

# Mending the Broken Branch



## Assessing the 110<sup>th</sup> Congress, Anticipating the 111<sup>th</sup>

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Barack Obama's triumphant presidential campaign in the 2008 election generated extraordinary interest and excitement in the United States and around the globe. Following on the heels of sweeping Democratic gains in 2006, this second Democratic victory was driven by a sharply negative referendum



© Reuters/Larry Downing - U.S. Speaker of the House Pelosi swears the members of the U.S. House of Representatives into office on the first day of the 110th Congress in Washington.

on an unpopular war and a ravaged economy, but also by a rejection of business as usual in public life: excessive partisanship, ideological rigidity, a constitutional system out of balance, a culture of corruption and administrative incompetence. Most importantly, the 2008 election outcomes heightened expectations for dramatic improvements in the conduct of American politics and governance and in the quality and timeliness of its public policy decisions. Meeting these public expectations poses a daunting challenge for the new president, especially with the opportunities provided by the crisis in the financial markets and the serious recession.

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The president cannot produce these results on his own; Congress must play a central role in the restoration of a healthy and productive democracy in America. Yet too often in recent years Congress has been the setting, if not entirely the source, of dysfunction. In the summer of 2006, two of us published *The Broken Branch*, which argued that Congress had failed to exercise its duties as the first branch of government – to engage in responsible and deliberative lawmaking, police the ethical behavior of its members, and check and balance the other branches. We traced the demise of Congress over nearly two decades, from the latter part of the forty-year Democratic House to the unified Republican government under President George W. Bush. This decline included a loss of institutional patriotism among its members, an abdication of constitutional responsibility vis-à-vis the executive, the demise of regular order (in committee, on the floor and in conference), and the consequent deterioration of the deliberative process – the signature comparative advantage of Congress as a legislative body. A fervent belief that noble and necessary legislative ends justified any political means abetted a culture of corruption, an explosion of earmarks, and a triumph of party and ideology over institution.

These developments had serious consequences for policy and governance. The absence of institutional regard among its leaders diminished Congress in the constitutional scheme and encouraged more unilateral and less responsible behavior by the executive. The failure of Congress to insist on more information from the executive translated into less effective congressional oversight of such crucially important matters as the war in Iraq and homeland security. The suspension of regular order in Congress created greater opportunities for parochial, special-interest provisions to be added to legislation out of public view and for poorly constructed laws to be enacted without proper vetting and correction. The failure to discern and make explicit the true costs of important policy initiatives – from tax cuts to the Medicare prescription drug benefit to the war in Iraq – made it impossible to do a realistic cost-benefit analysis before they were approved. And the sharply partisan strategies and tactics embraced by the unified Republican government further poisoned public discourse and undercut public trust in the political system.

These patterns of dysfunctional behavior in Congress and the other branches of government are at least partly natural and understandable responses to powerful forces in the political and social environment. This is a strikingly partisan era characterized by two strong and ideologically polarized parties with consistently narrow margins in both houses of Congress. These features of the party system are evident among elected officials in government and within the electorate. They are



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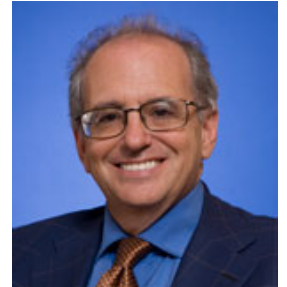


reinforced and strengthened by teams of aligned activists, interest groups, community organizations and media outlets. This environment encourages an intense struggle for control of government and an unabashed manipulation of electoral and governing institutions to achieve political and policy goals.

Major change within Congress is, therefore, most likely to originate outside Congress. That argument was put to the test by American voters on Nov. 7, 2006. By deposing Republican majorities in the House and Senate in as decisive a midterm vote for change as one can imagine on our uncompetitive electoral terrain, an angry electorate created a necessary condition for revitalizing the first branch of government and restoring some semblance of balance among the central political institutions of American democracy.

Shortly after the midterm elections, we launched the “Mending the Broken Branch” project to track and assess the performance of Congress under its new Democratic majority. Although deep partisan differences, narrow majorities, the routine partisan use of the Senate filibuster and Republican George W. Bush in the White House were bound to limit what the Democratic majority could accomplish, Democratic leaders were in a position to deliver on some of their campaign promises relating to the operations of the Congress. Divided-party government was actually conducive to reviving congressional oversight of the executive. Democrats had the political incentive and ability to use committees in both chambers to scrutinize the performance of administration officials and the implementation of policies and programs. They could challenge what they considered unjustified assertions of executive power and excessive use of presidential signing statements. In the majoritarian House of Representatives, Democrats had leverage their Senate counterparts lacked; they could, with a simple majority, use chamber rules to toughen ethics standards and enforcement mechanisms. House and Senate Democratic leaders could put Congress back to work by setting a longer and more intensive schedule in Washington. And House Democratic leaders could loosen restrictions on minority participation in the legislative process and restore a serious deliberative role for standing and conference committees.

One year ago we issued a report evaluating the first session of the 110<sup>th</sup> Congress. We compiled statistics on how Congress spent its time; what it achieved; and how the legislative process operated relative to the 109<sup>th</sup> Congress under unified Republican government and to the more comparable situation of the 104<sup>th</sup> Congress following the 1994 election, when a new Republican majority in both houses took office under a Democratic president. This report extends our analysis to the full, two-year 110<sup>th</sup>



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Congress. The chart below assesses legislative activity, achievements and process for the four congresses that bracketed the 1994 and 2006 elections. A discussion of what these measures reveal about congressional performance is followed by a more extended treatment of whether and how Congress reasserted its rightful powers vis-à-vis the executive, efforts to counter the culture of corruption through ethics, earmarks and lobbying reform, and the effectiveness of Congress in anticipating and responding to the financial crisis of 2007 and 2008. We conclude by looking ahead to the 111<sup>th</sup> Congress and what it will take to overcome the shortcomings of the 110<sup>th</sup>, deliver on President-elect Barack Obama's promises regarding policy and process, and restore the responsibilities and comparative advantages of the first branch of government.

## Comparing the Two New Congressional Majorities

The most visible indicators of congressional performance – public approval and election returns – provide conflicting assessments of the 104<sup>th</sup> and 110<sup>th</sup> Congresses. While none of the congresses immediately before and after the 1994 and 2006 elections enjoyed favorable reviews from the public, the new Republican majority at least held its own during the 104<sup>th</sup> Congress. Roughly a third of the public approved of its performance at the beginning and end of its two-year life. The new Democratic majority in the 110<sup>th</sup> began at roughly the same level of approval, but its ratings plunged to historic lows during 2007 and 2008.

When judged by subsequent election returns, the relative success of the two congresses is reversed. Following its first majority Congress in 40 years, Republicans suffered a decisive defeat in the 1996 presidential election and mixed results (a loss of three seats in the House, a gain of two in the Senate) in the congressional elections. By contrast, the 110<sup>th</sup> Congress was followed by a sweeping victory for the majority Democrats, with a new Democratic president comfortably installed in the White House and Democrats substantially enlarging their majorities in the House and Senate. In the most recent Congress, the public saw little to approve of in its performance but reserved electoral retribution for the minority Republicans.

Neither measure is a particularly accurate or useful gauge of congressional performance since they are driven partly by unrelated forces. The ratings of Congress improved in 1996 as the economy rebounded and President Bill Clinton and the Republican Congress saw it in their interests to reach agreement on a number of important policy initiatives. The abysmal ratings of Congress during 2007



and 2008 reflected a broader public discontent with the direction of the country, the war in Iraq and the economy. The pitched partisan battles and policy irresolution surely contributed to the low public esteem of Congress but were not the dominant factors. At the same time, Democratic gains in the House and Senate in 2008 were made possible by the harshly negative referendum on President Bush and the attraction of the Obama presidential candidacy, not any particular achievements by the Democrats in Congress. To better grasp congressional performance, we need to examine how it spent its time, what it achieved and how the legislative process operated.

## Oversight

Both new majorities, in 1995 and 2007, worked longer and harder in Washington than did their predecessors in the first session of each Congress, as reflected how long they spent in session and in the number of roll call votes cast. However, those differences diminished somewhat in the second session. What remained most striking about activity throughout the 110<sup>th</sup> Congress, especially in the House, was the dramatic increase in the amount and scope of its oversight of the executive following years of relative inattention and deference under the Republican majority. The new Republican House majority in the 104<sup>th</sup> Congress, by contrast, did less oversight than was done by Democrats of a Democratic administration in the 103<sup>rd</sup> Congress.

A good deal of the oversight during the 110<sup>th</sup> Congress was devoted to Iraq, the dominant public concern, which had been largely neglected in the previous Congress. But oversight activity ranged across diverse subjects, was mostly serious in its approach, and often had real consequences for policy and administration. Examples from 2007 include the departure of many political appointees at the Justice Department following revelations about the firing of several U.S. attorneys; changes in resources and administrative arrangements following investigations of neglect and abuse in the treatment of injured veterans from Iraq and Afghanistan; and new provisions governing contracting arrangements, from Blackwater to Halliburton. In 2008 significant areas of oversight included the financial crisis (though primarily after the fact); various FDA matters including food and product contamination; and a number of issues before the Justice Department. Although the second session of the 104<sup>th</sup> Congress featured oversight on a range of topics, much of the agenda was consumed by the Whitewater investigations.

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Oversight in the 110<sup>th</sup> Congress included more than examination of scandals or abuses; it also included much more systematic scrutiny of programs and agencies. One change was the revitalization of the authorization process, which had atrophied in the previous decade. Most programs and agencies require reauthorization every five years; the process usually entails a serious examination of the program or agency, its successes and failures and its record compared with the intent and word of the law. The decline of regular authorizations—with some programs going for many years without reauthorization and others done in a *pro forma* fashion—was one additional component in the decline of oversight. Authorizations increased in number, quality and content in 2007. Committees held nearly twice the number of non-Pentagon-related authorization hearings in 2007 as in 2005 (77, up from 42), and several major reauthorizations were signed into law, including the first complete renewal of the Head Start program in nearly a decade. The second session of the 110<sup>th</sup> was also more productive on authorizations than its Republican-led counterparts in 1996 and 2006 in terms of major reauthorizations enacted.

## Legislative Productivity

Quantitative assessments of the legislative productivity of the 104<sup>th</sup> and 110<sup>th</sup> Congresses are limited gauges of congressional performance. The legislation passed by the two chambers is increasingly dominated by routine and symbolic measures. Both new majority congresses passed more substantive measures than their predecessors, but the number of public laws signed by the president declined in both cases. This is largely a consequence of moving from unified to divided-party government. Substantive and political differences between a president of one party and a congressional majority of the other, especially during a time of deep ideological polarization, make the policymaking process more difficult to navigate. At the same time, we know from past experience that divided-party governments are not doomed to gridlock.

During their initial year in power, the Democratic majority in 2007 significantly outperformed the Republican Congress that took up the gavel in 1995 in terms of the number and significance of new public laws. Only one item in the Republican Contract With America was signed into law at the end of 1995, while most of the Democratic New Direction Agenda proposals were enacted. Democrats aimed lower in their legislative promises and overcame the many obstacles in their way. Their legislative harvest included a number of long-stalled proposals, including higher fuel-efficiency standards for motor vehicles, a minimum wage increase, and a



restructuring and expansion of college student assistance. Republicans in 1995 shot the moon and ended the year frustrated by Senate inaction, presidential vetoes and a government shutdown that proved politically damaging to them.

No such advantage for the Democrats was evident during the second session of 110<sup>th</sup> Congress. After their sobering experience in 1995, Republicans regrouped in 1996 and ultimately reached agreement with President Clinton on a number of significant measures including welfare reform, health insurance portability and a safe drinking water package. Confronting a recession and a financial meltdown in 2008, the Democratic-led Congress passed (and President Bush signed) a stimulus package, a housing rescue bill, and a Wall Street bailout. A key factor in these achievements is that both parties (and hence branches) were open to problem-solving, whether for electoral or policy motivations.

To be sure, both congresses also demonstrated the barriers imposed by divided government. The pitched budget battles in 1995 and 1996 attest to the limitations of party-based agendas under divided government. In the 110<sup>th</sup>, stalemates over the State Children's Health Insurance Program (SCHIP), climate change, the alternative minimum tax, the Colombian free-trade agreement and Iraq attest to the difficulty of legislating in periods of divided government. Moreover, some big-ticket items – including the FISA amendments and the Wall Street bailout – came perilously close to going down in flames, as the auto bailout did in the lame-duck session.

## Process

Much of the critique of the broken branch centers on the rise of a destructive form of partisanship that created powerful incentives for congressional leaders in both chambers to short-circuit regular deliberative procedures in committee, on the floor and in conference. House Republicans leveled this charge against the Democratic majority in the waning days of its 40-year control and promised to restore regular order once the GOP moved into the majority in the 104<sup>th</sup> Congress. Democrats made a similar pledge in their successful 2006 campaign to regain the majority in the 110<sup>th</sup>. Each began with good intentions and sincere efforts, but both succumbed to forces and interests that initially triggered these developments. Party-line voting intensified among Republicans in the 104<sup>th</sup> Congress and Democrats in the 110<sup>th</sup>. In both congresses, leaders of the two new majorities concluded that delivering on their policy promises took priority over their procedural commitments.

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## ***Regular Order in the House***

Democratic leaders in 2007 quickly concluded that the implacable opposition to their agenda by President Bush and the Republican congressional leadership, combined with the 60-vote hurdle in the Senate, made it virtually impossible to return to regular order in committee, on the floor, and in conference and still advance their legislative agenda. In this intensely competitive, partisan environment, facing high expectations to set a new policy direction following the decisive 2006 election, they opted for action and product over process. Their pledge to curb the procedural abuses of the previous Republican majority would for the most part have to be set aside. The choice was not surprising. The new Republican leadership in 1995 came to the same conclusion, despite years in the minority decrying the tactics of House Democratic majorities. Still, it exacerbated partisan tensions in Congress and further fouled the toxic atmosphere enveloping Washington.

We saw some pockets of cooperation and civil engagement between the parties, mainly in committees such as Financial Services and among some individual party leaders and rank-and-file members. Speaker Nancy Pelosi and her office, like their predecessors, were deeply involved in setting the agenda and drafting legislation central to it. Pelosi, however, loosened the reins a bit on committees and gave them more room to operate. But as the Congress progressed and the agenda became more controversial, opposition tactics in the House and frustrations with the Senate led the House Democratic majority to embrace many of the same unorthodox means (circumventing standing committees, writing closed rules, using the suspension calendar, waiving layover requirements, avoiding the conference process) that Republicans had employed to advance their agenda. The number and percentage of restrictive rules used by Democratic leaders to control debate and amending activity on the House floor exceeded the degree of control and departure from regular order exercised by their Republican predecessors. The Democratic majority in the 110<sup>th</sup> Congress considered legislation under fewer open rules and many more closed rules than any of their six Republican predecessors. Moreover, the Democrats were at least as willing to forego committee deliberations and bring unreported bills directly to the floor under special rules as their Republican counterparts. A pattern of tighter, more centralized control – which began more than two decades ago under Democratic rule and then intensified under Republican majorities, especially after the 2000 election – continues unabated.

Nowhere is this pattern more evident than in the processes used to reconcile differences between the House and Senate. After pledging to make the conference

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process more open and inclusive, Democratic leaders almost banished conference committees altogether in the second session of the 110<sup>th</sup> Congress. Only two of the significant bills signed into law in 2008 – the farm bill and the consumer product safety measure – went through a genuine conference process. The others either had *pro forma* conferences or simply bounced back and forth between the houses with full-text or nearly full-text amendments. Some – like the housing rescue bill and the financial bailout – were under severe time pressure. Most of the rest were not.

One of the more contentious issues between House Democrats and Republicans in the 110<sup>th</sup> was the use of the motion to recommit with instructions. Under House rules, the motion is a protected right of the minority and represents one last attempt to amend a bill before final passage. It is especially important when amending opportunities are limited or nonexistent due to the use of restrictive rules. At the start of the 110<sup>th</sup> Congress, Speaker Pelosi ended the previous majority's practice of making votes on motions to recommit strict party-line affairs. Members – particularly the freshmen from more conservative districts who had helped build the Democrats' new majority – welcomed this move, as it allowed them to vote occasionally for Republican motions to recommit with which many of their constituents might agree.

The House minority quickly seized on this flexibility. Because House pay-as-you-go budget rules drastically expanded the number of motions that were considered “germane” and thus permitted, Republicans began to offer motions explicitly designed to force these same vulnerable Democrats to cast politically embarrassing votes. In addition, Republicans frequently changed the wording of their motions, which had the effect of killing the bill, rather than returning it amended to the chamber floor for a final passage vote.

During the 110<sup>th</sup>'s first session, House Republicans offered 86 motions to recommit, up from just 35 during the first session of the 109<sup>th</sup>. Republicans passed 21 of these motions in 2007 while Democrats in 2005 passed none. Democratic leaders often had to pull measures from the floor out of fear of losing the final vote after a successful motion to recommit. Frustrated by this successful minority party strategy, they sought to diminish its effectiveness. The number of motions introduced and passed in the second session (36 and 3) dropped sharply but remained far greater than earlier congresses. And Democratic leaders gave serious thought to changing House rules to limit the minority's right to offer such motions.



## Senate Filibusters

The award for the most arresting statistic in the 110<sup>th</sup> Congress was earned by the Senate, where 142 cloture motions were filed—an all-time Senate high. In comparison, 82 cloture motions were filed in the 104<sup>th</sup> Congress when Republicans took back control of the Senate, and just 71 cloture motions were filed in the 109<sup>th</sup>. More than once a week, on average, senators resorted to the chamber’s cloture rule in an effort to limit debate and bring the chamber to a vote. Not surprisingly, given the Senate’s slim majority and polarized parties, Senate leaders succeeded less than half the time in securing the necessary 60 votes to invoke cloture. Reflecting the deep divide between the two Senate parties, more than 80 percent of the majority party typically voted in favor of cloture, while more than half of the minority party typically voted against.

Why did Senate leaders file for cloture so often? Democratic leaders argued that Republican filibusters – threatened and real – made necessary Democrats’ reliance on cloture motions. Otherwise, slews of minority-party amendments and extended debate would render legislative action impossible. Republicans strongly disagreed, arguing instead that the majority leader too often filed for cloture before the minority had been given the chance to fully debate and amend the majority’s proposals.

To be sure, there is some truth to both sides. More generally, however, the rise in cloture motions reflects forces that are unique to the 110<sup>th</sup> Congress, as well as longer-term trends that have been underway in the Senate for some time. There is no doubt that the Democrats’ repeated efforts to force a change in the course of the war in Iraq during this Congress contributed to the exponential rise in Republican filibusters and Democrats’ use of cloture. Senate consideration of House Democrats’ “Six-for-06” agenda also helps account for the rise in cloture motions, with many aimed at ending debate on these Democratic policy initiatives. Roughly half of the cloture motions were aimed at bringing the Senate to a vote on Democratic policy priorities. Given the differences between the parties, the Democrats’ tenuous hold on the Senate majority and the most wide-open presidential race in nearly a century, we suspect it is no coincidence that Republicans targeted Democratic priorities with filibusters.

The rise in cloture motions likely also reflects the majority’s frequent reluctance to go to conference to resolve differences between House and Senate versions of major measures. Those major measures enacted into law that went to conference almost never faced cloture votes when their conference reports were considered on the Senate floor. Securing Republican consent in conference eliminated the minority’s

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incentive to defeat the conference report on the floor. In contrast, roughly half of the major measures that did not go to conference required cloture motions to bring the Senate to a vote.

It is important to recognize that the rise in cloture is not simply due to deep partisan differences. Often in the past two years, maverick Republicans like Sens. Tom Coburn (Okla.) and Jim DeMint (S.C.) attempted to derail measures they deemed too costly or tried to force the Senate to consider cost-cutting reforms, even when such obstruction countered their party's preferences. Not surprisingly then, cloture voting is not always partisan. When Senate Democrats succeeded in invoking cloture, on average cloture earned the votes of nearly 80 percent of the chamber. The use of cloture need not always signal that a filibuster is imminent. Leaders often file for cloture to lend some predictability to floor action, as cloture blocks non-germane amendments and moves the Senate to a scheduled vote.

Although the Senate's record of 142 motions is remarkable, the chamber's reliance on 60-vote thresholds is even more common than a count of cloture votes suggests. Although the practice is not new, it seems that the Senate in the 110<sup>th</sup> Congress moved more often than before to agree to 60-vote thresholds for passage even when the majority leader did not file a cloture motion. On numerous occasions, Senate leaders negotiated unanimous-consent agreements that required amendments or bills to secure 60 votes for passage. In other words, counting cloture votes understates the power of the Senate minority to block majority will. Amendments to the farm bill, surveillance bills, the AMT measure and defense bills, among others, were subject to 60-vote requirements negotiated by Senate leaders. The House member who declared that "it takes 60 votes to order pizza in the Senate" was not too far off.

Despite the noted rise in cloture motions, it would be a mistake to conclude that the Senate's record this Congress was without precedent. The 60-vote requirement has been a stranglehold on the Senate for some time. Harry Reid is not the first frustrated Senate majority leader to decry the minority party's ability to tie the chamber in knots. Bill Frist bemoaned filibusters against judicial nominees, Trent Lott and Tom Daschle before him often resorted to filing cloture motions in efforts to defeat minority filibusters. So too did earlier party leaders Bob Dole and George Mitchell feel compelled to rely on cloture and complicated unanimous-consent agreements to resolve gridlock. So long as minority parties have strong incentives to exploit Senate rules, majority leaders will innovate at the margins to rein in obstruction across the aisle. And President Obama will have plenty of incentives to



entice enough Senate Republicans into serious negotiations on his major policy initiatives to avoid an automatic Senate filibuster. If he or Senate Democrats fail to engage more than the usual Republican moderates, cloture motions are not likely to decline; Republicans would instead be likely to rally together on these procedural votes to protect their party's leverage in the legislative process during a period of unified-party control. And it is a short and easy step to go from using these motions to protect the minority and get a say in legislation to trying to block action altogether to embarrass the majority and use the "do-nothing" label as an election battle cry.

### Advice and Consent

At first glance, the 110<sup>th</sup> Senate's exercise of advice and consent for judicial nominations was relatively tame—lacking the drama of the previous Congress when Majority Leader Bill Frist (R-Tenn.) attempted to "go nuclear" in the Senate to ban Democrats' filibusters of appellate court nominations. No such nuclear conflagration took place in 2007 or 2008, as the Democrats' return to the Senate majority gave them control of the reins of the confirmation process. With Republicans in the Senate minority and a Republican in the White House, President Bush's ability to secure confirmation of lower-court nominees required him to select candidates acceptable to Senate Democrats. Ironically, divided-party government helped reduce some of the heat underlying confirmation fires that raged over the previous two Congresses.

That said, the record of the 110<sup>th</sup> Senate in confirming presidential appointees for the lower federal courts matched previous lows set in periods of divided government. The Senate confirmed 10 of Bush's 24 nominations to the U.S. Courts of Appeals, barely exceeding the previous low water mark of 41 percent that was set in the first two years of Bush's administration. In contrast, just under three-quarters of Bush's nominees for the U.S. District Courts were confirmed, a rebound from the previous Congress when barely half of Bush's trial court nominees were confirmed.

The Senate's treatment of Bush's nominees triggers several observations. First, Democrats acted as is typical for the majority party in periods of divided government in the run-up to a presidential election. With the possibility of a Democratic White House and increased Democratic Senate margins, Democrats in the 110<sup>th</sup> Senate had little incentive to confirm more Bush nominees; they clearly preferred to save vacancies for the 111<sup>th</sup> Senate. Second, conflict over federal trial court nominations is typically much lower than that for appellate court seats, because of the nature of the trial courts and their position in the federal judicial hierarchy. In this context, the

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harder road traveled by trial court nominees in recent years suggests that the intense partisan conflict over appointments to the appellate bench has begun to spill over to nominees for the trial courts—not surprisingly, given that appellate court judges are often elevated from the district courts. Third, despite the uneven confirmation record, just 5 percent of federal judgeships sat vacant at the close of the Bush administration—roughly half the vacancy rate at times under Clinton. Finally, as unified party control returns to Washington, we expect to see higher confirmation rates and possibly a long-awaited expansion in the number of federal judges to help the judiciary cope with heavy caseloads.

## Checks and Balances

The late constitutional scholar Edward Corwin defined the relationship between the president and Congress on foreign policy as “an invitation to struggle.” More generally, the framers of the Constitution anticipated two assertive branches, competing with the other not just over policy but primacy in institutional power. In the Constitution, a number of provisions provides overlapping responsibilities and power, while also giving Congress substantial tools to check and balance any unilateral assertion of power by a president, whether in war-making or domestic concerns. The American political system works best when both branches are mindful and protective of their own prerogatives while respectful of those of the other.

Of course, the United States has gone through ebbs and flows of strong and weak presidents, and strong and weak congresses. But it is hard to find an era to match 2001 through 2006, when the Bush presidency asserted breathtaking executive authority with virtually no challenge or pushback from Congress. The president (and his vice president, Dick Cheney) used two main theories to make their claims of overweening executive power: the concept known as the unitary executive and the belief that executive power in the hands of the commander in chief and his subordinates becomes supreme and unchallenged at a time of war. In this case, the reference was to the war on terror, with no time limits.

The failure of Congress over much of the Bush administration to challenge the president’s regular and far-reaching assertions of executive power was one of the main reasons we referred to the legislature as “the broken branch.” Congress actively discouraged oversight of the executive branch; held tightly constrained and limited hearings when abuses by the executive, such as Abu Ghraib, occurred or were alleged; deferred almost totally to the president on issues like surveillance at home

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and abroad; failed to challenge the president's assertions of constitutional authority to ignore provisions of laws via signing statements; and did not push for testimony or documents from the White House when issues, scandals or problems arose.

The arrival of the 110<sup>th</sup> Congress offered promise of a new approach by Congress to these issues. A major reason for a different tack, of course, was the shift in partisan control. It is not surprising that a more aggressive and skeptical Congress emerges when it faces off against a president of the opposite party. But it is also important to note that institutional pride and the assertion of institutional prerogatives is neither a partisan nor ideological issue.

Some of the strongest critics of the assertions of presidential authority and its execution by the Bush administration came from conservative Republicans, including former representative Mickey Edwards (Okla.), conservative activist David Keene and former Reagan Justice Department official Bruce Fein. And even during the worst times for the broken branch, there were exceptions, including Republicans Rep. Tom Davis (Va.) on oversight and Sens. Lindsey O. Graham (S.C.) and John McCain (Ariz.) on torture. In the same fashion, a Democratic Congress offered vigorous oversight of the Clinton administration in 1993-94.

An assertive Congress, though, can act in two ways: to use its power mainly to embarrass or hogtie a president, or to act to challenge and rectify both genuine malfeasance and shortcomings in policy and administration in an executive branch as well as to defend the constitutional prerogatives of the first branch. In the latter part of the Clinton presidency, a Republican Congress did far more of the former than the latter. As we pointed out in *The Broken Branch*, there were many more hearings on the alleged abuse by the Clinton White House of its Christmas card list than there were during the Bush administration on Abu Ghraib.

How can we judge the 110<sup>th</sup> Congress? The record is mixed, albeit more positive than negative. The 110<sup>th</sup> Congress did express its discontent with many of the Bush administration's actions and the sweeping statements made by the president and vice president about their views of executive power. It held wide-ranging hearings on abuses of power and challenged several of the White House's positions on sensitive issues. But the bottom line is that any weakness in the presidency that emerged in the final two years of the Bush White House came primarily from the president's ever-weakening standing with the public and from intervention by the federal courts, not from Congress imposing its own views in sensitive policy areas like surveillance or extracting from the White House testimony from top officials or documents that would shed light on alleged abuses of power, or successfully beating back the



uniquely aggressive Bush approach to signing statements.

## FISA

The main tug of war between president and Congress in 2007-2008 came over FISA, the Foreign Intelligence Surveillance Act. FISA was first enacted in 1978 – in response to abuses of domestic surveillance uncovered by the Church Committee – as a way to bring congressional and judicial oversight to covert surveillance, while also allowing surreptitious surveillance to maintain national security. The act created a secret court, known as the Foreign Intelligence Surveillance Court, to provide warrants for secret searches.

Although there were some controversies during the Clinton administration, mainly over physical searches, the real issues over FISA emerged in 2005. In December of that year, the *New York Times* reported that a string of illegal electronic searches had been conducted without warrants from the FISA court. According to the *Times*, the Bush administration had received cooperation from 2002 on from a number of telecommunications companies to conduct wiretaps of electronic conversations.<sup>1</sup>

The administration argued that it was not bound to use the FISA Court to conduct surveillance. But criticism from outside groups and from Congress led to a drumbeat of calls for reform. They were amplified by additional news reports in 2006, including whistle-blower reports that AT&T, among others, had cooperated with the administration. A number of bills were introduced during 2006 to address the issues, including bipartisan ones to improve congressional oversight of electronic surveillance and make FISA the sole means to conduct foreign intelligence surveillance. Feeling pressure to act, House Republicans rallied behind a bill introduced by Rep. Heather A. Wilson (R-N.M.) to give the president enhanced authority to do surveillance of international phone calls and e-mails following or in anticipation of a terrorist attack (with some limits thereafter) – in effect making FISA compliance optional for the president. The bill was passed by the House shortly before the 2006 mid-term elections, with sharp partisan differences emerging as Republicans claimed that votes against it showed Democratic weakness against terrorism—an attack that did not seem to carry much weight with voters.

The new Democratic 110<sup>th</sup> Congress began to confront this issue early on. As the *Washington Post* reported in August 2007, a judge on the secret FISA court in March

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<sup>1</sup> James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *New York Times*, December 16, 2005, p. A1.

**The main tug of war between president and Congress in 2007-2008 came over FISA, the Foreign Intelligence Surveillance Act.**



challenged the government's ability to collect electronic information, while in May another judge on the same court said unequivocally that the administration needed a warrant for any surveillance using a fixed wire (the 1978 law had allowed warrantless surveillance for wireless calls). These rulings were made in secret.<sup>2</sup>

The Bush administration forced the issue in April, sending a bill to the Hill, followed by Director of National Intelligence Michael McConnell, who briefed 250 members of Congress on the need to swiftly amend FISA. The response from Democratic leaders in the Senate was to agree to move a streamlined bill – if the administration released to it documents describing the warrantless wiretap program the president had authorized, and his administration had carried out, in the period after Sept. 11, 2001.

McConnell and the White House refused to release the documents and began to press more insistently for a bill. On July 24, McConnell met in closed session with a bipartisan group of senators and said that there was an urgent need, based on enhanced terrorist activity, to give the administration more surveillance tools. Democrats saw McConnell's plea as credible – but his demand escalated from allowing leeway on purely foreign communications to encompassing all foreign intelligence targets, including communications involving persons inside the United States.

As Democrats in Congress communicated with McConnell, offering alternatives that put some checks and balances on the proposal, attempting at the same time to answer McConnell's concerns, the tension and mistrust grew as each side accused the other of misrepresenting their positions. The *Post* article describes a July 31 late-night session involving McConnell and Democratic leaders in which he refused to alter the plan to limit warrantless surveillance to foreign suspects tied to terrorist groups, despite the fact that an earlier measure backed by the Bush administration had included language to do just that.

In the end, Democrats blinked. A Republican bill virtually identical to the McConnell proposal, called the "Protect America Act of 2007," passed both houses of Congress with bipartisan support, including 16 Senate Democrats and 41 House Democrats. But the law, deemed "unacceptable" by the Speaker of the House as soon as it passed, was given a six-month sunset, requiring reauthorization by February 2008.

The jockeying for position began immediately. Top administration officials such as

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<sup>2</sup> Joby Warrick and Walter Pincus, "How the Fight for Vast New Spying Powers Was Won," *Washington Post*, August 12, 2007, p. A1.





McConnell and Kenneth Wainstein, the Assistant Attorney General for National Security, in speeches and testimony, argued for making the powers in the 2007 act permanent, and for granting immunity from prosecution for the telecommunications companies that had cooperated with the administration in the warrantless wiretap program. President Bush did the same, in a speech in September at the National Security Agency headquarters. Congressional Democrats, meanwhile, were drafting their own provision limiting the president's authority even as they demanded documents explaining the basis of the program before agreeing to any immunity request.

The House passed a bill in November, largely along party lines, that expanded court oversight of domestic-based surveillance and denied immunity to the telecommunications companies. The Senate passed its own version in February 2008 that allowed immunity. The two houses were unable (or unwilling) to resolve their differences when the law approached expiration; a 30-day extension was opposed by President Bush, who demanded a permanent bill. A 30-day extension failed to overcome a GOP filibuster in the Senate, and no bill passed before FISA expired. Months of negotiations followed, with House Democrats refusing to cave in to the president's demands that they accept the Senate's immunity provision.

The deadlock persisted into June, when congressional Democrats, congressional Republicans, and the White House engaged in intensive negotiations and finally reached agreement. The bill gave the president a victory by allowing retroactive immunity from lawsuits – but, as David Rogers of *Politico* noted, when the bill was finally sent to the president in early July, it gave the FISA courts a serious role, added protections for Americans abroad and phased out the authorization in December 2012, allowing the next president to put his own imprint on the issue. The overall legislation, Rogers argued, represented the most significant effort by Congress to reassert itself over electronic surveillance.<sup>3</sup>

## Subpoenas

Congress also took on the president on the allegations of perjury and obstruction of justice in the so-called Valerie Plame affair, and on abuse of power in the Justice Department over the firing of several U.S. attorneys. The Plame case arose in July 2003, when columnist Robert Novak “outed” Plame, an undercover CIA operative married to former Ambassador Joseph Wilson, in a column intended to discredit

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<sup>3</sup> David Rogers, “FISA Finally Clears Congress,” *Politico*, July 9, 2008.



Wilson, who had publicly challenged the Bush administration's claim that Iraq was seeking uranium in Niger, a major rationale for the war in Iraq. Novak's disclosure triggered a major public controversy over how Novak had learned about Plame's status, with questions over whether the disclosure violated the law—much of it emerging in the heat of Bush's 2004 reelection campaign.

As the controversy expanded, an independent investigation led by Chicago U.S. Attorney Patrick J. Fitzgerald was initiated by the acting attorney general in December 2003. That in turn led to an indictment of Vice President Cheney's chief of staff, I. Lewis "Scooter" Libby, not over the issue of whether he had improperly disclosed Plame's name, but over obstruction of justice and perjury. Libby was tried in 2007 and convicted on March 6 of that year.

Two days after the conviction, Henry A. Waxman (D-Calif.), the chairman of the House Oversight and Government Reform Committee, announced a hearing for March 16 at which he would call Plame to testify. Waxman did not let the matter drop. He demanded documents relating to the disclosure of Plame's name from the Justice Department, including FBI interviews with President Bush and Vice President Cheney. When the documents were not turned over, Waxman subpoenaed them in June 2008.

The White House objected to the subpoenas, leading the committee to focus its request on the FBI interview with Cheney as it dropped its request to get the interview with the president. The White House resisted that effort as well, claiming executive privilege. In the end, the House committee fell back on issuing a scathing bipartisan report, calling the executive privilege claim "legally unprecedented" and "inappropriate"—especially since Vice President Cheney had himself said he was not a part of the executive branch when he tried to avoid disclosure requirements for executive branch officers.

## U.S. Attorneys

Soon after the 2006 elections, the Department of Justice dismissed seven United States attorneys. While it has been traditional that a change in administration brings wholesale turnover in U.S. attorney positions, all of which are political appointees of the president, a wholesale dismissal of U.S. attorneys by the president who had nominated them was extremely unusual; since three other U.S. attorneys had been dismissed earlier in the Bush administration for questionable reasons, this action raised warning signals and hackles inside Congress, and the new Democratic



Congress began hearings into the matter right after it convened in January 2007.

The hearings and journalistic investigations soon uncovered evidence of questionable behavior in the White House and the Justice Department, making the issue a national controversy – enough of one that President Bush responded directly in a news conference in March 2007. The president stressed that he had “broad discretion” to dismiss any and all of his political appointees, but directed the attorney general and his key staff to testify in front of relevant congressional committees and to release information about “the process used to make the decision about replacing eight of the 93 U.S. Attorneys.”

But the president also balked at ordering or allowing his White House staff who might have played a role in the dismissals from testifying; he offered a concession instead, to allow “relevant committee members on a bipartisan basis to interview key members of my staff to ascertain relevant facts.” He decried Congress’s demands for more, and said it would be “regrettable” if Congress “headed down the partisan road of issuing subpoenas and demanding show trials.” The president also said that there was no indication that anybody in his administration did anything improper.

The fallout from the firings continued to build through 2007. Congress was both outraged and embarrassed to learn that it had passed a provision in the reauthorization of the USA PATRIOT Act in 2006 that eliminated the 120-day term limit for interim appointments by the attorney general to fill U.S. attorney vacancies – thus allowing the attorney general to bypass the Senate confirmation process when vacancies occurred in these positions. Both houses quickly passed bills rescinding this provision, and the president signed a law doing so in June.

The hearings with senior Justice Department officials showed major contradictions between their testimony and internal department memos and e-mails. Several of the dismissed U.S. attorneys vigorously protested their dismissals, which the president and the attorney general defended on the grounds of bad performance. The hearings showed gross politicization of hiring these officials and others at the Justice Department, with a wholly disengaged attorney general, Alberto R. Gonzales, who delegated the authority over hiring and firing to two young aides, Monica Goodling and Kyle Sampson, and evidence of significant White House involvement in the decisions. An initial concern emanating from senators from the states involving the dismissed U.S. attorneys quickly spread to many other legislators of both parties, but also with some partisan tension as the hearings continued.

By March, the resignations began and by the middle of the month, a growing number



of lawmakers from both parties were calling on Gonzales to resign. On March 21 – the day after the president’s news conference in which he said his aides would not testify under oath if subpoenaed – the House Judiciary Committee subpoenaed five Justice Department officials. The next day, the Senate Judiciary Committee did the same. On April 10, the House Judiciary Committee issued a subpoena for documents from Gonzales. The White House announced the same day that large numbers of e-mails from Republican Party accounts had been lost, with many potentially involving official White House business, including communications related to the firing of U.S. attorneys, some of them involving White House aide Karl Rove. On May 2, the Senate Judiciary Committee issued another subpoena, this time compelling the Justice Department to produce all e-mail from Karl Rove, no matter the e-mail account, that might relate to the dismissal of U.S. attorneys. In July, a former top political assistant to the president, Sara Taylor, appeared in front of the Senate Judiciary Committee but regularly invoked executive privilege in refusing to answer many questions, to the frustration of the committee. White House Counsel Harriet Miers was scheduled to appear the next day, but her lawyer announced that she would not appear. Senior Democrats on the House Judiciary Committee expressed disappointment at the decision and warned Miers that she could be subject to contempt proceedings. A few days later, Reps. John Conyers Jr. (D-Mich.) and Linda T. Sanchez (D-Calif.) notified the White House Counsel that if White House Chief of Staff Joshua Bolten did not turn over documents that the House Judiciary Committee had subpoenaed, it might also result in contempt actions.

On Aug. 27, Attorney General Gonzales resigned. His replacement, Michael B. Mukasey, was asked by Speaker Pelosi to investigate whether Miers and Bolten had displayed contempt of Congress by refusing to testify or turn over documents to Congress on the firing of the U.S. attorneys. In late February 2008, Mukasey said that he would not ask a grand jury to investigate, asserting that noncompliance by the two did not rise to the level of a crime. House Judiciary Committee chair Conyers argued that the decision to stop contempt proceedings demonstrated a willingness on the part of the administration to go to any length to keep its role in the firings hidden. Congress, through the House Judiciary Committee, moved to another option, filing a civil suit asking the court to rule on the efficacy of the congressional subpoenas. (Note: Two of us, Mann and Ornstein, filed an amicus brief in this case.) On Nov. 29, 2007, the Senate Judiciary Committee weighed in again, with a ruling from the committee chairman Patrick J. Leahy (D-Vt.) that rejected White House claims of executive privilege, dismissed White House offers of voluntary cooperation as a sham, and insisted on the compliance with subpoenas issued to Bolten and



Miers. Two weeks later, the committee approved contempt citations for the two.

In the meantime, the Justice Department under Mukasey was conducting its own internal investigations into the U.S. attorney firings and other allegations of mismanagement and politicization in hiring. In July 2008, a report from the department's inspector general and the Office of Professional Responsibility issued scathing findings about Goodling, Sampson and other top officials. It found that Sampson, former White House liaison Jan Williams and Goodling violated federal law and department policy, and that Sampson and Goodling committed misconduct by considering political and ideological leanings in soliciting and selecting immigration judges, which are career civil services positions protected under law. A few days later, U.S. District Judge John D. Bates ruled in the subpoena case brought by Congress – and ruled in favor of Congress. “The executive’s current claim of absolute immunity from compelled Congressional process for senior presidential aides is without any support in the case law,” Judge Bates ruled. The ruling was appealed, delaying any real confrontation between Congress and Bolten or Miers (or other officials under subpoena, such as Karl Rove).

The next step came on Sept. 29, 2008, with the release of a second report from the Justice Department on the firing of the U.S. attorneys. The report found “significant evidence that political partisan considerations were an important factor” in the firings and blamed Gonzales for maladministration. The report, however, said that, in part because of its failure to get key internal documents from the White House or get key figures to talk to investigators, it was unable to obtain all the facts in the case. It could not recommend prosecution of officials but did urge further investigation through an independent prosecutor. Attorney General Mukasey responded with a statement that said the report “makes plain that, at a minimum, the process by which nine U.S. Attorneys were removed in 2006 was haphazard, arbitrary and unprofessional, and that the way in which the Justice Department handled those removals and the resulting public controversy was profoundly lacking.” Mukasey then appointed an independent prosecutor, Nora Dannehy, a career official acting as U.S. attorney in Connecticut. On Nov. 19, the Senate Judiciary Committee issued its own report, sharply critical of the White House and the Justice Department, and recommended contempt proceedings move forward against Bolten and Miers. It remains an open question whether the 111<sup>th</sup> Congress will push the new Democratic administration to continue the battle long after Bush has left office – or whether the administration will be willing to do so.

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## Signing Statements

Presidential signing statements – made when a president signs a bill sent to him by Congress – have been used by presidents since early in the 19<sup>th</sup> century. They range from ceremonial to direct challenges to congressional authority or assertions of presidential power. Their use has grown in recent decades, beginning particularly with President Ronald Reagan, who actively sought to have courts consider signing statements when interpreting statutory law. The upward trend has continued since, and increasingly the statements have contained one or more challenges or objections to the underlying legislation. President George W. Bush objected to over 700 provisions of law, usually on the grounds that they infringed on the authority granted to the executive branch by the Constitution.

Congress cannot stop a president from issuing signing statements, but it has tried to limit their scope, challenge their constitutionality and shed public light on their intent. In the 110<sup>th</sup> Congress there were numerous bills introduced to limit the power, oversight hearings held on signing statements, and a Government Accountability Office letter requested and issued. None of the legislative efforts advanced beyond the hearing stage, however. In contrast, the Republican-led 109<sup>th</sup> Congress paid relatively little attention to the president’s aggressive use of signing statements, although there were a few instances in which Republican members of Congress questioned the expansion of executive power. But the activity level in this area was clearly sharply higher in the 110<sup>th</sup>. Nonetheless, the additional activity on the part of the 110<sup>th</sup> Congress did not alter Bush’s behavior or the prevalence of signing statements claiming unfettered presidential power.

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## Ethics, Lobbying and Earmark Reform

The “culture of corruption” – a term used to describe the toxic stew of scandals associated with former House majority leader Tom DeLay (R-Tex.), Jack Abramoff and others that erupted in and around Congress in 2005 and 2006 – was a powerful argument Democrats used to gain their foothold in 2006 and propel themselves back into power on Capitol Hill. It worked, even though the scandal involving Democratic Rep. William Jefferson of Louisiana showed that not all the scandals involved Republicans.

Not surprisingly, ethics, earmark and lobbying reform became a priority even before the 110<sup>th</sup> Congress convened. Members of both parties floated reform ideas during the lame-duck session that followed the 2006 election. Congressional leaders



announced that they would fold unfinished spending bills for the previous fiscal year into an omnibus continuing resolution – but would create a moratorium on earmarks in it.

On Dec. 15, 2006, incoming Speaker of the House Pelosi announced an ambitious reform agenda for the coming year, including the aforementioned earmark moratorium, a promise to toughen lobbying and contribution disclosure rules, and the creation of an independent office to conduct preliminary investigations of potential ethics violations by members and staff.

The formal rules package was unveiled the day the new Congress convened. Some of the ideas were far-reaching and not widely popular among lawmakers, including restricting the use of corporate jets, a ban on gifts and meals paid for by lobbyists, restrictions on travel and disclosure of bundling activities of lobbyists. Equally unpopular was the independent ethics office. The plan also provided robust disclosure of earmarks, including those on tax and tariff provisions.

The Senate version of an ethics bill passed by a 96-2 margin on Jan. 18, 2007, just two weeks after the new Congress convened. It had a few real differences with the House version. It did not ban corporate jet travel, but instead required that lawmakers would have to pay higher amounts for such flights. The bill did ban gifts, trips or meals from lobbyists for members; restricted lobbying by the spouses of members; moved from a one- to a two-year “revolving door” ban on lawmakers becoming lobbyists after leaving office; required more lobbyist disclosure; and rescinded pension rights from lawmakers convicted of serious crimes. Reformers’ attempts to expand the definition of a lobbyist to include grass-roots lobbying was rejected 55 to 43. The Senate’s attempt to create an independent Office of Public Integrity failed; the provision was rejected 71 to 27.

The House followed with its own ethics bill in May 2007, which passed 396 to 22 despite serious divisions over specific provisions. The bill, meant to complement the January rules package, included a sharp expansion of information online about lobbyists and programs and strict disclosure of contributions bundled by lobbyists. But several provisions pushed hard by reformers, including disclosure of “grass-roots” lobbying campaigns and an extension from one year to two on the ban on lobbying, failed. Nonetheless, most reformers hailed the passage of the bill.

One important issue was not concluded with the May bill: the independent “office of public integrity” that had been proposed at the start of the Congress, rejected soundly in the Senate and not acted upon in the House. Speaker Pelosi created a



bipartisan task force chaired by Rep. Michael E. Capuano (D-Mass.) to consider proposals to streamline and improve congressional ethics investigations. After months of deliberation (in which both Mann and Ornstein played advisory roles), the task force recommended in March 2008 that an Office of Congressional Ethics be created to investigate allegations of ethics violations.

Despite bipartisan deliberations, the proposal was opposed by Republican congressional leaders and vigorously debated on the House floor. It was adopted by a narrow margin (after barely surviving by a single vote on a procedural motion). The new office was designed to have six members, three each appointed by the speaker and minority leader, all “individuals of exceptional public standing,” none to be lobbyists, current members of Congress or candidates for Congress. The panel was given several constraints on its actions, with checks to prevent politicization or excessive investigations but also with rules that would ultimately make its reports public and have them sent to the House Ethics Committee to determine further action.

A few reformers were unhappy with the plan; Melanie Sloan of Citizens for Responsibility and Ethics in Washington called it a “paper tiger.” But most in the reform community lauded its passage, despite its lack of subpoena authority, as a major step toward revitalizing a long-moribund ethics process.

## Earmarks

The explosion in earmarks during the 108<sup>th</sup> and 109<sup>th</sup> Congresses – the number peaked in 2005, with 13,492 projects totaling almost \$19 billion – was a major impetus for the 2006 election change to a Democratic majority. The “bridge to nowhere” became a rallying cry and a focal point for outrageous misuse and waste of taxpayer dollars. Thus, when the 110<sup>th</sup> Congress convened, it was not surprising that earmark reform was high on the list for the majority leadership’s reform agenda. The rules package that opened the Congress did the following:

- Barred members from using earmarks to reward or punish other members for their votes on matters before the House.
- Required disclosure of the name and address of any intended recipient, the purpose of the earmark, and whether the member has a financial interest in the organization or entity receiving the earmark or would otherwise benefit financially from its inclusion.

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- Required that all matters before a conference committee (including earmarks) be subject to full and open debate; that a final version of a conference report must be voted on by a meeting open to all members of the conference committee; and that no item (including earmarks) may be added to the legislation after the conference committee has adjourned.

The first steps taken on earmarks by the 110<sup>th</sup> Congress were quite encouraging. It moved rapidly to exclude all earmarks from the nine fiscal 2007 appropriations bills that were enacted in January 2007. The congressional leadership pledged to cut the earmark funding in each of the 2008 appropriations bills by 50 percent below the levels of appropriations bills passed in the 109<sup>th</sup> Congress. And it established a policy to have every letter requesting an appropriations earmark be published by the Government Printing Office before the floor consideration of the relevant bill.

Reality soon conflicted with rules. Confronted with a flood of earmarks for appropriations bills, and with a pledge to cut them drastically, Appropriations Chairman David R. Obey (D-Wis.) asked the House for a one-month moratorium on earmarks to enable the staff to review and cull them. Rebuffed by Republicans, Obey came back with a plan to exclude all earmarks from the appropriations bills in committee and floor deliberations but leaving room in the bills for funding the earmarks through the conference committee process. Reformers – and Republicans – howled that this would violate the transparency element of the new rules. Obey responded that members could contact his committee if they objected to an earmark the conference committee inserted, and the sponsor of that earmark would have an opportunity to respond to such criticism.

In the end, earmarks were considered and added to many of the appropriations bills, and the House fell considerably short of its objective of cutting earmark funding in half. The 2008 appropriations bills ended with 11,145 earmarks totaling \$15.3 billion, a reduction, to be sure, but closer to 20 percent than 50 percent.

Many “soft earmarks,” ones in the form of suggestion and not mandate, came in the end-of-year rush, since most of the appropriations bills were not dealt with individually. Congress passed a 3,500 page omnibus spending bill in December 2007; in report language there were nearly 9,000 earmarks worth an estimated \$7.5 billion. President Bush condemned them, called for fiscal discipline and ordered agencies to ignore them, despite the fact that the bill included 1,600 presidential earmarks worth more than \$16 billion, and the president evinced no desire to block defense earmarks, which totaled \$8 billion for 2,100 projects.



In fiscal 2009, Congress continued to struggle to have virtue match performance. Republicans, led by Minority Leader John A. Boehner, along with Reps. Frank R. Wolf (Va.), Jack Kingston (Ga.) and Zach Wamp (Tenn.), introduced a resolution at the beginning of 2008 calling for a moratorium on all earmarks. Chairman Obey responded with a survey for all members asking whether they supported a moratorium—and whether they would each continue to submit earmark requests for the year. His “Dear Colleague” letter had two boxes for members to check yes or no. The first box read: “I believe the House should suspend earmarks for the year. Consistent with this position, I will therefore be submitting no earmark requests for fiscal year 2009.” The second box read: “I believe the House should continue to provide responsible earmarks at a reasonable level and consistent with that position, I will be submitting appropriate requests for fiscal year 2009.” The result was more rhetoric and no overall action.

With most appropriations bills still falling behind schedule, the signs were that earmarking was continuing to decline from its highs, but still involved far more specific projects and money than Congress had promised. The preliminary estimates from the Office of Management and Budget suggested significant declines in earmarking in agriculture, commerce (cut in half from fiscal year 2008), transportation and housing. But earmarking in defense and energy remained significantly high, largely because of the continuing war in Iraq and the fluctuations in oil prices. So, too, were earmarks in homeland security and health and human services.

The 2008 presidential campaign had earmarks as a major focus, mostly because of the continued passionate opposition to them by John McCain. McCain’s campaign pledge that he could cut \$100 billion from the budget by eliminating earmarks was widely rejected by experts, since the definition of earmark he used included all aid to Israel and two-thirds of foreign aid overall, military housing costs for returning veterans and many other widely popular programs that have nothing to do with bridges to nowhere. But the concept of earmarking was a potent political weapon, and candidate Barack Obama pledged his own reform plan to do more about runaway earmarks. Whether the ideas discussed during the campaign could translate into serious changes in behavior – especially with the incoming Congress’s top priority being a huge economic stimulus package built around infrastructure – remained to be seen. One encouraging sign was the apparent agreement between President-elect Obama and Democratic congressional leaders to prohibit the inclusion of any earmarks in the stimulus package.

**But the concept of earmarking was a potent political weapon, and candidate Barack Obama pledged his own reform plan to do more about runaway earmarks.**



## Congress as Crisis Manager

The legislative performance of the 110<sup>th</sup> Congress was indelibly shaped by its response to the financial crisis that has spread and deepened since August 2007. The financial crisis continues, and most observers expect the nation's deepest recession since the 1930s to get much worse before it gets better. How well did Congress anticipate a crisis? Did it try to do anything about it? And how well did Congress manage the crisis once it unfolded?

Congress's response to crisis reveals much about its institutional capacity to tackle complicated and pressing public problems. In today's increasingly dire economic environment – one challenged by rising foreclosures and bank failures – the limits of Congress's problem-solving abilities are plain, as seen in the near demise of domestic car makers and in the market's steep declines over the past several months. Despite the intense involvement of many party and committee leaders on vexing issues, Congress offers an uneven record in responding to the array of economic problems. Legislative circumstances, institutional rules, electoral motivations and the sheer complexity of the policy issues underline the difficulties Congress has faced.

At times – such as in the debacle over rescuing the automakers – legislative gridlock directly contributed to economic declines. Other times – such as in the enactment of the Wall Street bailout – Congress's institutional and electoral pathologies encouraged excessive deference to the executive branch. Such deference has proven costly to Congress's ability to compel the administration to address critical issues at the heart of the financial crisis. Moreover, we read the steep market declines – despite the billions committed by Congress, the administration and the Federal Reserve to unfreeze financial markets – as *prima facie* evidence of the markets' lack of confidence in the federal government's problem-solving capacity.

## Anticipating Crisis

The roots of the financial crisis are complex.<sup>4</sup> Economic experts place the origins of the domestic crisis in a housing bubble that encouraged financial innovation and excessive risk-taking. The rise in housing prices over the past decade encouraged mortgage lenders to extend loans to borrowers with poor credit, with a significant deterioration in lending standards starting in 2004. With expectations of ever-rising

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<sup>4</sup> On the origins of the financial crisis, see Martin Neil Baily, Robert E. Litan, and Matthew S. Johnson, "The Origins of the Financial Crisis," *Fixing Finance Series*, Paper #3, November 2008, The Brookings Institution.

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home prices, lenders assumed that less credit-worthy borrowers could simply refinance into new mortgages once the attractive terms of the new, innovative mortgages reset. At the same time, innovations in the securitization of mortgages further fueled bad underwriting practices. Financial institutions repackaged the mortgages that had been securitized as bonds and bought insurance (known as credit-default swaps) to protect themselves against losses in case of defaults on the underlying loans. Since credit-rating agencies tended to give solid-gold ratings to these packages, the fear of default was minimal.

When the housing bubble burst in 2007, firms with large exposure to these now “toxic” mortgage-backed assets (including underwriters, hedge funds and companies that insured the bonds) found themselves saddled with huge losses, undermining their financial stability. Emergency weekend rescues engineered by the Federal Reserve and the Treasury Department of investment bank Bear Stearns, insurance giant AIG and the government-sponsored enterprises (GSEs) known as Fannie Mae and Freddie Mac over the course of 2008 (and their refusal to rescue another investment firm, Lehman Brothers) came to a head in September when the Treasury Secretary and the Fed chairman came to the Hill with a dire forecast of economic Armageddon if Congress failed to enact a \$700 billion bailout package to buy up the toxic assets of financial institutions.

Did Congress do anything about the crisis as it was unfolding? We cannot do justice here to the full range of debates that raged over the course of the Clinton and Bush presidencies over appropriate federal steps to oversee financial and housing markets. It is important to note that excessive risk-taking and over-leveraging by financial players occurred against a backdrop of financial deregulation – a regime sustained and expanded over the past two and a half decades with the support of Democrats and Republicans. In 1999, a Republican Congress and Democratic President Clinton repealed Depression-era laws separating commercial banking, investment and insurance industries. Between 1998 and 2000, efforts by the Commodity Futures Trading Commission to bring financial derivatives under the purview of regulatory agencies were thwarted, as then-chairman of the Federal Reserve Alan Greenspan and then-Treasury Secretary Robert E. Rubin, and his successor Larry Summers, persuaded legislators to back off of regulation. As former representative Jim Leach (R-Iowa) said recently about legislators’ unwillingness to challenge Greenspan, “You’ve got an area of judgment in which members of



Congress have nonexistent expertise.”<sup>5</sup> Congress did take more serious steps in 2005 to rein in the mortgage securitization business after accounting scandals in 2003 and 2004 at Fannie Mae and Freddie Mac, the nation’s largest entities in the mortgage-lending industry. Bush administration proposals would have created a new regulator for the mortgage securitization giants and limited the firms’ portfolios. Republicans claim that Democrats foiled their efforts, charging that Democrats feared that tighter regulation of the firms would undermine the firms’ congressional charters to finance low-income and affordable housing. Democrats counter that they signed onto the regulatory effort in the House in 2005, even after Republicans trimmed a requirement that the firms donate 5 percent of their profits to an affordable housing fund. Stalemate ensued in the Senate, however, when a tough Republican bill to place stronger constraints on the mortgage giants left out a funding stream for affordable housing. Deadlock on that issue – and bicameral differences over the scope of new regulatory constraints – doomed congressional action.

Congress sports a patchy record in reacting to emerging problems in housing finance over the course of the Bush administration. Granted, the stalemate in the 109<sup>th</sup> Congress over tightening regulation of Fannie and Freddie occurred before the twin companies’ aggressive dive into the risky subprime-lending business. That three-fold increase in Fannie and Freddie’s business took place between 2005 and 2008, with the precarious state of subprime lending revealed in August 2007. Once the firms were clearly dissolving in 2008, Congress did act – as we explore in detail below. Still, the accounting scandals in 2003 and 2004 should also have sent signals to congressional majorities about a dire need to reform how these quasi-public agencies were handling several trillion dollars in mortgage financing. Those scandals, however, seem to have been insufficient to motivate legislators to investigate lending patterns in the GSEs or compromise over desired reforms.

## Responding to Crisis

Congress and the president responded to the unfolding housing and financial crises in four ways: fiscal stimulus, plans for mortgage relief, a government takeover of Fannie and Freddie and billions funneled to Wall Street. Efforts to extend financing to the domestic automobile industry would have counted as a fifth legislative response, had endemic legislative gridlock been overcome (although the administration did step in to negotiate emergency loans to help keep the automakers

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<sup>5</sup> As quoted in Peter S. Goodman, “Taking Hard New Look at a Greenspan Legacy,” *New York Times*, October 9, 2008, p. A1.



afloat). Although Congress proved adept at creating economic stimulus early in the year, a veritable legislative meltdown characterized Congress's performance by year's end.

### ***Fiscal Stimulus***

With respect to economic stimulus, Congress's actions at the outset of 2008 earned widespread praise, as many reacted positively to the swift enactment in February 2008 of a \$152 billion package of tax rebates and breaks. Congress's handiwork was deemed timely and targeted, meeting economists' prescription for an effective economic stimulus. Economists note a small bump up in retail sales following disbursement of the checks, but also note evidence that recipients seem to have preferred to save the money or to use it to pay off debts – limiting its effectiveness as a fiscal tool. Nor are we asking much of Congress when it comes together to dole out dollars directly to individuals and families, packaged with tax breaks for businesses. Still, the ability of a Democratic Congress to focus on a narrow package of short-term benefits, work hand-in-glove with Republican congressional leaders, and also keep the package within bounds acceptable to the Republican White House is notable.

### ***Foreclosure Relief and Financing Housing***

Congress's performance in response to the housing crisis is tougher to gauge. Bipartisan compromise was secured in the summer of 2008 on a broad package aimed at reining in the GSEs and stemming the foreclosure crisis. Congress's solutions included steps to encourage restructuring of troubled mortgages, extend housing tax breaks, create a new regulator for the GSEs, and – most remarkably – grant virtually unlimited authority for the Treasury to lend to the GSEs and buy their stock. Treasury Secretary Henry M. Paulson Jr. termed the new authority (whose potential cost the Congressional Budget Office was unable to specify) the “bazooka in his pocket,” and argued that storing it there would be sufficient to forestall further GSE losses and restore their financial stability. Such optimism proved misplaced, as the government moved to take over the mortgage giants in September – an enormous and aggressive federal intervention to prevent their failure and the consequences to credit markets that might otherwise ensue.

Congress deserves strong marks for overcoming years of legislative deadlock over the appropriate level of government regulation of the public-private GSEs and for devising one potential approach to mitigating foreclosures. Legislators' willingness to

**The ability of a Democratic Congress to focus on a narrow package of short-term benefits, work hand-in-glove with Republican congressional leaders, and also keep the package within bounds acceptable to the Republican White House is notable.**



compromise reflects in part the growing pressures placed on businesses and households by the freeze in credit markets and the rising numbers of foreclosures in both Democratic and Republican-leaning congressional districts. Indeed, the housing bubbles that developed in fast-growing and often Republican areas of Florida, Arizona, California and Nevada spurred some Republican support for mortgage relief when legislators might otherwise have been ideologically opposed to government intervention. The desire for mortgage relief (strongest amongst Democrats) and tighter regulation of the GSEs (strongest among Republicans) motivated both sides come to the negotiating table. Although partisan stalemate left more ambitious foreclosure mitigation measures on the table, Congress made an important down payment toward helping to keep some families from defaulting on their mortgages.

Perhaps more importantly, however, legislators' hands were forced by the intervention of Secretary Paulson in early July with his urgent call for implicit government commitments to backstop the companies. The specter of the failure of the GSEs proved sufficient to motivate congressional compromise. Whether Paulson planned his intervention to capitalize on Capitol Hill momentum or whether his proposal stimulated compromise – either scenario points to the impact of an unfolding crisis that affects a broad swath of the country and a wide array of economic interests.

Procedurally, Senate consideration of the housing bill put on full display the difficulties of legislating in a chamber hamstrung by the need for 60 votes and unanimous consent on a near-daily basis. As Sen. Christopher J. Dodd (D-Conn.) noted as the Senate neared enactment, “You need a Ph.D. in parliamentary procedure because of the way the House sent the bill over.”<sup>6</sup> We would hazard that three Ph.D.s might not be enough. The three-part structure of the House bill created three times as many opportunities to derail Senate consideration of the package, as ambitious senators forced leaders to secure multiple 60-vote coalitions.

### ***Restoring Financial Stability***

Congress's most visible action in the 110<sup>th</sup> Congress was its bailout of the financial services industry – engineered in late September by Secretary Paulson with the support of Federal Reserve Chairman Ben S. Bernanke and pitched to congressional leaders as the only way to avoid the imminent collapse of U.S. financial markets. In a

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<sup>6</sup> Benton Ives, “Housing Bill Inches Forward in Senate; Isakson Says Ensign Should Give In,” *CQ Today Print Edition*, July 7, 2008.



two-week period, Paulson proposed, congressional leaders amended, rank-and-file members defeated and then enacted into law a \$700 billion fund for the Treasury to buy up toxic mortgage-related assets that were destabilizing Wall Street's financial firms. After the initial House failure and the subsequent freefall of the stock market, the Senate sweetened the package with tax breaks, tax changes and unrelated bills to secure sufficient votes.

The high mark of Congress's performance in the bailout was its cobbling a large majority for the financial rescue and its refusal to accept the Treasury's request for a blank check -- an open-ended grant of unchecked authority to execute the Troubled Asset Relief Program (known as TARP). Prodded by the Senate, Congress placed conditions on TARP expenditures: limits were placed on executive compensation, increases in dividends were banned, equity stakes in the firms were required, and oversight boards were created to report periodically on the TARP. Legislators also mandated that the Treasury dedicate some of the TARP funds for mortgage relief, although to this date with the first half of the \$700 billion committed, no such plan has been implemented. Congress also created the opportunity for Congress to reject the administration's request for the second installment, engineering a fast-tracked process for a joint resolution of disapproval should Congress decline to grant the current or subsequent administration the second tranche of funds. Granted, the president would have to sign the disapproval resolution to defeat the release of funds, meaning that with a Republican in the White House, a Democratic Congress would likely have to muster a supermajority to overcome a potential presidential veto.

That is the high mark. The low mark became apparent as the 110<sup>th</sup> Congress ran its course. First, within days, Secretary Paulson had done a U-turn, abandoning the plan to buy up toxic assets and instead move to inject public capital in financial institutions -- a policy tool Paulson had deemed a sign of "failure" in congressional testimony during consideration of the Wall Street rescue. Second, despite infusing over \$150 billion directly into banks, the Treasury admitted in November that it had no way of accounting for how the banks were using the funds. Were banks using the funds to increase lending? Pay bonuses? Give out dividends? Buy up weaker banks? Anecdotal reporting over the course of the fall -- including reports that the insurance giant AIG was using over \$18 billion of TARP funds to pay off its credit-default swaps to U.S. and European banks -- led congressional leaders to claim that additional TARP funds would be released only with restrictions on their uses and the imposition of accountability controls. The Treasury's failure to spend funds on mortgage relief for homeowners also stirred legislators to vow changes in the program. Third, despite





billions of government cash invested in banks, markets have continued their downward slide and historic volatility. Investor confidence collapsed this fall as policymakers failed to act consistently and communicate effectively the steps they were taking.

Clearly, many things went wrong in the design and execution of TARP, and both Congress and Secretary Paulson contributed to the economic and political mess that has ensued. Paulson and the Treasury urged that TARP be written broadly enough to allow the Treasury to invest funds in banks rather than to buy up toxic assets. At the same time, Paulson essentially cut off debate about alternative uses of the funds by declaring capital injections a failed strategy. Paulson's multiple U-turns over the fall – and the Treasury's effective refusal to allocate TARP funds to mitigate mortgage defaults – did not help. Understandably frustrated, legislators started to call for revisions to the TARP program under the new administration. Still, Congress designed a financial package that allowed the Treasury to spend nearly \$350 billion with no accountability for how the money was used, little transparency in how institutions were selected for infusions, no metrics for determining program effectiveness and no mechanism for forcing the Treasury to comply with the terms of the law that required action to mitigate foreclosures.

Congress's proclivity for blame avoidance and its tendency to trust – but not verify – the administration's judgment undermined its effectiveness as a crisis manager in this instance. In particular, the failure to fully vet the alternative use of the TARP funds has proven problematic. First, senators soon realized that the special inspector general created to oversee TARP likely did not have the authority to investigate capital injections into the banks; he or she would be limited to overseeing the purchase of troubled, mortgage-backed assets (should Obama's Treasury decide to take such a route). Second, the provisions requiring Treasury to impose executive compensation limits applied only when Treasury purchased toxic assets from a firm via an auction; institutions receiving capital injections were exempt.<sup>7</sup> Because Paulson said at the time that the Treasury would be unlikely to pursue such a strategy of "failure," Congress acquiesced. Finally, multiple oversight bodies were created, but no carrots or sticks were crafted to encourage Treasury compliance with the mandate to address the foreclosure crisis. In fact, Congress created only a blunt tool for forcing the Treasury's hand: a disapproval resolution for rejecting the second half of the bailout fund that required the president's consent. Had Congress required

**Despite billions of government cash invested in banks, markets have continued their downward slide and historic volatility.**

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<sup>7</sup> Amit Paley, "Executive Pay Limits May Prove Toothless," *Washington Post*, December 15, 2008, p. A1.



a joint resolution of approval – making subsequent expenditures conditional on congressional action – it would have reserved for itself a stronger tool for forcing Treasury attention. More likely, Congress had no interest in committing itself to voting yet again to bail out Wall Street.

## Broader Consequences

We see three broader institutional and policy dilemmas that arose from Congress's approach to enacting the Wall Street bailout. First, facing intense public antipathy towards the bill and worried about the electoral consequences of voting on it weeks before the elections, Congress was unwilling to take ownership of the problem and potential solutions. As Dodd reasonably put it in December, "A lot of this, when we did the [financial bailout] bill ... was not to micromanage. ... The idea was to give them authority, give them resources, and then surround them with accountability standards."<sup>8</sup> In doing so, of course, Congress erred on the side of excessive deference to the executive branch – and unfortunately with few accountability standards to guide the Treasury's spending. The consequences of deference are coming home to roost. True, the Treasury notes that the financial system did not collapse, but that hardly counts as evidence for the effectiveness of how TARP funds have been used. At the same time as Treasury has been pumping billions into financial firms, the Federal Reserve, with little transparency, has ramped up its balance sheet to nearly \$2 trillion as it loans billions to markets to attempt to restore liquidity and the flow of credit.

Second, we have been struck by the 110<sup>th</sup> Congress's inability to step back and consider the broader role of Congress and the federal government in restoring the economy. As one Senate staffer put it recently, Congress has lurched from crisis to crisis but hasn't done much policymaking. To be fair, ambitious legislation is tough to design in periods of divided government, small majorities and the run-up to a wide-open presidential election – all in the context of a financial tsunami. Nor is redesign of government regulation and involvement in the economy likely to occur overnight in the midst of what appears to be the worst recession since the Great Depression. Still, the economic consequences of the subprime mortgage crisis have been evident for over a year, and there have been no shortage of proposals for how to address the foreclosure crisis at the heart of the nation's economic troubles. The incoming Congress would be well advised to ramp up in financial market expertise and move

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<sup>8</sup>As cited in Phil Mattingly, "Bailout Fatigue Overwhelms Key Lawmakers," *CQ Today*, December 12, 2008.



early to engage Republicans in constructive thinking about how the economy can be turned around.

Third, we are struck by the fragility of Congress's emergency legislative capacity. True, we often condone Congress's weaknesses by noting that there can be little opportunity to sort out problems in the face of tough time constraints. Still, suffice it to say that the bailout of Wall Street almost did not occur. And in the attempted rescue of the Big Three, Congress proved unable to reach consensus – stymied largely by Senate rules that allowed a minority to take hostage a bargain negotiated by Democrats and the White House. The regional concentration of the domestic auto industry in the more moderate Rust Belt put conservative Republican support out of reach and spelled the demise of the plan. Improving Congress's institutional capacity and political will to arbitrate tough problems will be imperative in the 111<sup>th</sup> Congress, as the number of troubled industries and sectors is likely to increase and the nation's recession broadens and deepens.

## **Conclusion: Prospects for Congress in 2009 and Beyond**

This review of the performance of the 110<sup>th</sup> Congress underscores the limited extent to which the new Democratic majority was able to reverse the policy commitments of President Bush or the institutional dynamics that have shaped congressional behavior in recent years or respond effectively to the most serious financial and economic crises in many decades. The 2006 election produced a clear agenda change in Washington, some mid-level policy reversals, increased congressional oversight of the executive, a strengthening of ethics standards and procedures and a modest rebalancing of power between the Congress and White House. But divided government, the continuing ideological polarization of the parties and Congress's bipartisan proclivity for blame avoidance frustrated efforts to deal with the central challenges facing the country. Meanwhile, the venomous partisan atmosphere, routine suspension of regular order, filibuster politics and demise of deliberation continue unabated.

Barack Obama comes to the White House with strong electoral winds at his back, enlarged Democratic majorities in Congress, a strikingly successful transition and extremely favorable public opinion in the United States and abroad. He confronts the most serious financial and economic crises since the Great Depression and the most daunting and constraining policy inheritance imaginable. He has promised immediate action on financial stabilization and economic revival and then major reform of



energy, health care and fiscal policy. Obama has also pledged to change the divisive partisan nature of our politics. Extraordinary challenges, ambitions, opportunities and constraints. The new president appears ready to take up the charge; can we say the same of the Congress?

In terms of the willingness of a Democratic Congress to operate as its own branch of government -- and not just a wholly owned subsidiary of the White House -- there were a few early encouraging signs. One in particular was the clear signal sent to Vice President-elect Joe Biden that he would not be welcome as a regular participant or guest at the weekly lunches of Democratic senators where they hear speakers, discuss strategy, and sometimes simply vent against the White House, the House of Representatives or the Republican minority. Vice President Cheney made a point of going to all the weekly luncheon sessions of Senate Republicans, meaning that more often than not, open criticism of their own administration was suppressed by Republican senators. Despite Biden's pedigree, including 36 years in the body, Majority Leader Reid made it clear that this kind of regular attendance breached the boundaries and limited the independence of the Senate. And Speaker Pelosi apparently spoke firmly to incoming White House Chief of Staff Rahm Emanuel about her expectations for how the new administration must treat the House with institutional respect.

But this sign of feistiness is more symbolic than real. The biggest test for Congress as an independent branch remains its willingness to do vigorous oversight of the executive. In the House, the decision by Waxman, arguably the most ardent and adept master of oversight in modern times, to abandon the chair of the Oversight and Government Reform Committee to take the reins of the Energy and Commerce Committee, may make for a serious decline in oversight; his replacement at the OGR Committee, Rep. Edolphus Towns (D-N.Y.), is not known for his high energy level. But at the same time, the Energy and Commerce Committee's subcommittee on Oversight and Investigations has often been a highly assertive force in the House, and may be newly invigorated under Waxman. But oversight must also include the regular efforts of the appropriations subcommittees, and of the authorizing committees, and a continuing restoration of the authorization process.

The willingness of Congress to police the ethical behavior of its members will test early the mettle of the 111<sup>th</sup> Congress. For the House majority, the case of Rep. Charles B. Rangel (D-N.Y.), the chair of the Ways and Means Committee, will be high on the agenda; can the ethics committee do a vigorous and fair job? Will the Office of Congressional Ethics, now constituted with a full membership and a staff, be given



the leeway to operate independently? Will the Senate finally follow suit and create its own independent office?

Another test will come with the willingness of Democratic leaders in the House and Senate to restore the regular order. In the House, the enlarged majority has already moved to streamline the House rules to reduce the opportunities of the minority to embarrass, delay or obstruct, through the motion to recommit. Such a move would be acceptable if it is accompanied by a corresponding openness, in committees and on the House floor, to more amendments from the minority (and from rank-and-file members of the majority).

In the Senate, a reduction in the use of techniques like filling the amendment tree to curtail minority impact – if accompanied by a minority willingness to cooperate with the majority to pass important legislation – would be a sign that the filibuster, or threat of filibuster, would be lessened. And in both houses, the willingness to return to the routine use of conference committees is a key to restoring the regular order.

The onus in these areas is not only on the majority leadership; it is also on the minority to use its position to put forward its own alternatives and not try simply to manipulate the rules and processes for delay and embarrassment. But the first steps to encourage minority constructive participation have to come from the majority.

President Obama will perforce play a critical role in encouraging or discouraging moves to restore genuine deliberation on Capitol Hill. His ambitious agenda combined with enlarged Democratic majorities will tempt him and his advisors to encourage congressional leaders to use any available institutional levers to move priority legislation quickly and cleanly through Congress. Such moves, however, would almost certainly reignite the partisan wars and diminish Obama's prospects for delivering on his promise to alter the character and tone of our politics. They might also frustrate rather than facilitate efforts to grapple seriously with health-care costs, quality and coverage; climate change and renewable energy; and economic revitalization and opportunity.

An early fiscal stimulus package provides an excellent opportunity to start on a more constructive and productive procedural course, one that makes room for members of both parties to engage in lawmaking and for Congress to do much more than ratify the recommendations of the new administration. After initially signaling they would write the fiscal stimulus bill quickly and without following regular order, the Democratic leadership in Congress now appears to be on a more deliberative course. That would bode well for such hopes. Interestingly, the decisive Democratic



victory in 2008 and the severe economic problems dictate the policy space in which the administration and Congress will engage, and it will be very different than that which followed recent Republican victories. We have already moved into an era of more activist government, one likely to be characterized less by ideological imperatives and more by a search for practical solutions to obvious problems. This is just the time for Congress to once again begin to contribute its comparative advantages as a strong, independent and deliberative first branch of government.

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***The Mending the Broken Branch Project***

*examines policy-making and oversight activity in the 110<sup>th</sup> Congress as well as action on key issues to provide a complete picture of the legislative branch's efforts to mend itself. The project issues regular reports as it monitors Congress's performance under its new Democratic majorities in the House and Senate.*

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Figure 1 – Analysis of the 110<sup>th</sup> Congress

House	103 <sup>rd</sup> Congress (1993-94)	104 <sup>th</sup> Congress (1995-96)	109 <sup>th</sup> Congress (2005-06)	110 <sup>th</sup> Congress (2007-08)
<i>Time In Session</i>				
Legislative Days	265	289	241	282
Hours	1887	2444	1917	2266
<i>Roll Call Votes</i>				
	1122	1340	1214	1876
<i>Measures Passed</i>				
Substantive	172	196	131	210
Routine	558	412	512	758
Symbolic	197	102	440	890
<i>Oversight Hearings</i>				
Full Committee and Subcommittee	1129	901	960	1403
Appropriations	545	440	242	362
Iraq			84	193
<i>Markups</i>				
	709	594	345	432
<i>Rules</i>				
Open	48	69	22	12
Modified Open	16	18	2	11
Structured	36	23	49	62
Modified Closed	17	23	15	21
Closed	18	25	54	87
Self-Executing	20	19	36	49
Restrictive Rules as Percentage of All Rules	52.6%	44.9%	83.1%	88.1%
<i>Suspensions</i>				
	493	390	922	1616
<i>Motions to Recommit</i>				
Total Offered	45	68	57	122
Successful	4	4	0	24



<i>Waivers of Layover Requirements</i>				
Expedited Rules	11	16	22	17
Waivers on Conference Reports	16	25	20	11
<i>Average Party Unity Scores</i>				
Democrats	88.5	84	88.5	92
Republicans	83	91.5	90.5	86

<b>Senate</b>	<b>103<sup>rd</sup> Congress (1993-94)</b>	<b>104<sup>th</sup> Congress (1995-96)</b>	<b>109<sup>th</sup> Congress (2005-06)</b>	<b>110<sup>th</sup> Congress (2007-08)</b>
<i>Time In Session</i>				
Legislative Days	291	343	297	373
Hours	2514	2876	2250	2467
<i>Roll Call Votes</i>	724	919	645	657
<i>Measures Passed</i>				
Substantive	152	158	103	109
Routine	514	325	431	357
Symbolic	264	154	580	726
<i>Oversight Hearings</i>				
Full Committee and Subcommittee	450	509	595	742
Appropriations	259	206	154	146
Iraq			77	93
<i>Markups</i>	274	240	213	198
<i>Cloture Motions</i>				
Successful	14	9	34	61
Failed	32	41	20	48
Withdrawn	23	18	17	27
No Action Taken	11	14	0	6





<i>Judicial Nominations</i>				
Percentage of Appeals Court Nominees Confirmed	85.7%	57.9%	55.6%	45.5%
Percentage of District Court Nominees Confirmed	90.6%	74.7%	51.6%	72.5%
<i>Average Party Unity Scores</i>				
Democrats	86.5	85	88	87
Republicans	83.5	91	88	82

<b>Congress</b>	<b>103<sup>rd</sup> Congress (1993-94)</b>	<b>104<sup>th</sup> Congress (1995-96)</b>	<b>109<sup>th</sup> Congress (2005-06)</b>	<b>110<sup>th</sup> Congress (2007-08)</b>
<i>Public Laws</i>				
Signed by President	465	339	482	460
Vetoed	0	17	0	11
Vetoes Overridden	0	1	0	4
<i>Approval Ratings</i>				
Beginning of First Session	27%	33%	43%	35%
End of First Session	24% (Nov. 1993)	30% (Sept. 1995)	29% (Dec. 2005)	22% (Dec. 2007)
Beginning of Second Session	28%	35%	27%	23%
End of Second Session	23% (Dec. 1994)	34% (Sept. 1996)	26% (Nov. 2006)	19% (Nov. 2008)

For source information and definitions, please see the glossary for Sarah A. Binder, Thomas E. Mann, and Molly Reynolds, "One Year Later: Is Congress Still the Broken Branch?" *Mending the Broken Branch*, Vol. 2, January 2008, available at

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