

## LEGISLATORS AS THE “AMERICAN CRIMINAL CLASS”: WHY CONGRESS (SOMETIMES) PROTECTS THE RIGHTS OF DEFENDANTS

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*It is an axiom of faith among criminal procedure scholars that legislatures are hostile to criminal defendants. Many have gestured towards an alleged “legislative default” in criminal procedure to support judicial activism to ensure fairness in the criminal process. This article, taking its cue from Mark Twain’s insight that Congress is our “distinctly native American criminal class,” questions the prevailing wisdom and argues that legislatures are sometimes sympathetic to criminal defendants.*

*Over the centuries, legislators have been menaced by criminal prosecution, and this prospect has, on significant occasions, shaped the development of Anglo-American criminal procedure. In the late seventeenth century, after a prolonged period of vicious treason prosecutions, over the course of which almost every political faction was threatened and not a few innocent people executed, Parliament intervened to provide protections for defendants accused of treason. These measures included many of the rights we take for granted in criminal trials today: the right to counsel, to compel witnesses to appear on the defendant’s behalf, and to have those witnesses sworn. More recently, in the aftermath of the Abscam sting operation of 1978–1980, Congress scrutinized undercover investigations; and following the unsuccessful prosecution of Representative Joseph McDade in 1996, Congress enacted a pair of measures to rein in federal prosecutors. Congress in part has itself to blame for the ease with which federal prosecutors can now bring close cases, for Congress has in recent years vastly extended criminal liability, particularly in the area of white collar crime. This article argues that the federalization of crime exposes politically prominent individuals, including*

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*members of Congress, to the criminal process and in this way ensures that the institution will not be wholly antagonistic to criminal defendants.*

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## I. INTRODUCTION

Mark Twain's barb that "there is no distinctly native American criminal class except Congress"<sup>1</sup> is usually taken as comic exaggeration. At least that was my own view until, while voting in the last election, I realized that my last four Representatives in Congress had all had run-ins with the law, and not on the side of its avenging angels. Police had been dispatched to the home of James Moran (D.-Va.) to investigate a "domestic argument" involving his wife;<sup>2</sup> Eleanor Holmes Norton (Del.-D.C.), an indefatigable advocate of tax reform, failed to file income tax returns for seven consecutive years;<sup>3</sup> Joe Kennedy (D.-Mass.) was frustrated in his gubernatorial bid when it was revealed that his brother and campaign manager, Michael, had carried on a possibly criminal affair with a teenage babysitter;<sup>4</sup> and finally, Mel Reynolds (D.-Ill.) resigned from Congress in 1995 after being convicted in state court of statutory rape.<sup>5</sup> In 1997, Reynolds was sentenced on unrelated charges to federal prison, where he repented for several years until President Clinton pardoned him.<sup>6</sup>

That members of Congress are frequently subjects in criminal investigations and defendants in criminal trials, although seemingly comical, has relatively serious implications. It is an axiom of faith among criminal procedure scholars that legislatures are unsympathetic to criminal defendants. In an influential 1974 law review article, Professor Anthony Amsterdam coined the phrase "legislative default" to describe the perceived failure of legislatures to enact criminal procedure protections.<sup>7</sup> "Legislatures," he wrote, "have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police."<sup>8</sup> Amsterdam's pessimism was born of his conviction that "[e]ven if our growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in American society to keep our legislatures from the politically suicidal undertaking of police control."<sup>9</sup> As a consequence, Amsterdam was

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1. MARK TWAIN, *Following the Equator*, in *SELECTED WRITINGS OF AN AMERICAN SKEPTIC* 329, 330 (Victor Doyno ed., 1983).

2. See Jo Becker, *Moran Got Loan from Drug Lobbyist; Va. Congressman Co-Sponsored Bill to Help Pharmaceutical Firm*, WASH. POST, Oct. 31, 2000, at A1; see also Marc Fischer, *Moran's Conduct No Impediment to Incumbency*, WASH. POST, July 23, 2002, at B1 ("Moran has had a special relationship with ethics.").

3. See Kent Jenkins, Jr., *Del. Norton's Money Battles; Taxes, D.C. Deficit Test Freshman Lawmaker*, WASH. POST, Feb. 25, 1991, at D1.

4. See Matt Bai, *A Kennedy Crackup*, NEWSWEEK, May 12, 1997, at 50.

5. See Mike Dorning, *Clinton Grants Clemency, Frees Reynolds*, CHI. TRIB., Jan. 21, 2001, at 15.

6. *Id.*

7. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378-79 (1974).

8. *Id.*

9. *Id.* at 379. It should be noted that the public "hysteria" may not have been wholly hysterical: starting in the mid-1960s, crime rates rose dramatically and did not plateau until the mid-1990s. See FRANCIS FUKUYAMA, *SOCIAL DISRUPTION* (1999).

skeptical of proposals to cede judicial control over police practices to legislatures, as it was unlikely that the latter would formulate effective substitutes to judicial checks—such as the exclusionary rule—on police overreaching.<sup>10</sup>

Since Amsterdam, many scholars have similarly emphasized “legislative default” in the criminal procedure area to support judicial activism to protect defendants.<sup>11</sup> Judges have also gestured towards an alleged failure in the legislative process to claim a license to give broad readings to constitutional provisions protecting criminal defendants.<sup>12</sup> But the premise—that legislatures are indifferent to criminal defendants—has seldom been scrutinized. In fact, legislators have on several occasions confronted the possibility of criminal prosecutions, and this prospect has profoundly shaped the *legislative* development of Anglo-American criminal procedure. Although legislators may have responded to criminal prosecutions by seeking to narrowly protect themselves, they are often unable to do so without affording protections to others as well.

History provides an important example of spillover in procedural protections, from the political classes to ordinary defendants. The Treason Act of 1696<sup>13</sup> was a landmark in the history of Anglo-American procedure; it went far towards establishing the adversary system that we know today.<sup>14</sup> Initially, however, the protections it afforded criminal defendants were intended to apply to only a tiny class of cases: prosecutions for treason.<sup>15</sup> The defendants in such cases were not ordinary folks, but members of the political classes—peers and gentlemen who sat in the Houses of Parliament.<sup>16</sup> After a prolonged period of vicious treason prosecutions encouraged by various political factions, over the course of which almost every political group was menaced and not a few innocent people executed, Parliament intervened to provide protections for defendants accused of treason.<sup>17</sup> Included in these protections were many of the rights we take for granted in criminal trials today: the right to

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10. Amsterdam, *supra* note 7, at 380.

11. Michael C. Dorf & Michael Isaacharff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 928 (2001); see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991).

12. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 12 (1997) (“Perhaps more so than anywhere else in constitutional law, in criminal procedure the broad exercise of judicial power tends to be justified precisely by the legislators’ unwillingness to protect constitutional interests.”).

13. Treason Act of 1696, 7 Will. 3, c. 3, §§ 1–7 (Eng.).

14. See James R. Phifer, *Law, Politics, and Violence: The Treason Trials Act of 1696*, 12 ALBION 235 (1980); Samuel Rezneck, *The Statute of 1696: A Pioneer Measure in the Reform of Judicial Procedure in England*, 2 J. MOD. HIST. 5 (1930); Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 L. & HIST. REV. 215 (1993).

15. Shapiro, *supra* note 14, at 215.

16. See *id.* at 219–20.

17. See John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1067 (1994).

counsel, to compel witnesses to appear on the defendant's behalf, and to have those witnesses sworn.<sup>18</sup>

In more recent times, members of Congress have found themselves increasingly subject to criminal prosecution.<sup>19</sup> Ironically, Congress has itself to blame for this prospect. The latest rash of such prosecutions is partly due to Congress's own broadening of the substantive criminal law, particularly in the fields of mail fraud, RICO, and bribery.<sup>20</sup> In addition, Congress has dramatically increased funding for federal criminal law enforcement, in part in response to the "mounting hysteria" over an alleged explosion in white collar crime.<sup>21</sup> But now finding themselves to be the victims of the zealous federal prosecutors, members of Congress have sought to rein in the prosecutors they unleashed.

In the past few years, Congress has enacted a number of measures to protect defendants, largely motivated by their own experiences. The most far-reaching law imposes state legal ethics rules on federal prosecutors, dramatically shifting the tactics that may now be employed in undercover investigations.<sup>22</sup> The measure was spearheaded by Representative Joseph McDade (R.-Pa.), who had faced an eight-year ordeal as the subject of a criminal investigation and then as the defendant in a criminal trial.<sup>23</sup> In much the same way, California Assemblyman Scott Baugh, a Republican from Orange County, led an effort to reform the state's grand jury system after he had been indicted.<sup>24</sup> Neither McDade nor Baugh claimed any interest in protecting criminal defendants prior to their own experiences. But if a conservative is a liberal who's been

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18. *Id.* The right to counsel did not at that time include a right to counsel paid for by the state if the defendant was indigent. It should be noted that defendants prosecuted for treason were not likely to be indigent; most had substantial private means.

19. See *infra* text accompanying notes 163–204.

20. See J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1119, 1258–59 (1999) (noting the increasing prosecutorial use of RICO and money laundering statutes, starting in the 1980s).

21. See generally Amsterdam, *supra* note 7. Although Amsterdam does not consider the phenomenon of white collar crime, I would suggest that certain lobbies have touted salient examples of corporate corruption (Enron, Worldcom) to pursue their legislative agendas. See Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 751 (1999) ("Congress is currently quite vulnerable to availability cascades, partly because its members feel compelled to respond to mass demands for legislation . . .").

22. See Citizens Protection Act of 1998 (widely known as the "McDade Amendment"), Pub. L. No. 105-277, § 101(b), 1999 U.S.C.A.N. (112 Stat. 2681), 2681-118 to -119 (codified at 28 U.S.C. & 530B); see also 28 C.F.R. § 77.2(a) (2000).

23. McDade's saga is discussed *infra* Part IV.C.

24. See Nancy Hill-Holtzman, *Baugh's Grand Jury Bill Passes in Senate; Law: Huntington Beach Republican's Reform, Which Would Allow Lawyers to Be Present, Is Supported by Diverse Coalition*, L.A. TIMES, Sept. 9, 1999, at B1 ("The measure (AB 527), sponsored by Assemblyman Scott Baugh (R-Huntington Beach), was prompted by his own experience of being indicted by an Orange County grand jury on campaign reporting violations in 1996 after winning his first political race."). Governor Gray Davis vetoed the bill. See Nancy Hill-Holtzman, *Davis Vetoes Popular Grand Jury Reform; Bill Would Have Admitted Defense Lawyers to Grand Jury Secret Sessions*, L.A. TIMES, Oct. 12, 1999, at B3.

mugged,<sup>25</sup> then a liberal would seem to be a conservative who's been indicted.<sup>26</sup>

The plan is as follows. Part II of the article tells the familiar story of legislative default, spinning the usual explanatory theories and offering a few illustrative vignettes, all of which purport to demonstrate legislative indifference to the rights of criminal defendants. Part III then revisits the story of legislative default. A fairer assessment of legislative performance in the criminal realm suggests that lawmakers have conflicting goals. Especially in the past thirty years, with the dramatic expansion of criminal liability, powerful constituencies have been subject to the criminal process and have lobbied Congress for enhanced procedural protections. And included in this "better" class of criminals are members of Congress themselves. Part IV demonstrates that many of the most significant legislative measures to protect criminal defendants have arisen when members of the legislature themselves are threatened with the criminal process. Significantly, such measures, although originally intended simply to protect the legislators, have quickly spilled over to protect all citizens ensnared in the criminal process. Part V concludes with some predictions about the future development of criminal legislation in light of this more nuanced assessment of the political pressures confronting members of Congress.

## II. THE THEORY AND PRACTICE OF LEGISLATIVE DEFAULT

Academics have developed at least two theories (political process and public choice) to explain and predict "legislative default" in the criminal procedure field. Both theories are premised on the claim that legislators, responding to public pressure, are unlikely to identify with criminal defendants or seek to extend to them any protections. Indeed, the enactment of criminal procedural protections would be, in Professor Amsterdam's words, "politically suicidal."<sup>27</sup> Our first sketch of recent American experience seems to abundantly fulfill these expectations. Legislators have declined to protect criminal defendants, except in rare and narrowly circumscribed circumstances when powerful constituencies (the press, lawyers) have been threatened.<sup>28</sup> Legislative default has invited judges to remedy the failure in the political process by fashioning rules to ensure fairness in the criminal process.<sup>29</sup>

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25. See IRVING KRISTOL, *NEO-CONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA* x-xi (1995).

26. A witticism attributed to Alan Dershowitz.

27. Amsterdam, *supra* note 7, at 31-102.

28. See *infra* notes 81-85 and accompanying text.

29. See *infra* notes 90-98 and accompanying text.

### A. Political Process

In *United States v. Carolene Products*,<sup>30</sup> the Supreme Court upheld a federal statute criminalizing the interstate shipment of skimmed milk.<sup>31</sup> Footnote three of the opinion, touting the “extensive literature” demonstrating the “great importance to the public health of butter fat”<sup>32</sup> has, sadly, fallen into disfavor among the health authorities.<sup>33</sup> Footnote four, however, has generally thrived among constitutional law authorities. In it, Justice Stone argued that the “presumption of constitutionality” attaching to garden-variety legislation may be inapplicable when the statute involves “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”<sup>34</sup>

A hagiography surrounding footnote four was quick to emerge,<sup>35</sup> and Justice Lewis F. Powell, Jr. later characterized it as “the most celebrated footnote in constitutional law.”<sup>36</sup> The appeal of footnote four to judges and their acolytes in the academy is easy to discern; for it recognizes a vague, and vaguely constitutional, authority for courts to act aggressively on behalf of minorities when legislatures have proven incapable of doing so. Indeed, the influence of footnote four on the Court’s jurisprudence was so “pervasive” as to become “difficult to particularize.”<sup>37</sup> One observer saw the influence of footnote four in the mid-century “activist” opinions of the Warren Court, which were said to reflect a “heightened sensitivity to the plight of blacks” and a greater willingness to deploy judicial power on behalf of beleaguered minorities.<sup>38</sup>

In *Democracy and Distrust*, Professor John Hart Ely developed the core idea of the *Carolene Products* footnote, arguing that “it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.”<sup>39</sup> The Court, he continued, “should also concern itself with what majorities do to minori-

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30. 304 U.S. 144 (1938).

31. *Id.* at 147–54.

32. *Id.* at 150 n.3.

33. For a scathing indictment of said health authorities, see JAMES T. BENNETT & THOMAS J. DILORENZO, *PUBLIC HEALTH PROFITEERING* (2001).

34. *Carolene Prods.*, 304 U.S. at 152 n.4.

35. *But see* Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397 (criticizing the politics behind the *Carolene Products* case).

36. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982). One treatise reached for stars in its praise, terming footnote four “the hinge on which much of modern constitutional argument turns.” WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 621 (2d ed. 1995) (providing examples of scholarship).

37. Louis Lusky, *Footnote Redux: Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1103 (1982).

38. *Id.* at 1104. It should be noted that Professor Lusky was Justice Stone’s clerk when *Carolene Products* was decided, so he may be guilty of making more of his handiwork than is warranted.

39. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 76 (1980).

ties, particularly . . . laws ‘directed at’ religious, national, and racial minorities and those infected by prejudice against them.”<sup>40</sup> Likening various disfavored classes of citizens, such as aliens<sup>41</sup> and gays,<sup>42</sup> to the “discrete and insular minorities” immortalized by Justice Stone in footnote four, Ely argued that judicial vigilance was appropriate when legislatures, and the democratic process, failed to fully represent a minority group’s interests and rights.<sup>43</sup> Ultimately, Ely’s theory of “political process” or “representation-reinforcement” triumphed in squaring a circle; for he purportedly demonstrated that counter-majoritarian judicial review is not only consistent with, but required by, democratic theory: unless the judicial branch steps in to represent the chronic losers in the give-and-take of the political process, majoritarian institutions would frustrate the genuine democratic will.<sup>44</sup>

Although Ely did not extend his theory to criminal procedure, other scholars were quick to recognize the explanatory power of the representation-reinforcement model.<sup>45</sup> In a 1990 law review article, Professor Michael Klarman acknowledged the “utter poverty” of most constitutional justifications provided for the Warren Court’s criminal procedure revolution.<sup>46</sup> Yet Klarman proceeded to use Ely’s theory to offer just such a defense. Klarman noted that “[i]f all segments of society were equally likely to come in contact with the criminal justice system, legislative rulemaking would very likely be the norm.”<sup>47</sup> In fact, through the 1960s, objectionable police practices were experienced principally by marginalized and often disenfranchised minority groups.<sup>48</sup> “Because,” Klarman wrote, “the political process does not adequately represent the interests of those societal groups largely populating the criminal class, political process theory demands judicial superintendence.”<sup>49</sup>

Other scholars have pushed Ely’s theory still further in justifying judicial activism in the criminal procedure arena, arguing that criminal defendants or prison inmates are themselves the sort of “discrete and insular minorities” that are worthy of special judicial protection.<sup>50</sup> According to this argument, courts should extend criminal procedure protections not because certain minority groups (*e.g.*, African Americans or aliens)

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40. *Id.*

41. *Id.* at 148–49, 151, 161–62.

42. *Id.* at 162–64.

43. *Id.* at 102–03.

44. *Id.* at 87–101.

45. See Brian L. Zavin, *The Right to Appointed Counsel on Prosecution Appeals: Hard Realities and Theoretical Perspectives*, 25 N.Y.U. REV. L. & SOC. CHANGE 271, 291 (1999); see also Susan N. Herman, *Why the Court Loves Batson: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1815 (1993).

46. Klarman, *supra* note 11, at 763.

47. *Id.* at 766.

48. *Id.*

49. *Id.*

50. Robert A. Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455, 482 (1984).



are disproportionately likely to be caught in the criminal process and deprived of the sympathies of the general population. Rather, it is said, suspected and convicted criminals themselves constitute an “outsider group,” denied full representation in the democratic process.<sup>51</sup> This is a contestable reading of *Democracy and Distrust*. Among other difficulties, the public animus incurred by suspected and (especially) convicted criminals is not wholly irrational. And furthermore, to the extent that convicted criminals—unlike, for example, African Americans—are disenfranchised, there is little doubt that this is constitutional, and does not warrant judicial remedy.<sup>52</sup>

It must, however, be acknowledged that Ely’s theory lends itself to misinterpretation, or perhaps simply myriad interpretations, as he failed to elucidate the phrase “discrete and insular minorities.” Indeed, Ely has given rise to a slew of critics, often firing their salvos from opposing vantage points.<sup>53</sup> Leaving aside the doubtful constitutionality of the judicial enterprise invited by the representation-reinforcement model,<sup>54</sup> Ely’s “theory gives little guidance on how to determine whether the political process has malfunctioned.”<sup>55</sup> There will always be winners and losers in the democratic political process; and almost by definition, losers often consist of a group that could be characterized as a “minority.” More importantly, Ely failed to recognize that minorities can often wield disproportionate power in the political arena, either because they are more focused in their desires than far-flung majorities, or because they can opportunistically forge coalitions with other interest groups.<sup>56</sup>

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51. See Dorf & Isaacharff, *supra* note 11, at 928 (arguing that “criminal procedure provisions protect another outsider group, suspected and convicted criminals”); Barry R. Bell, Note, *Prisoner’s Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 190 (1986) (arguing that judicial activism is appropriate in the prison regulation context because prisoners “exert little or no political leverage”).

52. See *Baker v. Pataki*, 85 F.3d 919, 920 (2d Cir. 1996) (rejecting the argument that disenfranchisement of prison inmates violated Voting Rights Act and U.S. Constitution).

53. See, e.g., Raoul Berger, *Ely’s “Theory of Judicial Review,”* 42 OHIO ST. L.J. 87 (1981); Joseph D. Grano, *Ely’s Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO ST. L.J. 167 (1981); Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

54. This may be akin to averting one’s gaze from the elephant in the corner of the room. For a devastating attack on the constitutionality of Ely’s enterprise, see Grano, *supra* note 53, at 185–95.

55. Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 446 (1999).

56. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 735 (1985) (“Quite simply, our efforts in bargaining theory have led us to expect that ‘middling minorities’ of the ‘discrete and insular’ kind will elect a significant number of Representatives—say 20 to 25—who are extremely responsive to their interests. As long as these politicians are not treated like pariahs, they can become a potent legislative force—trading votes with other legislators to further the objectives of their own constituents.”). Moreover, Ely’s suggestion that African Americans as a class are politically powerless or disenfranchised, whatever its validity through the 1960s, is at least debatable today. Compare Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (arguing that the Jim Crow era is over and that a reappraisal of Ely’s theory is needed), with Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 223 (“blacks remain underrepresented politically”). The 1998 article by Professors Kahan and Meares is the most sophisticated recent use of Ely’s theory in the criminal procedure context. They draw a distinction between

### B. Public Choice

With the advent of public choice theory,<sup>57</sup> the analysis of the legislative process has become more sophisticated.<sup>58</sup> Most simply put, public choice theorists apply economic models of human behavior to the political process.<sup>59</sup> Public choice theorists contend that the legislative process is “a microeconomic system in which actual political choices are determined by the efforts of individuals and groups to further their own interests.”<sup>60</sup> The process by which interest groups obtain benefits for themselves from lawmakers is often labeled “rent-seeking.”<sup>61</sup> Whereas Ely’s representation-reinforcement theory had simplistically assumed that minorities are underrepresented in the democratic process, and therefore would be disadvantaged in any rent-seeking competition, public choice theorists have recognized that exactly the opposite is often the case.<sup>62</sup> Minority groups are often more successful in rent-seeking than dispersed majorities, and can wield *more* influence than their numbers would predict.<sup>63</sup>

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policing strategies that target “the average citizen,” which should be entitled to judicial deference, and strategies that disproportionately burden minority groups, which courts should carefully scrutinize. Kahan & Meares, *supra*, at 1172–76. This suggestion has been criticized as contrary to the Framers’ design, for it effectively allows majorities to define the fundamental rights of all citizens. See Alschuler & Schulhofer, *supra*, at 244 n.138.

57. The seminal work is often said to be James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (1962). “[P]ublic choice did not find its way into the legal literature until the early to mid-1980s.” Maxwell L. Stearns, *Restoring Positive Law and Economics: Introduction to Public Choice Theme Issue*, 6 GEO. MASON L. REV. 709, 711 (1998). In a broader sense, however, the insights of public choice can be traced back to James Madison and Niccolò Machiavelli. See Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 16 (2003).

58. Arguably, too sophisticated. See Abner J. Mikva, *Symposium on the Theory of Public Choice: Foreword*, 74 VA. L. REV. 167 (1988) (criticizing public choice theorists for trying to mathematically model the lawmaking process).

59. See, e.g., Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 399–400 (1992) (“All players in the legislative arena are assumed to be rational self-interest maximizers. Public choice theorists analogize Congress to a marketplace in which public interest groups and lobbyists attempt to procure favorable legislation to benefit their constituents.”); see also Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 878 (1987) (“The basic behavioral postulate of public choice, as for economics, is that man [including legislators] is an egotistic, rational and utility maximizer.”) (citation omitted).

60. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 52 (2d ed. 1995) (citation omitted).

61. See, e.g., Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. L. REV. 1551, 1555 (2003) (“[The] process of special interests trying to influence the law to transfer wealth from the public to themselves and to thereby increase their wealth above what they would receive in a competitive market (i.e., to earn ‘economic rents’) is referred to as ‘rent seeking.’”).

62. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 53–65 (1965); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 345 (1987).

63. See Farber, *supra* note 62, at 289 (“If public choice has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process.”). Indeed, the smaller the group, the easier it is to organize and therefore, paradoxically, the greater success such a group can have in influencing the political process. See OLSON, *supra* note 62, at 53–65. A poten-

Scholars have spun out the implications of the public choice theory's insights into the gruesome realities of the lawmaking process. Recognizing that legislation is generally little more than a "deal" struck by the various rent-seekers, one scholar has urged courts to interpret statutes "in a dynamic fashion" that mitigates "the nightmare."<sup>64</sup> And Judge Frank Easterbrook, crediting the "discoveries of public choice theory," has reinvigorated the hoary cannon of construction that statutes in derogation of the common law be narrowly construed.<sup>65</sup> In this respect, Easterbrook is following Blackstone, who contrasted the slowly evolving common law, viewed as the embodiment of reason, with legislatures, viewed as "unprincipled political creatures."<sup>66</sup>

Although public choice theory and rent-seeking models have been used extensively to explain the genesis of various civil legislation,<sup>67</sup> few have applied these lessons to criminal legislation.<sup>68</sup> In general, scholars have argued that public choice theory suggests there will be a dearth of criminal legislation. Because the benefits of criminal legislation are dispersed among the general public, it is said there is generally little incentive for lawmakers to act in this realm.<sup>69</sup> "Criminal law-making," Professor Dan Kahan has written, "confronts members of Congress with high opportunity costs: time spent enacting criminal legislation necessarily comes at the expense of time that could be spent enacting legislation sought by small, highly organized interest groups, which are more likely than the public at large to reward legislators for benefits conferred and to punish them for disabilities imposed."<sup>70</sup>

But this may not go far enough. In a provocative essay, Professor Donald Dripps has argued that legislatures are not simply indifferent to

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tially competing factor is that certain groups, especially certain racial minority groups, may be shut out of winning coalitions. See Lawrence, *supra* note 62, at 345.

64. WILLIAM ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 40–48 (1987); see also Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (explaining how interest groups affect policy-making).

65. Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 544 (1983).

66. Farber & Frickey, *supra* note 59, at 881 n.49; see also 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*63, \*68–70, \*85–88, \*91–92; Easterbrook, *supra* note 65.

67. See GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* (1989); David E. Bernstein, *The Law and Economics of Post-Civil War Restriction on International Migration by African-Americans*, 76 TEX. L. REV. 781, 824 n.311 (1998) (collecting articles using public choice theory to explain, among other laws, the repeal of Prohibition, dairy legislation, the Seventeenth Amendment, and roadway construction projects).

68. See Lanier Saperstein, Comment, *Copyrights, Criminal Sanctions and Economic Rents: Applying the Rent Seeking Model to the Criminal Law Formulation Process*, 87 J. CRIM. L. & CRIMINOLOGY 1470, 1470 (1997) ("Few, if any, public choice theorists have applied the rent seeking model to the criminal law formulation process. This is particularly odd given that rent seeking is such a prevalent model in examining the formulation of civil legislation. On first inspection, public choice theorists may posit that the benefits of criminal law are public goods."). Saperstein's comment is itself a rare exception, for it applies the rent-seeking model to the criminalization of certain copyright violations.

69. See Dan M. Kahan, *Is Chevron Relevant to Criminal Law?*, 110 HARV. L. REV. 469, 474 (1996).

70. *Id.* at 475; see also Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 648 (2000).

criminal procedure protections; rather, they are actively hostile to such protections.<sup>71</sup> “Public choice theory,” Dripps has written, “suggests that an overwhelming preponderance of political incentives favor unrestricted enforcement of the criminal law, even if this means abusive police methods or convicting the innocent.”<sup>72</sup> Most citizens, it is said, view themselves as potential victims of crime, not suspects.<sup>73</sup> And in addition, the burden of police misconduct and unjust convictions tends to fall on a group that is not politically powerful: young men (particularly minorities).<sup>74</sup> Dripps therefore used public choice to breathe new life into Amsterdam’s notion of legislative default, reviving the argument for judicial activism to protect the legislatively neglected rights of criminal defendants.<sup>75</sup>

### C. *Testing the Theory*

At first blush, Dripps’s application of public choice theory to criminal legislation seems to be largely borne out. The occasional legislative forays into criminal lawmaking are consistent with public choice theory, in that criminal laws often seem designed not to address a real public need, but to enhance the lawmakers’ popularity. Federal criminal legislation is vulnerable to the criticism that it consists of little more than “feel good” measures serving little concrete public purpose.<sup>76</sup> An example sometimes cited in this regard is the gratuitous 1994 federal car jacking law.<sup>77</sup> It was passed just weeks after a highly publicized car jacking and murder in Maryland—despite the fact that the preexisting federal law was quite broad and that states were quickly passing severe car jacking laws of their own.<sup>78</sup> Furthermore, legislation expanding criminal li-

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71. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993). As the title suggests, Dripps’s article provided the inspiration for my own.

72. *Id.* at 1081.

73. *Id.* at 1089.

74. *Id.* at 1088–90.

75. *Id.* at 1096–97 (“All I argue is that when judges interpret language that bears on criminal procedure, they should acknowledge their singular responsibility to those who are unable to defend themselves through electoral politics.”).

76. See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability*, 83 VA. L. REV. 939, 959 n.69 (1997) (“Much criminal legislation may stem from legislators’ desire to pander to popular opinion, particularly in the wake of some infamous crime.”). It is unclear that judges are more insulated from these sorts of pressures than legislatures. See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 666 (1987) (“The judiciary is under equally severe pressure to expand the reach of criminal statutes. Even assuming that judges, unlike legislatures, are immune to the effects of public clamor to do something about crime (not necessarily an accurate assumption), the internal pressure on judges to affirm convictions for serious crimes must be enormous.”).

77. 18 U.S.C. § 2119 (2000).

78. The original federal car jacking statute contained the jurisdictional prerequisite that the defendant possessed a firearm. Congress amended the statute in 1994 to make car jacking a federal offense even if no firearm is used. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (codified as amended at 18 U.S.C. § 2119 (2000)); cf. Greg Hollon, *After the Federaliza-*

ability in certain specific areas, such as enhanced sanctions for copyright infringements, has been “driven by interest groups,” and is therefore entirely explicable through a rent-seeking model of legislation.<sup>79</sup> Still other criminal legislation, such as onerous penalties for possession of crack cocaine, is disproportionately borne by minority groups that are said to be inadequately represented in the legislative process.<sup>80</sup>

Occasionally, legislatures have enacted criminal procedure protections above and beyond those created by the courts, but again public choice theory is perfectly adequate to explain this process. For the most part, such legislation has been narrowly tailored to carve out special protections for powerful interest groups. An illustration is the Privacy Protection Act of 1980.<sup>81</sup> The media was stirred to action after the Supreme Court decided *Zurcher v. Stanford Daily*,<sup>82</sup> which audaciously suggested that members of the Fourth Estate should be treated as ordinary citizens when police execute search warrants for criminal evidence.<sup>83</sup> Congress, responding to the media’s hue and cry about *Zurcher*, promptly extended special protections for the Dan Rathers and Walter Cronkites of the world that you and I can only dream of.<sup>84</sup> Perhaps that is not entirely true: another powerful interest group that has successfully lobbied legislatures for special protections from the police is the legal community.<sup>85</sup>

For the most part, then, when legislatures have taken the trouble to enact legislation in the criminal realm, it spells no good for defendants. On occasion, when courts have construed a criminal law in a way that narrows liability, Congress has amended the law to give it a broader reach.<sup>86</sup> And as Professor William Stuntz has observed, legislatures have

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*tion Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 500 (1996) (“The rapid expansion of federal criminal jurisdiction, fueled by politicians’ desire to appear increasingly tough on crime, has led to the enactment of more than 3000 federal criminal statutes,” including the 1994 car-jacking statute.).

79. See Saperstein, *supra* note 68, at 1472.

80. See 21 U.S.C. § 841 (1999); Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1276 (1998) (noting that in 1993 blacks comprised 88.3% of federal crack convictions, while whites comprised only 4.1%).

81. Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. §§ 2000aa-2000aa-12 (2000)).

82. 436 U.S. 547 (1978).

83. *Id.* at 565-67.

84. The Privacy Protection Act of 1980, prohibits federal agents from searching and seizing material from “a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication,” provided that that person is himself an innocent third party. 42 U.S.C. § 2000aa(a) (2000); see also MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES AND MATERIALS 665-66 (6th ed. 2000) (compiling state statutory responses to *Zurcher*). For example, California requires police to notify people to whom the subpoenaed records pertain. See CAL. CIV. PROC. CODE § 1985.3(b)(1) (West 1998).

85. See 2 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 38.6-.24 (3d ed. 2000); 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1(a), at 395-401 (3d ed. 1996).

86. In *McNally v. United States*, 483 U.S. 350, 358 (1987), the Supreme Court held that the words “to defraud” in the mail fraud statute referred to “wronging one in his property rights by dishonest methods or schemes,” and “usually signify the deprivation of something of value by trick, deceit, chicanery, or overreaching” (citation omitted). Thus, the Court held that the mail fraud statute requires some sort of property deprivation. Congress then amended the mail fraud statute to overrule

often actively undercut the effectiveness of judicially created procedural protections.<sup>87</sup> For example, Congress and state legislatures have underfunded criminal defense counsel, increased sentences for numerous offenses, and vastly expanded substantive criminal liability.<sup>88</sup> As Stuntz has argued, judicially created criminal procedure rules have thus driven an ill-advised expansion of the substantive law, which in turn makes courts more protective of the rights of suspects, and so on in a vicious cycle.<sup>89</sup>

Judges have on occasion explicitly justified their activism in the criminal procedure realm by gesturing towards a legislative dereliction of duty—that is, the duty to comply with the Constitution. Illustrative is Justice O'Connor's dissenting opinion in *Illinois v. Krull*,<sup>90</sup> which involved judicial review of a state law authorizing certain warrantless searches.<sup>91</sup> O'Connor noted that “[t]he legislature’s objective in passing a law authorizing unreasonable searches . . . is explicitly to facilitate law enforcement.”<sup>92</sup> Opposed to this popular pressure is the Fourth Amendment, and “it is a measure of the Framers’ fear that a passing majority might find it expedient to compromise Fourth Amendment values that these values were embodied in the Constitution itself.”<sup>93</sup> The crux of O'Connor's argument was that legislatures cannot be trusted to respect such unpopular constitutional provisions, and hence the need for judicial vigilance: “Legislators by virtue of their political role are more often subjected to the political pressures that may threaten Fourth Amendment values than are judicial officers.”<sup>94</sup>

A somewhat different statement of the issue can be seen in Chief Justice Burger's dissenting opinion in *Furman v. Georgia*,<sup>95</sup> in which a

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*McNally*. 18 U.S.C. § 1346 (1988) (“For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right to honest services.”). After *Ratzlaf v. United States*, 510 U.S. 135, 146 (1994), construed the federal money-laundering statute to require a willful intent, Congress deleted the word “willfully” from the statute. See Riegl Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2253 (codified as amended at 31 U.S.C. §§ 5322(a), 5321(c)(1) (1994)).

87. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7–12, 55–59 (1997).

88. *Id.* at 55–59.

89. *Id.* at 60–65. In A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. REV. 409, 500–01 (1999), the authors further argue that judges and lawyers will tend to make the law, and especially procedures, more complex. First, this increases demand for their services. Second, greater complexity increases their discretion because it substitutes standards for rules and makes it more difficult to figure out what they are doing and when they have abused their discretion. Third, many prosecutors and judges are past or future defense lawyers, so they will share at least some of the financial self-interest of the defense bar.

90. 480 U.S. 340, 361 (1987) (O'Connor, J., dissenting).

91. *Id.* (O'Connor, J., dissenting).

92. *Id.* at 365 (O'Connor, J., dissenting).

93. *Id.* (O'Connor, J., dissenting).

94. *Id.* at 365–66 (O'Connor, J., dissenting); see also *Rhodes v. Chapman*, 452 U.S. 337, 358 (1981) (Brennan, J., concurring) (arguing that prison inmates are “voteless, politically unpopular, and socially threatening”) (citation omitted).

95. 408 U.S. 238 (1972).

plurality of the Court held the death penalty to be unconstitutional.<sup>96</sup> Burger wrote that “in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society.”<sup>97</sup> Although courts should not always defer to that judgment, Burger argued that “only . . . unambiguous and compelling evidence” should allow courts to credit arguments of legislative default.<sup>98</sup> The contrast between the O’Connor and Burger opinions helpfully shapes the issue before us: How serious is the problem of legislative default? Are legislatures, as O’Connor speculated, “subject to political pressures that may threaten” constitutional values in the criminal procedure realm? Or are there countervailing mechanisms to ensure legislatures are not wholly insensitive to the plight of criminal defendants? To these questions we now turn.

### III. LEGISLATIVE DEFAULT REVISITED

This section begins with a reappraisal of the empirical evidence of legislative default. The evidence in fact suggests that, contrary to the conclusions reached in the previous section, Congress is not wholly insensitive to the rights of criminal defendants. Over the past thirty years, and especially over the past six, there has been a flurry of legislative activity to *protect* criminal defendants. Clearly something is afoot: How can we account for the recent congressional interest in criminal procedure protections? What emerges, I argue below, is that Congress is in part responding to the consequences of its own dramatic expansion of substantive criminal liability.<sup>99</sup> Included among those increasingly victimized by this expansion of the criminal law are politically prominent individuals, including members of Congress, who have the wherewithal to influence the lawmaking process.

#### A. *Protecting Defendants*

In the past six years, Congress has defied the scholarly consensus<sup>100</sup> and extended a number of procedural protections for criminal defendants. In 1998, Congress enacted the Hyde Amendment, which permits acquitted defendants to recover legal fees upon a judicial finding that the prosecution had been “vexatious, frivolous or in bad faith.”<sup>101</sup> The following year, Congress passed the Citizen Protection Act, widely known

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96. *Id.* at 239–40.

97. *Id.* at 384 (Burger, C.J., dissenting).

98. *Id.* (Burger, C.J., dissenting).

99. Especially with respect to the growth of federal criminal law, there are already tomes of overheated academic protests. *See, e.g.*, Charles D. Bonner, *The Federalization of Crime: Too Much of a Good Thing*, 32 U. RICH. L. REV. 905 (1988).

100. *See supra* Part II.

101. Pub. L. No. 105-119, Title VI, § 617, 111 Stat. 2519 (1997) (codified at 18 U.S.C. § 3006A note (2000)).

as the McDade Amendment, imposing states ethics rules upon federal prosecutors and effectively restricting the investigative tactics that may be pursued in federal investigations.<sup>102</sup> And then in 2000, Congress approved the Civil Asset Forfeiture Reform Act, which renders more difficult the seizure of a criminal defendant's assets.<sup>103</sup> Nor do these bills exhaust the legislature's interest in protecting criminal defendants. Repeatedly over the past few years, members of Congress have labored to pass "The Innocence Protection Act," which would provide grants to states to improve legal services for capital defendants and provide access to DNA testing for federal inmates who have credible claims of innocence.<sup>104</sup>

In addition, percolating in Congress over the last few decades have been various proposals to reform the federal grand jury system.<sup>105</sup> In 1976, Senator John Tunney, the Chairman of the Senate Subcommittee on Constitutional Rights, opened hearings on grand jury reform with the observation that "[c]ontinuing revelation of Government lawlessness has led to a breakdown in public trust in the integrity of our institutions. The federal grand jury has not escaped this skepticism."<sup>106</sup> Tunney proceeded to make an observation that flips the ordinary expectations about legislatures and courts and their respective enthusiasm to protect criminal defendants: "Confronted by instance after instance of grand jury abuse, the courts have repeatedly failed to exercise their supervisory responsibilities over the grand jury process."<sup>107</sup> Thus, Tunney suggested, it is up to the legislature to remedy an instance of *judicial* default—the courts' unyielding refusal to create any meaningful checks upon prosecutorial use, and some say abuse, of the grand jury system.<sup>108</sup> In ensuing hearings, various members of Congress lamented the use of the grand jury to target political opponents.<sup>109</sup>

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102. See Citizens Protection Act of 1998, Pub. L. No. 105-277, § 101(b), 112 Stat. 2681, 2681-118 to -119 (codified at 28 U.S.C. § 530B) (Supp. V. 1999)).

103. Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of 8, 18, 19, 21, 28, 31, 42 U.S.C.).

104. See S. 486, 107th Cong. (2001), introduced to the Senate on March 7, 2001 (originally introduced to the Senate during the 106th Cong.), by Senator Patrick Leahy, (D.-Vt.) and H.R. 912, 107th Cong. (2001), introduced to the House on March 7, 2001 (originally introduced to the House during the 106th Cong.) by Representative William D. Delahunt (D.-Mass.).

105. See Michael Waldman, *Grand Jury: Ripe for Reform*, CRIM. JUST., Winter 2002, at 4, 6-7 (discussing various current proposals, including one by Representative Delahunt that would permit defense counsel to accompany witnesses in the grand jury room).

106. *Reform of the Grand Jury System: Hearing Before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary*, 94th Cong. (1976) (opening statement of Sen. John V. Tunney).

107. *Id.*

108. More recent instances of such judicial default in the grand jury context include *United States v. Williams*, 504 U.S. 36 (1992) (holding that prosecutors do not have a duty to present exculpatory evidence to the grand jury), and *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991) (holding that grand jury subpoena should be quashed only if "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation").

109. Introducing a Senate bill to reform the grand jury, Senator James Abourezk (D.-S.D.) stated that "the Nixon administration used the grand jury as a tool of political repression in its effort to si-



Furthermore, in the mid-1970s, a number of Congressional committees, most famously the so-called Church Committee, heard evidence of widespread domestic abuses by the FBI and CIA, including surveillance of Martin Luther King, the Students for a Democratic Society, the Ku Klux Klan, African American activists, and Vietnam War protesters.<sup>110</sup> These groups would appear to be the sort of undervalued and underrepresented minorities as to which Congress should be at best indifferent and more likely hostile. To the contrary, however, Congress responded to evidence of FBI and CIA abuses by enacting the Foreign Intelligence Surveillance Act in 1978 (FISA),<sup>111</sup> which was intended to prevent domestic surveillance of politically unpopular groups and curtail the powers of foreign intelligence and counterintelligence officers to operate on American soil.<sup>112</sup>

Congress amended the FISA in one of its most recent forays into criminal lawmaking, the United States of America Patriot Act of 2001 (USAPA or Patriot Act),<sup>113</sup> in ways that dilute some of the original

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lence the anti-war movement.” *Reform of the Grand Jury System: Hearing Before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary*, 94th Cong. (1976) (statement of Sen. James Abourezk); see also *Federal Grand Jury: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law, House Comm. on the Judiciary*, 94th Cong. (1976) (providing accounts of alleged grand jury abuses, including the Patty Hearst case, the Daniel Ellsberg/Pentagon Papers case, and the Tallahassee 23/Vietnam Veterans Against the War case). For a useful summary of legislative proposals to reform the grand jury, see Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1179–83 (1984) and Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 48 n.310 (1996).

110. See S. REP. NO. 94-755, at v (1976).

111. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1863 (2000).

112. The FISA created a legal and judicial framework for “foreign intelligence” surveillance operations conducted in America distinct from the regime governing ordinary law enforcement surveillance. Prominent civil libertarians over the years have criticized the FISA as insufficiently protective of First and Fourth Amendment values. See, e.g., *Warrantless National Security Physical Searches: Before the House Permanent Select Comm. on Intelligence*, 103d Cong. (1994) (statement of Kate Martin, Director, Center for National Securities Studies), available at 1994 WL 14190196; Jeffrey Toobin, *Crackdown*, NEW YORKER, Aug. 30, 2002 (“[T]here is a lower standard to getting FISA taps.”). The FISA in fact included several checks to guard against abuses. For example, FISA surveillance must comply with “minimization procedures” that are designed to limit the acquisition, retention, and dissemination of information about United States persons. 50 U.S.C.A. §§ 1801(h)(1), 1824(4) (2003). More importantly, a high-level executive branch official must verify that the surveillance is intended to gather “foreign intelligence” and not simply to collect evidence of ordinary criminal activity. As the FISA was originally enacted in 1978, an application for a surveillance order was required to include a certification to the Foreign Intelligence Surveillance Court (FISC) that “the purpose of the [surveillance or search] was to obtain foreign intelligence information.” 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (emphasis added). The actual experience with the FISA, especially in the 1990s, suggests that the bureaucratic apparatus created by the FISA was perhaps all too effective in frustrating investigations with overlapping criminal law enforcement and foreign intelligence gathering purposes. See United States Gen. Accounting Office, *FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited*, GAO-01-780, 13–14 (July 2001), <http://www.gao.gov/new/items/d01780.pdf> (last visited May 27, 2004); see also Craig S. Lerner, *The USA Patriot Act: Promoting the Cooperation of Foreign Intelligence Gathering and Law Enforcement*, 11 GEO. MASON L. REV. 493, 495–512 (2003) (discussing the FISA and the Patriot Act’s changes to the law).

113. USA PATRIOT Act, Pub. L. 107-56, §§ 206–207, 214–215, 504, 115 Stat. 272, 282, 286–88, 364–65 (2001).

FISA's restrictions on information gathering. It is worth briefly considering the Patriot Act; it is sure to be cited as a case study to disprove the thesis of this article, demonstrating that legislatures in fact give not the slightest concern to criminal defendants. Indeed, the Patriot Act has inspired a veritable cottage industry of criticism, from the academically yawn-enforcing<sup>114</sup> to the hysterically muckraking;<sup>115</sup> and a common lament is that Congress rolled over for the President and sold out criminal defendants.<sup>116</sup> Yet suggestions that Congress simply rubber-stamped legislation proposed by the executive branch are overwrought. Consider two examples.<sup>117</sup> First, the Senate version of what would become the Patriot Act included a proposal by Senator Leahy to repeal the McDade Amendment and thereby liberate federal prosecutors from the burden of complying with state ethics rules.<sup>118</sup> Yet the provision was dropped when it met opposition in the House of Representatives.<sup>119</sup> For reasons explored below, the House would seem to have a persisting interest in preventing overreaching by federal prosecutors.<sup>120</sup>

Second, the changes to the FISA effected by the Patriot Act were in fact more modest than those sought by President Bush and reflect a relatively robust legislative interest in guarding against the sorts of abuses

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114. Cowardly fear of offending any of my brethren in the academy (my modest defense: I am untenured) prevents me from offering a citation for this unflattering proposition. However disparaging I may be of members of Congress, I do not intend to suggest that legislators have a monopoly on the shameless pursuit of self-interest.

115. See, e.g., Jennifer Van Bergen, *Repeal the Patriot Act*, TRUTHOUT, Apr. 1, 2002, at [http://www.truthout.org/docs\\_02/04.02A.JVB.Patriot.htm](http://www.truthout.org/docs_02/04.02A.JVB.Patriot.htm) (last visited May 27, 2004) ("The USA Patriot Act is an insult to Americans. . . . [I]t utterly relinquishes any semblance of due process, violates the First, Fourth, Fifth, Sixth and Eighth Amendments, and unacceptably mixes aspects of criminal investigations with aspects of immigration and foreign intelligence laws. . . . Let me state it even more bluntly. This law is dangerous. It's a travesty.")

116. See Elec. Frontier Found., *EFF Analysis of the Provisions of the USA PATRIOT Act That Relate to Online Activities* (Oct. 31, 2001), at [http://www.eff.org/Privacy/Surveillance/Terrorism/20011031\\_eff\\_usa\\_patriot\\_analysis.php](http://www.eff.org/Privacy/Surveillance/Terrorism/20011031_eff_usa_patriot_analysis.php) (last visited May 27, 2004) ("[T]he vast majority of the sections included [in the USAPA] have not been carefully studied by Congress, nor was sufficient time taken to debate it or to hear testimony from experts outside of law enforcement in the fields where it makes major changes. This concern is amplified because several of the key procedural processes applicable to any other proposed laws, including inter-agency review, the normal committee and hearing processes and thorough voting, were suspended for this bill.")

117. There are others. For example, the legislation submitted to Congress by the Bush administration in early October 2001 would have authorized the Attorney General to detain indefinitely any noncitizen he believed posed a national security threat. See John Lancaster, *Hill Puts Brakes on Expanding Police Powers*, WASH. POST, Sept. 30, 2001, at A6. Congress revised the proposed language and incorporated several procedural protections in the USAPA, including limits on the duration of the detention and provisions for judicial review. USA Patriot Act § 412(a)(6), codified at 8 U.S.C. § 1226a(a)(6) ("An alien . . . whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.")

118. See United and Strengthening America Act of 2001, S. 1510, 107th Cong. (Senate/Leahy proposal).

119. See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 437 n.194 (2002) (discussing legislative history of the Patriot Act).

120. See *infra* text accompanying note 410.

that occurred in the 1960s and 1970s.<sup>121</sup> After the September 11th attacks, the Department of Justice lobbied Congress to amend the FISA in a way that would have made it unmistakably clear that FISA investigations were permissible even when the FBI's primary purpose was to enforce the criminal law and not simply to gather foreign intelligence.<sup>122</sup> Yet several members of Congress expressed the concern that the Department's proposed amendment would have effected too fundamental a change in the FISA regime.<sup>123</sup> Some members publicly agonized that the FISA mechanism, if amended as sought by the executive branch, would be overused by prosecutors in law enforcement investigations, especially when they were unable to satisfy the stringent requirements imposed by the federal wiretap statute (Title III) and the Fourth Amendment.<sup>124</sup>

The above evidence, although somewhat anecdotal, at a minimum indicates some legislative interest *opposed to* what Professor Dripps called the "unrestricted enforcement of the criminal law, even if this means abusive police methods or convicting the innocent."<sup>125</sup> Indeed, revisiting the past, one cannot be but struck by the inability of Dripps's view to account for many legislative actions. For example, the "Palmer raids" are often cited as the paradigmatic case of federal law enforcement gone amok, with thousands of suspected Communists arrested or deported based on their alleged advocacy of the overthrow of the United States government.<sup>126</sup> Seldom noted, however, is the fact that Congress

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121. Compare *Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the House Comm. on the Judiciary*, 107th Cong. 74 §§ 153, 156 [hereinafter *Draft Anti-Terrorism Act Hearings*] (advocating use of the FISA Court when "a purpose" of an investigation is foreign intelligence-gathering, and arguing for the Attorney General's power to require the production of evidence relevant to said investigations), with USA PATRIOT Act, Pub. L. 107-56, § 218 (restricting purpose of the FISA Court to situations in which the gathering of foreign intelligence is "a *significant* purpose" of an investigation) (emphasis added).

122. The Department of Justice had sought to replace "the purpose" in the FISA certification requirement with "a purpose." It explained that "[c]urrent law requires that FISA be used only when foreign intelligence gathering is the sole or primary purpose of the investigation. This section will clarify that the certification of a FISA request is supportable where foreign intelligence gathering is 'a' purpose of the investigation." *Draft Anti-Terrorism Act Hearings*, *supra* note 121 (discussing § 153). The Department further contended that "[t]he change would eliminate the current need continually to evaluate the relative weight of criminal and intelligence purposes, and would facilitate information sharing between law enforcement and foreign intelligence authorities, which is critical to the success of anti-terrorism efforts." *Id.* at 56-57.

123. See *The USA PATRIOT Act in Practice: Shedding Light on the FISA Process: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 15 [hereinafter *2002 PATRIOT Act Hearings*] (statement of Senator Richard J. Durbin); *id.* at 7-8 (statement of Senator Dianne Feinstein); *id.* at 16 (statement of Senator Charles E. Schumer).

124. Senator Arlen Specter explained that "[t]he word 'significant' was added to make it a little easier for law enforcement to have access to FISA material, but not to make law enforcement the primary purpose" of FISA investigations. *2002 PATRIOT Act Hearings*, *supra* note 123, at 10. Accordingly, Congress agreed to amend the FISA to permit investigations only where "a *significant* purpose" was the gathering of foreign intelligence. *Id.*

125. Dripps, *supra* note 71, at 1081.

126. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 995-97 (2002).

responded to the raids with hearings to investigate the excesses.<sup>127</sup> How are we to account for such congressional actions?

What is needed is some correction to the prevailing theory to explain why legislatures do not in fact, always and remorselessly, favor the “unrestricted enforcement of the criminal law,” and why, at least on occasion, they have even provided criminal procedure protections when the courts have failed to do so.

*B. Upscale Criminals, Their Lawyers, and America’s Antigovernment Tradition*

To begin, let us return to Professor Stuntz’s insightful recognition of a judicial-legislative dynamic in the production of American criminal law. Over the past three decades, legislatures have undercut the judicial protections for criminal defendants; they have underfunded defense counsel, increased sentences for numerous offenses, and vastly expanded criminal liability.<sup>128</sup> These actions are best understood, Stuntz has argued, as a legislative rejection of the judicial expansion of protections for criminal defendants.<sup>129</sup> However true this may be, there is another step in the dynamic that Stuntz and others may have failed to consider. The expansion of the criminal law, as well as the development of increasingly intrusive technologies to investigate violations of the ever-expanding criminal law, have led to *legislative* concerns about overbroad criminal law enforcement. Thus, instead of judicially created procedural rules driving legislatures to expand the criminal law, an entirely different dynamic is at work: a substantive expansion of the criminal law has propelled *legislatures* themselves to enact criminal procedure protections.<sup>130</sup>

This dynamic can be seen on various levels. First, the broadening of the substantive criminal law has created a powerful new class of lobbyists: the white collar criminal defense bar. Until recently, the criminal defense bar was a rather scattered and motley group, not well-paid and

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127. See Todd David Peterson, *Congressional Oversight of Open Criminal Investigations*, 77 NOTRE DAME L. REV. 1373, 1389 (2002) (discussing Charges of Illegal Practices in the Department of Justice: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 66th Cong. (1921) and Attorney General A. Mitchell Palmer on Charges Made Against Department of Justice by Louis F. Post and Others: Hearings Before the House Comm. on Rules, 66th Cong. (1920)).

128. See Stuntz, *supra* note 87, at 7–9.

129. See *id.* at 4 (“As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs. Severe limits on defense funding are the most obvious example, but not the only one. Expanded criminal liability makes it easier for the government to induce guilty pleas, as do high mandatory sentences that serve as useful threats against recalcitrant defendants.”).

130. One might analogize to the tax field, where Congress has expanded liability over time, while simultaneously auctioning off loopholes to the highest bidders. See Deborah L. Paul, *The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?*, 76 N.C. L. REV. 151, 177 (1997) (“Since tax simplicity is not an ideal that is likely to develop its own independent constituency, complicated, intractable, and incoherent legislation is likely to ensue, according to public choice view, as self-promoting politicians pander to the special interest by sprinkling loopholes throughout the federal income tax without any regard for the costs imposed on the rest of society.”).

held in low regard by their peers.<sup>131</sup> Such a group was unable to unite, and unlikely to exert any meaningful pressure on the legislative process. With the expansion of criminal liability in the 1970s, however, criminal defendants have gone upscale.<sup>132</sup> This better class of defendants can afford to hire expensive lawyers, and their demand has created a sizable supply of high-priced white collar defense lawyers with fancy law degrees at prestigious firms, often in Washington, D.C. and New York. This new defense bar is wealthy, concentrated geographically, and well-organized.<sup>133</sup> It has every opportunity to lobby for legislation that would protect its interests (and not coincidentally its clients' interests). The National Association of Criminal Defense Lawyers (NACDL) is the primary lobbying vehicle and has been the untold story behind recent legislation protecting criminal defendants.

The fingerprints of the NACDL are all over the recent legislative efforts on behalf of criminal defendants.<sup>134</sup> First and foremost is the Civil Asset Forfeiture Reform Act of 2000.<sup>135</sup> This legislation makes it considerably more difficult for the federal government to seize assets involved in criminal wrongdoing under civil forfeiture laws, a change that is especially important to criminal defense lawyers because it directly affects their ability to be paid. Various scholars had predicted that Congress would be extremely reluctant ever to encourage funding of criminal defense lawyers,<sup>136</sup> but they failed to take into account the new-found power of lobbying groups, such as white collar defense lawyers.<sup>137</sup>

On the civil forfeiture issue, and many other issues, the NACDL had substantial help from standard business lobbying groups, such as the

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131. A colleague of mine, who clerked on the Supreme Court in the early 1980s, reports that when being wooed by the elite Washington, D.C. and New York firms, he was frequently told, "We do everything. Except family law. And of course criminal defense."

132. See Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995). In a 1993 survey of 200 corporate general counsels, forty-two percent reported that their corporation was the target of a criminal investigation and twenty-seven percent of the officers or directors were notified that they were personally targets. See Dan K. Webb et al., *Understanding and Avoiding Corporate and Executive Criminal Liability*, 49 BUS. LAW. 617, 617 n.1 (1994); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 515-18 (2001) (compiling some of the more comical state and federal criminal laws of recent vintage, including a Florida law criminalizing the selling of untested sparklers and a federal statute criminalizing the unauthorized use of the name "Woodsy Owl").

133. On the development of the modern criminal defense bar, see KENNETH MANN, *DEFENDING WHITE COLLAR CRIME* 19-34 (1985); Craig S. Lerner, *Conspirators' Privilege or Innocents' Refuge: A New Approach to Joint Defense Agreement*, 77 NOTRE DAME L. REV. 1449, 1462-65 (2002).

134. *Civil Asset Forfeiture Reform Act of 1997: Hearing Before the House Comm. on the Judiciary*, 105th Cong. (June 11, 1997), available at 1997 WL 316521 (statement of David B. Smith, Nat'l Ass'n of Criminal Def. Lawyers); *Civil Asset Forfeiture Reform Act of 1997: Hearing Before the House Comm. on the Judiciary*, 105th Cong. (June 11, 1997), available at 1997 WL 325622 (statement of E.E. Edwards, Nat'l Ass'n of Criminal Def. Lawyers).

135. Civil Asset Forfeiture Reform Act (CAFRA) of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified as amended in scattered sections of 8, 18, 19, 21, 28, 31, 42 U.S.C.).

136. See, e.g., Dripps, *supra* note 71, at 1081.

137. The NACDL is hoping to follow its triumph on civil forfeiture reform with another involving grand jury reform. See David E. Rovella, *Grand Jury Battle Begins: Defenders Back Bill for Witness Rights, but DOJ Lawyers Balk*, NAT'L L.J., May 29, 2000, at A4.

U.S. Chamber of Commerce and the National Association of Manufacturers.<sup>138</sup> This draws attention to another important point about the modern expansion of the criminal law: any expansion of *corporate* criminal liability threatens politically significant groups, who may mobilize in opposition. Such groups may be reluctant to incur the bad publicity accompanying any highly public opposition to a law, the professed purpose of which is to curtail corporate fraud, or the like.<sup>139</sup> But they still often do so behind the scenes, or through proxies such as the *Wall Street Journal*<sup>140</sup> or lobbying groups like the Chamber of Commerce. At times, when the proposed criminal legislation is particularly irksome, business groups appear willing to incur the reputational costs that may accompany public opposition.<sup>141</sup>

It is not only self-interested business groups, and their lawyers, who have successfully mobilized to oppose legislation expanding the powers of police and prosecutors. Certain academic observers betray an ungenerous view of their fellow citizens when they suggest that ordinary Americans have little interest in protecting civil liberties. Although there is, to be sure, a strand in the American tradition hostile to outsiders and reckless of civil liberties,<sup>142</sup> there is a contrary strand. Indeed, far more so than citizens of Western European or Asian democracies,

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138. As a member of the NACDL told the House Judiciary Committee, in advocating civil forfeiture reform, the NACDL was joined by “the Americans for Tax Reform, Chamber of Commerce of the United States of America, Small Business Survival Committee, Republicans for Choice, Institute for Justice, The Madison Project, Free Congress Foundation, American Conservative Union, National Rifle Association, Association of Concerned Tax Payers, Conservative Leadership Pact, Law Enforcement Alliance of American, Eagle Forum, Seniors Coalition, Frontiers of Freedom, [and the] American Civil Liberties Union.” *Oversight of Federal Asset Forfeiture: Its Rule in Fighting Crime: Hearing Before the Subcomm. on Justice Oversight, Senate Judiciary Comm.*, 106th Cong. (July 21, 1999), available at 1999 WL 20010428 (statement of Samuel J. Buffone, Nat’l Ass’n of Criminal Def. Lawyers).

139. As Professor Daniel Richman writes:

It is not very surprising that one rarely sees high-profile efforts by interest groups to limit purely criminal statutes. Expectations that federal enforcers will appropriately exercise their gate keeping authority put a special burden on a group that wants statutory immunization. To make a compelling case, the group publicly has to argue not only that its socially valuable activities theoretically can be prosecuted under the law in question, and will therefore be chilled, but also that there is a real possibility that prosecutors will actually pursue such conduct. These arguments can sound perilously close to admissions that a group plans to pursue an antisocial or immoral course of conduct. While concentrated interest group power can be publicly deployed to criminalize conduct, groups might well prefer less-visible means of restraining criminal enforcement.

Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. REV.* 757, 775–76 (1999).

140. See, e.g., Editorial, *The November Markets*, *WALL ST. J.*, July 10, 2002, at A14 (criticizing congressional legislation expanding criminal liability for corporate fraud).

141. See Press Release, U.S. Chamber of Commerce, U.S. Chamber Blasts Senate Commerce Bill Criminalizing Product Liability Laws (Sept. 25, 2000), available at <http://www.uschamber.com/press/releases/2000/september/00-133.htm> (last visited May 27, 2004).

142. GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* xiii (1978) (“Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights.”).

Americans have throughout their history displayed a robust skepticism about investing powers in hands of government officials.<sup>143</sup>

The Palmer Raids, as noted earlier, are relentlessly cited by denigrators of the American body politic as the paradigmatic illustration of a repressive American political tradition.<sup>144</sup> Scarcely acknowledged is the fact that the Palmer Raids gave rise to the creation of the American Civil Liberties Union, which quickly became a considerable force in American legal and political life.<sup>145</sup> Nor was the incipient ACLU alone in its criticisms, for, as one observer notes, the Palmer Raids “repulsed many in the political mainstream.”<sup>146</sup> The same could be said of the anticommunist excesses in the immediate aftermath of World War II. When the New York legislature refused to seat five elected socialists, the move was protested not only by the New York bar, but also by arch-conservative Supreme Court Chief Justice Charles Evan Hughes.<sup>147</sup> And when Los Angeles police arrested socialist author Upton Sinclair in 1921, “repressionist muscle and eventual overkill alarmed even conservatives.”<sup>148</sup>

Today, many observers across the political spectrum have voiced privacy concerns about new investigative technologies, such as the FBI’s Carnivore Program, that have the potential to affect many innocent people.<sup>149</sup> Especially after the September 11th attacks, and the stepped-up efforts to track down terrorists, with possible spillover privacy intrusions for ordinary citizens, the ACLU’s fortunes in galvanizing public interest in civil liberties has risen.<sup>150</sup> Membership in the ACLU has increased since the attacks on the Pentagon and World Trade Center, and now includes over 350,000 people.<sup>151</sup> Furthermore, ACLU funding has grown considerably in recent years, during which time it has received multimillion dollar grants.<sup>152</sup> Nor can the ACLU be deemed a marginal interest

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143. See FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 51 (1995) (“Americans have a strong antistatist tradition, evident in the relatively small size of the American public sector when compared to virtually all European nations, and in opinion polls that show Americans expressing decidedly lower levels of confidence in and respect for government than do citizens of other industrialized nations.”).

144. See *supra* text accompanying note 126.

145. See H.C. PETERSON & GILBERT C. FITE, *OPPONENTS OF WAR, 1917–1918* (1957).

146. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 38 (1996).

147. *Id.* at 38 n.154 (citing Thomas E. Vadney, *The Politics of Repression: A Case Study of the Red Scare in New York*, 49 N.Y. HIST. 56 (1968)).

148. PAUL L. MURPHY, *THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR* 9 (1972); see also *id.* at 157–58.

149. See Jane Black, *These Are Not Your Father’s Wiretaps: Privacy Advocates Fear That the FBI’s Need to Monitor Internet Age Technologies, Such As Voiceover IP, Will Give It Far Too Sweeping Powers*, BUS. WK. ONLINE, Feb. 27, 2003, available at 2003 WL 6951901 (describing the Carnivore technology and discussing privacy concerns); see also Dana Hawkins, *Body of Evidence*, U.S. NEWS & WORLD REP., Feb. 18, 2002, at 60 (describing privacy concerns about the emerging biometrics technology).

150. Kate Shatzkin, *ACLU Rises on Conservative Tide*, BALTIMORE SUN, Feb. 8, 2003, at 1A.

151. *Id.*

152. *Id.*

group, as retired Republican House Majority Leader Dick Armey and former Representative Bob Barr of Georgia, once among the most conservative voices in Congress, have affiliated themselves with the organization.<sup>153</sup> With such powerful lobbying allies, the ACLU is poised to expand its influence and one may expect the enactment of protections against police and prosecutorial overreaching.

### C. *The “American Criminal Class”*

In explaining congressional interest in enacting protections for criminal defendants, there is one powerful explanation that, to the best of my knowledge, has been almost wholly ignored in the literature: members of Congress have themselves been investigated and prosecuted.

That members of Congress might be criminal defendants would have come as no surprise to James Madison. Although further evidence of the wisdom of the Founding Fathers is, at this late date, superfluous, it is worth noting that the authors of the U.S. Constitution contemplated the possibility that members of Congress would themselves be prosecuted.<sup>154</sup> Although only one member was indicted in the eighteenth century,<sup>155</sup> and four in the nineteenth century (for treason,<sup>156</sup> manslaughter,<sup>157</sup>

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153. See ACLU News, at <http://www.aclunc.org/aclunews/news0301/tips.html> (last visited May 27, 2004) (quoting Press Release, ACLU, ACLU Membership Surges in Wake of Sept. 11 Attacks (Dec. 2, 2002)). The press release goes on to note that Representative Henry Hyde (R.-Ill.) has said of the ACLU: “They are a very useful and productive force in jurisprudence.” *Id.*

154. See Eric M. Freeman, *The Law As King and the King As Law: Is a President Immune from Criminal Prosecution Before Impeachment?*, 20 HASTINGS CONST. L.Q. 7, 30 n.77 (1992) (Senators “are punishable by law for crimes and misdemeanors in their personal capacity. For instance, the members of Assembly are not liable to impeachment, but, like other people, are amenable to the law for crimes and misdemeanors committed as individuals.”) (quoting James Iredell, Speech to the North Carolina Ratifying Convention (July 28, 1788) in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 125–26 (Jonathan Elliot & J.B. Lippincott eds., 2d ed. 1881)); *id.* (citing James Wilson, Speech to the Pennsylvania Ratifying Convention (Dec. 4, 1787) in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492–93 (Merrill Jensen ed., 1976)).

155. Mathew Lyon, a congressman from Vermont, was convicted of violating the Sedition Act of 1798, 1 Stat. 596. *United States v. Lyon*, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8646). He was sentenced to four months imprisonment and to pay a \$1000 fine. “When released from prison, Lyon went immediately to Philadelphia where Congress was in session and where he was treated as a popular hero, crowds turning out along the road to receive him with cheering.” GILES J. PATTERSON, *FREE SPEECH AND A FREE PRESS* 135 (1939). Forty years later, Congress refunded the fine to Lyon’s heirs. See Michael Kent Curtis, *Teaching Free Speech from an Incomplete Fossil Record*, 34 AKRON L. REV. 231, 244 (2000).

156. Senator John Smith was indicted by a Virginia court for participating in Aaron Burr’s conspiracy against the United States. His case was dropped after Burr was acquitted on a technicality. In subsequent expulsion proceedings in the Senate he was represented by prominent defense attorney Francis Scott Key. Richard A. Baker, *Senate Historical Minute*, THE HILL, Aug. 25, 2001. In an ironic turnabout, Francis Scott Key’s son, Phillip Barton Key, became a District Attorney, and prosecuted Representative Philemon Herbert (D.-Cal.) for manslaughter in 1856. Herbert, incensed by the slow service of a waiter at the Willard Hotel, had pulled out a pistol and shot him to death. JAMES T. CURRIE, *THE UNITED STATES HOUSE OF REPRESENTATIVES* 34 (1988). He was tried and acquitted of manslaughter. *Id.* And then in a further incredible turnabout, Phillip Barton Key was himself murdered by a member of Congress, Representative Daniel Sickles (D.-N.Y.). Key had been carrying on an affair with Sickles’s wife, and Sickles shot him in broad daylight in Lafayette Square, across the



murder,<sup>158</sup> and accepting a bribe<sup>159</sup>), in the twentieth century the pace has quickened. From 1900 to 1969, thirty members of Congress were indicted, mostly for a variety of financial crimes involving defrauding the United States or accepting bribes.<sup>160</sup> In addition, three were charged for Prohibition-related offenses,<sup>161</sup> and one for violating the Espionage Act.<sup>162</sup>

The thirty-year period of 1970 to 2000 was an especially busy one for federal prosecutors in the public corruption unit: sixty-one members of Congress were indicted.<sup>163</sup> Perhaps the highest profile investigation was the Abscam sting operation, in which an international con man set himself up, with the assistance of the FBI, as an American representative for two Arab sheiks and obtained favors for money from nearly a dozen members of Congress and various local public officials in the Northeast.<sup>164</sup> In another high-profile prosecution, one of the most powerful members of Congress, Dan Rostenkowski (D.-Ill.), pleaded guilty to mail fraud and was charged with using government employees to perform personal services for him.<sup>165</sup> Although the sentencing judge berated Rostenkowski for his “reprehensible” behavior, Rostenkowski himself was defiantly unapologetic, and was extravagantly praised by his colleagues even after his plea agreement was reached.<sup>166</sup> An amusing episode occurred after Representative Jay Kim (R.-Cal.) pleaded guilty to illegally raising money during his 1998 election.<sup>167</sup> Sentenced to house arrest, he

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street from the White House. NAT BRANDT, *THE CONGRESSMAN WHO GOT AWAY WITH MURDER* 72–79, 120–24 (1991). Numerous witnesses testified to the shooting, but Sickles’s team of eight prominent defense attorneys devised a “temporary insanity” defense—the first of its kind—and succeeded in winning an acquittal. *Id.* at 153, 171, 184.

157. Representative Philemon Herbert (D.-Cal.). See CURRIE, *supra* note 156.

158. Representative Daniel Sickles (D.-N.Y.). See BRANDT, *supra* note 156, at 72–79, 120–24; see also *supra* note 156.

159. *Indictments—A Grand Congressional Tradition Since 1798*, L.A. TIMES, June 5, 1994, at 2 (Rep. Robert Smalls (R.-S.C.) in 1877) [hereinafter *Indictments*].

160. For example, Representative James Curley of Massachusetts was indicted for mail fraud in 1943–1944. After charges were dismissed, Curley was reelected to his seat in Congress. He was later elected mayor of Boston. See H.H. WILSON, *CONGRESS: CORRUPTION AND COMPROMISE* 69–82 (1951). Representative Adam Clayton Powell, Chair of the House Committee on Education and Labor, was accused of income tax evasion, using public funds for personal travel, and of placing his wife on his payroll although she performed no services whatsoever, and in fact did not even live in Washington, D.C. Charges were eventually dismissed. See CHARLES V. HAMILTON, *ADAM CLAYTON POWELL, JR.: THE POLITICAL BIOGRAPHY OF AN AMERICAN DILEMMA* 446–50 (1991); see also *Indictments*, *supra* note 160, at 2.

161. *Indictments*, *supra* note 159, at 2 (Rep. John W. Langley (R.-Ky.) in 1924; Rep. M. Alfred Michaelson (R.-Ill.) in 1929; and Rep. Edward E. Denison (R.-Ill.) in 1929).

162. *Id.* (Rep. Victor Berger (Socialist-Wis.) in 1918).

163. See Appendix A.

164. For a riveting account of the Abscam saga, see ROBERT W. GREENE, *THE STING MAN: INSIDE ABCAM* (1981).

165. See Toni Locy, *Rostenkowski Fraud Plea Brings 17-Month Sentence: Former Ways and Means Chief Fined \$100,000*, WASH. POST, Apr. 10, 1996, at A1.

166. *Id.*

167. See John Mercurio, *At Last Moment, Pirozzi Decides to Face Kim*, ROLL CALL, Dec. 13, 1999, at 2, available at LEXIS, News Library, Roll CI File.

was forced to wear an ankle bracelet when he went to work—in the House of Representatives.<sup>168</sup> In addition, six members of Congress were indicted for sex-related offenses,<sup>169</sup> and several others have been investigated by their colleagues for sexual improprieties.<sup>170</sup> Appendix A to this article lists the many other members of Congress who have been indicted for criminal offenses.<sup>171</sup>

Indicted members of Congress have generally refused to surrender their privileged status without a struggle. Indeed, several have made full use of the special powers they wield as the princes of our American realm. A striking example of such behavior culminated in the Supreme Court case, *Marshall v. Gordon*.<sup>172</sup> When a New York grand jury was investigating a member of Congress for his activities in a labor organization, the member took to the floor of Congress and charged the New York district attorney, Snowden Marshall, with malfeasance.<sup>173</sup> After the grand jury indicted the member, a House committee, at his prompting, initiated an investigation of Marshall and issued a barrage of subpoenas.<sup>174</sup> A defiant Marshall published a letter in a New York newspaper alleging that the Congressional committee was interfering with the grand jury investigation.<sup>175</sup> The House responded to the letter by holding Marshall in contempt and ordering the Sergeant at Arms to arrest him.<sup>176</sup> At this point, however, the Supreme Court intervened. Although acknowledging an “implied power to deal with contempt” to punish those interfering with Congress in the performance of a legislative duty, the Court held that Marshall’s intemperate letter did not warrant such punishment.<sup>177</sup>

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168. *Id.*

169. One Representative was charged and convicted of committing oral sodomy in a Capital Hill men’s room (Rep. Jon C. Hinson (R.-Miss.) in 1981), one Representative was charged with soliciting sex from a prostitute (Rep. Allan T. Howe (D.-Utah) in 1976), and four were charged with soliciting sex with minors (Rep. Frederick Richmond (D.-N.Y.) in 1978, Rep. Robert E. Bauman (R.-Md.) in 1980, Rep. Donald E. Lukens (R.-Ohio) in 1989, and Rep. Mel Reynolds (D.-Ill.) in 1995). *Through History, Scandal Spells Defeat*, NAT’L L.J., July 14, 2001, at 1–2 [hereinafter *Scandal Spells Defeat*], available at LEXIS, News Library, NTLJNL File; Editorial, BOSTON HERALD, Sept. 10, 1995, at 29.

170. For example, Barney Frank of Massachusetts was censured for fixing the parking tickets of a male prostitute, who used Frank’s home in Washington, D.C. to ply his trade. *See Frank Reprimanded for Ties to Prostitute*, 46 CONG. Q. ALMANAC 103 (1991). Senator Robert Packwood was investigated for sexually harassing his female staff. *Packwood Faces 13 More Accusers*, N.Y. TIMES, Feb. 8, 1993, at A15; *see also* Editorial, BOSTON HERALD, Sept. 10, 1995, at 29 (discussing the sexual escapades of Rep. Arlan Strangeland (R.-Minn.); Rep. “Buzz” Lukens (R.-Ohio); Rep. Gus Savage (D.-Ill.); Rep. Robert Bauman (R.-Md.); Rep. Roy Dyson (D.-Md.); Rep. Tom Evans (R.-Del.); Rep. Ernie Konny (R.-Cal.); Rep. Fred Richmond (D.-N.Y.); Rep. Allan Howe (D.-Utah); Rep. John Young (D.-Tex.); Rep. Joe Waggoner (D.-La.); Rep. Wayne Hayes (D.-Ohio); Rep. Wilbur Mills (D.-Ark.); Rep. Dan Crane (R.-Ill.)).

171. *See infra* Appendix A.

172. 243 U.S. 521 (1917).

173. *Id.* at 530–31.

174. *Id.* at 531.

175. *Id.* at 532.

176. *Id.*

177. *Id.* at 542–48.

Although Congress, as an institution, has seldom been as shamelessly obstructionist of a criminal investigation of one of its own, individual members of Congress have regularly used the special perks of their official positions to assail prosecutors who have dared to cross them. A recent example, with vast significance, involves Representative Joseph McDade, a Republican from Pennsylvania.<sup>178</sup> McDade could be viewed as a victim of the expanded scope of the substantive criminal law, for which Congress of course is partly to blame.<sup>179</sup> McDade was charged with accepting about \$100,000 in campaign contributions, vacations, and other gifts in exchange for helping defense contractors get government business.<sup>180</sup> Under investigation for four years and under indictment for another four, McDade incurred more than a million dollars in legal fees, which he defrayed largely through contributions from lobbyists and other supporters.<sup>181</sup> One of McDade's principal defenses, both at trial and in the court of public opinion, was that the prosecutors had created crimes out of actions authorized by House rules.<sup>182</sup> McDade's criticisms of the prosecutors were seldom measured. He told the press, for example, that "the game on the part of the Justice Department is to break you. They use any method they can to achieve that end and at the end of the day they walk away. They can charge you with anything."<sup>183</sup> Although a jury acquitted McDade on August 1, 1996, the spectacle of their beleaguered colleague excited the sympathies of members of Congress and inspired a rash of proposed legislation to protect criminal defendants.<sup>184</sup>

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178. See *infra* Part IV.C.

179. One of the counts against McDade was brought under the Racketeering Influenced and Corrupt Organizations Statute (RICO), 18 U.S.C. § 1962. See *United States v. McDade*, 827 F. Supp. 1153, 1180–87 (E.D. Pa. 1993) (discussing the RICO count against McDade). Enacted by Congress in 1970, as part of Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 922 (1970), RICO has proven to be fertile ground for ingenious readings by creative prosecutors. See generally Lynch, *supra* note 76; Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920 (1987). In McDade's case, the government identified the racketeering enterprise as "The Office of the Honorable Joseph M. McDade." See *McDade*, 827 F. Supp. at 1180. Congress, having given birth to RICO in 1970, has watched, possibly with dismay, as prosecutors have repeatedly leveled RICO charges against members of Congress. See, e.g., *United States v. Bustamante*, 45 F.3d 933, 941–47 (5th Cir. 1995) (RICO conviction affirmed); *United States v. Biaggi*, 909 F.2d 662, 693 (2d Cir. 1990) (RICO conviction reversed); *United States v. Traficant*, 209 F. Supp. 2d 764 (N.D. Ohio 2002) (affirming jury conviction on RICO count); *United States v. Mavroules*, 819 F. Supp. 1109 (D. Mass. 1993) (RICO charges adequately pled). Biaggi, himself a victim of the RICO statute, had ironically proposed an amendment to the proposed statute in 1970 that would have made it even broader than it ended up being. See Organized Crime Control Act of 1970, § 30, 91st Cong., 2d Sess., in 116 CONG. REC. H35343 (Oct. 7, 1970) (amendment proposed by Representative Biaggi criminalizing membership in the Mafia and La Cosa Nostra).

180. See T.R. Goldman, *For McDade, Life Fuels Legislation: After Acquittal, an Assault on Prosecutors' Reach*, LEGAL TIMES, May 18, 1998, at 1.

181. See Chris Conway, *Defense Industry Funds McDade Defense*, PITT. POST-GAZETTE, June 30, 1996, at B3.

182. *McDade*, 827 F. Supp. at 1172–74.

183. Anick Jesdanun, *House Panel Votes to Reimburse Lawmakers for Court Costs If They Win*, ASSOCIATED PRESS, July 22, 1997, available at 1997 WL 4876218.

184. See *infra* Part IV.C.

Soon after McDade's ordeal concluded, prosecutors indicted James Traficant (D.-Ohio) on bribery and racketeering charges.<sup>185</sup> Like McDade, the irrepressible Traficant took full advantage of his public position to blast his pursuers, both in the FBI and in the local U.S. Attorney's Office. Indeed, Traficant indulged in rhetoric that could easily be construed as defamatory,<sup>186</sup> but he has been careful to do so on the floor of Congress, where, of course, he is immune from any defamation suit.<sup>187</sup> And like McDade, Traficant succeeded in convincing a House Committee to initiate hearings to contemplate legal changes to restrict the powers of federal prosecutors.<sup>188</sup> Although Traficant failed to convince his colleagues in Congress, he has vowed to press forward in this public-spirited venture from his new living quarters: a prison cell.<sup>189</sup>

The above recitation of formally indicted members of Congress only scratches the surface of those who have had run-ins with the law. In the last term of Congress, Representative Gary Condit (D.-Cal.)<sup>190</sup> and Senator Robert Torricelli (D.-N.J.)<sup>191</sup> lived for over a year in the cross-hairs of police and prosecutors, who were investigating highly publicized murder and racketeering allegations. Numerous other members of Congress, especially in recent years, have spent months and even years, while serving in office, as the subjects of criminal investigations. To name only a few: Democratic House Speaker James Wright,<sup>192</sup> his would-be successor, Representative Tony Coelho,<sup>193</sup> and Republican House Speaker Newt

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185. Thomas J. Sheeran, *Rep. Traficant Pleads Innocent*, ASSOCIATED PRESS, May 11, 2001.

186. The examples are legion. For example, Traficant said (on the floor of Congress) of one FBI agent that under oath the agent had "lied on me to save his ass." 147 CONG. REC. E2010-01 (2001) (statement of Rep. Traficant). Traficant also claimed, in Congress, that prosecutors in the Department of Justice were paid by "the mob." See 7/27/00 House Race Hotline, available at 2000 WL 6363320.

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

188. See Damon Chappie, *Republicans Give Traficant Platform to Bash Justice Dept.*, ROLL CALL, July 27, 2000, available at 2000 WL 8734933 (noting that House Republicans gave Traficant the opportunity to conduct hearings into prosecutorial abuse, supposedly in payback for his vote to impeach President Clinton).

189. See Mark Leibovich, *The Convict's Campaign Staff; Jim Traficant May Be in Jail, but Supporters Still Work for His Reelection*, WASH. POST., Oct. 27, 2002, at F1. Rep. William J. Janklow (R-S.D.) was the most recent member of Congress to face criminal charges. A jury convicted him of felony manslaughter in December 2003 in connection with a fatal traffic accident. See T.R. Reid, *Jury Finds Janklow Guilty, Congressman to Resign Office Next Month*, WASH. POST, Dec. 9, 2003, at A1.

190. Condit at first denied, then acknowledged an extramarital affair with an intern in his office, Chandra Levy, whose disappearance and murder is still unsolved. See, e.g., Steve Twomey & Sair Horwitz, *Chandra Levy's Remains Found in Park; Dog Walker's Discovery Occurs a Year After Ex-Intern Vanished*, WASH. POST, May 23, 2002, at A1.

191. Torricelli was nearly indicted in connection with illegal contributions to his 1996 Senate campaign. See Susan Schmidt, *Probe Targets Torricelli's Aides*, WASH. POST, Feb. 2, 2001, at A5.

192. The "diverse corruptions of James C. Wright, Jr.," involving sham book deals and exerting undue influence at the Federal Home Loan Bank Board, are discussed in DENNIS F. THOMPSON, *ETHICS IN CONGRESS* 43-48 (1995).

193. Coelho, the House Whip, was next in line to assume the House Speaker position when Wright resigned, until it emerged that he had underpaid his taxes and engaged in questionable fundraising practices. *Id.* at 48.

Gingrich.<sup>194</sup> In addition, there were the investigations that ensnared groups of members of Congress, such as the Keating Five scandal<sup>195</sup> and the House bank scandal.<sup>196</sup> And even this does not exhaust the list of individuals who bring first-hand knowledge about the criminal process (from a customer's point of view) to the halls of Congress. Several members of Congress have been indicted *before* voters deemed them worthy of service of Congress.<sup>197</sup> Most striking is the case of Alcee Hastings, a federal judge in Florida who was indicted for taking bribes. After a jury acquitted Hastings, the Senate heard the evidence and impeached him.<sup>198</sup> Hastings subsequently ran for the House of Representatives as a Democrat, and he now represents the people of the twenty-third District of Florida.<sup>199</sup>

Whether members of Congress are of a more crooked disposition today than their predecessors a century or two ago is an unanswerable question (or, in any event, it strains the powers and competence of this author).<sup>200</sup> There is no doubt that more members of Congress, and public officials generally, are being criminally investigated and prosecuted. This may simply be a function of the greater scrutiny of the modern Fourth Estate, the enhanced independence of prosecutors, and the wider panoply of criminal regulations. Indeed, it is not immediately apparent that members of Congress today are any less ethical than members of my chosen profession—the legal academy. A lower percentage of law professors may be charged with crimes, but that may simply be because law professors are not overwhelmed by the same temptations as members of Congress. Students may complain about a grade, after all, but they are unlikely to offer \$50,000 to change it. If they did, it is not clear that law professors would fare much better than the members of Congress propositioned by a faux Arab sheik in the Abscam investigation.

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194. See Walter V. Robinson, *Flurry of Ethical Issues in Washington Prompts Hard Look at Business As Unusual*, BOSTON GLOBE, Mar. 26, 1989, at 1 (noting that “Wright’s principal accuser, Rep. Newt Gingrich of Georgia, now stands charged with putting together a questionable deal for his own book,” and reporting that “Gingrich, a Republican, privately raised \$105,000 from conservative supporters, money that was used to pay the book’s promotion costs and give the investors a tax break and his wife \$10,000 in income”).

195. See C. LAWRENCE EVANS & WALTER J. OLESZEK, CONGRESS UNDER FIRE: REFORM POLITICS AND THE REPUBLICAN MAJORITY 35–38 (1997); David Johnson, *Ex-Manager of House Bank Accepts Plea Deal and Admits Embezzlement*, N.Y. TIMES, Oct. 6, 1993, at A18.

196. See SENATE COMM. ON ETHICS, INVESTIGATION OF SENATOR ALAN CRANSTON, 102d Cong., S. REP. NO. 102-223, at 18–19, 21 (1991); Dennis Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369 (1993).

197. Several other members of Congress have been indicted *after* leaving Washington. For example, former Representative Michael J. Harrington (D.-Mass.) pleaded guilty to fraud in 2001. See David Weber, *Ex-U.S. Rep Suspended from Law Practice*, BOSTON HERALD, Aug. 23, 2003, at 26. Harrington’s attorney, Thomas Puccio, was one of the lead prosecutors in the Abscam investigation.

198. See EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 172–80 (1999) (reprinting the articles of impeachment against Hastings).

199. See MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2002 (2001).

200. The issue is inconclusively considered in THOMPSON, *supra* note 192, at 3.

*D. The Availability Heuristic: Revisiting Public Choice Theory*

Although the preceding section has, of course, not shown that a majority of the members of Congress are criminals, the data does reveal that a sizable minority have a familiarity with the criminal process as criminal defendants. The unexamined assumption that criminal defendants are to legislators, as Sartre quipped of hell, “other people,”<sup>201</sup> is therefore inaccurate. Members of Congress typically need only look at the fellow in the next row, or in a mirror, to contemplate the unfortunate visage of a person in the dock. How is such a state of affairs likely to influence the lawmaking process?

First, one might expect legislators to enact laws that directly protect themselves (and their family and friends) from criminal prosecution. As members of Congress and their immediate circles are more likely to engage in white collar crime than crime of the grubbier variety, the suggestion might be that laws would be comparatively more protective of upscale defendants. Of course, legislators are subject to a powerful countervailing pressure—to mete out especially harsh punishment on the privileged rich who transgress legal norms. The opposing pressures are nicely described by Michael Levi in his analysis of the enactment of criminal fraud laws in England:

The desire to protect public confidence in the legitimacy of the system is countered by the fear of damaging the volume of trade and of putting themselves and their colleagues at risk of being convicted of criminal offences; and many groups have conflicting short-term and long-term interests which are not resolvable in a self-evident way.<sup>202</sup>

Although legislators might be wary of the public’s wrath if they shamelessly protected themselves, they have on occasion risked opprobrium when especially motivated to shield themselves from the criminal process.<sup>203</sup> More typically, however, legislators seem prepared to increase their own potential exposure to future criminal sanctions (as lobbyists or business executives) by enacting laws pandering to public outrage about miscellaneous corporate scandals, however draconian such punishments might be.<sup>204</sup>

This being said, my claim is that the overrepresentation of criminals in Congress exerts a subtle, albeit pervasive influence, on the dispositions and prejudices of modern legislators. The twenty-first century member of Congress spends much of her time with a dotting staff, fawning lobby-

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201. JEAN-PAUL SARTRE, *No Exit, in NO EXIT AND THREE OTHER PLAYS* 20–21 (1955).

202. MICHAEL LEVI, *REGULATING FRAUD: WHITE-COLLAR CRIME AND THE CRIMINAL PROCESS* 84 (1987).

203. See *supra* at text accompanying notes 172–77 (discussing the circumstances surrounding *Marshall v. Gordon*).

204. For a recent example of such pandering, consider the Sarbanes-Oxley law, which extends the maximum prison term for securities fraud to twenty-five years in prison. Sarbanes-Oxley Act of 2002, H.R. Rep. No. 107-610, § 807 (2002).

ists, and, more importantly, other members of Congress; and her vision of the “public” and the “public good” is skewed as a result.<sup>205</sup> Indeed, it would hardly be surprising if members of Congress honestly came to associate the good of members of Congress (and their families and staffs) as the equivalent of the “public good.”

To be sure, public choice theory emphasizes that legislators are primarily self-interested (and in this sense no different from you and me).<sup>206</sup> Enhancing one’s own reelection prospects, expanding one’s sphere of influence, and burnishing one’s reputation, whether it be with the *New York Times* or the *Wall Street Journal*, are said to be the primary variables in the typical politician’s utility function. But this is not to say that legislators do not also enjoy imagining themselves as the invaluable agents of the “public good.” If anything approximates infinity in an expanding universe, it is the human capacity for self-delusion,<sup>207</sup> and in this respect yet again, legislators prove themselves to be all-too-human.

How is the legislator likely to formulate her idea of what constitutes the public good, and what legislation will therefore redress a genuine ailment in the body politic? In answering this question, cognitive psychologists would point to the availability heuristic, “a pervasive mental shortcut whereby the perceived likelihood of any given event is tied to the ease with which its occurrence can be brought to mind.”<sup>208</sup> As Timur Kuran and Cass Sunstein have written, “[c]ognitive psychologists . . . have demonstrated that the probability assessments we make as individuals are frequently based on the ease with which we can think of relevant examples.”<sup>209</sup> Although the availability heuristic may have been advantageous to man in his earliest evolutionary surroundings,<sup>210</sup> in modern times, when television news nightly reports the “one-in-a-million” accident that inevitably happened somewhere in America, the availability heuristic has ceased to be a salutary cognitive shortcut, for it easily results in an overestimate of certain risks—airline accidents being the easi-

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205. The bizarre day-to-day life of modern Congressmen is described in several books. See, e.g., ELIZABETH DREW, *THE CORRUPTION OF AMERICAN POLITICS* (2000).

206. See *supra* Part II.B.

207. I am indebted for this elegant formulation of an incontestable fact to my colleague, Nelson Lund.

208. Kuran & Sunstein, *supra* note 21, at 685.

209. *Id.*; see also Amos Twersky & Daniel Kahnemann, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTIC AND BIASES* 3, 11 (Daniel Kahnemann, Paul Slovic & Amos Twersky eds., 1982) (“The availability heuristic predicts that human beings “assess the frequency of . . . an event by the ease with which instances or occurrences can be brought to mind.”).

210. When a primitive man, after eating a particular kind of mushroom, convulsed in agony and then died, that was useful information for his clan, and one easily sees why this datum was indelibly imprinted upon their consciousness. See Paul H. Rubin, *How Humans Make Decisions*, 41 *JURIMETRICS J.* 337, 349 (2001) (“[T]he availability heuristic stood us in good stead in the [environment of evolutionary adaptation].”). As Eric Posner notes, “[i]t is evolutionarily more costly for an organism to fail to respond to a threat than it is for the organism to respond incorrectly.” Eric A. Posner, *Law and Emotions*, 89 *GEO. L. J.* 1977, 2003 (2001).

est example.<sup>211</sup> Indeed, there is a burgeoning literature describing how the availability heuristic results in a skewed assessment among the public as to the relative likelihood of various calamities, and therefore misplaced pressure on elected representatives to enact laws that will redress virtually nonexistent harms.<sup>212</sup>

The literature fails to go far enough, however, in cataloging the significance of the availability heuristic for the lawmaking process. It is not simply the general public that is prone to erroneous risk assessments: lawmakers themselves are equally prone to faulty judgments. And in this respect, their extended associations with significant numbers of indicted or investigated individuals is apt to shape their views of the criminal justice system. After all, nearly everyone who is charged with a crime claims she is the victim of overzealous police and prosecutors. Although such claims are typically ignored, when the person crying wolf is a member of Congress, attention must be paid. Members of Congress assume (as virtually no one else in America does) that their colleagues in Congress are honest; and, as a consequence, the indicted or investigated member's criticisms of her relentless pursuers in the U.S. Attorney's Office or Department of Justice are apt to find sympathetic ears in the halls of Congress. Perhaps, the members say to themselves as they watch their forlorn colleagues, prosecutors *are* out of control. Yes, the public interest requires legislative measures to check them.

Ultimately, my argument does not require us to revamp the core of public choice theory; for I do not assume that members of Congress are motivated by an honest assessment of the public good. My point simply is that in advancing their own self-interest, as public choice theory assumes, an additional component of a legislator's utility function, slighted in much of the literature, is her pleasing self-assessment as an agent of the public good. And the lawmaker's assessment of what is in the public interest, and what ills demand a legislative solution, are disproportionately shaped, as the availability heuristic would predict, by the experiences of those closest to her. An equally jargonistic way of saying the

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211. Cf. Jeffrey Rosen, *Bad Luck*, NEW REPUBLIC, Oct. 31, 2001 ("By taking the worst and most infrequent examples of criminal violence and melodramatically claiming that they were typical, television created the false impression that everyone was equally at risk, thereby increasing its audience.").

212. See, e.g., Kuran & Sunstein, *supra* note 21, at 746-60 (proposing various legislative and administrative brakes to cognitive errors that result from the public's vulnerability to the availability heuristic). In the private sector, the biases introduced by the availability heuristic can be limited by introducing some form of "accountability." "Accountability is a broad notion that describes any situation in which a decision maker believes that he must justify his decision to others and that failure to provide a satisfactory justification will cause the decision maker to suffer negative consequences." Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1064 (2001). Simply put, bond traders who consistently make bad decisions, arising from erroneous mental biases, will soon find themselves out of a job. In theory, of course, members of Congress are also accountable, and rash decisions can be penalized. The sense that current members of Congress are no longer accountable has fueled the "term limits" movement. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 32-33 (1998).



same thing is that members of Congress, just like ordinary voters<sup>213</sup> and judges,<sup>214</sup> realize a consumption value from the act of voting.<sup>215</sup> The value a member of Congress assigns to a piece of legislation in large part depends on how much rent she is able to extract from an affected interest group. But in addition, there is a value realized in visualizing oneself as the solution to a grave public ill.

Consider, for example, the Americans with Disabilities Act (ADA),<sup>216</sup> a law that has imposed multibillion dollar costs on the economy with, to date, ambiguous benefits.<sup>217</sup> No doubt many members of Congress enacted the measure due to the intense (and lucrative) lobbying efforts of various powerful interest groups, such as the American Association of Retired People,<sup>218</sup> and no doubt a few members expected the ADA would effect a wealth transfer to preferred groups, such as plaintiffs' lawyers, who will then be in a position to enhance their reelection prospects. But a striking aspect to the ADA was the orgy of self-congratulation that accompanied its passage, as lawmakers took turns complimenting one another for enacting so vital a piece of legislation.<sup>219</sup> To fully explain the legislative enthusiasm for the ADA, one needs to extend the ordinary calculus of public choice theory and add that the members of Congress assigned so great (and some would say, so greatly misplaced) a value to the ADA because they perceived the legislation to be addressing a genuine public ill, at least as they understood it. The foremost proponents of the ADA—Senator Robert Dole and Representative Tony Coelho—each suffered from a serious disability (atrophied arm, epilepsy),<sup>220</sup> and numerous other members of Congress trotted out their own disabilities, or those of close family members.<sup>221</sup>

The solipsistic alignment of the private good and the public good seems to be a trademark of the modern legislator. She casts her gaze on the ills of those near to her and concludes, as the availability heuristic would predict, that those ills are rampant. Although the error of such an

213. See, e.g., Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 129 n.32 (2000).

214. See Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 14–15 (1993) (emphasizing the consumption value judges derive from deciding cases and their interest in maximizing leisure).

215. Cf. *Barrow v. Falck*, 977 F.2d 1100, 1105–06 (7th Cir. 1992) (“[L]awyers get consumption value out of working for certain clients.”).

216. Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101–12213 (West Supp. 1995).

217. See Susan Schwochau & Peter David Blanck, *Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271, 272 (2000) (collecting employment data and concluding that “the ADA’s track record in improving employment opportunities for individuals with disabilities appears dismal”).

218. Cf. Dr. Charles T. Dubin, *American Association of Retired Persons Public Policy Statements on Americans with Disabilities Act*, 1990, 44 FED. LAW, Mar./Apr. 1997, at 28 (commenting on the AARP’s continued support for the ADA and urging a broad interpretation of the ADA in the future).

219. See, e.g., 136 CONG. REC. 10,869 (1990) (remarks of Representative Edwards).

220. See Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 33 (2000).

221. As was noted at the time, Senator Tom Harkin’s brother was deaf and Representative Steny Hoyer’s wife had epilepsy. There were many other examples. See *id.* at 33–34.

assumption is patent, legislators now regularly tout their private ills not only to garner sympathy, but also to demonstrate the supposedly empirical basis for their understanding of society's overall condition. With respect to criminal legislation, members of Congress see the persecution of their honest colleagues by out-of-control prosecutors wielding intolerable powers in the enforcement of overly broad laws, and the sight triggers an interest in the enactment of criminal laws that are protective of defendants. At least that is my claim; the next section puts it to the test.

#### IV. LEGISLATORS IN ACTION: PROTECTING THEMSELVES, PROTECTING CRIMINAL DEFENDANTS

At various times in Anglo-American history, legislators have resolved to provide for more equitable rules in criminal investigations and trials. Probing the reasons for such actions, one sees that legislators may have originally intended simply to insulate themselves and other elites from the criminal process, but the procedural protections they enacted quickly spilled over to ordinary defendants. This section offers three prominent examples of this dynamic: the Treason Act of 1696, the Abscam saga, and the blowback from the prosecution of Representative Joseph McDade. I conclude with a few words in modest defense of the much-maligned institution of "independent counsels." The prosecutions of politically prominent figures undertaken by independent counsels, whatever other ills they may engender, at least cast a spotlight on the criminal process, and may thus invigorate a more public debate about its fairness.

##### A. *Treason Act of 1696*

After the Restoration of the Crown in 1660, English partisan politics gradually emerged, with parties, which eventually became known as Whigs and Tories, disagreeing on fundamental questions of the meaning of English constitutionalism and the appropriate role of the Church.<sup>222</sup> The disagreements took a violent turn in 1678, as the Whigs charged many of those closest to King Charles II with a papist conspiracy.<sup>223</sup> The star witness in these treason cases, one Titus Oates, testified under oath on several occasions, almost surely perjuring himself.<sup>224</sup> But the wheel of fortune turned, and the opposition Whigs soon found themselves on the

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222. See TIM HARRIS, *POLITICS UNDER THE LATER STUARTS: PARTY CONFLICTS IN A DIVIDED SOCIETY 1660–1715*, at 8 (1993) ("Political conflict in Restoration England developed along two major axes: the constitutional, involving questions about the relative balance of power between Court and Parliament, the extent of the royal prerogative, and the potential for corruption by the Court; and the religious, centering on the issue of the Church and Dissent.")

223. See George Fisher, *The Jury's Rise As Lie Detector*, 107 *YALE L.J.* 575, 619 (1997).

224. *Id.* at 618 (noting that Oates's "fame as a trial witness eclipsed all others in the centuries before Court TV").

receiving end of treason accusations.<sup>225</sup> Some of the most illustrious men in politics at the time, such as Algernon Sidney and William Lord Russel, were either executed or imprisoned.<sup>226</sup> Oates himself, in a richly deserved turnabout, was convicted, and was sentenced to “whippings, perpetual imprisonment, and regular exposures in the pillory.”<sup>227</sup>

After the Glorious Revolution, there was an “awakening of opinion to the necessity of legal reform.”<sup>228</sup> The procedures that governed treason trials, and indeed virtually all felony prosecutions, were more redolent of show trials than of genuine judicial enterprises to ascertain the truth.<sup>229</sup> First and foremost, defendants in felony cases were deprived of the assistance of counsel, at least in responding to questions of fact.<sup>230</sup> Insofar as defendants were typically imprisoned prior to trial, this prevented them from engaging in what we would call discovery. Second, defendants were denied copies of an indictment until the eve of trial, further complicating efforts to conduct pretrial preparations.<sup>231</sup> Finally, the trial itself was marked by a dramatic asymmetry: the prosecution was able to place its witnesses under oath, whereas defendants could not administer oaths to those testifying on their behalf.<sup>232</sup> This often rendered the defendant incapable of meaningfully rebutting his accusers because judges often noted that defense witnesses, not under oath, were not entitled to the deference given sworn witnesses.<sup>233</sup>

The unfairness of felony trials conducted under such circumstances did not go unremarked upon, even at the time. As one judge, addressing a defendant in a felony case, noted:

Look ye, if ye speak to me privately, as to my own particular opinion, it is hard for me to say, that there is any express resolution of the law in the matter; but the practice has always been to deny a copy of the indictment . . . I think it a hard case, that a man should have counsel to defend himself for a two-penny trespass [a misdemeanor], and his witnesses examined on oath, but if he steal, commit murder . . . nay, high treason, where life, estate, honor, and all

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225. *Id.* at 620.

226. *See* Phifer, *supra* note 14, at 240.

227. Fisher, *supra* note 223, at 622.

228. Rezneck, *supra* note 14, at 13; *see also* Phifer, *supra* note 14, at 242 (“There is considerable evidence to show that men in both parties who had lived through the decade 1679–1689 remembered it as a time when the fabric of national life was torn asunder by contrived plots, corrupt judges, and a deadly cycle of judicial murder.”).

229. On some differences between seventeenth century felony trials and our own, *see* Craig S. Lerner, *Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2073–74 (2002) (book review).

230. *See* Langbein, *supra* note 17, at 1067.

231. *See* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Seventeenth Century England*, 75 CORNELL L. REV. 497, 508 (1990).

232. Langbein, *supra* note 17, at 1067.

233. *Id.* at 1055–56.

are concerned, he shall neither have counsel, nor his witnesses examined on oath.<sup>234</sup>

Lawyers in the 1680s from both parties published pamphlets criticizing the criminal procedure rules depriving defendants of counsel.<sup>235</sup> There was, however, little impetus to reform these procedures until the political classes were themselves victimized by them. As the nineteenth century legal historian James Fitzjames Stephen noted, “[w]hat the political trials of the seventeenth century really did was to expose men of high rank and conspicuous position to the calamities [which] must have been felt by thousands of obscure criminals without attracting even a passing notice.”<sup>236</sup>

In 1689, the House of Lords drafted a bill that would have tightened the proof requirement for treason prosecutions (by requiring two witnesses), and, more generally, transformed the procedures governing *all* felony prosecutions: the accused would be afforded the assistance of counsel; he would be furnished a copy of the indictment one week before trial; and defense witnesses would be put under oath.<sup>237</sup> The House of Commons resisted the original draft, “an action owing largely to jealousy between the two Houses,” rather than any profound disagreement.<sup>238</sup> Indeed, in 1691, the House of Commons proposed its bill, largely replicating the Lords’ bill, although with one significant alteration: it made clear that the added procedural protections were extended only for treason prosecutions, and not for all felony defendants.<sup>239</sup> Over the course of the next several years, members of Parliament polished the language in the bill, and amended and narrowed the provisions in miscellaneous ways.<sup>240</sup> Yet even as the matter became bogged down in details, there was still a strong push to see it through. As one historian has noted, “[t]he ghosts of martyrs from the 1680s were summoned to clank around the House of

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234. Rezneck, *supra* note 14, at 9 (quoting Roswell’s Case (which occurred in 1664), from X STATE TRIALS 267 (T.B. Howell ed., 1816–1825)).

235. The Whig lawyer Robert Atkins wrote: “And I ever thought it a severity in our law, that a Prisoner for his life is not allowed the assistance of a grave and prudent lawyer.” *Id.* at 13. The Whig lawyers Robert Atkins and John Hawles likewise argued:

[I]f a man be cooped up, and not suffered to go about his business for himself, and no friend must be employed to do it for him, how is it possible for him to make his defense? I know it is said that his innocence must defend him. . . . Is it his innocence shall appear on his forehead, or an angel come from heaven and disprove the accuser, or shall the accuser be detected by the bare questions of the prisoner?

*Id.* at 14.

236. 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 402 (MacMillan 1883); see also John H. Wigmore, *Required Numbers of Witnesses; A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 101 (1901) (stating, with respect to an earlier change in treason laws, that “the dominant legislator class, who might not have cared how many a humble subject was unfairly convicted of petty thievery, were well alive to the possibilities of treason law . . . and they probably were moved by the thought of self-protection against the future”).

237. See Phifer, *supra* note 14, at 244; Rezneck, *supra* note 14, at 16.

238. See Phifer, *supra* note 14, at 244.

239. See Rezneck, *supra* note 14, at 17–21.

240. For example, the 1694 version of the bill provided that the accused was entitled to the indictment five days, rather than a week, before trial. See Phifer, *supra* note 14, at 245.

Commons during every debate on the reform bill; and while they rattled about, the bill's supporters would rise alternately to plead and demand that the bill be passed."<sup>241</sup>

At last, in 1696, the Treason Act was passed, extending the right to counsel, compulsory witness, and to know the state's charges, but only to those accused of treason.<sup>242</sup> Yet these protections quickly spilled over to all felony cases. Apparently, the incongruity of having special procedural rules for treason defendants was an unstable equilibrium. In 1702, Parliament expanded the right to allow defense witnesses to be sworn to all felony trials.<sup>243</sup> The courts soon interpreted that legislation to authorize compulsory process in all felony trials as well.<sup>244</sup>

The courts also gradually expanded the right to counsel, and defense counsel began to appear in ordinary criminal cases in the 1730s.<sup>245</sup> In allowing counsel to appear in ordinary felony cases, courts seem to have been motivated by the rationale of the Treason Act, its preamble declaring it was intended to provide defendants "just and equal means for defense of their innocencies in such cases."<sup>246</sup> Professional prosecutors were always used in treason cases, and increasingly in ordinary prosecutions in the 1710s and 1720s;<sup>247</sup> when the Crown was represented by trained lawyers, it seemed only fair to allow defendants professional representation as well (assuming they could afford it). Americans constitutionalized these rights by ratifying the Sixth Amendment and expanded them to include "all criminal prosecutions."<sup>248</sup>

It is difficult to overstate the importance of the Treason Act of 1696 in shaping the direction of Anglo-American criminal procedure.<sup>249</sup> In this respect, Professor George Fisher concludes his otherwise wonderful account of the origins of the Treason Act on an errant note. Fisher recognizes the Treason Act was inspired less by any profound insight into the need for fair criminal process than by Parliament's selfish interest in protecting itself. He thus writes that "[w]hat appears at first to be a defining moment in the history of legal thought, then, turns out to be little

241. *Id.* at 247.

242. Treason Act of 1696, 7 Will. 3, ch. 3, §§ 1–7.

243. 1 Anne, stat. 2, ch. 9, § 3 (1701) (part of omnibus criminal law revision act). On this extension of the right to swear defense witnesses, see Fisher, *supra* note 223, at 616.

244. See authorities collected in Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 90 n.73 (1974).

245. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 311–13 (1978).

246. 7 & 8 Will. 3, ch. 3, § 1.

247. J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660–1800*, at 352–56 (1986).

248. U.S. CONST. amend. VI.

249. Dissenting from this view, the nineteenth century historian James Stephens downplayed the significance of the 1696 Act, arguing that judges in the seventeenth century were on their own initiative altering the procedures in felony cases. See 1 STEPHEN, *supra* note 236, at 399, 416–17. Although there had indeed been such a trend, see Reznick, *supra* note 14, at 22, the trials before and after the implementation of the Treason Act were markedly different. See Phifer, *supra* note 14, at 256 ("Unlike defendants before them, [defendants after 1696] were not merely objects of an inexorable process, unable to join the contest that would determine whether they lived or died.").

more than historical shrapnel, thrown off by the familiar clash of men of high office.”<sup>250</sup> Yet virtually every significant development in Anglo-American law could be dismissed as “historical shrapnel,” in that the vindication of some glorious principle was, in a sense, little more than a victory in a struggle waged by self-interested men of political standing. Surely even the Magna Charta could be so characterized, as the barons at Runnymede secured various promises from King John, limiting royal powers to their own advantage, but also to the benefit of all Englishmen thereafter. The Treason Act of 1696 should be seen in the same light: fashioned by politically powerful men, fearful for their own lives, it wrought a dramatic change in Anglo-American criminal procedure. As Samuel Rezneck writes, “[The Treason Act] set up definite rules of procedure, from which deviation was increasingly more difficult; the very formalism of modern criminal law procedure has had not a little to do with the humanization of the criminal trial.”<sup>251</sup>

### B. *The Abscam Investigation*

As the 1680s were a time of terror for members of Parliament, with accusations of treason prosecutions promiscuously bandied about, the late 1970s and early 1980s proved to be a harrowing time for members of the U.S. Congress. To Congress’s great chagrin, FBI agents and federal prosecutors used some of the vast resources Congress itself had invested in them to investigate political corruption. The result, the Abscam investigation of 1979–1980, ultimately netted convictions of one United States Senator, six Representatives, the Mayor of Camden, and miscellaneous state and federal officials in the Northeast.<sup>252</sup> Little congressional outrage was directed at the public officials who had accepted tens of thousands of dollars in bribes. Rather, House Speaker Thomas P. “Tip” O’Neill spoke for many of his colleagues when he declaimed that “[Operation Abscam] was a setup, a goddamn setup.”<sup>253</sup>

The most notorious public corruption investigation in U.S. history was conceived by John Good, a veteran FBI agent, and Mel Weinberg, an international con man.<sup>254</sup> In exchange for clemency after a fraud conviction, as well as a substantial stipend, Weinberg agreed to be the point man in an undercover investigation of organized crime in New Jersey.<sup>255</sup> Early in the investigation, for obscure reasons, the investigation’s focus shifted to public officials. (The likeliest explanation is that one of the crooks mentioned to Weinberg that local politicians, such as Angelo

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250. Fisher, *supra* note 223, at 624.

251. Rezneck, *supra* note 14, at 22.

252. GREENE, *supra* note 164, at 250–64.

253. *Id.* at 254.

254. See *United States v. Myers*, 527 F. Supp. 1206, 1209 (E.D.N.Y. 1981), *aff’d in part, rev’d and remanded in part*, 692 F.2d 823 (2d Cir. 1982).

255. *Id.* at 1209–10; GREENE, *supra* note 164, at 75–79.

Erichetti, Mayor of Camden, were for sale.)<sup>256</sup> The subsequent shift to members of Congress is further clouded in mystery, but it seems to have been precipitated by a conversation between Erichetti and Weinberg about the Shah of Iran's fate, and the possibility that other Arab sheiks would be willing to bribe members of Congress to secure permanent resident status here in the United States.<sup>257</sup> Erichetti volunteered the names of several members of Congress, who would be prepared to offer private relief legislation on the sheiks' behalf—for a price.<sup>258</sup> With \$50,000 in hand, and clad in a long beard and a dishdash, Weinberg approached the members of Congress named by Erichetti, as well as others mentioned in the course of the ensuing investigation, and many took the cash.<sup>259</sup>

The use of informants and undercover operations is as old as the common law itself. A 1275 statute allowed "a convicted criminal" to "obtain[] a pardon conditional on ridding the world of some half-dozen of his associates."<sup>260</sup> As might be expected, such a system of informants rapidly led to abuses, which in turn occasionally precipitated reform measures.<sup>261</sup> The informant system was carried over to America.<sup>262</sup> The FBI used undercover investigations from its very inception,<sup>263</sup> although during the J. Edgar Hoover years, they were used mostly in connection with the gathering of foreign intelligence, rather than in the enforcement of the criminal law.<sup>264</sup> Undercover investigations ramped up again after Hoover's death in 1972,<sup>265</sup> and despite occasional reports of abuses, there was a noteworthy dearth of legislative interest in any reform. This abruptly changed after the Abscam investigation was made public. As Representative Henry Hyde noted, with the sort of candor and self-knowledge one does not ordinarily expect of a member of Congress, "it is

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256. *Myers*, 527 F. Supp. at 1210; GREENE, *supra* note 164.

257. *Myers*, 527 F. Supp. at 1210; GREENE, *supra* note 164, at 158–213.

258. *Myers*, 527 F. Supp. at 1210.

259. Indeed, most took the money gleefully. *See, e.g.*, *United States v. Jenrette*, 744 F.2d 817, 820–22 (D.C. Cir. 1984) (member of Congress indicating his willingness to accept a bribe by saying he had "larceny in [his] blood"); *Myers*, 527 F. Supp. at 1211 (member of Congress indicating the same, stating he was "no Boy Scout"). Representative Frank Thompson refused the money the first time it was offered, but accepted at the second meeting with Weinberg. Senator Williams declined the money on several occasions, but finally relented and succumbed to temptation. *See United States v. Williams*, 529 F. Supp. 1085, 1091 (E.D.N.Y. 1981).

260. Clifford S. Zimmerman, *Towards a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 153 (1994) (quoting 3 SIR WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 608 n.11).

261. *Id.* at 154–58.

262. *See Marvin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our Government.").

263. *See* FRED J. COOK, *THE FBI NOBODY KNOWS* 56 (1964).

264. *See* S. REP. NO. 97-682, at 35–38 (1982).

265. *See* Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 EMORY L.J. 75, 77 n.10 (1987).

unfortunate that we [Congress] get serious about this [the dangers of undercover investigations] only when our own ox is gored.”<sup>266</sup>

Over the course of several years (1980–1983), both the House and Senate conducted elaborate hearings into the dangers of undercover operations.<sup>267</sup> Members raised the concern that wholly innocent persons, targeted in undercover operations, would incur the “taint of being investigated.”<sup>268</sup> In this respect, a few members of Congress—that is, those who had been approached during the investigation, but who had declined a bribe—seemed to be imagining themselves. Yet few rebuffed the bribe outright,<sup>269</sup> and some members, such as Senator Larry Presser (R.-S.D.)<sup>270</sup> and Representative John Murtha<sup>271</sup> (D.-Pa.), allegedly declined the bribes with more circumspection than indignation.

Members of Congress also raised the concern that wholly innocent persons would be overwhelmed by irresistible temptation, and that the government would thus be in the business of “creating” crime.<sup>272</sup> Both

266. See *id.* at 147 n.262 (quoting *FBI Undercover Operations: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 344 (1982) (statement of Rep. Hyde)).

267. Professor Goldwasser has compiled and analyzed the sundry hearings. *Id.* at 95 n.3. See *FBI Undercover Activities, Authorization, and H.R. 3232: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong. (1983) [hereinafter *1983 House Hearings*]; *FBI Undercover Operations: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. (1982); *Law Enforcement Undercover Activities: Hearings Before the Senate Select Comm. to Study Law Enforcement Undercover Activities of Components of the Dep't of Justice*, 97th Cong. (1982); *FBI Undercover Guidelines: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. (1981); *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong. (1979–1980).

268. *Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary Report on FBI Undercover Operations*, 98th Cong., 2d Sess. 29 (1983) [hereinafter *House Report*].

269. One who did unmistakably regret the offered bribe was the late Sen. Patrick Moynihan (D.-N.Y.). See GREENE, *supra* note 164, at 206–07.

270. Pressler's public story was that he had met with some Arab friends, who vaguely mentioned something about contributions. Pressler added, “After two or three minutes, I stood up and said the purpose of the meeting was different than I was led to believe. I repeated three times the word illegal.” GREENE, *supra* note 164, at 254. The videotape suggests that when offered a \$50,000 bribe at their one and only meeting, the Senator declined the money, but he couched his words with the utmost care, as one would expect from a former Rhodes Scholar:

In any event, it would not be proper for me to promise to do anything in return for a campaign contribution, so I would not make any promises or any. . . . I mean you can judge. You can hear my general philosophy and you can make a judgment. Ah, but I can't ah, you know ah, you can't make a commitment to do anything in these campaigns. Indeed, I wouldn't be fully intellectually honest doing that, you know, until I'm fired up with the situation. So maybe that, maybe that makes it possible for you to, you know, to help out, or to take steps and . . .

*Id.* at 241. Weinberg nearly gagged in disbelief, thinking to himself: “This guy wants us to give him \$50,000 on trust.” *Id.*

271. When Murtha was approached by FBI agents, he declined their bribe but sent them to two other members, Representative Frank Thompson Jr. (D.-N.J.) and Representative John M. Murphy (D.-N.Y.). See Pat Towell, *Savvy Legislator Murtha Moves to Spotlight*, CONG. Q. WKLY. REP., available at 1989 WL 3346850. Murtha was later named as an unindicted coconspirator in the indictments of Thompson and Murphy, and he agreed to testify at their trials. GREENE, *supra* note 164, at 238–39, 252, 254.

272. Representative John Seiberling of Ohio, for example, said that Congress needed to scrutinize “the idea of giving people of dubious moral standards free rein to entice anyone they can to commit a



the House and Senate proposed legislation that would have required the FBI to establish some evidentiary predicate (either probable cause or reasonable suspicion) before targeting an individual in an undercover investigation.<sup>273</sup> In the Abscam investigation, it was noted, the FBI had propositioned public officials with virtually no evidence that those approached had previously committed any crimes.<sup>274</sup> The House bill would have required the FBI to obtain judicial approval, akin to a search warrant or a Title III wiretap order, before initiating an undercover investigation of an individual.<sup>275</sup> The more modest Senate bill would have required a certification of an evidentiary predicate from a high-level person within the Department of Justice.<sup>276</sup>

Although neither of the bills found their way into law, which may be for the best,<sup>277</sup> the pressure applied by the hearings had its intended result. The Department of Justice, bowing to congressional pressure, promulgated new regulations governing wiretaps and undercover operations, especially those involving members of Congress, but extending beyond this narrow compass.<sup>278</sup> The “Civiletti Guidelines” (named after the then-Attorney General) required FBI agents to obtain the approval of the local U.S. Attorney or the Department of Justice before authorizing an informant to participate in any “extraordinary” criminal activity.<sup>279</sup> “Extraordinary” was defined as any activity that created a significant risk of violence or severe financial loss, or that involved corruption of public officials.<sup>280</sup> The spirit of the Civiletti Guidelines still permeates the current Department of Justice guidelines, which explicitly require the FBI to obtain the approval of an Assistant Attorney General for any wiretap

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crime.” *Id.* at 254. As a law student, Professor Bennett Gershman wrote one of the more scathing academic critiques of the Abscam investigation, and advocated the enactment of a “federal entrapment statute” to guard against investigative abuses. See Bennett L. Gershman, Comment, *Abscam, The Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565 (1982). Weinberg himself was unmoved by the entrapment defense:

I don't understand all this entrapment bullshit from the defense lawyers. Like . . . I'm supposed to have told the Senator what to say in the hotel. He's a United States Senator. Why's he takin' orders from a hood like me? He always coulda said 'No.' Nobody twisted anybody's arm to take the bread. We said it was there if they wanted it. They knocked each other over tryin' to be first on the bread line.

GREENE, *supra* note 164, at 185. Ultimately, the courts rejected the entrapment defenses and all seven members of Congress were convicted by juries.

273. See Goldwasser, *supra* note 265, at 92–97.

274. *Id.* at 80.

275. *Id.* at 92–94 (discussing *House Report*, *supra* note 268, at 83–87).

276. *Id.* at 95–97 (discussing SENATE SELECT COMM. TO STUDY UNDERCOVER ACTIVITIES OF COMPONENTS OF THE DEP'T OF JUSTICE, FINAL REPORT, S. REP. NO. 682, at 377–78 (2d Sess. 1982)).

277. This is Goldwasser's conclusion. See *id.* at 145–47. Among her criticisms is that a judicial authorization requirement would unduly complicate undercover investigations.

278. See *Commonwealth v. Long*, 837 F.2d 727, 732–33 & 732 n.3 (6th Cir. 1988) (comparing the “Civiletti Guidelines” with their predecessor, the “Levi Guidelines”); Amanda J. Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 309 (2001).

279. See S. REP. NO. 97-682, at 504–16 (Dec. 2, 1980).

280. *Id.* at 523.

when “the monitoring relates to an investigation of a member of Congress . . . .”<sup>281</sup>

The long-term ramifications of the Abscam investigation have been considerable. In the aftermath of the Abscam investigation, Congress intensified its oversight of the FBI,<sup>282</sup> and not coincidentally there has not been a major FBI investigation of corruption in Congress for over two decades. Predictions of another FBI sting of Congress<sup>283</sup> misconceived the lessons the FBI drew in the aftermath of Abscam. To be sure, several scalps were won, and some of the leading prosecutors in the Abscam investigation parleyed their experiences into lucrative careers in white collar defense practice.<sup>284</sup> But FBI headquarters, which has an institutional memory, seems to have been chastened by the barrage of congressional scrutiny. As appendix A to this article demonstrates, although there were a slew of prosecutions of members of Congress just prior to the Abscam investigation, such cases dropped off precipitously in the early 1980s.

### C. *The McDade Blowback*

In the foreign intelligence world, “blowback” occurs when an operation spins out of control and achieves precisely the opposite result of what its handlers intended.<sup>285</sup> Usually associated with the CIA,<sup>286</sup> the Department of Justice is still reeling from a withering episode of blowback. In 1992, after a four-year investigation, the Department of Justice, aided by teams of FBI agents, indicted Representative Joseph McDade for helping companies win defense contracts in return for campaign contributions and private gifts.<sup>287</sup> McDade, a powerful member of the House Appropriations Committee, was a Republican with strong ties across the political aisle. If the goal of the McDade indictment was to remove a corrupt member of Congress and, in the larger view, to check the ever-swelling corruption of our nation’s naturally criminal class, then it failed. Indeed, the McDade indictment was the most grievous strategic blunder the DOJ and FBI have committed in recent years, and it culminated in a

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281. See U.S. Attorney’s Manual 9-7.302.

282. See *supra* note 267.

283. See Goldwasser, *supra* note 265, at 81 (predicting “almost certainly another Abscam”).

284. The top prosecutor in the case, the flamboyant Thomas Puccio, has gone on to become one of the nation’s top criminal defense lawyers, whose clients have included the Teamsters Union and Claus von Bulow. Irv Nathan, a young assistant in DOJ’s Criminal Division, is also a prominent criminal defense attorney.

285. Charles V. Peña, *Blowback: The Unintended Consequences of Military Tribunals*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 119 (2002) (“In CIA or ‘spook’ parlance, ‘blowback’ is the unintended consequences of covert operations.”).

286. The most notorious example of blowback in recent years was the CIA’s decision to arm the Afghan “Taliban” fighters in the 1980s. See generally PETER L. BERGEN, HOLY WAR, INC.: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN 63–75 (2001).

287. See, e.g., *United States v. McDade*, 827 F. Supp. 1153, 1162 (E.D. Pa. 1993), *aff’d*, 28 F.3d 283 (3d Cir. 1994).

pair of measures (the Hyde Amendment and the McDade Amendment) that have humbled and chastened the DOJ and FBI. The years following the McDade prosecution have been ones of relative quiet in the DOJ public corruption unit, at least insofar as prosecutions of members of Congress are concerned.

### 1. *The Hyde Amendment*

The Hyde Amendment presents both a puzzle (why did Congress enact a measure protecting criminal defendants?), and a solution, rooted in the tribulations of Representative McDade. For those squeamish at the sight of the production of sausage, caution is recommended when reading the account of how the Hyde Amendment issued from our nation's legislature.

#### a. The Puzzle

Joseph McDade was first elected to the House of Representatives in 1962, and was apparently much loved by his constituents for funneling hundreds of millions of federal dollars, also known as pork, to his district for, among others things, an "historic," (read: useless) sixty-six million dollar Steamtown train and a national park (bearing McDade's name).<sup>288</sup> Alas, McDade may not have been wholly selfless in pursuit of his constituents' interests; after using his post on the House Appropriations Committee to win lucrative defense contracts for a local munitions plant, McDade allegedly accepted not only campaign contributions, but also a variety of personal gifts, including a trip on the corporate jet to the NCAA Final Four basketball tournament.<sup>289</sup>

In 1992, a federal grand jury returned a five-count indictment against McDade, charging him with conspiracy, acceptance of an illegal gratuity by a public official, and RICO violations.<sup>290</sup> His skilled lawyers manufactured an avalanche of pretrial motions,<sup>291</sup> which delayed the trial for years. McDade's principal defenses, in the court of public opinion

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288. See Anick Jesdanun, *McDade Seen as Constituents' Ally: Retiring GOP Congressman Remembered for Delivering Contracts, Jobs to Scranton*, HARRISBURG PATRIOT (Harrisburg, Pa.), Dec. 28, 1998, at B5 (as one constituent put it, "When you voted for him, you voted for yourself, too."); see also *McDade to Chair Energy & Water Subcmt.*, CORPS REP. (Dec. 6, 1996), available at 1996 WL 8169209 ("We try to mention him at least once in every pig book we do," said David Williams, of Citizens Against Government Waste (CAGW)).

289. See *McDade*, 827 F. Supp. at 1162; Jesdanun, *supra* note 288.

290. *McDade*, 827 F. Supp. at 1162.

291. See, e.g., *United States v. McDade*, No. 92-249, 1992 WL 151314, at \*1 (E.D. Pa. June 19, 1992) (denying defense motion to dismiss indictment and for evidentiary hearing); *McDade*, 827 F. Supp. 1153 (denying defense motions to dismiss indictment); *United States v. McDade*, No. 92-249, 1992 WL 382351, at \*2-3 (E.D. Pa. Dec. 11, 1992) (denying defense motion alleging government impropriety in delivering too many documents in response to discovery requests); *United States v. McDade*, No. 92-249, 1992 WL 187036, at \*1 (E.D. Pa. July 30, 1992) (denying defense motion to dismiss because of prosecutor's conflict of interest); *United States v. McDade*, No. 92-249, 1995 WL 476230, at \*4 (E.D. Pa. Aug. 7, 1995) (denying defense motion to exclude expert testimony).

and at trial, meandered from “I forgot,” to “[s]omeone on my staff should have declared it.”<sup>292</sup> Acquitted in 1996, McDade was feted a few weeks later by defense contractors in a poolside cocktail party in San Diego.<sup>293</sup> McDade subsequently escorted his jurors on a private tour of the Capitol.<sup>294</sup> The investigation and trial did, however, exact a toll on McDade, resulting in the loss of the opportunity to serve as Chairman of the House Appropriations Committee.<sup>295</sup>

Among the progeny of McDade’s misadventures is a provision now called the Hyde Amendment, enacted November 26, 1997.<sup>296</sup> The Hyde Amendment is a perfect example of legislation enacted as far from the public view as possible. It was not even enacted as part of the text of the United States Code, but rather as a statutory note to U.S.C. § 3006A, the section setting guidelines for funding representation of indigent criminal defendants. The provision, which was tucked into an appropriations bill, provides that

the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . may award to a prevailing party, other than the United States, a reasonable attorney’s fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith . . . .<sup>297</sup>

An exception is allowed when the court finds that “special circumstances make such an award unjust.”<sup>298</sup> Fees are subject to the limits set out in the Equal Access to Justice Act (EAJA), which provides for an award of attorneys’ fees in the civil context.<sup>299</sup> In order to be awarded attorneys’ fees, an individual must not have a net worth over \$2 million, or a corporation or other organization a net worth over \$7 million.<sup>300</sup>

The Hyde Amendment would appear to be an example of the sort of legislation that could never pass, according to the criminal procedure specialists, using public choice theory. Who would care about compen-

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292. See Michael deCourcy Hinds, *Top Republican on a House Panel Is Charged with Accepting Bribes*, N.Y. TIMES, May 6, 1992, at A1.

293. See Anick Jesdanun, *McDade’s Career in Congress*, ASSOCIATED PRESS, Jan. 4, 1999, available at 1999 WL 2228079.

294. See Anick Jesdanun, *McDade Played Host to Jury That Acquitted Him of Bribery, Racketeering, Got Capital Tour*, PITT. POST-GAZETTE, Nov. 1, 1996, at C6.

295. *Id.*

296. See David Jackson, *Proposal to Pay Legal Fees After Acquittals is Protested*, DALLAS MORNING NEWS, Oct. 24, 1997, at 6A (“The Hyde amendment was inspired in part by the long legal fight of Rep. Joseph McDade, R.-Pa., who was acquitted in 1996 on charges of helping companies win defense contracts in exchange for campaign contributions.”).

297. Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (1997).

298. *Id.*

299. 28 U.S.C. § 2412 (2000). The EAJA provides that fee awards “shall be based upon prevailing market rates,” but shall not exceed \$125 per hour unless some special factor exists. *Id.* § 2412(d)(2)(A).

300. 28 U.S.C. § 2412(d)(2)(B). The EAJA was enacted in 1996 as part of pro-small business legislation called for in the Republican Contract with America.

sating individuals or organizations of middling wealth who were prosecuted vexatiously, frivolously, or in bad faith? (The poor are excluded because they are represented by court-appointed counsel.) Those of us constituting the (blandly law-abiding) middle class are more apt to see ourselves as the victims of crime than as the perpetrators,<sup>301</sup> and few of us, I suspect, lie awake at night, fearful that the executive branch will trouble to persecute us. And, indeed, there was no groundswell of popular support driving the measure, as its rather underhanded method of enactment suggests.

b. The Solution

But there was a very important, if tiny, middle-class group that feared such prosecution: members of Congress themselves. The Hyde Amendment is the Treason Act of 1696 writ small; protections that were designed for defendants of the political class spilled over to protect the public at large. Indeed, one aspect of the original legislation is especially noteworthy: *it covered only members of Congress and their staffs*. It was proposed by John Murtha, a Democratic representative from Pennsylvania and friend of Joseph McDade.<sup>302</sup> Murtha himself, the attentive reader may recall, had his own brush with the law fifteen years earlier, during the Abscam investigation, when he escaped indictment, but was an unindicted coconspirator in the prosecution of one his colleagues in the House of Representatives.<sup>303</sup>

The House Appropriations Committee approved the spending bill with the amendment proposed by Murtha in July 1997, and the measure appeared to be heading for quiet success.<sup>304</sup> The Associated Press picked up on the story, however, and contacted Murtha.<sup>305</sup> Murtha told AP that the amendment was prompted not only by what happened to McDade, but also by the need to preserve “the independence of the Congress” and constitutional separation of powers.<sup>306</sup> “I’m trying to show that the House can set its own rules,” he said. “The House of Representatives is a separate entity, and the Justice Department can’t interpret the rules to suit themselves.”<sup>307</sup> Apparently, Murtha was referring to McDade’s accusations that prosecutors created crimes out of actions permitted under House rules.

However pure Murtha’s concern for separation of powers and constitutional checks and balances may have been, the reaction of the press was not favorable. The Republicans, who had recently won a majority in

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301. See Amsterdam, *supra* note 7, at 378–79; Dripps, *supra* note 71, at 1089.

302. Jesdanun, *supra* note 183.

303. See *supra* note 271 and accompanying text.

304. See Jesdanun, *supra* note 183.

305. *Id.*

306. *Id.*

307. *Id.*

the House for the first time in nearly forty years, had been trumpeting reform of an aristocratic Congress, eliminating privileges and insisting that legislation and regulations that applied to ordinary people should apply to members of Congress too.<sup>308</sup> This provision therefore begged to be greeted with charges of hypocrisy, and the press obliged. As one editorial put it, "One of the first things the newly Republican House did in 1994, as part of the Contract with America, was to remove certain laws and rules that placed Congress above other Americans. Murtha's plan would offset those reforms. Why should members of Congress be treated differently from other Americans?"<sup>309</sup> One columnist pointed out that "McDade and every other member of Congress already has the ability to establish legal defense funds that you and I can only drool over."<sup>310</sup> The columnist was referring to members' ability to draw on campaign funds and political supporters' dollars to pay defense lawyers.<sup>311</sup> Faced with a barrage of media criticism, the House rejected the Murtha amendment.<sup>312</sup>

Enter Henry Hyde, who reintroduced a modified amendment. The Murtha amendment, besides applying only to members of Congress and their staffs, had allowed recovery of attorneys' fees if the defendant simply prevailed at trial, no matter what the reason.<sup>313</sup> Hyde acted to salvage the situation by introducing legislation that would allow attorneys' fees for anyone acquitted of a federal crime, unless the prosecution could

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308. See Republican Contract with America, available at <http://www.house.gov/house/Contract/CONTRACT.html> ("On the first day of the 104th Congress, the new Republican majority will immediately pass the following major reforms, aimed at restoring the faith and trust of the American people in their government: First, require all laws that apply to the rest of the country also apply equally to the Congress; . . .").

309. See Editorial, *Congress Is Not Above Law*, LANCASTER NEW ERA (Lancaster, Pa.), July 28, 1997, at A6; see also Edward Cohn & Jason Zengerle, *A Better Class of Cannibal*, AM. PROSPECT, Nov. 1, 1997, at 15 ("So congressmen and their staffs, uniquely, would be sheltered from Washington's cannibalistic culture—leaving them free to cannibalize everybody else. So much for Congress subjecting itself to the laws of the land."); Keven Willey, *Little People Feel Defendant's Rage*, ARIZ. REPUBLIC, Aug. 20, 1997, at B2 ("Maybe we should start calling members of Congress 'Your Highness.' Better yet, let's cut the crap and call them 'God.' No other segment of society enjoys such judicial largess."); Editorial, *A Pampered Congress*, AUSTIN AMERICAN-STATESMAN, July 30, 1997, at A14 (describing the Murtha bill as "just the latest example of Congress setting itself apart—and above—the people it is supposed to represent" and as "another perk for coddled and indulged members of the House and Senate"). Other members of the press were upset that Congress was legislating legal fees for itself while proposing to cut the budget for the Legal Services Corporation in half. See, e.g., Ragan Powers, Editorial, *'Justice for All' Will Be Hollow Words Without Funding for Legal Services*, NEWS TRIB. (Tacoma, Wash.), Sept. 12, 1997, at A9. Indeed, some members of the House Appropriations Committee reportedly wondered whether the provisions for reimbursement should not at least be extended to cover other government employees. Anick Jesdanun, *Some House Members Are Hoping the Justice . . .*, ASSOCIATED PRESS POL. SERVICE, July 23, 1997, available at 1997 WL 2541037. Several White House aides, for example, "were eventually reimbursed by the Justice Department for lawyers they hired in connection with congressional investigations." *Id.* As Representative Vic Fazio put it, "[t]his opens up a can of worms." *Id.*

310. Willey, *supra* note 309.

311. See *infra* text accompanying notes 331–38.

312. See Janet Hook, *Congress Gets More Liberal—with Itself*, L.A. TIMES, Sept. 28, 1997, at A1.

313. Jesdanun, *supra* note 309.

show the case was “substantially justified.”<sup>314</sup> Democrats were not slow to seize on the weaknesses of Hyde’s proposal. Gleefully assuming a law-and-order position, Democrats blasted the amendment for causing prosecutors to shy away from legitimate but risky cases.<sup>315</sup> Representative John Conyers of Michigan, the ranking Democrat on the Judiciary Committee, argued that sex offenders and drug dealers are often hard to convict because witnesses may be reluctant to testify.<sup>316</sup> “I think it is ironic that the party that prides itself on its tough-on-crime stances is pushing an amendment that will mainly benefit rapists, child molesters and drug dealers,” Conyers said.<sup>317</sup> Assistant Attorney General Andrew Fois wrote a letter to Hyde criticizing the amendment, contending the provision would force prosecutors to weigh each case according to whether the government could afford to pay attorneys’ fees.<sup>318</sup> The DOJ further claimed the Hyde Amendment would spawn massive litigation over what it means for a prosecution to be “substantially justified.”<sup>319</sup> And President Clinton threatened to veto the spending bill on the basis of the Hyde Amendment.<sup>320</sup>

Henry Hyde defended the amendment in a passionate speech on the House floor. He invoked the tribulations of McDade, “the case of someone we all know who went through hell, if I may use the term, for many years of being accused and finally prevailed at enormous expense, one he will never get out from under.”<sup>321</sup> Hyde continued, “What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong.” He thundered, “You should be entitled to your attorneys’ fees.”<sup>322</sup> “What is the remedy, if not this, for somebody who has been unjustly, maliciously, improperly, abusively tried by the Government?”<sup>323</sup> Yet at the time Hyde spoke, the words “malicious” or “frivolous” appeared nowhere in the amendment; the standard was simply a prosecution that was not “substantially justified.”<sup>324</sup>

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314. Naftali Bendavid, *Proposed Law Would Allow Acquitted to Recover Fees; President Threatens Veto over Hyde Rider*, CHI. TRIB., Sept. 25, 1997, at 13.

315. *Id.* (“Democrats seemed pleased to adopt the pro-prosecution, anti-criminal role so often taken by Republicans.”).

316. *Id.*

317. *Id.*

318. *Id.* (quoting the Fois letter as stating, “It would unwisely inject financial and budgetary considerations and projections into prosecutive decisions that should be based on the facts and the law.”).

319. *Id.*

320. *Id.*

321. 143 CONG. REC. H7786, H7791 (daily ed. Sept. 24, 1997) (statement of Rep. Henry Hyde).

322. *Id.*

323. *Id.* at H7792.

324. *Id.* at H7791. Hyde nevertheless had predicted in earlier testimony that few cases would be affected by the provision and that its total cost would be low, less than EAJA’s cost of between \$1 million and \$8.2 million a year; he even claimed the provision would save money because it would discourage frivolous prosecutions. *Statement of Honorable Henry J. Hyde to Allow for the Recovery of*

Several Democrats took Hyde to task on the floor. Representative Lynn Rivers (D.-Mich.) argued that the Hyde Amendment would still in effect only apply to members of Congress and other public officials because only they could claim their prosecutions were “politically motivated,” which she suggested would be necessary to obtain fees under the amendment.<sup>325</sup> In addition, she argued that the amendment would be positively harmful because of its potential “chilling effect” on federal prosecutions.<sup>326</sup> Representative David Skaggs (D.-Colo.) took issue with the standard of proof proposed. “Were the words ‘malicious’ and ‘abusive’ in his amendment, and maybe those are criteria that also ought to be introduced, it would be a different matter. Those were not standards that are in his amendment although they were certainly the standards invoked in his rhetoric.”<sup>327</sup> Skaggs also drew attention to the unusual legislative stratagem that Hyde was pursuing to secure the law’s enactment. He deemed the Hyde provision to be “an extraordinary matter of policy to attempt to bring up for the first time as an amendment to an appropriations bill and, I think, wholly out of the judicious character with which the gentleman typically manages the business of his committee.”<sup>328</sup> He pointed out that the measure had been “subject to no hearings, no opportunity for representatives of the Justice Department or the criminal defense bar or anyone else to really explicate the implications, the consequences, the costs of a significant change in the way the United States of America would manage its criminal justice responsibilities.”<sup>329</sup> But Hyde persisted. To Skaggs’s criticism, he responded, “The only reason it is here now, I saw the Murtha amendment, it was coming to the floor, and I thought we could do it better. That is all.”<sup>330</sup>

Why was Hyde so passionate about providing some protection for criminal defendants at that time? The House was already embroiled in a number of internal disputes—including a congressional pay raise—and disputes with the President—including the method of census counting and various budgetary battles. One would have thought the Hyde amendment could wait for another time, leaving Hyde free to concentrate his attention elsewhere. Surely public choice theory would suggest

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*Attorneys Fees and Litigation Costs in a Criminal Prosecution Before the House Rules Committee*, 105th Cong., Sept. 5, 1997, at 1997 WL 14150345.

325. 143 CONG. REC. H7792 (1997). In any case, she claimed that the amendment was “unnecessary” because there were already in the criminal justice system “many protections to seal defendants from frivolous cases,” such as grand jury determinations of probable cause and judicial decisions on Rule 29 motions and the like. *Id.* at H7793. Hyde pointed out in rebuttal that the cost of a legal defense could still be great, despite these protections. *Id.*

326. *Id.* at H7793.

327. *Id.* at H7792.

328. *Id.* at H7791. Representative Hyde was chairman of the House Judiciary Committee.

329. *Id.*; see Abner J. Mikva, *The Long, Long Bill: Siren Song of Omnibus Legislation Too Often Tempts Congress*, LEGAL TIMES, Feb. 15, 1999, at 24 (criticizing omnibus, catch-all legislation enacted outside the public view).

330. 143 CONG. REC. H7794 (1997). He argued that the concept was very simple, and that a similar provision had been in place for some time concerning civil litigation. *Id.* at H7793.



that members of Congress would have “better” ways to spend their days than debating a measure that seemed to appease no interest group whatsoever. Yet Hyde evidently felt some urgent need to act quickly, some reason beyond the simple “seize the day” rationale he invoked on the House floor.

One possible reason involves an issue dear to members of Congress, but one that the media did not link to the Hyde amendment issue. At precisely that time, the Federal Election Commission was threatening one of the increasingly common means politicians were using to pay their legal bills: campaign contributions.

Members of Congress had depended heavily on campaign funds to defray the costs of legal representation.<sup>331</sup> Representative Newt Gingrich, although he did not use campaign funds to repay \$300,000 to the House Ethics Committee (instead relying on a personal loan from Robert Dole), did use about \$1.1 million in campaign funds to pay for legal expenses in the same case.<sup>332</sup> Representative Barney Frank, after using more than \$120,000 in campaign funds to pay legal expenses connected with allegations about a male prostitute, justified his actions with the claim that “[i]n my case, criminal charges were never brought and it grew entirely out of my status in the House.”<sup>333</sup> Gingrich and Frank were hardly unique. In 1992 alone, according to the Campaign Study Group, thirty-three U.S. House members used campaign funds to pay fines.<sup>334</sup> Although there was a ban on using campaign funds for personal use, paying for legal fees and fines out of campaign funds had become standard practice.<sup>335</sup> Some lawmakers concluded, as did Frank, that investigations into their conduct were motivated primarily because of their political positions. And many others probably were not terribly concerned with principle, but were simply looking for a ready source of cash.

In 1996, however, the Federal Election Commission began issuing decisions calling into question the propriety of using campaign funds to

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331. See Johnny Carter, Note, *To Provide for the Legal Defense: Legal Defense Funds and Federal Ethics Law*, 74 TEX. L. REV. 147 (1995).

332. See, Michael Kranish, *Using Campaign Funds for Fees and Fines Isn't Uncommon*, BOSTON GLOBE, Apr. 18, 1997, at A22. According to federal records, Gingrich also used \$145,000 in campaign funds for legal representation in a prior ethics case. *Id.*

333. *Id.*

334. *Id.* For example, former Representative Dan Rostenkowski “used \$1.3 million [in campaign funds] to fight various charges, including embezzlement of campaign funds.” *Id.* Former Representative Nicholas Mavroules used over \$78,000 in campaign funds to pay legal fees associated with charges of “racketeering, bribery, and income-tax evasion, according to the Independent Campaign Study Group.” *Id.*; see Carter, *supra* note 331, at 153–54 (describing the creation of legal defense funds by Senators Bob Packwood, David Durenberger, Orrin Hatch, Mark Hatfield, Alan Cranston, Alphonse D’Amato, Harrison Williams, Tom Harkin, Brock Adams, Joe Biden, and Kay Bailey Hutchison and by Representatives Dan Rostenkowski, Barney Frank, Jim Wright, Nicholas Mavroules, Floyd Flake, Harold Ford, Joseph McDade, Mary Rose Oakar, Mel Reynolds, Walter R. Tucker, Charles Diggs, Dan Flood, Robert Garcia, Frank Thompson Jr., George Hansen, Don Young, John Jenrette, and Gerry Studds).

335. See Carter, *supra* note 331, at 150–54.

pay these fees.<sup>336</sup> Previously, the FEC had authorized candidates to use campaign funds to pay legal fees in specific instances closely connected with the campaigns themselves.<sup>337</sup> But starting in 1996, FEC rulings in connection with Representative Wes Cooley (R.-Or.) and Representative Terry Costello (D.-Ill.), limited the use of campaign funds to pay legal bills.

In 1996, Wes Cooley was under investigation regarding his military record and his wife's receiving benefits as a veteran's widow, among other things.<sup>338</sup> Cooley applied for permission from the FEC to use money in his campaign fund to pay his legal fees.<sup>339</sup> The FEC authorized use of campaign funds to pay for attorneys' fees associated with responding to press allegations and, in the process, the FEC acknowledged that "the activities of candidates and officeholders may receive heightened scrutiny and attention because of their status as candidates and officeholders."<sup>340</sup> The Advisory Opinion said that campaign funds could not be used, however, to pay for fees for actual litigation before the Veterans Administration or in court.<sup>341</sup> The FEC said this would be a conversion to personal use, since "the obligation to comply with VA eligibility requirements would exist even if Mr. Cooley were not a candidate or officeholder."<sup>342</sup>

In the summer of 1997, the FEC elaborated on its position in the case of Representative Costello, who was an unindicted coconspirator in a federal corruption case.<sup>343</sup> Some of the allegations against him involved official acts, others not. The FEC authorized 100% payment with campaign funds for any legal expense that "relates directly to allegations arising from campaign or officeholder activity" and for any legal expense that "relates directly and exclusively to dealing with the press."<sup>344</sup> The FEC cut back, however, on its prior authorization of payment for work indirectly related to responding to press allegations (such as research) that did not directly relate to allegations arising from campaign or officeholder activity.<sup>345</sup> Such fees would only qualify for fifty percent payment with campaign funds.<sup>346</sup> In other words, as of August 1997, it was clear

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336. Op. F.E.C. 1997-12 (Aug. 15, 1997); Op. F.E.C. 1996-24 (June 27, 1996).

337. The FEC had authorized a candidate who had been charged with illegally taking down his opponent's campaign signs to use campaign funds to pay for his defense. Op. F.E.C. 1995-23, at 1 (July 20, 1995). And the same year, the FEC had authorized a campaign committee to use campaign funds to challenge a sheriff's office's seizure of committee property to enforce a prior debt against the candidate. Op. F.E.C. 1995-21, at 1-2 (July 28, 1995).

338. *Or 02: More Hints of Cooley Abandoning Re-election Bid*, THE HOTLINE, June 18, 1996, at 16.

339. *Id.*

340. Op. F.E.C. 1996-24, at 3 (June 27, 1996).

341. *Id.* at 4.

342. *Id.*

343. Op. F.E.C. 1997-12 (Aug. 15, 1997).

344. *Id.* at 4.

345. *Id.* at 5.

346. *Id.*

that members of Congress could not indiscriminately dip into campaign funds to pay for any and all lawyers' fees in defending themselves against criminal or civil claims.

And so, although neither Hyde nor any other member of Congress mentioned the campaign fund problem in recorded debate over the Hyde Amendment, the pressure on members to pass some measure to help reimburse legal fees was evident. Both houses of Congress passed the Hyde Amendment as part of a budget bill, but in conference the language entitling the acquitted criminal defendant to fees whenever the government's position was not "substantially justified" was modified: fees were to be awarded only for prosecutions deemed by a judge to be "vexatious, frivolous, or in bad faith."<sup>347</sup> Although some officials still grumbled at the amendment, the administration did not actively oppose it.<sup>348</sup> The *Washington Post's* editorial page gave the measure its blessing, calling the amendment with its compromise language "a credible approach to a weighty problem," which balanced well the competing interests of law enforcement and individual protection against vexatious prosecution.<sup>349</sup> The *Post* noted, however, the amendment's messy origins with Representative Murtha together with the lack of any hearings on the provision, and it suggested that this was "a dangerous way to make fundamental decisions about criminal justice policy."<sup>350</sup> The *Post's* squeamishness at the sight of sausage-making does not belie the fact that the process of checks and balances worked in this case to produce measured protection for criminal defendants, and protection for criminal defendants may often originate in unsavory legislative schemes. A week after Hyde proposed his amendment, the vote was scheduled and the amendment was approved, 340-84 as part of Fair Lawyer legislation.<sup>351</sup>

### c. Postscript

Contrary to some of the worst fears about the Hyde Amendment, no floodgate of frivolous requests for attorneys' fees has opened so far.<sup>352</sup> Courts have proven to be quite cautious about allowing defendants' fees in their interpretations of the Hyde Amendment, and only the very occa-

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347. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997); see Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 48-49 (1999) (discussing legislative history of Hyde Amendment).

348. Editorial, *Who Pays the Lawyers?*, WASH. POST, Dec. 3, 1997, at A24.

349. *Id.*

350. *Id.*

351. *Senate Passes FDA Overhaul; House Endorses Pay Raise*, ASSOCIATED PRESS POL. SERVICE, Sept. 28, 1997, 1997 WL 2552466.

352. In the first year after the enactment of the Hyde Amendment, "[o]f approximately 7,000 criminal cases brought in federal court . . . , about four are known to have resulted in favorable rulings under the Hyde Amendment, [and] [n]ot one penny has been doled out." Irvin B. Nathan & John C. Massaro, *Shekels and Hyde: Little Money, Many Lessons from Hyde*, 6 No. 1 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 1 (Feb. 1999).

sional defendant gets an award.<sup>353</sup> There are a few dozen available opinions discussing the Hyde Amendment,<sup>354</sup> and none of this litigation to date has involved members of Congress or their staffs.

Courts have interpreted the Hyde Amendment differently from the EAJA in several respects, making it even more difficult to recover attorneys' fees after a criminal prosecution than after a civil proceeding. Under the EAJA, the government bears the burden of proof if an action to recover attorneys' fees is brought.<sup>355</sup> The Hyde Amendment<sup>356</sup> states that awards "shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under [the EAJA]."<sup>357</sup> Courts have interpreted this provision to mean that the defendant bears the burden of proof.<sup>358</sup> In addition, following the statutory language, courts have concluded that the standard of proof is different in the two acts.<sup>359</sup> As previously discussed, the standard of proof under the EAJA allows recovery of attorneys' fees if the government's position was not "substantially justified." Several courts have noted that legislators criticized this standard as too relaxed in the context of the Hyde Amendment,<sup>360</sup> and all courts to address the issue have held that the "vexatious, frivolous, or in bad faith" standard under the Hyde Amendment is more demanding than the EAJA standard.<sup>361</sup> Thus, the Hyde Amendment has inverted the commonplace expectations about legislatures and courts and their respective interests in protecting criminal defendants.<sup>362</sup> The legislature enacted a measure intended to provide substantial procedural protections, but the courts have narrowed the law's scope.<sup>363</sup>

## 2. *Citizen Protection Act*

The McDade Amendment, also grandiosely known as the Citizen Protection Act (CPA), has been described as "Joseph McDade's swan

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353. See *United States v. Holland*, 214 F.3d 523 (4th Cir. 2000).

354. See *United States v. Lindberg*, 220 F.3d 1120 (9th Cir. 2000); *In re 1997 Grand Jury*, 215 F.3d 430 (4th Cir. 2000); *United States v. Truesdale*, 211 F.3d 898 (5th Cir. 2000); *United States v. Gilbert*, 198 F.3d 1293 (11th Cir. 1999).

355. *Lindberg*, 220 F.3d at 1124.

356. See, e.g., *Meinhold v. United States Dep't of Def.*, 123 F.3d 1275, 1277 (9th Cir. 1997).

357. 18 U.S.C. § 3006A (1994) (statutory note).

358. *Lindberg*, 220 F.3d at 1124; *In re 1997 Grand Jury*, 215 F.3d at 436; *Truesdale*, 211 F.3d at 908; *Gilbert*, 198 F.3d at 1304.

359. *Lindberg*, 220 F.3d at 1124.

360. *Id.* at 1124–25; *Gilbert*, 198 F.3d at 1300–02.

361. Several have turned to Black's Law Dictionary in their efforts. See *In re 1997 Grand Jury*, 215 F.3d at 436; *Gilbert*, 198 F.3d at 1298–99; *U.S. v. Reyes*, 16 F. Supp. 2d 759, 761 (S.D. Tex. 1998). Appellate courts have so far been deferential to district court decisions under the Hyde Act, reviewing only for "abuse of discretion." *Lindberg*, 220 F.3d at 1124; *In re 1997 Grand Jury*, 215 F.3d at 436; *Truesdale*, 211 F.3d at 906; *Gilbert*, 198 F.3d at 1297–98.

362. See *supra* Part II.A–B.

363. In fact, given the prevailing reading of the law, acquitted defendants are ordinarily dissuaded from filing motions under the Hyde Amendment, for defense lawyers recognize the unlikelihood of recovery.

song—and a parting shot at the Department of Justice . . . .”<sup>364</sup> The law requires that “[a]n attorney for the Government shall be subject to [s]tate laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”<sup>365</sup> Simply put, the CPA imposes state ethics rules on federal prosecutors. However equitable that may sound, it has in practice proven highly problematic, and has been the subject of substantial academic criticism.<sup>366</sup> Prior to 1998, for at least a decade, state and federal courts, as well as the local bar associations, had grappled with the problem of developing ethical rules for federal prosecutors.<sup>367</sup> The CPA stunted any possibility of gradual development, neglected the panoply of conflicting interests at stake, and shackled federal prosecutors with a law that has proven difficult and costly to administer.

It originated just weeks after McDade’s acquittal, when he introduced the original version of a bill that would eventually become law.<sup>368</sup> In a subcommittee hearing, Representative McDade was the first and principal witness, summoning his “first-hand knowledge of the overzealousness and excessiveness of federal prosecutors.”<sup>369</sup> Although McDade alleged that the “problem” of prosecutorial misconduct was “serious,” he provided virtually no evidence to support this claim, other than anecdotal

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364. T.R. Goldman, *McDade Gets in Final Dig Against DOJ*, LEGAL TIMES, Oct. 26, 1998, at 18.

365. 28 U.S.C.A. § 530B(a) (West 2003).

366. See, e.g., Green & Zacharias, *supra* note 119; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725–41, 765–73 (2001); Note, *Federal Prosecutors, State Ethics, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2083–93 (2000) [hereinafter McDade Note]. But see Sapna K. Khatiwala, Note, *Toward Uniform Application of the “No-Contact” Rule: McDade Is the Solution*, 13 GEO. J. LEGAL ETHICS 111 (1999) (defending the McDade Amendment).

367. Model Rule 4.2, like its predecessor, Model Code of Disciplinary Rule 7-104, restricts a lawyer’s ability to contact a person represented by another lawyer. In *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), the Second Circuit held that the no-contact rule applied in the context of a preindictment criminal investigation. *Id.* at 837. Attorney General Richard Thornburgh promptly responded to *Hammad*, claiming that the Supremacy Clause preempted the application of state ethics rules to federal prosecutors. *In re Doe*, 801 F. Supp. 478, 489 Ex. E (D.N.M. 1992) (citing Memorandum from Richard Thornburgh, Attorney General, to All Justice Department Litigators (June 8, 1989)). The “Thornburgh Memorandum” also emphasized the “substantial burden” the application of the no-contact rule would have on law enforcement. *Id.* Attorney General Reno issued regulations in 1995, reaffirming in principle the Thornburgh Memorandum, although eschewing some of its more combative language. See Communications with Represented Persons: Final Rule, 59 Fed. Reg. 39,910 (1994) (codified at 28 C.F.R. Part 77). The courts, however, continued to voice their misgivings. See, e.g., *United States v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998) (rejecting the preemption argument justifying the “Thornburgh Memorandum” and “Reno regulations”). See generally McDade Note, *supra* note 366 (evaluating the McDade Amendment’s effects on federal prosecutors and arguing that the McDade Amendment will impede federal law enforcement).

368. The bill was introduced as the Ethical Standards for Federal Prosecutors Act of 1996. See H.R. 3386, 104th Cong. (2d Sess. 1996); *Ethical Standards for Federal Prosecutors Act of 1996: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. (2d. Sess. 1996) [hereinafter *Ethical Standards Hearings*]. The legislative history of the McDade Amendment is recounted in Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L. J. 207, 214–16 (2000).

369. *Ethical Standards Hearings*, *supra* note 368, at 9 (statement of Rep. Joseph M. McDade).

claims based on his own experience.<sup>370</sup> Why, then, should the members of the House heed his words? Because, said McDade, he spoke “with the authority of one who has had his life turned upside down . . . .” He added:

So I come to you today with a bias borne of hard personal experience. I used to blindly trust that our system worked. Now I have learned that our law enforcement community has to some extent lost its way, strayed from its mission.<sup>371</sup>

The Department of Justice dispatched the Solicitor General, Seth Waxman, to Capitol Hill to respond to McDade and to urge the House of Representatives to reject his proposal,<sup>372</sup> and the executive branch won a temporary victory when the subcommittee buried the bill.<sup>373</sup> Undeterred, McDade reintroduced the bill in the next Congress.<sup>374</sup> The bill made it out of subcommittee, but the House Committee on the Judiciary then failed to take any action.

McDade soldiered doggedly on. In March 1998, he introduced an expanded version of the legislation in the Committee on the Judiciary.<sup>375</sup> At this point, the bill had thirty-three sponsors,<sup>376</sup> virtually all of whom were, like McDade himself, Republicans. Yet a few members of the House crossed the political aisle. They included: Representative Murtha, whose run-in with the law during the Abscam investigation has already been noted;<sup>377</sup> Representative Traficant, who had been indicted

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370. *Id.*

371. *Id.*

372. *Id.* at 46 (statement of Seth P. Waxman, Associate Deputy General, Office of the Deputy General, United States Department of Justice). Waxman noted that DOJ “strongly opposes” the McDade law, which “has the potential to work serious harm.” *Id.* Waxman pointed out the innumerable questions left unaddressed by the simplistic measure:

The bill leaves open, and confused, the question of enforcement. Generally, a bar disciplines its members for violations of its rules. The ultimate penalty for infractions is disbarment. Does the legislation anticipate that state bars will discipline attorneys who are not within their membership? Does it anticipate that the Department of Justice or the federal courts will be responsible for such enforcement? Whose interpretation of the bar rules will count for purposes of enforcement? These are not easy questions; I raise them not because I have the answers, but because the answers are necessary to any consideration of this bill.

*Id.* at 47. He further noted the complications that the law would particularly create in undercover investigations, because of the rule, developed in the civil context, that lawyers not directly contact represented parties. *See id.* (“[T]he bill could seriously hamstring the Department’s ability to conduct undercover investigations, which provide a critical weapon in the fight against the distribution of illegal narcotics, organized gang activities, child pornography, and a host of other crimes.”).

373. *See Ethical Standards Hearings, supra* note 368.

374. *See* H.R. 232, 105th Cong. (1st Sess. 1997).

375. *See* H.R. 3396, 105th Cong. (2d Sess. 1998). This bill, in addition to imposing state ethics rules on federal prosecutors, created a “Misconduct Review Board” to consider allegations of prosecutorial misconduct.

376. The sponsors are recorded as an appendix to testimony before the House Appropriations Committee. *See Regarding the Fiscal Year 1999 Appropriation for Defender Services Before the House Appropriations Subcomm. on Dep’t of Commerce, Justice and State, and the Judiciary*, 105th Cong. n.2 (Apr. 1, 1998) (statement of Gerald B. Lefcourt, Nat’l Ass’n of Criminal Def. Lawyers), 1998 WL 1808970.

377. *See supra* note 271 and accompanying text. Murtha’s assistance did not go unnoticed: when Murtha found himself locked in a tight Democratic Party primary contest in 2002, McDade ponied up

two decades earlier and would be indicted again in a few years;<sup>378</sup> and Representative Ford, Jr., whose father (also a member of Congress) had been indicted for bank fraud and tax evasion.<sup>379</sup> Although the bill claimed thirty-three sponsors, the House Judiciary Committee declined to take action on it.

At this point, the progress of the CPA becomes murky.<sup>380</sup> It seems that McDade convinced the House Appropriations Committee to include his proposed legislation in an appropriations bill.<sup>381</sup> After a perfunctory hearing, the Committee passed the appropriations bill, with McDade's provision included, in July 1998.<sup>382</sup> The McDade provision found its logical place in an appropriations bill, nestled immediately between a provision allocating \$17 million for the maritime administration and a section amending the National Whale Conservation Fund Act.<sup>383</sup> Support for the McDade provision swelled in Congress when it emerged that Independent Counsel Starr had engaged in allegedly questionable tactics during the Lewinsky investigation, including the questioning of a suspect outside of the presence of her counsel.<sup>384</sup>

The bill was then collapsed into an Omnibus Consolidated and Emergency Supplemental Appropriations Bill,<sup>385</sup> and presented to the Senate on August 31, 1998. Although the House had been a congenial place for McDade's law, the Senate accorded it a relatively chilly reception. Senator Leahy (D.-Vt.), the Chairman of the Senate Judiciary Committee, spoke out on the floor against the CPA, noting that the provision placed "unnecessary and ill-advised obstacles in the path of effective interstate and international prosecutions."<sup>386</sup> The ranking minority member of the Senate Judiciary Committee, Senator Hatch (R.-Utah), also criticized McDade's measure<sup>387</sup> as harmful to the legitimate interest

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\$1000 for his old colleague. *See Murtha Banks More Than Mascara for Primary Matchup*, CONGRESS DAILY, May 10, 2002, available at <http://nationaljournal.com/pubs/congressdaily>.

378. *See supra* text accompanying notes 185-89.

379. *See* MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 2000 1500 (1999).

380. Credit goes to Professors Green and Zacharias for casting light on this swamp. It isn't pretty. *See* Green & Zacharias, *supra* note 119, at 215 nn.49-50.

381. *See id.* at 215 n.49 (citing H.R. 4276). A motion to strike the Citizens Protection Act was defeated by a vote of 345-82. *See* 144 CONG. REC. H7226 (1998).

382. *See* Green & Zacharias, *supra* note 119, at 215 nn.49-50.

383. *See* 144 CONG. REC. H11075 (daily ed. Oct. 19, 1998).

384. *See* Khatiwala, *supra* note 366, at 113 ("The highly publicized conduct of the Independent Counsel focused attention on the standard operating procedures of federal prosecutors and generated support for the McDade Amendment on Capitol Hill.").

385. *See* Green & Zacharias, *supra* note 119, at 215 n.50 (citing H.R. Conf. Rep. No. 105-825 (1998)).

386. 144 CONG. REC. S12859 (statement of Sen. Leahy).

387. He was careful not to criticize McDade himself. *See* 144 CONG. REC. S12799 (statement of Sen. Hatch) ("The sponsor of this measure is Representative Joe McDade, a man who, by all accounts, was wrongly prosecuted by zealous federal prosecutors and who has been vindicated.").

of law enforcement.<sup>388</sup> In addition, noting the remarkably unified opposition to the measure inside and outside the administration,<sup>389</sup> Hatch and Leahy expressed displeasure that the Judiciary Committee had been bypassed, and they sent a letter to the Senate Appropriations Committee urging removal of the provision from the conference report.<sup>390</sup>

Indeed, far from there being any groundswell of support for the measure, most outside observers were critical. Here again, as with the Hyde Amendment, Congress proved itself determined to enact a measure that satisfied no real constituency, and that few in the general public considered to be in the public interest. The *Washington Post*, for example, hardly a bastion of law-and-order conservatism, ran an editorial critical of the CPA.<sup>391</sup> Although acknowledging that steps should be taken to check federal prosecutors, the editorial pointed out that the measure was too blunt to accommodate the countervailing interests in effective law enforcement.<sup>392</sup> The *Post* editorial noted that “[o]ne might expect that criminal justice legislation that is opposed by the president, the attorney general and the chairman and ranking member of the Senate Judiciary Committee would not be blithely slipped into the statute books.”<sup>393</sup> But that was precisely what happened. And when push came to shove, Leahy and Hatch declined to hold up the entire appropriations because of their opposition to the measure.<sup>394</sup>

Gloating over the act’s passage in his final days in office, McDade scorned even the veneer of even-handedness, and spoke of his handiwork in the tones of a caricature of a crusading ACLU lawyer: “The Department of Justice today is engaging in the most immoral activity I can imagine,” McDade pronounced.<sup>395</sup> “They charge any citizen that they can get,

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388. He argued that the measure would “severely hamper the ability of the Department of Justice to enforce federal law and cede authority to regulate the practice of law by federal prosecutors in our federal courts to more than fifty state bar associations.” *Id.*

389. *See id.* (“[T]he McDade provision is opposed by Attorney General Reno and by the Administration. It is opposed by a bipartisan group of six former Attorneys General of the United States from the Nixon, Carter, Reagan and Bush administrations. It is opposed by the Director of the FBI, the Administrator of the Drug Enforcement Administration, and the Director of the Office of National Drug Control Policy . . . . And this provision is vigorously opposed by an overwhelming bipartisan majority of the Senate Judiciary Committee, the committee with jurisdiction over this matter.”).

390. *See* 146 CONG. REC. S4446 (statement of Sen. Leahy) (quoting joint letter to the Senate Appropriations Committee).

391. Editorial, *Hampering Law Enforcement*, WASH. POST, Oct. 18, 1998, at C6.

392. *Id.* (“[T]he McDade provision is not the simple good-government measure that it seems. The department’s position responds to the fact that the duties of federal prosecutors—especially in the context of multi-state investigations and certain undercover work—sometimes conflict with state ethics rules. Lawyers normally are prohibited from contacting directly someone whom they know to be represented by counsel, but this rule sometimes makes no sense in the context of federal criminal investigations. The department, therefore, asserts that its lawyers, while generally obliged to follow state bar rules, can ignore them in this key arena.”).

393. *Id.*

394. *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, Pub. L. No. 105-277, § 801, 112 Stat. 2681, 118–19 (1998).

395. Panel Discussion, Prosecutorial Misconduct: The McDade Amendment, at <http://www.fed-soc.org/Publications/Transcripts/mcdade.htm> (last visited May 27, 2004).



and as it was once said, they don't throw the book at them, they throw the library."<sup>396</sup> Ironically, if McDade's concern was the prosecutorial penchant to "overcharge" in the drafting of indictments, a legitimate concern that does indeed warrant scrutiny, his measure does absolutely nothing to address this problem.

But what *has* the CPA accomplished? To their credit, Senators Leahy and Hatch have tracked the real-world consequences of the McDade Amendment, and urged its repeal.<sup>397</sup> Indeed, even before the September 11, 2001 attacks on the Pentagon and World Trade Center, the two leaders of the Senate Judiciary Committee cataloged how the application of the vagaries of state ethics rules, and in particular the rule prohibiting contact with represented parties, have sabotaged one federal investigation after another.<sup>398</sup> For example, Senate Leahy took to the floor of the Senate and described how the McDade Amendment worked in actual practice in an FBI child-murder investigation.<sup>399</sup> Having obtained a reliable tip that an individual, who was in a county jail after conviction on an unrelated charge, was the culprit, the FBI sought to wire one of the suspect's trusted accomplices.<sup>400</sup> But prosecutors, fearful that this might run afoul of the state's ethics rules prohibiting contact with represented parties, sought guidance from the State Bar Disciplinary Counsel.<sup>401</sup> The Counsel, interpreting the state ethics rules, concluded that the suspect was still a "represented person" and, therefore, prohibited any direct contact by an agent of the police.<sup>402</sup> Such a prohibition, one should add, is in no way required by the U.S. Constitution,<sup>403</sup> nor any federal regulations, but the effect of the McDade Amendment here was to short-circuit a federal murder investigation.<sup>404</sup>

The September 11th attacks have prompted a reappraisal of the costs of the McDade Amendment. FBI agent Colleen Rowley, the celebrated whistleblower who excoriated FBI headquarters for its refusal to approve a warrant application to search Zacarias Moussaoui's laptop

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396. *Id.* McDade repeated his tale for anyone who would listen. See Richard Willing, *Federal Prosecutors Have New Hurdle Law's Sponsor Says Abuse is Rampant*, USA TODAY, Apr. 19, 1999, at 12A (quoting McDade saying, "[t]hese guys [referring to federal prosecutors] play rough' . . . 'Their mantra used to be 'Let justice be done.' Now it's, 'Winning is everything.'")

397. See 146 CONG. REC. S4446-49 (daily ed. May 25, 2000) (statement of Sen. Leahy).

398. *Id.*

399. *Id.* at S4447.

400. *Id.*

401. *Id.*

402. *Id.*

403. First of all, police and prosecutors are foreclosed from engaging suspects in undercover conversations, but only after the suspect has been indicted. See *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Dobbs*, 711 F.2d 84 (8th Cir. 1983) (applying *Massiah* to undercover contacts with represented persons in the course of preindictment investigation). Second, the State Bar Disciplinary Councils erred in construing the suspect to be a "represented party," since his conviction on the unrelated charge was final. Cf. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987).

404. For a useful discussion of the costs of the McDade Amendment, see Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707 (2001).

computer,<sup>405</sup> specifically urged Congress to reconsider the McDade Amendment, precisely because of the hindrance it might pose in terrorism investigations.<sup>406</sup> Indeed, it is relatively easy to imagine how investigations into terrorist cells stretching across states, and involving parties who may have had brushes with the law in the past, might be delayed or even jeopardized by the McDade Amendment.<sup>407</sup> In response, as noted earlier, Senator Leahy included a proposal in the Patriot Act to overhaul the McDade Amendment.<sup>408</sup> But the House steadfastly rejected the Senate's call for its replacement with a more measured provision.<sup>409</sup> Responsible for creating this monster, and apparently attached to its own handiwork, the House would not consent to its destruction.

#### D. *Two Cheers for Independent Counsels*

When the Ethics in Government Act lapsed in 1999,<sup>410</sup> there was a sigh of relief heaved by virtually every politician in Washington, D.C. Yet it was not that long ago that the independent counsels, given life by the Ethics in Government Act, were hailed as the collective saviors of American politics. In 1978, in the aftermath of Watergate, politicians from both sides of the political aisle trumpeted the need for prosecutors statutorily segregated from the Department of Justice, who could vigorously investigate politically powerful figures.<sup>411</sup> The fracturing of the ex-

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405. See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951-957-72 (2003) (analyzing the Moussaoui episode).

406. *FBI Counter-Terrorism Effort: Agency Reorganization Before the Senate Comm. on the Judiciary*, 107th Cong. (2002), available at 2002 WL 20317891 (statement of Colleen Rowley, FBI Special Agent and Minneapolis Chief Division Counsel) ("It is only a question of time until terrorists also learn to take advantage of this law, as they apparently have with other facets of our American laws and privileges.").

407. For example, consider an investigation into a terrorist cell operating in California, Oregon, and Nevada. Federal prosecutors would first need to determine which of the state's ethics rules governed the investigation—with the likely answer under the McDade Act being all of them. Perhaps several of the suspects have retained lawyers in immigration matters. The FBI, having succeeded in planting an undercover agent in the cell, wishes to wire him and engage him in conversations with the suspects. But are the other suspects "represented parties?" Would such activities constitute violations of any of the relevant states' ethics rules? The Department of Justice attorneys supervising the investigation would need to consider the matter before authorizing the operation. And keep in mind that the attorneys will know that a failure to act in accordance with the ethics rules could result in them being personally disciplined, and possibly disbarred, by the Bar Disciplinary Authorities. See Or. State Bar Ass'n Bd. of Governors, Formal Op. 1999-156 (1999), available at [http://www.osbar.org/\\_docs/ethics/1999-156.pdf](http://www.osbar.org/_docs/ethics/1999-156.pdf) (last visited May 27, 2004); *In re Gatti*, 8 P.3d 966 (Or. 2000) (disciplinary proceeding involving topic of Formal Op. 1999-156).

408. See Uniting and Strengthening America Act, S. 1510, 107th Cong. § 501 (2001). Senator Leahy's proposal would have instructed federal courts to develop uniform ethics rules for federal prosecutors.

409. Compare *id.* with Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 § 501, 115 Stat. 272, 274 (section 501 of the Leahy proposal is not contained in this Act).

410. The law was originally enacted in 1978. See Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824. It was renewed in 1982 and 1987. It lapsed in 1992, and was renewed in 1994.

411. See President Jimmy Carter, Ethics in Government Act of 1978: Remarks on Signing S. 555 into Law, 1978 PUB. PAPERS 1854, 1854 (Oct. 26, 1978) ("Today I'm pleased to sign into law the Ethics

ecutive prosecutorial function formed the basis of a constitutional challenge to the statute. In the 1988 case *Morrison v. Olson*,<sup>412</sup> the Supreme Court upheld the Ethics of Government Act, with Justice Scalia alone in dissent, hammering away at the dangers of a prosecutorial institution largely insulated from the constraints imposed on other prosecutors.<sup>413</sup>

At the time, Scalia's concerns were largely dismissed—at least by the majority of Democrats. After all, during the 1980s, it was almost entirely Republicans whose ox had been gored. There had been a few investigations of executive officials in the last years of the Carter administration,<sup>414</sup> but independent counsels did not terrorize the political landscape until the 1980s, when many pummeled top figures in the Reagan and first Bush administrations.<sup>415</sup> When the Ethics in Government Act came up for renewal in 1992, Republicans, having been victimized for over a decade, opposed the measure, and the law lapsed.<sup>416</sup> Two years later, however, it was revived for another five-year term.<sup>417</sup> President Clinton's speech at the signing ceremony is worth quoting at some length; it makes for amusing reading, at least in light of subsequent events:

I am pleased to sign into law S. 24, the reauthorization of the Independent Counsel Act. This law, originally passed in 1978, is a foundation stone for the trust between the Government and our citizens. It ensures that no matter what party controls the Congress or the executive branch, an independent, nonpartisan process will be in place to guarantee the integrity of public officials and ensure that no one is above the law. Regrettably, this statute was permitted to lapse when its reauthorization became mired in a partisan dispute in the Congress. Opponents called it a tool of partisan attack against Republican Presidents and a waste of taxpayer funds. It was neither. In fact, the independent counsel statute has been in the past

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in Government Act of 1978, which gives us added tools to ensure that the Government is open, honest, and is free from conflicts of interest.”).

412. 487 U.S. 654 (1988).

413. *Id.* at 733–34 (Scalia, J., dissenting) (arguing that the majority “fail[ed] to explain why it is not true that—as the text of the Constitution seems to require, as the Founders seemed to expect, and as our past cases have uniformly assumed—all purely executive power must be under the control of the President”).

414. One of the more frivolous independent counsel investigations involved claims of drug use of Hamilton Jordan, President Carter's Chief-of-Staff. For a catalog of all independent counsel investigations, see Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2283–86 (1998) (quoting General Accounting Office, CQ research Globe staff chart).

415. Lawrence Walsh's Iran-Contra investigation is the most renowned, but there were numerous others. For example, Secretary of Labor Raymond Donovan was subject to on-again, off-again independent counsel investigations for five years. *See id.*

416. *See* Katy J. Harriger, *The History of the Independent Counsel Provisions: How the Past Informs the Current Debate*, 49 MERCER L. REV. 489, 506 (1998).

417. *Id.* at 513–14.

and is today a force for Government integrity and public confidence.<sup>418</sup>

Of course, Clinton's opinion of independent counsels soured over the next few years, as he himself found that they could, allegedly, waste taxpayer funds on partisan attacks.

By the time the Ethics in Government Act came up for renewal in 1999, academics, as well as politicians, had lost faith in the venture. Indeed, like the thousands of Parisians who emerged in 1945, claiming to have fought in the Resistance, law professors descended from their ivory towers in the late 1990s and, *en masse*, protested they had agreed with Scalia's dissent in *Morrison v. Olson* all along. (Yet how quiet they had been in 1980s!)<sup>419</sup> Hardly a voice was raised to preserve the Ethics in Government Act when it came up for renewal in 1999.<sup>420</sup> The serious debate was conducted among those who would junk the law altogether and those who would preserve independent counsels in an attenuated form, usually involving the creation of a division of career lawyers within the Department of Justice.<sup>421</sup>

One possible drawback to placing independent counsel within the Department of Justice is that their zeal and independence could be questioned. But the costs of the Ethics in Government Act, and the all-too-zealous prosecutors supposedly unleashed by that statute, are said to be greater than the costs of an alternative scheme. This is not the place to engage in this debate; for what it's worth, my personal experiences incline me to agree that there are powerful constitutional and policy arguments against independent counsels, at least in their original form.<sup>422</sup> My narrow point here, however, is that some of the critics of the Ethics in Government Act may overstate its costs and understate its benefits.

One oft-stated cost imposed by independent counsels is that they undermine the public trust in government. Although the goal of the Eth-

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418. President William J. Clinton, Statement on Signing the Independent Counsel Reauthorization Act of 1994, 1994 PUB. PAPERS 1168, 1168-69 (June 30, 1994).

419. For a rare exception, see Steven L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988).

420. Virtually the only person to defend the law was former Independent Counsel Walsh. See Lawrence E. Walsh, *The Need for Renewal of the Independent Counsel Act*, 86 GEO. L.J. 2379 (1988). By contrast Kenneth Starr, after he resigned as Independent Counsel, raised doubts about the constitutionality of the Ethics in Government Act. See *The Future of the Independent Counsel Act: Hearing Before the Senate Comm. on Government Affairs*, 106th Cong. 419-73 (Apr. 14, 1999) (statement of Judge Kenneth W. Starr).

421. See Philip B. Heymann, *Four Unresolved Questions About the Responsibilities of an Independent Counsel*, 86 GEO. L.J. 2119 (1998); Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047 (1999) (proposing a significantly more restricted and defined role for the Independent Counsel); Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 475-79 (1996) (arguing that the Independent Counsel statute is not worth its cost); Sunstein, *supra* note 418 (calling for the repeal of the Act). For a compilation of the literature on independent counsels, see Judith Roof, *Investigating the Special: The Symbolic Function of The Independent Counsel*, 77 IND. L.J. 277, 279 n.2 (2002).

422. I served as Associate Independent Counsel in the Office of Independent Counsel (Whitewater investigation) from 1996-1998.

ics in Government Act was to restore confidence in elected officials, the vicious cycle of criminal accusations, and the highly publicized scandal-mongering indulged by both parties, has solidified an impression that politicians are a collection of crooks.<sup>423</sup> Yet one might wonder why this “cost” is not better understood as a benefit. Surely, the Founders of the American republic exhorted citizens to view government with skepticism and even suspicion. As Thomas Jefferson stated, “Free government is founded in jealousy, and not confidence. It is jealousy and not confidence which prescribes limited constitutions, to bind those we are obliged to trust with power.”<sup>424</sup> Indeed, it is, in many respects, a virtue that so many Americans share Twain’s dim view of politicians, and that events, such as Clinton’s scandals and the Abscam investigation, provide continual reinforcement of this view. As a nation, we are skeptical of politicians and, therefore, wary of any assertions of governmental power: this is a good thing.<sup>425</sup>

Another alleged cost imposed by independent counsels is that they render politics such a distasteful enterprise that many honorable men and women will forsake it altogether. Again, this cost could easily be recast as a benefit. Many countries, especially in Europe and Asia, are renowned for channeling their best and brightest into the civil service.<sup>426</sup> An American reaction to this allocation of human resources may be to regard it as inefficient. Energetic, intelligent, and honorable men and women are often better deployed in science, commerce, and an array of endeavors that are wealth-generating, than in the rent-seeking and wealth-dissipating enterprise that is modern politics. And to the extent that genuinely public-spirited citizens enter politics, it is almost surely beneficial that they first prove themselves in careers outside of politics, for such men and women may bring to politics a greater detachment and independence than those who have clawed up the rungs of power.

Furthermore, there may be a benefit to having a cadre of robust independent counsels, scouring the political scene for corruption.<sup>427</sup> First and foremost, there is likely to be a great deal of it, and the more corruption that there is, the greater the drag on a nation’s economic well-being. As a recent historian of post-Civil War New York City writes, citizens at that time recognized that the mounting political corruption threw into

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423. A development lamented in Lanny Davis, *Spinning out of Control: The Scandal Machine*, 60 MD. L. REV. 41 (2001).

424. Kentucky Resolutions (Nov. 10, 1798), in PHILIP B. KURLAND & RALPH LERNER, 5 THE FOUNDERS’ CONSTITUTION 131, 133 (1987); see also Patrick Henry, *Speeches at the Virginia Ratifying Convention*, in THE ANTI-FEDERALIST 299 (Herbert Storing, ed., 1985) (“Suspicion is a virtue . . .”).

425. See *supra* text accompanying notes 142–53.

426. See, e.g., *The Civil Service*, ECONOMIST, Jan. 24, 1976, at 28 (discussing the high percentage of French bureaucrats who attended the prestigious Ecole Nationale d’Administration).

427. It is true that “[m]ost of [the Independent Counsel] investigations have been expensive, time consuming and have resulted in no charges being filed.” Joshua M. Perrtula, *The Political Price of the Independent Counsel Law*, 25 HASTINGS CONST. L.Q. 257, 268 (1998). But the threat of indictment hangs over the politician’s head.

doubt the city's booming economy.<sup>428</sup> More recently, although further from home, political corruption in Korea has jeopardized that country's economic development.<sup>429</sup> The meaningful threat of prosecution plays a vital check on the seemingly inevitable tendency of politicians, whatever their antecedent moral inclinations, from indulging in favoritism or worse.<sup>430</sup>

Second, and most relevant to the thesis of this article, the only likely avenue to legislative action on behalf of criminal defendants is to continually expose politicians, and powerful individuals aligned with them, to criminal investigation and prosecution. Historically, there is one principal way to motivate legislators to recognize the plight of criminal defendants: indict them. The legislative results are not always optimal. As I have suggested, the McDade Amendment, inspired in part by McDade's own prosecution, as well as the investigation of President Clinton, has serious flaws; and one registers the possibly idle hope that Congress will soon see fit to modify the measure. But the reality is that, absent McDade's indictment, Congress would not likely have ever focused its attention on the serious questions surrounding the regulation of federal prosecutors.

Another related benefit to the prosecution of politically powerful figures is the widespread exposure of common prosecutorial practices. Denunciations rained down on Kenneth Starr from all sides, but the simple fact is that virtually all of the tactics he employed are wholly commonplace in federal investigations. Although some observers have criticized Starr and the institution of the independent counsel as a sort of *sui generis* evil,<sup>431</sup> others have noted the similarities between an independent counsel and a typical federal prosecutor.<sup>432</sup> For example, the Office of Independent Counsel did not violate any ethics rules, let alone constitutional prohibitions, in approaching and questioning Monica Lewinsky, even though she was represented in a civil proceeding.<sup>433</sup> And it is perfectly legal to subpoena family members of suspects, to call witnesses re-

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428. See Renee Lettow Lerner, "The Tastes and Habits of an Aristocracy": The New York Bar and Reform of the Elected Judiciary After the Civil War (forthcoming) (manuscript on file with author).

429. Craig P. Ehrlich & Dae Seob Kang, *Independence and Corruption in Korea*, 16 COLUM. J. ASIAN L. 1, 6-17 (2002).

430. As noted earlier, I take no position as to whether members of Congress are more immoral than the average citizen. My point is that they are exposed to far greater temptations, with predictable results.

431. See Roscoe C. Howard, Jr., *Wearing a Bull's Eye: Observations on the Differences Between Prosecuting for a United States Attorney's Office and an Office of Independent Counsel*, 29 STETSON L. REV. 95, 141 (1999); H. Richard Uviller, *Poorer but Wiser: The Bar Looks Back at Its Contribution to the Impeachment Spectacle*, 68 FORDHAM L. REV. 897, 899-904 (1999).

432. See ALAN M. DERSHOWITZ, *SEXUAL MCCARTHYISM* 172 (1998); Paul Butler, *Starr Is to Clinton As Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705 (1999); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 397 (2001); Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 642-43 (1999).

433. Such a tactic might now be foreclosed by the McDade Amendment, however.

peatedly to the grand jury, and to exercise essentially unreviewable discretion in charging and plea decisions.<sup>434</sup> As Samuel Dash has written:

The people see the independent counsel as a special case of abuse, but in fact they are observing how Federal prosecution routinely operates . . . . If the public is offended by the behavior of independent counsels, the remedy is not to kill the independent counsel law, but to demand higher standards of fairness from Federal prosecutors generally.<sup>435</sup>

If independent counsels spur such a public debate, then at least one good thing can be said to come from the sordid, and finally closed, saga of the Ethics in Government Act.

## V. CONCLUSION

Many academics, political observers and politicians have lamented the “criminalization of political differences,” and, in this regard, applauded the end of the allegedly politically charged independent counsel investigations.<sup>436</sup> It is worth noting, however, that the termination of the Ethics in Government Act in 1999 has hardly inaugurated an “era of good feelings” among Republicans and Democrats, nor is the absence of such a development necessarily a bad thing. Politicians, like all of us, prefer a harmonious workplace, but from a citizen’s perspective, one may prefer robust partisanship, and therefore a measure of contentiousness, among our elected officials. Although our nation’s founders were generally skeptical of parties, one could argue that partisanship, now an entrenched feature in political life, is a salutary supplement to Madisonian institutions, pitting “ambition against ambition,” and thereby further checking the aspirations of our would-be political masters.<sup>437</sup> Indeed, one could argue that the nonpartisan coziness that sometimes descends upon members of Congress is more troubling than partisan contentiousness, for it undermines the Madisonian scheme and renders our political masters overly friendly towards, and protective of, one another.<sup>438</sup> Furthermore, the exposure of politically prominent classes to criminal prosecution is, at least in part, useful in reminding those classes, and a fascinated general public, of the grim realities of the criminal process. Few things concentrate the mind like the prospect of indictment, and legislators are likely inclined to enact protections for criminal defendants only when persons close to them personally endure its hardships.

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434. See Davis, *supra* note 432, at 415–22.

435. Samuel Dash, *Why the Independent Counsel Law Deserves to Live*, N.Y. TIMES, Feb. 17, 1999, at A15. Dash served as an ethics consultant to the Independent Counsel from 1994 to 1998.

436. See Edwin M. Yoder, *The Presidency and the Criminalization of Politics*, 43 ST. LOUIS U. L.J. 749 (1999).

437. See THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1982).

438. See Jim VandeHei, *Ethics Probes Decline on Hill; Parties’ Truce Leads to Inaction*, WASH. POST., Aug. 7, 2002, at A1 (describing the informal understandings between Republicans and Democrats that resulted in Congress’s failure to investigate ethical charges against a number of its own).

This article has argued that the development of Anglo-American criminal procedure has in part been driven by politically charged prosecutions.<sup>439</sup> The treason trials of the late seventeenth century led to the momentous Treason Act of 1696; the Abscam investigation generated scrutiny of undercover investigations; and the prosecution of Representative McDade produced the McDade Act, limiting the permissible tactics in federal investigations. Indeed, one troubling possibility is that institutional players in federal law enforcement, such as FBI headquarters, may be more reluctant to initiate investigations of members of Congress because they are fearful of congressional reprisals.

Although such a concern is legitimate, there are countervailing forces to ensure that members of Congress will never completely insulate themselves from the criminal process. First, there will always be ambitious prosecutors, such as a Thomas Dewey or a Rudy Guiliani, who recognize that a time-honored path to political success is to vow to eliminate political corruption, however quixotic such a crusade may be. Members of Congress may labor to centralize political corruption prosecutions in the Department of Justice, over which they may more easily hold sway, but the ninety-three U.S. Attorneys scattered around the country are less easily intimidated.

Second, whether members of Congress are naturally more disposed to criminality than the rest of us, or whether the astonishing perks of their office create temptations that few of us confront and virtually none of us could resist, the fact is that members of Congress are, as Twain long ago noted, the American criminal class. Members of Congress may seek to deter prosecutors, but one can expect that every few years a momentous scandal will erupt that will create a public demand for prosecution. As this article has argued, Congress in part has itself to blame for the ease with which federal prosecutors can now bring closed cases; in pandering to public hysteria, Congress has vastly extended criminal liability. When a Congressman such as Joseph McDade, having voted in favor of RICO in 1970, later finds himself charged under this capacious statute, someone's petard has truly been hoist. If the past is any guide to the future, then one can count on it happening again.

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439. See *supra* notes 223–27, 235–51, 262–87, 358–63 and accompanying text.



APPENDIX A<sup>440</sup>  
INDICTED MEMBERS OF CONGRESS

Member	Date of Indictment	Charge	Outcome
Rep. William Janklow (R.-S.D.)	2003	Vehicular homicide	Convicted, sentenced to 100 days in prison
Rep. James Traficant (D.-Pa.)	2001	Bribery and racketeering violations	Convicted, sentenced to 8 years
Rep. Joseph Kolter (D.-Pa.)	1996	Stealing from House Post Office	Pleaded guilty, sentenced to 6 months
Rep. Walter R. Tucker (D.-Cal.)	1995	Extortion and tax fraud	Sentenced to 27 months in prison
Rep. Jay Kim (R.-Cal.)	1995	Electioneering violations	Pleaded guilty to misdemeanor, sentenced to house arrest while serving in House of Representatives
Del. Walter Fauntroy (D.-D.C.)	1995	Failing to file financial disclosures	Pleaded guilty, sentenced to probation
Rep. Mel Reynolds (D.-Ill.)	1994	Soliciting sex with minor and obstruction of justice	Convicted and sentenced to 5 years in prison
Rep. Carroll Hubbard (D.-Ky.)	1994	Obstruction of justice	Convicted, sentenced to 1 year

*(Continued on next page)*

440. The appendix is largely drawn from *Indictments, A Grand Congressional Tradition Since 1978*, L.A. TIMES, June 5, 1994, at 2. It has been supplemented with materials drawn from: BRANDT, *supra* note 156; GREENE, *supra* note 164; Jeff Leeds, *Former Rep. Tucker Reports to Prison for 27-Month Sentence*, L.A. TIMES, June 4, 1996, at B1; Leibovich, *supra* note 189; Reid, *supra* note 189; *Through History Scandal Spells Defeat*, NAT'L J., July 15, 2001.

APPENDIX A—*Continued*

Rep. Larry Smith (D.-Fla.)	1993	Tax evasion, campaign violations	Convicted, sentenced to 3 months
Rep. Albert Bustamante (D.-Tex.)	1993	Racketeering, accepting illegal gratuity	Convicted
Rep. Nick Mavroules (D.-Mass.)	1992	Bribery, tax evasion, influence peddling	Pleaded guilty, served 15 month in jail
Rep. Joseph McDade (R.-Pa.)	1992	Accepting illegal gratuities	Acquitted
Rep. Floyd H. Flake (D.-N.Y.)	1992	Conspiracy, fraud, tax evasion	Charges dropped
Rep. Donald E. 'Buz' Lukens (R.-Ohio)	1989	Soliciting sex from a minor	Convicted, jailed for 9 days
Rep. Robert Garcia (D.-N.Y.)	1988	Influence peddling, bribery, extortion, conspiracy (WEDTECH)	Conviction overturned on appeal
Rep. Pat Swindall (R.-Ga.)	1988	Perjury	Convicted, sentenced to 1 year
Rep. Fofu I. F. Sunia (D.-Amer. Samoa)	1988	Defrauding the government	Pleaded guilty
Rep. Harold E. Ford (D.-Tenn.)	1987	Bank fraud, mail fraud, tax fraud	Jury deadlocked in first trial, acquitted in second
Rep. Marlo Biaggi (D.-N.Y.)	1987	(WEDTECH)	Convicted, jailed for 26 months
Rep. Henry B. Gonzales (D.-Tex.)	1986	Assault	Charges dropped
Rep. Bobbi Fiedler (R.-Cal.)	1986	Electioneering violation	Dismissed 2/26/86
Sen. Bob Kasten (R.-Wis.)	1985	D.U.I.	Charges dropped

*(Continued on next page)*

APPENDIX A—*Continued*

Rep. George Hansen (R.-Idaho)	1983	Filing false financial disclosure statements	Convicted 4/2/84, sentenced to 15 months
Rep. James A. Traficant Jr. (D.-Ohio)	1982	Bribery	Acquitted
Rep. Ike Andrew (D.-N.C.)	1982	D.W.I.	Pleaded guilty
Rep. Jon C. Hinson (R.-Mass.)	1981	Sodomy	Pleaded no contest to reduce the charges
Rep. Charles J. Carney	1980	Accepting illegal gratuity	Dismissed
Sen. Harrison A. 'Pete' Williams, Jr. (D.-N.J.)	1980	ABSCAM	Convicted
Rep. Robert E. Bauman (R.-Md.)	1980	Soliciting sex from a minor	Charges dropped
Rep. Richard Kelly (R.-Fla.)	1980	ABSCAM	Convicted
Rep. John F. Murphy (D.-N.Y.)	1980	ABSCAM	Convicted on most courts, sentenced to 3 years
Rep. Frank Thompson Jr. (D.-N.J.)	1980	ABSCAM	Convicted (several charges dismissed), jailed for 13 months
Rep. John W. Jenrette Jr. (D.-S.C.)	1980	ABSCAM	Convicted, sentenced to 2 years
Rep. Raymond R. Lederer (D.-S.C.)	1980	ABSCAM	Convicted, sentenced for 1 year

*(Continued on next page)*

APPENDIX A—*Continued*

Rep. Claude Leach (D.-La.)	1979	Buying votes, violating federal campaigns finance laws	Acquitted of vote-buying; other charge ruled improper
Rep. Michael O. Myers (D.-Pa)	1979	Disorderly conduct, bribery, conspiracy	Convicted, sentenced to 3 years
Rep. Nick Galianakis (D.-N.C.)	1979	Perjury	Charges dismissed
Rep. Joshua Eilberg (D.-Pa.)	1978	Illegally receiving compensation	Pleaded guilty
Rep. Herbert Burke (R.-Fla.)	1978	Intoxication, resisting arrest, influencing a witness	Pleaded guilty
Rep. Daniel J. Flood (D.-Pa.)	1978	Perjury 9/5/78 Bribery, conspiracy 10/12/78	Pleading guilty to mail fraud and tax evasion
Rep. Frank M. Clark (D.-Pa.)	1978	Mail fraud, perjury, income tax evasion	Pleaded guilty to mail fraud and tax evasion
Rep. Fredrick Richmond (D.-N.Y.)	1978	Soliciting sex for pay	Charges dropped
Rep. Otto E. Passman (D.-La.)	1978	Bribery, conspiracy, income tax evasion	Acquitted
Rep. Charles C. Diggs, Jr. (D.-Mich.)	1978	Mail fraud, perjury	Convicted, sentenced to 3 years
Rep. Richard T. Hanna (D.-Cal.)	1977	Conspiracy to defraud the government	Pleaded guilty, jailed for 18 months
Rep. Edward A. Garmatz (D.-Md.)	1977	Bribery, conspiracy, influence peddling	Case abandoned by Justice Department

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APPENDIX A—*Continued*

Rep. Richard A. Tonry (D.-La.)	1977	Receiving illegal campaign contributions, promising federal patronage to contributors, obstructing justice, conspiracy	Pleaded guilty, jailed for 6 months
Rep. James F. Hastings (R.-N.Y.)	1976	Operating a kick-back scheme with members of his congressional staff, mail fraud, filling false vouchers	Convicted, jailed for 16 months
Rep. Frank J. Horton	1976	Reckless driving, D.W.I.	Pleaded guilty
Rep. Allan T. Howe (D.-Utah)	1976	Soliciting sex acts for pay	Convicted
Rep. Henry J. Helstoski (D.-N.J.)	1976	Bribery, conspiracy, obstructing justice, perjury	Charges dismissed
Rep. James R. Jones (D.-Okla.) (not formally indicted)	1976	Failing to report a cash campaign contribution	Pleaded guilty
Rep. Wendell Wyatt (R.-Or.) (not formally indicted)	1976	Violating campaign spending laws	Pleaded guilty
Rep. Andrew J. Hinshaw (R.-Cal.)	1975	Soliciting a bribe, bribery, embezzlement, misappropriation of public funds, grand conspiracy	Convicted, jailed
Rep. George Hanson (R.-Idaho) (not formally indicted)	1975	Violating campaign spending laws	Pleaded guilty

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APPENDIX A—*Continued*

Sen. Edward J. Gurney (R.-Fla.)	1974	Violating Florida campaign finance law; conspiracy, perjury, soliciting bribes	Acquitted
Rep. Angelo D. Roncallo (R.-N.Y.)	1974	Extorting political contributions	Acquitted
Rep. Frank J. Brasco (D.-N.Y.)	1974	Conspiracy to receive bribes	Convicted, jailed
Rep. Bertram L. Podell (D.-N.Y.)	1973	Conspiracy, bribery, perjury	Pleaded guilty to conspiracy and conflict of interest, jailed
Rep. J. Irving Whalley (R.-Pa.)	1973	Mail fraud, obstruction of justice, payroll abuse, threatening federal witness	Pleaded guilty
Rep. Cornelius Gallagher (D.-N.J.)	1970	Federal income tax evasion, perjury, conspiracy	Pleaded guilty, jailed
Rep. Martin B. McNeally (R.-N.Y.)	1970	Failure to file federal income tax returns for four years.	Pleaded guilty, jailed
Rep. John V. Dowdy (D.-Tex.)	1970	Conspiracy, conflict of interest, perjury, obstructing of justice, facilitating bribery	Convicted, sentenced to 18 months
Rep. Hugh J. Addonizio (D.-N.J.)	1969	Extortion, conspiracy, income tax evasion	Convicted, sentenced to 10 years
Sen. Daniel Brewer (D.-Md.)	1969	Soliciting and accepting bribes	Conviction reversed on appeal
Rep. Frank W. Boykin (D.-Ala.)	1962	Conflict of interest, conspiracy, to defraud government	Convicted, fined \$40,000

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## APPENDIX A—Continued

Rep. Thomas F. Johnson (D.-Md.)	1962	Conflict of interest, conspiracy to defraud the government	Convicted
Rep. William J. Green Jr. (D.-Pa.)	1956	Conspiracy to defraud the government, influence peddling	Acquitted
Rep. Thomas J. Lane (D.-Mass.)	1956	Federal income tax evasion	Pleaded guilty, sentenced to 4 months in prison and fined \$10,000
Rep. Ernest K. Bramblett (R.-Cal.)	1953	Making false statements about congressional payroll kickbacks	Convicted, fined \$5,000, sentenced to 2–4 months
Rep. John L. McMillan (D.-S.C.)	1953	Violated law barring members of Congress from contracting with the government	Acquitted
Rep. Theodore Leonard Irving (D.-Mo.)	1951	Misusing labor union funds for 1948 campaign	Acquitted
Rep. Walter E. Brehm (R.-Ohio)	1950	Accepting illegal campaign contributions	Convicted, sentenced to 5–15 month (suspended), and fined \$5,000
Rep. J. Parnell Thomas (R.-N.J.)	1948	Conspiracy to defraud the U.S. government, payroll padding, receiving salary kickbacks	Convicted, sentenced to 6–8 months, later pardoned
Rep. Andrew J. May (D.-Ky.)	1947	Conspiracy to defraud the U.S. government, accepting bribes	Convicted, served 9 months of 8–24-month sentence

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APPENDIX A—*Continued*

Rep. James M. Curley (D.-Mass.)	1943–1944	Mail fraud, conspiracy	Convicted, served 5 months of 6–18-month sentence, sentence then commuted, and pardoned by Harry S. Truman
Rep. B. Frank Whelchel (D.-Ga.)	1940	Accepting money to obtain appointive offices for certain constituents	Acquitted
Rep. John H. Hoeppel (D.-Cal.)	1936	Influence peddling	Convicted, sentenced to 4 months–1 year; fined \$1,000
Rep. George E. Foulkes (D.-Mich.)	1934	Conspiracy to assess political contributions from postmasters	Convicted, sentenced to 18 months, fined \$1,000
Rep. Harry E. Rowbottom (R.-Ind.)	1931	Accepting bribes	Convicted, sentenced to 1 year
Rep. Fredrick N. Zihlman (R.-Md.)	1929	Bribery	Acquitted
Rep. Edward E. Denison (R.-Ill.)	1929	Violating prohibition by possessing alcohol	Dismissed
Rep. M. Alfred Michaelson (R.-Ill.)	1929	Violating prohibition by importing liquor	Acquitted
Rep. John W. Langley (R.-Ky.)	1924	Violating prohibition, influence peddling, conspiracy	Convicted
Sen. Burton K. Wheeler (D.-Mo.)	1924	Illegally receiving compensation for services	Acquitted

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APPENDIX A—*Continued*

Sen. Truman Newberry (R.-Mich.)	1919	Conspired to spend the money to secure election to Senate	Convicted, sentenced to 2 years, fined \$10,000, reversed on appeal
Rep. Victor L. Berger (S-Wis.)	1918	Violating Espionage Act	Convicted, sentenced to 20 years, reversed by Supreme Court
Sen. Joseph R. Burton (R.-Kan.)	1904	Representing a client in a proceeding involving U.S. government	Convicted, reversed on appeal, reindicted, reconvicted
Sen. John H. Mitchell (R.-Or.)	1905	Conspiracy, bribery, influence peddling,	Convicted, died while case was being appealed, conviction upheld by Supreme Court
Rep. John N. Williamson (R.-Or.)	1905	Conspiracy to defraud the U.S. government, including others to commit perjury	Convicted, sentenced to fine and 10 months, reversed on appeal
Rep. Binger Hermann (R.-Or.)	1904	Conspiracy to defraud U.S. of public lands, destroying public records	Dismissed
Sen. Charles H. Dietrich (R.-Neb.)	1903	Bribery, conspiracy to defraud the government, holding the government contracts while in elective office	Acquitted
Rep. Robert Smalls (R.-S.C.)	1877	Accepting a bribe	Convicted

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APPENDIX A—*Continued*

Rep. Daniel Sickles (D.-N.Y.)	1859	Murder	Acquitted
Rep. Philemon T. Herbert (R.-Cal.)	1856	Manslaughter	Acquitted
Sen. John Smith (D.-Ohio)	1807	Treason, misdemeanor, co-conspirator with Aaron Burr against the United States	Acquitted
Matthew Lyon (Ky.)	1798	Violating Sedition Act	Convicted, jailed; fine refunded to heirs in 1840