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Special Orders

Lobbying, Ethics, and Procedural Reforms: The Do-Nothing 109th Congress Does Nothing about Reforming Itself

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The deluge of news reports detailing influence peddling and other shady dealings by members of Congress and lobbyists created a reform atmosphere in Congress late 2005 that virtually disappeared a year later. However, by September 2006 voters were outraged by the Mark Foley page scandal and the allegations that the House GOP leadership had averted its responsibility to stop Foley's advances toward male teenage pages. In exit polls for the 2006 election, 74 percent of voters said corruption was very or extremely important in their decision.¹ Corruption became a national issue and the Democrats promised to "drain the swamp" and make Washington more open, more ethical, and more civilized.

The story of reform began in earnest with the crimes of lobbyist Jack Abramoff and three former congressional staffers. They were central figures in the lobbying scandal which triggered efforts to reform lobbying law and ethics on the Hill. After the miscreants struck plea deals in January 2006, they implicated Rep. Bob Ney (R-Ohio), who had helped them on legislative issues in exchange for things of value in mid-October 2006. Abramoff had paid for two golf outings to Scotland secretly using client funds that drew considerable scrutiny — one involving Ney, the other involving former House Majority Leader Tom DeLay (R-Texas). Burdened by the additional pressure of a state money-laundering case in Texas, DeLay gave up his leadership position in September 2005 and subsequently resigned from the House. Ney gave up his House Administration Committee chairmanship January 15, and later announced that he decided to retire at the end of the 109th Congress rather than continue what had become a difficult reelection bid. He pleaded guilty in October 2006 to accepting things of value for official acts. Rep. Randy "Duke" Cunningham (R-Calif.) also resigned after pleading guilty to tax evasion and accepting \$2.4 million in bribes in exchange for earmarks on the House Appropriations Committee. Federal prosecutors also found a \$90,000 payoff in the freezer of Rep. William Jefferson (D-La.) in a Department of Justice probe of his relationship to telecommunications deals in Africa and elsewhere.

These lobbying scandals generated public outrage and eventually became potent 2006 election issues (surprisingly after they adjourned to campaign). The Senate and House responded by holding hearings and passing two comprehensive lobbying reform bills in early 2006, S. 2349, Legislative Transparency and

Accountability Act of 2006 and H.R. 4975, Lobbying Accountability and Transparency Act of 2006.² However, in the end the Senate and House could not or would not resolve differences between the two reform bills in conference before recessing to campaign in the 2006 midterm election.

The two failed reform bills included almost seventy additions and revisions to lobbying laws, campaign finance laws, congressional ethics rules, and congressional procedural reforms. The Senate and House bills included a wide mix of reforms. The most significant addressed earmarking, “revolving door” and post-member employment, member negotiating prospective employment, expansion of the “cooling off” employment period for members and staff, limited access to House floor and gym by former members who are lobbyists, gifts from lobbyists, campaign contribution reporting, leadership PACs, privately paid congressional travel, campaign finance, and increased penalties for lobby disclosure violations. Other provisions called for restriction of out-of-scope matters in conference reports, disclosure of holds on nominations and bills, improved lobbying transparency, timing and disclosure of lobbying reports, new penalties for non-compliance by lobbyists, new rules for coalitions and associations who lobby, rules for paid grassroots lobbying, revision of the Foreign Agents Registration Act, and new audits and oversight of lobbying reports by the General Accountability Office. There were also recommendations for regular publication of an ethics manual; ethics training for members, staff and lobbyists; restrictions on 527 organizations; creation of a Study Commission to Strengthen Confidence in Congress; and other lobbying, ethics, legislative procedural, and campaign finance reforms.

The Senate voted overwhelmingly in March 2006 to pass S. 2349 that would ban gifts from lobbyists, require more frequent disclosure of lobbying activity, and restrict the practice of secret “holds” on Senate bills. It also would double to two years the “cooling off” period that keeps senators and their top aides from lobbying their colleagues after leaving the Senate. All bills, including authorizations, appropriations, and tax measures, would have had to include a list of earmarks and name the member who requested each one.

The House followed the Senate in May with H.R. 4975 that passed by a narrow, four-vote margin. Many opponents said the bill would do so little that it would be better to defeat it and start over. The bill did not deal with procedural problems pushed by the Democrats. The bill originally would have banned privately funded travel for the rest of the year, but Majority Leader John A. Boehner (R-Ohio), replaced the ban with a process to allow the ethics committee to approve trips after June 15. The leadership package also included language calling for disclosure of members who inserted earmarks in appropriations bills, as well as H.R. 513 that would require independent 527 organizations to register with and report to the Federal Election Commission (FEC), effectively barring those groups from receiving large, unlimited “soft money” contributions. Senate Majority Leader Bill Frist (R-Tenn.) said the 527 provision could not pass in the Senate, stalling and then dooming real reform. Senator Susan Collins (R-Maine), chairman of the Senate Homeland Security and Government Affairs Committee, which had partial jurisdiction over lobbying reform legislation concluded, “Initially, I worried that Congress would do this bill too quickly and that it might not be as well-thought-out as it needed to be. That fear seems ludicrous now.”³

If passed and enforced, the reforms would have made major changes in lobbying, campaigns, and Congress. However, in the end only a special rule limiting access to the House floor and the House gym by former members who had become registered lobbyists and a watered down earmark reform was passed by the House. The clamoring for major reform ended in minor and meaningless symbolic change in the House.

Nevertheless some progress was made by putting these two important bills before the House and Senate. Perhaps after the 2006 election, members will pass real reform. Three of the most important opportunities for significant reform were enforcement of existing rules and codes of ethics, reducing the number of earmarks and making them more transparent, and improving congressional procedures.

Enforcement of Ethics

Congress has the right to police itself.⁴ At the heart of this current ethical collapse is the unfortunate reality that Congress has failed to do so. Ethical violations have often made front-page news, but the House Committee on Standards of Official Conduct, with jurisdiction over ethical matters, seems not even to have met until October 2006. Although the House ethics committee announced an investigation of Representative Cunningham (pleaded guilty to several felonies), Representative Ney (pleaded guilty to several felonies), and Representative Jefferson (under DOJ investigation), they have held no hearings or have not published results of their investigation. Review of this committee's calendar and its counterpart in the Senate coupled the paucity of actions taken shows no response to the scandal from mid-2005 and throughout 2006. Moreover, the House ethics committee's October hearings were really forced upon them as the House faced its greatest scandal, the revelation of Congressman Mark Foley's sexually suggestive emails to underage House pages.

Congress has been grossly deficient in its investigation of these violations and in its enforcement of its own rules. Reformers have called for an independent ethics body, office, or commission. The invisibility and incompetence of the Senate Select Committee on Ethics and the House Committee on Standards of Official Conduct throughout this period seems even to have inspired several members of Congress to recommend the creation of an independent ethics body to investigate violations of the rules of the Congress and lobbying law. However, with the prospect of a group overseeing them through an independent Office of Public Integrity or Ethics Commission, the reform was overwhelmingly rejected in committee and amendments killed on the floor of the Senate.

Earmarks

The recent ballooning of "earmarks" in appropriations, authorizations, and tax legislation was a major development, covered widely by the press and of interest and then of concern to the public. Earmarks are narrow provisions of law that are inserted secretly into legislation without public debate, notice or attribution. Earmarks may well be the most offensive legislative manipulation, and possibly the most egregious of all legislative misbehavior by Members of Congress. The number of earmarks in appropriations bills has increased substantially, from the hundreds in the 1970s to 4,126 in 1994 to 12,852 in 2006. The value of earmarks as a percentage of total discretionary spending increased from 3.5% in 1994 to 4.5% in 2006, even as the deficit increased and the total discretionary spending and controllability of the budget decreased. The absolute value of earmarks has increased from \$26 billion to \$64 billion. Members of both parties participated in the growth of earmarks with 60% going to Republicans and 40% going to Democrats. The criminal conviction of Rep. Duke Cunningham was built on an exchange of earmarks for personal cash and in-kind payments. Earmarks also have been associated with campaign contributions and government contracts.

The increase of earmarks is one of the most important reasons why public trust in Congress has dropped dramatically in recent years.

Several measures for reforming the earmarking process were included in Senate lobbying and ethics reform proposals. S. 2261, introduced by Senator Barack Obama (D-Ill.), and S. 2265, sponsored by Senator John McCain (R-Ariz.), proposed to define an earmark as an appropriation that is restricted to an "identifiable person, program, project, entity, or jurisdiction" in a manner that "discriminates against other persons, programs, projects, entities, or jurisdictions similarly situated that would be eligible but for the restriction."⁵ S. 2349, sponsored by Senator Trent Lott (R-Miss.), which covered earmarks in appropriations, authorization, and revenue bills, is the compromise measure that passed the Senate on March 29, 2006. Its companion House legislation, H.R. 4975, sponsored by Rep. David Dreier (R-Calif.), passed the House on May 3, 2006. The bills are currently in conference committee. While the bills do not propose restrictions as

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stringent as those outlined in the Obama and McCain bills, both attempt to bring some small measure of transparency to the earmarking process. Both require the identification of earmark sponsors.⁶ However, H.R. 4975 covers only earmarks in general appropriations bills, not authorization and tax legislation. These less than valiant attempts resulted in weakened earmark reforms that passed the House in August 2006 and then failed entirely when the House and Senate did not hold their conference.

Congressional Procedural Reforms

The job performance of the Congress has disappointed the American people. The number of days that the 109th Congress has spent in session is the lowest since the end of World War II. The number of committee and subcommittee meetings is likewise at post-War low. Although the number of bills passed is an imperfect indicator, this Congress's numerically measured output is the second lowest since 1947.⁷

The Congress also has failed to complete its basic homework, the required annual appropriations that fund the federal government. Over the last seven years, there have been, on average, almost eight continuing resolutions in each year. Barely one subcommittee bill per year has passed on time. Large numbers of stop-gap continuing resolutions have been needed just to keep the government operating. And in an increasing number of instances, the appropriations process has ended with massive, unwieldy omnibus appropriations bills that fund multiple agencies. The continuing resolutions and omnibus bills are magnets for extraneous provisions that provide inefficient and unexamined spending – including the notorious “earmarks”, discussed above.

Along with Congress not policing itself and the increase of earmarks, procedural changes in Congress have undermined the legislative process. There have been procedural abuses in the House, Senate, the conference process, oversight, and with continuing resolutions. Many inside and out of Congress have pushed for reforms to solve these problems.⁸

Abuses in the House

Closed Rules. The use of closed rules that restrict the right of the minority to offer amendments has steadily increased since the 103rd Congress. In that Congress (1993-94), there were 49 open rules and 18 closed rules. In the 108th Congress (2003-04), there were 28 open rules and 36 closed rules. The increase in the number of closed and restrictive rules has been steady and momentous.⁹

Suspensions of the Rules. The Congressional Research Service documents an increasing number of bills considered under suspension of the rules. Suspension of the rules had been used primarily to expedite consideration of non-controversial legislation. In practice today, suspensions are employed to limit debate on substantive bills. Between the 104th and 108th Congresses, the number of bills considered under suspension of the rules has more than doubled, from about 400 in the 104th Congress to more than 900 in the 108th.

Extended Roll Calls. Under the House Rules, roll call votes are to be open for 15 minutes. However, on an increasing number of occasions involving controversial votes, the House leadership has held roll calls open much longer to provide time to strong-arm members into changing their minds. The most egregious and notorious misuse of an extended roll call vote occurred when the House leadership left the vote on the Medicare prescription drug bill open for two hours and 53 minutes, during which time enough nays were changed to yeas by the tactics of the House leadership to pass the bill. Almost all close votes on controversial bills in recent years have been left open.

Self-Executing Rules. The House leadership has also used the “self-executing rule” to rewrite substantive legislation in the Rules Committee. The self-executing rule substitutes a new bill for the bill that was reported out of the committee of jurisdiction to the Rules Committee, or adds some significant amendment to that bill. Material in the new bill or amendment may or might not have been subjected to hearings and debate, but even when it has; it does not represent the originating committee's deliberations. When a self-

executing rule is also written as a closed rule, it can present the House with a take-it-or-leave-it vote on a bill that has not been subjected to hearings, or debated at all, and that did not pass (or even could not have passed) the committee with jurisdiction and expertise over the relevant subject matter.

“Emergency” Procedures. Fully 116 of 191 House rules in the 108th Congress were considered “emergency measures,” which means they could bypass House rules on scheduling, including requirements that work be conducted during regular business hours, with notice of meetings given 48 hours in advance, and relevant materials supplied to each member 24 hours in advance.¹⁰ In these cases, there is far too little time to read the legislation, especially in the weighty tomes that typify omnibus budget bills.

Reporting of Bills Outside of Normal Hours. In the 108th Congress, 76 of 191 bills were reported after 8:00 p.m. (21 of those were reported at 7:00 a.m. on the following day, although for legislative scheduling purposes it was still considered the previous day).¹¹ Often, those reports were followed by consideration of the bill very late at night (or early in the morning) or even on weekends. For example, the conference report on H.R. 1836, The Economic Growth and Tax Relief Reconciliation Act of 2001, was reported out of the Rules Committee to the full House at 5:17 a.m. on Saturday, May 26, 2001, and the bill was taken up by the House at about 6:51 that morning – giving members a maximum of one hour and 34 minutes, before 7:00 a.m. on a Saturday morning, to read the bill.

Abuses in the Senate

The Constitution envisions a Senate that provides deep consideration of important issues. That there are two senators to every state, regardless of population, forces each senator and the Senate as a body to seek consensus among disparate interests before legislation can become law. Passage of highly controversial legislation is very difficult in the Senate structure. Still, there are other recent impediments to deliberate considered action.

Filibusters. The regular order in the Senate calls for unlimited debate and amendment. Terminating debate requires 60 votes. When a determined and persistent minority engages in unlimited debate (a filibuster) to prevent a vote on legislation that they oppose, the motion for a vote of 60 senators to close debate, a cloture vote, is required. The number and duration of filibusters has increased significantly in recent years.¹²

Holds. Traditionally, senators have been allowed to stop, or “hold,” Senate confirmation of presidential nominations of individuals from their own states, on the premise that senators were particularly well situated to exercise judgment regarding their own constituents. A hold can extend indefinitely and the maker of the hold is anonymous. Over time, the scope of the hold has gradually broadened to all legislation. The prevalence of these holds has increased beyond any sound justification.

Abuses in the Conference Process

Conference committees are not fulfilling their function, that is, to reconcile the differences between House and Senate legislation so as to provide a compromise version that everyone can approve. Violations of sound past practices have included the failure to convene a bipartisan conference committee. Instead members from the majority side meet informally and in private to write the “compromise” legislation on their own. There is no notice of committee meetings, and members from the minority are not invited. One reason for this practice is that in the House, if a conference committee has failed to report its bill after a stated length of time, the minority may issue a “motion to instruct” the conferees, which is subject to a vote on the floor with a minimum time for debate. This potential embarrassment is avoided by simply not appointing the conference committee until after the majority members have completed their own bill informally.

Even if there is an appointed conference committee, it often meets only once for a “photo opportunity,” after which time the minority members are dismissed and the majority writes its own bill. The conference committee may or may not meet for a final session at which the majority’s version is approved without real debate or amendment.

The concept of “scope” in conference, under which the conference report must “split the difference” between the House and Senate bills, has been discarded. Recent conference reports have included provisions totally extraneous to both House and Senate bills, even sometimes provisions that have never been considered in hearings or debated in either chamber. In some notorious instances, the extraneous provisions have been added by staff – at uncertain direction – after the members voted final passage of the conference report.

Weakness of Congressional Oversight

It is the traditional responsibility of a Congress controlled by either party to exercise vigorous oversight of an administration of either party. An administration should want rigorous oversight, so that any failures in the management or direction of any federal agency can be identified and corrected early, before serious damage is done. There has been a long-term precipitous decline in congressional oversight activities as measured by the number of hearings, no matter whether there is unified or divided party government. Oversight failure reduces the necessary feedback for success or failure of public programs and policies. Failure to exercise rigorous oversight is a failure of a basic function of Congress, its responsibility of checks and balance with the executive branch.

Government by Continuing Resolution

With the failure of the appropriations process there has been increasing reliance on the continuing resolution (CR), a temporary, slapdash appropriations bill, to keep the affected agencies running. CRs generally provide funding at the same level as that of the prior fiscal year. The Congress resorts to CRs because it cannot make the essential decisions about many agencies’ programs and funding. The proliferation of CRs may be in some part due to certain members’ belief that CRs prevent spending increases. While that may be in a temporary sense, its long term costs can be very high. Under a CR, there is none of the essential weighing of priorities that is necessary for rational government.

A CR is really an absence of decisions. Agency managers are put on hold. Any plans for reform or restructuring of programs must be postponed. The resulting unpredictable funding flows over the course of a fiscal year require the postponement of important personnel and investment decisions. Under these circumstances, it is difficult for federal program managers to do their jobs effectively.

Finally, the same failure to govern that breeds CRs also begets the absence of oversight. Once it becomes clear that there will be no individual appropriations bill for an agency, it becomes far too easy not to hold the detailed hearings about agency performance that are necessary to ensure that tax dollars are spent wisely.

Conclusion

There has been dramatic growth and sophistication of the Washington lobbying world in the last thirty years. This explosion of the lobbying business is a direct response to the increased complexity of public problems with resulting government growth, and is nurtured by other changes in the way companies and other organized interests have responded to changes in issue campaigns in the media, changes in law and regulations, and increased competition in the lobbying business. Growth of government has created a new supply of laws, hearings, investigations, regulations, and other proposals requiring some type of response or proactive advocacy. The Washington lobbying community has responded to these demands with new

organizations, techniques, and tactics of public advocacy. The increase in abuses in congressional procedure documented in this analysis has been directly linked to this growth and the competition and diversification of the lobbying world. The revolving door of staff and members of Congress leaving the Hill has heavily influenced the structure of the lobbying industry and the tactics used by lobbyists. Inside knowledge of the use and abuse of legislative procedure (e.g. dramatic growth in the use of earmarks, increase in the use of closed rules, manipulation of conference committees) is well known by former members of Congress and staff who become lobbyists. It is a valuable commodity to lobbyists' clients. There has become a seamless web between legislators and lobbyists in developing and using the extraordinary procedural devices documented in the analysis.

Because of their close relationship with the new Washington lobbying community, House and Senate leaders may have misread the wishes for change in the way Washington works by their rank and file and by the voters. Lobbyists certainly did not call for change. Most demands for reform came from lawmakers with difficult reelection fights and from voters who are upset with the reports of abuses in Congress. Powerful majority party members from safe districts or who were not up for reelection in the Senate in 2006 did not want to change the way Congress and lobbying works. They had nothing to lose. They did not have to worry about angry voters who might turn them out of office. The sense of urgency disappeared as the reforms went through the Senate and House committee process and floor debate. The last statement on the reform legislation from Speaker Dennis Hastert was on July 9, 2006, "This is a complex bill and it takes time to accomplish, but the fact that both the House and Senate passed their own versions shows the seriousness with which Congress is addressing this issue."¹³

After the 2006 election the House and Senate leadership received a strong mandate or an absolute demand from the voters to reform lobbying, ethics, procedures, and campaign finance. There is nothing like a "wave" election (like 1974 and 1994) with significant incumbent losses to send a message to Congress. Congress has been moved a clear reform mandate from the 2006 voters. Reform is a top priority of the 110th Congress.¹⁴

Notes

1. "The Questions That Defined the Election," *The Washington Post*, November 12, 2006, A6.
2. See <http://spa.american.edu/ccps/> for Senate and House ethics committee testimony and a side-by-side comparison of current lobbying and campaign finance law and the provisions of the House and Senate bills. Also see CRS Report for Congress, *Lobbying, Ethics, and Related Procedural Reforms: Comparison of Current Provisions of S. 2349 and H.R. 4975*, May 9, 2006. Also see Erik Schickler, "Repairing the 'Broken Branch': Prospects for reform in the 110th Congress," a paper prepared for presentation at the Woodrow Wilson International Center for Scholars, roundtable on "Can Congressional Reform Help End Policy Gridlock?", November 13, 2006, Washington, DC.
3. Jeffrey H. Birnbaum and Jim VandeHei, "Call for Lobbying Changes Is a Fading Cry, Lawmakers Say," *Washington Post*, June 26, 2006, A03.
4. This is based on the provision of the Constitution conferring on the Congress the power to punish its own members for disorderly behavior (Article 1, Section 5, Clause 2; in full, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."). The ultimate breadth of this power is subject to debate; a legal memorandum on this question is included in this statement as an appendix.
5. Sandy Streeter, *Comparison of Selected Senate Earmark Reform Proposals*, CRS Report for Congress, March 6, 2006.
6. Sandy Streeter, *Earmark Reform Proposals: Analysis of the Latest Versions of S. 2349 and H.R. 4975*, CRS Report for Congress, May 12, 2006.

7. Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (New York: Oxford University Press, 2006).

8. These problems have been documented in a report issued by the House Committee on Rules Minority Staff in March 2005 report, *Broken Promises: The Death of Deliberative Democracy*, CRS reports, and in Thomas Mann and Norman Ornstein's *The Broken Branch* (Oxford University Press, 2006).

9. *Broken Promises: The Death of Deliberative Democracy*, report of the House Committee on Rules Minority Staff, March 8, 2005. These rules cover non-conference, non-procedural legislation

10. House Rules Minority Report, 33-34.

11. House Rules Minority Report, 35.

12. Sarah Binder, Eric Lawrence, and Steven Smith tracked the use of filibusters showing a significant increase in incidence over time from 1917 to 1996. They use a variety of data sources, including a Congressional Research Service report and the *Congressional Quarterly Almanac*.

13. Andy Sullivan, "Reform Bill Stalled in Congress," Reuters, July 9, 2006.

14. See <http://democraticleader.house.gov/pdf/houseprinciples.pdf> for the House Democratic Party reform principles as of October 27, 2006. The specific reforms for the 110th Congress include enacting portions of the Honest Leadership and open Government Act of 2006, which Speaker-elect Pelosi has promised to be her act as Speaker. They include:

- Ban on gifts from lobbyists
- Ban on all privately funded travel
- Ban on lobbyists attending or participating in congressional trips
- Disclosure of grassroots lobbying
- Increased disclosure in government contracting and a tightening of government contracting laws
- Extend ban on lobbying by former members to two years
- Extend post-employment ban to senior congressional and executive branch staff
- Enact disclosure requirements for House members and staff negotiating for jobs in the private sector.



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