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110TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 110–885

FINAL REPORT AND SUMMARY OF ACTIVITIES

R E P O R T

OF THE

SELECT COMMITTEE TO INVESTIGATE THE VOTING IRREGULARITIES OF AUGUST 2, 2007 U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 2008—Referred to the House Calendar and ordered to be printed

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VOTING IRREGULARITIES OF AUGUST 2, 2007

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Mr. DELAHUNT, from the Select Committee to Investigate the Voting Irregularities of August 2, 2007, submitted the following

R E P O R T

PART I—FINAL REPORT

The Select Committee to Investigate the Voting Irregularities of August 2, 2007 (the "Select Committee") was created on August 3, 2007, by House Resolution 611 to investigate the circumstances surrounding the record vote requested by the gentleman from California (Mr. Lewis) on the motion to recommit H.R. 3161, including the Chair's ruling; to report to the House a final report regarding findings of fact on the actions of any Members, officers, or employees of the House during the vote in question; and to recommend changes to the rules and procedures of the House of Representatives to protect the voting rights of all Members.

Pursuant to that resolution, the Select Committee hereby submits its final report, including its finding of facts, analysis, and recommendations.

SUMMARY OF THE SELECT COMMITTEE'S INVESTIGATION

On September 5, 2007, the appointments to the Select Committee made by the Speaker and the Minority Leader pursuant to H. Res. 611[1] were published in the Congressional Record. The Speaker appointed Mr. Delahunt and designated him Chairman of the Select Committee. The Speaker also appointed Mr. Davis of Alabama and Ms. Herseth Sandlin. The Minority Leader appointed Mr. Pence and designated him Ranking Member of the Select Com-

[1] H. Res. 611 states, in pertinent part, "The select committee shall be comprised of 6 Members, of which 3 Members shall be appointed by the Speaker and 3 by the Minority Leader."

mittee. The Minority Leader also appointed Mr. LaTourette and Mr. Hulshof.

On September 27, 2007, the Select Committee, pursuant to its mandate set forth in H. Res. 611, issued an interim report to the House of Representatives. The interim report included the oversight plan of the Select Committee, which described the anticipated course of the investigation.

The Select Committee held a series of briefings and hearings designed to inform the members of the Select Committee of the mechanics of conducting a record vote on the House floor, the Electronic Voting System (EVS), and the precedents and procedures relevant to the voting process.[2] The first of these hearings took place on September 27, 2007. That hearing gave the members an opportunity to understand the overall process of conducting a record vote. It also gave them an opportunity to understand the data and documents that are typically compiled during a record vote and that the Select Committee expected to examine during the course of its inquiry. The Clerk and her staff appeared as witnesses.

On October 18, 2007, the Select Committee held a member briefing, which consisted of a "walkthrough" of the Electronic Voting System on the House floor. The briefing was conducted by the Clerk, her staff, and the Parliamentarian.

On October 25, 2007, the Select Committee held a hearing on Rules, Precedents, Custom and Practice regarding voting in the House of Representatives. Former House Parliamentarian Charles W. Johnson and Chief Tally Clerk Mark O'Sullivan appeared as witnesses.

The Select Committee conducted a thorough investigation of Roll Call 814. At the outset, the Select Committee sent a "Dear Colleague" to all Members of the House of Representatives inviting any and all Members who were present in the chamber the night of August 2, 2007, and who had direct, firsthand, personal knowledge, to share that information with the Select Committee if they wished. Ultimately, the Select Committee interviewed four Members and seventeen staff members of the House. The staff interviews included staff from the Office of the Clerk, the Office of the Parliamentarian, and Minority and Majority Leadership Offices. The Members interviewed were Messrs. Hoyer, Boehner, Blunt, and McNulty. The Select Committee reviewed over 5,000 pages of documents related to Roll Call 814. It closed its investigation by conducting two days of public hearings to receive testimony regarding Roll Call 814 from important witnesses.

The Select Committee, on a bipartisan basis, made findings and recommendations discussed later in this report. The material which follows represents countless hours of research, analysis, and discussion. The Select Committee's investigation would have been far more difficult without the cooperation and assistance of a number of offices and individuals. Chief among those the Select Committee would like to acknowledge are the offices of the Clerk and the Parliamentarian. The Select Committee also extends its appreciation to former Parliamentarian Charles Johnson and CRS for their advice and consultation throughout the investigation and in the development of its recommendations.

[2] See part II of this report for a full list of the Select Committee's activities.

VOTING BY ELECTRONIC DEVICE *

Overview

The Electronic Voting System (EVS) was installed in the House chamber in 1972 pursuant to the Legislative Reorganization Act of 1970 and was first used on January 23, 1973.[3] Under clause 2(a) of rule XX, voting by electronic device is the preferred method for conducting a record vote: "Unless the Speaker directs otherwise, the Clerk shall conduct a record vote or quorum call by electronic device."

The current EVS was installed in January, 2004, and it represents the fourth major upgrade of the EVS since its inception in 1972. The main hardware is located in the Rayburn House Office Building and is connected to the House floor by a secure line. There are 47 EVS input devices on the House floor, including a primary terminal that is located on the rostrum and controlled by the seated tally clerk. The remaining 46 devices are voting stations located behind the Members seats. In addition to these input devices, there are several terminals on the House floor that allow Members and staff to view the progress of the vote and the results in real time. These are located at the leadership tables and in the rear of the chamber and do not allow input into the system. There is also a secondary EVS terminal in the Office of Legislative Operations in the Capitol.

A vote is conducted by three tally clerks. There is a "seated" tally clerk who operates the primary terminal,[4] a "standing" tally clerk who stands on the lowest level of the rostrum and who assists the seated tally clerk, and a tally clerk who monitors the vote at the secondary EVS terminal in the Office of Legislative Operations.

Members may cast or change their votes by inserting their personal voting card into one of the 46 voting machines and pushing one of three buttons—a green button for "yea," a red button for "nay," or an amber button for "present." In addition to voting at an electronic voting station, Members may cast their votes manually in the area in front of the rostrum referred to as the "well." To do so, Members retrieve an appropriately colored card (called a "well card") from the table in the well. On the card, they write their name, district, and the State or territory they represent and turn it in to the standing tally clerk. The standing tally clerk verifies

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* The material in this section of the report is derived from multiple sources, including John V. Sullivan, Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, 110th Congress, H. Doc. 109–157, 2007 (hereinafter "Manual"); Member Briefing on Voting in the House of Representatives—The Rostrum and the Electronic Voting System: A "Walkthrough" by the Clerk of the House Lorraine C. Miller, Oct. 18, 2007; Michael L. Koempel & Judy Schneider, *CRS Memorandum to Select Committee Chairman, Concordance of Questions and Answers from Hearings of the Select Committee to Investigate the Voting Irregularities of August 2, 2007*, Dec. 2007; Clerk's Briefing to House Committee on House Administration, Aug. 16, 2007 CLERK 467–494; the hearings held by the Select Committee; interviews conducted by the Select Committee and its staff; and other materials cited in the appendix IV of this report.

[3] The permissive use of an EVS was incorporated in the Legislative Reorganization Act of 1970 (84 Stat. 1140, 1157) and was made part of the standing Rules of the House in the 92d Congress. (Manual § 1014.)

[4] The seated tally clerk sits at the primary EVS terminal on the Speaker's Dais. Here, the tally clerk can initiate and terminate a vote, illuminate and release the display boards, begin the clock that tracks the minimum amount of time for the vote, open and close the voting stations, identify the vote (e.g. suspension of the rules or agreeing to the amendment), and process and verify well cards for cast votes or for changed votes.

the identifying information,[5] record the Roll Call number on the card, and hands it to the seated tally clerk, who enters the vote into the EVS.

There are display boards above the east and the west doors of the chamber, referred to as "electronic summary displays." These display the time remaining in the vote and the running tally. There is another display board behind the Chair, which displays the vote of each Member.

Members may verify their votes at any voting station or by checking the display board above the rostrum. As votes are cast at the voting stations, the EVS automatically records each vote and updates the display boards behind the Chair and above the east and west doors. The system refreshes every 1½ seconds and appears to be virtually instantaneous to most observers. A vote cast or changed by well card will not be reflected on the display boards until after the seated tally clerk has entered it in the EVS terminal and the computer refreshes the displays.

Although the goal of the clerks is to expeditiously enter a Member's well vote and have it displayed as quickly as possible, the process inevitably takes longer than when a Member votes electronically. Sometimes the seated tally clerk enters and verifies each well card into the EVS as the standing tally clerk hands over the card—which can take from 2 to 10 seconds. At other times, particularly when a number of Members are voting in the well, the seated tally clerk will enter and verify them as a batch—a few seconds per card can quickly add up to several minutes. Consequently, depending on the speed and sequence of actions taken by the seated tally clerk, well votes will take a varying amount of time to be reflected on the summary board.

For purposes of the vote total, although a Member may cast and change his or her vote any number of times during a record vote, each Member has only one vote—the last one cast. Nevertheless, all EVS transactions are captured by the EVS and included in the transaction log. The EVS was designed to allow Members to change their votes at the voting stations so long as the voting stations are open. However, in 1976, Speaker Albert announced changes to the voting policy, still in effect, that allows changes at voting stations to occur only during the first 10 minutes of a 15-minute vote. To change a vote after the first 10 minutes, a Member must vote in the well by well card, unless the Member voted present, in which case that Member may change his or her vote until the voting stations are closed.[6] During a 5-minute vote, Members may change their vote at any station throughout the duration of the vote.[7]

The seated tally clerk keeps a handwritten list of Members who change, and how they change, their votes after the first 10 minutes. This list is given to the reading clerk to announce when the Chair inquires of Members whether anyone wishes to vote or to change their vote. If, during the same record vote, a Member submits a subsequent well card (for example, to change a vote) the new well card is numbered and stapled to the previous well card

[5] The standing tally clerk may add identifying information to a well card where the information provided by the Member may still be ambiguous, for example, where the voting Member shares the same last name as other Members, the tally clerk may add the voting Member's first name or initial to provide clarity.

[6] Speaker Albert, Mar. 22, 1976, p. 7394 (Manual, § 1014).

[7] This policy was announced by Speaker O'Neill. Jan. 4, 1977, pp. 53–70 (Manual, § 1014).

cast by the Member.[8] If that well card is submitted during the last 5 minutes of 15-minute vote or after the Chair inquires for changes, the subsequent well vote is announced by the reading clerk, even if it is a duplicate (in which case, the reading clerk would announce how that Member had previously voted).

Members are responsible during electronic votes for verifying that their votes are recorded accurately.[9] This is particularly important because the precedents presume the technical accuracy of the EVS; and, thus, the Speaker declines to entertain requests to correct the Journal and Record on votes taken by electronic device.[10]

Data for each vote taken by electronic device is collected in several files: transaction log, checkpoint file, vote journal log, and hardware and software error logs.[11] The transaction log records all voting transactions by each Member during a particular vote, including every vote cast, the time each vote is cast, any changes, and the manner in which the vote is cast (i.e. from a voting terminal or by well card) and allows for the generation of a detailed report. The checkpoint file is written at the conclusion of the record vote and contains a snapshot of the vote data at the end of the vote. The vote journal log records when a vote begins and ends and when voting stations are closed, opened, or reopened. The hardware and software error logs record any errors which occur during the execution of the record vote.

Closing an Electronic Vote

Clause 2(a) of rule XX sets the minimum time for an electronic vote at 15 minutes, except in those circumstances where House rules permit the Speaker or the Chairman of the Committee of the Whole to reduce the minimum time to 5 minutes—such as clause 8 or 9 of rule XX[12] or clause 6 of rule XVIII.[13]

The technical process for closing an electronic vote in the EVS can be viewed as a five-step process. Each step is generally triggered by statements uttered by the Chair and requires the seated tally clerk to select an option on the primary computer to effect each step. In his testimony before the Select Committee, Chief Tally Clerk Mark O'Sullivan stated, "The whole procedure of con-

[8] The seated tally clerk may verify his or her recording of well cards by checking the cards against a screen display on the monitor or by calling by phone the Legislative Operations Office staff to confirm the well cards against a printout from the EVS made by that office.

[9] This policy was announced in 1973 by Speaker Albert and has been adopted by all subsequent Speakers. Manual, § 1017.

[10] Id.

[11] These files are only available internally within the House and not to the public.

[12] Clause 8 of rule XX allows the Speaker to postpone certain questions and to "cluster" them for voting at a designated time or place in the legislative schedule. These questions include such questions as approval of the Journal, passing a bill or joint resolution; adopting a resolution or concurrent resolution; and agreeing to a conference report or a motion to instruct. Clause 8(c) provides that "The Speaker may reduce to five minutes the minimum time for electronic voting on a question postponed under this clause or on a question incidental thereto, that follows another electronic vote without intervening business, so long as the minimum time for electronic voting on the first in any series of questions is 15 minutes." Clause 9 provides that "The Speaker may reduce to five minutes the minimum time for electronic voting on any question arising without intervening business after an electronic vote on another question if notice of possible five-minute voting for a given series of votes was issued before the preceding electronic vote."

[13] Clause 6 of rule XVIII permits the Chairman of the Committee of the Whole to reduce to 5 minutes (1) a vote that follows a quorum call; (2) votes on pending amendments provided the first vote is 15 minutes; and (3) votes on postponed questions provided the first vote in the series is a 15-minute vote.

ducting votes and the closing of votes is almost the same since I have been here," although "each vote has little permutations."[14]

Closing the voting stations. The first step of the process is called "closing the voting stations." This typically occurs when the Chair asks whether any Members wish to vote or change their votes or after the first 10 minutes of a 15-minute vote. This action signals the seated tally clerk to close the 46 voting stations on the back of the chairs in the chamber to further input, requiring all additional votes or changes to be cast by well card. However, the seated tally clerk may exercise some discretion in deciding when to close the voting stations. Though the typical procedure is to close the voting stations when the Chair utters the phrase "do any Members wish to vote or change their vote," the clerks explained to the Select Committee that if the tally clerk perceives Members are still seeking to vote, and it would be more efficient to leave the stations open rather than requiring Members to vote in the well by well card, the tally clerk may leave the stations open, or may reopen the stations after they have been closed. This is also the point where a handwritten list of all Members who changed their votes, and how they changed, after the first 10 minutes of a 15-minute vote (which is prepared by the seated tally clerk) is announced by the reading clerk (e.g. Mr. Davis, off "aye," on "no"). Any votes or changes submitted by Members after this point are announced immediately upon being entered into the EVS; no further list is kept.

Terminating the vote. The second step of the process is called "terminating the vote." A vote is terminated at the direction of the Chair, when there are no Members in the well attempting to cast their votes, the seated tally clerk has finished entering the data from all of the well cards submitted, and when the EVS has "absorbed" all votes cast (i.e. the EVS has processed and refreshed the displays to reflect that data). At that time, the seated tally clerk will indicate to the standing tally clerk that the tally displayed above the chamber's doors is reliable and selects the option on the EVS terminal to terminate the vote. The standing tally clerk prepares the "tally slip" to hand to the Parliamentarian, who in turn hands it to the Chair to include in the Chair's announcement of the result of the vote.[15]

Setting the vote to final. The third step, "setting the vote to final," causes the word "FINAL" to appear on the summary display boards. Votes may still be entered after the Clerk has selected this option in the EVS. Neither the selection of this option in the EVS, nor the display of the word "FINAL" on the display board, bears parliamentary significance. This step typically occurs when the Chair is reading the tally slip.

Releasing the Displays. The fourth step, "releasing the displays," typically occurs as the Chair completes reading the vote tally and states an unequivocal announcement of result. This is the first step in releasing the EVS.

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[14] Select Committee Hearing, "Voting in the House of Representatives—Rules, Procedures, Precedents, Customs, and Practice." Oct. 25, 2008 p. 32.

[15] The "tally slip" is a small slip of white paper on which the tally clerk writes down for the Chair the vote tally. The tally slip is not given to the Chair until the tally clerks confirm that the voting stations are closed and that all well votes have been properly recorded. Multiple tally slips can be filled out by the standing tally clerk and passed up through the Parliamentarian to the presiding officer. This typically occurs if Members present themselves in the chamber or the well, indicating their desire to vote or change their vote after step 1 but before step 5, which is the final release of the displays.

House Parliamentarian John Sullivan explained what constitutes an unequivocal announcement of result: "Again, it is totality of the circumstances. I can recall on occasion when a Chair uttered what in a transcript would look like an unequivocal statement of result, but it is just because the last syllable was coming out of his mouth just as he wanted to pull up because a Member was running down the aisle. That vote was taken because 700,000 Americans wanted it to be recorded. * * * We rationalize that the Chair hadn't put the period on the end of the sentence in that circumstance. But usually if the Chair says, 'The amendment is adopted,' that is the unequivocal statement of the result. 'The bill is passed.' When he utters that sentence, that should be the end of the vote."[16]

Verifying the release. Fifth and finally, the EVS asks for "verification of the release." The first four steps may be reversed. However, once the fifth step is completed, the vote is closed. At this point, the EVS is shut down, the display boards are cleared, and the vote may not be reopened.

After the vote is closed, the tally clerks on the rostrum proof the well card votes with the tally clerk located in the Office of Legislative Operations. After this proof has been completed, the vote totals are released to the Clerk's public website.

The Select Committee heard testimony that the practice of tally clerks in closing down a vote varies slightly among specific clerks. Some of the tally clerks actually wait until the Chair "gavels down the vote" and then "clicks through those four or five steps just simultaneously." Furthermore, some of the newer clerks may not be as fast as some of the more experienced ones.

On occasion (such as when a vote must be restarted or there is a technical difficulty that would require the vote to be taken by call of the roll), the tally clerk may opt to "abort" a vote; that is, cancel a vote that is in progress. As the Select Committee learned, this is very rare.

The Respective Roles of the Chair, the Clerk, and the Parliamentarian in the Direction and Conduct of a Vote by Electronic Device

Clause 2(a) of rule XX sets forth the respective roles of those involved in a record vote. It states:

> Unless the Speaker directs otherwise, the Clerk shall conduct a record vote or quorum call by electronic device. In such a case the Clerk shall enter on the Journal and publish in the Congressional Record, in alphabetical order in each category, the names of Members recorded as voting in the affirmative, the names of Members recorded as voting in the negative, and the names of Members answering present as if they had been called in the manner provided in clause 3.

This rule is understood to mean that a vote is conducted by the tally clerks at the direction of the Chair.

The Parliamentarian's role is to assist the Chair in comporting with the rules, precedents, and practices of the House. As such, the

[16] Member Briefing on Voting in the House of Representatives—The Rostrum and the Electronic Voting System: A "Walkthrough" by the Clerk of the House Lorraine C. Miller. Briefing. Oct. 18, 2007, p. 18.

Parliamentarian may offer guidance and recommendations to the presiding officer on the decision of when to close a vote. The Parliamentarian may also, as an agent of the Chair, advise the tally clerk on the proper conduct of a vote.

There have long, if not always been, two tally clerks, who have traditionally been viewed as nonpartisan "agents of the Chair." Although the tally clerks are specifically referenced in the Rules of the House, much of their role and responsibilities have been established through custom, usage, and tradition. Until 1973, and for 184 years prior, the two tally clerks processed roll call votes manually. The role of the tally clerks was not perceived to change once the electronic voting system was adopted, at least not significantly enough to warrant a formal rules change or codification. They were and continue to be appointed solely to do the business of conducting a vote and to ensure that Members are recorded accurately.

The seated tally clerk is charged with the technical aspects of initiation and termination of the EVS, as well as the operation of the rostrum EVS terminal throughout a vote. In most cases, the seated tally clerk initiates the EVS when the Chair states, "The yeas and nays are ordered. Members will record their vote by electronic device."

In the normal course of a vote, the tally clerks will take instruction from the Chair by listening to certain "cues." However, upon occasion, the tally clerk may interject a suggestion. For example, an inquiry of the Chair whether any Member wishes to vote or to change their vote is a cue to the tally clerk to turn off the 46 voting stations available to Members, requiring Members who still need to vote to come to the well. In the example given here, the tally clerk may suggest directly to the Chair or through the Parliamentarian that, if there are a number of Members who have not yet voted, the voting stations be left open or reopened as an efficient way to process a large number of votes. The tally clerks ultimately provide the Chair a vote tally that the Clerk has determined accurately reflects each vote cast. Under the long-standing practices and traditions of the House, this determination is communicated to the Chair via the tally slip.

Under clause 2(a) of rule XX, the Chair directs, or controls, the vote. As stated by Charles Johnson, "[T]he Chair, in his or her nonpartisan capacity, conducts the vote, and it can't be any other way."[17] The Chair's control of the vote is exercised within the applicable rules, precedents, and best practices in consultation with the Parliamentarian.

Once the minimum time for a vote has expired, the Chair determines when to close the vote.[18] However, once the voting system has been released after the completion of the fifth and final step performed by the seated tally clerk, the Chair no longer has the discretion to permit additional votes—the EVS cannot return to a previous vote.

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[17] Hearing, Oct. 25, 2008, p. 11.

[18] With respect to the amount of time a vote may be held open, the precedents of the House dictate that "on a call of the House, or a vote, conducted by electronic device, Members are permitted a minimum of 15 minutes to respond, but it is within the discretion of the Chair, following the expiration of 15 minutes, to allow additional time for Members to record their presence, or vote, before announcing the result." Manual, § 1014.

The Chair's determination of when to close a vote has been described by Charles Johnson as based on the "totality of the circumstances." Of particular importance to the Chair is the enfranchisement of Members. The Select Committee heard testimony regarding the traditional view of the Speaker that it is the Chair's obligation to protect the right of a Member to vote because each vote cast is on behalf of the approximately 600,000 citizens that Member represents. However, the Chair has a dual obligation to conduct the vote efficiently. The Chair's obligation to protect a Member's right to vote is not so great as to require the Chair to hold open a vote indefinitely.[19] Indeed, since the 103rd Congress, the Speaker has announced that each occupant of the Chair would have the Speaker's full support in striving to close each electronic vote at the earliest opportunity and that Members should not rely on signals relayed from outside the chamber to assume that votes will be held open until they arrive.[20]

The dual—and often conflicting—obligation of enfranchisement and efficiency has resulted in the practice of "multiple tally slips." It is not uncommon for the Chair, having almost completed the announcement of a vote from a tally slip, to permit a tardy Member who has just entered the chamber to cast a vote. In that case, the tally clerk prepares a new tally slip reflecting the additional vote. As long as the EVS has not been released, it has been the practice of the Chair to permit latecomers to cast a vote. Often, as the tally clerk prepares a new tally slip, another latecomer enters the Chamber and is afforded the same courtesy.

There is one rule that impacts the discretion of the Chair as to when a vote may be closed after the minimum time has expired. That rule was adopted on January 5, 2007, as a new sentence to clause 2(a) of rule XX, which states: "A record vote shall not be held open for the sole purpose of reversing the outcome of such vote."[21] The Chair has held that this rule sets a standard that may be challenged not by a point of order during the vote but by the offering of resolution alleging a violation of the rule as a question of the privileges of the House under rule IX after the vote has been announced.[22]

One of the foundations of parliamentary procedure in the House is that the Chair will be impartial in conducting votes. The Chair's call of the vote result must be carried out without partisanship[23]

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[19] "Because the Chair has the discretion to close the vote and to announce the result at any time after 15 minutes have elapsed, those precedents guaranteeing Members in the chamber the right to have their votes recorded even if the Chair has announced the result (e.g., V, 6064, 6065, VIII, 2143), which predate the use of an electronic voting system, do not require the Chair to hold open indefinitely a vote taken by electronic device." (Manual, § 1014).

[20] Manual, § 1014.

[21] This discretion of the Chair and the arguably unresolved application and interpretation of the new sentence in 2(a) has been the source of controversy in the House chamber throughout the 110th Congress. Responses to numerous parliamentary inquiries and questions of privilege regarding the application of this provision have been recorded in the House Rules and Manual as follows: "In response to a parliamentary inquiry concerning the rule on holding votes open for the sole purpose of reversing the outcome, the Chair advised that the first record vote of a legislative day, especially if unexpected, may require more time to complete (Jan. 18, 2007, p.___). In addition, the Chair is constrained to differentiate between activity toward the establishment of an outcome on the one hand and activity that might have as its purpose the reversal of an already established outcome on the other. As such, the Chair may hold the vote open beyond expiration of the minimum time in order to allow all Members to vote." (Manual, § 1014.)

[22] 76 Cong. Rec. H3193 (daily ed. May 8, 2008).

[23] Deschler-Brown Precedents §1, ch. 30.

and must reflect the true and accurate tally as provided by the Clerk.

In short, the Chair has nearly complete discretion as to when to close a vote and exercises impartiality in the control of a vote and the announcement of a result. The Chair provides instruction and direction to the tally clerks, with the advice and counsel of the Parliamentarian. As an agent of the Chair, it is the tally clerks' responsibility to certify that the tally provided the Chair is accurate.

THE EVENTS SURROUNDING ROLL CALL 814

By any measure, the week of August 2, 2007, was difficult. The House was scheduled to depart for the August District Work Period on August 3. The House was busy trying to complete much of its legislative agenda, including completing the outstanding appropriations measures. In fact, at the close of the legislative day of Thursday, August 2, the House had been in session for 51 hours that week and 65 hours the previous week. The crush of legislative business, combined with the partisan tone of the week's debate, created a contentious atmosphere within the House chamber. John Sullivan, the Parliamentarian of the House, described the atmosphere this way: "The chamber was about as raucous as it gets. This week of proceedings in the House was, I don't mean to be judgmental, but it was the ugliest week I can remember in the House." Mr. Sullivan noted that throughout the events of the evening of August 2, the membership was exercising little restraint in their deportment on the House floor.[24]

On the night of August 2, 2007, the House was completing consideration of H. R. 3161, the funding bill for the Department of Agriculture and related agencies for the fiscal year 2008. After concluding a series of 11 two-minute votes on the remaining amendments to the bill, the Committee of the Whole rose and reported the bill back to the House as amended. At this point, the gentleman from New York, Mr. McNulty, assumed the Chair as Speaker pro tempore.

At approximately 10:22 p.m.,[25] the gentleman from California, Mr. Lewis, the Ranking Republican Member of the Committee on Appropriations, offered on behalf of the Minority a motion to recommit the bill with instructions. The instructions contained in the motion sought to report the bill back to the House promptly with an amendment that "(1) prohibits any funds in the act (including grant funds) from being used to employ an alien who is not authorized to be employed in the United States; and (2) prohibits any funds in the act for rental housing assistance programs to provide assistance to an alien not authorized to receive such assistance pursuant to 213A of the Immigration and Nationality Act."[26]

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[24] Select Committee Interview of House Parliamentarian John Sullivan, Feb. 27, 2008, p. 366. (Hereinafter "Sullivan interview".)

[25] All times cited in this report are keyed to the time code on the video recording of floor proceedings prepared by the Office of the Chief Administrative Officer for the use of the Select Committee.

[26] It is important to note that the instruction did not require that the amendment be reported back to the House "forthwith," meaning that, if the motion were adopted, consideration on the bill would end until further action by the Committee on Appropriations. The practical effect would have been to delay any further consideration of the bill until after the August District Work Period.

The Chair put the question on the motion. When Mr. McNulty announced his opinion that the "noes" prevailed, Mr. Lewis requested the yeas and nays, and the Chair announced that the 15-minute vote would be taken by electronic device.

Roll Call 814 began at approximately 10:34 p.m.

A Close Vote

The vote proved to be extremely close. Both the video evidence and the log from the EVS examined by the Select Committee show that the vote tally remained close for much of the vote, usually within 5 to 10 votes one way or the other. At approximately 10:35 p.m., 1 minute from the start of the vote, Catlin O'Neill, a floor assistant to the Speaker,[27] left her position on the right side of the rostrum and walked to the Democratic leadership table. At 10:38:30 p.m., Ms. O'Neill returned to the rostrum, running down the aisle on the Democratic side of the House chamber, and had a 3-second interaction with Mr. McNulty. Although neither Ms. O'Neill nor Mr. McNulty had any specific recollection of that conversation, Ms. O'Neill testified that she believed she was asking him to announce the time remaining in the vote.[28] Seconds after this interaction, the Chair banged the gavel and announced that "Members have 10 minutes left to vote. The vote is on the motion to recommit."

This was the first of three interactions between Ms. O'Neill and Mr. McNulty during the course of Roll Call 814. The second interaction occurred at 10:46 p.m., 12 minutes into the vote. Here, the video again shows Ms. O'Neill returning to the rostrum from the Democratic leadership table. She appears to speak to Mr. McNulty for 3 seconds, turns away for 4 seconds, and then appears to speak to him again for 2 seconds. Although neither Ms. O'Neill nor Mr. McNulty had a specific recollection of the substance of that conversation, Mr. McNulty again banged the gavel seconds thereafter and announced that "Members have 2 minutes in which to vote on the motion to recommit."

Three Pivotal Minutes

By all accounts, the chamber was noisy. At 10:49 p.m., 15 minutes into the vote, the Majority Leader, Mr. Hoyer, walked down the center aisle, and approached the right side of the rostrum. As Mr. Hoyer walked through the well at 10:49:34 p.m., Jerry Hartz, the Speaker's Director of Floor Operations, signaled to the Speaker, who then turned and proceeded to the front of the rostrum to vote by well card. The Speaker's vote brought the tally to 214 yeas and 214 nays.

Mr. Hoyer has acknowledged that he yelled several times, in a voice he believed loud enough to be heard by the Chair, "Close it [the vote] down," or words to that effect, and appeared to make a

[27] During her interview with the Select Committee, Ms. O'Neill described her role as generally being responsible for the scheduling of presiding officers and communicating with the rostrum staff and presiding officers, typically through the parliamentarians, during the conduct of a vote. Select Committee Interview of Catlin O'Neill, Feb. 25, 2008, p. 339. (Hereinafter "O'Neill interview".)

[28] O'Neill interview; Select Committee Interview of the Hon. Michael R. McNulty, Apr. 9, 2008, p. 444. (Hereinafter "McNulty interview".)

gaveling motion in the direction of the Chair.[29] These comments were heard by at least six professional staff on the rostrum that evening, but Mr. McNulty testified before the Select Committee that he "absolutely did not hear that."[30]

Although Mr. Hoyer testified that he had no recollection of the Speaker voting,[31] his comments coincided with her voting.

The third interaction between Ms. O'Neill and Mr. McNulty, occurred at 10:49:46 p.m., slightly over 15 minutes into the vote. Mr. Hoyer approached Ms. O'Neill, who was standing in the well on the right side of the rostrum. Mr. Hoyer testified that he told Ms. O'Neill that he wanted the vote closed while the Majority was prevailing.[32] Approximately 5 seconds later, Ms. O'Neill turned and appeared to have a conversation with Mr. McNulty: Mr. McNulty stood up, leaned towards Ms. O'Neill, and gestured with his hand. Here again, Ms. O'Neill and Mr. McNulty could not recall the specifics of this conversation. Both Ms. O'Neill and Mr. McNulty testified that at some point Ms. O'Neill told the Chair that the vote was going to be close, and they both testified that Ms. O'Neill did not instruct Mr. McNulty to close the vote.[33]

The video shows that at 10:50:06 p.m., the Parliamentarian, John Sullivan, crossed the well and appeared to have a brief conversation with Ms. O'Neill and Mr. Hoyer in the well at the base of the rostrum.

At 10:50:05 p.m., 16 minutes and 3 seconds after the vote began, the tally shown on the video turned to 214 yeas and 214 nays. The Chair struck the gavel and at 10:50:07 p.m. began to announce that tally without waiting for a written tally slip. However, Mr. McNulty never completed the statement because, as he was in the process of making the announcement at 10:50:12 p.m., Messrs. Mitchell and Lampson, both Democratic Members, submitted well cards to the standing tally clerk changing their votes from "aye" to "no."

As the well cards of Messrs. Mitchell and Lampson were being processed by the clerks at 10:50:16 p.m., three Republican Members, Ms. Ros-Lehtinen and Messrs. Lincoln and Mario Diaz-Balart, entered the well to change their votes from "no" to "aye." Mr. McNulty testified that it was his intention to close the vote after the last of these three well cards had been entered (that of Mr. Mario Diaz-Balart) if no other Member showed up in the chamber to vote.[34] Mr. McNulty further testified that ultimately he made this decision because he observed no other Members in the well preparing to vote at this time, and he was concerned that holding the vote open any further might trigger criticism that he had violated clause 2(a) of rule XX.[35]

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[29] Select Committee Interview of the Hon. Steny Hoyer, Apr. 16, 2008, p. 514. (Hereinafter "Hoyer interview".)

[30] See, e.g., Select Committee Interview of Kevin Hanrahan, Feb. 8, 2008, p. 157. (Hereinafter, "Hanrahan interview".); Select Committee Interview of De'Andre Anderson, Feb. 8, 2008, p. 131. (Hereinafter "Anderson interview".). See also, Hearing of the Select Committee to Investigate the Voting Irregularities of August 2, 2007. Investigative Hearing Regarding Roll Call 814, Day 1 and 2 (May 13 and 14, 2008).

[31] Hoyer interview, p. 502.

[32] Id.

[33] O'Neill interview, p. 446.

[34] McNulty interview, p. 444.

[35] Mr. McNulty here is referring to the new sentence in clause 2(a) of rule XX that states: "A record vote by electronic device shall not be held open for the sole purpose of reversing the outcome of such vote."

Testifying that he was frustrated that the vote had remained open after the announcement of 214 yeas and 214 nays, the Majority Leader confronted Mr. Sullivan on the second step of the rostrum at 10:50:34 p.m., 29 seconds after Mr. McNulty's aborted attempt to close the vote. Mr. Hoyer can be heard saying in an animated tone: "We control this House, not the Parliamentarians." Mr. Hoyer testified that he was angry because he believed, albeit mistakenly, that one of the Parliamentarians had advised Mr. McNulty to keep the vote open.[36]

At 10:51:25 p.m., approximately 18 minutes after the vote began, the Chair announced for a second time the result as 214 yeas and 214 nays. Unlike the initial announcement, however, Mr. McNulty added the words "the motion is not agreed to," and banged the gavel. The Chair read the vote totals from the electronic summary board rather than the usual practice of waiting for a tally slip. As the gavel fell, Mary Kevin Niland, the reading clerk, was still announcing Mr. Mario Diaz-Balart's well vote. Due to the inherent short lag time in updating the summary display, less than a second after Mr. McNulty announced the result, the electronic display board upticked to 215 yeas and 213 nays and displayed the word "FINAL."[37] The Republican side of the chamber erupted in anger as they believed that the Majority had purposefully taken the "win" from them.

"Uncharted Territory"

The inconsistency between Mr. McNulty's announcement and the total displayed on the summary board caused great confusion among the rostrum staff. Many of them described to the Select Committee that they were "shocked" or "stunned" by the announcement. The confusion among the Clerk's staff was best summed up by Mr. Kevin Hanrahan, the standing tally clerk during Roll Call 814 this way: "We were off track, and we were in no man's land at that point."[38]

Mr. Sullivan described the House as having crossed into "uncharted territory."[39] The appearance of the word "FINAL" on the summary board exacerbated the confusion and agitation of the Members in the chamber. Mr. McNulty testified that he knew he had made an error. "I was just kind of stunned when I looked up and saw the 215–213 and the word 'FINAL' after it. I'll be very honest with you; I did not know what to do next."[40] Mr. Hoyer testified that, because of the uptick, he knew that the "vote could not stand" and that the "Minority was justifiably outraged." Furthermore, he approached John Sullivan within 45 seconds of Mr. McNulty's announcement to ask him the best way to vacate the vote.[41]

Numerous witnesses, including John Sullivan and Charles Johnson, testified that, since 1974 when the EVS became operational, they had never seen a Chair announce the result of a vote without

[36] Hoyer interview, p. 503, 516.

[37] The word "FINAL" appears on the display board when the Tally Clerks have executed the third step in a five-step process for closing an electronic vote in the EVS. The word connotes the status of the computer file and its display. It has no parliamentary or legal significance.

[38] Hanrahan interview, p. 160.

[39] Sullivan interview, p. 360.

[40] McNulty interview, p. 439.

[41] Hoyer interview.

waiting for the tally clerks to prepare a tally slip signifying that the voting system had been closed to further input.[42]

At 10:51:38 p.m., 8 seconds after the announcement, Ms. Gillibrand, a Democratic Member who had been visible in the well, approached the rostrum and began filling out a well card. A few seconds later, Mr. Space, a Democratic Member—who had been standing at the desk for more than a minute—submitted a well card, as did Ms. Gillibrand, both of whom changed their votes from "aye" to "no."

Mr. McNerney, a Democratic Member, approached the rostrum and also began filling out a well card at 10:52:05 p.m., 35 seconds after the announcement. At 10:52:35 p.m., Ms. Niland began announcing the changes earlier submitted by Ms. Gillibrand and Messrs. Space and McNerney. At the same time, Mr. Sullivan approached the Chair and began writing an explanatory statement, which was to include a final vote tally. Mr. Sullivan testified that he intended that this statement be considered the "functional equivalent" of a tally slip.[43]

The Aftermath

In the minutes immediately following the Chair's announcement, there was a great deal of rostrum traffic. Members from both parties approached the Chair and the parliamentarians.

At 10:54:37 p.m., approximately 3 minutes after the announcement, Mr. Boehner, the Minority Leader, entered the well with his hand raised, indicating his intent to cast a vote. At 10:54:50 p.m., Mr. Boehner submitted a red well change card, intending to change his vote from "aye" to "no." Although unknown to Mr. Boehner for at least several days after this incident, it was later discovered that his well change card was never processed.

At 10:54:57 p.m., Mr. Sullivan can be seen giving Mr. McNulty the statement that he had been preparing. When Mr. McNulty appeared to move toward the microphone to read from the paper, Mr. Sullivan asked him to refrain until they can "make sure this is sorted out."

At approximately 10:55 p.m., Mr. Hoyer submitted a red well change card. This card was never processed because it duplicated his existing vote against the motion already recorded in the EVS.[45]

Approximately 20 seconds later, after being called over by the seated tally clerk, De'Andre Anderson—who appeared to be experiencing some difficulty—Mr. Sullivan can audibly be heard saying, "We've got big problems, bigger than that."

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[42] In his interview, Mr. Sullivan described the importance of the tally slip this way: "Its main purpose is an assurance that the numbers written on it were put there after the system had been closed for further input and the numbers were static. It's probably the most important quality control device in the announcement of a vote. So to read a number off the wall, that's not a static number, that's a snapshot of that computer refresh cycle. And there might be other electrons on their way to the board. And to read a number from that board is liable to be contradicted the next time the computer refreshes." Mr. Sullivan also explained that Mr. McNulty's failure to await a tally slip was a departure from the best practice on announcement of a vote, but it was not a violation of the Rules of the House. (Sullivan interview, p. 58.)

[43] Document Production of House Parliamentarian John Sullivan, Reflections on Roll Call 814 (received by Select Committee Jan. 4, 2008).

[45] Mr. Sullivan explained that "Technically, the duplicate should have been processed as well, in which case the reading clerk, rather than saying off aye on no, Mr. Hoyer, would say Mr. Hoyer voted no, meaning this is a duplicate, we already have that in the system." (Sullivan interview, p. 387.)

At approximately 10:56 p.m., Mr. McNulty banged the gavel and recognized Mr. Hoyer, who made a unanimous consent request to "vacate the vote we have just taken." Multiple objections were heard coming from the Republican side of the chamber.

Hearing those objections, Mr. McNulty began conferring with Messrs. Wickham and Lauer, while Mr. Sullivan began conferring with other Members and staff. In particular, Mr. Sullivan expressed his hope to Mr. Boehner's floor staff, Jay Pierson and Jo Marie St. Martin, that objections would be withdrawn and that Mr. Hoyer could attempt another unanimous consent request to vacate because, in Mr. Sullivan's opinion, this was the best option "to achieve justice." [46]

At 10:57:38 p.m., Mr. Hoyer embarked on a second option. Mr. McNulty recognized the Majority Leader, who moved to "reconsider the vote by which the previous vote was taken."

Mr. McNulty stated that he first had to call the vote before the motion to reconsider would be in order. Reading from the statement prepared by Mr. Sullivan, Mr. McNulty began his announcement by trying to explain the events that had transpired, while being repeatedly interrupted by shouts from the chamber.[47]

At the conclusion of Mr. McNulty's statement, he recognized the Majority Leader, who moved to reconsider the vote. At approximately 10:59 p.m., the Chair put the question on the motion to reconsider. Mr. Boehner requested a recorded vote, which was ordered at 10:59:20 p.m.

An EVS Failure Adds to the Confusion

It first became evident that there was a problem with the EVS at 10:54:57 p.m., when Mr. Sullivan can be heard advising the Chair that there was a problem with the computer. Mr. Anderson testified that he was unable to terminate the vote.[48] Mr. Hanrahan can be seen leaning over the second tier of the rostrum consulting with Mr. Anderson and looking at the screen of the EVS terminal at numerous points in the video. At 10:59:31 p.m., Mr. Wickham can be seen consulting with the tally clerks and Ed Sorenson, the Deputy Clerk with responsibility for technical operations—and the senior member of the Clerk's staff on duty that evening.

According to a presentation subsequently prepared by the Clerk's office, at that point the EVS vote on the original motion to recommit was not yet terminated, meaning that the seated tally clerk had not been able to complete all of the steps required to terminate the vote, release the summary boards, and move on to the next vote. That document states that "because the termination process was reversed for additional well votes, EVS would not terminate normally." [49] In his interview, Mr. Sorenson stated that he recog-

[46] Sullivan interview, p. 367.

[47] At 10:58:02 the video shows Mr. McNulty stating: "The Chair prematurely called the vote at 214–214 * * * while there were still votes being entered. After all of the cards were added, the final vote was 212 to 216 nay." The transcript in the Congressional Record for that day differs and better reflects the statement written by Mr. Sullivan for the Chair: "The Chair prematurely announced that the motion was rejected on a tie vote of 214–214. After the cards already submitted in the well were entered in the computer, the result was the same, albeit by a different tally, 212–216. The motion is not adopted." (126 Cong. Rec. H9650 (daily ed. Aug. 2, 2007, vol. 2.))

[48] Anderson interview, p. 135.

[49] Draft Memorandum. from Lorraine Miller, Clerk of the House to Comm. on House Admin. (Sept. 2007) CLERK 467–494.

nized that there was a problem with the computer and realized that the House could not move on to the vote on the motion to reconsider until it was resolved.[50]

At 11:00:26 p.m., Mr. Boehner moved to adjourn and Mr. McNulty informed the Members of the problem with the computer: "I would advise the Minority Leader that that motion is not proper at this time because we are in a * * * vote on the motion to reconsider. The only reason it is not on the board is that the machine is down."[51]

Messrs. Sullivan, Wickham, and Sorenson discussed the options for moving forward. A decision was ultimately made to "abort" the vote (essentially "undoing" the vote and, for purposes of the EVS, making it as if the vote had never occurred). Both Mr. Sullivan and Mr. Sorenson testified that Mr. Sorenson was certain that aborting the vote would not result in data being lost in the long-term; however, it would be lost in the immediate term.[52] It would take several hours to recapture the results from the main computer for depiction in the Journal and the Congressional Record.

At 11:02:30 p.m., the vote was aborted, the data from that vote became unavailable on the EVS, and the motion to reconsider showed up on the EVS terminals, including those on both the Republican and Democratic sides of the chamber as Roll Call 814.[53]

Finally, at approximately 11:03 p.m., most Republican Members walked out of the chamber in protest. The next day, on August 3, Mr. McNulty apologized to the House for his role in the controversy.

FINDINGS AND ANALYSIS

The evidence gathered by the Select Committee during the course of its investigation shows that Roll Call 814 was, in many ways, the perfect storm: a long and contentious week; a close vote on a politically sensitive issue; the lateness of the hour; urging from the Majority Leader and other Members to close the vote; an attempt by the Chair to uphold or enforce clause 2(a) of rule XX; and a breakdown of the EVS. This unfortunate combination of factors effectively undermined the confidence of many Members in the outcome of Roll Call 814, and also raised their concerns about the integrity of the voting process on that occasion. It is the Select Committee's hope that the findings and recommendations set forth in the subsequent pages will help to prevent such a situation from reoccurring.

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[50] Select Committee Interview of Ed Sorenson. Feb. 4, 2008, p. 47. (Hereinafter "Sorenson interview".)

[51] Again, the statement which appeared in the Congressional Record was different than the Chair's utterance: "The Chair would advise the minority leader that this motion is not proper at this time because we are in a vote on the motion to reconsider the vote on the motion to recommit with the previous question ordered to final passage without other intervening motion. The only reason it is not on the board is that the machine is down." (126 Cong. Rec. H9651 (daily ed., Aug. 2, 2007, vol. 2).)

[52] Sullivan interview, p. 391, and Sorenson interview, p. 54.

[53] Over the course of the night of August 2 and the early morning hours of August 3, the Clerk's personnel reconstructed Roll Call 814 by using data stored in various files on the EVS. Once the vote was reconstructed, the subsequent votes were renumbered as Roll Call 815 and 816.

FINDING 1

As is the traditional role of the Majority Leader, Mr. Hoyer urged the Chair to close the vote—after time for voting had expired and with no apparent voting activity in the well—when the majority was prevailing. Neither the Chair nor the rostrum staff was pressured to circumvent the rules and practices of the House. Nevertheless, the Chair's premature announcement of the vote led to a series of cascading errors on the rostrum, including the failure to process well cards submitted by the Minority and Majority Leaders and a failure in the EVS, all of which further undermined many Members' confidence in the integrity of the vote.

The Select Committee recognizes that the House is a political body in which the Majority Leader and other leaders (past, current, and yet to come) make every reasonable attempt to ensure that their side will prevail during a close vote.

Roll Call 814 was just such a close vote. It was a vote Mr. Hoyer wanted to win, and he attempted to communicate to Mr. McNulty his desire that the vote be closed.[54] Mr. Hoyer acknowledged making such statements and admitted that it was "certainly possible" that he helped create an atmosphere where Mr. McNulty felt pressure to close the vote sooner than he might have otherwise.[55] For his part, Mr. McNulty testified that he neither heard those comments nor felt pressure.[56]

Mr. McNulty aborted his first attempt to call the vote because, in complying with the Speaker's opening day policy, he noticed Members in the well changing their votes.[57] Mr. Hoyer believed, albeit mistakenly, that the Parliamentarian had intervened when the well was empty to prevent the Chair from closing the vote.[58] As a result, Mr. Hoyer approached Mr. Sullivan, for approximately 2 seconds on the side of the rostrum, and stated in an animated manner that "we control this House, not the Parliamentarians."

Some of the rostrum staff testified that Mr. McNulty's second premature announcement of the vote (which included an unequivocal statement of result) left them "stunned," or words to that ef-

[54] "I was saying we need to shut down the vote * * * Clearly I wanted the vote to terminate at the time that the votes were in * * * but it was not a conversation [with Mr. McNulty], because I was never proximate to him * * * I never had a conversation with * * * Mr. McNulty." (Hoyer interview, p. 510.)

[55] Q: "Is it possible in your mind that your demeanor that night may have unintentionally created an environment of more pressure on [Mr. McNulty] to close the vote? I mean, do you [believe] that you may have inadvertently created an environment where he felt more pressure to drop the gavel than he would have otherwise?" A: "Certainly possible." (Rep. Pence & Rep. Hoyer, Hoyer interview, p. 535.).

[56] Q: "[F]or all the questions about whether he [Mr. Hoyer] pressured you or influenced you, I don't even see his physical presence. Do you agree with that?" A: "I don't recall his physical presence, and I know that he was never successful in communicating anything to me." (McNulty interview.)

[57] "I stopped because somebody was in the House with a card, attempting to change the vote, and then others followed." (McNulty interview, p. 447).

[58] "Mr. McNulty called the vote [at 214 yeas and 214 nays] [and] I thought he was acting within his discretion as the Speaker. From my perception * * * the other parliamentarian [Ethan Lauer] appeared to me to be saying to Mr. McNulty—again, I could not hear anything, so I'm telling you what appeared to me to be the case—appeared to be saying to Mr. McNulty he could not do that." (Hoyer interview, p. 503.)

fect.[59] The Select Committee found that the announcement created a sense of confusion on the rostrum that evening, particularly among the professional staff. Although there was no intent to interfere with the execution of duties of the rostrum staff, the confusion contributed to the technical mistakes made on the rostrum that evening.

All Members are responsible for creating an atmosphere of civility and decorum. The Select Committee reminds all Members that they must be mindful that rostrum staff is executing specific and sometimes urgent responsibilities on the rostrum and, therefore, they should gauge their need to interrupt rostrum staff accordingly.

When the seated tally clerk attempted to close Roll Call 814, there was a failure in the EVS. This failure further added to the confusion that night by preventing the clerks from following their normal procedures for releasing the system and starting the next vote. The problem was further exacerbated by the decision to abort the vote, causing the loss of EVS data related to Roll Call 814 until it could be recovered the next day. Neither the Chair, the Leadership, nor the Leadership staff, participated in the decision to abort the vote.

The clerks also failed to process two well changes submitted while the vote was still open. The first unprocessed card, from Mr. Boehner, changed his vote from an "aye" to a "no"—a procedural necessity if he were to offer a motion to reconsider. The second, cast by Mr. Hoyer, duplicated his electronic vote and therefore would not have affected the final tally but should have nonetheless been announced by the reading clerk.[60]

There may be a disagreement about what should be the final vote tally, but one fact is indisputable: the vote tally of 212 yeas and 216 nays that was finally announced is incorrect. It is either 215 yeas and 213 nays, which would have reflected the tally at the time the Chair prematurely announced the statement of result, or 211 yeas and 217 nays, which would have reflected the tally had Mr. Boehner's well card been processed.

On this occasion, the Select Committee acknowledges the work of the rostrum staff under difficult circumstances during a vote that was complicated by many factors, significantly the Chair's premature announcement.

FINDING 2

The Chair failed to observe the customary procedures and protocols for closing a vote, resulting in an inaccurate announcement and unintentionally raising concerns regarding the legitimacy of that vote.

Mr. McNulty twice failed to await a tally slip prior to attempting to announce the result of Roll Call 814. The first of those attempts was aborted by Mr. McNulty because additional Members entered the well with the intention of casting votes; the second attempt was

[59] "I was entering Mr. Mario Diaz-Balart's vote into the system. And as I was doing that, the Chair * * * announced the vote and pounded the gavel. I was stunned that, first of all, the process had been bypassed. I basically just continued to do my job as Seated Tally Clerk." (Anderson interview, p. 133.); "As soon as the Chair made the announcement that night and banged that gavel, our protocol—we were thrown off, we were gone, we were done. We were off track and we were in no man's land at that point." (Hanrahan interview, p. 160.)

[60] See footnote no. 45.

completed when Mr. McNulty recited an unequivocal statement of result ("the motion is not agreed to"). However, this announcement was premature and inaccurate. Moreover, the Parliamentarian testified that the premature announcement was immediately impeached by the uptick on the board and "could not be afforded legitimacy."

The protocol employed by the Clerk, the ultimate outcome of which is the tally slip, is designed to reinforce the legitimacy of the vote and ensure that the Chair is able to report an accurate result to the House.

Although Mr. McNulty is an experienced and well-regarded presiding officer,[61] he was not experienced in administering the new provision of clause 2(a) of rule XX.[62] Out of concern and confusion, he failed to follow the long-established procedures for closing a vote, unintentionally leading the House into uncharted territory, and thereby raising concerns about the legitimacy of the vote.[63]

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[61] "I don't know that (Mr. Hoyer and I) have had detailed discussion about [Roll Call 814], except [one] * * * actually about Mr. McNulty. Mr. Hoyer was sharing with me Mr. McNulty's concerns about how his position could be perceived here. And I reached out and talked to [Mr. McNulty] after that and told him that I didn't know anybody on either side of the House that thought that he had intentionally done anything that was unethical or that he should spend undue time worrying about this. It's just something we needed to work out and not see repeated in the future. * * * [I said that] sometimes you get caught in a situation that things happen that you don't intend to happen, and that he should feel confident in his respect that the Members have for him personally." (Select Committee Interview of the Hon. Roy Blunt, Apr. 8, 2008, p. 410.); "I think, as I have told you privately on the floor, I hold you in high regard. I admire you for your sense of professionalism and for your fairness. Let me say I think that that is why I and the other members of this committee on the minority side are struggling so much with this, with the facts of this incident. This was not a Mike McNulty moment. It was not. I want to say that while I am complimenting you. (Pence, McNulty interview); "I accept the regrets offered by my friend from New York. Having been in the Chair myself, I can understand how it can happen. He and I are friends. He is, in fact, one of the fairest Members who could ever be in the Chair." (Rep. Boehner, 127 Cong. Rec. H9661 (daily ed., Aug. 3, 2007, vol. 1). "I believe Mr. McNulty is an extraordinarily honest person of high integrity * * * He's a wonderful human being." (Hoyer interview).

[62] "Q: From the time when you were in the Chair as Speaker Pro Tem in the old majority and now when you had begun to preside or did begin to preside in the new majority, aside from clause 2(a) that we've been talking about, did you notice any other difference, in terms of were the rules different? Was presiding different? Was it handled any differently than you recall?

"A: Not that I can recall, Steve.

"Q: Pretty much, the votes were the same, they were called the same?

"A: The language was the same on calling the votes and so on. Of course, I've done it so many times through the years that those little cards that they give you? I mean, most of the time, I don't even need them.

"Q: Right. Do you recall any instance, either in the old majority or since you have presided beginning in 2007, when you called the vote without the benefit of a tally slip?

"A: No.

"Q: Okay. Would you—

"A: Prior to 2007, there was no clause 2(a) of rule XX." (McNulty Interview, p. 443).

[63] "To summarize, I called this vote prematurely, and that action caused a measure of chaos, confusion, and anger on the House floor. The morning after the event, I publicly apologized on the House floor to all Members of the House of Representatives. I repeat that apology today." (United States. Congress. House. Michael R. McNulty, Statement for the Congressional Record. Hearing of the Select Committee to Investigate the Voting Irregularities of August 2, 2007. Investigate Hearings Regarding Roll Call 814. (May 13, 2008, p. 428))

FINDING 3

The new sentence of clause 2(a) of rule XX (creating the rule against holding a vote open for the sole purpose of reversing the outcome), added at the beginning of this Congress, was a major contributing factor to the perfect storm of events of August 2, 2007. As evidenced by those events, this sentence is unworkable in practice.

With one exception, the Chair has complete discretion to close votes at any point after the minimum period for voting guaranteed under rule XX has expired. The Parliamentarian is merely an advisor to the Chair and cannot close votes. The exception to the Chair's complete discretion to close a vote is the new sentence of clause 2(a) of rule XX. Under this sentence, the Chair may not hold open a vote with the sole intent of reversing the outcome. The application of this sentence, therefore, pivots on the intent of the Chair.

The Chair, Mr. McNulty, testified that he believed that holding the vote open after Mr. Mario Diaz-Balart changed his vote would subject him to criticism that he was violating the new sentence of clause 2(a).[64] This overriding concern prompted Mr. McNulty to announce the result immediately after Mr. Mario Diaz-Balart cast his vote, breaking the long-standing practice of the Chair of announcing a vote from a tally slip.[65] Although the result of the vote at this time was 215 yeas and 213 nays, Mr. McNulty, looking at the display board over the east door of the chamber, understood the result to be 214 yeas and 214 nays, and that is the result that he announced.[66]

Mr. McNulty's testimony that he prematurely announced the vote immediately after Mr. Diaz-Balart cast his vote because he was concerned about violating clause 2(a) raises the question of whether Mr. McNulty violated clause 2(a) when he subsequently allowed the vote to be held open after his premature announcement for approximately 7 additional minutes while Members changed their votes (with the result changing to 212 yeas and 216 nays), thereby reversing the outcome. However, some believe that a finding of a violation of clause 2(a) does not appear warranted because it would have to be based on an interpretation of clause 2(a) as capable of being violated even without the intent required by the new sentence of clause 2(a), given that Mr. McNulty did not intend to hold the vote open for the sole purpose of reversing the outcome. Mr. McNulty testified that his nearly instantaneous realization that his premature announcement was inaccurate caused his thinking to shift from clause 2(a) to one of permitting the Parliamen-

[64] "When I announced the vote at 214–214 * * * I did not do so at the direction of any other person or persons. I did so on my own, in an attempt to enforce clause 2(a) of rule XX, which states that recorded vote by electronic device shall not be held open for the sole purpose of changing the outcome. My attempt to enforce clause 2(a) of rule XX was the reason for not following the usual, but not required, procedure of waiting for the written slip from the Tally Clerk." (Select Committee Hearing, May 13, 2008, p. 429).

[65] "It was not so much a conscious decision not to have the tally sheet [sic]. I really wasn't thinking of that at the time. I was fixated on enforcing, or at least acting in such a manner that there would not be the appearance of me holding the vote open for the purpose of changing the outcome." (Id.)

[66] "[The failure to wait for a tally slip] was clearly a mistake on my part * * * because it now seems apparent that the vote change which was announced by the Clerk just prior to my calling the vote at 214–214 had not yet been recorded by the computer, thus the discrepancy which ensued almost immediately after." (Id.)

tarian time to clarify the unprecedented situation caused by his mistaken announcement.[67] Neither Mr. McNulty nor the Parliamentarians had previously encountered or anticipated this error, and everyone was, as Mr. Sullivan testified, "in uncharted territory."[68]

There still are open questions regarding the interpretation of this sentence of clause 2(a) as applied to this case. In particular, questions remain as to whether the intent sufficient to trigger the rule occurred at Mr. McNulty's penultimate announcement of the result or whether his later decision to hold the vote open was sufficient to change the analysis. The Parliamentarian devised a parliamentary solution to the quagmire caused by the premature announcement which was executed by Mr. McNulty. This solution required the Chair to hold the vote open: (1) to allow the Clerk to process well votes that were turned in seconds after the premature announcement;[69] (2) to allow the Parliamentarian to draft a statement for the Chair to read that coupled an acknowledgement of error with an ultimate announcement of the result (212 yeas and 216 nays); (3) to allow the Parliamentarian to inform the Majority Leader, the Chair, and others, including Members and staff from the Minority, about the solution; and (4) to allow the Parliamentarian to discuss with the Majority Leader parliamentary options for retaking a vote that the Majority Leader believed "could not stand."[70]

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[67] "[A]fter I looked up at the board and saw the different total, I knew that I had committed an error. And I first started in the Chair under Bill Brown when he was the Parliamentarian, and I remember him spending a lot of time with me when I was in the Chair and things were quiet and him tutoring me about things. And one of the things that I remembered that he said that popped into my mind at that very moment was, when in doubt, do what the Parliamentarian says. And I knew that I had committed an error that had caused this chaos in the House. And I made the determination at that moment that I wasn't going to make any other ruling on that vote without the concurrence of the Parliamentarian. And what John said to me was, I am going to write out a statement for you to read. And I decided to wait until that was completed and to read it." (Id., p. 439)

[68] "What was uncharted about it to me was that it was an unequivocal statement of a result by the presiding officer * * * it was one that just by the surrounding circumstances could not be accorded legitimacy. I believe, now I'm not sure about this, but I believe the minute he uttered that [result] there was an uptick on the board * * * which was a manifestation to me that there were still electrons flying around. And then I looked at the tally clerks and saw that they had still other cards to input. It wasn't just that the last card had hit the board. There were several more cards to be done * * * And the board was not the result. The result was what the Chair announced. And those two differed at that point. The precedents that I'm aware of in this area that basically say if there is a mistake by human intervention, then you can, by unanimous consent, correct the mistake. They're limited to cases in which the result would not change. I'm not sure what the rationale for that was, but the basic rule is that, if Members are recorded incorrectly because of somebody else's human error and it would not change the result on the pending question, then even after the fact those Members may be recorded correctly. * * * those precedents largely arose with calls of the roll before the electronic voting system. The precedents of the electronic voting system are based on the idea that the machine is infallible * * * there is no human intervention. If a Member pushes the wrong button, that's the way the ball bounces. Here the human intervention that put us in uncharted territory was the presiding officer's premature announcement of the result. So it was a case not previously solved." (Sullivan interview, p. 361.)

[69] By the time Mr. Sullivan focused on the tally clerk, those cards were being processed. As he testified, Mr. Sullivan did not know precisely when those cards were submitted (before or after the announcement) or whether the EVS had been closed to further input. "[U]nder the circumstances, it [the unequivocal statement of the result by the Chair] was impeached by the surrounding circumstances, immediately contradicted by an uptick on the scoreboard. And when I gathered myself, I saw red and green cards sitting in front of the Tally Clerk * * * (Sullivan Interview, p. 362). "The uncharted territory here was the announcement of a result before the Tally Clerks had done their shut down from the periphery. The voting stations may well have still been open. A 429th vote could have come in from the back rail." (Sullivan Interview, p. 366).

[70] Mr. Sullivan's explanation regarding his statement for the Chair: "Part of the time I spent explaining what I was writing down for him; explaining that we had an unsustainable ostensible announcement of a result and we needed to apprise the House that it could not be accorded

Continued

The Chair's inclusion of an unequivocal statement of result in the Chair's second premature announcement raises the question of whether an equally reasonable alternative parliamentary solution could have required Mr. McNulty to reannounce the vote as 215 yeas and 213 nays, which was the accurate vote at the exact point in time of the premature announcement and would reflect the Chair's intent to close the vote after Mr. Mario Diaz-Balart had voted.

Any evaluation of this approach is complicated by the role clause 2(a) played in Mr. McNulty's premature announcement and the consequent necessity to consider his purpose in allowing Members in the well to change their votes seconds thereafter. Clause 2(a) potentially conflicts with the Speaker's announced policy that Members in the well should be afforded the opportunity to vote.

In this situation, the Select Committee finds that this approach also would have been reasonable but will not opine on whether this approach would have been preferable to the Parliamentarian's solution, which the Select Committee finds was not an unreasonable outcome under the circumstances.[71]

RECOMMENDATIONS

In light of the findings detailed in this report, the Select Committee recommends the following:

CLAUSE OF 2(a) OF RULE XX

Deleting the new sentence of 2(a)

First, the Select Committee recommends the deletion of the sentence in clause 2(a) of rule XX that states: "A record vote by electronic device shall not be held open for the *sole* purpose of reversing the outcome of such vote." [emphasis added] The Chairman of the Select Committee described the rule in his opening remarks at the May 13 hearing of the Select Committee this way: It is "a rule that was enacted with a noble intent to curb other perceived abuses, but a rule that is, at best, difficult to enforce, and at worst, the catalyst for the raw anger that we observed on August 2nd."[72]

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legitimacy; and that the system, when allowed to settle, produced different numbers, albeit no change in the result, and that would be the result, but it had to be preceded by at least some acknowledgement of error. [T]hen * * * I told him I now intend to go down to the well and see what could be worked out in the way of throwing oil on the water. * * * My conversation with Mr. Hoyer was my advice to him that if he wanted to try to do something here, it would be unanimous consent to vacate the conduct of that vote. And I believe that I was trying to contrast the utility of that move with the motion to reconsider. That it was superior, both in terms of its tendency to smooth things down and in terms of its legislative economy * * * He was in listen mode at that point, I believe. I don't think he responded. [At 23:57:08] on the [TV] screen I see myself, Jay Pierson and Lynn Westmoreland. And standing off to the side is Jo-Marie St. Martin, who is Mr. Boehner's counsel * * * and we were joined at some point by Mr. Hobson. [The nature of this conversation is that] Mr. Hoyer asked to vacate, objection was heard, and I was just consulting with Jay about whether they had a better solution in mind. That in terms of finishing the business and letting Members go, and in terms of trying to achieve justice on the motion to recommit, I could see no more immediate or suitable solution than a do-over, as it were. And so I was just making sure that such an option wasn't going to be foreclosed just by a visceral objection, then maybe, maybe people could see the benefit. So I was talking with Jay on those bases, I believe. [The minority staff did not offer] any particular procedural gambits. Jay may have apprised me of the level of outrage, how unthinkable it might be that they could achieve unanimous consent to vacate the proceedings." (Sullivan interview, p. 367.)

[71] Mr. Sullivan supported his advice to the Chair this way: "What was wrong with the announcement was not the particular numbers it contained, but that it contained unsettled numbers. And, in my judgment, to just introduce a different pair of unsettled numbers would not solve the problem." Select Committee Hearing, May 13, 2008.

[72] Opening Statement of Chairman Delahunt, Select Committee Hearing, May 13, 2008.

The Chairman's concern that the rule is difficult to enforce is supported by the body of precedent that has developed under the two-year operation of this rule. Under the rule "the Chair is constrained to differentiate between activity toward the establishment of an outcome on the one hand and activity that might have as its purpose the reversal of an already established outcome on the other."[73] In other words, an observer of the Chair's conduct of a record vote cannot discern, for purposes of enforcement of the rule, whether an activity is motivated by an intention to reverse the outcome. Furthermore, it is not enough that the activity be motivated by an intention to reverse an established outcome because the rule "focuses very clearly on exclusivity of purpose."[74] As the rules and practices of the House contemplate, however, a presiding officer could be motivated by multiple factors.[75] For example, the Chair could be intent on reversing an outcome while also intent on upholding the Speaker's opening day policy to ensure that all Members in the well desiring to vote have the opportunity.[76]

Former Parliamentarian Charles Johnson described the dilemma this way: "Others can claim to know because they have seen pressures brought to bear externally, but it is the Chair's intent as discerned by the Chair at that moment in time as the vote is being kept open" that is dispositive.[77] Even though the rule is entirely focused on the exclusive motivation of the Chair, Mr. Johnson stated that it would be inappropriate to require the Chair to declare a reason for delaying a vote.[78] Without such a declaration, it is impossible for the House to determine whether the Chair had the requisite intent necessary to find a violation of the rule.

In addition, as held by the Chair on May 8, 2008 (sustained on appeal), the rule does not establish a point of order having an immediate procedural remedy. The rule instead sets a standard of behavior for presiding officers (and one involving mens rea, at that) enforceable only on a collateral basis, as by a question of the privileges of the House.[79] The dignity and integrity of the proceedings of the House are dependent upon the dignity and integrity of its Speaker and those she appoints to serve in the Chair. The Chair's conduct of a vote was within the purview of rule IX before the adoption of this rule, and any perceived misconduct on the part of the Chair will remain the subject of a question of the privileges of the House if the Select Committee's recommendation is adopted.[80]

Furthermore, the Select Committee does not believe that striking the sentence in question from the rule reduces the standard of conduct for the Chair. Indeed, Mr. Johnson stated that the first and second clauses of the Code of Conduct (rule XXIII)—requiring conduct in a manner that reflects creditably on the House and requiring adherence to the spirit and the letter of the rules—apply to the

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[73] House Rules and Manual p. 808; see also Hulshof, Select Committee Hearing, Oct. 25, 2007, p. 34.
[74] Davis, Select Committee Hearing, Oct. 25, 2007, p. 19.
[75] Id.
[76] Speaker Pelosi, Jan. 5, 2007, p. —, (Manual § 1014).
[77] Select Committee Hearing, Oct. 25, 2007, p. 19.
[78] Id, p. 20.
[79] 76 Cong. Rec. H3193 (daily ed. May 8, 2008).
[80] See Johnson, Select Committee Hearing, Oct. 25, 2007, pp. 18, 20. For example, a resolution alleging abuse of the customs and practices of the House in holding a vote open for 3 hours was held to be just such a question of privilege under rule IX (Manual § 704).

conduct of the Chair. In particular, in Mr. Johnson's view, the reference in rule XXIII to the spirit of the rules "speaks volumes."[81]

In that vein, the Select Committee points to the principles that regulate the duties of the Speaker as articulated by Speaker Clay when he took the Chair on December 1, 1823. On that occasion, he described the principles as follows: "They enjoin promptitude and impartiality in deciding the various questions of order as they arise; firmness and dignity in his deportment toward the House" and "carefully guarding the preservation of the permanent laws and rules of the House from being sacrificed to temporary passions, prejudices, or interests."[82] Those principles will remain intact if the House chooses to adopt the Select Committee's recommendation.

Revised rule

In order for clause 2(a) of rule XX to reflect this change, the Select Committee recommends that the clause be amended to read as follows:

> 2.(a) Unless the Speaker directs otherwise, the Clerk shall conduct a record vote or quorum call by electronic device. With respect to any such record vote or quorum call the Clerk shall enter on the Journal and publish in the Congressional Record, in alphabetical order in each category, the names of Members recorded as voting in the affirmative, the names of Members recorded as voting in the negative, and the names of Members answering present as if they had been called in the manner provided in clause 3. Except as otherwise permitted under clause 8 or 9 of this rule or under clause 6 of rule XVIII, the minimum time for a record vote or quorum call by electronic device shall be 15 minutes.

This change strikes the new sentence added to the rule at the beginning of the 110th Congress.

BEST PRACTICES

The Select Committee recommends a revision of certain practices of the House that govern voting by electronic device.

Formalization of policy to ensure an accurate vote total

As the Select Committee discussed previously, the Chair's inaccurate announcement raised concerns regarding the legitimacy of Roll Call 814. Under current practice, the Clerk utilizes the tally slip as the mechanism to indicate to the Chair that the vote tally is accurate at that point in time.

From the earliest moments of the Select Committee's investigation, the importance of the tally slip was stressed by the professional staff.[83] Mr. Sullivan described the tally slip this way: "its main purpose is an assurance that the numbers written on it were put there after the system had been closed for further input and

[81] Select Committee Hearing, Oct. 25, 2007, pp. 41–42.
[82] Asher C. Hinds, Hinds' Precedents, § 1307, vol. 2.
[83] See Select Committee Hearing, Sep. 27, 2007, pp. 19–21.

the numbers were static. It's probably the most important quality control device in the announcement of a vote."[84]

The importance of the tally slip was amplified by Mr. Sullivan's predecessor, Mr. Johnson, in another early hearing of the Select Committee: "there [is] no other proper alternative to the announcement of the numbers and the announcement of the result" by the Chair other than from a tally slip, which represents a vote tally that is the product of a system that has been closed to further input and is thus accurate at that point in time.[85] Mr. McNulty himself admitted that the failure to await that slip resulted in an inaccurate announcement, and caused "chaos in the House."[86]

As clause 2(a) of rule XX directs the Clerk to conduct a vote by electronic device, the tally slip is the mechanism by which the Clerk transmits the tally when the presiding officer closes a vote. It also serves as a signal to the Chair that the numbers on that paper represent the true and correct tally at the time the vote was closed. The importance of the tally slip is not intrinsic to the slip itself, but rather the slip represents the "de facto certification"[87] provided by the Clerk that the result is reliable and accurate at that point in time.

The Select Committee does not believe that codifying the tally slip will best serve the House over the long-term. If the Clerk upgrades the EVS or there are other modifications to the House chamber, there may very well be another mechanism for transmitting this information to the Chair for the use in the ultimate announcement of the result. However, the process and protocol are of sufficient enough importance that their use should be formalized.

Accordingly, the Select Committee recommends that the Speaker include an announcement on the opening day of each Congress regarding the importance of the Clerk's certification that the vote tally is accurate, and the Speaker's expectation that presiding officers will await that certification before making their ultimate announcement of result.

The Speaker usually prints a series of policies in the Congressional Record at the beginning of each Congress, many of which provide standards for presiding officers.[88] For instance, the sixth such policy for this Congress deals specifically with the conduct of votes by electronic device, and is the origin of the policy regarding allowing Members in the well to cast their votes before the ultimate announcement of the result.[89] The Select Committee's suggested policy would be of similar character, as it also addresses the efficiency and accuracy of the voting process.

This approach has two benefits: first, because it is a policy of the Speaker and not a rule, it permits easy modification as circumstances in the House evolve; second, the formalization of this policy will buttress presiding officers in their efforts to ensure that the business of the House is conducted fairly and forthrightly, particularly when they face the normal range of pressures directed at presiding officers.

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[84] Sullivan interview.
[85] Select Committee Hearing, Oct. 25, 2007, p. 25.
[86] Select Committee Hearing, May 13, 2008, p. 42.
[87] Id., p. 24.
[88] See, e.g., 153 Cong. Rec. 2 (daily ed. Jan. 8, 2007), pp. H59–H61.
[89] Id, p. H60.

The ultimate lesson of Roll Call 814 is that while some Members may not be happy with the outcome of a particular vote, they must have confidence in the result. The formalization of the policies and procedures regarding the tally slip in the form of an announcement by the Speaker will go a long way to ensuring that vote announcements are accurate, and thus instill confidence in the process.

Appearance of "FINAL" on display board

The Clerk should remove the word "FINAL" from the display on the electronic summary board. The Clerk's display of the word has no legal or parliamentary significance. Furthermore, the display can be a source of confusion when the word is displayed before the vote is actually final.

Record of time for a vote

The Clerk should keep a record of the total time an electronic vote was held open, which the Clerk will make available to Members upon request.

Efficiency of an electronic vote

When the electronic voting system was instituted in 1973, it promised a swifter and more efficient voting process. Although certainly more swift than calling the roll, the full promise of swifter votes has not been realized. This is the case even though, over the years, the Leadership has repeatedly urged Members to vote in a more timely manner. It remains commonplace for 150 to 200 Members to be listed as "not voting" at the expiration of the minimum time guaranteed under the rules for a vote, especially on the first vote in a series of votes. It is also commonplace, at the end of a vote, for latecomers to straggle into the chamber one-by-one when the Chair is attempting to announce the result. It can take the Chair several minutes, and several attempted announcements, to close the vote, long after the minimum time for voting has expired. This troubling practice prolongs the vote and can cause confusion about its finality.

Since the early 1990s, the Speaker has tried to support the Chair's efforts to conduct swifter votes by encouraging Members to be timely and refusing to honor requests from tardy Members who call from outside the chamber seeking to hold open a vote. Those efforts, however, were often accompanied by a renewed commitment to ensure that all Members standing in the well seeking to vote would be given the opportunity (in practice, this commitment has extended to any Member in the chamber seeking to vote, not just those standing in the well). As a result, there has been little improvement in the timeliness of Members' voting.

When seeking to close votes, the Chair continues to confront the two competing principles that comprise the foundation of the Chair's conduct of a vote: enfranchisement on the one hand and efficiency (including swiftness, clarity, and finality) on the other. This dilemma for the Chair was a recurring theme among the witnesses interviewed during this investigation. Ensuring efficiency has become a difficult task for the Chair when the practice of the House—indeed its culture—preserves for Members the right to vote even when they are late. Often, in deciding when to leave their offices, committee meetings, or other obligations and proceed to the

floor to cast a vote, Members look not to the clock but to the number of Members who have not yet voted, thereby perpetuating the practice of prolonged votes.

Although enfranchisement is rightly a tenet of House voting practice, the responsibility to exercise a vote rests with the Member and not the Chair. Reducing the Chair's responsibility for ensuring that each Member has cast a vote would go a long way to return timeliness to the conduct of votes in the House. One way to accomplish that goal would be to eliminate the practice of voting during an electronic vote by a well card. The Chair would continue to exercise discretion as to when to begin closing the vote after the minimum time has elapsed. Once the Chair has established that Members present have finished voting (such as by querying whether all Members have voted), the Chair would declare that all voting machines shall close after a specified grace period of, for example, 2 minutes. Voting machines would automatically turn off after the expiration of this grace period and the vote would be closed.

Removing manual voting by well card and the institution of an automatic voting-machine shut-off after a specified grace period would significantly reduce the Chair's responsibility for ensuring that tardy votes are counted. Hopefully, a new practice would evolve that fosters efficiency while preserving the Chair's ultimate discretion in closing a vote (by allowing the Chair to determine when the grace period will begin and end).

Well voting during an electronic vote

At a minimum, the Speaker and the Clerk should examine the practice of voting during an electronic vote by a well card with a view towards minimizing the practice. Such examination may include proposals to amend the Rules of the House to restrict such practice. If well votes are taken during an electronic vote, the Clerk should process and announce all well votes or changes unless the Member specifically withdraws his or her well card prior to it being processed.

Majority-Minority Communication

The Majority leadership should proactively consult with the Minority leadership (either at the Member or senior floor staff level) as soon as practicable upon learning of rostrum problems to avoid miscommunication and suspicion regarding the source and resolution of those problems.

INCREASED TRAINING

The Select Committee recommends that the House institute new training procedures regarding the rules, practices, and precedents for voting. Furthermore, even more seasoned Members should receive updated training as new rules are adopted or new best practices emerge.

For all newly elected Members

The Clerk should conduct a walk-through of the EVS on the House floor. This should include an explanation of the responsibilities of each of the rostrum staff, the operation of the EVS, and the process of voting. The Committee on House Administration should include this in its curriculum of training for incoming Members.

For any Member newly appointed by the Speaker to preside

The Speaker, the Parliamentarian, and the Clerk should conduct a training session that should consist of a walk-through of the House floor as described for newly elected Members but with an emphasis on the rules, practices, and precedents governing the Chair's responsibilities during a vote, including the precedents requiring impartiality of the Chair.

In addition, the Speaker and Minority Leader should facilitate a periodic roundtable discussion among Members from the Majority and Minority parties who have extensive experience in the Chair and Members with less experience but who may be interested in learning from more experienced presiding officers.

For any Member newly announced as elected to Majority Leader, Minority Leader, Majority Whip, or Minority Whip, as well as any staff newly assigned to those positions

The Speaker, the Parliamentarian, and the Clerk should conduct a training session that should consist of a walk-through as described for newly elected Members but with an emphasis on the rules, practices, and precedents governing the responsibilities of the Leadership during a vote.

PART II—SUMMARY OF ACTIVITIES

Clause 1(d) of rule XI of the Rules of the House of Representatives requires each committee to submit to the House a report of that committee's legislative and oversight activities, summarizing the actions taken and recommendations made with respect to the committee's oversight plan. This part of the report shall constitute the Select Committee's report on its activities within the meaning of that rule.

LEGISLATIVE ACTIVITIES

The Select Committee has no legislative jurisdiction.

THE SELECT COMMITTEE'S OVERSIGHT PLAN

The Select Committee's oversight plan was contained in its initial report (H. Rept. 110–355) and is reprinted below:

The Select Committee plans to obtain information and hold hearings necessary to carry out its responsibilities under H. Res. 611. Four areas of investigation identified by the Select Committee are described briefly here, though in no way are these four areas intended to limit the Select Committee from following the evidence where it leads as it conducts its investigation.

Persons on the Speaker's Dais and Persons Responsible for Conducting a Vote

One major area of investigation for the Select Committee will be to determine who is customarily on the Speaker's Dais and each person's responsibility, including the presiding officer. Second, the Select Committee will determine which of these persons have duties relating to voting in the House and the Committee of the Whole, what those duties are, and when, where, and how those duties are carried out. Third, the Select Committee will determine the relationship between these persons in their execution of their specific duties related to voting in the House and the Committee of the Whole.

The Select Committee will also determine what other people, including employees of the House who are not on the Speaker's Dais but have duties related to voting in the House and the Committee of the Whole; what those duties are; and when, where, and how those duties are carried out. The Select Committee will also determine the relationship between these persons and the persons on the Speaker's Dais in their execution of their specific duties related to voting in the House and the Committee of the Whole.

The Select Committee will also determine the duties and authority of Members, leaders, and floor managers related to voting in the House and the Committee of the Whole.

This information is important to understanding the events surrounding the voting on the Motion to Recommit and to making such recommendations to the House as may be necessary to define and protect Members' voting rights.

Electronic Voting System

A second major area of investigation for the Select Committee is the operation of the electronic voting system for recording Members' votes in the House and the Committee of the Whole and the relationship of the system's operation to the duties for voting exercised by individuals on the Speaker's Dais and by individuals not on the Speaker's Dais. Parts of this investigation will examine:

• the tasks for which the electronic voting system was designed and features of the hardware and software to accomplish those tasks, including messages or reports on a vote before, during, and after the vote;

• the protocols for preparing and using the electronic voting system in the daily sessions of the House and the Committee of the Whole;

• the protocols for individuals on the Speaker's Dais to interface with the electronic voting system;

• the Members' interface with the electronic voting system in casting their votes;

• the use of information, by Members, leaders, and floor managers, generated by the electronic voting system during and after a vote; and

• documented instances of mistakes in the electronic voting system recording or not recording a Member's vote and accurately reporting vote totals and of other errors related to voting.

This information is also important to understanding the events surrounding the voting on the Motion to Recommit and to making such recommendations to the House as may be necessary to define and protect Members' voting rights.

Duration of a Vote

A third major area of investigation for the Select Committee is the duration of a vote and the duties and authority of the presiding officer and of other persons to determine when the opportunity of Members to vote closes. Clause 2(a) of rule XX states: '* * * the minimum time for a record vote or quorum call by electronic device shall be 15 minutes.' Clause 9 of rule XX states: 'The Speaker may reduce to five minutes the minimum time for electronic voting on any question * * *.' (Emphases added.) A vote may last longer than fifteen minutes, five minutes, (or on occasions when a shorter time is used, such as two minutes) in order to accommodate Members who were not yet recorded or who wish to change their vote or perhaps for other reasons. Clause 2(a) of rule XX also states: 'A record vote by electronic device shall not be held open for the sole purpose of reversing the outcome of such vote.'

In House Practice: A Guide to the Rules, Precedents, and Procedures of the House, a principal parliamentary reference of the House of Representatives, the parliamentarians have summarized House precedents to state:

> * * * The Chair has the discretion to close the vote and to announce the result at any time after 15 minutes have elapsed or to allow additional time for Members to record their votes before announcing the result * * *. Thus, no point of order lies against the decision of the Chair in his discretion to close a vote taken by electronic device after 15 minutes have elapsed * * *.

Elsewhere in House Practice, the parliamentarians have summarized other House precedents to state: "A Member who has voted may change his vote any time before the final announcement of the result."

In addition, it has long been the practice of Speakers to insert in the Congressional Record in the first few days of a new Congress a statement of policies on aspects of the legislative process. Continuing this custom in the 110th Congress, Speaker Pelosi announced policies that were published in the January 5, 2007, Congressional Record. Policy No. 6 deals with the conduct of votes by electronic device, and continued in effect, with modifications, a policy first announced by Speaker Gingrich on January 4, 1995. This policy states, in part:

> * * * the Chair enlists the assistance of all Members in avoiding the unnecessary loss of time in conducting the business of the House. The Chair encourages all Members to depart for the Chamber promptly upon the appropriate bell and light signal. As in recent Congresses, the cloakrooms should not forward to the Chair requests to hold a vote by electronic device, but should simply apprise inquiring Members of the time remaining on the voting clock. Members should not rely on signals relayed from outside the Chamber to assume that votes will be held open until they arrive in the Chamber. Members will be given a reasonable amount of time in which to accurately record their votes. No occupant of the Chair would prevent a Member who is in the Well before the announcement of the result from casting his or her vote.

A part of this area of investigation pertains to understanding the authority of the presiding officer under the rules and precedents of the House related to voting, as well as any informal practices exercised under that authority. Another part of this area of investigation relates to how Members learn whether time remains to record or change their votes, how these votes are cast and recorded, and how these votes are recorded in the electronic voting system.

This information is important to understanding the events surrounding the voting on the Motion to Recommit and how the House has balanced its accommodation of Members wishing to vote or change their vote with bringing a vote to a close. Such information is important for making such recommendations to the House as may be necessary to protect Members' voting rights.

Sequence of Events

What is learned from the three areas of investigation described above will enable the Select Committee to then fulfill the two purposes for which it was created: based on an investigation of circumstances surrounding the vote on the Motion to Recommit, report on actions by Members, officers, or employees of the House engaged in the disenfranchisement of Members in voting on the question, and recommend changes to House rules and procedures necessary to protect Members' voting rights.

The Select Committee will investigate the sequence of events surrounding the vote on the Motion to Recommit to establish a time line of events and to analyze these events within the context of the first three areas of investigation. The sequence of events includes the actions of Members in voting; the actions of persons on the Speaker's Dais and of persons not on the Speaker's Dais related to the conduct and duration of the vote; the operation of the electronic voting system, including messages and reports from the Chair during and after the vote and the relationship of paper to electronic records; and the duration of the vote. As an aid to the Select Committee's investigation, H. Res. 611 directed officers of the House to 'preserve all records, documents, recordings, electronic submissions, or other material, regardless of form, related to the voting irregularities of August 2, 2007.' The Office of the Clerk has provided communications to the Select Committee and testified regarding the information and material it has so far recovered, collected, and stored.

OVERSIGHT ACTIVITIES

The Select Committee undertook those oversight activities described below in furtherance of its investigation.

BRIEFINGS HELD

On October 18, 2007, the Select Committee held a briefing on the floor of the House entitled "Member Briefing on Voting in the House of Representatives—The Rostrum and the Electronic Voting System: a 'Walkthrough' by the Clerk of the House Lorraine C. Miller." The Members of the Select Committee were briefed on the operation of the EVS by the Clerk, her staff, and the Parliamentarian and his staff.

INTERVIEWS TAKEN

The Select Committee and its staff conducted 24 interviews between February 4 and April 16, 2008. Those interviews are listed in the table below.

Interviews taken by the Select Committee

Individual Interviewed	Date(s) of Interview
Frances Chippardi, Chief of Legislative Operations, Office of the Clerk	Feb. 4, 2008
Ed Sorenson, Deputy Clerk, Office of the Clerk	Feb. 4, 2008
Goldey Vansant, Chief of Legislative Computing Systems, Office of the Clerk	Feb. 4, 2008
Allys Lasky, Assistant Journal Clerk	Feb. 6, 2008
Mary Kevin Niland, Reading Clerk	Feb. 6, 2008
Max Spitzer, Assistant Parliamentarian	Feb. 6 & May 8, 2008
De'Andre Anderson, Assistant Tally Clerk	Feb. 8, 2008
Kevin Hanrahan, Assistant Tally Clerk	Feb. 8, 2008
Ethan Lauer, Assistant Parliamentarian	Feb. 14 & May 9, 2008
Tom Wickham, Deputy Parliamentarian	Feb. 14, 2008
George Kundanis, Deputy Chief of Staff, Office of the Speaker	Feb. 15, 2008
Jay Pierson, Floor Assistant, Office of the Republican Leader	Feb. 15, 2008
Rob Cogorno, Former Director of Floor Operations, Office of the Majority Leader.	Feb. 21, 2008

Interviews taken by the Select Committee—Continued

Individual Interviewed	Date(s) of Interview
Jerry Hartz, Executive Floor Assistant, Office of the Speaker	Feb. 22, 2008
Jo Marie St. Martin, General Counsel and Director of Floor Operations, Office of the Republican Leader.	Feb. 22, 2008
Catlin O'Neill, Floor Assistant, Office of the Speaker	Feb. 25 & Apr. 16, 2008
John V. Sullivan, Parliamentarian	Feb. 27, 2008
Hon. Roy Blunt, Republican Whip	Apr. 8, 2008
Hon. John A. Boehner, Republican Leader	Apr. 9, 2008
Hon. Michael R. McNulty, Speaker pro tempore during Roll Call 814	Apr. 9, 2008
Hon. Steny Hoyer, Majority Leader	Apr. 16, 2008

HEARINGS HELD

On September 27, 2007, the Select Committee held a hearing entitled "Voting in the House of Representatives." The Select Committee heard testimony from the Honorable Lorraine C. Miller, Clerk of the House of Representatives. She was accompanied by her counsel, Russell Gore, and other members of her staff.

On October 25, 2007, the Select Committee held a hearing entitled "Voting in the House of Representatives—Rules, Procedures, Precedents, Customs and Practice." The following individuals testified: Charles W. Johnson, former Parliamentarian of the House of Representatives and Mark O'Sullivan, Chief Tally Clerk of the House of Representatives.

On May 13 and 14, 2008, the Select Committee held an investigative hearing on Roll Call 814. The following individuals testified: Mr. Kevin Hanrahan, Assistant Tally Clerk; The Honorable Michael R. McNulty, Speaker pro tempore during Roll Call 814; The Honorable Steny Hoyer, Majority Leader; Mr. John Sullivan, Parliamentarian; Mr. Ethan Lauer, Assistant Parliamentarian; Mr. Max Spitzer, Assistant Parliamentarian; Mr. Jerry Hartz, Executive Floor Assistant, Office of the Speaker; Ms. Catlin O'Neill, Floor Assistant, Office of the Speaker; and, Mr. Jay Pierson, Floor Assistant, Office of the Republican Leader.

PUBLICATIONS

Organizational Meeting on Adoption of Committee Rules; Consideration of Interim Report; and Hearing on Voting in the House of Representatives. Meeting and Hearing. September 27, 2007. PRINTED.

Interim Report of the Select Committee to Investigate the Voting Irregularities of August 2, 2007. Report. September 27, 2007. PRINTED, H. Rept. 110–355.

Member Briefing on Voting in the House of Representatives—The Rostrum and the Electronic Voting System: A "Walkthrough" by the Clerk of the House Lorraine C. Miller. Briefing. October 18, 2007. PRINTED.

Voting in the House of Representatives—Rules, Procedures, Precedents, Customs, and Practice. Hearing. October 25, 2007. PRINTED.

Interviews Conducted During the Course of the Investigation of the Voting Irregularities of August 2, 2007. 2008. PRINTED

Investigative Hearing Regarding Roll Call 814, Day 1. Hearing. May 13, 2008.

Investigative Hearing Regarding Roll Call 814, Day 2. Hearing. May 14, 2008.

PART III—COMMITTEE CONSIDERATION

COMMITTEE CONSIDERATION

The Select Committee met in open session on September 25, 2008, and adopted this report by a record vote of 6 yeas and no nays.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Select Committee to list the record votes on the motion to report legislation and amendments thereto. A motion by Mr. Delahunt to adopt this report and transmit it to the House was agreed to by a record vote of 6 yeas and no nays. The names of Members voting for and against follow:

—YEAS—	—NAYS—
Mr. Delahunt	
Mr. Davis	
Ms. Herseth Sandlin	
Mr. Pence	
Mr. LaTourette	
Mr. Hulshof	

PART IV—APPENDIX

MATERIALS CITED

CONGRESSIONAL PUBLICATIONS

Wm. Holmes Brown & Charles W. Johnson, *House Practice: A Guide to the Rules, Precedents, and Procedures of the House*. 2003.

Michael L. Koempel & Judy Schneider, *CRS Memorandum to Select Committee Chairman, Concordance of Questions and Answers from Hearings of the Select Committee to Investigate the Voting Irregularities of August 2, 2007*, (Dec. 2007).

Michael L. Koempel, Jacob R. Straus & Judy Schneider, *CRS Report RL34570, Record Voting in the House of Representatives: Issues and Options (July 3, 2008).*

Jacob R. Straus, *CRS Report RL34366, Electronic Voting System in the House of Representatives: History and Evolution (May 8, 2008).*

John V. Sullivan. *Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, 110th Congress*. H. Doc. 109–157. 2007.

127 *Cong. Rec.* H9682–9685 (daily ed. Aug. 3, 2007, vol. 1).

126 *Cong. Rec.* H9650 (daily ed. Aug. 2, 2007, vol. 2).

DISCOVERY

Legislative Computing Systems, Office of the Clerk. Using the Electronic Voting System: U.S. House of Representatives: Tally Clerk User Manual. August 30, 2004.

Miller, Lorraine C. *Clerk's Briefing to House Committee on House Administration*. Aug. 16, 2007. CLERK 467–494.

Miller, Lorraine C. *Draft Memorandum from Lorraine Miller, Clerk of the House to House Committee on House Administration*. Sept. 2007.

Sullivan, John V. *Reflections on Roll Call 814*. Received by Select Committee Jan. 4, 2008.

HEARINGS, MEETINGS, AND BRIEFINGS

Organizational Meeting on Adoption of Committee Rules; Consideration of Interim Report; and Hearing on Voting in the House of Representatives. Meeting and Hearing. September 27, 2007.

Member Briefing on Voting in the House of Representatives—The Rostrum and the Electronic Voting System: A "Walkthrough" by the Clerk of the House Lorraine C. Miller. Briefing. October 18, 2007.

Voting in the House of Representatives—Rules, Procedures, Precedents, Customs, and Practice. Hearing. October 25, 2007.

Investigative Hearing Regarding Roll Call 814, Day 1. Hearing. May 13, 2008.

Investigative Hearing Regarding Roll Call 814, Day 2. Hearing. May 14, 2008.

INTERVIEWS

Staff Interview of De'Andre Anderson, Assistant Tally Clerk, Feb. 8, 2008, *Interviews Conducted During the Course of the Investigation of the Voting Irregularities of August 2, 2007*. 2008

Staff Interview of Kevin Hanrahan, Assistant Tally Clerk, Feb. 8, 2008, Id.

Staff Interview of Ed Sorensen, Deputy Clerk, Feb. 4, 2008, Id.

Staff Interview of Catlin O'Neill, Floor Assistant, Office of the Speaker, Feb. 28, 2008, Id.

Member Interview of John V. Sullivan, Parliamentarian of the House, Feb. 27, 2008, Id.

Member Interview of the Honorable Michael R. McNulty, M.C., Apr. 9, 2008, Id.

Interview of the Honorable Steny Hoyer, Majority Leader of the House, Apr. 16, 2008, Id.

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