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IT'S TIME FOR TRUTH IN VOTING

"If you let me write the procedure, and I let you write the substance, I'll [beat] you every time."¹

—*Representative John Dingell (D-MI)*

INTRODUCTION

Votes by Members of Congress determine America's laws. Votes by citizens allow them to pass judgment on their representatives. But today's Congress uses procedures that render votes meaningless—or worse, deceptive. Congress routinely makes important decisions without voting at all, or simply avoids voting on controversial issues. Members of Congress frequently resort to fundamentally deceptive procedures that diminish their own responsibility and accountability. Such practices are a major cause of widespread voter cynicism about federal legislators' sincerity and good faith. In the 103rd Congress, Idaho Republican Representative Michael D. Crapo introduced a truth-in-voting bill, H.R. 3633, designed to stop such abuses and to make the workings of Congress more open and understandable to the general public. Among the deceptive practices the truth-in-voting bill would remedy are:

- ✓ **Voting to cut spending without actually saving any money;**
- ✓ **Building automatic spending increases into federal programs;**
- ✓ **Permitting Congressmen to cast votes for other Members;**
- ✓ **Holding secret meetings on public business;**
- ✓ **Hiding legislators' contacts with federal regulators;**

¹ See Mary W. Cohn, ed., *How Congress Works* (Washington, D.C.: Congressional Quarterly, Inc., 1991), p. 39.

- ✓ **Forcing** votes on legislation before Members have time to read the law in question;
- ✓ **Letting** a majority of Members vote to overturn the rights of the minority;
- ✓ **Enacting** substantive legislation by casting procedural votes;
- ✓ **Casting** votes that look good but have no legislative consequences;
- ✓ **Hiking** the federal debt without voting on it; and
- ✓ **Adding** provisions to legislation in conference committee that did not originate in either House of Congress.

Especially in the House of Representatives, legislative procedures make it easy for Members to take more than one position on an issue, or even to conceal their true position as well as the means they use to further it. Like vote fraud in elections, deceptive voting practices in Congress strike at the heart of representative democracy. Citizens find it difficult or impossible to make informed judgments about what their Representatives are actually doing. Furthermore, the widespread use of clandestine procedures by Members of Congress strongly suggests that Members feel they have something to hide.

The House of Representatives should be an open forum where diverse policies get a fair hearing. Today, it is a closed, controlled system producing predetermined outcomes. Until Congress is made more open and accountable to its constituents, Members will continue to be able to mislead and confuse the citizens they ostensibly represent. Truth-in-voting legislation would stop Members of Congress from using arcane procedures to conceal substantive political actions and confuse outside observers. Until such a reform bill is enacted, an arsenal of smoke and mirrors will remain at Congress's disposal. A truth-in-voting package to ensure that public policy is created by meaningful, open votes is an essential element of any congressional reform effort.

Both Real and Realistic

The last two years have provided increasing evidence that the public understands the significance of secretive and misleading House procedures and that Representatives feel pressure to reform them. In 1993, Oklahoma Republican Representative James M. Inhofe successfully crusaded to change the Rules of the House to make congressional signatures on discharge petitions public. These petitions allow a majority of Representatives to extract legislation from recalcitrant committees. But keeping signatures secret until the petition was full, as was formerly the case, allowed Members to play both sides of an issue to satisfy different constituencies. They could publicly support a bill, and even cosponsor it, while working behind the scenes to engineer its demise. Inhofe's accomplishment dealt a severe blow to the ability of Members of Congress to conceal their political positions. When his efforts became a matter of widespread discussion, public opinion forced a 384-40 vote in favor of full disclosure of petition signatories.

The discharge petition episode symbolized one of the House's central problems: the path of policy through the federal legislature is stymied by procedural hurdles that are enormously difficult to understand. Until Representative Inhofe's work placed the dis-

charge petition in public view, it was just another arcane aspect of congressional procedure.

In another indication that internal House procedures are coming under increasing public scrutiny, special rules that determine how each piece of legislation will be considered, which typically meet little resistance, were defeated during 1993 at the highest rate in at least fifteen years.² According to House Rules Committee Chairman Joe Moakley, Members are becoming more concerned that procedural votes are becoming political issues that "you can't explain."

Moreover, when Members try to explain that votes on rules are not nearly as important as votes on final passage, voters respond: "Don't give me any of that political gobbledegook."³ Public attention is not misplaced. Though rules votes are supposed to be wholly procedural, each of the rules that failed during the first session of the 103rd Congress had one common element: they would have increased the federal deficit.

Crapo's package, largely assembled from existing proposals, most of which enjoy significant support, represents a promising effort to build on the demonstrated desire of the public and House Members for a more open and accountable legislative process. H.R. 3633 is an ambitious but realistic reform agenda which should play a central role in the 104th Congress's debate over House reform.

SPENDING CUTS THAT DON'T SAVE MONEY

After years of attacks on the Superconducting Supercollider (SSC) by congressional critics of big-ticket science projects, the \$11 billion project was defunded by Congress in October 1993. When the House decided by a 140-vote margin to send the bill that funded the SSC back to conference committee with (eventually successful) instructions to strip the SSC funds from it, the common theme of House Members explaining their votes was thrift in government. "This is the most significant test of the House's resolve to save taxpayers money," said New York Republican Sherwood L. Boehlert. "We've got to cut spending if we're going to be responsible in balancing the budget and managing fiscal affairs," said Ohio Democrat Eric D. Fingerhut. But—as in nearly every case where Congress votes to reduce an appropriation—no money was saved. The Appropriations Conference Committee diverted the \$640 million in 1994 funding that the House rejected entirely to SSC shutdown costs.

Votes by the House or Senate to cut particular programs strongly imply that the federal government will save money; under usual congressional budget practices, however, not one dime is saved by such votes. The annual congressional budget resolution, which must be approved before particular appropriations are considered, provides for spending caps known as 302(b) allocations⁴—on each of the thirteen regular appropriations bills.

2 Timothy J. Burger, "Number of Rules Defeated This Session Is Up Sharply," *Roll Call*, December 6, 1993, pp. 10-11.

3 See Timothy J. Burger, "Rule Defeat Brings Total Near Record," *Roll Call*, February 7, 1994, p. 1.

4 They are called 302(b) allocations because they originate from that section of the 1974 Budget Act.

A vote by the whole House or Senate to cut spending on an appropriations bill cedes control of the funds back to the appropriations conference committee: that group remains free, in the conference process of working out differences between the House and Senate versions of a bill, to restore the cuts or substitute other spending items up to the 302(b) allocations. Like warriors fighting the mythical Hydra, congressional budget-cutters who manage to kill a program on the floor will find that another rises to take its place.

What this means is that the whole Congress has no way to cut spending after approving the annual budget resolution. Even when both Houses of Congress vote to defund a program, the appropriations committees are free to design new ways to spend the federal money that they control. While the result, a conference report, is subject to the subsequent approval of the whole Congress, that vote merely ratifies committee decisions. There is no opportunity to revisit spending for particular programs among the many large agencies funded in a single appropriation bill. When opponents of a particular program persist in their opposition to such bundles of spending, appropriations committee members typically threaten to cut programs important to insistent Members or suggest that the most worthy-sounding of hundreds of programs would be threatened by votes to reject a conference report.

While SSC opponents who struck a fiscally conservative pose point out that the lion's share of the \$11 billion SSC cost was to be appropriated in future years, canceling contemplated future expenditures does not actually save any money. The 1993 reconciliation bill (the centerpiece of the legislation enacting President Clinton's budget) sets overall domestic spending caps for the next five fiscal years. Since Congress habitually spends all the way up to the caps' limit, any SSC "savings" almost certainly will be diverted to another spending program.

The ability of congressional appropriations barons to spend up to the limit, no matter how many votes to cut programs passed the House, was an occasional topic of discussion in budget floor debates in 1993: after repeated exhortations on the necessity of thrift in an age of deficit financing by, for example, the space station's political opponents, defenders like Republican Representative Bob Walker of Pennsylvania argued that its elimination "is not going to give you one penny of deficit reduction," because the spending that already had been appropriated would merely be plowed back into other programs. Walker had the better of the argument here, since appropriations subcommittees typically spend almost all the money they have control over (they spent 98 percent of available appropriations in the last two fiscal years);⁵ if they did otherwise, it might shrink the amount of money they controlled in the next fiscal year.

Lowering the amount of money that Congress can spend is one route to reducing the budget deficit, but that method deprives Members of a potent reelection tool. This helps to explain why the Penny-Kasich deficit reduction amendment created a firestorm of resistance from the White House and the House Democratic leadership.⁶ The core of the legislation's deficit reduction plan was a reduction of the spending caps by roughly \$40

⁵ See *The Budget of the United States Government, Fiscal Year 1995*.

⁶ The Common Sense Deficit Reduction Act of 1993 was an amendment to H.R. 3400, a bill to approve part of the Administration's plans for "reinventing government."

billion over the succeeding five years, which would have triggered a consequent weakening of congressional spending power. The White House mounted a publicity offensive against Penny-Kasich because it wanted to use the savings garnered from reducing some programs to fund new spending initiatives—an approach dubbed “carve-and-spend” by one senior Administration official.⁷ This suggests that the White House resisted Penny-Kasich because it reduced Congress’s aggregate spending power, a change far more threatening than any particular program cut.

When Congress votes to cut federal spending but fails actually to save any money, it harms both American taxpayers and American representative democracy. Congress should reform spending procedures to make its cuts count: votes against particular spending programs should trigger a corresponding reduction in the federal spending ceiling. That way, money would in effect be set aside for deficit reduction, rather than merely being placed back a step in the spending pipeline.

The “Make Our Cuts Count” bill, H.R. 3145, was introduced in 1993 by Representative Crapo and currently has 99 cosponsors. This proposal would actually lower the amount of federal spending permitted when Members vote for spending cuts, thus making those cuts irreversible. “Imagine my surprise, as a new Member, after voting on many bills to cut budgets and to trim back, to find out that when the House and the Senate both vote to cut the same project, program, or activity, all that dies is the project or the program. The money goes back into a special account that the conference committees can then reallocate to the conference bill to other spending outside of specific public review,” Crapo said when explaining what motivated him to write the bill.

New York Democrat Representative Charles Schumer’s Deficit Reduction Lock-Box legislation embodies a related approach. It would require all discretionary spending cut legislation to specify whether the savings gained would be spent on other programs or go to deficit reduction. If both Houses favored deficit reduction, the congressional spending ceilings would be lowered so as to prevent another round of appropriations.

The second session of the 103rd Congress saw Representatives Crapo and Schumer join to offer H.R.4057, which would allow the direction of all spending cuts in appropriations bills to deficit reduction. Over 150 House Members cosponsored H.R. 4057—a promising foundation for a bipartisan budget-cutting initiative. Ohio Republican John Kasich, Minnesota Democrat Tim Penny, and Texas Democrat Charles Stenholm incorporated a tougher lock-box reform in their proposed Common Cents Budget Process Reform Act (H.R. 4434). Their reform would have created additional enforcement authority in future years (“out years”) of appropriations bills.

Representative Crapo will include the Stenholm-Penny-Kasich lock-box measures as part of his new truth-in-voting bill in the 104th Congress. Until Congress creates a lock-box for spending cuts so that its savings will not be diverted into other programs, its pretensions (and votes) to cut federal spending will remain nearly meaningless.

⁷ See Clay Chandler, “White House Tries to Halt Budget Cuts; Aides Want Savings to Fund Health Care and Other Programs,” *The Washington Post*, November 13, 1993 p. A1.

THE BASELINE BUDGETING CON GAME

*Early in 1993, the Clinton Administration announced it would cut \$200 billion in spending out of its budget over the next five years. Such an aggregate spending reduction would have represented a remarkable change from previous Administrations, which routinely spent more every year. But the fiscal plans the Administration revealed failed to match its promises. Projected federal spending for 1994 was \$1.45 trillion, and even granting the Administration all its budgetary assumptions—the figure for 1998 was \$1.75 trillion. Most people would see this as a \$300 billion hike in federal spending, but the federal government sees it as a \$200 billion cut.*⁸

The Administration's half-trillion-dollar discrepancy is due to the way that Congress and the President calculate budget cuts. Rather than using last year's actual spending as a base, they use an imaginary number called a "baseline." Baseline figures are produced by government economists who estimate how much money the federal government will need to do everything it did last year, factoring in inflation, population growth, and other variables. Such baseline numbers nearly always outpace inflation. It is this imaginary "current services baseline" that Congress uses to calculate spending cuts and increases.

Since the Medicare baseline typically calls for yearly increases of 12 percent to 13 percent, for instance, Medicare spending "cuts" easily coexist with spending hikes that are triple the rate of inflation. As Texas Democrat Charles Stenholm has noted, baseline budgeting thus "creates a bias to increase spending."⁹ The situation is reminiscent of Alice in Wonderland, who had to run as fast as she could just to stay in the same place. Members of Congress who try to stop the growth of federal programs are worse off than Alice: even when they successfully cut spending, baseline budgeting ensures that they fall even further behind.

Congress's use of baseline budgeting to program automatic spending increases in government programs has a dire effect on the federal deficit: every year of the last twelve, the deficit predicted in the congressional budget agreement underestimated the actual deficit. Rather than addressing the overspending, the current services baseline allows Congress to reset the spending clock each year. Indeed, in the rare instances when spending increases fail to reach the anticipated baseline levels, Congressmen argue for more spending while calling such increases cuts.¹⁰ Such deceptive accounting can easily be eliminated by requiring Congress and the President to use the spending levels for the current fiscal year as baselines when preparing the next year's budget. Changing to the accounting procedures used by the rest of the country would make spending increases unambiguous and readily identifiable.

Several Members have introduced legislation to eliminate Congress's baseline budgeting scam. California Republican Christopher Cox's Budget Process Reform Act (H.R.

⁸ See James K. Glassman, "A Bit of Creative Accounting Makes the Budget A Fraud," *The Washington Post*, July 30, 1993, p. B1.

⁹ Testimony before the Joint Committee on the Organization of Congress, March 18, 1993.

¹⁰ See Chris Warden, "The Budget's Dirty Little Secret," *Investor's Business Daily*, June 23, 1993, p. 1.

2929), which would abolish the current services baseline as part of a broader budget reform, has 165 cosponsors. Minnesota Republican Jim Ramstad's "Common Sense Budget Act" (H.R. 323), a separate measure consisting only of Cox's baseline abolition proposal, currently has 122 House cosponsors.

In August 1994, the House voted by a 247-171 margin to eliminate baseline budgeting and to begin comparing year-to-year spending by means of actual dollar totals. This change was coupled to several less significant budget reforms, none of which saw passage in the 103rd Congress due to absence of Senate action. Representative Crapo plans to incorporate the House-passed provision, along with a request that the cost of every new bill be identified before it is voted on, in the new version of his truth-in-voting legislation. Until the peculiar accounting practice of baseline budgeting is abolished, federal spending will continue to balloon—and many votes for spending cuts actually will be votes for spending increases.

COMMITTEE VOTES WITHOUT COMMITTEE VOTERS

"I consider this to be an emergency," declared Democratic Representative George E. Brown, Jr., Chairman of the House Science, Space, and Technology Committee. Brown had promised to resort to proxy voting—that is, casting the votes of absent committee members—only in an emergency. That emergency had clearly arrived. "I do it with very great reluctance," the chairman explained, "and I want you all to understand that, and, hopefully, to not have any more situations which prevent you from attending than is necessary."¹¹

What was the emergency that demanded so many Members' absence from the committee? The dedication of Washington's newest museum. Rather than rescheduling the committee meeting, Brown began to cast votes for absentee members, thus ensuring that even if the committee lacked the deliberation that absent members might have added, at least the committee votes would go the way Brown wanted them to.

Although public attention is most often focused on the votes that take place on the House and Senate floors, the votes cast in congressional committees are arguably more important.¹² Committees cast the votes that design legislation, while the contribution of the whole Congress is sometimes only an up-or-down vote on a committee's decision. Each committee acts as a mini-legislature that can pass, rewrite, or kill any bill in its jurisdiction, and each committee member can offer as many amendments as desired. (While legislation being considered by the whole House is often immune from amendment, there is no limit to amending legislation when it undergoes committee scrutiny as long as the amendments are related, or germane, to the bill.) Committee votes determine what legislation makes it to the floor and its content when it gets there.

¹¹ Markup of H.R. 820, the National Competitiveness Act of 1993, April 22, 1993.

¹² The use of the term committees in this section extends to subcommittees as well.

The importance of committee votes becomes even greater when some Members are absent. Most committees have tried to solve the problem of absent members by permitting the practice of proxy voting.¹³ Proxy voting, however, creates numerous undesirable consequences. By helping Members in a scheduling pinch, proxy voting promotes committee absenteeism. Proxies magnify the advantages held by the majority party—especially in the House, since its committee ratios are typically more lopsided by several percentage points than the ratio of the two parties in the whole House. The use of proxies allows the majority party members to extend their control over the committee system by scheduling multiple, contemporaneous committee and subcommittee meetings. The committee chairman, who sets the committee's entire agenda, can postpone controversial matters until he controls sufficient proxies to ensure that the vote will go his way. The ability of the congressional leadership to block legislative agendas by means of procedural maneuvers thus undermines the deliberative opportunities that committee meetings were intended to preserve and shrinks the accountability of Members who do not actually cast votes they are responsible for. Ironically, House Rules strictly prohibit Members from voting for other Members on the House floor.¹⁴

But proxies are the norm in many committees. The House Committees on the Judiciary, Public Works and Transportation, and Energy and Commerce used proxies on every legislative vote in 1993. Over 40 percent of the total individual votes cast in Public Works and Transportation were by proxy. Of particular concern are instances when the votes of absent members greatly outweigh those present, such as a November 9, 1993, Public Works vote on an amendment to H.R. 3460, where over 80 percent of the votes were by proxy.¹⁵ Proxies also dominated the votes of Members who were actually there at the time in the Judiciary Committee, where over two-thirds of votes on an amendment to H.R. 811 were proxies.¹⁶

Some Members have attempted to convince their committees of the unfairness of proxy voting. Representative Bob Walker of Pennsylvania, the senior Republican on the Committee on Science, Space, and Technology, argues that “when we accept proxy voting as a way of doing business, we lose all pretense of legislating as a deliberative process. When the citizens of this country see an empty House chamber during consideration of a bill on the Floor on television and ask where are the Members, we often reply that they are in the committee where the real business of the Congress is conducted. What is the excuse when citizens of the country show up at one of our markups and see proxies being voted rather than real Members voting?”¹⁷ Chairman Brown conceded that there were problems with proxies and pledged to minimize, but not eliminate, their use.

13 Only five House committees do not allow proxy voting: Appropriations, Intelligence, Rules, Standards of Official Conduct, and Veterans' Affairs.

14 Rules of the House, rule XIII(3). Democratic Representative Austin Murphy of Pennsylvania was reprimanded in the 100th Congress partially because his vote had been registered in the House while he was outside the District of Columbia. See the debate in the *Congressional Record* of December 18, 1987, the day the House voted to reprimand Murphy.

15 Amendment by Tim Valentine (D-NC) to the Hazardous Materials Transportation Act.

16 Amendment by Henry Hyde (R-IL) to the Independent Counsel Reauthorization Act to permit removal of independent counsel if the counsel mishandled classified information.

17 House Committee on Science, Space, and Technology organizational meeting, January 7, 1993, to eliminate a section of legislation that would study the effects of radar detectors.

Several months later, Brown explained his use of proxies this way: "As a matter of explanation, the Chair is deeply chagrined and disturbed at having to use the proxies, but considers that this is an extremely important vote that he hates to lose very badly." Walker responded that the Republicans likely could have won the vote in question were he to use Republican proxies, but his objections to proxies motivated him to avoid their use.¹⁸ Brown has held down the incidence of proxy voting relative to other committees, but still, 20 percent of the votes that were cast in his committee in 1993 included the use of proxies.

Representative Walker's pledge to eschew use of Republican proxies may be a symbolic step in the right direction. But moral victories like Walker's do nothing to resolve the systemic problem of Members who, in effect, have more than one ballot in a milieu where a shift of one vote can be crucial. Truth in voting requires that any vote credited to a Member should actually be cast by that Member.

Getting rid of proxy voting would also ameliorate another much-discussed problem: many Members today are simply on too many committees.¹⁹ If proxies were disallowed, the value of each additional committee membership would diminish—and the incentive for the majority party to create conflicting committee and subcommittee hearings would disappear. Such conflicts detract from the deliberative nature of Congress. Finally, elimination of proxy voting would make each vote cast in committee and subcommittee more meaningful and valuable—and make those who cast votes more accountable.

In the November 1993 House markup in the Joint Committee on the Organization of Congress (JCOC), an amendment to ban all proxy voting in committees and subcommittees as well as a less expansive substitute that would ban proxy voting only in full committees were defeated on party-line votes. Republican Representative Jennifer Dunn of Washington, who offered the two amendments, has introduced freestanding legislation to ban proxy voting, H. Res. 236, which gained over 100 cosponsors, including both the Democratic and Republican freshman reform task force leaders.

The separate report of the Senate Members of the JCOC concedes that proxies cause problems. The Senators propose to ban the use of proxies that affect the outcomes of votes, conceding the basic illegitimacy of permitting one legislator to cast another's ballot. By confining proxy voting to instances where it will be irrelevant, the Senate proposal raises the question of why the ability to cast irrelevant proxy votes is worth preserving.

The Joint Committee prohibited proxy voting in its own deliberations, but adopted an alternate procedure which is nearly as bad. The committee opted to discuss all amendments to the reform bill before voting on any of them. Although the discussion phase of the markup was often sparsely attended, Members poured into the markup during the voting phase. Allowing Members to skip debates but show up for the votes makes the dis-

¹⁸ Markup of H.R. 820, the National Competitiveness Act of 1993, April 22, 1993.

¹⁹ Numerous Members from each party made this point in a variety of different ways. See the prepared statements in *Committee Structure: Hearings Before the Joint Committee on the Organization of Congress*: e.g., Rep. Dan Rostenkowski (D-IL), pp. 518-19; Sen. Patrick Leahy (D-VT), p. 548; Rep. John Dingell (D-MI), p. 617; Rep. James Leach (R-IA), p. 669.

cussions mostly superfluous and reveals the much-ballyhooed committee deliberative process as a sham. A voting system that encourages members to vote without hearing the arguments about a proposition shares the flaws of the proxy system.

Representative Crapo's truth-in-voting bill incorporates a prohibition on proxy voting identical to the Dunn bill as its Section 3. Until such a measure is passed, the principle of "one-man, one vote" in the House of Representatives will be interpreted in a very different way than it is in the rest of the country.

PUBLIC BUSINESS WITHOUT PUBLIC ACCESS

It is not unusual for congressional committees to meet behind closed doors. But the closed meeting that the Ways and Means Committee held on May 12, 1993, had an added element that their previous closed meetings lacked: a crowd of Congressmen outside the locked doors of the Ways and Means committee chambers, carrying signs with slogans like "Do Not Disturb: Democrats Raising Taxes." The Members picketing outside the chambers were attempting to dramatize the inappropriateness of closeting the markup that would design the details of the Clinton tax hike, which consisted of over a quarter of a trillion dollars over the next five years coupled with tax breaks for politically favored transportation and housing industries.

House Rules allow committees to close their meetings whenever a majority of the committee votes to do so.²⁰ Freshman Republicans Richard Pombo of California and Jennifer Dunn argued that the importance of the matters under discussion made closed hearings inappropriate. Pombo suggested that it was improper for the Ways and Means Committee to privately deliberate on "the largest tax increase in the country's history."²¹

Such provocative tactics by freshman Members were met with arguments by senior Congressmen eager to defend the status quo of secrecy. Maryland Democratic Representative Steny H. Hoyer, the chairman of a committee that appropriates funds for numerous government bodies, said that if the committee did not close its sessions out of self-protection, "the agency lobbying would be horrific." Speaker of the House Tom Foley, who helped write the current rules in the mid-1970s, suggested that the comparative freedom of committee members to do what they want in closed sessions made for better decisions: "I think sometimes there is a feeling that there is better discussion, less inhibited, more free and full discussion...in closed session."²²

Keeping the public from knowing about public business is a practice with declining popularity both inside and outside the United States; for instance, last year C-SPAN was permitted to broadcast Russian parliamentary committee meetings that dealt with possible tax plans. In America, government meetings in most states are routinely open to the press and the public, but Congress's important meetings are often closed. The two House committees that most frequently meet behind closed doors—Appropriations and Ways

²⁰ Rule XI, 2 (g) (1).

²¹ Kenneth J. Cooper, "GOP Freshmen Knocking on Closed Doors," *The Washington Post*, May 13, 1993 p. A25.

²² *Ibid.*

and Means—decide how the federal government raises taxes and spends money. For instance, Ways and Means prevented the public from observing discussions of the 1986 tax bill, the 1988 welfare reform bill, and the 1988 catastrophic illness legislation. The nearly immediate repeal of the catastrophic bill upon public realization of its actual consequences suggests that greater openness in government might have headed off that legislative disaster.

It is difficult to see any justification for routinely locking the public out of meetings of democratically elected legislators. Only in strictly limited circumstances (for example, national security concern) is there a public interest in keeping information private. Speaker Foley's suggestion that citizens who observe congressional meetings, and not the Members who run them, are somehow responsible for a decline in legislative decision-making during open meetings is puzzling at best. Open public meetings, which give citizens the opportunity to be informed about what their elected representatives are really up to, are at the center of American ideals of self government, not an impediment to them.

The fight for full disclosure, however, should not stop with open meetings. The abuses leading to the House restaurant, post office, and bank scandals would likely have been curbed or eliminated far earlier had knowledge about the details of congressional operations been available to the public. Although the Freedom of Information Act guarantees public access to most information and documents held by the federal executive branch, Congress drafted that law so as to exclude itself from coverage. Applying the same information disclosure rules to Congress would give Americans much-needed information about the way their legislature does business. While Congress should be covered by all laws that it imposes on the rest of the country, Freedom of Information Act coverage should be at the top of the congressional coverage agenda. Citizens should have a right to know about the contacts that Members of Congress make with special-interest lobbyists and federal regulatory agencies. Public disclosure of official meetings and official business would both better inform the electorate and bring questionable congressional behavior into the public's field of vision.

Dunn's open meetings bill, H.R. 175, has 126 cosponsors. Her open meetings amendment to the Joint Committee on the Organization of Congress's reform bill was defeated on a party-line vote. Sections 4 and 5 of Representative Crapo's truth-in-voting bill incorporate Dunn's open meeting legislation as well as legislation to apply the Freedom of Information Act to Congress. Until such legislation is passed, House Members will be invulnerable from serious scrutiny by their constituents.

STAMPEDING LEGISLATION THROUGH CONGRESS

Twenty-four hours before the House of Representatives voted on the reconciliation conference report that would enact President Clinton's tax changes into law, Representative Ron Klink, Pennsylvania Democrat, asked his staff to obtain a copy of the bill. Sorry, his staff was told: copies would be unavailable until the next morning, about twelve hours before the \$496 billion tax increase the bill contained would come up for a vote.

Any Congressman who had tried to read the 3,000-page package in the 12-hour window of opportunity granted to review it would have had to skim

*250 pages per hour, passing on more than \$688 million in proposed new taxes every minute. During the floor debate on the rule for the bill, Representative Gerald R. Solomon, New York Republican, declared, "Not one member knows what he's voting on today!"*²³

Representative Solomon's complaint is hardly surprising. In theory, Representatives should have adequate time to read important legislation. House rules require that all legislation be available for three days before a vote.²⁴ But in practice, the House routinely waives its waiting-period rules and rams through important legislation that could benefit from three days' scrutiny. In addition to the Clinton tax bill, the House waived waiting periods for a majority of the session's appropriations bills. It is difficult to imagine why Members vote to waive the rules so frequently, other than to grease the skids for pork-barrel spending or to cut short debate on controversial proposals.

Take the thousand-page \$151 billion highway authorization bill that was rushed through at the end of 1991.²⁵ Shortly after midnight on November 27, one day before Congress planned to adjourn for the year, the House Rules Committee approved a waiver of all House rules applying to the highway conference report. The waiver was approved even before the bill had come out of conference. House members began debating the conference report at 4:00 a.m., still without a copy of the legislation they were considering. Just before 5:00 a.m. a single copy of the bill, pieced together from different word processing machines, arrived on the House floor. The bill sat undisturbed for an hour. At 6:00 a.m. the House overwhelmingly approved the \$151 billion package, although no Member had even looked through it. Several weeks later, analysts at the Department of Transportation were still discovering pockets of pork buried in the hundreds of pages that no Representative had read. Nothing about the bill necessitated the blind voting procedure used by the Congressmen. Although waiting a few days to vote on the bill might not have changed the outcome, the prospect of scrutiny certainly would have forced the conferees to rethink the pork they packed into the bill.

In truth, even a three-day waiting period is too short to guarantee responsibility in crafting and voting on legislation. The waiting period should be extended to five days. The additional time would allow congressional staff members, the press, and public interest groups time to inform voters about the costs and benefits of proposed legislation. With Congress required to make legislation available for five days before they vote on it, public pressure would force Congress to avoid decisions that waste public money. Instead of allowing money to be spent without sufficient time for review and debate, rules that encourage deliberation would remind Congress of the source of the money and make them more responsible to that source: the taxpayers. The mere prospect of public scrutiny might well head off bad legislation before it comes to the floor. Section 5 of Representative Crapo's truth-in-voting bill would extend the legislative cooling-off period to five days. Especially when coupled with the bill's requirement that waived rules must pass the House by a supermajority vote, extending the legislative cooling-off period

²³ See *Congressional Record*, August 5, 1993, p. H-6111.

²⁴ See Rule XXX, 7.

²⁵ See the discussion of the Intermodal Surface Transportation Efficiency Act of 1991 in Eric Felten, *The Ruling Class* (Washington, D.C.: Regnery Gateway, 1993), pp. 3-5.

would help the House write better laws. California Republican David Dreier attempted to include an amendment to that effect in the Joint Committee on the Organization of Congress reform bill; that plan was blocked by a party-line vote.

ANARCHY RULES

The 110 freshman Representatives elected in 1992 vowed to reform Congress. Once they arrived in Washington, however, they were told by senior Members they would have to wait. A committee formed by the outgoing Congress would report in a year. Rules reforms demanded by freshman Democrats were postponed and then handed off to a party caucus committee.

In June of 1993, the freshmen's first opportunity arrived. The legislative branch appropriations bill, which funds the entire Congress and its instrumentalities, was up for consideration. Enthusiastic, reform-minded lawmakers submitted fifty different reform proposals ranging from staff cuts to abolition of congressional perks. Nearly half of the amendments came from the freshman class. But the junior lawmakers were to be rebuffed again.

Although normal House procedures allow Members to offer virtually any amendment to cut spending from an appropriation, House leaders were able to block standard procedures with the aid of the Rules Committee. That committee issued a rule specifying that only six of the mildest reform amendments could be offered. Members of both parties protested—Minority Leader Bob Michel complained that the Rules decision was the most “outrageous, anti-democratic, and anti-reform” he had ever seen.²⁶ And rank-and-file Democrats like Minnesota Representative Tim Penny argued that his own party's leadership was “determined to manipulate the outcome by limiting the options. This is not democratic. This is not consistent with the principles of the Democratic Party to which I belong.”²⁷ But the leadership prevailed and the most significant reform proposals never came up for discussion.

Most of the rules by which the House does its business are exemplary in providing for fair process and protecting the rights of legislative minorities. The only problem is that the House rarely follows its own rules. The House Rules Committee, once described as a legislative traffic cop, has come more to resemble the manager of a crooked casino, attempting to rig every legislative contest to benefit the majority party. House Rules are now routinely waived (officially ignored), and unique procedures are devised to suit the political circumstances of every bill. House leaders frequently use “restrictive rules” to avoid votes on controversial issues, often leaving rank-and-file members with no opportunity to contribute to legislation other than a take-it-or-leave-it final vote. While a majority of Members must approve that rule, they are under tremendous pressure to do so: their party's leadership carefully monitors rules votes and can strip uncooperative members of committee memberships and other congressional privileges.

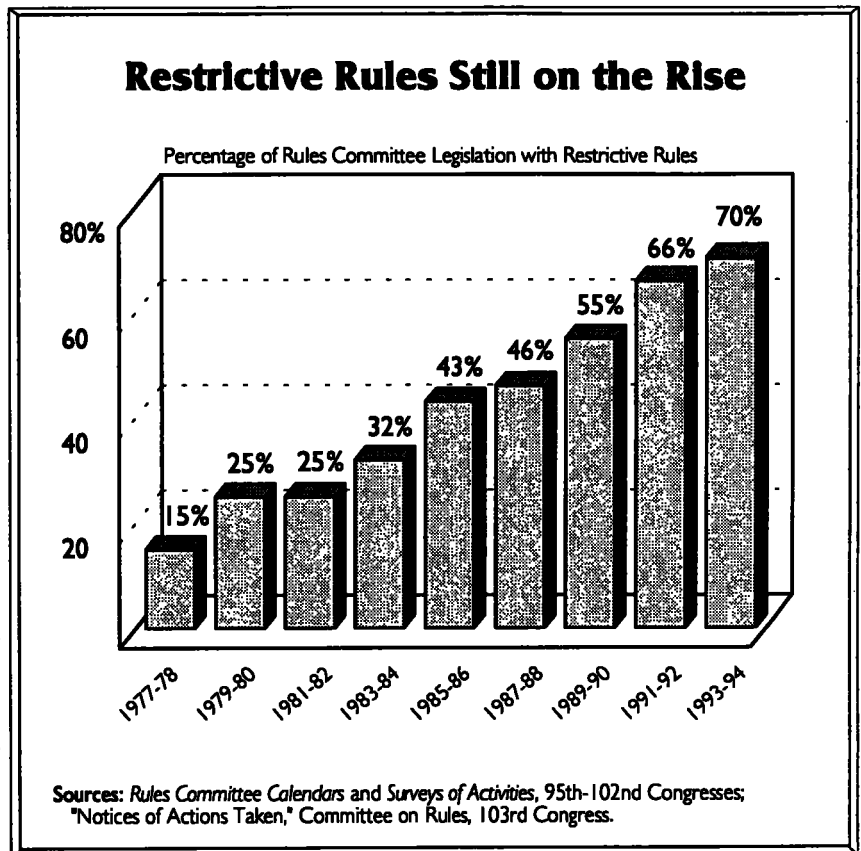
²⁶ See *Congressional Record*, June 10, 1993, p. H-3386.

²⁷ See *Congressional Record*, June 10, 1993, p. H-3389.

Such flexible rules benefit the party in power, which can operate with little or no constraint on its legislative agenda. Indeed, Thomas Jefferson began his review of parliamentary procedure, which is still incorporated in the House Rules, by noting that the best recipe for undemocratic, centralized political power was “a neglect of, or departure from, the rules of proceeding. [The rules] operated as a check and control on the actions of the majority, and...they were, in many instances, a shelter and protection to the minority, against the attempts of power.”²⁸ Although rule abuses pave the way for majoritarian dominance of Congress, such waivers also make it possible for Members of both parties to avoid tough choices. With closed rules which limit amendment opportunities, Members can claim to favor policies and then regretfully note that they were unable to vote on them. In 1993, rule waivers blocked the possibility of germane amendments to over three-quarters of the bills approved by the Rules Committee. While the growing practice of limiting amendments (see graph) is often used against the minority party, waivers and closed rules do most harm to challenger candidates and the public, who are deprived of more and more votes that would provide information on where Members stand on the issues.

The Rules Committee also uses special rules to concoct unique procedures designed to prejudice the outcome of votes. One such rule was designed in November 1993 to derail the popular Penny-

Kasich initiative that would have saved over \$90 billion of federal spending over the next five years. Passage of the Penny-Kasich reforms would have interfered with Clinton Administration plans to increase social spending (including the Administration’s health care proposal).²⁹ The House Rules Committee, determined to carry water for the Administration, crafted a rule intended to defeat Penny-Kasich while simultaneously providing



²⁸ *The Constitution, Jefferson's Manual, and Rules of the House of Representatives* (Washington, D.C.: U.S. Government Printing Office, 1991), p. 118.

²⁹ See, e.g., floor speeches in the November 22, 1993, *Congressional Record*: Rep. Lynn Woolsey (D-CA), p. H-10743; Peter Deutsch (D-FL), p. H-10744.

political cover for doing so. The rule put forward an alternative package assembled by Representative Martin Sabo, which claimed to cut \$30 billion of federal spending. Unlike Penny-Kasich, the Minnesota Democrat's proposal would allow the spending cuts to be recycled into other programs, rather than being used for deficit reduction. Rather than allowing Representatives Penny and Kasich to amend the Sabo bill, as would be the case under normal procedures, the rule provided for a vote on an amendment by Sabo that did nothing more than repeat the text of his bill. The vote on the Penny-Kasich amendment that had motivated the rule was placed second.³⁰ Members who had campaigned in favor of serious spending cuts were able to vote for Sabo's weak package, claiming they had done the right thing. The rule worked as intended. The superfluous amendment provided political cover, and Penny-Kasich was defeated. In sum, once the House leadership had mustered a majority of Members to waive legislative procedure with the rule, they were able to derail Penny-Kasich without taking substantial political heat for doing so.

The public is outraged when Congress refuses to comply with the laws that it imposes on everyone else. But when it waives its own rules—to block pertinent amendments, for example—it fails even to comply with the rules it has designed especially for itself. Such waived rules can easily eviscerate the benefits of the orderly procedures and protections for minority rights contained in House rules. Imperfections in current rules—such as too-brief legislative waiting periods—are only increased when those rules are waived. Even if, for instance, the waiting period is extended, the ability of the House to waive rules so easily renders the rule nothing more than an easily-broached inconvenience.

Republican Representative David Dreier of California attempted to amend the reform bill produced by the Joint Committee on the Organization of Congress with a requirement for a three-fifths supermajority to waive standard House rules, but was blocked by a party-line vote. Section 6 of Representative Crapo's truth-in-voting bill would sharply curb restrictive rules and rules waivers by requiring a two-thirds supermajority to pass them. That hurdle would force Members to face the seriousness of voting to make an end run around rules they have agreed upon for themselves.

LEGISLATING WITHOUT VOTES, VOTING WITHOUT LEGISLATION

Permitting homosexuals to join the military was one of President Clinton's first actions. The public exploded, causing senior Members of Congress to demand hearings on the abolition of the military ban. One of the main complaints of centrist legislators was not about the substance of the new policy, but about the way it was arrived at: presidential fiat. Congress, they emphasized, should have a say in such a historic and significant decision. Months of dramatic and well-publicized hearings followed. Various approaches were offered and debated on the House and Senate floors. But when the House finally endorsed a compromise policy, most Members did not notice. The House rule accepting Senate amendments to the Family and

³⁰ See testimony of Rep. Gerald Solomon (R-NY), *Congressional Record*, November 22, 1993, pp. H-10722, H-10723.

Medical Leave Act included a provision endorsing the Administration's interim gays-in-the-military policy.

The animating idea of a system of democratic representation is that public officials who must stand for reelection will feel some pressure to take into account the interests of their constituents. Voters have a periodic opportunity to review the records of their representatives. Members of Congress are supposed to face their scrutiny, deciding on such important matters as aid to foreign allies, issues of federal budgeting and debt, and even pay raises for themselves. If they make bad choices, the theory goes, they will be voted out of office. But despite record levels of public dissatisfaction with Congress, fewer and fewer legislators lose reelection campaigns. One reason is that Congress has devised numerous ways to avoid responsibility by making decisions without having to vote on them. The public has a difficult time holding individual Members accountable for policies that were decided without votes. Even worse, Congress has devised ways to cast politically popular votes with symbolic value but no substantive consequences. Legislators thus appear to be following a popular course, when in fact they are doing nothing or even doing the opposite of what is advertised.

Take, for instance, the device of the “self-executing rule” in the House. When Members consider major legislation, they also must decide and separately vote on the rule under which the legislation is considered—which determines, for instance, how the legislation can be amended. Rule determination is meant to be fundamentally procedural, but a self-executing rule smuggles in substantive policy matters. Thus, when Members vote on a self-executing rule, they can make policy without responsibility—and without any resulting political heat.

The House has not shied away from using self-executing rules to make responsibility-free decisions on questions of central public importance. In 1987, a vote on the rule for appropriations legislation was a way for Congress to address a controversial pay raise.³¹ Earlier that year, another rules vote was Congress’s vehicle to provide \$3.5 billion in aid to the Nicaraguan Contras without an open discussion of the issue. The 103rd Congress also used self-executing rules to mislead both Representatives and their constituents: in addition to the gays-in-the-military incident discussed above, the rule for the Omnibus Budget Reconciliation Act, which extended the budget’s deficit targets and “pay-as-you-go” rule several years farther into the future, also enacted policies into law without disclosing that it was doing so. Whatever one’s opinions on the substance of such decisions, the way that the House makes those decisions is difficult to defend.

The nadir of the House’s tendency to make policy under the table is House Rule XLIX, a permanent self-executing rule, which permits continual increases in the federal debt limit without the embarrassment of voting for them. That rule provides that the vote for approval of the budget resolution conference report “shall be deemed to have been a vote in favor of [a joint resolution increasing the debt limit] on final passage in the House of Representatives”—which is to say, a vote on non-statutory budget goals is considered to be a vote on legislation hiking the debt limit. This permits Members of Congress to address yearly federal spending and revenue goals without touching the tricky

31 House Joint Resolution 395, 100th Congress.

question of raising the cumulative federal debt. The vote on raising the debt never really takes place; it is only "deemed" to have been made. But since no Representative can be held responsible for a vote he is only deemed to have made, the debt ceiling continues to rise, as though spiraling upward for reasons entirely unrelated to the actions of Members of Congress. The result in the House is that there is no pressure to reduce the deficit and no opportunity to do so. In the Senate, both Gramm-Rudman-Hollings deficit-reduction plans were amendments to votes on raising the debt limit. House Members have no opportunity to bring up such legislation independently; they can only follow the lead of the Senate.

Just as policies come out of the House without votes, votes sometimes emerge without policies. Since every legislator likes to have a record of votes he can display to his constituents to demonstrate that he has voted the right way on the issues, the House has devised a way to let its Members cast free votes that have no real consequences. Normal parliamentary procedure requires legislators to make choices: favoring one proposition requires opposing competing proposals. But "king-of-the-hill" rules permit Members to vote in favor of any number of competing proposals, with only the last proposal to achieve a majority vote being adopted. The votes on any but the last option represent opportunities for Members to cast votes that look impressive but fail to accomplish anything.

"King-of-the-hill" rules determined legislative outcomes in November 1993, when the House voted on rival resolutions on the date for United States troop withdrawal from Somalia. The Rules Committee gave the House the opportunity to vote king-of-the-hill style on two separate deadlines for withdrawal.³² A majority of representatives supported a resolution calling for removal of all troops from Somalia by the end of January. Another vote followed immediately, this one on a resolution calling for complete withdrawal by the end of March.³³ That passed the House as well. Since senior House Members knew they could muster a majority for the March withdrawal, scheduling it at the end was designed to predetermine the outcome while giving lawmakers free opportunities to posture in favor of earlier withdrawal. The king-of-the-hill voting procedure shielded Members from criticism for failing to recommend the earlier deadline, since most of them could say they voted for it. "King-of-the-hill" rules let Members have it both ways: they can vote to support a proposition and kill it at the same time. Such procedural abuses amount to willful misrepresentation that dishonors representative democracy.

Votes in Congress should be on the record and directly linked to legislation. Conversely, when Members' decisions are not recorded, they should not be permitted to make policy without fingerprints. Reconnecting the votes that Members cast to the legislation they produce should be at the center of any program to make Congress a truly representative institution. Section 6 of the truth-in-voting bill would eliminate eccentric procedural maneuvers like self-executing rules, House Rule XLIX, and king-of-the-hill rules, bringing the House closer to truth in voting.

32 *Congressional Record*, November 8, 1993, pp. H-8903-12.

33 *Congressional Record*, November 9, 1993, pp. H-9039-62.

CONFERENCE COMMITTEES: THE LOOSE CANNONS OF CONGRESS

The use of public funds to subsidize indecent and sacrilegious art created one of the greatest public scandals of recent years. In response to the furor created by National Endowment for the Arts grants, Republican Senator Jesse Helms of North Carolina designed an amendment to the bill that funded the NEA³⁴ that barred it from supporting "patently offensive" art. Both the House and Senate voted in favor of Helms's amendment by better than a 2:1 margin. The only hurdle that remained was the conference committee, which was packed with dissenters from Helms's position. Since conferees are not supposed to revisit issues that both Houses of Congress agree upon, passage of Helms's funding restriction appeared certain. But committee chairman Sid Yates, an Illinois Democrat, decided to overturn the judgment of the House and Senate. In exchange for an agreement not to raise grazing fees on public lands (a subject covered by the same bill), Yates received the cooperation of Western Members in deleting the Helms amendment. This made the votes in favor of tighter NEA regulation that both Houses of Congress had cast nothing more than a fraud on their constituents. From that point on, when Members of Congress were asked about their position on the NEA, they could piously point to their votes in favor of the Helms amendment. Only a careful student of congressional procedure would know that those votes were made irrelevant by conference committee deal-making.

When House Members wish to express their position on some matter before a conference committee, they can pass a "motion to instruct" the committee. But since these motions are not binding and create no law, conferees (who generally meet secretly) can, and frequently do, ignore their instructions. This system is beloved both by officeholders who want to demonstrate that they voted the politically popular way and by committee members who do not want anyone outside the committee to interfere. Citizens who eventually discover that the system is rigged to permit votes without responsibility and committee conferences without outside input are typically not as enamored. When procedural tricks are used to cast publicity-stunt votes that avoid any real action on restricting NEA funding (as detailed above) or eliminating franking (the putative goal of a 1989 motion to instruct), Congress is misleading the public.

The cure for such procedural fakery is simple: when both Houses of Congress favor or oppose a particular measure, their votes should count. Congress needs procedural reforms to ensure that conference committees no longer act as shadow legislatures that are free to conjure up legislation that lacked support in either House of Congress. Conference committees should be prevented from inventing wholly new programs or funding programs at higher levels than the House or Senate had previously designated. Additionally, the House should have the ability to issue binding instructions to conferees and to hold any conference report out of order if it violates such a motion. These reforms will produce greater responsibility and accountability in Congress and ensure that it is forced

34 H.R. 5503, Department of the Interior and Related Agencies Appropriations Act, 1993.

to abide by the consequences of any measure it passes. Reining in conference committees will ensure that when Members of Congress vote, they will be forced to mean what they say.

Section 6 of Representative Crapo's legislation would prevent conference skullduggery by preventing conference committees from funding programs at a higher level than either House of Congress had previously approved. It would also force House conferees to follow the dictates of motions to instruct that are produced by the House. Such reforms would reallocate House legislative power and responsibility where it belongs, stripping it from secret conference committees and reassigning it back to the whole House.

CONCLUSION

Though known as an autocrat, Speaker of the House Sam Rayburn valued orderly deliberation. "Not all the measures which emerge from the Congress are perfect, not by any means, but there are very few which are not improved as a result of discussion, debate, and amendment. There are very few that do not gain widespread support as a result of being subject to the scrutiny of the democratic process," Rayburn noted in 1942.³⁵ Today, the House fails to provide the kind of constructive criticism through congressional scrutiny that Rayburn thought essential to the legislative process. Indeed, congressional procedures that obscure more than they clarify are a central source of the lack of accountability that plagues Congress today. Such procedures account for the widespread phenomenon of voters who admire their Congressman and despise Congress: Members can disguise their substantive political actions through confusing and misleading votes, forcing constituents to judge their representation by nonpolitical factors like constituent service. Truth-in-voting reforms would force Members to make tough choices honestly and to shoulder responsibility for them. Requiring Members to take responsibility for the policies that Congress produces would also rehabilitate Congress's battered image. H.R. 3633, Representative Crapo's Truth-in-Voting Act, would reform many deceptive and ill-understood facets of congressional procedure. Among the truth-in-voting reforms are:

- ☞ A "make our cuts count" provision that will send all money from reduced appropriations back to the Treasury for deficit reduction, rather than permitting appropriations committees to appropriate again;
- ☞ A requirement that Congress and the President use current spending levels as baselines when preparing next year's budget, so that spending increases from one year to the next will be clearly identifiable;
- ☞ A ban on proxy voting, which will prevent one Member from casting another's committee vote;
- ☞ An open meetings rule that would grant public access to public deliberations;
- ☞ Application of the Freedom of Information Act to Congress, which would make public all communications from Congressmen to independent agencies and special interest groups

35 Texas Forum of the Air, radio address, November 1, 1942.

- ☞ **A five-day waiting period before legislation can be voted on**, which would create more time for criticism, analysis, and appropriate amendment of legislation;
- ☞ **A two-thirds requirement to impose a closed or restrictive rule on legislation**, or to waive procedural rules, which would diminish the current trend of frequently waiving rules often used to (among other things) ram through legislation;
- ☞ **A ban on king-of-the-hill rules**, which would prevent the series of showpiece, non-substantive votes that such rules currently produce;
- ☞ **A ban on "deeming" language in rules**, which will prevent Congressmen from sneaking substantive legislation into procedural votes;
- ☞ **Elimination of the House secret debt limit increase rule and Budget Act reform**, so that Members would have actually have to vote to hike the debt limit as well as federal spending increases, rather than being free of responsibility when spending and debt raise automatically; and
- ☞ **Restriction of conference scope**, which will force conference committees to stay within the realm of legislation that the two Houses produce previous to conference, rather than being free to introduce legislative material not proposed by either House.

Most of these reform measures have been introduced separately by Members who are concerned about making Congress more responsible and accountable to its constituents. Several of these freestanding proposals enjoy the support of over one hundred Members of the House. This level of support and the success of Representative Inhofe in reforming the House discharge procedure demonstrates the political appeal and viability of Representative Crapo's truth-in-voting package. Such reforms doubtless will be resisted by those Members of Congress who have an interest in keeping the institution as secretive and mysterious as possible. But sunlight is the best remedy for many problems of government, and the openness that these measures would foster ultimately will lead to more accountability and responsibility on the part of elected officials. The American ideal of a well-informed citizenry in control of participatory democracy demands nothing less.

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