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Is the Broken Branch on the Mend? An Early Report on the 110th Congress

Sarah A. Binder, Thomas E. Mann and Molly Reynolds

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The failure of Congress to fulfill its responsibilities as the first branch of government – to engage in responsible and deliberative lawmaking, to police the ethical behavior of its members, and to check and balance the executive – contributed to the demise of the Republican majority in last November’s midterm election. The argument and evidence that Congress had become “the broken branch” was spelled out in a book with that title, by Thomas E. Mann and Norman J. Ornstein and published the summer before the 2006 election. How well is Congress performing under its new Democratic leadership? This is the first in a series of reports by Brookings’s Mending the Broken Branch Project that seeks to track and assess that performance.

After its first seven months in power, the Democratic-led Congress adjourned for its August recess with a flurry of legislative activity aimed in part at bolstering its dismal public standing. Democrats touted these accomplishments while Republicans complained of autocratic leadership. Across town, President George W. Bush criticized Democrats’ priorities, while his aides hinted at vetoes of measures to expand children’s health insurance and to reform energy and student loan programs.

How should the performance of the Democratic Congress be graded? If public approval of Congress is the gold standard, the new majority has fallen well short of its ambitions. A mid-August Gallup poll revealed that only 18 percent of Americans approved of the job Congress was doing, matching Gallup’s lowest recorded rating (from March 1992) of the first branch of government. But this measure largely reflects a broader public discontent with the direction of the country, the war in Iraq, the state of the economy and the performance of the president. Democrats correctly point to polling evidence that while Congress as an institution gets low marks, the public also rates the Democrats substantially

higher than the Republicans on almost every important public issue and prefers to maintain the current majority in power.

A more promising way to evaluate the performance of Congress is to assess the extent to which the new majority has delivered on its promises. Democrats took up their gavels in January pledging to change the course of the war in Iraq, advance a targeted list of domestic priorities, hold the administration accountable through active oversight, end the so-called culture of corruption on Capitol Hill, restore a full work schedule and civility between the parties, and return to regular order in the legislative process. Now Democrats face criticism on the right and left. Conservatives charge a “do-nothing Congress,” while liberals lament Congress’s inability to curtail American military involvement in Iraq and its sluggish performance on priorities at home.

Deep ideological differences between the parties, narrow majorities in the House and Senate, a minority party eager to exploit its procedural rights and a Republican president in the White House have clearly frustrated Democratic ambitions to end the war in Iraq and to move more aggressively on health care, energy and other domestic priorities. Even with the wind from the midterm elections at their backs, Democrats have discovered that enacting meaningful policy change while promoting full and fair deliberation is easier to promise than to produce. At the same time, the 110th Congress in some respects bears little resemblance to its predecessor. Elections do make a difference.

Legislative Activity

The chart below provides an initial quantitative assessment of the new Congress before its first August recess, compared with its immediate predecessor and with the Republican Congress that took office after the 1994 election over the same interval. Both

new majorities in 1995 and 2007 began their tenures by working harder in Washington. Time in session, committee meetings, roll call votes and substantive measures passed increased relative to the previous Congress. The level of energy and activity on Capitol Hill has picked up markedly in 2007 as it did in 1995.

Congressional oversight of the executive branch has intensified under Democratic rule, especially in the House, following years of inattention and deference by their Republican predecessors under unified government. Serious contesting of the executive branch, mostly through oversight, may be the most notable achievement of the 110th Congress. In contrast, congressional oversight increased modestly in the Senate but not at all in the House during the first seven months of the 104th Congress, led by a new Republican majority.

Legislative Achievements

In the most recent congresses, with the permanent campaign fully entrenched, the number of purely symbolic measures has jumped dramatically. Overall, however, the number of bills signed into law by the president declined from 1993 to 1995 and again from 2005 to 2007. This is not surprising given the shift from unified to divided party government in each instance.

The new Democratic Congress has fared less successfully on major legislation enacted and signed into law before the August recess than did the Republican Congress that preceded it in 2005, but far better than the Republican Congress that took up the gavel in 1995. Democrats' accomplishments this year have included implementation of the 9-11 Commission recommendations, lobbying and ethics reform, a temporary expansion in the administration's authority to wiretap suspected terrorists with limited court review, an

increase in the minimum wage, reform of foreign investment rules, a competitiveness package encouraging scientific research and innovation and a number of major initiatives and new priorities embedded in its continuing and supplemental spending bills. Although immigration reform foundered in the Senate, Congress has made significant headway on many of its domestic priorities, including energy policy, children's health insurance, college student loans, Head Start, drug safety and a farm bill. Such efforts remain works in progress, with action awaited in the Senate or conference and several presidential vetoes threatened for this fall. How many of these measures are signed into law by the end of the first session of the 110th Congress will determine the legislative productivity of the new Democratic majority.

In comparison, although 2005 was a difficult year politically for President Bush with the collapse of his Social Security reform plan, the aftermath of Hurricane Katrina and the growing opposition to the war in Iraq, the Republican Congress managed to enact new laws on class-action lawsuits, bankruptcy, trade, energy and transportation before its August recess. Still, the Democrats' legislative harvest has been bountiful compared with their Republican counterparts in 1995, who found their "Contract with America" stymied by opposition from the Senate and the president.

Because public opposition to the war in Iraq was the most important factor in the Democratic victory in the 2006 midterm election, it is reasonable to ask how the Democratic majority has done in leveraging that opposition to alter the course of the war. Anti-war activists had high hopes, however naïve, of ending in short order American military involvement. They have been deeply disappointed in the results. To be sure, the 110th Congress has been much more active than its predecessors in overseeing and critiquing the conduct of the war and in moving resolutions to alter policy to the House and Senate floors.

Some of these activities have led the administration to adjust, if not alter, its actions relating the war. Democratic unity on key Iraq votes has increased over the last seven months but support among Republicans has been meager, even though many in the GOP have been concerned about the substance and politics of the president's policy. Little beyond benchmarks and reporting requirements has found its way into law.

The test of the Democratic strategy to ratchet up pressure on their Republican colleagues through aggressive oversight and a series of public votes will come this fall, with reports to Congress on the troop "surge" and key votes on fiscal year 2008 funding of the war.

Legislative Process

Reining In Earmarks

The new Democratic majority promised a return to fiscal responsibility, to be achieved by reinstating pay-as-you-go budget rules and by reforming the use of earmarks in the appropriations process. The former has been codified in both House and Senate rules and largely followed. Reining in earmarks has proven much tougher.

There is no single definition of an earmark, as House and Senate rules, the Congressional Research Service, legislators and the press often use the term to refer to different types of targeted funding. Generally, earmarks are provisions or report language inserted into House or Senate bills at the direction of a legislator that authorize or recommend a specific amount of spending authority targeted to a specific state, locality, congressional district or entity, rather than doing so through a formula or competitive award. Appropriations bills are the most common vehicle for shepherding earmarks through the legislative process. Authorization bills, such as highway spending packages, also represent a

common, though less heralded, source of earmarks. The latest highway bill—enacted in 2005—included \$23 billion in earmarked spending.

Earmarks have grown exponentially over the past decade and a half. In fiscal year 1994, there were 4,155 earmarks totaling \$25.7 billion in enacted appropriations bills. By fiscal year 2006, there were 13,014 totaling \$53.5 billion.¹

One longtime observer of spending practices has noted that lawmakers have also changed the distribution of earmarks as their overall volume has surged. In the 1980s, earmarks were often reserved as rewards for members who had served for years and had risen to powerful positions on key committees; now earmarks are distributed more broadly across rank-and-file legislators to bolster members' electoral security in almost all congressional districts. Scholars who have examined the politics of earmarking have also shown that recent majorities are now doling out significantly higher earmarked sums to members of the majority party, turning earmarks into a tool for maintaining the majority.

As the 110th Congress opened in January, both President Bush and House Appropriations Committee Chairman David R. Obey, D-Wis., promised to reduce the cost of earmarks by half. In its opening-day package the House agreed to require disclosure of earmarks, their sponsors and amounts in any bill or conference report containing them. The Senate has gone further in the lobbying and ethics reform bill awaiting the president's signature, requiring not only disclosure but also publication of such information on a congressional website in a searchable format for at least 48 hours before the underlying measure is voted on. The Senate version also allows for a point of order to be raised against "airdropped" earmarks – those added during a conference committee – which can only be waived by 60 votes. The House rule does not address airdropped earmarks, but points of order against such earmarks will be permitted on the House floor for the rest of the 110th

Congress. Finally, the new Senate rules can be waived by the joint agreement of Senate party leaders under some circumstances.

How, then, are the two chambers performing under these new rules and in the face of the earmark-reduction pledges from both sides of the aisle? Preliminary data are encouraging. The House-passed version of the Commerce-Justice-Science appropriations bill for fiscal year 2008, for example, contains 1,137 earmarks totaling \$331 million, while the final version for fiscal year 2006 included 2,394 equaling \$13.6 billion. Similarly, the current Interior appropriations bill contains 321 earmarks costing \$329 million; the fiscal year 2006 version incorporated 825 at a cost of \$895 million.

These initial numbers are promising, but much work remains. For both houses, the format of the disclosed information is cumbersome and complicated, making substantive analysis difficult. Although House rules state that each bill must contain “a list of congressional earmarks...and the name of any Member, Delegate or Resident Commissioner”² who requests an earmark, the rules do not require disclosure of the earmark’s cost in that same list. Only one of the pending House spending bills includes such dollar amounts. Senate appropriations bills include earmark amounts alongside information on the project’s name and sponsor, but the information is dispersed throughout the appropriations report, rather than in a single easily located list.

Moreover, although the transparency requirements apply to both appropriations and authorizing bills, recent action on a bill to reauthorize children’s health insurance programs suggests that the Democratic majority has not completely weaned itself from hidden earmarks. *The New York Times*, for example, recently highlighted a set of provisions in the bill that function substantively as earmarks, yet are not disclosed.³ The House report certifies that the bill does not contain earmarks or targeted tax benefits, but the *Times* located

over three-dozen provisions that would direct millions of dollars to specific hospitals through their Medicare payments. Granted, the hospitals are not specifically named, and thus the earmarks might not run afoul of the new rules. Still, it would seem that there is significant progress to be made on the goal of changing the earmark culture in Congress.

Returning to Regular Order

Change is much less evident in the ways and means of lawmaking in both chambers. Democratic promises to restore civility and return to regular order have foundered on the shoals of narrow majorities, bitter partisanship and ideological polarization.

In the House, the process for debating a bill on the floor—how long to dedicate to debate, how many amendments can be offered on the floor, how many and what types of waivers of violated rules to allow for each bill—is recommended by the House Rules Committee and must be adopted as a “special rule” by majority vote on the chamber floor before a bill is brought to the floor. Because the Rules Committee is stacked heavily in favor of the majority party, that party is typically faced with the choice of promoting deliberation or clamping down on alternatives. Thus, to assess House Democrats’ performance in delivering on their promise to return to regular order, we can observe the balance of open (promoting deliberation) and modified closed or closed (limiting participation) special rules adopted in the House.

When faced with the choice of promoting deliberation or protecting their favored outcomes, Democrats in the 110th Congress have almost routinely chosen the latter. In the first seven months of 2007, Democrats approved 19 open or modified open rules, compared with 50 closed or otherwise structured rules. Similarly, in 1995, after initially loosening the process with more open rules, the new House Republican leadership reverted to a tighter process with little room for minority participation soon thereafter. By 2005, the House floor

was nailed as tight as a coffin. In 2007, Democrats' good intentions to improve relations between the parties and restore a genuinely deliberative process quickly gave way to the higher priority of delivering on their legislative promises in the face of a Republican minority determined to deny them a record of achievement. The number of closed and self-executing rules and suspensions has increased, the conference process has been short-circuited on a number of occasions (including important legislation on foreign investment rules, wiretapping, and lobbying and ethics reform), and waivers have been granted for layover requirements for rules and conference reports. The atmosphere in the House is toxic, as evidenced by the near meltdown of the House over the leadership's clumsy handling of a procedural vote on an agriculture appropriations bill.

Experience in the House with the motion to recommit is emblematic of the deeply strained relations between the parties. Traditionally, the motion to recommit with instructions has afforded the minority an opportunity to amend a bill before final passage. This is especially important when the House is operating under a rule that limits amendments. Near the end of their 40-year majority, Democrats increasingly denied Republicans an opportunity to add instructions to their motions to recommit, thus robbing the minority of their chance to amend the bill and leaving them only with the option of killing the measure. When the Republicans gained the majority in 1995, they pledged to restore the full motion. They did so, but later turned it into a sham by treating such motions as a procedural vote on which majority party members were whipped to oppose regardless of substance.

In 2007, the House Democratic leadership returned the motion to recommit to a free vote. Republicans not surprisingly seized this opportunity to offer and win a substantial number of such motions. Unfortunately, in most cases the substance of their

motions to recommit with instructions fell well short of serious efforts to amend the underlying legislation. Instead, they were often “gotcha” amendments with the sole purpose of embarrassing electorally vulnerable members of the majority party. Other times, Republicans used motions to recommit to return measures to committee to kill them, rather than to amend them on their way to a final vote. Not surprisingly, Democrats responded by warning that they might clamp down on such motions in the future. An unhealthy dynamic has been reinforced, with damaging consequences for relations between the parties and for the quality of deliberation in the House.

In the Senate, there is no rule allowing a majority to determine the nature of debate and amending activity when bills come to the floor. Instead, senators have the power of “extended debate.” Unless the Senate can muster sixty votes to cut off debate and thus to invoke cloture, debate continues. This means a minority of the chamber can block the majority from calling for a vote on a bill, amendment, conference report, or even on the motion to bring up a bill or to appoint conferees. With just 51 senators—including one who often votes with Republicans and one who has been sidelined for health reasons—Democrats have often been unable to muster sufficient votes to move the Senate along. The result has often been gridlock, as evidenced by the failure to vote on immigration reform, withdrawal of troops from Iraq and several other issues.

The key procedural issue dividing the parties in the Senate is whether the new Democratic leadership has too often exploited the cloture process and thereby undermined deliberative debate. Republicans charge that Democratic leader Harry Reid has overplayed the cloture card. They argue that Reid’s proclivity for filing cloture motions squelches debate and undermines consideration of important policy problems. Moreover, they contend that Democrats have tried to use cloture to force Republicans to cast votes on hot-

button issues like the removal of Attorney General Alberto Gonzales. Democrats place the blame on Republicans, arguing that filing for cloture is the only way to rein in Republican filibusters of the Democrats' agenda. Hogwash, retort Republicans. Democrats' reliance on cloture is simply a power grab.

Which side is right? Not surprisingly, the truth lies in between partisan extremes. Democrats are headed toward surpassing the all-time record for filing cloture motions currently held by Republicans, who filed 82 cloture motions in the entirety of the 104th Congress after gaining control of the Senate in the midterm elections of 1994. Under Reid's leadership, 54 cloture motions have been filed in the first seven months of 2007. Senators have been casting fewer and fewer recorded votes in recent years, meaning that cloture votes consume a growing proportion of the time spent voting in the Senate.

But Reid is not the first leader to rely on cloture to manage the Senate's agenda in the face of a minority unwilling to consent to voting on pending motions and measures. The accompanying figure compares the parties' use of cloture over more than thirty years in the Senate. The average number of cloture motions filed monthly has more than tripled since the 1970s. Thirty years ago, Democrats filed for cloture about once every other month. Democrats this year are on track to file for cloture on average twice a week. But relying on cloture is not only a tool of the Democrats. Before Reid took up the gavel, Republican majorities facing Democratic presidents since 1973 filed significantly more cloture motions per month than did Democratic majorities facing Republican presidents.

Lacking a cloture-proof majority and facing Republicans who are often unwilling to allow votes on Democratic proposals unless they are matched by votes on Republican alternatives, Democrats have little recourse but to file for cloture to move the Senate along. Both parties have resorted to parliamentary tactics outside the normal process, as Democrats

try to block consideration of Republican amendments and Republicans single-handedly place holds on measures and block formation of conference committees. As a result, partisan tempers have continued to flare in the Senate. Each side is suspicious of the other's intentions, and neither party has much incentive to de-escalate the procedural wars brewing on the chamber floor.

Conclusion

Is the broken branch on the mend? The public shows little appreciation for the performance of the new Democratic Congress in its first seven months in office. Job-approval ratings are very low, and are lower than they were for the last Republican Congress at the August recess. This reflects broad public discontent with the direction of the country and the war in Iraq but also displeasure with Congress for failing to reverse course on Iraq and for continuing the bitter partisan warfare that has characterized recent policy-making.

As Democrats are now learning, congressional majorities face an uphill battle legislating without control of the White House, even when elections provide a powerful boost to their fortunes on Capitol Hill. Divided-party government can create conditions for legislative cooperation between the branches, as seen during the Reagan and Clinton administrations. But this president is more inclined to pick a fight than to negotiate a deal with the opposition, further limiting the Democrats' ability to deliver on their policy agenda.

Nonetheless, the policy agenda in Congress has clearly changed as a result of the election, and the legislative harvest of the new majority before the August recess was by no means inconsequential. Many additional measures are in the pipeline, with their fate to be determined in the fall. Iraq, of course, remains the great uncertainty.

In terms of Congress's procedural record, there are positive steps in both chambers' efforts to rein in out-of-control earmarking and to force greater disclosure of lobbyists' activities. These are limited, but important, steps in rebuilding Congress's reputation and legitimacy in the public's eye. Moreover, the new Democratic Congress should receive high marks for reinvigorating the practice of tough oversight of the administration and its actions in the war on terror, as well as at home in the Department of Justice and within the White House itself. Such efforts are probably motivated as much by partisan competition as by institutional imperative; we would need to observe Democratic congressional oversight of a Democratic administration to truly know whether the broken branch is on the mend.

Despite these positive steps, Democrats—particularly in the House—have failed in their promises to return the House to regular order. So long as strict partisan majorities limit the participatory rights of the Republican minority, much remains to be improved. Across the Capitol, Democrats have aggressively attempted to control the Senate's agenda through the use of cloture and over-reliance on other chamber rules and practices. But, we would hasten to observe, Republicans' willingness to exploit the Senate's lax rules of debate and amending power leave Democrats with little other choice if they hope to move their policy priorities through Congress and to the president's desk.

Congress continues to be shaped by its broad political environment, one characterized by ideological polarization, intense partisanship and narrow majorities. These forces make mending the broken branch a difficult and long-term endeavor.

¹ These figures are from the Congressional Research Service, using their definition of earmarks and are reported in current dollars.

² Rules of the House of Representatives, Rule XXI, Clause 9.

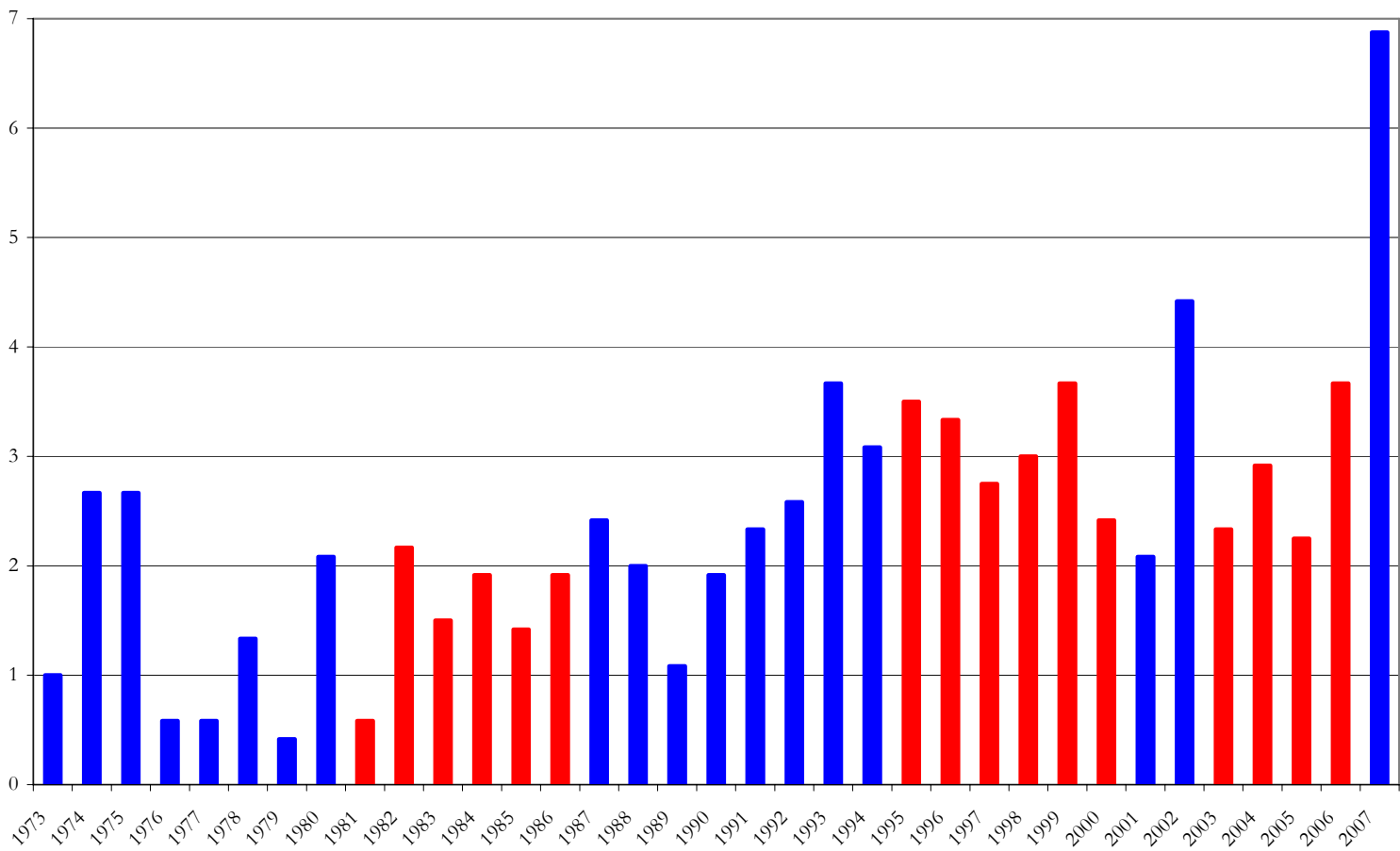
³ Robert Pear, "Select Hospitals Reap a Windfall Under Child Bill," *New York Times*, August 12, 2007, p. A1.

House	103 rd Congress (1993)	104 th Congress (1995)	109 th Congress (2005)	110 th Congress (2007)
<i>Time In Session</i>				
Legislative Days	97	109	87	111
Hours	620	999	664	1032
<i>Roll Call Votes</i>	410	635	453	846
<i>Measures Passed</i>				
Substantive	48	67	52	90
Routine	117	63	88	207
Symbolic	39	7	100	263
<i>Oversight Hearings</i>				
Full Committee and Subcommittee	473	438	393	605
Appropriations	283	295	123	204
Iraq			63	133
<i>Markups</i>	233	255	136	185
<i>Rules</i>				
Open	11 (4 on appropriations bills)	32 (12 on appropriations bills)	12 (11 on appropriations bills)	12 (11 on appropriations bills)
Modified Open	3	15	0	7
Structured	10	8	19	25
Modified Closed	8	7	8	4
Closed	4	3	14	21
Self-Executing	10	3	9	22
<i>Suspensions</i>	113	29	217	456
<i>Motions to Recommit</i>				
Total Offered	17	25	24	59
Successful	0	1	0	15
<i>Waivers of Layover Requirements</i>				
Expedited Rules	4	0	5	2
Waivers on Conference Reports	7	3	6	6

Senate	103 rd Congress (1993)	104 th Congress (1995)	109 th Congress (2005)	110 th Congress (2007)
<i>Time In Session</i>				
Legislative Days	104	134	101	120
Hours	780	1229	769	935
<i>Roll Call Votes</i>	247	396	220	310
<i>Measures Passed</i>				
Substantive	30	37	25	32
Routine	124	57	61	82
Symbolic	65	45	173	235
<i>Oversight Hearings</i>				
Full Committee and Subcommittee	189	259	219	308
Appropriations	122	111	70	81
Iraq			57	62
<i>Markups</i>	84	94	93	103
<i>Cloture Motions</i>				
Successful	3	3	11	22
Failed	9	15	5	19
Withdrawn	6	11	4	10
No Action Taken	3	5	0	3

Congress	103 rd Congress (1993)	104 th Congress (1995)	109 th Congress (2005)	110 th Congress (2007)
<i>Public Laws</i>				
Signed by President	81	28	60	55
Vetoed	0	2	0	2
Vetoed Overridden	0	0	0	0
<i>Earmarks in Appropriations Bills</i>				
Number	4155	2499	13,014	
Total Cost	\$25.7 billion	\$37.4 billion	\$53.5 billion	
<i>Approval Ratings</i>				
Pre-Election	18%	23%	40%	26%
Beginning of Congress	27%	33%	43%	35%
August Recess	23%	30%	36%	18%

Average Number of Cloture Motions Filed per Month, 1973-present



Glossary

Measures Passed: Substantive measures are those that make notable changes to policy or that pertain to high-profile issues. (In the 109th Congress, these included the Terri Schiavo matter; in the 110th, ethics reforms.) Routine measures concern non-controversial matters or make only small changes to existing policy. Symbolic measures are those without force or effect, like those honoring particular people or calling on a group to take a particular action.

Oversight Hearings: These include hearings that a committee calls oversight hearings (for example, “the committee concluded an oversight hearing to examine CAFE standards”); hearings held by oversight subcommittees; reauthorization hearings for specific federal programs; hearings on specific portions of the federal budget; and hearings that investigate an established problem or an existing program or policy.

Rules: The House Rules Committee determines which of five types of rules will set the conditions for the debate and amendment of a particular piece of legislation. An open rule allows any member to offer an amendment that complies with the standing rules of the House. A modified open rule requires amendments be pre-printed in the Congressional Record. A ‘structured’ rule allows three or more amendments to be considered; a modified closed rule allows only one or two. Closed rules prohibit amendments other than those recommended by the committee that sent the bill to the floor. Any type of rule on a bill may be self-executing, meaning that specific amendments can be included as part of it without needing to be voted on separately. Any type of rule on a bill may be self-executing, meaning

that specific amendments can be included as part of it without needing to be voted on separately.

Waivers of layover requirements: Layover requirements stipulate how long after a bill or conference agreement is reported the House must wait before beginning its deliberations. One waiver of these requirements is called an expedited procedure rule, and it allows legislation to be brought to the floor on the same day that the House Rules Committee approves the rule governing its debate and amendment process instead of waiting until the next legislative day. The second waives the requirement that a conference report cannot be considered by the House until the third business day after the report and joint explanatory statement have appeared in the Congressional Record.

Motions to Recommit: Under House rules, this motion allows those in opposition to a measure one final chance to obtain a recorded vote on their preferred course of action. A motion to recommit without instructions effectively kills the bill under consideration by requiring that it repeat all the steps in the committee consideration process and is not debatable. A motion to recommit with instructions (a more common course of action) sends the bill back to the committee that sent it to the floor, usually with language calling for the measure to be reported back immediately and giving these motions the functional equivalency of substantive amendments or substitutes.

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