
**QUESTION: WHAT'S WRONG WITH CONGRESS?
ANSWER: IT'S A DEMOCRATIC LEGISLATURE**

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What's wrong with Congress? Everyone seems to have an answer, and most of them consist of a long list of complaints: Congress is uncivil, it is too partisan, it is gridlocked, and it produces earmarks – “bridges to nowhere” – but no broad legislation in the public interest. Among expert commentators such as Thomas Mann and Norman Ornstein, the criticisms also include more detailed charges.¹ For example, they suggest the House of Representatives has become a majority party steamroller in which the minority is excluded from decision-making,² and the majority flagrantly manipulates the rules for a partisan advantage.³ Commentators also argue that because the Senate now requires sixty votes – a supermajority – to do almost anything, this heightened requirement contributes mightily to gridlock.⁴ Finally, Mann and Ornstein criticize Congress for failing to perform its constitutionally-specified role as a coequal branch – checking and balancing executive power.⁵

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¹ See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 7, 15 (2006) (suggesting “the post-2000 House of Representatives looks more like a House of Commons in a parliamentary system than a House of Representatives in a presidential system,” and that Congress looks “like an arm of the Second Branch, a supine, reactive body more eager to submit to presidential directives than to assert its own prerogatives”).

² See *id.* at 6 (explaining how the Medicare bill was “marked up” in the House Ways and Means Committee in a partisan fashion, and minority Democrats were excluded from the process and most of the deliberations).

³ See *id.* at 1.

⁴ See Barbara Sinclair, *The “60-Vote Senate”: Strategies, Process, and Outcomes*, in *U.S. SENATE EXCEPTIONALISM* 242, 260 (Bruce I. Oppenheimer ed., 2002) [hereinafter Sinclair, *The “60-Vote Senate”*] (explaining that because of Senate rules, such as the filibuster, one Senator can pose a significant barrier to legislation unless sixty Senators vote to end debate, and therefore the filibuster). Others, notably Sanford Levinson, deplore the very makeup of the Senate, pointing out its highly unrepresentative character. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 49-62 (2006) (explaining how the Senate, by electing equal numbers from every state, is unrepresentative and undemocratic).

⁵ See MANN & ORNSTEIN, *supra* note 1, at 16-17 (“Congress was placed at the center, not the periphery, of a strong federal government and empowered with democratic legitimacy and institutional authority. . . . Sadly, today it is down – very much the broken branch of government.”).

There is some truth to all of these claims. Not too long ago, a senior House Democrat called a Republican colleague a “little wimp.”⁶ A different Republican on the House floor charged, “Like a moth to a flame, Democrats can’t help themselves when it comes to denigrating and demonizing Christians.”⁷ A Speaker of the House held what was supposed to be a fifteen-minute vote open for almost three hours while he and his leadership colleagues twisted arms to pass a bill.⁸ According to one count, there were thirty-six filibusters in the 109th Congress (2005-06) and fifty-two in the just-ended 110th Congress.⁹ Finally, many informed observers would agree that, from 2001 through 2006, Congress did not do a very good job of overseeing and checking the executive.¹⁰

Does this mean that Congress is “an increasingly dysfunctional and ineffective institution”? I argue no. First, I take issue with “increasingly.” I contend Congress is more capable now than it was in the past of producing legislation that responds to reasonably strong popular demands. As I discuss briefly below, the House is now organized to function in ways that make this so.¹¹ The strengthening and internal homogenization of the political parties – that is, the much maligned partisan polarization – has made possible the development of a stronger and more activist party leadership that allows the majority to work its will.¹² The strict gatekeeping at the committee level that

⁶ Alan K. Ota, Liriel Higa & Siobhan Hughes, *Fracas in Ways and Means Overshadows Approval of Pension Overhaul Measure*, CQ WKLY., July 19, 2003, at 1822, 1822 (“Pete Stark, D-Calif. . . . sa[id] to [Congressman Scott] McInnis, ‘Oh, you think you are big enough to make me, you little wimp?’”).

⁷ Mike Allen, *GOP Congressman Calls Democrats Anti-Christian; Remarks in Floor Debate Stir Protest*, WASH. POST, June 21, 2005, at A4.

⁸ MANN & ORNSTEIN, *supra* note 1, at 1-2 (describing the Prescription Drug Bill vote on November 23, 2003 which started at 3:00 a.m. and closed at 5:53 a.m. even though the rules called for a fifteen minute vote).

⁹ See Barbara Sinclair, *The New World of U.S. Senators*, in CONGRESS RECONSIDERED 1, 7 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2009).

¹⁰ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320 (2006) (“Congress has not passed legislation to denounce these presidential actions [H]ere we come to a subtle change in the legal landscape with broad ramifications: the demise of the congressional checking function.”); Patricia Wald & Neil Kinkopf, *Putting Separation of Powers into Practice: Reflections on Senator Schumer’s Essay*, 1 HARV. L. & POL’Y REV. 31, 68-69 (2007) (“Congress has enacted sweeping legislation that largely authorizes the President to do what he has been doing.”).

¹¹ See *infra* notes 49-52 and accompanying text.

¹² See BARBARA SINCLAIR, LEGISLATORS, LEADERS, AND LAWMAKING: THE U.S. HOUSE OF REPRESENTATIVES IN THE POSTREFORM ERA 301 (1995) [hereinafter SINCLAIR, LEGISLATORS].

used to characterize Congress is long gone.¹³ To be sure, the Senate continues to be a roadblock to decisive action; but House action can put pressure on the Senate to act, especially if it is backed by public opinion.

Second, Congress will almost always seem “dysfunctional” to some because most of us inevitably evaluate its performance, at least in part, in terms of our own notions of what is good public policy – that is, through an ideological lens. Thus, one of the major charges against Congress has been gridlock.¹⁴ Yet it is hard to argue that the Congresses of 2001-06 were characterized by gridlock. Those Congresses produced some highly significant legislation – two huge tax cut bills in 2001¹⁵ and 2003,¹⁶ the Prescription Drug/Medicare bill in 2003,¹⁷ and all the post-9/11 legislation.¹⁸ Many of us may think much of this was bad legislation, but it was not the product of an ineffectual Congress.

More basically, I disagree with the conclusion that Congress is a “dysfunctional and ineffective institution,” because we need to remember that the job we ask Congress to do is really, really hard. We need to evaluate Congress in terms that take account of this difficulty, especially if our evaluations are going to be the basis of reform recommendations. What do we ask Congress to do? First, pass legislation that is both responsible – that is, effective in handling the problem at issue – and responsive to majority sentiment. Second, we ask Congress to do so through a legislative process that is deliberative and inclusive on the one hand, and expeditious and decisive on the other. Third, we ask Congress to do it in public.

Obviously, Congress will never succeed completely – there are some inherent contradictions and some tough trade-offs. We cannot have it all. Over its history, Congress has struck different balances among these values, as I discuss briefly below. Moreover, we can learn a good deal about the character of these trade-offs from analyzing how the chambers have changed over time. My argument is that the current balance in the House is better than it has been throughout most of the post-World War II period because it

¹³ See STEVEN SMITH, CALL TO ORDER 46 (1989) (explaining that by 1980 “[a] relatively closed, committee-oriented system had become a more open, floor-oriented system for much legislation”).

¹⁴ See, e.g., Adam Clymer, *The Gridlock Congress*, N.Y. TIMES, Oct. 11, 1992, at A1.

¹⁵ Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

¹⁶ Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752.

¹⁷ Medicare Prescription Drug, Improvement, and Modernization Act, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

¹⁸ See, e.g., Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594; Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S.C.); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

provides accountability and reasonable expeditiousness. But, as I also point out, the current balance entails costs as well.¹⁹

The Congress of the 1950s, often of late held up as a paragon of bipartisan harmony and productivity, was, in fact, a body controlled by independent and often conservative committee chairs, chosen on the basis of seniority and therefore not accountable to anyone.²⁰ True, decision-making was largely bipartisan, with senior committee Democrats and Republicans, who had forged close relationships over many years, working together.²¹ The system gave members incentives and opportunities to develop expertise in their committees' areas of expertise – an important asset for a body with limited expert staff. Furthermore, some major legislation was produced: the bill establishing the federal highway system, for example.²² This, however, was also a system that tended to exclude junior members – and often liberals – from meaningful participation.²³ It had no means of holding key decision-makers accountable to the membership,²⁴ consequently blocking much important legislation – aid to education and major civil rights legislation, for example – for which majorities certainly or probably existed.²⁵

The majority Democratic Party's peculiar composition underlays this "committee government" congressional regime. The party emerged out of the New Deal realignment as a coalition of increasingly conservative southerners and increasingly liberal northerners.²⁶ Bolstered by their greater seniority resulting from their region's lack of party competition, southerners dominated congressional positions of influence and used these positions to block legislation that their northern colleagues wanted.²⁷ When the balance between the two factions started to shift decisively toward the North beginning with the 1958 election, reform forces spearheaded by northern liberals began to reshape decision-making in both chambers.²⁸

¹⁹ I hasten to add that these are value judgments.

²⁰ See RICHARD BOLLING, HOUSE OUT OF ORDER 79-80, 108-09 (1965) (describing a bipartisan conservative group that is generally able to command a clear majority, led by chairmen with seniority who are able to force younger members to align with them).

²¹ See *id.* at 80 (explaining the bipartisan conservative alliance as "an understandable consequence of convictions common among southern Democrats and certain Republicans, mostly from the Midwest").

²² National Interstate and Defense Highways Act, Pub. L. No. 84-627, 70 Stat. 374 (1956).

²³ See BARBARA SINCLAIR, MAJORITY LEADERSHIP IN THE U.S. HOUSE 3 (1983) [hereinafter SINCLAIR, MAJORITY LEADERSHIP].

²⁴ See *id.*

²⁵ See, e.g., BOLLING, *supra* note 20, at 179 (describing the process of passing a civil rights bill in 1956-57, which included delays in the Judiciary Committee and a hostile Rules Committee who used many dilatory strategies).

²⁶ See SINCLAIR, MAJORITY LEADERSHIP, *supra* note 23, at 3.

²⁷ See *id.* at 3.

²⁸ See *id.* at 4.

Tracing the long and complex story of this transformation is neither necessary nor possible here. What is relevant is to understand that by the late 1970s, a very different Congress had emerged. The internal structure of both chambers had been transformed; the capacity to participate in the making of legislative decisions, which had previously been centered in committees, became much more widely distributed.²⁹ Committee chairmen could no longer dominate their committees nor could they block legislation that party majorities wanted to consider.³⁰ In both chambers, subcommittees became vehicles for policy entrepreneurs who were highly active in publicizing problems and promoting policy solutions.³¹ The floor became a far more active decision-making arena in both the House and the Senate; the number of amendments offered on the floor shot up, and bills were more often altered on the floor.³² In the Senate, extended debate – which had been infrequently used in the 1950s – became almost routine.³³ Filibusters, actual and threatened, were employed by more members and on a broader range of issues.³⁴

Congress had become more internally democratic and participatory; it had also become more open and more accessible to groups without establishment ties.³⁵ Reformers found, however, that a more open and participatory process came at a price. Thus, in the House, floor sessions were stretching on interminably and compromises carefully crafted in committee were being picked apart on the floor.³⁶

An increase in the Democratic Party's ideological homogeneity and the threat posed to the Democratic Party by the Reagan Presidency led to a further transformation of the legislative process in the House of Representatives.³⁷

²⁹ See *id.* at 3; BARBARA SINCLAIR, *THE TRANSFORMATION OF THE U.S. SENATE* 72 (1989) [hereinafter SINCLAIR, *TRANSFORMATION*] (“[D]uring the 1970s, senators greatly expanded the supply of staff and committee positions – resources particularly useful for broadening senators’ involvement across a number of issues.”); Lawrence C. Dodd & Bruce I. Oppenheimer, *The House in Transition*, in *CONGRESS RECONSIDERED*, *supra* note 9, at 21, 49-50.

³⁰ See SINCLAIR, *MAJORITY LEADERSHIP*, *supra* note 23, at 5.

³¹ See SMITH, *supra* note 13, at 8 (explaining how the changes in Congress led to a “new breed” of congressmen who were noted for their “policy activism”).

³² See *id.* at 130 (explaining that during the 1970s, the “percentage of representatives offering floor amendments increased from just over 40 to over 80,” the “percentage of senators offering floor amendments . . . increase[ed] from about 90 percent . . . to 100 percent,” and members of both chambers looked “to the floor as an avenue for pursuing their legislative interests far more frequently than they did in the 1950s”).

³³ See *id.* at 233-34.

³⁴ See *id.* at 257-58.

³⁵ See SINCLAIR, *MAJORITY LEADERSHIP*, *supra* note 23, at 4-10 (describing how the changes to Congress led to the election of different types of congressmen and made “full participation by the most junior member possible”).

³⁶ See SINCLAIR, *LEGISLATORS*, *supra* note 12, at 48.

³⁷ See *id.* at 49.

The 1980s saw the emergence of strong policy-oriented party leadership that was more involved, and more decisive, in organizing party and chamber, setting the House agenda, and determining legislative outcomes.³⁸ Most of the rule changes that augmented the leadership's strength in a major way actually took place earlier – during the reform era.³⁹ During this time, the leaders gained considerable say over the assignment of members to committees, over the power to name the members and chair of the Rules Committee, and over the designation of committee chairmen.⁴⁰

What changed in the 1980s was the willingness of the Democratic membership to allow its leadership to fully exploit these new institutional powers.⁴¹ The House is a majority-rule institution; decisions are made by simple majorities and the opportunities for minorities to delay, much less block, action are exceedingly limited.⁴² Additionally, the Speaker is both the presiding officer of the chamber and the leader of the majority party. When the majority party is homogeneous, its members have the incentive to grant the Speaker significant new powers and resources and to allow her to use them aggressively because the legislation she will use her powers to pass is broadly supported in the party.

The majority party leadership also oversees the referral of bills to committee, determines the floor schedule, and controls the drafting of special rules that govern how bills are considered on the floor.⁴³ The leaders can bypass committees when they consider it necessary or they can orchestrate post-committee adjustments to legislation.⁴⁴ The leaders can: work with (and, if necessary, lean on) the committees to report out legislation in a form acceptable to a majority of the party membership and in a timely fashion;⁴⁵ deploy the extensive whip system to rally the votes needed to pass the legislation;⁴⁶ bring the bills to the floor at the most favorable time, and under floor procedures that give them the best possible chance for success;⁴⁷ and, if

³⁸ See *id.* at 44.

³⁹ See *id.* at 46.

⁴⁰ See *id.* at 71.

⁴¹ See *id.* at 51.

⁴² See, e.g., James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001, 1013 (2007) (“In the House, a cohesive majority party can – if it prefers – develop legislation without consulting the minority at all; as a result the Speaker and minority leader may go for months without having any direct communication.”); Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2350 (1995) (explaining Congress operates on the belief that the Constitution requires only a “bare majority” to pass ordinary legislation).

⁴³ See SINCLAIR, LEGISLATORS, *supra* note 12, at 70-73.

⁴⁴ See BARBARA SINCLAIR, UNORTHODOX LAWMAKING 5 (2d ed. 2005).

⁴⁵ See SINCLAIR, LEGISLATORS, *supra* note 12, at 168.

⁴⁶ See *id.* at 118-19.

⁴⁷ See *id.* at 210 (“The leaders’ aim is to schedule major legislation for floor consideration when they have the requisite votes and when the political benefits of passage

necessary, use the powers of the presiding officer to advantage the legislation.⁴⁸

Recent Republican and Democratic majority leaderships have used their powers aggressively to pass their party's legislative agendas and protect their members.⁴⁹ Thus, special rules for floor consideration that bar all amendments except those explicitly allowed by the leadership-controlled Rules Committee have become routine.⁵⁰ As previously alluded to, Speaker Dennis Hastert in 2003 held open the vote on the conference report on the Medicare prescription drug bill for almost three hours while he, Majority Leader Tom DeLay, and other supporters worked to change enough Republican votes to pass a bill central to President George W. Bush's agenda.⁵¹ The House has become quite efficient at producing legislation that reflects the legislative preferences of its majority party.⁵² To be sure, the cost is sometimes a shortchanging of deliberation and fairly frequently a lack of minority participation. The problem is that so long as the parties are as ideologically polarized as they are today, the minority will dislike most of the compromises the majority is willing to make.

On the other side of the Capitol, the individualist Senate of the 1970s and early 1980s was also being changed by partisan polarization. However, the impact was different from what it was in the House. Polarization has made participation through their parties more attractive to senators than it was when the parties were more heterogeneous and the ideological distance between them less.⁵³ Recent Senate party leaders have sought to provide more channels for members to participate in and through the party.⁵⁴ Senate rules, however, are a great deal more permissive than House rules and give individual members much greater prerogatives.⁵⁵ Consequently, the Senate majority leader lacks many of the institutional tools the Speaker of the House possesses.

are at their height. House rules and standard operating procedures give the majority-party leadership control over the floor schedule.”).

⁴⁸ See *id.* at 251 (describing how the Speaker will sometimes hold the vote open past the allotted time while proponents “scurr[y] around seeking” a congressman willing to switch his vote).

⁴⁹ See, e.g., *id.* at 203.

⁵⁰ *Id.* at 151.

⁵¹ See MANN & ORNSTEIN, *supra* note 1, at 1-2.

⁵² See SINCLAIR, LEGISLATORS, *supra* note 12, at 252.

⁵³ See Alan I. Abramowitz, *Party Realignment, Ideological Polarization, and Voting Behavior in U.S. Senate Elections*, in U.S. SENATE EXCEPTIONALISM, *supra* note 4, at 31, 31 (“Party line votes occur more frequently, and party cohesion is much greater. Regional divisions within the parties are much less prominent.”).

⁵⁴ Bruce I. Oppenheimer, *Let's Begin with the Senate: An Introduction to U.S. SENATE EXCEPTIONALISM*, *supra* note 4, at 3, 10 (“The Senate parties [through the leadership] created new structures to cope with collective action problems, especially when the parties were evenly divided and most competitive.”).

⁵⁵ See SINCLAIR, TRANSFORMATION, *supra* note 29, at 208.

Majorities simply cannot work their will in the way they can in the House.⁵⁶ Often, it is now senators acting as a party team who exploit Senate prerogatives to gain partisan advantage and, of course, it is almost always done by the minority party.⁵⁷ Senate rules do exert some pressure toward bipartisan compromise and certainly do give the minority more say than in the House, but they also make decisive action difficult.

In addition to these sorts of major “regime” changes in congressional structure and decision-making, Congress, as an elected body, responds to short term changes in its political environment. Elections may change the membership, the leadership, and/or the members’ views about what is politically possible, politically necessary, or both. Consequently, how Congress makes decisions, and the decisions it makes, may change based on the fluctuating political environment.

The Democratic Congress elected in 2006 functioned differently than its Republican predecessor in a number of important respects. Mann and Ornstein were rightly concerned about the House schedule in the last few Republican Congresses; often the House was in session and its members were in Washington from 6 p.m. Tuesday until Thursday afternoon.⁵⁸ Such a truncated schedule provided little time for deliberation or even for committee meetings at all. This schedule changed with Democratic control. Having been out of power since 1995, Democrats had a big agenda, and furthering it required spending more time in Washington. As a result, committees became much more legislatively active.⁵⁹ And, as expected, Congress was a great deal more diligent about oversight.⁶⁰ Congressional Democrats were eager to examine all aspects of the Bush Administration; this was mostly serious and not “gotcha” oversight.⁶¹ Policy did change – not nearly as much as Democrats would have liked, but still substantially, as David Mayhew has pointed out.⁶²

⁵⁶ See Gerald Gamm & Steven S. Smith, *Emergence of Senate Party Leadership*, in U.S. SENATE EXCEPTIONALISM, *supra* note 4, at 212, 213 (“Unlike the House . . . [t]he possibility of a filibuster has long meant that an inconvenienced Senate majority cannot impose rules changes that might disadvantage the minority.”).

⁵⁷ See Sinclair, *The “60-Vote Senate,”* *supra* note 4, at 251.

⁵⁸ See MANN & ORNSTEIN, *supra* note 1, at 87; Wald & Kinkopf, *supra* note 10, at 58.

⁵⁹ See Thomas E. Mann, Molly Reynolds & Peter Hoey, *A New, Improved Congress?*, N.Y. TIMES, Aug. 26, 2007, at WK11 (highlighting the increased legislative activity under Democratic leadership during the 110th Congress’s first year).

⁶⁰ See James Hamilton, Robert F. Muse & Kevin R. Amer, *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1116 (2007).

⁶¹ See Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 CAL. L. REV. 901, 955 (2008) (explaining that following the Democratic takeover of Congress in 2007, the new majority decided to make “broader inquiries into the Executive’s handling of intelligence policy”); Note, *Oversight and Insight: Legislative Review of Agencies and Lessons from the States*, 121 HARV. L. REV. 613, 614 (2007) (describing how the Democratic Congress examined regulations it found

So, in thinking about reform, we need to remember at least two points. First, we are not dealing with a static institution. Congressional structure and decision-making have changed over time, and in addition congressional decision-making can, and often does, change in the short run in response to electoral signals. This, I believe, increases the burden on those advocating reform through constitutional revision. Second, because of the inherent difficulty of what we ask Congress to do, the interrelationships of various structural features, and how those structural features affect incentives, we need to be hard nosed in our analysis and modest about our proposals. As Kenneth Shepsle points out, we really need to think through the likely second- and third-order effects of what on the surface may seem like great reforms and perhaps realize we are likely to be far from perfect in predicting all of their likely effects.⁶³

To illustrate, let me very briefly discuss two popular proposed reforms – abolishing earmarks and forcing more open rules for the floor consideration of legislation in the House. If, as is the case in the United States, legislators are elected from geographically defined areas – from congressional districts or states – they are going to be responsive to those constituencies first.⁶⁴ This does not mean members of Congress are unconcerned with the “public good.” Rather, most are just not going to willingly commit political suicide. That means, among other things, that members are going to need to be able to explain their votes to their constituents.⁶⁵ So beware of getting rid of earmarks completely; they often provide the grease – the explanation for general interest legislation. In any case, both chambers at the beginning of the 110th Congress

problematic that were promulgated by the Bush Administration, including grazing reforms, and its refusal to implement a water recycling program).

⁶² See David R. Mayhew, *Is Congress “the Broken Branch”?*, 89 B.U. L. REV. 357, 359 (2009) (describing the “menu” of legislation during 2007-08, including significant legislation which was supported by the White House and Democrats, but not many Republicans).

⁶³ See Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 384 (2009).

⁶⁴ See RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 31 (1978) (describing how House members think about and are responsive to their constituencies first because their goal of reelection is primary, and reelection requires the support of their constituencies).

⁶⁵ See *id.* at 17-18; JOHN W. KINGDON, *CONGRESSMEN’S VOTING DECISIONS* 29 (3d ed. 1989).

did adopt rules increasing the transparency of earmark requests⁶⁶ and, in 2007, the number and dollar value of earmarks in appropriations bills decreased.⁶⁷

Beware, too, of getting overly excited about restrictive rules for considering legislation on the House floor. The minority party – and quite a few independent observers – argues that rules barring any germane amendments are undemocratic, but such rules are often necessary to prevent carefully constructed compromises from coming unraveled on the floor.⁶⁸ If allowed to offer any and all germane amendments, the minority may well come up with ones that repeatedly place some of the majority in the politically perilous position of choosing between “the popular” and “the responsible” vote. Forcing the most vulnerable members of the majority to take such votes is often the minority’s aim.⁶⁹ An important facet of the job of the congressional party leadership – one that a strong party leadership has a much better chance of carrying out – is protecting and enhancing the party’s reputation.⁷⁰ This means bringing a broader perspective to bear, and restrictive rules can be a valuable leadership tool for making it easier for members to take a broader perspective. In thinking about reform, we need to remember both that a geographically-based electoral system builds in a certain parochialism – also known as responsiveness and accountability to the constituency – and that how the legislature is organized internally can either accentuate or attenuate that parochialism.

So does this mean we do not need reform? Personally, I would redo the Senate if I could. I would do so because I think the composition of the Senate is basically unfair and not because I think it actually has highly pernicious effects. But that is not going to happen.

My advice to reformers who actually want to get something done would be to concentrate on small-bore internal reforms to better balance deliberation and inclusiveness, on the one hand, and expeditiousness and decisiveness, on the other. One such reform would be strengthening layover requirements for legislation. Actually, the House in the 110th Congress was fairly good about

⁶⁶ See Elisabeth Bassett, Comment, *Reform Through Exposure*, 57 EMORY L.J. 1049, 1078 (2008) (“[T]he Senate has changed internal rules that will increase the transparency of the earmark process. The Senate now requires that any earmark, and the name of the Senator requesting the earmark, be publicly available on the Internet for at least forty-eight hours before a vote on the legislation containing the earmark.”).

⁶⁷ See Alan Wirzbicki, *Congressional ‘Pork’ Down Sharply Under New Disclosure Rules*, THE BOSTON GLOBE, Sept. 23, 2007, at A1; see also Sarah A. Binder et al., *Assessing the 110th Congress, Anticipating the 111th*, MENDING THE BROKEN BRANCH, Jan. 2003, at 1, 25-26, available at http://www.brookings.edu/~media/Files/rc/papers/2009/0108_broken_branch_binder_mann/0108_broken_branch_binder_mann.pdf.

⁶⁸ See SINCLAIR, MAJORITY LEADERSHIP, *supra* note 23, at 83.

⁶⁹ See, e.g., *id.* at 35 (describing how in late 1980 House Republicans urged that a Senate budget resolution be offered as a germane amendment in order to “embarrass the Democrats during the election period”).

⁷⁰ See SINCLAIR, LEGISLATORS, *supra* note 12, at 214.

abiding by rules designed to give members some time to examine legislation before they were required to vote, but the rules and abidance by the rules could be even stricter. As to filibuster reform, major changes are probably not in the cards, but perhaps one could get a rule change barring a filibuster on going to conference. That has been a real problem, especially in the 110th Congress.⁷¹ Republican objections, often by the far right – by James DeMint of South Carolina and Tom Coburn of Oklahoma, for example – have prevented conferences even when the Senate Republican leadership wanted them.⁷² When there is no conference, decision-making is less inclusive, often with only a small group of party and committee leaders making the decisions.

Finally, can we figure out a way of encouraging oversight under unified control without creating other and worse problems? I suspect Democrats are going to oversee an Obama Administration more diligently than Republicans oversaw the Bush Administration. We must remember that 2001-06 was the first period of unified Republican control in almost fifty years,⁷³ and that affected Republican behavior. Furthermore, members of Congress do learn. Most Democrats think the Republicans did Bush no favors by engaging in little oversight.⁷⁴ Still, more incentives for oversight, if correctly calibrated, are worth serious consideration.

So, what is the bottom line? *Well-informed* criticism of Congress is a good thing. It can be part of the political atmospherics that give some members ammunition for sensible reform efforts and others pause. But, again, we need to remember that what we ask of Congress is really hard; and with all its failings, it is still our most democratic branch.

⁷¹ See *Capital Hill's Conferences: Can They Be Revived?*, CQ WKLY., Jan. 5, 2009, at 18, 18 (showing drops in conferenced legislation between Congresses); Darren Goode, *Energy – Dems Moving Forward on Tax Provisions*, CONGRESSDAILY, Oct. 26, 2007, http://www.nationaljournal.com/congressdaily/am_20071026_2.php (relating internal congressional division concerning going to conference to discuss energy legislation).

⁷² See Robert Pear, *Earmarks Seen Likely to Continue, but with Details*, N.Y. TIMES, Jan. 22, 2008, at A13.

⁷³ Prior to 1994, when the Republicans won both Houses of Congress, they had not controlled it since 1952.

⁷⁴ Interviews with Members of Congress on a not-for-attribution basis, in Wash., D.C. (Jan. 2003-Dec. 2008).