

RESTORING ORDER:
*Practical Solutions
to Congressional
Dysfunction*



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**RESTORING ORDER: PRACTICAL SOLUTIONS TO
CONGRESSIONAL DYSFUNCTION**

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A BIPARTISAN MESSAGE FROM THE HONORABLE LEE HAMILTON & THE HONORABLE MICKEY EDWARDS

The Framers of our nation created a political system built upon three vibrant, assertive, and active branches of government, with a series of checks and balances in place to make sure that no single branch or individual could accumulate too much power and threaten the rights and freedoms of citizens, and to create a deliberative process to make good public policy. Congress, the first branch of government, was designed to be the linchpin of this system, the body closest to the people, with the most robust specified powers.

In recent years Congress has failed to properly execute its role as the first branch of government. Congress' inability to represent, legislate, and to check and balance the other branches of government has let down the nation. The disappearance of the ideological center has created a polarized and combative Congress. Fairness in the legislative process has broken down and a majority-rule-at-all-costs mentality has stifled discussion and ended consensus building. Oversight has disappeared; as has the institutional pride that drives Congress to challenge the executive when it tries to expand its own powers; instead, executive authority has spread unchecked. Ethical standards have eroded. Dysfunction in Congress is always bad, but it is particularly alarming now when the nation's challenges at home and abroad are so acute.

After the 2006 election, we have a golden opportunity to fix our nation's broken branch. It is critical that Congress remain transparent and accountable. The House and Senate must work to create balance and restore order and integrity to the legislative process. The country needs and deserves an active, confident, and institutionally strong Congress. As former members of Congress, we recognize the urgent need for these reforms. This important guide is written and crafted by noted experts in congressional reform, Thomas Mann and Norman Ornstein, who believe deeply in Congress as the first branch of our government, and understand its vital role in protecting our democracy.



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INTRODUCTION

ADVANCING *the Reform Agenda*

At the height of the Lobbying scandal involving Jack Abramoff in early 2006, the Committee for Economic Development held a forum on lobbying and ethics reform in which congressional scholar Norm Ornstein declared the current environment in Congress “completely dysfunctional.” He described the demise of regular order in the legislative process at the hands of closed-door conference committee meetings where unrelated measures are tacked on by party leaders, spending bills are earmarked with special pork projects, and large omnibus bills—that no one has had time to read—are forced through with minimal, if any, debate. In the end, Ornstein concluded that a bad process yields bad public policies.

These procedural pathologies, as well as the various scandals plaguing Congress in recent months, have not gone unnoticed by the American public. Various polls released in the last several months show that American voters are more cynical than ever about Congress, giving both Democrat and Republican lawmakers a big “F.”

In a recent analysis of a Tarrance Group poll, pollster Ed Goetas reports, “When voters were asked if they felt lawmakers in Washington ‘put you first,’ or ‘put partisan politics first,’ only four percent felt that lawmakers put them first, and a whopping ninety-two percent felt lawmakers put

partisan politics first.” The conclusion reached by Goetas about voters’ attitudes towards Congress: “Washington is broken and needs to be fixed.”

**“NINETY-TWO PERCENT OF VOTERS
FELT LAWMAKERS PUT PARTISAN
POLITICS FIRST.”**

— ED GOETAS, THE TARRANCE GROUP

The Reform Institute could not agree more. It is time for Congress to conduct the people’s business under complete transparency and adhere to the same accountability standards it imposes on various industries. During this time of deep partisanship, we need our leaders to take bold steps towards restoring integrity and faith to the legislative branch. Without confidence in the legislative process, all Congressional business is under a cloud of doubt and suspicion.

Given this difficult time of scandal and low public confidence, the Institute believes this is an opportunity to make thoughtful policy recommendations and has enlisted noted congressional scholars **Thomas Mann** (The Brookings Institution) and **Norman Ornstein** (American Enterprise Institute) to direct a new report, *Restoring Order: Practical Solutions to Congressional*

Dysfunction. The report presents a comprehensive reform package encompassing structural, procedural, and systemic changes to the way Congress conducts its business.

The goal of *Restoring Order* is to raise awareness about practical solutions to legislative dysfunction by addressing five major pillars of reform: regular order, deliberation, oversight, corruption, and enforcement.

Regular Order refers to the set of rules, norms, and practices that facilitate the orderly conduct of business in a legislature. Needed changes include restoring transparency and accountability to the legislative process, imposing a waiting period on bills reported to the floor so that members have time to read them before voting, allowing the minority party to introduce amendments, and opening the doors to the minority in conference committees that are currently a closed-door process. The House of Representatives' three-hour vote on the Medicare prescription drug bill, a vote that was supposed to take fifteen minutes, is one example of the collapse of the regular order; the refusal to consider meaningful amendments to the bankruptcy bill in either the House or Senate; and the sharp expansion in the House of closed rules banning all amendments for consideration; and of "self-executing rules," that waive all points of order before any consideration of a bill, are others.

Deliberation in committee, on the floor, and in conference, is essential to lawmaking. Committees need more scope to scrub legislative proposals. Members and their staff need more time to review the details of legislation before the vote is called on the floor. More genuine debate needs to occur at every level of the legislative process. The Medicare bill and the Patriot Act were among the major bills pushed through Congress without much debate and deliberation either in committee or on the floor. The same has been true of the massive budget packages the past few years.

Oversight of the executive is essential to our system of checks and balances. Congress needs to monitor major policies of the administration and its agencies before public outcry for a reversal on policy ensues. The failure of either chamber to do any meaningful oversight of the Department of Homeland Security or its component parts, such as FEMA, contributed to the failure to respond to Katrina. This lack of congressional oversight allows for a continued failure to provide interoperable communications to first responders facing another terrorist attack or natural disaster. The Dubai Ports debacle and the White House wiretapping program are additional examples of the need for congressional oversight

Corruption undermines the integrity and legitimacy of government. Steps need to be taken to thwart the undue influence of special interests and lobbyists on the policy making process through earmarking, the solicitation of campaign funds, and the provision of benefits in return for a sympathetic hearing on Capitol Hill. From the famed "bridge to nowhere" in Alaska, a \$230 million earmark tacked onto the transportation bill by Alaska's senior senator per the request of special interest groups, to the action taken by House Appropriations Committee Chair Jerry Lewis that resulted in a windfall for a New York investment firm shortly after it held a fundraiser bringing in \$150,000 for his leadership PAC, examples of corruption big and small, legal and illegal, abound.

Enforcement is essential if existing and new laws and rules are to have any force. New mechanisms are needed in both the House and Senate to investigate and enforce ethics rules and lobbying laws without the inherent conflict of interest plaguing the House and Senate Ethics Committees. To this day, the House Ethics Committee remains in a partisan stalemate over ethics investigations related to the former Majority Leader.

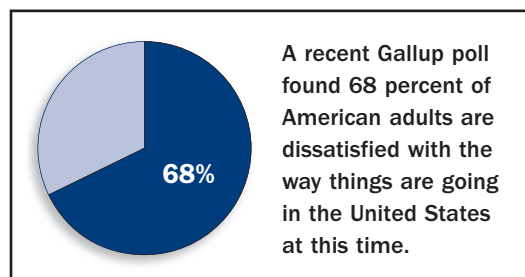


CHAPTER 1

THE PROBLEM *of Congressional Dysfunction*

The 2006 congressional elections were contested at a time of deep public unhappiness with the direction of the country and the performance of the Congress. The first branch of government now has an opportunity for a fresh start in dealing with the serious criticisms that have been leveled against it. This report, written before the 2006 mid-term elections, is directed to Democratic and Republican leaders and members in both the House and Senate. Conceived and sponsored by the Reform Institute, the report offers suggestions for changes in the rules and practices that govern the operation of both chambers. Its focus is on improving the quality of deliberation, strengthening congressional engagement with and oversight of the executive, and boosting ethical standards and the means of enforcing those standards.

Signs abound that Congress, the first branch of government, has become “the broken branch.” In each of its central responsibilities—to represent, to legislate, and to check and balance the other branches—Congress has fallen woefully short of the expectations of the Framers of the Constitution. Uncompetitive elections, intense partisanship, nonstop campaign fundraising, and an ethics process in tatters have distorted the links between members and their



constituents. The demise of regular order—the set of rules, precedents and norms that facilitate the orderly conduct of business in a legislature—has precipitated a sharp decline in the quantity and quality of deliberation. An aggressive assertion of executive authority on national security and domestic policy has been met by a feeble response from a largely supine and inattentive Congress. At the same time, Congress has eschewed nearly all serious oversight of agencies and programs. These derelictions in exercising its responsibilities have serious consequences—sloppy, ill-considered policies, flawed implementation, and public disillusionment with American democracy.

This report offers concrete suggestions on the steps that Congress might take to begin to repair the damage and reassume its rightful place as the linchpin of American democracy. It is timed to coincide with organizing party caucuses

in both the House and the Senate following the November 2006 midterm elections. A full description of the pathologies of the contemporary Congress and the roots of its institutional decline is available elsewhere.¹

While much of this report discusses specific congressional rules and procedures, its authors are fully aware that the most powerful levers for mending the Congress lie elsewhere. The external political environment of Congress—especially the ideological polarization of the parties and their near parity at virtually all levels, the rise of the permanent campaign, and the increasingly combative nature of talk radio, cable television and blogging—has prompted much of the destructive behavior inside Congress. Changes in that environment encouraged by entrepreneurial politicians and forced by angry voters are essential to significant and durable improvements in Congress.

A MORE FAITHFUL ADHERENCE TO THE LETTER AND SPIRIT OF EXISTING RULES AND RESPONSIBILITIES WOULD GO A LONG WAY TOWARD REVERSING DYSFUNCTIONAL CONGRESSIONAL BEHAVIOR.

One might plausibly argue that shifts in public opinion have already sparked some stirrings on Capitol Hill. The collapse of President Bush's political standing in the year before the midterm elections made it more difficult for the House Republican leadership to control the agenda and deny members opportunities to amend leadership-crafted bills. The president's deteriorating political fortunes and the intervention of the courts also encouraged a bit more oversight of the executive and some resistance to claims of the inherent powers of the presidency. Examples here include National Security Agency (NSA) warrantless surveillance

and the treatment of enemy combatants. We would like to be optimistic and say that these nascent signs of life and ripples of change will persist and grow after the election. But that is very much in doubt. In the short term, divided party government would itself provide political motivation for more aggressive oversight of the executive. But there is no guarantee that this oversight will be substantive and forward-looking; nor is it obvious that a new majority will follow regular order in running the House and Senate.

The unhealthy dynamic on Capitol Hill clearly calls for changes in rules and procedures. But quite apart from formal changes in chamber and party rules, a more faithful adherence to the letter and spirit of *existing* rules and responsibilities would go a long way toward reversing dysfunctional congressional behavior. In this highly partisan era, leaders have a good deal of leeway with (and indeed encouragement from) their members to bend the rules to serve partisan and ideological interests. If congressional party leaders had a greater appreciation of the history of Congress and its special place in the constitutional system and plausible reason to believe that good process might be good politics, they could better balance their partisan and institutional responsibilities.

Moreover, relatively small numbers of members concerned about institutional shortcomings can use their leverage to force leaders to operate differently. The narrow majority in the House makes it possible (though certainly not comfortable) for a dozen or so members of the majority party to join the opposition in voting down overly restrictive special rules. In the Senate, the Gang of 14 (the group of seven Republican and seven Democratic senators who came together to prevent a major rupture of Senate rules and traditions) demonstrated how a coordinated threat to join or withhold support for a filibuster of judicial nominations can deny the leadership the abil-

ity to detonate the “nuclear option” and change rules and traditions by majority fiat. Members who feel uncomfortable operating in an intensely partisan atmosphere with rules bent to serve that purpose need the courage and incentive to step outside that environment and create a new center. The challenge is to nurture more institutional identity and patriotism among members and to establish a broad public presumption of how Congress should manage its internal affairs and exercise its constitutional responsibility to check and balance the executive.

In short, altering the external political environment to diminish the ideological polarization between the parties and persuading con-

gressional leaders to more faithfully embrace existing internal rules and institutional responsibilities, while encouraging enough rank-and-file members to use their leverage to insist on regular order and executive oversight would, if achievable, offer the most promising strategy for mending the broken branch. Nonetheless, there are additional steps that can be taken by the House and Senate to move Congress in the right direction. This report offers recommendations under three broad categories: deliberation, oversight, and ethics.

ENDNOTES

1. *Thomas E. Mann and Norman J. Ornstein, The Broken Branch: How Congress Is Failing America and How To Get It Back On Track (Oxford University Press, 2006).*



CHAPTER 2

DELIBERATION: *Enhancing the Discussion*

Congress constantly struggles to find the proper balance between its three building blocks: individual members, committees, and parties. Individuals provide the crucial representational link to the citizenry and make Congress a distinctively human institution. Committees lend both the House and Senate a division of labor, expertise, access to information, and a setting for face-to-face deliberation on complex public policy issues. Parties give Congress the capacity to set an agenda and act upon it. Excessive individualism promotes parochialism and gridlock. Autocratic committee chairs can ignore the views of citi-

zens expressed by their representatives and frustrate the efforts of party leaders to advance a coherent legislative program. Party leaders who sharply centralize authority risk marginalizing committees and individual members and weakening the deliberative capacity of Congress.

At various times in its history, Congress has suffered from each of these imbalances. Today it is the latter—an excess of partisanship and centralization—that contributes most to congressional dysfunction. Restoring regular order would bring some much-needed breathing room into the process—for individual members, committees, and the minority party—and markedly strengthen Congress’s capacity for deliberation. That means serious and open hearings and markups in subcommittees and committees, rules that permit genuine debate and amendment on the House floor, an end to the practice of holding votes open well beyond the customary fifteen minutes to manipulate the outcome, ample time for members and staff to read the text of bills and conference reports before having to vote on them, and the meaningful involvement of all conference committee members in debating and deciding the content of their report. A commitment by the Speaker and Senate Majority Leader at the beginning of

A COMMITMENT BY THE SPEAKER AND SENATE MAJORITY LEADER AT THE BEGINNING OF THE NEW CONGRESS TO FOLLOW REGULAR ORDER IS AN ESSENTIAL FIRST STEP IN RESTORING BALANCE TO THE BUILDING BLOCKS OF CONGRESSIONAL DELIBERATION.

the new Congress to follow regular order is an essential first step in restoring balance to the building blocks of congressional deliberation.

Restoring the House

Amending the rules of the House to achieve a fair and deliberative process is limited by the chamber's majoritarianism. Any rule (other than the one providing for a motion to recommit) can be suspended or repealed by a simple majority vote. Indeed, special rules that limit opportunities to offer amendments and waive points of order based on existing rules are now routinely reported by the Rules Committee and adopted by the majority. A Speaker determined to dispense with regular order and supported by his or her party colleagues can do just that with impunity. The current manipulative practice of allowing votes on motions to recommit with instructions—but making them procedural rather than substantive, and therefore demanding party fealty—effectively eliminates the one supposed guarantee to the minority for a vote on an amendment to or substitute for the underlying bill. But new rules and public, as well as internal pressure for adhering to old ones can create a presumption of how the House is to be run, which at the very least should make it awkward for a new majority to revert to old patterns.

Deciding which reforms should be sought through new rules and which through more faithful adherence to *existing* rules is no easy task. The majority party has to retain some degree of flexibility and discretion in setting the House agenda and advancing its legislative program. Adopting a host of new rules to increase the likelihood of compliance with existing ones could have perverse, unanticipated consequences. Our first preference, then, is for a public pledge by the Speaker to run the House in a way that is consistent with the objectives specified in the recommended changes in rules and practices below:

Committees

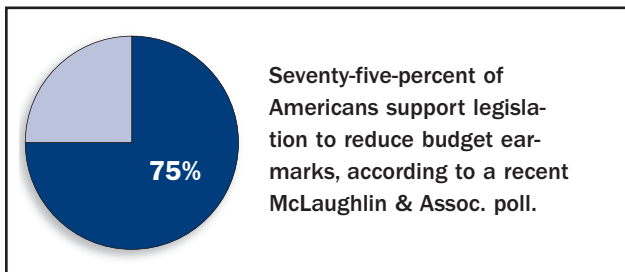
Committees should be given a bit more autonomy by the leadership to weigh legislative alternatives and craft bills in a deliberative, transparent process, committee members in both parties afforded opportunities to participate in meaningful hearings and markups, the authorization process revitalized, and bills reported out of committees not so easily replaced through self-executing rules by leadership alternatives.

Earmarks

The House (and Senate) should adopt new rules and procedures to bring more transparency to the earmarking process. The explosion of earmarks in recent years, with at most cursory review by committees and evidence of personal benefits accruing to some members who sponsor them, needs to be reined in.

The sponsorship and possible conflicts of interest on earmarks (individual projects for districts, states, or companies inserted by members in authorization and appropriations bills) should be fully transparent and opportunities to strike such items afforded on the House floor. A printed copy of legislation should be available to all members of the House and an electronic version posted publicly well in advance of the time they are considered (ideally, 72 hours), opportunities for amendments by individual members and the minority party provided apart from a substantive motion to recommit, and adherence to the customary time limit of fifteen minutes for recorded votes.

The House might amend its Ethics Code to require disclosure of any real or potential financial interest in an earmark as well as any control over or relationship with an entity receiving an earmark. House rules should prohibit the addition of earmarks to conference reports that were not included and fully disclosed (including the sponsor and essential governmental purpose for each earmark) in the House-passed or Senate-passed version of that measure committed to conference.



Conference Committees

Conference committees should be more strictly limited to reconciling differences in legislation approved by the House and Senate (disallowing whole new provisions or separate bills to be added), full public meetings with recorded votes required for discussion and resolution of such differences, and no changes permitted to a conference report after its approval at a public meeting by House and Senate conferees. Meetings between majority and minority leaders, as well as between chairs and ranking members of committees and subcommittees, should become routine, not the exception that they have become in recent years.

Restoring the integrity of the conference process is essential. One rules change that could contribute to this restoration is the elimination of proxies in determining whether a majority of House-appointed conferees have voted. This could force public meetings of conference committees and ensure some minimal level of participation in debating and resolving differences by majority and minority members.

Steps must be taken to put some teeth in the existing rules designed to make bills and conference reports available to members before they have to vote on them. For example, the one-day layover requirement for special rules (which usually waive points of order provided for by existing rules) to be considered on the floor is now circumvented by adjourning the House for an hour or so, thereby creating two legislative days in one calendar day. The rule should be changed from one day to twenty-four hours. It would take a two-thirds vote to waive

that requirement. The current provision that the opportunity to read conference reports is automatically waived in the last six days of a congressional session should be repealed. The formal filing of a bill, conference report, or special rule should include both printed copies and posting on the Internet.

Restoring the Senate

Changing the rules of the Senate is a much more difficult task than in the House, since such proposals are subject to extended debate (i.e. filibusters) which can be shut off only by a two-thirds vote (the threshold is higher for rules changes than regular legislation). On the other hand, existing rules go a long way toward preventing the majority party in the Senate from abusing the process and denying opportunities for debate and amendments.

Regular Order

Because of the heavy reliance on unanimous consent agreements, the Senate Majority Leader routinely accommodates the “holds” put on legislation and nominations by individual senators and negotiates with the minority over the terms under which measures are brought to the floor. Absent such agreements, sixty votes for a cloture motion limiting debate must be marshaled. Regular order in the Senate, therefore, is neither as regular nor as ordered as in the House.

Deliberation

Yet the Senate, like the House, suffers from a marked decline in deliberation and debate. Senators today spend less time in session than their predecessors. Even when in Washington, they devote a substantial portion of their time to fund-raising, further limiting time spent in debate on the floor. Debates that do occur are often a series of disconnected statements designed not to persuade colleagues, but to send messages to important constituencies outside Congress. Limited time, intense partisanship, and little tolerance for uncertainty

make it highly unusual for debate to persuade senators to change their opinions. And current Senate leaders, like their House counterparts, have been willing to circumvent committees, accelerate the strategic use of earmarks (i.e. promise projects to senators in return for votes on other legislation), contribute to the abuse of the conference process, and threaten to rip apart the fabric of chamber rules and traditions to achieve partisan or ideological objectives.

Fundraising

Improvements in the Senate are most likely to come from major changes in scheduling and campaign fundraising practices, new leaders

who understand and value the traditions and responsibilities of the Senate, and a few senators in the tradition of James Allen and Howard Metzenbaum who are willing to annoy their colleagues by using their prerogative to object to unanimous consent requests in order to insist on open, orderly, and informed consideration of legislation.

The Senate does need to think through several of its long-standing procedures and rules.

Nominations

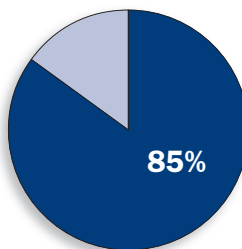
Too many executive branch nominations by a president are blocked or stymied for reasons that have little or nothing to do with the

The Session Schedule

One of the biggest obstacles to restoring Congress to its proper place is the sharply abbreviated schedule followed by both the House and Senate. The fact is representatives and senators spend very little time in Washington. The 109th Congress appears to have set a modern-day record for the fewest days in session. In 2006 the House had barely 65 full days out of 365 in session! A typical workweek now has members arriving late on Tuesday and departing mid-day Thursday. During the two days in a given week spent in Washington, the floor activity is frenetic and abbreviated itself, as members take every opportunity to leave the Capitol and its grounds to go “off-site” to fund-raise. Opportunities for them to dig into the deliberative process, in committee or on the floor are greatly constrained by the precious little time they spend together. Members do not get to know one another and have little incentive to bring families to Washington or to socialize together.

Genuine discussions of policy—with colleagues on both sides of the aisle prepared to consider new information and take seriously the arguments of those with whom they disagree—are increasingly a rarity on Capitol Hill. Members are assembled collectively to ratify decisions made elsewhere, too often to advance a partisan and ideological agenda. As far as party leaders are concerned, more time by members in committee and on the floor might introduce an element of uncertainty into a process designed to ensure there are no sur-

prises. Keeping Congress in session for extended periods of time—two or three consecutive five-day weeks followed by a one or two-week break—and changing the fund-raising arms race in Washington could begin to change that dynamic. Indeed, there is nothing more important to changing the decision-making and deliberative dynamic in Congress than making sure that legislators are there for sustained periods of time, working on policy and oversight and interacting with one another in committees and on the floor. Nothing would better demonstrate a commitment to a genuinely deliberative legislative process than an announcement by the Speaker of the House and Senate Majority Leader that the bodies commit to being in session a substantial number of full five-day weeks each year. Committing to 26 such weeks—130 working days—while recognizing that circumstances might make the number of full weeks smaller, would be the best way to start.



Eighty-five percent of Americans wish Congress had accomplished more in this year's session, according to a recent CNN poll.

qualifications of the nominee. Holds have so mushroomed as common practice that senators routinely hold qualified nominees as hostages to accomplish other goals. They can do this effectively because there are multiple choke points where filibusters would clog the legislative process, leaving leaders with few options to override the holds. Here, a useful rules reform would be to make motions to proceed to nominations non-debatable. That would speed up the process and allow the Majority Leader to dispense with a frivolous or extraneous hold expeditiously without compromising the ability of senators to use holds to deal with an administration unresponsive to a legitimate oversight interest. Of course, the Majority Leader would also need the will to challenge Senate colleagues on this much-coveted but often irresponsibly employed power. It would be especially useful if Senate Majority and Minority Leaders announced together to their colleagues at the beginning of the new Congress that such holds will not be automatically tolerated or allowed to continue for indefinite periods. At the same time, the Majority Leader should be sensitive to the overuse of motions to bring debate to a close at the very outset of debate and refrain from initiating cloture until there has been a significant opportunity to debate.

Filibusters

On filibusters more generally, the Senate has slid rapidly and completely away from the traditional practice—one where a filibuster

was reserved for an issue of serious national significance and where there was a significant minority that felt intensely that a bill on such an issue would be a catastrophe. In these cases, the filibuster would bring all other Senate business to a halt, as often round-the-clock sessions and multiple cloture votes were required to reach some conclusion. That kind of filibuster has not been seen for years. Now the filibuster is, in effect, simply an occasion where a senator raises an objection, via a hold, and issues an intention to filibuster that in turn raises the threshold needed for passage to sixty votes from a simple majority.

The Senate should reserve real filibusters for real national controversies, and reemploy on rare but important occasions the real filibuster—with the Senate dropping other business until the issue is resolved. Those in the minority must also show their legitimate intensity by taking to the floor for hours and days at a time. Here is another area where a full Senate schedule in Washington—three five-day weeks on, one week off—would provide ample time to enable a real filibuster to unfold while still attending to other important business during the session. For other, less sweeping issues, including nominations, where the effort to raise the bar is minimal, there should be a different practice, one that has concrete time limits for a sixty-vote threshold, gradually diminishing over, say, a month, until the threshold would drop to a simple majority. Thus, the hold, in this case, would delay an issue (or nominee), but not indefinitely or forever.



CHAPTER 3

OVERSIGHT: *Ensuring Transparency & Accountability*

The return of unified party government after the 2000 elections, the first such Republican government since the Eisenhower years, removed one incentive—the partisan one—for Congress to actively oversee and aggressively assert its authority vis-à-vis the executive. The perceived shared political fates of Republicans at both ends of Pennsylvania Avenue produced teamwork between the branches in which Congress was the subservient partner. This was reflected in the decline in congressional oversight and the indifference on Capitol Hill to incursions on its constitutional authority.²

Divided party control ensures a greater level of congressional activity to oversee and check the executive, but not necessarily activity directed at constructive ends. An oversight agenda consumed by scandal, for example, may serve partisan interests but does little to grapple with problems of policy conception and implementation. In this intensely partisan era, one in which the institutional identities and loyalties of members of Congress have atrophied, it is no simple task to get Congress, in a unified or divided party government, to play the strong, independent, and responsible role intended by the Framers. Party and ideology too easily trump institution. Reversing this pattern will require inculcating a greater degree of institu-

tional self-respect among congressional leaders and members. But it will also depend on those in Congress concluding that a strong and assertive first branch can serve their interests by keeping their president from pursuing ill-conceived policies, ones that may come back to haunt him and

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his party far more than the temporary embarrassment of a tough oversight hearing, improving the success of policies and programs by making mid-course corrections, and enhancing their reputations as serious and responsible public officials.

Committees

Specific reforms should be directed toward reducing the intensity of partisanship on key oversight committees. The intelligence and

appropriations committees, both of which several decades ago had stellar reputations for tough and responsible scrutiny of the executive based on bipartisan cooperation and strong professional staffs, have been gravely damaged in this corrosive partisan environment.

PARTY AND IDEOLOGY TOO EASILY TRUMP INSTITUTION. REVERSING THIS PATTERN WILL REQUIRE INCULCATING A GREATER DEGREE OF INSTITUTIONAL SELF-RESPECT AMONG CONGRESSIONAL LEADERS AND MEMBERS.

Reauthorization

The beginning of renewal in oversight needs to come with a return to a regular process of reauthorizations, which have nearly disappeared from the legislative process. When programs and agencies were actually subject to a real process of reauthorization, generally every five years (defense and intelligence authorizations are annual), that process involved a careful, or at least in-depth, examination of its performance, assets and liabilities, pros and cons, and costs and benefits. An attenuated schedule in Congress has meant the demise of such reauthorizations; Congress gets around them by

simply continuing the programs one year at a time or by appropriating funds (often in continuing resolutions) for unauthorized programs. The bar for postponing or avoiding reauthorizations should be made higher, perhaps by allowing a point of order against consideration of a continuing appropriations resolution which contains unauthorized items. While we believe strongly that regular authorizations are essential, that does not include the current practice of packaging disparate authorizations into huge omnibus bills, which reduce the opportunity for serious review of the contents of legislation by members, staff, and the public.

Appropriations

The appropriations process also needs change. Appropriations committee rules should require each subcommittee to do serious oversight every two years of each significant-sized program and agency within its jurisdiction. Earmark reform would help in this area, ameliorating the obsession the appropriations panels have developed over individual targeted grants and freeing them to get back to the basics of the legislative process.

ENDNOTES

2. The year and a half interruption in Republican control of the Senate following Jim Jeffords decision to leave his party and organize with the Democrats, most of it coming after the terrorist attacks of 9/11 and the immediate public response of national unity, did not noticeably reverse that pattern.



CHAPTER 4

ETHICS: *Rebuilding Public Confidence*

Sadly, the 109th Congress is likely to be remembered more for the criminal and unethical behavior of some of its members and former staff than for its legislative productivity. Some of the cases—including the guilty pleas of Duke Cunningham and Bob Ney and the allegations against William Jefferson—involved bribery, violations of federal law that the Department of Justice is fully capable of prosecuting. But others suggested the presence of more systemic problems in Congress. The investigation of super-lobbyist Jack Abramoff provided a window on unseemly relationships among members, staff, lobbyists, and clients in which campaign contributions and perquisites of travel and entertainment grease the path to access and influence in the legislative process. Tom DeLay's K Street Project revealed the systematic involvement of congressional party leaders in staffing lobbying shops and trade associations in Washington—at times through the threat of negative government action if the appropriate people were not hired—and then enlisting the assistance of the grateful employees (often former aides whose incomes grew five- or ten-fold) in campaign fundraising. Investigations of members and current and former staff of the House Appropriations Committees raised troubling questions about the revolving door for congressional staff and

the marketing of legislative earmarks. Newspaper investigations suggested a number of prominent members of Congress may have profited handsomely from real estate investments whose value was enhanced by their official actions in Congress.

In the midst of these and other revelations about possible illegal or unethical behavior, a weak congressional ethics process was made even more ineffectual when the Speaker fired from the ethics committee the three Republican members who had the temerity to rebuke Majority Leader Tom DeLay for unethical behavior. It is impossible to overstate the corrosive effect on Congress of a near-non-existent ethics process, one where members, staffers, and lobbyists alike know that enforcement of ethics laws and rules won't happen. A few members—the Duke Cunninghams—take advantage of the vacuum with a vengeance. Many more simply become lax and inattentive to what is ethical and appropriate. And the larger approach to the regular order easily descends into the kind of “ends justify the means” approach to rules, procedures, and the constitution that has typified the contemporary Congress.

Transparency

Dealing with the culture of corruption and establishing a legitimate ethics process in Congress will take many steps. Reducing the opportunities

available to individual members to deliver—or appear to deliver—special benefits for narrow interests is an essential step. Restoring regular order and increasing transparency in the legislative process—in committee, on the floor, and in conference—would restrict those opportunities and begin to change the climate that sanctions such behavior. That is why the reforms discussed above under deliberation are so important. In addition, changes are needed in lobbying regulation, the ethics process, and campaign fundraising.

Lobbying Reform

As part of their regular and more frequent reports to Congress, lobbyists should be required to disclose the campaign contributions and other financial assistance they provide to members of Congress; their firms or other employers should also disclose the funds spent on grassroots lobbying. Members of Congress should be prohibited from accepting travel and lodging reimbursement from private interests that lobby Congress and required to file timely reports on all travel not financed with public funds. Leaders of non-profit groups that are used to launder or disguise contributions from other entities to fund congressional travel or other perks should be subject to criminal sanctions. The revolving door should be slowed by increasing the ban on lobbying Congress by former members and staff from one to two years. Indeed, Congress should consider even more dramatic steps to reduce the corrosive process where so many members and staff plan to go into lucrative lobbying jobs after leaving Congress, steps to ensure that the lure of doing favors for firms or individual lobbyists in return for a big payoff later on—the sort of temptation that led Tony Rudy to be an active mole for Jack Abramoff inside House Majority Leader Tom DeLay’s office—is sharply reduced. One way would be to have a program for young people who want to work on the Hill to get their stu-

dent loans forgiven if they work in Congress for five years and agree not to do lobbying in Washington for five years thereafter.

Independent Ethics Commission

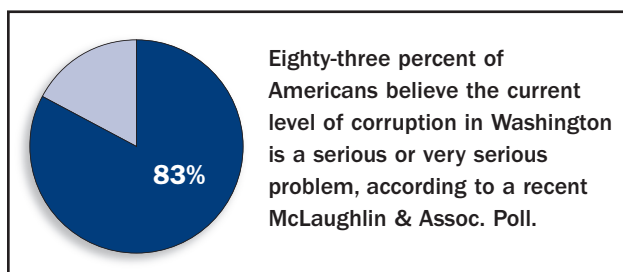
More important than lobbying reform, in our judgment, is revitalization of the congressional ethics process. The ethics committees in both chambers need to return to a tradition of bipartisanship and noninterference by party leaders. One option there, suggested by former Rep. Tom Downey, is to have the chairmanship of the ethics committees rotate each year between a Democrat and a Republican, regardless of which party has the majority. But if old and new laws and rules are to be credibly enforced, that process needs to be bolstered by an independent ethics commission within the legislative branch (including former members like Lee Hamilton and Bill Gradison, and modeled on bodies already in operation in Kentucky, Florida and Tennessee) and a professional staff office that would provide support to the independent commission, manage a strengthened reporting and disclosure system, and advise members and staff on appropriate behavior. The independent commission would oversee the office, make preliminary decisions on whether to dismiss or investigate charges of unethical behavior, and, where appropriate, forward recommendations for further investigation or action to the relevant ethics committee. The authority for recommending actions by the full House and Senate would be retained by each chamber’s ethics committee, which would continue to be composed of equal numbers of Democratic and Republican members. Any sanctions imposed on members would, as now, require action by the full House or Senate, as provided for in the Constitution.

Leadership PACS and Fundraising

Identifying corrective steps to deal with the conflicts of interest that develop between members and parties on the one hand and

interest groups and lobbyists on the other is a daunting task. But two steps seem compelling. Banning leadership PACs – to limit member shakedowns of lobbyists, privately-financed personal expense accounts and the fund-raising-based bidding for committee and party leadership posts – is an urgently required step. In addition, prohibiting fund-raising when Congress is in session, as many states now do for their legislatures, might well improve the quantity and quality of deliberation.

The November 2006 elections provide Congress with an opportunity to begin to mend its position as the broken branch of government. The most consequential and constructive changes would come from leaders of the House and Senate pledging to fairly and faithfully implement existing rules and norms. Some rules changes might encourage



the implementation of such pledges. What is essential is that members of Congress understand and acknowledge the extent to which the first branch of government has strayed from the intentions of the Framers. Once that reality is acknowledged, members will be in a position to make changes in rules, practices, and behavior that restores the proper balance to the American constitutional system and begin to regain the trust of the American people.



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