 The ethics committees should consider elaborating on that precept by endorsing the proposition that every member should give some consideration to the merits before honoring a request for intervention, instead of always taking the constituent's side against the bureaucracy.198 This article argued above that the advocacy dimension of the legislator's role is normal and inescapable.199 Legislators are not solely advocates, however. They are also responsible for promoting the public interest — which encompasses the interests of groups and individuals who lack the resources to press their case on Capitol Hill as effectively as highly organized groups can.200 That the obligation to consider an issue from multiple vantage points probably

note 155, they run the risk of being construed as obstruction of a criminal inquiry or as covert pressure to decide the case in the constituent's favor. See S. Rep. No. 354, 94th Cong., 1st Sess. 37 (1975) (suggesting that requests for status reports should in "doubtful cases" be regarded as falling within the scope of § 557(d)).

194. See Waldman, supra note 73, at 23.

195. In the Keating case, Senator DeConcini took this view: even constituents with a "lousy" case have "a right to have somebody stand up for them." 5 Keating Hearings, supra note 129, at 108 (Jan. 9, 1991). For evidence that this view is widely held, see Beard & Horn, supra note 182, at 74-75 (quoting from survey responses by House members themselves); Gellhorn, supra note 46, at 71-72; Johannes, supra note 44, at 122. As one might expect, many agency officials agree that congressional offices often forward cases uncritically. See id. at 105.

196. DOUGLAS, supra note 63, at 88.

197. See Advisory Opinion No. 1, supra note 131.

198. See THOMPSON, supra note 28, at 94-97.

199. See supra section I.A.

200. See ETHICS OF LEGISLATIVE LIFE, supra note 17, at 47-48; David E. Price, Legislative Ethics in the New Congress, in REPRESENTATION AND RESPONSIBILITY, supra note 17, at 129, 136-38.
cannot be enforced does not mean that it should be ignored as an ethical ideal.

A rule or aspirational principle to the effect that members should pursue only cases with serious merit would have particular force if it entailed a duty to investigate the facts before intervening, so that the member would have some minimum level of confidence in the claim before pursuing it. However, any provision intended to codify a requirement of this sort would have to be carefully drafted so as to recognize that casework takes many forms. Frequently a congressional office simply restates facts presented by the constituent, or forwards the citizen's letter with a perfunctory cover letter attached. In these situations, the office is in little position to appraise the strength of the claim — nor is the agency really likely to believe otherwise. On this point the Senate Ethics Committee was persuasive:

The Committee believes the duty of a Member to determine the merits of a case is related to the level of action he or she is going to take. For example, a routine status inquiry would not require the same level of familiarity with the merits of a case as would proposing a possible solution. The Committee also appreciates the fact that in the normal course of daily events a Senator's staff, without the Senator's knowledge or involvement, provides many routine constituent services which by their nature require little or no inquiry into the merits. Moreover, casework is often an informal, interactive process: a caseworker may inquire whether there is anything to a constituent's grievance, an agency spokesperson explains why there is not, and the matter ends there. Such interchanges occur on too casual a level to warrant the kind of "Rule 11" obligations that accompany the filing of a civil lawsuit.

Yet, short of placing a burden of inquiry on members to determine the merits of every claim to which they lend assistance, one can suggest more modest guidelines: that members should avoid making affirmative representations without a reasonable basis, should refrain from press-

201. See, e.g., Klonoff, supra note 46, at 705-06.
202. KEATING REPORT, supra note 4, at 10.
203. See JOHANNES, supra note 44, at 100-01.
204. See FED. R. CIV. P. 11(b) (requiring litigants filing court papers to certify, after reasonable inquiry, that their legal contentions are tenable and their factual contentions have or are likely to have evidentiary support).
205. See HOUSE ETHICS MANUAL, supra note 133, at 249 ("As a matter of common sense, when communicating with an agency, Members and staff should only assert as fact that which they know to be true. . . . A prudent approach in any communication would be to attribute factual assertions to the constituent."). A related technique that congressional offices sometimes use is to write a letter to the agency stating what the member expects it to do if the facts turn out to be as the constituent claims.
ing a cause that they know is invalid under controlling law, and should intervene only after making whatever inquiry is reasonable under the circumstances.206

3. Threats of Reprisal on Unrelated Matters

Another question is whether certain types of arguments should be off-limits — or at least strongly disfavored — when members of Congress do casework for constituents. House Advisory Opinion No. 1 forbids suggestions of “favoritism or reprisal” directed toward the agency.207 The meaning of this prohibition is not entirely clear, however. Moreover, neither the Senate nor its ethics committee has expressly adopted any restriction in this area, although the committee has “encouraged” senators to look to the advisory opinion for “guidance.” The subject of reprisal thus deserves close attention here.

Of course, the House advisory opinion’s admonition that the “public interest” is paramount in constituent service activities208 would militate against the use of threats for some purposes — for example, pursuit of a personal feud — but certainly not for all of them. Sometimes a member might threaten a “reprisal” precisely in order to promote the public interest as he or she defines it. D.C. Federation,209 offers a useful illustration. Everyone in that case seemed to assume that the chairman sincerely believed that the bridge should be built; nothing suggested that he was threatening to hold up subway funding for any other reason than to advance that goal. Notably, the court pointedly refused to criticize him for his conduct210 — perhaps because it felt that such a judgment was beyond judicial competence, but possibly also because the intrinsic legitimacy of this behavior was unclear.

A logical extrapolation of the court’s decision would point toward congressional ethics rules expressly providing that members should re-

206. See FRONTLINE MANAGEMENT, supra note 53, at 212-13. For an example of the embarrassment and unfavorable publicity that can result from a failure to check one’s facts, see Benjamin Sheffner, A Tale of Constituent Service Gone Awry, ROLL CALL, Jan. 23, 1995, available in LEXIS, Legis Library, Rollcl File (describing how then-Representative Jon Kyl, at the request of a constituent, wrote a letter urging the Latvian parliament to cease denying a seat to a local politician; Kyl was chagrined when he later learned of the Latvian’s criminal record as a racial extremist).

207. See supra note 132 and accompanying text. Kentucky’s ethical misconduct statute, although confusing, appears to endorse essentially the same principle. See supra note 138.

208. See supra note 132.

209. D.C. Fedn. of Civic Assns. v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971); see supra notes 164-69 and accompanying text.

210. See 459 F.2d at 1249.
frain from attempting to influence administrative decisions by making threats or promises to take action on an unrelated matter. Such a rule seems supportable even though vote-trading, exchanges of favors, and other sorts of "logrolling" are an integral part of congressional culture. The constituent service area differs from the typical struggle that takes place exclusively within the legislature, because an agency acts under a statutory mandate. For an administrator to rely on a factor extrinsic to its mandate, such as the possibility of a legislator's retaliation, would normally render the agency's decision ultra vires. Thus, the rule would reflect the central concern of D.C. Federation: preventing agency actions that violate the rule of law. Theoretically it would operate before the fact to intercept approximately the same sort of comments that, if the agency were shown to have acted on them, would support judicial reversal of the agency action after the fact. Moreover, it would serve as a remedy for some congressional pressures that the courts cannot effectively police because of justiciability limits.

Such a rule also would fit well with existing ethics authorities, even if one regards the "favoritism or reprisal" language in Advisory Opinion No. 1 as inconclusive. Senator Douglas cautioned legislators that they should not "try to punish administrators for adverse rulings by withholding appropriations or by other punitive actions," nor should they threaten to do so. The Tuttle decision from Maine is easily justified on the basis of the suggested rule, although it involved a promised inducement rather than a threat. The holding of the Wright case appears at first glance incompatible with the rule, because one allegation there was that Wright had placed a "hold" on a savings and loan bailout bill in order to obtain more favorable treatment for Texans facing enforcement actions. The House Ethics Committee's dismissal of this allega-

211. Such a rule might well apply to a recent incident in which a dozen members of Congress wrote to the National Labor Relations Board, urging it to settle charges pending against an employer, Overnite Transportation Company. Their letter warned: "All parts of the federal government are being reviewed for ways to cut spending." Describing the letter as a ploy, one representative explained: "I was trying to do whatever I could to offend them into some type of cooperation." Pro-Business Republicans Cutting Agency Regulations (NPR radio broadcast, Sept. 4, 1995), available in LEXIS, News Library, NPR File.

212. See generally Daniel Hays Lowenstein, For God, for Country, or for Me?, 74 CAL. L. REV. 1479, 1497-1500 (1986) (book review) (questioning notion that political logrolling is necessarily wrong).

213. DOUGLAS, supra note 63, at 90.

214. See supra note 136 and accompanying text.
tion, however, appears to have rested on a lack of probative evidence rather than a belief that such conduct is permissible.\textsuperscript{215}

One commentator, however, has criticized \textit{D.C. Federation} on the ground that statutes should generally be interpreted to permit agencies to consider congressional policy views as such, because this interpretation will promote the essential process of compromise between the two politically accountable branches.\textsuperscript{216} He suggests that in \textit{D.C. Federation} the court should have read the statute as authorizing consideration of the chairman's views, because it did not explicitly foreclose reference to that consideration.\textsuperscript{217}

The answer is that an individual member is not the Congress and does not speak for the entire body. Indeed, it is doubtful that Congress could pass a law expressly ascribing relevance to the wishes of influential members as such.\textsuperscript{218} Thus, an ambiguous statute should not be interpreted as doing so by implication. Of course, a sound argument does not become impermissible "political influence" merely because a member of Congress makes it.\textsuperscript{219} Moreover, prudent administrators strive for a good relationship with their congressional overseers, and may often be well advised to accept their interpretation of ambiguities in the statute. Both sides, however, should be encouraged to remember that their preferences must operate within whatever framework the statute provides as a test for the agency's use of discretion.

The precise legal framework applicable to a given case may be subject to intense debate. For this reason ethics rules in this area should apply only to manifestly irrelevant arguments.\textsuperscript{220} In the end, however, one should recognize that even broadly worded administrative statutes typically have some boundaries written into them. Pure logrolling is un-

\textsuperscript{215} See Agency Door, supra note 65 (remarks of Rep. Frank); Klaus, supra note 130, at 36-37.


\textsuperscript{217} See id.

\textsuperscript{218} A law providing, for example, that "any decision under this section must be acceptable to the chair of the relevant appropriations subcommittee" would be in danger of being held to confer "executive" functions on legislative actors, a practice that the Supreme Court regards with considerable disfavor under separation of powers principles. See supra note 149 (discussing modern cases on separation of powers).

\textsuperscript{219} See DCP Farms v. Yeutter, 957 F.2d 1183, 1188 (5th Cir. 1992) ("[T]he force of logic and ideas is not our concern [in defining congressional 'interference' and 'political pressure']. They carry their own force and exert their own pressure.").

\textsuperscript{220} When legislators influence an administrative decision by advancing a legal interpretation that is erroneous but defensible, the proper remedy is not an ethics sanction, but judicial reversal of the agency's action. See, e.g., Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 364-66 (D.C. Cir. 1989) (per curiam).
likely to qualify as the kind of "reasoned decisionmaking" that agencies are expected to display in their exercises of discretion. To return to the D.C. Federation example, scholars have made powerful arguments that the judiciary has given a narrower construction to the highway statute involved in that case than Congress ever intended;221 nevertheless, it would be a stretch to interpret the law as saying, "Authorize a bridge if it will get you a subway." An even more extreme example would be the allegation made, but not proven, against Senator Byrd in Sierra Club: that he offered to trade support for the SALT treaty for concessions in an EPA rulemaking.222

4. Threats in General

The House Ethics Committee suggested a broader formulation in the Wright case, which said that an allegation of undue influence should not be considered in the absence of evidence of a "reprisal or threat." Should there be a general proscription of "threats"? That was the proposal of a study commission that was convened in Maine following the Tuttle case,223 although the legislature did not act on this recommendation.

A condemnation of all threats seems overbroad, however. Taken literally, it could suppress legitimate oversight.224 A good example is suggested by DCP Farms v. Yeutter,225 a case decided in 1992 by the Fifth Circuit — the same court that had decided Pillsbury a quarter century earlier. The court summarized the background facts:

This case arises from attempts by the Department of Agriculture to enforce the statutory limit of $50,000 per "person" in federal crop subsidies against DCP Farms. The three farms, controlled by two families, had created 51 irrevocable trusts to maximize the number of "persons" eligible to receive farm subsidy payments. DCP Farms were slated to receive $1.4 million in subsidies for the 1989 crop year.226

223. "All legislators, without exception, shall refrain from any threat, or statement that could be reasonably construed as a threat, orally or in writing, relating to legislative action in communication with a state agency or authority." COMMISSION TO EXAMINE ETHICS IN STATE GOVERNMENT, REPORT OF 3 (1988); see Lawrence, supra note 138, at 448-49.
224. See Lawrence, supra note 138, at 450 (criticizing the Maine study commission's proposal on this ground).
225. 957 F.2d 1183 (5th Cir. 1992).
226. 957 F.2d at 1185.
Congressman Jerry Huckaby, chairman of the House subcommittee that had sponsored the subsidy limits, wrote to the Department about DCP’s situation, which had been described in press reports. He declared that payment of the full amount would violate the letter and spirit of the law. Moreover, “Congressman Huckaby indicated that if the USDA allowed DCP Farms to treat all 51 irrevocable trusts as ‘persons,’ he would introduce legislation to revise the definition of ‘persons’ to exclude trusts entirely.”227 The Department responded that it would take a very aggressive enforcement position toward the farms. When it did so, DCP Farms sought interlocutory judicial review. A district court enjoined the proceedings, but the court of appeals reversed. The appellate court rejected the notion that a congressman’s expression of views about how a law should be interpreted injects an extraneous factor within the meaning of D.C. Federation, remarking that it “would be unrealistic to require that agencies turn a deaf ear to comments from members of Congress.”228

The principals’ exchange about the meaning of the statute was clearly permissible oversight. More to the point, the congressman’s statement that he might introduce legislation if the Department did not accede to his position, while it could be called a “threat,” seems entirely legitimate. It would be excessive hair-splitting to distinguish between the congressman’s expression of opinion as to the meaning of the law as it then stood and the congressman’s determination to seek changes in it if necessary to “clarify” the legislature’s intention. The latter flows naturally out of the former. It is doubtful that one would want to criticize — let alone punish — Huckaby for “threatening” to play the very role that the Constitution assigns to lawmakers.

This issue illustrates with unusual clarity the analytical value of Professor Thompson’s claim that constituent service activities should be evaluated from the standpoint of whether they enhance or impede democratic processes.229 Certainly one would not have wanted an influential member of Congress to commence efforts to change the statute without informing the agency and giving it an opportunity to consider whether it wanted to head off possibly unpredictable legislative action by acquiescing in the member’s interpretation. The participants’ interchange provided an opportunity for the kind of dialogue over legal and policy

227. 957 F.2d at 1186 (emphasis added).
228. 957 F.2d at 1188.
229. See supra notes 28-30 and accompanying text.
issues that ought to take place between the lawmaking and law-enforcing branches.\(^{230}\)

To generalize, political power touches the relationship between the legislative and executive branches on too many levels for one to be able to say that congressional “threats” are always out of place. Such a prohibition seems distinctly less attractive than the guideline discussed earlier, which in effect would reach only those threats that would induce the agency to act for plainly irrelevant reasons if it acceded to the legislator’s demand.\(^{231}\)

5. The Outer Limits of “Undue Influence” Regulation

The ultimate question about ethics regulation of “undue influence” in constituent service is whether a member who does not resort to threats should nevertheless be subject to sanctions for exerting inordinate pressure on an agency. During the Keating proceedings, Senator Helms — in a statement that borrowed heavily from the recommendations of the Committee’s special counsel\(^{232}\) — tried to articulate such a standard: “Even absent ... threats, a legislator’s pressure on behalf of a constituent may lead the administrator reasonably to believe that he or she should decide a case not on the merits, but should accede to the legislator’s request because of a concern about the ability to deal with the legislator on future agency matters.”\(^{233}\) Thus, “Senators must avoid interventions that appear to be improper either because they are not merit-based or because they are of such a kind or degree that administrators reasonably believe that their decisions cannot be merit-based.”\(^{234}\)

Although the Senate Ethics Committee as a whole did not endorse that or any other standard to define the limits of permissible pressure in senators’ interventions with administrators, it was very critical of Senator DeConcini’s aggressiveness toward the bank regulators.\(^{235}\) Nevertheless, the Committee, including Senator Helms, drew back from finding ...
an impropriety in his conduct. A less forgiving observer might argue that the Committee not only should have reached the opposite conclusion on that point, but should have found all five senators guilty of improper pressure tactics in the Keating case. Such a claim might rest in large part on the singular fact that the five senators arranged to meet as a group with bank regulators on Keating's behalf. One could easily interpret this coordinated effort as an attempt to make a show of force that one or two senators could not have displayed by themselves. An application of the Helms standard might also lead to the conclusion that the House Ethics Committee should have reprimanded Speaker Jim Wright for what it regarded as his "intemperate" advocacy, even though it found insufficient evidence of an overt threat or reprisal.

Given the unequal power relationship between members of Congress — or at least some well-positioned members — and many agency officials, it would be difficult to deny that risks of implicit coercion often inhere in the casework situation. Agencies understand that they incur at least some risk of adverse consequences if they appear too uncooperative in their response to a legislator's contact. Senator Douglas addressed the ethics implications of this dynamic by advising legislators that they should not bully or intimidate agency officials and should clearly acknowledge that the ultimate decision rests in administrative hands.

In a disciplinary context, however, one may doubt that the ethics committees could fairly administer a ban on overly aggressive advocacy. Unlike a prohibition on threats of reprisal, which can be framed as a more or less bright-line principle, the Helms standard seems extremely vague. It would provide a member with virtually no guidance

236. See id. (DeConcini's conduct was "inappropriate" but gave only the "appearance of being improper").
237. See Babcock, supra note 182, at A25 (quoting a former SEC chairman: "I regarded it as highly unusual to have even a single senator come to me. To have five come would have seemed extraordinary."). But see 6 Keating Hearings, supra note 129, at 193-94 (Jan. 16, 1991) (remarks of Sen. Rudman) (dismissing as "absurd" Common Cause's position "that there is improper conduct if a group of Senators intervene with an agency on behalf of a citizen even in the absence of political contributions").
238. See supra note 137 and accompanying text.
239. See, e.g., DOUGLAS REPORT, supra note 134, at 29-30.
240. See JOHANNES, supra note 44, at 102-04.
241. See DOUGLAS, supra note 63, at 90.
242. Cf. Bloch, supra note 149, at 119 n.255 ("An attempt to draw a judicially enforceable line between 'strong feelings on the merits' and 'threats' would be arbitrary, highly manipulable, and too restrictive."). Professor Bloch maintains that the limits of legislative advocacy are best left to be defined by the consciences of individual legislators, not the courts — although she does not directly address the possibility of regulation by the ethics committees. See id. at 122.
as to what kinds of advocacy might be held in a disciplinary proceeding to be too aggressive. The problem is not simply with Senator Helms's particular formula; indeterminacy seems unavoidable in this area. A member naturally strives to be influential; at what point does this influence become undue? Nebulous standards are particularly worrisome when they are to be enforced in a political arena, in which damaging charges are easy to lodge and in which the adjudicators are elected officials who themselves are subject to strong political pressures.

Against the risks of arbitrary and unforeseeable application of an "excessive advocacy" standard must be weighed the potential benefits of a rule that might constrain overly aggressive behavior by legislators. As an empirical matter, however, the magnitude of the undue influence problem should not be exaggerated. In his study of constituent service, Johannes reported that members and caseworkers almost always hesitate to pressure an agency; they consider the technique ineffective or counterproductive in most instances. Although he acknowledged instances in which congressional offices have pursued cases with a remarkable degree of aggressiveness, even agencies seemed to agree that extravagant pressure is rare. Fear of adverse publicity was another constraining factor for members and their staffs — and that was before the Keating affair, which undoubtedly has led to even more caution. Agencies are in the best position to blow the whistle on heavy-

243. An alternative formula was offered by an ethics consultant, Michael Josephson, when the Senate was considering its new Rule XLIII (which will be discussed in Part IV, infra). He urged that the rule be amended to provide that congressional intervention must be "neither calculated to, nor reasonably . . . likely to, cause another government official to make a decision on any basis other than the appropriate criteria." Glenn R. Simpson, Post-Keating-Five Rules Change for Constituent Service Urged by Leaders, ROLL CALL, Mar. 23, 1992, available in LEXIS, Legis Library, Rollcl File. This formulation seems even less clear than the Helms version. Legislators or staffers who wished to conform to it would apparently have to predict not only how their words would be understood, but also the administrator's likely response to those words — a judgment that might require speculation on such matters as the tractability of the particular agency official contacted.

244. See JOHANNES, supra note 44, at 102, 106-07.

245. See id. at 108 (citing Mary Thornton, Rep. Lott Forcefully Presents His Views to the Justice Department, WASH. POST, Feb. 19, 1982, at A2 (reporting that then-Representative Trent Lott "hound[ed]" the Justice Department, sending it a letter every other day)). Lott is now Senate Majority Leader and, in fact, sat on the Senate Ethics Committee during the Keating case.

246. See id. at 102-03; see also Babcock, supra note 182, at A25.

247. See JOHANNES, supra note 44, at 107, 126.

handed casework tactics. They also can strike back in more mundane ways, such as by failing to act promptly on other cases or to pass along tips about impending federal grants in the district.

In short, legislators wield significant power in their contacts with agencies, and they have a responsibility to exercise it in an ethical fashion. The ethics committees would do well to follow Senator Douglas's lead by admonishing members against heavy-handedness and intimidation in the constituent service realm. Moreover, because the House's existing guidelines forbid "direct or implied" suggestions of reprisal, they would seem to leave some room for sanctions in a case in which a legislator makes perfectly clear, without putting into words, his intention to retaliate against an agency that does not submit to his demands. The Senate should adopt a similar rule. When faced with the possibility of attempting to enforce open-ended prohibitions on aggressive advocacy, however, the committees have probably been correct in choosing to err (if at all) on the side of underinclusiveness.

6. Public Disclosure Options

An alternative, or perhaps additional, means by which Congress could take steps to prevent or discourage improper legislative influences upon administrative proceedings would be through a disclosure mechanism. Commentators have maintained that problems attributable to constituent service would be reduced if congressional contacts with agencies were logged and regularly disclosed to the public. Although this is a somewhat indirect method of promoting legislative ethics, the arguments for and against the idea have a considerable overlap with issues regarding the substantive content of the legislative ethics rules. The following discussion summarizes the arguments for and against such a

249. Much of the early reporting on the Keating Five affair itself was based on information obtained from sources within the FHLBB. See, e.g., Michael Binstein, A Study in Power: How S&L 'War' Led Senators To Pressure Regulators, WASH. POST, May 15, 1988, at H1 (relying on internal agency documents).

250. See JOHANNES, supra note 44, at 102, 144.

251. See Advisory Opinion No. 1, supra note 131 (emphasis added).

252. See, e.g., THOMPSON, supra note 28, at 101; Waldman, supra note 73, at 23. Professor Schotland has proposed a docketing requirement limited to requesters who have given the legislator campaign contributions above a specified amount. See Roy A. Schotland, Proposals for Campaign Finance Reform: An Article Devoted to Being Less Dull Than Its Title, 21 CAP. U. L. REV. 429, 460 (1992). A difficulty with that plan is that caseworkers do not necessarily know which requesters are contributors, see JOHANNES, supra note 44, at 125, and the Keating decision in effect cautions against the ethical appearances of their making efforts to find out. See infra section IV.E.3.
Arguments for a logging procedure run something like this: Regular disclosure of constituent service contacts would permit the normal mechanisms of political accountability to supplement, or partially substitute for, enforcement proceedings by the ethics committees. Armed with the facts, the public could make its own assessment of the propriety of individual contacts. The logging procedure would also serve as a deterrent to constituent service activities that a member would be embarrassed to have on the public record. One would expect that members of Congress would normally welcome public knowledge about the services they perform for constituents; if there are situations that the member wishes to keep away from the sunshine, perhaps these are contacts that deserve to be deterred. For example, if the logs were to disclose that a series of interventions by one member was entirely out of keeping with normal patterns, the member could at least be called on to explain his unusual activity. Finally, a logging requirement would promote public confidence in government, because it would provide — even if only imperfectly — assurance that members could not intercede for influential constituents without leaving any fingerprints. At the same time it would give legislators of good will a way of saying that they have nothing to hide.

An across-the-board logging requirement would be a costly endeavor, however. According to the leading political science study of constituent service, the average House office handles about 100 casework requests per week, and the average Senate office handles about 300. This adds up to an annual workload of about four million cases.253 The amount of time and energy that would be consumed each year in the creation of four million docket entries could be substantial. At a time of growing emphasis on the streamlining of government, one could wonder whether a new layer of red tape should be imposed without a clear public need in this area.

The existence of such a need is certainly open to doubt. Political science studies do not lend much support to the popular belief, which the Keating scandal has no doubt fostered, that attempts to exert undue influence in constituent service are commonplace.254 Indeed, if congressional constituent service is a routine and generally appropriate activity, as this article has maintained, one can question whether it should be monitored as if it were inherently suspicious. Finally, if records of leg-

253. See Johannes, supra note 44, at 35.
254. See supra notes 182, 244-50 and accompanying text.
islative interventions were made readily accessible, the impact on public debate would undoubtedly prove somewhat mixed. Public logs would presumably reveal significant facts in some instances, but they would also lend themselves to exploitation and distortions by a member’s political enemies, who could hint at sinister dealings in a manner that the member would have trouble rebutting.

The issue is debatable, but let us suppose, for the sake of analysis, that Congress does decide to institute a logging requirement. A plausible point of departure would be a proposal that Senator Robert Dole made while the Keating case was pending in Congress. His plan would have required executive-branch agencies to maintain records of their contacts with legislators or legislative aides on pending or potential enforcement matters or awards of contracts. Written communications would have been placed in a public file; oral communications would have been logged for publication in the Congressional Record.255 He explained this proposal by invoking what he called the "front-page test": "if we are not willing to read about an intervention on the front page of the newspapers, then we ought to think twice about making that phone call or writing that letter."256

The theory behind the Dole plan seems to be that disclosure obligations should be limited to particularly sensitive types of cases. Consistently with that theory, Congress might wish, if it decides to create a logging regime, to experiment with a system that would follow the general outlines of the Dole plan to the extent it would apply to pending or potential agency enforcement proceedings.257 In enforcement cases, even if the probability of abuse is low, arguably the need for public confidence that the rule of law will be maintained is at its zenith. This may be one reason why the Keating case, which of course arose in an enforcement context, struck a raw nerve. At the same time, a requirement limited to enforcement cases would be less unwieldy than an across-the-board logging requirement, because members of Congress intervene less often in enforcement proceedings than in situations in which a constituent seeks affirmative benefits from government.258

256. Id.
257. Senator Dole's proposal for docketing also extended to any agency proceedings "relating to the award of contracts." Id. There is, however, no conspicuous record of scandals or undue congressional influence in that context. Nor is it intuitively obvious why contract awards should be deemed more sensitive than, say, awards of licenses or of local development grants. Senator Dole himself did not explain why he singled out contract awards for special attention.
258. See JOHANNES, supra note 44, at 21. As one author put it (somewhat tautologically): "[T]he goal [of the Keating Five] was to get an independent agency to back
Who, if anyone, should do the logging — the agency or Congress? Senator Dole’s selection of the agency as a more logical candidate seems correct, for several reasons. First, if the justification for logging is to minimize the risks of congressional overreaching, placing the responsibility for recording these interactions in hands other than those of Congress itself seems appropriate. Second, a researcher could more conveniently retrieve all records pertaining to a single transaction if they were compiled by a single source rather than by multiple congressional offices. Third, agencies have substantial experience maintaining similar logs in other contexts: many already possess formal procedures for recording or summarizing ex parte contacts that they receive in formal adjudications and in rulemaking proceedings. Fourth, agencies also have broader experience than congressional offices in handling the privacy issues (discussed immediately below) that could arise in this connection.

Any proposal for logging of congressional contacts regarding enforcement matters must confront some significant privacy issues. Suppose that a legislator visits an agency and argues that a constituent whom the agency is investigating is blameless. Spurred by this visit, the agency takes a closer look, concludes that the legislator was right, and drops the investigation. One certainly can doubt the fairness of placing on the public record the name of the individual who was investigated. The “front-page test” may make sense for members of Congress themselves, because they must be accountable for exercises of official power; but the now-vindicated citizen is in a different position. Similarly, one could imagine other circumstances in which records of a constituent service contact might contain private information that should not be stored in an easily accessible government record.

259. Under the APA, ex parte contacts are prohibited in formal adjudication, but if they do occur, the official who receives them is expected to place written communications, and memoranda summarizing oral communications, on the public record. See 5 U.S.C. § 557(d)(1)(C) (1994). For examples of regulations that individual agencies have issued to implement this mandate, see 18 C.F.R. § 385.2201 (1995) (FERC); 47 C.F.R. §§ 1.1208, 1.1212 (1995) (FCC). Rules of the Food and Drug Administration refer specifically to legislative contacts. See 21 C.F.R. § 10.65(c), (i) (1995).


261. For example, an agency might be studying the antitrust or tax implications of a planned corporate transaction; public disclosure of the existence of those plans might thwart their effectiveness. Or an agency’s investigation of alleged fraud in disability benefits might implicate highly personal medical information.
Although Congress might wish to design a special set of procedures to deal with this tension, probably the simplest solution would be to make use of existing laws. Thus, the Freedom of Information Act (FOIA)\(^{262}\) contains a list of types of information that are exempted from public disclosure,\(^{263}\) and an extensive case law fleshes out these exemptions so as to reconcile competing impulses toward disclosure and secrecy. Every agency has acquired experience applying the exemptions that relate most closely to its work. Other provisions protecting individuals from unjustified disclosures of information in government hands are found in the Federal Privacy Act.\(^{264}\) Agencies are accustomed to working with this Act as well. On the other hand, the FOIA and the Privacy Act do not apply to Congress. Although proposals to extend those laws to Congress are now under consideration, the difficulties of such an extension should not be underestimated.\(^{265}\)

The FOIA also contains a well-defined set of procedures for effecting disclosure. Under the FOIA framework, the basic question to resolve would be whether agencies should place the logs routinely into a publicly accessible database,\(^{266}\) or should instead release information from their logs only in response to an affirmative request.\(^{267}\) Although the former choice would make disclosure easier and quicker for the public, it could also force agencies to devote an inordinate amount of time to the redaction of entries that no one intends to peruse. Accordingly, the latter approach seems to be the preferable default rule. An individual agency might well decide, however, in the context of its particular case load, that the risks of intrusion on legitimate privacy interests are so low that routine publication of the logs it maintains would be warranted.

To be sure, the sort of privacy-protection precautions suggested here may prove to be unnecessary — or, on the contrary, may mean that there would be, in practice, so little disclosure of congressional contacts as to cast doubt on the value of the entire logging procedure. Congress or the agencies themselves should give due consideration to these empirical questions before disclosure measures are implemented on any ambitious scale.

A final implementation issue is suggested by an unusual episode in 1989, when the Interior Department began to maintain a log of contacts between its employees and congressional offices. Congress responded with a brief, though ineffective, effort to prohibit the department from requiring the logging. House members explained that the Department's procedure could deter agency whistleblowers from bringing questionable administrative behavior to the attention of the legislative branch. Although the validity of these fears is unclear, any new proposal to mandate logging of congressional contacts with agencies should at least take into consideration, and seek to ameliorate, the potential for an adverse impact on valuable communications originating from the agencies.

IV. Favoritism and Money Influence in Constituent Service

The Keating Five affair has given rise to an enormous amount of discussion about the relationship between constituent service and campaign fundraising. To date, however, the Senate's response to pressures for new rules that might allay public fears about money influence has been exceedingly cautious, and the House has not responded in any formal fashion at all. This Part begins by describing the limited regulation and case law that now exists, including the Keating case and its aftermath. Next the discussion attempts to identify some of the premises that should guide the design of further ethical standards in this area. Finally, this Part examines several options for new written guidelines, using as a vehicle for analysis a set of standards that were proposed during the Keating case by the special counsel to the Senate Ethics Committee.

A. Background

Financial relationships between members of Congress and their supporters and associates are regulated in a variety of ways. For example, the Federal Election Campaign Act limits the amounts that senators and representatives may receive for their election campaigns. Moreover, statutes and internal rules in each chamber circumscribe the outside income, gifts, travel, and other financial benefits that members

268. See Susan M. Davies, Comment, Congressional Encroachment on Executive Branch Communications, 57 U. CHI. L. REV. 1297, 1297-98 (1990) (describing how Congress adopted the prohibition but then retreated due to White House pressure).
may accept from private parties for personal use. The criminal law places other constraints on receipt by government officials of illicit financial benefits from outsiders, such as bribes and illegal gratuities.272

Until recently, however, authorities on legislative ethics had rarely addressed the problems generated by links between constituent service and financial benefits to members. Senator Paul Douglas, whose writings on legislative ethics were described earlier, stressed the importance of separating fundraising from casework, such as by allowing a “decent interval” to elapse between the favor and the request.273 Later, in 1970, House Advisory Opinion No. 1 declared that one “self-evident” principle to be observed was that “[a] Member’s responsibility in this area is to all his constituents equally . . . irrespective of political or other considerations.”274 For the most part, however, the Senate Ethics Committee had scant official guidance available to it when public pressure forced it to confront the Keating Five scandal. In fact, it became fairly clear from the early stages of that proceeding that the case implicated no violations of specific laws or Senate rules. Consequently, the case turned primarily on an application of Senate Resolution 338, a catchall provision empowering the Committee to redress “improper conduct which may reflect upon the Senate.”275

B. The Keating Case

As the reader will recall from our earlier perusal of the proceedings in the Keating case,276 the Committee decided to take no formal action against four of the senators. It issued a “reprimand” to Senator Alan Cranston, explaining that he had “engaged in an impermissible pattern of conduct in which fund raising and official activities were sub-

271. See supra note 32.
272. The principal criminal provisions are discussed infra text and accompanying notes 308-27.
273. Senator Douglas noted:

   It is probably not wrong for the campaign managers of a legislator before an
election to request contributions from those for whom the legislator has done appre-
ciable favors, but this should never be presented as a payment for the services
rendered. Moreover, the possibility of such a contribution should never be sug-
gested by the legislator or his staff at the time the favor is done. Furthermore, a
decent interval of time should be allowed to lapse so that neither party will feel
that there is a close connection between the two acts. Finally, not the slightest
pressure should be put upon the recipients of the favors in regard to the
campaign.

DOUGLAS, supra note 63, at 89.
274. Advisory Opinion No. 1, supra note 131, at 1078.
276. See supra notes 4-9 and accompanying text.
In its final decision on Cranston, as well as in its earlier report on the other four senators, the Committee was clearly sensitive to the central dilemma of the Keating Five case: articulating a basis on which to distinguish the five senators’ conduct from that of other senators who are constantly engaged in both campaign fundraising and constituent service, sometimes with the same people. In fact, the committee labored to write a narrow decision that could justify the reprimand of Cranston while reaffirming conventional norms of the Senate.

Specifically, the Committee defended constituent service as an essential aspect of a senator’s job, and indeed declared that a senator has an obligation to help a campaign contributor with a legitimate grievance, although, in such a case, the senator should “take special care” to avoid harm to the public trust. The Committee found that none of the senators had lacked a reasonable basis for raising questions about the fairness of the Bank Board’s treatment of Lincoln; when considered apart from Keating’s contributions to their campaigns, none of their interventions with regulators had been improper. Conversely, none of the contributions they received had been improper when considered apart from their acts of intervention. Thus, in Cranston’s case, the sole basis for disciplinary action was that his fundraising and official actions had been “substantially linked.” At the same time, the Committee did not say that this “linkage” had been causal; it expressly declined to find that there had been a corrupt bargain, which would have constituted bribery. The issue, instead, was basically one of unseemly appearances.

What was the substance of the “substantial linkage” between Cranston’s fundraising and official actions? The Committee was deliberately indefinite, stressing that its decision was based on “the totality of the circumstances.” Nevertheless, two broad areas of improper conduct emerge from the Committee’s explanation. First, the Committee found several instances in which discussions about Lincoln’s regulatory problems between Cranston and Keating, or their respective staffs, occurred in close contiguity with fundraising activities, sometimes at the same meetings or only days apart. The magnitude of Keating’s contri-

277. KEATING REPORT, supra note 4, at 20.
278. See id. at 6-7, 12.
279. See id. at 12.
280. See id. at 14.
281. See id. at 14-16.
282. See id. at 16.
283. See id. at 29, 36.
284. Id. at 35.
285. See id.
butions to organizations affiliated with Cranston — nearly one million dollars — may also have contributed to the Committee's feeling that the financial relationship between the two of them called for an extra measure of discretion that Cranston did not display.

The second basis for the Committee's decision was that Cranston's office practices resulted in an exceptional blurring of the line between fundraising activities and official business. The Committee relied specifically on the activities of Joy Jacobson, Cranston's chief fundraiser. Although she was not a Senate employee and had no substantive responsibilities, she sat in on meetings on the Lincoln problem, arranged some substantive meetings, and so forth. She also sent Cranston memora­nda indicating a belief that his major financial backers, including Keating, were entitled to expect favored treatment, a belief that Cranston apparently never sought to dispel.286

A critical appraisal of the Committee's rationale leaves one with the uneasy feeling that Cranston's misconduct regarding Keating was, at most, different only in degree from what other members of Congress do. Cranston's bitter "everyone does it" defense287 may not have been literally correct, because differences of degree can matter; but the Committee's reasoning, with its vague central concept of "substantially linked" activities and its reliance on the "totality of circumstances," had little capacity to provide guidance to other legislators. The finding that Cranston's office practices differed from those of other senators seems to have rested on a firmer factual foundation;288 yet one can scarcely believe that this finding would have led to disciplinary action in the absence of the charges relating to Keating.

C. Rule XLIII

Whatever the limitations of its ruling as a source of instruction for other senators, the Ethics Committee managed to save some face by pointing out that guidance might soon be forthcoming from another quarter.289 At the Committee's request, the Senate party leaders had appointed a bipartisan task force the previous April to draft prospective rules governing senators' constituent service activities. That task force, chaired by Senator Wendell Ford, presented its report the following spring in the form of a resolution. In July 1992 the Senate adopted the

286. See id. at 27-29.
287. See Kuntz, supra note 7, at 3438.
288. See KeATING REPORT, supra note 4, at 31.
289. See id. at 16, 50.
resolution — with an absolute minimum of fanfare — as Rule XLIII of the Senate Code of Official Conduct.

Like Advisory Opinion No. 1, which the House Ethics Committee adopted in 1970, Rule XLIII begins by affirming the right of a legislator to assist constituents or other petitioners by communicating with administrative officials. The rule lists several types of services that senators may render, such as "express[ing] judgments" and "call[ing] for reconsideration of an administrative response." Then comes the only substantive limitation in the rule: "The decision to provide assistance to petitioners may not be made on the basis of contributions or services, or promises of contributions or services, to the Member's political campaigns or to other organizations in which the Member has a political, personal, or financial interest." The rule also declares that senators are responsible for the conduct of their staff.

The rule and the accompanying section-by-section analysis by its sponsors are carefully drafted, but the substance of the rule is extraordinarily cautious. In fact, the rule really does nothing to upgrade the ethical standards governing senators' constituent service practices. The rule's admonition that decisions about whether to provide service to constituents and other petitioners "may not be made on the basis of" financial contributions merely restates a proposition that had previously been expressed in the House's Advisory Opinion No. 1 and in the Keating report. At most, therefore, the new rule elevates what had

290. Senator Ford brought the resolution to the Senate floor "[i]n the dead of night"; two senators made brief supporting remarks; the Senate passed the resolution by voice vote; and minutes later Congress left for a two-week recess. Glenn R. Simpson, Senate Quietly OKs Constituent Service Rule; Votes Just Moments Before Recess on Post-Keating Provisions for Handling Requests, ROLL CALL, July 13, 1992, available in LEXIS, Legis Library, Rollo! File. Obviously the Senate was not inclined to advertise its new rule as a triumph for reformism.

292. The task force borrowed this list almost verbatim from the House advisory opinion. See Advisory Opinion No. 1, supra note 131, at 1078.
294. "A Member's responsibility in this area is to all his constituents equally . . . irrespective of political or other considerations." Advisory Opinion No. 1, supra note 131, at 1078.
295. The cardinal principle governing Senators' conduct in this area is that a Senator and a Senator's office should make decisions about whether to intervene with the executive branch or independent agencies on behalf of an individual without regard to whether the individual has contributed, or promised to contribute, to the Senator's campaigns or other causes in which he or she has a financial, political or personal interest. KEATING REPORT, supra note 4, at 11-12; see also id. at 30.
been a supporting rationale in the Keating case to the status of a positive-law requirement.

Moreover, the rule is actually less stringent than Advisory Opinion No. 1, because it does not endorse the House committee's renunciation of suggestions of "favoritism or reprisal." That principle — as well as Senator Douglas's advice — presumably would carry some moral authority in any future ethics enforcement proceeding, but, as the Ethics Committee itself pointed out in the Keating case, they do not have the force of Senate precedents.296

Finally, although the new rule states a desirable precept as far as it goes, its utility as an enforcement mechanism seems quite limited. When the Ethics Committee is asked to enforce the rule, it will have to make an inquiry into motive, which may be fruitless in the absence of unusual "smoking gun" evidence. It is already hard for the Committee to reach a consensus on matters that are deeply personal and have such obvious partisan implications in the background. Making the operative standard inherently conjectural can only aggravate this difficulty. To be sure, one could have criticized the parallel language of Advisory Opinion No. 1 and the Keating report on the same ground. The point remains, however, that Rule XLIII is unlikely to make any significant difference in Senate norms or practice. Presumably the rule would prevent an office from overtly establishing a double standard between the services it renders to contributors and noncontributors; but it is hard to believe that any senatorial office has such a policy, at least after the Keating affair.297

Ultimately, each House must strike a balance between a legislator's freedom to serve constituents and her responsibility to uphold the public trust. Given the vagueness of the Keating case's teachings — combined with the remarkable restraint manifested in Rule XLIII — one can be confident that the Senate's efforts to reconcile these competing objectives will not be the last word. Accordingly, the following sections attempt to carry forward the debate where the prevailing ethics authorities have left off.

296. "[S]ources ... such as the writings of Senator Paul Douglas and Advisory Opinion No. 1 of the House ... have value as helpful guidance .... However, these sources, in and of themselves, are not precedential and should not be considered as established Senate norms for purposes of discipline." Id. at 14.

297. Had it been in force at the time of the Keating decision, however, Rule XLIII would have furnished a straightforward basis for disciplinary action in Cranston's case: the Committee found that Joy Jacobson made clear her belief that contributors deserved special favors and that Cranston never tried to disabuse her of this understanding. See id. at 20.
D. Tightening the Rules: Some Normative Premises

Before turning to specific proposals that are intended to curb favoritism and money influence in constituent service, this section examines some of the underlying policy considerations that any such reforms must take into account. Once again, the subject can be analyzed as involving conflicting responsibilities. Some of those responsibilities lend impetus to the argument for stricter regulation; others suggest the need for a degree of caution.

1. The Impulse Toward Stricter Regulation

In a sense, the case for new ethics rules in this area seems obvious. All would agree\textsuperscript{298} that members of Congress should not intervene in administrative proceedings because their services have been purchased for money. As noted earlier, most legislative ethics regulation is addressed to conflicts of interest between a member's self-interest and her legislative duties, and the manner in which constituent service can be used to promote one's reelection prospects would certainly fit that description.\textsuperscript{299} The weakness of Rule XLIII's response to this sort of abuse naturally stimulates interest in finding stronger remedies.

One difficulty in appraising the strength of this rationale, however, is that it does not, and apparently cannot, rest on tangible evidence of pervasive favoritism in constituent service. Disturbing as the Keating episode was, no one has substantiated the frequently encountered accusation\textsuperscript{300} that it was typical of a large class of cases. Indeed, political science accounts of constituent service tend to indicate the contrary. John Johannes, in his book on casework (published before the Keating scandal), reported that although interventions by congressional offices in administrative agency matters were not always free of favoritism, most were.\textsuperscript{301} Nor have other empirical studies of constituent service identified favoritism as a significant problem.\textsuperscript{302}

\textsuperscript{298} Except, perhaps, Charles Keating. When asked whether he thought his contributions had brought him influence, he responded, "I certainly hope so." Terry Atlas, Scandal Builds Around Lincoln S&L, CHI. TRIB., Nov. 19, 1989, at C7.

\textsuperscript{299} See supra notes 31-34, 83 and accompanying text.

\textsuperscript{300} See, e.g., Liedl, supra note 73.

\textsuperscript{301} See JOHANNES, supra note 44, at 124-25. Interestingly, Johannes seemed to assume that to the extent the offices gave special treatment to anyone, they generally did so for a member's personal friends or political allies, or for VIPs from the home district; he barely mentioned contributors as potential beneficiaries of such treatment. See id. at 123-27. But see id. at 124, 154 (quoting two caseworkers who alluded to favoritism for "big contributors").

\textsuperscript{302} Cain, Ferejohn, and Fiorina, although generally skeptical about the value of constituent service to the body politic, do not mention the issue of favoritism at all. See
Members and staff point to several factors as militating against special treatment for particular requesters, including a sense of professionalism among caseworkers, their awareness of existing ethics rules, and apprehensions about adverse publicity (which may be the greatest deterrent factor of all, particularly since the Keating affair). Political logic also lends plausibility to congressional offices' claims that they do not confine constituent service to friends and supporters: part of the motivation for casework is that the member can use it to reap political support from citizens who might not agree with her stands on policy issues.

Of course, the ethical hazards of special treatment for campaign contributors in the constituent service process deserve the ethics committees' attention even if overt favoritism in that process is not particularly common. Moreover, Congress has at least one other obvious reason to consider tightening existing safeguards against favoritism in constituent service: the prevalent public belief that Congress as an institution has fallen captive to wealthy "special interests." The Keating case has become a focal point for public disgust about lobbyists, PACs, and other symbols of the dominance of money in the legislature. The scramble for campaign donations has become so visible, and the amounts involved so large, that corruption seems to many citizens an ever-present danger on the legislative scene. Thus, even if stories about special favors in the specific context of constituent service are exceptional, they loom large when seen through the lens of the widely held conviction that people like Charles Keating already enjoy more than their share of political influence.

The House and Senate have recently made efforts to counteract these perceptions by voting to overhaul their rules on acceptance of gifts and on lobbyist registration. Similarly, the shaky state of Congress's reputation for integrity should give impetus to any proposal that promises to reassure the public that the legislative branch is striving to free itself from the risks of dependency and of "legalized bribery." The establishment of visible and relatively objective rules may minimize the

CAIN ET AL., supra note 45. Klonoff asserts that constituent service is equally available to all citizens. See Klonoff, supra note 46, at 708 n.26.

303. See JOHANNES, supra note 44, at 125-27.
304. See supra notes 247-48 and accompanying text.
305. See PRICE, supra note 63, at 119; supra notes 75-82 and accompanying text; cf. Lowenstein, supra note 30, at 849-50 (arguing that exchanges of favors between legislators and administrators — so-called "state-bribery" — should not be considered criminal bribery, in part because they benefit the affluent and nonaffluent alike).
chances of incidents that would embarrass their institution in the future. Perhaps such rules could also provide something of a safe harbor for members whose constituent service or fundraising practices might subsequently be questioned.

2. Cautionary Factors: Lessons from the Corruption Case Law

Nevertheless, there are valid reasons to approach proposals for reform with circumspection. First, Congress should leave sufficient latitude for members to perform constituent service, which in and of itself constitutes a legitimate feature of the informal checks-and-balances system of the government. The executive branch does make mistakes, and congressional intervention is often a useful corrective to bureaucratic error. This theme has been developed at length in Part II and need not be recapitulated here.

Second, the Senate Ethics Committee was correct when it remarked in the Keating case that fundraising for congressional campaigns is "a fact of life." Ethics rules designed to prevent special treatment for contributors must come to terms with that reality.

Obviously members of Congress desire latitude for campaign fundraising — but should the ethics rules accommodate that desire? One way to explore that question would be to examine the attitudes of a relatively disinterested branch of government — the judiciary — in an analogous context. Just as the field of administrative law sheds light on the proper contours of "undue influence" in legislative ethics, the criminal law offers suggestive lessons about the needs of legislators as candidates. The most relevant case law arises under the corruption statutes, including those punishing bribery, extortion, and illegal gratuities. These provisions raise numerous issues of interpretation that other scholarly works have dissected in detail; for present purposes only a few points from the case law need be mentioned.

307. KEATING REPORT, supra note 4, at 16.
308. See 2 KATHLEEN F. BRICKLEY, CORPORATE CRIMINAL LIABILITY §§ 9:28-41 (2d ed. 1993). Regarding the specific problem of applying the corruption laws to campaign contributions, see JOHN T. NOONAN, JR., BRIBES 621-51 (1984); Lowenstein, supra note 30; ROSENBERG & MASKELL, supra note 130, at 41-62. The last-cited study includes a discussion of the criminal "conflict of interest" statute, 18 U.S.C. § 203 (1994), which prohibits members from accepting "compensation" for "representational services" before federal agencies. See id. at 48-52. Neither that statute nor several other obscure criminal provisions analyzed by Rosenberg and Maskell will be discussed here, because of the absence of case law directly addressing the issue with which this section is concerned. Cf. James M. Falvey, Note, The Congressional Ethics Dilemma: Constituent Service or Conflict of Interest?, 28 AM. CRIM. L. REV. 323, 348, 358-59 (1991) (acknowledging, despite the allure of applying § 203 to facts like those
The corruption laws certainly place some outer limits on a legislator's ability to use constituent service as a fundraising device. Undoubtedly, campaign contributions are sometimes bribes, and a legislator's intervention with an administrative agency is sometimes the consideration for which the forbidden payment is made. Furthermore, the Speech or Debate Clause of the Constitution, which prevents courts from examining the "legislative acts" of members of Congress, would probably not impede a prosecution of a legislator for taking a bribe in exchange for constituent service, because casework is not the kind of "legislative act" that the clause shields from judicial scrutiny.

Nevertheless, the courts have sometimes taken great pains to avoid a reading of the corruption laws that would interfere with the legitimate needs of the campaign finance system. The Supreme Court made its clearest statement along these lines in McCormick v. United States. The defendant was a West Virginia state legislator who solicited money from an organization of foreign-born doctors on whose behalf he was sponsoring legislation to liberalize medical licensing requirements for organization members. The Department of Justice prosecuted him under the Hobbs Act, an extortion statute that applies to "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." McCormick defended his actions on the ground that the payments he had received from the doctors had been campaign contributions.

The Court found compelling policy reasons to read the statute to permit normal solicitation of political contributions:

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of

308. See United States v. Anderson, 509 F.2d 312, 330-31 (D.C. Cir. 1974); Lowenstein, supra note 30, at 808-09.

309. See United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990); United States v. Podell, 519 F.2d 144 (2d Cir. 1975).

310. See, e.g., United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990); United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990); United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990); United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990).

311. U.S. CONST. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, they shall not be questioned in any other Place ....").


extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries . . . would open to prosecution . . . conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.315

Therefore, political contributions would be subject to prosecution as having been obtained "under color of official right," within the meaning of the Hobbs Act, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking."316 The Court's requirement of an "explicit promise or undertaking" — one form of a "quid pro quo" — was striking because of the absence of statutory language on which to predicate it.317 Equally striking, perhaps, is that even the government essentially agreed with this requirement, at least in the abstract; its defense of the verdict in McCormick rested on the assumption that the jury had properly found that the payments to McCormick were not campaign contributions at all.318

The strained statutory construction to which the Court resorted in McCormick319 would not have been necessary if the case had involved a

315. McCormick, 500 U.S. at 272. Note the Court's suggestion that "ethical considerations" may diverge from the dictates of the criminal law. Still, if the Court is correct in its belief that the described conduct is "unavoidable," ethics rules must take that fact into account, just as the criminal justice system does.

316. 500 U.S. at 273.

317. See 500 U.S. at 277 (Scalia, J., concurring).

318. See Brief for the United States at 29, McCormick (1991) (No. 89-1918) ("If this case had involved a campaign contribution rather than a personal payoff, it would have been necessary for the government to prove that the contribution was obtained by a threat to take unfavorable action or a specific promise to take favorable action, i.e., a quid pro quo."). See also Evans v. United States, 504 U.S. 255, 286 (1992) (Thomas, J., dissenting) (reasoning that the quid pro quo requirement in McCormick was necessary "to prevent the Hobbs Act from effecting a radical (and absurd) change in American political life").

319. The policy analysis in McCormick may have lost some of its practical importance in light of a later case, Evans v. United States, 504 U.S. 255 (1992), in which the Court apparently adopted a restrictive mental state requirement for all extortion prosecutions arising out of the "under color of official right" language of the Hobbs Act — regardless of whether campaign contributions are involved. See 504 U.S. at 268 n.20. The Court defined the requisite state of mind for such prosecutions somewhat more broadly than McCormick had: an agreement would not have to be explicit, but could be inferred from the official's having "obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 504 U.S. at 268; see also 504 U.S. at 257 (finding that the defendant's acceptance of bribe, with knowledge
member of Congress prosecuted under the federal bribery statute, 18
U.S.C. § 201(b)(2). That statute contains explicit language suggesting a
quid pro quo requirement: the bribed official must have solicited, ac-
cepted, or agreed to accept something of value “in return for . . . being
influenced” in the performance of an official act.320 Moreover, the bri-
bery statute also requires a showing that the official acted “corruptly,” a
criterion that would surely leave room for judicial flexibility if some fu-
ture case were to present a possibility that a member of Congress had
been convicted of bribery because of normal fundraising actions.321
Thus, although one reasonably could assume that, on facts like those of
McCormick, the Court would require at least as strong a showing of a
guilty mental state under the bribery statute as it has required under the
Hobbs Act,322 the case law acknowledging a quid pro quo requirement
under § 201(b)(2)323 is not a particularly illuminating test of the judici-
ary’s solicitude for the campaign fundraising process.

The statute imposing liability for the offense of accepting an illegal
gratuity, 18 U.S.C. § 201(c)(2), is a different story. It applies to any of-
official who, “otherwise than as provided by law for the proper discharge
of official duty . . . seeks [or] receives . . . anything of value personally
for or because of any official act performed or to be performed by such
official.”324 On its face this statute seems to pose a considerable threat
to routine solicitation or acceptance of campaign contributions, because
its words do not even hint at a requirement of an illicit bargain or cor-
rupt motive.

of payor’s intent to ensure favorable action, “constituted an implicit promise to use his
official position to serve the interests of the bribegiver”). Lower courts remain uncer-
tain whether the Court has modified McCormick itself, that is to say, whether a jury
should be instructed to apply the relaxed Evans state of mind rules even if it finds that a
payment was a bona fide campaign contribution. See United States v. Blandford, 33
F.3d 685, 695-98 (6th Cir. 1994) (summarizing competing views), cert. denied, 115 S.

321. Lowenstein’s solution to the problem of potential overbreadth in the bribery
laws is to define the scope of “corruptness” by reference to “intermediate political the-
ory” — theoretical assumptions about what rules are most conducive to the health of
the political system. See Lowenstein, supra note 30, at 805-06. That method is roughly
comparable to the approach used by the McCormick and Brewster decisions discussed
in this section, although these courts may have reached substantive conclusions that dif-
fer from Lowenstein’s.
322. Cf. United States v. Allen, 10 F.3d 405, 411 (7th Cir. 1993) (dictum) (sug-
gest that bribery statutes should be read consistently with McCormick unless they
contain language plainly suggesting otherwise).
323. See, e.g., United States v. Niederberger, 580 F.2d 63, 68 (3d Cir. 1978);
United States v. Raborn, 575 F.2d 688, 692 (9th Cir. 1978); United States v. Strand, 574
F.2d 993, 995 (9th Cir. 1978).
Nevertheless, in a leading decision, United States v. Brewster, the D.C. Circuit insisted that the gratuity statute, too, must be interpreted in light of political reality. Reversing a senator's conviction on gratuity charges because of faulty jury instructions, the court pointed out the problem: the statute would eradicate the distinction between an unlawful gratuity and a legitimate campaign contribution if it were construed to allow liability on the basis of a legislator's mere knowledge that a contribution was made because of the legislator's record and would probably be followed by further contributions if the legislator maintained a similar record:

No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.

The situation might be different, the court noted, in a prosecution against an unelected official, such as an Internal Revenue Service agent. In such a case the government might not need to prove any mental state; any "tip" paid to the agent as an individual could be considered wrongful, as it would compensate him for actions that he is supposed to take anyway. But this logic does not work for elected officials, who under some circumstances should accept payments of money based on the giver's appreciation of the official's past or anticipated actions. Therefore, the gratuity offense as applied to an elected official must contain an element of criminal intent.

For this article's purposes, the significant aspect of McCormick and Brewster is not whether they drew lines in precisely the right place — indeed, both have been criticized. More important is the courts' underlying point: the criminal law must not be applied in a manner that makes political fundraising unworkable. One need make only a small extension of this reasoning to arrive at the conclusion that ethics rules,

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325. 506 F.2d 62 (D.C. Cir. 1974).
326. 506 F.2d at 81. See also Lowenstein, supra note 30, at 848 & n.237 (agreeing that a straightforward reading of the gratuity statute is unacceptable, because it would seriously interfere with legitimate campaign finance activities).
too, must take account of candidates' legitimate interest in raising money for reelection campaigns.\textsuperscript{329}

3. The Campaign Finance Reform Connection

The previous section's extrapolation from judicial decisions may seem unconvincing, because the legislature — unlike the judiciary — does not have to take the campaign finance system as a given. Congress could alter the system itself. Indeed, the Senate Ethics Committee's report on the Keating case included an "urgent" call for bipartisan campaign finance reform.\textsuperscript{330} Of course, campaign finance reform is already the subject of a vast literature, and this article cannot do justice to its complexities. Still, the logical connection between that subject and the Keating scandal is too obvious to ignore. The following discussion does not argue for any particular reform program; it merely attempts to demonstrate that campaign finance reform would not necessarily eliminate, and might not even go far toward ameliorating, the problems of ethics regulation examined in this Part.

In the first place, the need for congressional candidates, including incumbents, to raise large sums from private sources is likely to remain a "fact of life"\textsuperscript{331} even if Congress does enact some form of campaign finance reform legislation. For that situation to change, campaign costs would have to be either heavily subsidized or drastically reduced, and neither is probable. The option of large-scale public financing of Senate and House races appears to lack support from the electorate and has little chance of being adopted anytime soon.\textsuperscript{332} This is not to say that new campaign finance legislation is unlikely to draw upon public resources

\textsuperscript{329} See \textit{Congress and the Public Trust}, supra note 38, at 180 (noting that, unlike other gifts, "campaign contributions are tolerated [in governmental ethics] because they are a necessary incident of our present electoral system").


\textsuperscript{331} See \textit{supra} note 307 and accompanying text.

at all. For the foreseeable future, however, political realities probably dictate that both incumbents' and challengers' campaigns will remain primarily dependent on private money.

At the same time, efforts to overcome the reality that congressional campaigning is expensive would likely prove futile or self-defeating. Barring a major reappraisal by the Supreme Court of its First Amendment case law, Congress could not impose mandatory limits on spending without inviting a strong constitutional challenge. Moreover, the weight of the political science literature indicates that stringent limits on campaign spending would be ill-advised as a matter of policy, because they would handicap challengers and entrench incumbents. Challengers generally need generous funding if they are to have a serious chance of overcoming the advantages of incumbency — one of which, as we have seen, is the incumbent's record of constituent service itself. Perhaps there is a case for some spending limits, particularly if they are made voluntary and set at relatively high levels. Much less acceptable, however, is the notion that a serious reform program would or should limit expenditures to such an extent that members would lose the incentive to exploit constituent service for the sake of campaign contributions.

Even if one accepts the thesis developed to this point — that one should not count on campaign finance legislation to eliminate the need

333. See Buckley v. Valeo, 424 U.S. 1, 54-59 (1976). In view of the Court's recent reaffirmation of First Amendment limits on regulation of election-related spending in Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996), the prospects for such a retrenchment seem remote at best. Although Congress could presumably overcome the constitutional difficulty by making spending limits voluntary and offering incentives to induce candidates to comply with them (as it has done with public financing of presidential campaigns, see Buckley, 424 U.S. at 90-108), generous incentives would revive the problem of taxpayer resistance to the funding of elections from the public treasury.


335. See supra notes 87-89 and accompanying text.

336. The discussion in the text has assumed for the sake of argument that efforts to curb the money flow would actually be effective, but that premise is open to doubt. Experience testifies to candidates' ingenuity in finding ways to circumvent legislative ceilings on their campaign spending. See, e.g., Alexander, supra note 334, at 170.
for extensive political fundraising — one might expect that such legislation would at least improve the ethical environment for congressional constituent service. But even that proposition is open to doubt. As scholars have repeatedly observed, the history of campaign finance reform is a "classic illustration of the law of unanticipated consequences." Future measures could easily meet a similar fate.

The difficulties can be explored in connection with a few reform proposals that respond directly to problems that the Keating scandal highlighted. Charles Keating's ability to generate huge contributions to the five senators was a direct result of his assiduous exploitation of loopholes that permitted "bundling" (aggregation of contributions from many donors for a single candidate) and "soft money" donations (contributions to party activities, such as voter registration and get-out-the-vote drives). Current campaign finance reform bills contain provisions that would curb these practices, and Congress should give these proposed measures due attention.

As intrinsically attractive as these proposals may seem, however, their significance for the ethical climate of Congress should not be evaluated in a vacuum. A crucial question is whether the avenues for fundraising that would exist under the new regime, taken as a whole, would be less likely to lead to abuse than the avenues available under the old system. This question cannot be answered with much confi-

337. Sorauf, supra note 332, at 1365; see Lillian R. BeVier, Campaign Finance Reform: Specious Arguments, Intractable Dilemmas, 94 COLUM. L. REV. 1258, 1276, 1279 (1994); Schotland, supra note 252, at 437 & n.16.


340. The leading bill of the 104th Congress was a "bipartisan" package that, among other things, would have established "voluntary" spending limits and offered various incentives to induce candidates to accept them. It also would have imposed severe restrictions on bundling, soft money contributions, and PACs. See S. 1219, 104th Cong., 1st Sess. (1995). In June 1996 the Senate sponsors lost in an attempt to overcome a filibuster, and essentially conceded that the bill would not be enacted during the 104th Congress. See Adam Clymer, Senate Kills Bill To Limit Spending in Congress Races, N.Y. TIMES, June 26, 1996, at A1.

341. Both of the practices under discussion have their defenders. See Beth Donovan, Much-Maligned 'Soft Money' Is Precious to Both Parties, 51 CONG. Q. WKLY. REP. 1195 (1993) (noting support among political scientists for parties' liberal access to soft money); Robert Alan Dahl, 'Bundling' Political Expression, LEGAL TIMES OF WASH., Sept. 20, 1993, at 23 (opposing ban on bundling). The basic question for Congress is whether it can preserve the beneficial aspects of bundling and soft money while preventing them from being used to undermine the fundamental purposes of election regulation.
dence. Reforms such as curbs on bundling or soft money would presumably have the effect of increasing the pressure on members to solicit from a larger number of donors. It is at least plausible to suppose that this pressure could actually intensify incumbents' temptations to exploit constituent service as one means of winning support from these donors.\footnote{342}

Other components of a reform package might augment those temptations even further. For example, one of the most popular proposals, which stands a good chance of becoming part of any overhaul of campaign finance laws,\footnote{343} is to eliminate or sharply reduce the amounts that candidates may accept from political action committees (PACs). Whatever the overall merits of this idea,\footnote{344} it seems inapt as a cure for the problems of the Keating case.\footnote{345} By definition, PACs tend to be broad-based. They are likely to be much more interested in a member's legislative record than in, say, the member's willingness to intervene in an agency enforcement proceeding brought against an individual.\footnote{346} Indeed, PACs have seldom if ever been accused of attempting to subvert congressional constituent service functions. Perhaps, as some argue, tighter constraints on PACs are essential because of their corrupting influence on congressional lawmaking;\footnote{347} nevertheless, a shift in the relative influence of PACs and individuals in the financing of congressional campaigns would not seem likely to improve, and might actually aggra-

\footnotetext{342}{Cf. Sorauf, supra note 332, at 1365 ("[T]he danger of making the supply of money too small for the candidate demand [is that] the 'value' of contributed money increases and thus its political leverage.").}

\footnotetext{343}{See supra note 340.}

\footnotetext{344}{Much of the scholarly literature suggests that the case against PACs is not as strong as the public usually assumes. See Alexander, supra note 334, at 171-72; Larry J. Sabato, PACs and Parties, in Money, Elections, and Democracy: Reforming Congressional Campaign Finance 187, 187-90 (Margaret Latus Nugent & John R. Johannes eds., 1990); Sorauf, supra note 332, at 1364-65.}

\footnotetext{345}{Cf. Simpson, supra note 330 (debunking Common Cause advertisements that cited the Keating scandal in support of proposals to ban PACs, even though Keating did not operate through a PAC).}

\footnotetext{346}{Agency rulemaking proceedings may occupy a middle ground between these poles: one can easily envision a PAC attempting to induce a member of Congress to be "helpful" in such a proceeding, but at the same time rulemaking proceedings are considered among the most appropriate for legislative participation. See supra note 179.}

\footnotetext{347}{In one of the more ambitious efforts to document the corrupting power of PACs, Lowenstein claims that PACs tend to promote their ends by using a "legislative strategy" — that is, trying to use donations to win the passage of statutes that favor their interests. See Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted, 18 Hofstra L. Rev. 301, 308-13, 329-35 (1989). He does not assert that they similarly corrupt constituent service.}
vate, the political context within which casework occurs. This might become one of the “unanticipated consequences” of campaign finance reform.

Finally, even if Congress could somehow manage to devise a workable and politically acceptable method by which its members could run for office without any major donors, the ethics issues examined in this Part would not disappear entirely. Although lavish political support like Keating’s triggers the most intense apprehensions about congressional favoritism, much smaller contributions — which would continue to exist under any plausible campaign finance regime — sometimes touch a raw nerve in public opinion as well. Regardless of the fate of campaign finance reform, ethics authorities must think through the manner in which they will respond to those sentiments.

E. Reform Proposals and New Approaches

Against this background of competing tensions, Congress should look with an open mind at suggestions for further ethical limitations on constituent service. Perhaps the rules can be refined in a way that would provide greater reassurance of members’ integrity without unduly burdening their ability to perform the ordinary functions of their offices. Moreover, even members who oppose further restrictions on their freedom of action should appreciate the desirability of making existing expectations more explicit. Clarification of what is now the “unwritten law” might make it easier to follow, more predictable in its application, and more reassuring to the public than is now possible under the prevailing, open-ended “improper conduct” standard, a criterion that the chairman of the Senate Ethics Committee, Senator Heflin, aptly described as a know-it-when-you-see-it test.

If Congress does reopen serious consideration of the ethics issues surrounding constituent services for contributors, what new standards should it adopt? Analysis could begin with some of the ideas for regulation that emerged during the Keating proceedings themselves. During

348. See Two Cheers for PACs, ROLL CALL, May 10, 1993, at 4 (“Our own work at this newspaper has shown, time and again, that truly unsavory donors are not PACs, but individuals [such as Keating].”).

349. See, e.g., Contributions and Constituent Service, ST. LOUIS POST-DISPATCH, Oct. 16, 1993, at 14B (editorial criticizing a state legislator who wrote to a state agency on behalf of a day care home and soon afterwards accepted a $250 campaign contribution from the home’s owners).

350. See Kuntz, supra note 7, at 3432.
the Ethics Committee's hearings, Special Counsel Bennett proposed four principles for the Committee's consideration:351

1. A Senator should not take contributions from an individual he knows or should know is attempting to procure his services to intervene in a specific matter pending before a Federal agency.

2. A Senator should not take unusual or aggressive action with regard to a specific matter before a Federal agency on behalf of a contributor when he knows, or has reason to know, the contributor has sought to procure his services.

3. A Senator should not conduct his fundraising efforts or engage in office practices which lead contributors to conclude that they can buy access to him.

4. A Senator should not engage in conduct which would appear to be improper to a reasonable, nonpartisan, fully informed person.

The Committee's ultimate decision did not expressly endorse any of these principles, but its reasoning contained echoes of all of them. The Bennett standards deserve attention here because, although each can be criticized, they do pose the right issues for consideration: (1) simultaneity of constituent service with solicitation or acceptance of political contributions; (2) intervention on behalf of contributors; (3) office practices; and (4) discipline based on the appearance of impropriety.

1. Simultaneity of Campaign Contributions and Intervention

   a. The "Decent Interval" Test. Up to a point, Bennett's principle that "[a] Senator should not take contributions from an individual he knows or should know is attempting to procure his or her services to intervene in a specific matter pending before a Federal agency" bears comparison with the first prong of the Ethics Committee's ruling on Senator Cranston's conduct. Both start from the premise that, even if a legislator's decision to press an individual's cause before an agency is not actually influenced by the individual's campaign support, the risk of influence becomes intolerably high when these two events occur close together in time, and public appearances can suffer as a result. Thus, both Bennett's and the Committee's positions recall Senator Douglas's advice that "a decent interval of time should be allowed to lapse" between a favor and solicitation of a campaign contribution.352 At the same time, large differences of degree separate Bennett's proposed rule


352. See supra note 273 and accompanying text.
from the Committee's holding: the Committee went to great lengths to portray the Keating-Cranston connection as extreme, but Bennett's rule would govern a broad class of situations.

Bennett claimed that his rule could be deduced from extant Senate precedents, but that proposition was shaky. Collection of campaign donations and representation of constituent interests before federal agencies are legitimate and, in many cases, routine events. For the Ethics Committee to have treated the confluence of these two common events as unethical simply because they occurred at about the same time would have required a considerable extrapolation of precedent—an extension that probably would have been too zealous in the context of a disciplinary proceeding, in which considerations of fair notice loom large.

That conclusion, however, does not mean that the Senate or House should not adopt the Bennett rule, or something like it, as a prophylactic measure, aimed at preventing the kind of unseemly appearances that the Keating Five case generated.

If one thinks about Bennett's principle this way, it actually seems underinclusive. First, it refers only to taking a contribution, as opposed to solicitation; surely, however, any circumstances that would foreclose an ethical member from passively accepting a contribution must likewise prevent that member from actively requesting it. Second, Bennett's rule would discourage contributions while a constituent is seeking intervention; yet potentially troublesome appearances do not evaporate instantly once a legislator accedes to such a request. Perhaps, therefore, the ethics committees should explicitly endorse Senator Douglas's suggestion that the legislator who intervenes with an agency on a constituent's behalf should wait for "a decent interval of time" before soliciting or accepting a campaign contribution from the beneficiary. To date the committees have never endorsed that notion, even as an aspirational matter.

353. See 1 Keating Hearings, supra note 129, at 58 (Nov. 15, 1990).
354. The suggested rule would address only simultaneity between political contributions and intercession with administrative agencies. It would not, for example, speak to the situation in which a member arranges to hold a fundraising event at just around the time when he expects to be making decisions on a bill that will vitally affect some of the persons whom he has invited to the event. That situation is not uncommon. See, e.g., David E. Rosenbaum, Defying Odds, New Yorker Saves Milk Subsidies, N.Y. Times, Dec. 6, 1995, at A1; Moynihan Holding Well-Timed Party, N.Y. Times, June 11, 1993, at A20. Nevertheless, until Congress finds a way to avoid conducting legislative business during campaign season, it probably cannot adopt a categorical ban on such "well-timed" events.
The purpose of this guideline would be to erect a temporal buffer between casework and donation, so as to reduce the risk, and minimize the appearance, of a bargain between legislator and petitioner. To be sure, the very fact of mutual benefits between the two, even if separated in time, will strike some external observers as suspicious. That kind of appearance, however, is not avoidable at reasonable cost. As discussed above, our campaign system runs on private donations, and it would be perverse to try to make sure that a donor has no reason for his or her gift. Thus, the rules should not seek to prevent contributions that are motivated by appreciation for the member's services. Rather, the limited goal of the suggested rule would be to give the public a degree of assurance that a donation and an intervention have stemmed from two separate decisions, rather than from a direct exchange of benefits between legislator and constituent.

Although individual members would no doubt feel that such a measure would be a considerable intrusion on their autonomy, they probably would be able to live with it. After all, the Committee hearings elicited testimony from senators who claimed that they already operate under self-imposed restraints of this kind.355 The Keating episode may have made such self-restraint more common. To the extent that members are already living by the suggested principle, the case for codifying it becomes all the stronger.356

355. Senator Inouye testified that he returns contributions that he receives within a few days after assisting the donor. See 3 Keating Hearings, supra note 129, at 46 (Dec. 3, 1990). Two of the Keating Five senators testified more generally that they keep discussions of casework and contributions separate. See 5 id. at 177 (Jan. 4, 1991) (Sen. Glenn); id. at 20 (Jan. 9, 1991) (Sen. DeConcini). In addition, Senator Riegle testified that he had returned contributions generated by Keating because he was troubled by their proximity in time to the fateful April 1987 meetings. See id. at 81-82 (Jan. 7, 1991); see also Charles R. Babcock & Helen Dewar, Keating Fallout: Senators Draw Own Lines on When To Intervene, WASH. POST, Jan. 16, 1991, at A17 (noting Senator Rudman's policy against "accepting substantial contributions from any company during a period in which the company is facing a 'major confrontation' with regulatory agencies").

356. The committees would need to resolve various implementation issues, including the length of the waiting period and the advisability of exempting contributions below a certain sum. They might also consider exempting solicitations effected on a mass basis, such as direct mail or phone banks.

In addition, the committees would need to take account of the fact that some administrative transactions can run for years and go through various stages before a result is reached. Indeed, Charles Keating's case is illustrative: his feud with the FHLBB lasted for many months, and he drew upon congressional assistance frequently during that period. See Keating Report, supra note 4, at 21-27. There may be no entirely satisfactory way to write a rule to deal with such a situation, but one option would be to declare that a member must not accept a contribution from a constituent, who has benefitted from casework unless the member waits for a "decent interval of time" after
A rule codifying the Douglas "decent interval" principle should disapprove contributions from persons who the member knows are seeking or have recently sought constituent service — but not, as in Bennett's proposal, from persons who the member "should know" have sought such service. If the member who receives a contribution does not actually know that the contributor had recently sought the legislator's help in a dispute with a federal agency, then by hypothesis there was no illicit bargain or understanding between the two. Indeed, the logic behind the "should" in Bennett's principle is difficult to penetrate. The Keating decision teaches that members who want to play it safe should, to the extent feasible, separate the processes of casework and fundraising; this lesson is not easy to harmonize with Bennett's implication that members of a fundraising staff should make it their business to find out the identities of current requesters of the office's constituent services.

Moreover, although this qualification would limit the scope of the rule, that consequence is attractive, because it would tend to protect legislators from becoming embroiled in enforcement proceedings because of a minor transgression. Many of the transactions addressed by the rule may involve mundane casework activity and small donations, where the possibility of an innocent misunderstanding is significant. The rule should not be so stringently worded as to invite the use of ethics complaints as a tool of harassment — an ever-present risk in the high-stakes, sometimes hardball, world of congressional politics. On the other hand, the very existence of the rule would demonstrate that solicitation of contributions during or immediately after discussions with a congressional office about constituent service is disfavored.

b. Illustrative Controversies. Two post-Keating controversies illustrate the scope and limits of the suggested rule. The first example stems from one of the charges leveled at Representative Newt Gingrich soon after he became Speaker of the House. He reportedly wrote to the Food and Drug Administration to urge approval of a home testing kit for the HIV virus. The kit's manufacturer, Direct Access Diagnostics, had requested any steps to help the constituent with her problem. This solution would not necessarily foreclose the possibility of the member's soliciting or accepting campaign support from the constituent, because even protracted struggles with the bureaucracy typically have lengthy periods of "down time" in which no member is actively working on the matter.

uted $5000 to a foundation that has close ties to Gingrich and funds his speeches and educational activities. The company itself contributed $25,000 a few months later.\textsuperscript{358} The House Ethics Committee dismissed the charge,\textsuperscript{359} perhaps because it believed the company’s assertion that these contributions were unsolicited.\textsuperscript{360}

The Committee may have reached the right disposition under the House’s current rules, but under the rule suggested here the first donation, if not the second, would presumably have been impermissible.\textsuperscript{361} The suggested rule would be a prophylactic measure and would not turn on whether or not one believed the company’s claim. The premise would be that donations in the immediate wake of constituent service should be banned on an across-the-board basis, because they pose unusual risks of an impermissible bargain between the two parties, and enforcement authorities cannot feasibly identify which specific incidents have actually involved an improper exchange. At the same time, the rule would not seriously interfere with legitimate fundraising, because the Speaker could still accept a donation if the company were to remain appreciative at the end of the "cooling off period."

The second illustrative controversy developed out of memos written by an aide to Senator Frank Lautenberg during the senator’s 1994 reelection campaign. Addressed to the senator’s fundraising staff, the memos mentioned several individuals for whom the senator had recently done favors and urged the fundraisers to invite these individuals to make contributions to the senator’s reelection campaign.\textsuperscript{362} The memos were leaked to the press and led to charges that the senator had acted improperly by “targeting” beneficiaries of constituent service.\textsuperscript{363}

\textsuperscript{358} See Patrick J. Sloyan, Corporate Gifts to Gingrich Group: Critics Target Foundation Run by Associate, NEWSDAY, Jan. 29, 1995, at A5.

\textsuperscript{359} See Panel To Hire Special Counsel in Gingrich Investigation, 53 CONG. Q. WKL. REP. 3761 (1995) (text of Committee letter).

\textsuperscript{360} See Sloyan, supra note 358.

\textsuperscript{361} This discussion assumes that Representative Gingrich could not have exonerated himself by merely showing that the foundation to which the donations were made was not directly involved in his reelection campaign. Cf. Senate Rule XLIII(3) (decisions to provide assistance may not be based on contributions given to “organizations in which the Member has a political, personal, or financial interest”); KEATING REPORT, supra note 4, at 11-12 (same). In the Keating case itself, the Senate Committee treated Keating’s contributions to voter registration organizations and the California Democratic Party as being tantamount, for purposes of that proceeding, to political contributions to Cranston himself. See id. at 21-23.


\textsuperscript{363} See Simpson, Second Memo, supra note 362.
The Senate Ethics Committee examined the situation and found no impropriety, but added that the "appearance created by the memoranda entries is troubling."364

This situation would entail no violation of the rule proposed here, and the Ethics Committee's refusal to find a violation of the Senate's current rules also seems sound. Even Senator Douglas's classic monograph on government ethics says that it is "probably not wrong" to solicit contributions from past beneficiaries of constituent service — provided fundraisers wait a "decent interval" before making their appeal.365 No one seems to have claimed that the solicitations proposed in the Lautenberg memos would have offended this temporal limitation; rather, critics suggested that the senator should not have "targeted" beneficiaries of constituent service at all. Yet, to repeat, it is natural and appropriate for an incumbent officeholder to seek contributions from persons who have identifiable reasons to appreciate his record. Accordingly, if a member of Congress has reason to believe that a potential donor was grateful for advocacy performed on her behalf and regards the legislator as the kind of conscientious advocate of district or state interests who deserves to be returned to office, solicitation of a campaign contribution from her would be legitimate. This is not materially different from a member's decision to seek contributions from people who approve of or believe they have benefited from the member's record as a lawmaker.366


365. See supra note 273.

366. Professor Thompson appears to argue that campaign contributors given in response to constituent service activities do deserve less accommodation than contributions based on a member's voting record, because in the former case the contributor and candidate may not even share ideological positions. A contribution "given to support a candidate with whom a citizen shares a general political orientation or agrees on issues that he or she thinks salient . . . directly serves a political function: its aim is to help a candidate get elected, and works through the political process." THOMPSON, supra note 28, at 113-14 (footnote omitted). In contrast, a contribution resulting from constituent service "serves no public political function. A contribution given without regard to the political positions of the candidate only incidentally provides political support; its primary aim is to influence the candidate when in office." Id. at 113. This statement seems not even to acknowledge the possibility of a contributor who genuinely appreciates the member's efforts and believes that the member's helpfulness and responsiveness entitle him to another term. Of course, some contributions that follow in the wake of casework are actually payoffs for services rendered, and therefore corrupt — but one could equally well say that some contributions from a legislator's ideological soulmates are actually payoffs for his having been "helpful" on a pending bill. The question then becomes why one should presume corruption, or the subversion of democracy, more readily in the casework situation than in the lawmaking situation. Perhaps Thompson
The newspaper *Roll Call*, which broke the Lautenberg story, acknowledged in an editorial that senators routinely “target” contributors who have interests before their committees. The newspaper thought Lautenberg’s case was different because the memos had been “citing specific acts the Senator had taken and seeking to capitalize on them.” This focus on “specific acts” would be reasonable in a case in which a legislator or his fundraisers “cited” those acts to the targeted individual. Under those circumstances it would be arguable, though by no means self-evident, that the solicitation embodied a subtle element of pressure, a low-level type of extortion that could properly concern ethics authorities. But to assume that anyone used or intended improper appeals in the Lautenberg situation would have been pure speculation. The memos — which apparently were the sole basis for the allegations against the senator — merely referred to the “specific acts” as reasons why the fundraisers should approach the individuals in the first place. A plan to approach potential donors who have only one or two known reasons to support the candidate seems indistinguishable, in ethics terms, from a plan to approach potential donors who have a wide range of reasons to do so.

The Lautenberg controversy illustrates the confusion that was easy to predict from the Keating decision, which condemned Cranston for means to contend that citizens have no valid reasons to contribute to a political campaign except to advance their positions on policy issues. Yet many voters consider their representative’s stands on issues less important than his helpfulness as an advocate for the people of the district. See *Cain et al.*, supra note 45, at 37-43. Intellectuals may not agree with these voters’ priorities, but the prevalence of this attitude in the electorate is undeniable. It is by no means clear that incumbents undermine the democratic process when they seek financial support from voters who hold this view.

To some extent Thompson may be arguing that donations stimulated by casework are illegitimate because congressional intervention in the/administrative process is itself ethically dubious:

[C]itizens should influence their representatives and representatives should influence policy only in ways that can be contested through public deliberation and political competition in a democratic political process. . . . When legislators help private interests use public authority without submitting their claims to the full test of the democratic process, they are agents of corruption. *Thompson*, supra note 28, at 114. This suggestion reopens the policy debate, canvassed in Part II, about the overall merits of constituent service. One response to Thompson is that congressional intervention can actually strengthen the democratic process by bringing the perceptions of popularly elected officeholders to bear on administrative conduct that might otherwise escape effective external review.


368. A thin line may separate merely “referring” to past favors from “pressuring” beneficiaries or depicting the requested contribution as “a payment for services rendered,” practices that Douglas opposed. See *supra* note 273. On the other hand, Douglas’s general support for solicitation of contributions from recipients of favors indicates that he would not have dismissed all such solicitation as “inherently” coercive.
having “substantially linked” fundraising and official actions, without fleshing out the contours of that vague term. Close analysis shows, however, that Lautenberg did not engage in the kind of linkage that the Committee had denounced or had reason to denounce. The Committee’s refusal to impose sanctions was correct.369

2. Intervention on Behalf of Contributors

As we saw earlier, efforts to regulate legislators’ “pressure” or “aggressiveness” toward administrative agencies are fraught with complexities. This section considers the specific question whether legislators providing constituent service ought to approach agencies with special restraint if the intended beneficiary is a contributor. Bennett’s second proposed rule gave an affirmative answer: “A Senator should not take unusual or aggressive action with regard to a specific matter before a Federal agency on behalf of a contributor when he knows, or has reason to know, the contributor has sought to procure his services.” Although the Senate Ethics Committee did not directly endorse Bennett’s principle in the Keating case, it did acknowledge concerns similar to his. In particular, the Committee cited Keating’s contributions to Senator DeConcini’s campaigns as one reason why the senator should have investigated the issues in Lincoln’s case more thoroughly before pursuing it so aggressively.370

Bennett’s proposed rule seems awkwardly worded. A legislator working on behalf of a noncontributor may have legitimate reasons for displaying “unusual or aggressive action” toward an agency — for example, if the agency behaves in a particularly uncooperative way. To the extent that Bennett’s rule can be read to imply that a contributor should be entitled to less active representation, it seems manifestly unsound — one should not incur a penalty for supporting a political campaign. The last clause of Bennett’s proposed rule is also puzzling, because the purity or lack of purity of the constituent’s motives would seem to have little if anything to do with whether the member may properly be “aggressive” on his or her behalf.371

369. As will be discussed later, however, the Committee deserves less praise for adding that the incident created a troubling “appearance” of linkage. See infra notes 417-19 and accompanying text.

370. See KEATING REPORT, supra note 4, at 17. The Committee criticized Senator McCain for poor judgment on similar grounds, although it did not characterize his conduct as overly aggressive. See id. at 18-19.

371. This analysis assumes that Bennett used the word “procure” in a pejorative sense (i.e., as equivalent to “purchase”). If, instead, he used the word in a more neutral sense (i.e., as equivalent to “enlist”), the last clause of his rule would be trivial, because it would always be satisfied.
Nevertheless, the Bennett proposal points toward a valid criticism of the new Senate Rule XLIII. That rule calls for senators to treat contributors and noncontributors equally in deciding whether to intervene with an agency, but not in regard to the manner in which they intervene. A logical and probably desirable extension of Rule XLIII would provide that a member should pursue casework as aggressively for petitioners who do not contribute to the member’s campaign as for similarly situated petitioners who do contribute. In a sense this principle would represent a partial codification of the teachings of House Advisory Opinion No. 1, which declared years ago that “[a] Member’s responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.”

Actually, the House advisory opinion seems to reach much further than the suggested rule, because it rejects “favoritism” of all kinds, not just favoritism as between contributors and noncontributors. Moreover, as previously noted, the broad notion that congressional ombudsman services should be available to all constituents on an equal basis is part of the ethic of professionalism to which congressional offices claim to aspire. One can question, however, whether the ethics committees should undertake to enforce this norm with the threat of disciplinary sanctions. After all, society does not expect legislators to observe the same strict standards of impartiality that it expects from the judiciary. Indeed, there is probably no member of Congress who does not sometimes make special efforts for personal friends. Since the driving

372. Advisory Opinion No. 1, supra note 131, at 1078. The House Ethics Manual already states: “considerations such as political support, party affiliation, or campaign contributions should not affect either the decision of a Member to provide assistance or the quality of help that is given.” House Ethics Manual, supra note 133, at 250.

373. See supra notes 301-05 and accompanying text.

374. In the lawmaking sphere, one obviously could not expect legislators to provide “representation” to all constituents on an equal basis. Allying oneself with some interests, to the detriment of others, is part of the essence of political competition. In theory the constituent service side of a member’s job would be more amenable to a strict policy of evenhandedness, but as a practical matter the feasibility of keeping the two spheres completely separate is open to doubt. See also Lawrence, supra note 138, at 447 n.157 (questioning the wisdom of a rule confining casework to a legislator’s own constituents, because a citizen of a given district may feel that she would not get adequate support from her own representative and should be free to request help from another).

375. See supra note 301 and accompanying text. For example, the Senate Democratic leader, Senator Thomas Daschle, was criticized for intervening with federal aviation inspectors on behalf of a South Dakota friend whose air charter company had failed safety inspections. The Senate Ethics Committee, however, found that the intervention was routine and proper constituent service. See Neil A. Lewis, Panel Clears Senate Mi-
force behind current reform efforts is to address public apprehensions about the excessive role of money in politics, limitation of the disciplinary rule to inequities that occur in the specific context of campaign contributions seems defensible.

Even with regard to a rule that requires only equal treatment between campaign contributors and noncontributors, the ethics committees should probably limit their enforcement activity to relatively clear-cut and serious violations. In many cases, disparities that apparently reflect favoritism could have valid explanations: the facts of individual cases vary, different staff members handle different cases, and office priorities evolve over time. But this does not mean the suggested rule would be useless. It could still serve a legitimate precautionary function. Moreover, it would at least encourage legislators to instruct staff not to give contributors special treatment in either the initial decision to intervene or the methods used in pursuing a case.

The Senate Ethics Committee took a somewhat different approach to the issue of providing constituent service for a contributor. In such circumstances, the Committee said, a senator "must be mindful of the appearance that may be created and take special care to try to prevent harm to the public's trust in the Senator and the Senate." One way in which senators may do so, the Committee suggested, would be "by establishing office practices indicating that only constituent cases that they or their staffs reasonably believe have merit will be pursued." The Committee's criticism of Senator DeConcini was consistent with this analysis: casework for a contributor is appropriate if the senator has made sure that the underlying case is sound. This recommendation seems attractive as an advisory standard, although it does not seem amenable to use as a disciplinary rule. Another solution would be for the congressional office to emphasize that its request is only for fair consideration of the petitioner's situation, and that the agency should make its decision on the merits. That advice, which Senator Douglas recommended to legislators who wish to be "very correct," might be

norsity Leader on an Ethics Complaint, N.Y. TIMES, Dec. 1, 1995, at A24. His former Republican counterpart, Senator Robert Dole, reportedly used his influence with the Small Business Administration to help a former aide (and constituent) obtain a military food service contract through the minority set-asides program. Yet a House committee, controlled at the time by Democrats, examined the incident and found no reason to criticize the senator. See Ruth Marcus, Dole Pursued Set-Aside for Ex-Aide, WASH. POST, Mar. 23, 1995, at A9.

376. KEATING REPORT, supra note 4, at 12.
377. Id. at 30.
378. DOUGLAS REPORT, supra note 134, at 29.
especially good practice for legislators who are acting on behalf of contributors.

3. Office Practices

Bennett's third principle was that "[a] Senator should not conduct his fundraising efforts or engage in office practices which lead contributors to conclude that they can buy access to him." Presumably this rule was intended to address contributors' apparent ability to buy "access" to a legislator's services, not "access" in the more limited sense of an ability to obtain an audience with the legislator. So interpreted, it directly foreshadowed the second supporting rationale for the Senate Ethics Committee's reprimand of Senator Cranston. As already explained, the "substantial linkage" that the Committee discerned between Cranston's fundraising and constituent service activities consisted in part of improper office practices.

The Committee focused on the activities of Joy Jacobson, the senator's chief fundraiser. Although she was not a Senate employee and had no legislative responsibilities, her conduct was incompatible with that nominal limitation. For example, she attended a meeting with economist Alan Greenspan (in order to understand contributors' problems better, the senator later explained); she arranged substantive meetings; and she acted as an intermediary between Cranston's legislative aide and Keating or his staff. In addition, she herself did not keep fundraising and legislative issues separate, raising both in a single conversation with one Keating aide. She also wrote memos evincing an understanding that contributors were entitled to favored treatment. The Committee found that Senator Cranston was aware of her actions and attitude and never attempted to correct her understanding.

The basic idea behind Bennett's and the Committee's positions was sound. In fact, authoritative ethics pronouncements in closely related contexts have already endorsed the general principle that legislators are

379. To be sure, a lobbyist's opportunity to spend a few minutes with a busy member of Congress during a frenzied legislative session can be a coveted asset, and much of the literature on corruption expresses dismay that PACs seem able to purchase this asset through campaign contributions. See, e.g., THOMPSON, supra note 28, at 117; Lowenstein, supra note 30, at 827-28. But see United States v. Carpenter, 961 F.2d 824, 827 (9th Cir. 1992) (holding that a legislator's meeting with a lobbyist is not an "official act," and therefore a legislator may use campaign contributions to ration such access without violating the Hobbs Act; the court relied on a McCormick-like rationale that such rationing is normal and inevitable). Nevertheless, Bennett probably did not intend to address this sort of "access," which was never at issue in the Keating case.

380. See KEATING REPORT, supra note 4, at 27-29.
responsible for their aides' conduct.\textsuperscript{381} Making members accountable for their offices' routine practices creates desirable incentives for members to think about the appearances that those practices convey, and also about their own roles as supervisors of a staff.

However, the wording of Bennett's suggested standard seems flawed — over and above its ambiguity about the meaning of "access." It would apparently turn on the \textit{actual} perceptions of contributors. To enforce such a standard, ethics committees apparently would have to survey campaign supporters to ask them their impressions of the member's integrity. Loyal supporters might thwart disciplinary actions by swearing that they had discerned no corrupt tendencies (an act of support that might make the legislator feel all the more indebted to them). Disgruntled former supporters might exact revenge by testifying to the contrary.

To minimize these problems, the committees could revise Bennett's rule to refer to practices that "would reasonably lead" contributors to conclude that they can buy access. Under this standard, testimony from actual contributors would be relevant but not dispositive. Even that version, however, could be criticized for its vagueness and, consequently, its failure to give fair warning to the regulated as to what conduct is proscribed. An even better solution, therefore, would be for the committees of both chambers to identify particular fundraising or office practices that they believe will reasonably cause contributors to believe that they can buy access.\textsuperscript{382} Existing rules already limit offices' ability to assign substantive and fundraising tasks to the same staff member\textsuperscript{383} — the Joy Jacobson problem — and could be strengthened.

On the other hand, the ethics committees should not feel compelled to accept every attack on office practices at face value. For example, recall the case of Senator Lautenberg's chief of staff, who was criticized for advising fundraising staff to solicit contributions from

\textsuperscript{381} See Senate Rule XLIII(4); Advisory Opinion No. 1, supra note 131, at 1078.

\textsuperscript{382} Although it was suggested above, see supra note 379 and accompanying text, that Bennett's proposed rule was not intended to address "access" in the sense of mere meetings at the Capitol, the committees could, if they wished, take further steps to regulate "linkage" between contributions and that sort of access. For example, they could formalize the now-recognized norm that a solicitation letter should never explicitly state that contributors will receive special access to the member. The classic example is Senator Lloyd Bentsen's invitation to supporters to join a weekly "breakfast club" by contributing $10,000 apiece. The senator dropped the idea when it was criticized, and he later admitted in his vice-presidential campaign debate that it was "a doozy" of a mistake. See \textit{INTERPRETATIVE RULINGS}, supra note 184, No. 427 (declaring practice improper).

\textsuperscript{383} See, \textit{e.g.}, Senate Rule XLI(1) (no Senate staff, other than three aides who have been specially designated by the senator, may engage in fundraising).
constituents for whom the senator had recently done favors. Critics of the incident seem to assume that fundraising staff should not only refrain from doing legislative business themselves (the Joy Jacobson situation), but also should be forbidden to obtain leads from aides who do have substantive responsibilities. It seems hypersensitive to recoil against so small a concession to the reality that members of Congress are ultimately dependent on outside sources for financial support in their reelection campaigns. Members and their staff cannot be expected to solicit contributions purely at random. Despite today's climate of mistrust of Congress, the committees must struggle to keep the focus on the impressions that office practices reasonably convey.

4. **The Appearance of Impropriety**

Bennett's fourth proposed principle — that a "Senator should not engage in conduct which would appear to be improper to a reasonable, nonpartisan, fully informed person" — stirred up a lively controversy within the Ethics Committee as to whether senators may be disciplined for creating an "appearance of impropriety." In the end, Senator Helms expressly endorsed Bennett's position that they may. The majority refrained from adopting an appearance standard; indeed, it pointed out that "the Senate has not to date disciplined a member solely on the basis of the appearance created by his or her conduct." On the other hand, a desire to maintain appearances manifestly played a major role in the Committee's conclusions. The report contained pointed admonitions that senators should avoid the appearance of impropriety. Indeed, the logic of the Committee's reprimand of Senator Cranston plainly rested to some extent on distress over the appearances created by his "linkage" of campaign contributions and official actions. Moreover, in declining to recommend formal proceedings against Senators DeConcini and Riegle, the Committee upbraided each senator for conduct that, it said, "gave the appearance of being im-

384. See supra notes 362-69 and accompanying text.
386. See KEATING REPORT, supra note 4, at 14-16 (separate views of Sen. Helms). As previously noted, Helms's report was a slightly revised version of a draft prepared by Bennett himself. See supra note 7.
387. Id. at 6.
388. See id. at 12-13 ("Because Senators occupy a position of public trust, every Senator always must endeavor to avoid the appearance that the Senator, the Senate, or the governmental process may be influenced by campaign contributions or other benefits provided by those with significant legislative or governmental interests.").
389. See supra notes 283-86 and accompanying text.
In short, the Committee evinced a concern for public perceptions, yet it apparently lacked a precise theory about how to take them into account.\textsuperscript{391}

Appearance standards have played a prominent role in the public discourse on government ethics since at least the Watergate era.\textsuperscript{392} Historically, however, congressional endorsements of the appearances theme have been aspirational in character\textsuperscript{393} or have served as fleeting supplemental arguments in ethics committee decisions that primarily rested on findings of actual impropriety.\textsuperscript{394} The Keating case was the

\textsuperscript{390} See Keating Report, supra note 4, at 17, 19.

\textsuperscript{391} The Keating case arose under a Senate resolution that prohibits "improper conduct which may reflect upon the Senate." S. Res. 338, 88th Cong., § 2(a)(1), 110 Cong. Rec. 16,939 (1964). Read literally, this rule seems to foreclose an appearance standard, because it suggests that the challenged conduct must be both detrimental to the Senate's reputation and improper in some separately defined sense. On the other hand, the corresponding House provision does not support the same limiting argument, see House Rule XLIII, cl. 1 ("A Member . . . shall conduct himself at all times in a manner which shall reflect creditably on the House.").

\textsuperscript{392} See Morgan, supra note 357, at 598-602.

\textsuperscript{393} In an effort to demonstrate that an appearance-of-impropriety standard was already an established norm in congressional ethics regulation, Senator Helms laid particular stress on language from the Code of Ethics for Government Service. See H.R. Con. Res. 175, 85th Cong. at § V (1958) (admonishing against acceptance of "favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of . . . governmental duties"); Keating Report, supra note 4, at 15 & n.94 (separate views of Sen. Helms). Historians agree, however, that the Code was originally considered purely hortatory. See Congressional Ethics, supra note 17, at 147; Baker, supra note 17, at 24. Although, as Senator Helms noted, the Senate Ethics Committee's charter authorizes it to enforce the Code, that authority does not oblige the Committee to give binding force to any particular Code provision. No one claims that members of Congress must suffer discipline if they fail to comply with such Code platitudes as "Give a full day's labor for a full day's pay" or "Seek to find and employ more efficient and economical ways of getting tasks accomplished." H.R. Con. Res. 175, at § III, IV.

\textsuperscript{394} For example, Bennett strained a point when he argued that the Senate had already endorsed the appearance standard in its denunciation of Senator David Durenberger the year before the Keating decision. See Kuntz, supra note 385, at 229. The appearances rationale was clearly not the primary basis for that action. In fact, the Ethics Committee's detailed report, supporting its recommendation that Senator Durenberger's conduct be deemed "clearly and unequivocally unethical," made no allusion to an appearance standard. See S. Rep. No. 101-382, at 14 (1990). The basis of Bennett's claim was that the Committee also adopted in full, see id. at 4, the 106-page report of its special counsel (Bennett himself), which contained a single paragraph alluding to a duty to avoid the appearance of impropriety. See id. app. C, at 106.
first in which congressional ethics enforcement authorities have paid serious attention to the possibility of imposing sanctions predicated squarely on an appearance standard.

Nor has society at large reached a consensus on the role of appearances in ethics regulation. The American Bar Association's *Model Code of Judicial Conduct* contains an explicit appearance of impropriety standard.\(^{395}\) and so do the Office of Government Ethics (OGE) regulations governing the executive branch — although the OGE standard takes such a diluted form that it might be better described as presenting only the *appearance* of an appearance standard.\(^{396}\) On the other hand, the ABA abandoned its commitment to an appearance standard as a tool of attorney discipline when it promulgated the *Model Rules of Professional Conduct* in 1983.\(^{397}\) One reason for this decision was that scholars had sharply attacked the "appearance of impropriety" language of the previous code as vague and misleading.\(^{398}\)

\textit{a. Critique of the Appearance Standard.} Admonitions to legislators that they have an ethical obligation to avoid actions that could result in public disapproval fit naturally into discussions of congressional ethics. One of the central goals of the ethics codes, after all, is to promote public confidence in the legislative branch and thereby to reinforce the legitimacy of government.\(^{399}\) The same point can be put in terms of institutional loyalty and responsibility: unseemly behavior by a few members makes it harder for their colleagues to do their own jobs.\(^{400}\) Professor Andrew Stark, in an illuminating analysis, has explained the rationale for subjecting officeholders to the constraints of an appearance of impropriety disciplinary standard: its purpose is "to heighten their democratic representativeness — in order to ensure that officials per-
ceive reality the way the public does and are sensitive to norms that the public harbors.\textsuperscript{401}

The problems inherent in treating an appearance standard as a basis for disciplinary action are formidable, however. A central difficulty is the standard’s failure to provide regulated individuals with fair notice of what is proscribed. “Because it is subjective and amorphous, the appearance standard provides little guidance for assessing individual conduct. Moreover, an appearance is in the eye of the beholder and thus not entirely within the control of the one charged with conforming her conduct to a particular standard.”\textsuperscript{402}

More specifically, the appearance-of-impropriety test is elusive because, as ordinarily understood,\textsuperscript{403} it predicates liability on perceptions of improper conduct, instead of on conduct that is improper as such. This baseline is unwieldy under any circumstances,\textsuperscript{404} and is especially so in a political climate in which deep suspicion of legislators’ motives is pervasive. At a time when many people casually speak of the entire Congress as corrupt, a guideline that looks to maintaining public confidence in Congress can scarcely be applied at face value. Nor would such a straightforward application be desirable, because popular attitudes toward Congress often suffer from misinformation, unrealistic expectations, and failure to appreciate the tradeoffs that legislators must make among their constituents’ many incompatible demands.\textsuperscript{405}

Some proponents of “appearances” liability seem to recognize this problem, because they define the relevant perceptions as those of sophisticated citizens. Bennett’s reliance on the perceptions of the “reasonable nonpartisan, fully informed person” is typical.\textsuperscript{406} The durability

\textsuperscript{402} Nolan, supra note 33, at 78; see Saxon, supra note 21, at 206-10.
\textsuperscript{403} Professor Dennis Thompson favors a quite different approach to the appearance standard, which will be considered below. See infra notes 424-28 and accompanying text.
\textsuperscript{404} See WOLFRAM, supra note 398, \S 7.1, at 320.
\textsuperscript{405} See supra section II.D; cf. Gary C. Jacobson, Political Action Committees, Electoral Politics, and Congressional Ethics, in REPRESENTATION AND RESPONSIBILITY, supra note 17, at 41, 49-50 (arguing that popular demand for changes in campaign finance laws is not a suitable guide to reform, because the general public lacks sufficient information to make reliable judgments on the subject); see also United States v. Rostenkowski, 59 F.3d 1291, 1312 (D.C. Cir. 1995) (rejecting enforceability of House conflict-of-interest rules in criminal trials, in part because lay citizens such as jurors may not understand the unique convergence of official and personal activities in the life of a member of Congress).
\textsuperscript{406} Indeed, Bennett explained that “the concept of the informed person means someone who understands and appreciates that Senators can pressure regulators, that Senators can act on behalf of people who give them political contributions.” 1 Keating
of this distinction remains open to question, however. After all, literal adherence to the benchmark of a "fully informed" citizen's viewpoint would make enforcement of the appearance standard meaningless: to an observer who knows all the relevant facts, "appearance" and "reality" are identical.\textsuperscript{407} Thus, an ethics committee that wishes to pursue appearances liability in a serious way must, at a minimum, adopt the frame of reference of a person who knows fewer facts than the committee itself does. Furthermore, one of the main goals cited to justify the appearance standard is the preservation of public confidence. Yet the objective of honoring — or appeasing — public sensibilities stands in unavoidable tension with a commitment to rely on "informed" or sophisticated judgment.\textsuperscript{408} The more firmly an ethics committee declares that it will punish members whose conduct impairs public confidence, the more it creates a dynamic that presses it toward responding to the perceptions of citizens who are not "reasonable, non-partisan, and fully informed."

The appearance standard also seems overbroad in another way. Congress's reputation is threatened by many varieties of ethically dubious behavior that the disciplinary rules cannot feasibly address and that ethics committees cannot feasibly police.\textsuperscript{409} Thus, vices such as duplicity, indolence, grandstanding, meanness, pandering, and browbeating

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\item[407.] See Stark, \textit{supra} note 401, at 336. OGE's version of the appearance standard provides a tangible illustration of this difficulty. The rule requires executive branch employees to avoid actions creating the appearance that they are violating the law of ethics regulations "[a]s determined from the perspective of a reasonable person with knowledge of the relevant facts." 5 C.F.R. § 2635.101(14) (1995). In a famous OGE ruling stemming from the Whitewater controversy, the issue was whether Treasury Department officials had improperly disclosed nonpublic information for the purpose of furthering the private interests of the President or others — and also whether they had created the appearance of having done so. Ultimately, OGE found that the officials' conduct had not appeared improper on essentially the same grounds that it used to decide that their conduct had not been improper. See \textit{Office of Govt. Ethics, Report to the Secretary of the Treasury} 8-10, 19 (July 31, 1994). In effect, the appearance standard became superfluous — not because the report's authors were careless, but because of the nature of the test they were asked to apply.

However, if the "fully informed" observer is not to be the test, what criterion will be used? "Mostly informed"? "As informed as possible given the inherent limitations of their position" (as intimated in \textit{Thompson}, \textit{supra} note 28, at 127)? "As informed as people who watch C-SPAN"? The difficulty, and perhaps impossibility, of defining the relevant perspective coherently is one of the reasons why adjudication under the appearance standard has proved so impressionistic in practical application. \textit{See infra} notes 410-13 and accompanying text.

\item[408.] See Stark, \textit{supra} note 401, at 335-37.

\item[409.] See Jennings, \textit{supra} note 24, at 161-62 (question of what to codify "turns largely upon issues of enforceability, equity, and clarity of interpretation"); Saxon, \textit{supra} note 21, at 213-16; Vogelsang-Coombs & Bakken, \textit{supra} note 18, at 94-95.
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deserve condemnation but are not considered "improper" as ethics committees use that term. Still, many people, including "reasonable" people, might say that these sins look improper. This is not to suggest that ethics committees ever would, or should, impose liability for such conduct, but rather that the perceptions rationale proves too much and cannot provide legislators with meaningful guidance about what behavior the test actually serves to forbid.

By its nature, the appearance standard is an open invitation to findings of liability supported by superficial reasoning. Adjudicators who are not sure whether conduct really is improper can shore up a dubious analysis by asserting that the conduct at least appears to be improper. As political commentator Michael Kinsley has written, "‘[A]ppearances’ can . . . be a way of accusing someone of wrongdoing without saying what, if anything, is really wrong. It is a shortcut to moral outrage, for those who are in a hurry to get there.”

Scoffing at the Keating decision for its criticism of DeConcini and Riegle for “conduct that gave the appearance of being improper,” Kinsley continues: “It hardly requires the elaborate and costly proceedings of the Senate Ethics Committee to determine that there has been an appearance of impropriety. . . . The appearance of impropriety is precisely why the Ethics Committee was convened. What we want to know is: Was there impropriety?”

In the specific context of congressional ethics, use of an appearance standard as a disciplinary standard poses special hazards. The charges are likely to be highly visible and subject to intense public controversy before the ethics committee even begins its inquiry. Moreover, the adjudicators are not Article III judges but elected officials who are

410. Experience in the realm of attorney discipline supports this fear. See WOLFRAM, supra note 398, § 7.1, at 320 n.38 (noting that appearances notion "appears in opinions . . . in an incantational, intuitive way, and its use is hardly ever defended"); cf. ABA Comm. on Ethics & Professional Responsibility, Formal Op. 342, at 5 n.17 (1975) (concluding that inclusion of appearance standard in disqualification rule would likely cause application of that rule to “degenerate[] . . . into a determination on an instinctive, ad hoc or even ad hominem basis”).

411. Although not an ethics case, Pillsbury Corp. v. FTC, 354 F.2d 952 (5th Cir. 1966), is sometimes held out as a principal precedent supporting an appearance standard. See Kappel, supra note 130, at 162. If so, it is a tarnished precedent. Even though the ex parte contacts rule announced in that decision has met with general acceptance, the court’s discernment of an “appearance of partiality” on the specific facts of that case was exceedingly strained. See supra note 153.


413. Id.
themselves highly accountable to the public. Under these circumstances, an appearance standard, if taken seriously, would virtually guarantee a finding of liability. How can a member of the ethics committee say to his or her own constituents that the conduct does not appear improper, if they think it does? Indeed, such a standard could give rise to an insidious circularity: hostile editorials might not only trigger an ethics investigation of a member, but also become conclusive evidence that a sanction should be imposed. The distinction between ethics regulation and public disapproval would then be totally erased.

Special Counsel Bennett apparently tried to avoid this problem by suggesting that appearances be assessed from the perspective of a "reasonable nonpartisan, fully informed person." Aside from the fact that these qualifications tend to sever the link between the appearance standard and its theoretical justification of respecting public opinion, the additional criteria are not a realistic solution to the dilemma. They would put the ethics committee member in the hopeless position of saying to constituents, "Well, if you disagree with me, you must either be unreasonable, uninformed, or have a political ax to grind."

Finally, some might argue that the appearance standard is attractive precisely because of its stringency: even if it is overbroad, the argument might run, congressional ethics is in such a deplorable state that members should be encouraged to err, if at all, on the side of self-restraint. An in terrorem standard may be appealing where the conduct to be deterred involves only the member's self-interest, as is arguably true of limitations on outside income, gift restrictions, and the like. Constituent service, however, has affirmative value to the political system, and the realities of campaign finance make fundraising at least a necessary evil. Overdeterrence of casework or of normal solicitation of political support should not be shrugged off as cost-free.

This last point reminds us that the mission of the ethics committees is not merely to mete out sanctions and issue denunciations, but also to advise members about what they may do. Because legislative functions such as constituent service require members to strike a bal-

414. Cf. Bauer, supra note 20, at 481-82 (condemning the Keating proceedings as a "show trial" in which political demands, rather than Cranston's actual culpability, became the Committee's principal concern).

415. Peter Morgan argues that the appearance standard has still another cost. He contends that the mantle of legitimacy that ethics authorities have conferred on the appearance standard puts an undeserved weapon in the hands of political actors: it enables them to hurl flimsy but colorable charges at opponents, and also to distract attention from other problems, including other ethics problems, that deserve greater attention. See Morgan, supra note 357, at 607-18.

416. See Ethics of Legislative Life, supra note 17, at 52-53.
ance between conflicting responsibilities, the committees have a continuing obligation to help members identify the boundaries that separate permissible from impermissible means of pursuing these functions. The committees also should strive, on behalf of their chambers, to educate the public about the locations of these boundaries. One can question seriously whether a committee can successfully play these exculpatory and educative roles if it must also enforce a liability standard that condemns members merely because some fraction of the public would think that their actions were improper.

As an example of how the appearance standard can undercut debate about the limits of propriety, consider the Senate Ethics Committee’s equivocal response to the flap involving internal memos written by Senator Lautenberg’s chief of staff.417 The Committee found no evidence of an actual linkage between fundraising and official actions, nor of any other wrongdoing in this incident. Nevertheless, it stated that “the appearance created by the memoranda entries is troubling to the Committee,” because the language of the memos “tends to create an appearance that campaign solicitations could have been linked to official actions taken by the Senator on behalf of prospective contributors.”418 One might have supposed that if the senator and his aide did nothing wrong, as the Committee found (and as this article has maintained), the Committee should have exonerated him and declared that his critics were mistaken, instead of blaming him for the critics’ having jumped to an erroneous conclusion.419

b. An Alternative Approach. The preceding critique of the appearance standard of liability is not intended to deny the desirability of new rules to bolster public confidence in Congress. Indeed, one of the major premises of this article, particularly in its treatment of money influence, is that Congress should give further, serious consideration to adopting

417. For the particulars of this incident, see supra notes 362-69, 384 and accompanying text.
418. See Simpson, supra note 364.
419. The Committee was not alone in neglecting its educative function. Commenting on the same episode, a New York Times editorial acknowledged that “there is no evidence that Mr. Lautenberg granted any legislative favors with fund raising in mind,” and that his aide’s memo probably broke no Senate rules. Nevertheless, the editorial criticized the Ethics Committee for its failure to embrace an appearance standard, suggesting that the aide would not have written the memo had that test been in effect. A Fund-Raising Folly, N.Y. Times, Apr. 11, 1994, at A18. Should not a major newspaper strive to educate citizens about what it regards as the real boundaries of legislative propriety, instead of blaming legislators for public misconceptions that the newspaper itself has not sought to counteract? See Kinsley, supra note 412, at 4 (“[I]t is the function of The New York Times to bring perceptions into line with reality, not the other way around.”).
measures that may help to dispel the public's doubts about the integrity of the legislative branch. What is needed is an approach that serves this end without the substantial drawbacks of the appearance-of-impropriety standard of liability.

One reason that the appearance standard is so attractive to its supporters is its recognition that the legislative branch needs ethics rules that prohibit some conduct that is not intrinsically unethical. In other words, prophylactic rules should be part of the congressional ethics enforcement scheme. Indeed, probably most conflict of interest rules are written with this strategy in mind.

Prophylactic rules aimed at incipient or potential improprieties are attractive on several grounds. The opportunity to intercept some otherwise unprovable misbehavior is one such ground. Moreover, the rules can be written in objective terms. Objective rules can strengthen accountability by setting up visible standards by which citizens can evaluate officials' performance. In this respect, they compare favorably with rules that allude to legislators' motives; the latter sort of rules may have a closer link to ethical norms, but constituents cannot readily judge whether their representatives have obeyed them. Prophylactic rules can also counteract rationalizations. As the ABA Committee on Government Standards has noted, "ethics regulation can make its most meaningful contribution by helping government employees to recognize, and take steps to defuse, situations that invite compromised behavior." Finally, although these rules should not make public perceptions germane to the resolution of individual cases, the very existence and enforcement of these rules could be expected to bolster public confidence indirectly.

A focus on corrupting tendencies can make a useful contribution to the continuing evolution of ethics regulation, even if the appearance standard itself is renounced. This is essentially the position advocated by the ABA committee just mentioned. In its 1993 report on government ethics, the committee said that "appearance" concerns were pertinent to conflict-of-interest rules in the sense that such rules should address "the potential for (i.e., the 'appearance'), as well as the fact of, impropriety." Beyond this role in the delineation of basic rules in the area, however, " 'appearance of impropriety' is too vague and contesta-

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420. See THOMPSON, supra note 28, at 126-27.
421. Keeping Faith, supra note 33, at 297; cf. DENNIS F. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE 111-13 (1987) (arguing that, because legislators tend to rationalize their conduct, efforts to determine whether they acted for legitimate reasons should focus not on motives, but on the objective circumstances, such as campaign contributions, that may have corrupted their judgment).
ble a concept to function effectively as an independent benchmark in a system of ethics regulation," in the committee's view.

Extrapolating the same logic, the House and Senate should continue to develop rules to regulate practices that, although not inherently improper, tend to be associated with improper behavior. At the same time, however, such a rule-writing process can and should take account of countervailing values, such as the need to leave room for beneficial constituent service and reasonable political fundraising opportunities. An example of this sort of balancing is this article's proposal for a required "decent interval" between acceptance of a campaign contribution and performance of constituent service. That proposal is predicated on the assumption that, although simultaneity of contributions and services is not intrinsically corrupt, a prohibition on such temporal overlaps will tend to discourage improper bargains and will not cause substantial interference with normal campaign fundraising.

The ABA Committee's approach provides a useful lens through which to examine a variant on the appearance-of-impropriety test, proposed by Professor Dennis Thompson. Acknowledging some of the limitations of a test rooted in perceptions, he contends that "the more judicious versions of the appearance standard do not refer to appearances at all." Properly interpreted," he says, the test "would be better called a tendency standard because it presumes that under certain institutional conditions the connection between contributions and services tends to be improper." In particular, "a connection between contributions and services should be regarded as corrupt if it takes place under conditions that would lead citizens reasonably to believe that the contributions are causing services to be provided without regard to substantive merit or appropriate fairness."

One has to wonder why Thompson characterizes his proposed rule as an "appearance of impropriety" test at all, as he acknowledges that

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422. See Keeping Faith, supra note 33, at 296-97; see also Nolan, supra note 33, at 77-78 (arguing in executive branch ethics context for use of appearance considerations as a basis for writing rules, but not as a test for judging individual conduct).

423. An extant measure that has similarly been established for prophylactic purposes is Senate Rule XLI, which provides that only three employees of a Senate staff may engage in campaign fundraising. Although perhaps not classifiable as an ethics rule, this requirement does serve to reinforce the line of separation between electioneering efforts and official business. See also 18 U.S.C. § 207(e)(1) (1994) (members may not lobby Congress for one year after leaving office).

424. THOMPSON, supra note 28, at 124.

425. Id.

426. Id. at 125.
his proposal does not really depend on appearances.\textsuperscript{427} Retention of the familiar language can only serve to maintain continuity with conventional interpretations of the standard — and with those interpretations' many pitfalls. His proposal is perhaps best understood as a suggestion that the ethics committees should continue to develop rules to forbid actions that have unhealthy "tendencies." This idea, which is substantially equivalent to the ABA Committee's recommendation, deserves to be pursued.\textsuperscript{428} Much less attractive, however, is his implication that the committees should issue a generalized warning to members that they will face sanctions if they engage in actions that tend to be associated with impropriety. Using this statement as a vague \textit{in terrorem} threat would pose the risks of overdeterrence mentioned above. Thompson does not address those risks at all, and his analysis remains somewhat one-sided as a result.

In the end, it is worth recalling that the ethics enforcement system does not exist in a vacuum. According to the harsh rules of political life, members of Congress who fail to heed — or to anticipate changes in — political morality risk repudiation at the ballot box. Their political accountability gives them strong incentives to avoid unseemly appearances. Yet the imprudent and the unethical are not necessarily the same. Apprehensions about the legitimacy of legislators' behavior should be addressed through new categorical rules, such as those discussed in previous sections of this article, rather than through a standard that is as open-ended and difficult to contain as "the appearance of impropriety."

\textsuperscript{427} Although he does phrase the critical inquiry in terms of objective facts that would "lead citizens reasonably to believe" the legislator has acted corruptly, this is in effect no different than an inquiry in which adjudicators ask whether they themselves believe that the facts would reasonably support that conclusion. In other words, when one turns from asking what citizens \textit{do} believe to asking what they \textit{should} believe, the citizens become superfluous to the analysis, and allusions to their beliefs become only a rhetorical device. Thompson could escape this logical dilemma if he were to posit that the citizens whose conclusions matter under his test possess fewer facts than the ethics committees do. But he insists that his proposed test revolves around \textit{well-informed} and \textit{reasonable} perceptions. See id. at 127, 129. He also argues that the ethics committees could elaborate on the meaning of his standard through case law over time, thus implying that the standard would not depend in any substantial way on "perceptions" at all. See id. at 128-29.

\textsuperscript{428} Even in this context, however, the slogan "appearance of impropriety" seems unhelpful and could even hamper the full development of the kind of strictures that Thompson envisions. The phrase connotes conduct that, in the view of informed observers, is \textit{probably} associated with impropriety — the member is "apparently" acting improperly. Yet the rationales for prophylactic rules, as described above, do not suggest that they must be so confined. In some circumstances such measures could legitimately be used to reach conduct that is \textit{occasionally} or \textit{possibly} associated with impropriety, if ethics authorities see little or no reason to protect the conduct from overregulation.
CONCLUSION

This article began with an assertion that the ethical dimensions of congressional constituent service give rise to an exceptionally complex set of issues. The breadth of these issues should now be evident in light of this article’s lengthy tour through such disparate topics as representation theory, ethics theory, empirically oriented political science, and the case law on administrative law and criminal corruption. Yet the scope of the article’s discussion has largely been driven by its premise that proposed reforms in this area would touch upon some of the central responsibilities of congressional life. At least some of the time, legislators’ advocacy of constituents’ interests before administrative agencies serves as a beneficial check on executive branch indifference or overreaching. Similarly, the acquisition of campaign contributions is an inescapable incident of the political competition in which elected officeholders must regularly participate. Although both casework and political fundraising involve elements of self-interest that invite continuing scrutiny by the ethics committees, their respective roles in the political process give the committees good reasons to remain circumspect about regulating them.

The tension between ideals of legislative ethics and the legitimate needs of the political system leads naturally in the direction of compromise solutions and narrow distinctions. The foregoing pages have suggested a few ways in which a balance might be struck in specific contexts. One suggested principle would normally preclude a member of Congress from exerting strong pressure on an agency when formal administrative proceedings have commenced or are about to commence, or when the member tries to induce the agency to act on grounds that controlling law renders impermissible. In other situations, however, pressure generally should be tolerated. Another suggestion was that the ethics rules should forbid a member from soliciting a campaign contribution from a constituent at about the same time, or immediately after, she intercedes with an agency on the constituent’s behalf; but if she waits for a “decent interval of time” before seeking the contribution, no violation should be found.

This article’s specific appraisals of current and potential ethics rules are certainly debatable, depending as they do on contestable factual assumptions and a pragmatic process of reconciling competing interests. The principal aim here, however, is not to supply definitive answers to particular controversies but, instead, to explain and exemplify a general approach to thinking about issues of legislative ethics. This approach maintains that it is not enough to leap directly from the realization that a given legislative practice can be abused to the conclusion
that it should be suppressed. One must also go on to explore, to the extent possible, the workability of rules that would regulate the practice, the prevalence of the abuses, and the consequences of suppressing the practice for the political system as a whole.

General acceptance of this analytical approach might at least facilitate resolution of some of the unsettled questions in this area. Hair-trigger suspicion of the normal processes of constituent advocacy and campaign fundraising is a common enough feature of popular debate on congressional ethics, but it is hardly a constructive response to the complex issues that the Keating case raises. Perhaps, if thoughtful members of Congress and thoughtful segments of the general public could mutually agree to consider the issues from the more comprehensive perspective offered here, they could improve the chances that their solutions to these problems would be both wise and broadly acceptable.

APPENDIX

As a result of the project for which this study was prepared, the House of Delegates of the American Bar Association endorsed the following recommended guidelines regarding congressional constituent service on February 5, 1996:

BE IT RESOLVED, that the American Bar Association recommends that: * * *

2. In order to obtain the benefits to American citizens of constituent service contacts with administrative agencies by individual Members of Congress, while minimizing the risk that agencies will be induced to violate the substantive and procedural statutes that govern their decisions, Members of Congress and their staffs should:

A. comply with legal restrictions on ex parte contacts in formal proceedings by avoiding communications with the responsible agency decisionmakers that bear on the merits of pending cases;

B. observe special restrictions on ex parte contacts in informal proceedings set forth in statutes or agency regulations;

429. A genuine commitment to improving ethics in government . . . requires resisting the simple, and popular, assumption that more regulation is better regulation. Those who shape public policy must summon the diligence and fortitude to take on the difficult, and seldom applauded, task of thoughtfully identifying not only the areas that need more rules, but also the areas that need fewer rules and the areas that need different rules.

**Keeping Faith, supra** note 33, at 340; see Abner J. Mikva, From Politics to Paranoia, WASH. POST, Nov. 26, 1995, at C2 (decrying excesses in policing of ethics).

430. Part 1 of the resolution, which concerned the procedures by which the House and Senate enforce their ethics rules, is not reprinted here.
C. cooperate with efforts of agencies, as required by statute or regulation, to maintain logs that detail contacts between their personnel and persons outside the agency, including the Members and staff of Congress;

D. refrain from asking agencies to consider factors that are not permissible under the statutes that govern their programs;

E. work with staff of the agencies to ensure that oversight proceedings consider general issues of law and policy and avoid reference to any particular pending formal proceeding before an agency;

F. avoid advocating a constituent’s position before an agency without knowledge of its merits;

G. for investigations in which an agency is actively considering initiation of civil or administrative enforcement proceedings or referral for criminal prosecution:
   i. avoid any contacts that are relevant to the merits with agency officials who may later serve in an adjudicative role, and
   ii. for contacts with agency personnel who have investigative or enforcement responsibilities, ensure that any advocacy of a constituent’s claims is well-founded.

H. minimize the risks of undue linkage between contributions and constituent service by:
   i. neither soliciting nor accepting a substantial campaign contribution from an individual who the Member knows is currently attempting or has recently attempted to induce the Member to intervene before a federal agency, and
   ii. varying neither the initiation nor the vigor of a constituent service contact with an agency according to the status of the requester as a contributor.

I. These guidelines do not require Members of Congress and their staffs to refrain from:
   i. making a referral of a constituent’s inquiry, with a request that the agency give it due consideration, and
   ii. urging prompt conclusion of a matter in whatever manner the merits justify.