and never made it out. And, of course, there was the case of Abe Fortas, whose nomination by Lyndon Johnson to be chief justice was filibustered in 1968 until other problems forced Fortas to withdraw.[14]

As for other levels of judicial nominations, there is a long-standing tradition, exercised countless times, giving one or two senators from the home state a veto power over district court nominees. (This is the unwritten rule, incidentally, that was shattered by Orrin Hatch, then the Judiciary chairman, when Clinton was president.) This "blue slip" power was applied less frequently to appeals court nominees, but many in the past were killed far short of a vote on the Senate floor. Why weren't more of them filibustered? Because it was easy enough to kill most of the controversial ones without resorting to a filibuster.

Some retired conservative Republican senators, including Malcolm Wallop of Wyoming, understood this history and the implications of an abrupt change in the rules and deplored the move. But as Frist moved closer and closer to detonating the nuclear option, the silence of Republican pillars of the institution—Thad Cochran, Pete Domenici, and Dick Lugar—was deafening. Lugar warned that the consequences of pulling the nuclear trigger could be severe and backfire against Republicans and conservatives, but he then said that if the Republican leader asked him for support to do so, he would give it.

As many of us thought and wrote at the time, if they won't defend their institution, who will? In the end, a bipartisan group of old bulls, mavericks, and moderates—referred to as the Gang of 14—pulled the Senate back from the brink. Their informal agreement, entirely self-enforcing, to oppose both the nuclear option and filibusters on judicial confirmations except under extraordinary circumstances forced a temporary de-escalation of the judicial arms race. How long it would last was far from certain.

There *is* a long-standing tradition in the Senate regarding judicial nominations. That tradition calls for a vigorous and independent Senate playing its role of advice and consent. Because they represent lifetime appointments that cannot and should not be easily rescinded, judicial nominations require higher hurdles than simple legislation, which can always be amended or repealed. Charles Krauthammer called the nuclear option "restoration." It's not even close. And the willingness of dozens of senators to apply it spoke volumes about their indifference to the body's essence when they confronted short-term political expedience.



## The Decline of Deliberation

When we first came to Congress, members from New York, Pennsylvania and other parts of the Northeast were notorious for their commuting schedule. Many would try to limit their time in Washington to three days, spending long "weekends" back home. They were known as the Tuesday to Thursday Club. That meant coming down to the Capitol early on Tuesday morning, during routine morning business and before the substantive legislative schedule began, and returning home late Thursday night after the last votes, or early Friday morning.

### The Shrinking Schedule

Although these days the Tuesday to Thursday Club encompasses the vast majority of members, the schedule is even more attenuated. Members from all over the country straggle in late on Tuesday, insisting that there be no votes until the end of the day, and scramble to get out of town as early on Thursday as possible. Of course, it doesn't work every week—sometimes, votes actually take place on Mondays and Fridays, and sometimes emergencies or pressing business require full weeks and even occasional weekend sessions. But the change from the past—and the lack of time spent in meaningful floor debate—has been striking. For 2006, the second session of the 109th Congress, the House set a grand total of seventy-one days in which votes are scheduled to take place and an additional twenty-six

ninety-seven, the smallest number in sixty years. This Congress is on track to set a record-low workload for an entire Congress since the 80th—famous as, in Harry Truman's words, the "Do-Nothing Congress"—in 1947–48.

During the 1960s and 1970s, the average Congress was in session 323 days. In the 1980s and 1990s, the average declined to 278. But the days in session have since plummeted, with the likelihood that the first six years of the Bush presidency will show an average below 250 per two-year Congress.[15]

Beyond the attenuation of meaningful action and debate on the floor, we have seen as well the decline of committees, and not only through the disappearance of oversight. Major bills that in the past would have required weeks of hearings and days of markups are now often reviewed in days of hearings and with little or no visible time spent by the committee on systematic analysis of the legislation line by line and word by word. Much of the action now takes place behind closed doors, with bills, as in the bankruptcy case, put together by a small group of leadership staff, committee staff, industry representatives, and a few majority party members and then rammed through subcommittee and committee with minimal debate. In the 1960s and 1970s, the average Congress had an average of 5,372 House committee and subcommittee meetings; in the 1980s and 1990s the average was 4,793. In the last Congress, the 108th, the number was 2,135.[16]

### The Demise of Regular Order

But the lack of interest in the admittedly arduous process of going through multiple levels and channels of discussion, debate, negotiation, and compromise that make up a robust deliberative process has been a symptom of the broader malady in the contemporary Congress—the belief, especially in the House, that deliberation, fairness, bipartisanship, and debate are impediments to the larger goal of achieving



The House, unlike the Senate, [illegible]tion. With its complete control of the Rules Committee, the majority leadership may write special rules to control debate and amendments on the House floor. As long as its party members support the Rules Committee, the leadership may waive any standing rule not specified in the Constitution, such as the requirement that conference committee reports lay over for three days before they are considered by the House. By controlling the position of presiding officer, in committee or on the floor, the majority may also adopt less formal means to advance its legislative agenda and weaken the position of the minority.

During the last decade of their forty-year control of the House, Democrats made increasing use of this power to deny the minority Republicans opportunity to participate in any meaningful fashion in the legislative process. Republicans chafed under the increasingly heavy hand of the majority. In 1993 ranking Rules Committee member David Dreier and his Republican committee colleagues issued a stinging report criticizing the tactics used by the majority to shut down "deliberative democracy."[17] What was essential to the House but missing under the arbitrary rule of the Democrats, they argued, was a "full and free airing of conflicting opinions through hearings, debates, and amendments for the purpose of developing and improving legislation deserving of the respect and support of the people." Dreier acknowledged the majority's right to control the agenda and schedule and to structure legislation to advance its policy goals. But this can be accomplished, he asserted, without denying the minority an opportunity to be heard and have their ideas considered.

The 1994 election changed the majority party in the House but it did nothing to stem the decline of deliberative democracy. During more than a decade of Republican rule, the majority has tightened its grip on the House and the minority has been increasingly marginalized. Statistics on

House rules compiled by former Republican Rules Committee staffer Donald Wolfensberger document this trend.[18] The percentage of open or modified open rules dropped from 44 percent in the 103rd Congress (the last controlled by the Democrats) to 26 percent in the 108th Congress. During the same time span, the percentage of closed or modified closed rules jumped from 18 percent to 49 percent. Wolfensberger also documents an increasing use by the Republican majority of self-executing rules, which allow a bill to be altered without having a separate debate and direct vote on amendments, and of bills considered under suspension of the rules.

But this is only the tip of the iceberg. Committee deliberation on controversial legislation has become increasingly partisan and formalistic, with the serious work being done by the committee chair, party leadership, administration officials, and lobbyists. This pattern is repeated in conference committees, often without any pretence of a full committee mark-up with members of both political parties present. The Rules Committee routinely suspends its requirement of a 48-hour notice of meetings, invoking its authority to call an emergency meeting "at any time on any measure or matter which the Chair determines to be of an emergency nature."[19] Those meetings, at which 60 percent of all rules during the 108th Congress were reported (a lot of emergencies), often were scheduled with little advance notice between 8 p.m. and 7 a.m. And their primary purpose was to dispense with regular order.

For example, during the 108th Congress the Rules Committee, in structuring consideration of twenty-eight conference reports, almost always in emergency session, in every case waived all points of order against the conference report and against its consideration. This action made it virtually impossible to discover what was in each conference report before voting on it. Months after the adoption of the 850-page conference report on the Medicare prescription drug bill, which was filed in the House at 1:17 a.m. on November 21, 2003, and passed at 6 a.m. on November 22,



members and the public were still unraveling what was in the bill that became law.

This Rules Committee practice has been employed to facilitate the now-routine process of folding many significant issues into huge omnibus bills and bringing them to the House floor for up-or-down votes without any notice or time for members to read or absorb them. House leaders have become particularly enamored of packaging several standalone appropriations bills into one omnibus bill that is brought up at the end of the session, as all the members are preparing to go home and do not want to vote to shut down the government. By forgoing nearly all floor debate, they can pack these bills with numerous provisions that could never pass in separate votes.

But this form of legislating—which often means that bills are passed and laws are enacted via all-night sessions whereby staff and a few members and party leaders try to slap all the pieces together under tight deadlines—results in stealth legislation that has not really passed majority muster and frequently has embarrassing consequences. One pungent example occurred in December 2004, when it was discovered that a giant appropriations bill had a provision that would allow Appropriations staff access to individual tax returns and would exempt them from criminal penalties for revealing the contents of those returns.

When a press report disclosed the provision, after the bill had passed, it was denounced by subcommittee chair Ernest Istook, who said he had no idea that language was in the bill. It turned out that the provision had surfaced between 3 and 5 a.m. during an all-night staff negotiation just before the final 3,000-page document was slapped together and sent to the floor. It does not appear that the provision was a deliberately pernicious one—it was simply that no one understood what the language actually did. No wonder; they were operating, after all, sleep-deprived in the middle of the night after a series of crash sessions to put the omnibus together. Former Appropriations staffer Scott Lilly reflected eloquently on this process in a *Roll Call* op-ed:

While the flawed language should have been spotted, the circumstances in which it was added make such mistakes almost inevitable. Why do we conduct the people's business this way? Some say it's that Members of Congress have become too lazy to do their own work, and there may be some instances in which this is true. But my experience indicates that the vast majority of Members of both parties would love to revert to the old system in which the people elected to make these decisions actually do. I also know that nearly all of the staff who have been called on to participate in these exercises are deeply troubled by the process that has evolved.

The reason the old system of legislating no longer works is that the current leadership has not only assumed the role of passing the legislation required of Congress, but has also taken on the responsibility of insuring that the content of that legislation is consistent with a specific ideological criteria that is often not the will of a majority in the House.

They have committed to conservatives within the Republican Conference that legislation sent to the president will be consistent with the views of a majority of the Conference. On dozens of issues ranging from trade with Cuba to Canadian drug imports and the raising of the minimum wage, the majority position in the Republican Conference is not the majority position of the full House. Preventing the House from producing legislation that reflects the views of its Members requires circumventing a body of rules and procedures developed in the past 215 years.

The House was intended to be the centerpiece of our democracy. It can again function as a democratic institution if we return to the "regular order." When even subcommittee chairmen don't know the content of the legislation bearing their own name, the role of elected representatives has been diminished to the point that ordinary citizens can have little confidence that their views have any weight in decisions made by Congress.[20]

This is all part of a pattern, of which perhaps the most egregious practice has been the willingness of the majority leadership to hold open votes well beyond the fifteen minutes specified in the rules. As we discussed earlier, the vote on the Medicare prescription drug bill was the most extreme



example—Republican leaders held the vote open for nearly three hours in order to muscle the decisive votes for its passage. But other bills have been accorded the same treatment, most recently the Central American Free Trade Agreement and the oil refinery bill brought up in the House in the aftermath of Hurricane Katrina. The latter bill, crafted behind closed doors and filled with provisions to waive or obliterate environmental regulations, took nearly an hour to pass (for what was supposed to be a five-minute vote).

Rules Committee Chairman Dreier acknowledges that he and his colleagues in the Republican leadership now use the tactics he condemned when he was in the minority. "We have had to do some of the things we criticized once. . . . But now that I'm in the majority, I have this responsibility to govern. It's something I didn't completely understand when I was in the minority."[21] He has a point—up to a point. The Republican majority is narrow. The parties are even more ideologically polarized. President Bush is pursuing a conservative agenda that requires an aggressive partisan start in the House. Democrats are remarkably unified in their opposition.

But what is significant is what Dreier doesn't say. His party has manipulated the process to serve partisan interests far beyond what the Democrats did during their forty-year reign in the House. Most maneuvers aimed to garner a hard-fought legislative victory, but some—as witnessed by well-publicized, heavy-handed actions by Judiciary Committee Chairman Jim Sensenbrenner and Ways and Means Committee Chairman Bill Thomas—were simply to spite the vanquished minority.[22] And their impressive successes have come at a steep price: in the suspect content of the legislative product, the diminished institutional standing of the Congress, and the rancorous tone of public life in Washington and the country.

### The Explosion of Earmarks

Another sign of the decline of the deliberative process is the startling rise of earmarking—legislating specific projects

...ion of resources to professionals. Earmark fever ha... completely taken over the appropriations process as it earlier had consumed public works. The conservative watchdog group Citizens Against Government Waste commented in an open letter released in 2004, "Over the past ten years, pork-barrel spending has increased exponentially, from 1,430 projects totaling $10 billion in 1995 to 10,656 projects, totaling $22.9 billion, in 2004."[23]

Scott Lilly, the longtime Democratic staff director of the House Appropriations Committee and a stellar career professional in the House, noted, "Earmarking has not simply grown in volume; the distribution of earmarks has also changed dramatically. In the 1980s, earmarks were largely rewards for Members who had persevered for years on the back benches and risen to positions of significant power on key committees. Today, earmarks are much more broadly distributed among the rank and file, and this most important advantage of incumbency affects election outcomes not just in a few districts of well-connected Members but in virtually all Congressional districts."[24]

The most startling development on the earmark front has been in appropriations. In the definitive treatment of the appropriations committees, Richard F. Fenno's magisterial *The Power of the Purse* published in 1966, there is no reference to *earmark* in the index. That is because historically, appropriations bills have not explicitly targeted funds for particular programs in particular districts. They have shaped the direction of spending and often encouraged specific programs in report language. But appropriators avoided earmarks because they inevitably would lead to a kind of circus or bazaar, with rising pressure to add funds for each district or to use the earmark as a weapon to reward friends and punish enemies.

The House especially saw the danger in this process. The Senate was much happier to open the spigots and use the appropriations process to logroll and make each member



happy. Earmarks took off in the Senate in the 199... and have risen exponentially, with senators of both par... eager to take advantage. Only Senator John McCain (R-AZ) has stood up strongly against the practice. In the House, though, there were many voices opposing earmarks, including, particularly strongly, Republicans.

That is, until they took over the majority in the House. Now the House is at least as eager to use the earmarking process as the Senate, and the results are clear.[25] In 1992, there were 892 specifically earmarked programs or projects, adding up to $2.6 billion in spending. The number more than doubled in six years (1998) to 1,000 earmarks, with spending jumping to $13.2 billion. By fiscal year 2002, the number of earmarks rose to 8,341, with spending up to $20 billion. By 2005, the number had escalated to 13,997 at a cost of $27.3 billion. The trends are obvious for almost every area of discretionary spending—$7 billion or more in defense, $1.2 billion in military construction, one hundred more pages of earmarks in the Veterans, Housing, NASA and Environmental Protection Agency appropriations than in 1995, more than $1 billion in the Labor/HHS bill, which, under Obey, had no earmarks to speak of before 1995. Among the most avid proponents and users of these earmarks has been one (ex-) House Majority Leader Tom DeLay (R-TX).

As pragmatists and students of the legislative process, we have never been ardent foes of pork barrel spending. We understand that it takes grease to make the wheels of the legislative process move and that pork itself is not evil or even necessarily bad. Some of it is the price of getting things done in Congress, and much of it is beneficial to society. But you can reach a point where all the standards fall by the wayside and scarce funds are seriously misallocated—with important programs getting diminished funding so that picayune projects can prevail.

The problem is at its worst in the transportation arena. When the 1991 highway bill moved to the House floor, it was attacked scathingly by minority Republican members

for its excessive earmarks, which totaled 538 by the time the bill reached the president's desk. To be sure, that number was the highest in history—up to then. As Scott Lilly noted, "Since the passage of the Federal Aid Highway Act of 1956, there have been twenty separate highway bills enacted, including the one signed by President Bush in August 2005. Prior to 1970, these bills let state highway commissions determine transportation priorities. In 1970, Congress passed a highway bill that included three specific projects to be built based on the directives of Congress. For the next sixteen years, highway legislation was passed every two or three years and the bills contained as few as two and as many as fourteen."[26]

The number went up significantly, to 155, in the 1987 highway bill as many rank-and-file members specifically demanded a piece of the action, leading to the 538 in 1991. Now look at what has happened in the two blockbuster transportation bills enacted since the Republicans took control of the House, in 1998 and 2005. The 1998 bill contained 1,850 earmarks, at a total cost of $9.5 billion. The 2005 bill contained a jaw-dropping 6,371 earmarks, worth $23 billion. Scott Lilly again: "Over the past fifty years there have been 9,242 earmarks in highway bills. Of those, 8,504, or 92 percent, have been inserted in the three highway bills enacted since Republicans took the House ten years ago."

The 2005 transportation bill, after years of struggle to get it passed—the president had long threatened a veto if it exceeded a specified limit in cost—was held over for an extra day so that earmarks could be used as bait or threats to secure votes to pass the Central America Free Trade Agreement. Republican leaders had not merely tolerated the explosion in earmarking but encouraged and even masterminded it. Earmarks became major tools for them to protect incumbents in marginal districts and to buy votes in extraneous areas.

Of course, the use of projects or pork to protect incumbents or to logroll for votes is nothing new. But the sheer scope of their use in the past few years is a sharp break with tradition; that it occurred on the watch of self-proclaimed fiscal conservatives has left many real fiscal conservatives boiling.



## The Dominance of Machine Politics

Running the House of Representatives with an iron fist requires a high degree of unity and loyalty among members of the majority party. Indeed, strong leadership in the House is conditional on widespread agreement among rank-and-file members on major public policy issues. The growing ideological polarization between the parties set the stage for more aggressive and partisan leadership, initially while Democrats were in the majority, in the late 1970s through the early 1990s, and then more ambitiously under Republican rule. While party leaders were dependent upon policy consensus in their caucus to run the House, they sought other means of increasing loyalty among their members. Two proved to be of particular importance. The first was to play a more central role in congressional elections, especially in their financing; the second was to enlist sympathetic interest groups and their lobbyists to the partisan cause.

### *Money and Elections*

During the rise of strong party leadership, campaign fundraising became an essential activity of party leaders and aspiring leaders. In addition to raising funds for their own campaigns, they appeared at fund-raisers for their party colleagues in Washington and in their districts; formed leadership PACs to contribute funds to their colleagues' campaigns; exhorted interest groups to contribute to the party and its members; used nonprofits to cater to the personal and electoral interests of their colleagues; and raised substantial