

February 2006

CONGRESS: THE YEAR-END WRAP-UP

It was a dramatic end to a troublesome session: Ted Stevens (R-Alaska) – President Pro Tempore of the Senate, third in line to the presidency, “dean” of the Senate – wearing his talismanic “Incredible Hulk” tie – stood weeping in the well of the Chamber, disgraced and humiliated on the defeat of the Alaska National Wildlife Refuge (ANWR) drilling. At the back of the Chamber, four senior Stevens staffers also fought tears, as did his colleague, Lisa Murkowski (R-Alaska).

It was a sad end to a congressional session that was painted by the press as a defeat for President George W. Bush, a defeat for Senate Majority Leader and presidential aspirant Bill Frist (R-Tenn.), and a defeat for congressional Republicans in general.

“Achievements” of the First Session

The session had never produced a cascade of GOP victories, even when things appeared to be going better than they did at the end. But there was certainly a point, earlier in the session, when things seemed to be going “okay”:

- The bill to tighten bankruptcy filings – demanded by the large banks and enjoying supermajority support in both legislative bodies – had teetered on the brink of passage for years, stalled only by clever Democratic parliamentary brinkmanship. It finally tipped over into the “win” column.
- Two tort reform proposals became “public law” – although only after two decades of compromises that left both packages little more than legislative skeletons:
 - Class action tort reform would move large, diverse class action lawsuits into

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federal courts – assuming the tort reform withstands constitutional challenge.

- National Rifle Association (NRA), backed gun lawsuit reform legislation would prohibit lawsuits against gun manufacturers and dealers – with three huge loopholes: “negligent entrustment” (defined as “negligence”), design defect in suicide and accident cases, and violations of state law. In the first test of the legislation’s scope, New York, as predicted, argued that its sweeping lawsuit to destroy the firearms industry came within the new statute’s broad exceptions.
- For a year, the *Watch Report* had predicted that a stripped-down energy package (\$16 billion or less) consisting of tax incentives, largely ineffectual grants for energy conservation or development, and a great deal of pork could easily pass Congress if stripped of controversial issues, particularly drilling in the ANWR. Last summer, Congress decided to go that route.

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- In addition, by the narrowest of margins, the administration and the GOP leadership slammed through the Central American Free Trade Agreement (CAFTA).
- The nomination of Judge John G. Roberts, Jr. to be Chief Justice easily cleared the Senate—leaving the complexion of the Court almost unchanged. On the bright side, this was accomplished without destroying the Senate rules in a cataclysmic parliamentary confrontation that would have put an end to comity in the Senate.
- In an action that, in most years, would be largely preordained, Congress belatedly passed the \$300 billion highway bill. Fortunately, this legislation only comes up every six years, because its preparation essentially consists of ladling out large amounts of money to anyone who asks for it in order to secure passage. The Bush administration's chief objective—keeping the bill below \$257 billion—was remarkable in its unattainability. And even the fall-back objective—keeping the bill below \$280 billion—was achieved only by assuming, foolishly, that the states will pay back \$8 billion at the end of the bill's six-year term. Not surprisingly, Bush claimed a “victory” when he signed the legislation.

In short, the Republican “achievements” of the First Session of the 109th Congress were nothing to write home about, even when there was a superficial argument that they were achieving something.

Failures of the First Session

But there was even less to cheer about when Congress adjourned *sine die*:

- Despite assurances from Senate Finance Committee Chairman Chuck Grassley (R-Iowa), the Senate failed to take serious steps on the centerpiece of Bush's domestic agenda—legislation to reform the faltering Social Security system. Not only is the proposal dead for the remainder of Bush's presidency, it is difficult to imagine that any future administration will voluntarily take on the issue.
- After a report from a presidential panel that was roundly criticized by conservatives, the issue of serious reform of the Internal Revenue Code is largely dead for the remainder of the Bush administration. Efforts to index the alternative minimum tax were also postponed.
- Bush's immigration package—centered around a “guest worker” program—is, to say the least, in trouble. The House has passed a draconian alternative that pointedly ignores the administration's package.
- Despite intense pressure from the White House in order to force four Republican senators and five Democratic senators to assent to reauthorization of post-9/11 legislation with no further civil liberties protections, that issue has been bounced into February 2006. More about this later.
- A proposal to allow drilling in the Alaska National Wildlife Refuge (ANWR) died an ignominious death. Furthermore, the unsuccessful procedure employed by Senator Ted Stevens (R-Alaska) has so poisoned the well as to considerably diminish the chances that ANWR drilling will ever be achieved. More about this, later.
- Faced with a “scandal” involving the disclosure that the National Security Agency (NSA) has wiretapped conversations of American citizens, Bush was forced to bow to the hard-charging John McCain (R-Ariz.) and to sign legislation that included restrictions on the use of torture against detainees, including, presumably, methods

that the Defense and State Departments had both argued were lawful.

- Even the non-filibusterable budget-balancing “reconciliation” bill – slashed from the \$50 billion demanded by House conservatives to a \$39 billion figure more amenable to the Senate – was stopped short of final passage in 2005 by a procedural maneuver that knocked final passage into the new year.

And the Really Bad News . . .

Now for the bad news: Things are about to get even worse for the congressional leadership.

To begin with, 2006 is not only an election year, it is a sixth-year election year. Traditionally, during the sixth year of an administration, the party in power suffers significant congressional losses in the November elections.

The delicate balance in the House – in which trade and budget issues have recently been decided by one vote – will probably be upset. And Republicans could even lose control, particularly if pending litigation challenging their Texas redistricting efforts is successful.

But even the Senate – with its potential retirement and recruitment problems in Tennessee and possibly Mississippi – could, under the right set of circumstances, experience a political tsunami that could cost Republicans control.

From the outset, GOP senators from Ohio, Rhode Island, and Pennsylvania, all face challenging races:

- Ohio’s Mike DeWine is at loggerheads with the NRA as a result of his support for a semiautomatic ban amendment in the 108th Congress – an amendment that could not have even been offered had Majority Leader Frist not bungled the parliamentary procedure.
- Rhode Island maverick Lincoln Chafee has been bombarded with calls that he be challenged in the GOP primary as a lesson to other liberal Republicans – even at the potential cost of the seat.
- Pennsylvania’s Rick Santorum is so endangered in his reelection bid that he

recently resigned from a think tank defending “intelligent design” (ID) after finding out that some ID supporters had religious motivations!

The Republican hold on the Senate has been complicated even more by efforts of disgraced Mississippi senator Trent Lott (R-Miss.) to use the threat of retirement – which could throw his seat to Democratic former state attorney general Michael Moore – in order to wrest a leadership post from frightened Republicans.

Under the circumstances, suffice it to say that Democrats – even moderate Democrats – will be in no mood to help the GOP with its list of “legislative achievements.” And the problem will be made even worse by the leadership vacuum that has developed in both the House and the Senate.

In the Senate, Majority Leader Frist’s parliamentary and strategic inexperience has always been a problem. And, this year, that problem will be compounded by the fact that Frist is a lame-duck senator and a presidential candidate – who could be running against many of his fellow Republican senators, including John McCain (R-Ariz.), Chuck Hagel (R-Neb.), George Allen (R-Va.), Sam Brownback (R-Kan.), Rick Santorum (R-Pa.), and Lindsey Graham (R-S.C.).

In the House, Speaker Dennis Hastert (R-Ill.) has never been the controlling force in the institution. And Republican Whip, Acting Majority Leader Roy Blunt (R-Mo.) has shown that he’s no replacement for the shrewd, powerful, and embattled Tom DeLay. As one top insider put it, “With DeLay out of the picture, there is no one else” in either House.

As for DeLay, the news keeps getting worse and worse: Irrespective of what happens in the politically motivated prosecution in Texas, the recent guilty pleas by Jack Abramoff and Michael Scanlon, have registered high on the Washington Richter Scale. And there aren’t many “fish” who are bigger than Abramoff, save DeLay, Congressman Bob Ney (R-Ohio), John Doolittle (R-Cal.), Senator Conrad Burns (R-Mont.), and other members of Congress.

In spite of all of this, the Republicans’ year-end debacle was something of a self-inflicted wound. It was certainly facilitated by George Bush’s plummeting popularity, which – depending on

who's doing the polling – is at 46%, 39%, or 36%. As a result, facing the frightening prospects of November's elections, congressional Republicans are, for the first time, consciously trying to put distance between themselves and the administration.

But many of the problems that have made Senate Majority Leader Bill Frist an object of derision among his House counterparts come from the fact that the Senate Republican leadership – and Senate Republicans, in general – have relatively short tenures in the Senate – and little understanding of the institution and its rules. (Frist, when he assumed his leadership post three years ago, was in the lower 50 percentile in Senate seniority.)

Because of all of this, we are going to take the three most important year-end battles and analyze them, blow by blow. To our knowledge, this has not been done anywhere else in this depth – partly because even the best reporters don't understand the Senate rules well enough to report on them.

“To Do” list for Senate Republicans:

- (1) LEARN THE RULES
- (2) LEARN THE RULES
- (3) LEARN THE RULES

First, a couple of generalizations:

Roughly two-thirds of the GOP's year-end embarrassments occurred because the Republican leadership was procedurally outmaneuvered by its Democratic counterparts. The other third happened because House Republicans had failed to notice that the mood in the Senate had changed – and that it was no longer axiomatic that Orwellian “security” legislation could be passed merely by threatening to label the Democrats as “pro-terrorist.”

The procedural lapses are hardly surprising. Earlier this year, Frist's staff had to, once again, be educated on the simple exercise of “constructing an amendment tree” in order to prevent Democrats from offering controversial amendments to sensitive legislation.

And it is instructive that John Thune – the newly elected Republican from South Dakota who ousted Tom Daschle, the former Majority Leader – thus characterized the advice he received upon arriving: “When I got to the Senate, I was told that the only rule is: There are no rules.”

Well, both Bill Frist and Budget Committee Chairman Judd Gregg (R-N.H.) found out, to their regret, that – notwithstanding the “nuclear option” – there are in fact rules in the U.S. Senate.

The Alaska National Wildlife Refuge (ANWR)

Environmentalists have survived the “perils of Pauline” in connection with their battle to thwart drilling in the Alaska National Wildlife Refuge (ANWR). For years, Senate Republicans had attempted to tie ANWR – the centerpiece of the Bush energy agenda – onto a popular energy package filled with pork. With a Senate almost evenly divided on ANWR, however, Energy Committee Chairman Pete Domenici (R-N.M.) never came close to the number of votes needed to overcome a filibuster of this legislation.

So – following a suggestion that had already appeared in these pages – the Senate leadership proposed to tack ANWR onto the nonfilibusterable once-a-year budget-balancing “reconciliation” bill. Because the proceeds to the federal government from ANWR drilling would help balance the budget, this procedure was “kosher” – and almost worked.

The stumbling block came, however, when restive House conservatives – alarmed at the increasing liberalism of the Bush administration – rebelled against the scandal-wracked Majority-Leader-in-Abeyance and the real power center of the House, Tom DeLay. DeLay issued a semi-public apology, conceded in a closed meeting that he had “failed” his fellow legislators, and extended a “peace offering”: \$50 billion of budget cuts from Medicare, Medicaid, food stamps, and other social welfare programs.

House committees busily set about crafting a package to achieve this \$50 billion goal – complete with the ANWR rider – while the Senate produced a bill closer to \$30 billion in savings.

But this created a new problem: now, a group of 22 liberal Republicans – led by six-term Congressman Charles Bass (R-N.H.) – rebelled, denying the House leadership the 218 votes they needed to pass the reconciliation bill. In order to secure a majority, the leadership had only two choices: It could slash the spending cuts, or it could drop ANWR. It chose the latter.

Infuriated, Alaska senator Ted Stevens used his position as chairman of the Senate Appropriations

Defense Subcommittee to attach ANWR drilling to the \$453 billion Defense Appropriations Bill conference report. This violated several Senate rules for a variety of reasons, including the fact that—

- it [the attachment] was nongermane to defense appropriations, in violation of Rule XVI of the Standing Rules of the Senate;
- it constituted “legislation on an appropriations bill,” in violation of Rule XVI; and
- it was “outside the scope of conference.”

But the Senate rules are, if anything, flexible— as evidenced by the fact that, two decades ago, the entire Gramm-Rudman balanced budget package was crafted, *de novo*, on a conference report. This had caused the parliamentarian to throw up his hands and declare that “there were no more ‘scope of conference’ rules.”

In addition, the irascible Stevens thought he had bought the necessary votes by also attaching \$29 billion worth of Katrina-related relief, plus money for avian flu prevention and treatment— thereby making it more difficult for Gulf-State Democrats to support a filibuster of the bill (or to support a point of order).

He was wrong.

The anger at Stevens’ maneuver was palpable— with even senators in his own party like the mercurial John McCain (R-Ariz.) blasting the Stevens “gambit.”

With only 56 votes (out of the necessary 60) to shut off a filibuster of the ANWR-laden defense bill— and with Christmas recess looming— the Senate Republican leadership backed down. The conference report was stripped of the ANWR provisions. And, although the vicissitudes of the legislative process are unpredictable, it is hard to imagine that prospects for ANWR drilling have not been hurt by what are viewed as Stevens’ illegitimate tactics.

The Convoluted Journey of the Patriot Act Reauthorization

Karl Rove has become a master at arm-twisting pliant congressional Republicans, particularly on matters related to “national security.” Explaining why he had flip-flopped on the \$39.7 billion budget-cutting bill that he had once regarded as immoral, Minnesota senator Norm Coleman was

quoted in a national newspaper as saying that Karl Rove had called him and asked him what he wanted in exchange for his vote.

But Rove’s persuasive powers hit a brick wall in connection with his efforts to force a reauthorization of expiring provisions of post-9/11 legislation— with few concessions to those worried about civil liberties.

The Republican objective had been to slide the reauthorization through Congress with only a few tiny concessions— and to bully recalcitrant Democrats into supporting it by accusing them of being soft on terrorism.

The small nods to civil libertarians included these provisions:

- Procurement of sensitive records from libraries, gun shops, etc., would have to be approved by one of the three highest-ranking officials in the FBI.
- Rather than allowing executives an informal appeal on “national security letters” (i.e., demands for business records not backed by a court order), judicial review would be made explicit.
- Executives ordered not to disclose receipt of an investigative demand would be explicitly allowed to discuss the issue with an attorney for purposes of lodging a court challenge.

Suffice it to say that all of this fell far short of even the modest demands of Democrats and some Republicans, who had introduced legislation calling for --

- a shorter time limit for “sneak-and-peak” operations, until the target of the investigation is required to be notified of the search; and
- more stringent limits on the ability of the government to access sensitive information such as library records.

The situation was complicated when the *New York Times* reported— on the weekend of the vote— that the National Security Agency (NSA) was intercepting some U.S.-based international telephone calls without court orders, arguably in violation of federal wiretapping law. And this was true, even though it was also reported that the secret court established under the Foreign Intelligence

Surveillance Act (FISA) has granted all but four out of 18,742 search requests from the government.

In the end, 43 Democrats and four Republicans (plus Frist, for procedural reasons) voted against cloture on the hard-line package—a solid and unattainable seven votes short of what would have been required to pass the legislation.

But this created a quandary for the administration and the Republican leadership: They had been adamant in their predictions of the dire consequences of allowing the USA Patriot Act to expire—and it was unthinkable that they could allow the provisions to lapse, particularly if nothing happened as a result.

On the other hand, the White House had also been inflexible in its demand for nothing less than a full four-year extension—and had repeatedly rejected, as unacceptable, calls by opponents for a three-month extension while negotiations were proceeding.

The “solution” — which was an embarrassment for the Bush administration—was a six-month extension, which was, at the very least, a longer period than the three months that it had repeatedly rejected.

But there was still another stumbling block: House members had largely left for the recess. But the chairman of the House Judiciary Committee, James Sensenbrenner—who had been largely excluded from negotiations—decided to fly back to Washington in order to block the six-month period.

So, in the end, a White House that had sworn that it would veto a three-month extension was forced to swallow a month-and-a-half.

Dropping the Ball Over the Budget “Reconciliation” Bill

No doubt about it: Senator Judd Gregg (R-N.H.) should have spent a *great deal* more time studying the Senate rules. Cornered into emasculating the House’s \$50 billion savings package—and then outfoxed by Democrats who forced final passage of the budget bill into the Second Session—Gregg was heard to whine: “There are so many rules in this institution that go to minutiae.”

For the chairman of the Senate Budget Committee to not understand, anticipate, or appreciate the importance of the Senate rules—and, in particular,

the “Byrd rule”—reflects parliamentary amateurishness of the Senate leadership. But more about this later.

To review the bidding: Once a year, under the 1974 Budget Act, Congress can take a stab at passing a non-filibusterable bill to reduce the deficit. This bill is called the “reconciliation” bill. And both the Senate and the House have been plugging away at this exercise since last spring.

But the story got interesting when rebellious House conservatives forced an embattled Tom DeLay to agree to craft a “reconciliation” package with \$50 billion of budget “cuts”—which were actually cuts in increases that did not represent real “cuts” at all. Then, as we have seen, the liberal Republicans rebelled. And faced with the choice of jettisoning (1) the controversial ANWR drilling provisions, or (2) the \$50 billion figure from the budget “reconciliation” bill, the leadership chose to set ANWR adrift.

This, in turn, led to a brief display of temper in which Alaska senator Ted Stevens threatened to kill the entire budget-balancing “reconciliation” bill in order to salvage the ANWR provisions. But, as we have seen, he soon relented and shifted the ANWR provisions onto the Defense Appropriations Bill.

As a result, the \$50 billion in budget cuts narrowly passed the House.

But the Senate-passed bill was much less penurious, cutting only about \$32 billion from the budget. The *Watch Report* predicted last month that the final figure would be “\$30+ billion.” And, in fact, the final tally in the conference report was \$39.7 billion.

But—although the “reconciliation” bill could not be filibustered under the Senate rules—the \$7-\$8 billion increase in cuts (over the Senate figure) created serious problems in obtaining the 50 votes (with the Vice President casting the tie-breaking vote) that were needed for passage in the Senate.

So, the Senate leadership and Karl Rove began playing “let’s-make-a-deal” in order to round up their 50 votes. Some of the concessions included the following:

- phasing in, over two years, the period over which the proceeds from successful anti-dumping cases will be shifted to the U.S. Treasury, rather than going to the private parties bringing the challenges, as is the

case under current law—a move that could save Boise’s Micron Technology \$33 million;

- benefits for sugar producers, microchip makers, and home health care providers.

So, all of these “concessions” were bundled into the “reconciliation” conference report, which the House passed before sending its members home for the Christmas recess prior to Senate action.

But there was a new problem: Many of the “concessions”—and many of the preexisting provisions in the underlying “reconciliation” bill—were a violation of the Senate’s “Byrd rule.”

Not a whole lot of senators are big fans of the imperious Byrd (D-W.Va.). But, although the intricacies of the “Byrd rule” were apparently beyond the ken of the chairman of the Senate Budget Committee, the rule has a simple and very important purpose: Because the “reconciliation” bill cannot be filibustered, senators should be prohibited from loading it down with highly controversial nonbudget-related issues that would be filibustered in any other context.

Thus, the “Byrd rule” is simple, commonsensical, and important—and it has only one real complication:

- a provision in a “reconciliation” bill that actually makes the deficit *worse* can nevertheless be salvaged by offsetting budget savings; but
- a provision with absolutely *no* budgetary consequences can never be salvaged.

With this in mind, onto the scene came Senator Kent Conrad (D-N.D.), who was first elected to the Senate on a promise that he would balance the budget. Conrad raised a series of “Byrd amendment” challenges to provisions in the “reconciliation” bill and was successful in striking enough language so that the bill would have to be reapproved by the House prior to going to the President’s desk for signature.

Summary House passage was blocked, sending the bill into the Second Session. The result? An inconvenience. A political embarrassment. Republicans would be unable to list their \$39.7 billion in budget cuts in their year-end list of achievements.

But the larger point is that the Democrats are increasingly mastering the rules—and using them

to thwart popular Republican measures. And the Republicans—rather than learning the rules themselves—are responding by attacking and trying to abolish the parliamentary rubric that, for years, protected them.

The bottom line, substantively? The final version of the “reconciliation” conference report:

- would cut \$12.7 billion from increases in the education budget by, generally, setting fixed interest rates of 6.5% for undergraduate student loans (and 8.5% for graduate students and parents);
- would slash \$6.4 billion from increases in Medicare by (1) raising premiums for high-income recipients two years quicker, (2) freezing home health care payments and doctors’ fees, and (3) reducing compensation for imaging services;
- would raise \$4.7 billion by allowing increased state co-payments and premiums, in addition to benefit reductions, under the Medicaid program—and would toughen the rules for qualifying for Medicaid by transferring assets to heirs;
- would save a billion and a half dollars on child support for halting bonuses for states that divert child support money to enforcement efforts.

Peering into “The Post-Bush Era”

Like it or not, these are the words that are now being bandied about at the highest levels of strategic thinking on Capitol Hill. Within months, they will have gained currency—and will join phrases like “inside the Beltway,” “transparent,” “Borked,” and “Byrdable” in the political lexicon.

The fact is that Republicans who have become accustomed to taking orders from the White House will soon have to operate in a milieu where they will need—

- a legislative agenda;
- a platform;
- a leader; and
- a strategy.

Already, those who would wield power in Congress are developing plans to fill this vacuum.

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