

March 2006

## PREVIEW OF THE SECOND SESSION, 109TH CONGRESS

### The Big Picture

Two months into the Second Session of the 109th Congress, it is clear that everything Congress does this year will be dominated by one overwhelming reality: control of the House—and even control of the Senate—is at stake.

In the House—where all 435 members are up for reelection—even Republican politicians are privately conceding that they could easily lose control of the body.

In the Senate, the seats of at least three GOP incumbents—Rhode Island Senator Lincoln Chafee, Ohio Senator Mike DeWine, and Pennsylvania Senator Rick Santorum—are all highly endangered. And this is before election season really gets under way.

All of this is against a backdrop in which—over the past 100 years—the party in power has, on average, lost five Senate seats and 28 House seats during the sixth year of an administration. Hence, if the GOP did no worse than the historical average, it would lose control of the House and end up with a 50-50 split in the Senate, where Republican control would be maintained only by Vice President Dick Cheney's tie-breaking vote.

And there are certainly issues afoot that could make this a worse-than-usual year for the GOP. Most notably: Although slews of Democrats received contributions from disgraced lobbyist Jack Abramoff and his allies, they believe that, with care, they can transform that scandal into a Watergate-type “sea change” in the political landscape.

### ALSO IN THIS ISSUE . . .

#### 109th CONGRESS

The Big Picture . . . . .	Page 1
The Big Picture Part II . . . . .	Page 2
Immigration Reform . . . . .	Page 3
Process Reform . . . . .	Page 3
Taxes, Entitlements . . . . .	Page 4
Energy and the Environment . . . . .	Page 5
Tort Reform, Eminent Domain, Pension Reform . . . . .	Page 6
Regulation . . . . .	Page 7
Telecommunications . . . . .	Back Page

### The Preliminaries: Saving Congressional Seats

Thus, items #1, #2, and #3 on the GOP congressional agenda all revolve around efforts to staunch the impact of ongoing ethical controversies on incumbent reelection vulnerabilities.

The House leadership—led by Speaker Dennis Hastert—have the most to lose. So they were quick to come forward with some stop-gap measures, such as

- fuller reporting requirements for tax-exempt political organizations (called “527s”), which were used extensively by Democrat-leaning activists like George Soros in the 2004 elections;
- a prohibition on former congressmen on the House floor and in the House gym; and
- the elimination of pensions for congressmen (like Randy Cunningham) who are convicted of felonies.

The Judicial/Legislative Watch Report is published monthly by the National Legal Center for the Public Interest, a nonpartisan, nonprofit law and education foundation.

Address all correspondence to the  
**National Legal Center  
for the Public Interest**  
1600 K Street, N.W., Suite 800  
Washington, D.C. 20006  
Tel: (202) 466-9360  
Fax: (202) 466-9366  
E-mail: [info@nlcpi.org](mailto:info@nlcpi.org)  
Web site: [www.nlcpi.org](http://www.nlcpi.org)

But the 800-pound gorilla in this controversy is Senator (and potential presidential-candidate) John McCain (R-Ariz.), who, on December 16, introduced his own package of “ethics reforms.”

The McCain bill would:

- require quarterly (as opposed to semiannual) lobbyist filing—and require electronic filing;
- require the disclosure of all past executive and congressional employment by every lobbyist;
- require disclosure of all “grassroots activities” (i.e., “any attempt to influence the general public”), even though not done on behalf of any client—requiring extensive separate filing for this;
- require expanded disclosure of fund-raisers sponsored, travel provided, and gifts given to officeholders;
- increase potential lobbyist penalties to \$100,000;
- require disclosure of any “coalition” to which a lobbyist contributes \$10,000 or more;
- extend the “revolving door” lobbying prohibition by former congressmen and staff to two years—and require congressmen to disclose ongoing negotiations for employment;
- establish that congressmen required to reimburse companies for private jet travel do so at the “fair market value” of the

transportation—together with expanded disclosure and a requirement that the House and Senate update their rules regarding travel; and

- evaluate “skybox” tickets at the “face value” of the ticket—a “solution” that may still fail to halt the evaluation of “skybox” tickets at the price of the adjacent “nose-bleed” seats.

Thus, McCain—never a real favorite with conservative groups—has made a calculated decision to use the scandal in order to turn most of his attention to punishing them, rather than his congressional colleagues.

With a Congress committed to “doing something” —even if that “something” is catastrophic—the only way this legislation is going to be sidetracked is if opponents are willing to “go nuclear”—that is, to offer ethics reform that will genuinely terrify the congressional leadership. Some of the ideas that have been floated include:

- making Congress subject to every law, regulation, and bureaucratic imposition that governs “mortals”;
- permanently barring any congressman or congressional staffer from ever lobbying Congress; and
- setting up a full-time prosecutor to go after members of Congress.

## The Big Picture (Part II)

### One School of Thought: 2005 Was Business’ Year;2006 Is for Social Conservatives

Any Republican member of the House or Senate can rattle off the catalogue of legislative “achievements” during the First Session: bankruptcy reform, class action reform, gun liability reform, the Central American Free Trade Agreement (CAFTA), the \$14.6 billion energy bill, and the \$282+ billion highway bill.

But it doesn’t take a particularly shrewd politician to recognize a couple of realities:

- First, the exclusively pro-business agenda of the First Session is irrelevant to—or even opposed by—much of the Republican Party’s conservative base. CAFTA, in particular, was viewed as an infringement on American sovereignty. And the energy and highway bills were reviled as so much “pork.”

- Second, in an election year that Democrats are trying to turn into another “1974” — a scandal-driven Republican bloodbath — the GOP will lose seats and could lose control of both Houses without the enthusiastic and active support of that base.

True, long-suffering social conservatives have forgone much in the hope that the nominations of John Roberts and Samuel Alito would tip the balance on the Supreme Court. But the first time the Court fails to shatter all its precedents and grant certiorari in a politically charged case — such as last year’s appeal by the parents of Terri Schiavo — conservative infatuation with the power of the judiciary to solve their problems will shatter.

As a result, the emerging view is that Senate and House Republicans will spend 2006 dealing with “red meat” issues designed to appeal to social conservatives: a prohibition on same-sex marriage, tax cuts, and immigration reform.

## Immigration Reform

In the area of immigration, things are going to get really messy — soon.

At the end of the First Session, the House passed a draconian measure designed to appeal to the anti-immigrant faction of the Republican Party. That package would, for starters:

- create a mechanism for requiring employers to check with the federal government — and its databases — before hiring new employees; and
- make felons of all immigrants illegally in the United States and preclude any possibility that they could bootstrap their presence into legal status.

Suffice it to say that this Orwellian package has frightened even some House Republicans. And, when one of them raised concerns, he was reassured that the House-passed bill represents nothing more than an effort at political posturing for the electorate. It is worth noting, however, that the same congressman was given the same assurance in connection with the “Real ID Act” — which was subsequently signed into law.

The situation is vastly complicated because the Bush administration’s major immigration goal is the creation and expansion of a “guest worker program” — favored by a newly formed coalition consisting of business and organized labor. Such

a program — viewed as “amnesty” by anti-immigration conservatives — would be anathema to them.

The bottom line? A major mess. And no one knows how it will turn out.

## Process Reform: A Word about “Earmarks”

A great deal has been said about conservative dissatisfaction with the 2005 \$39.6 billion budget-balancing “reconciliation” bill — and about plans for procedural reforms to implement much deeper cuts. And the “flavor of the month” seems to be the notion that the elimination of appropriations riders — called “earmarks” — is the be-all-and-end-all of congressional budget reform.

Attacks on “earmarks” have ranged from “conservative” columnists like Robert Novak to liberal stalwarts like former Common Cause head Fred Wertheimer. In fact, House Speaker Dennis Hastert announced plans to include a clampdown on “earmarks” in his “Abramoff scandal” package.

But even if Congress is successful in crafting language that severely limits or even eliminates “earmarks” — and it is doubtful that the current Republican leadership has the parliamentary sophistication to do that in a way that will achieve its objectives — it may find that it has solved no problems and created a number of them.

In the first place, the notion that “earmarks” are used for nothing but self-serving “pork” is a mistaken one. The Polish trade union NSZZ Solidarnosc was rebuilt — and communism destroyed — with three earmarks: one on the 1987 Supplemental Appropriations bill and two on the 1988 and 1989 Foreign Operations Appropriations bills. Radio Marti was also created through an appropriations set-aside.

And on the flip side, it is foolish to assume that the elimination of “earmarks” will stop congressmen from being able to channel appropriations money to favored projects. For years, the annual Public Works Appropriations bill contained little or no statutory language directing money to specific projects. But the nonbinding “report language” attached to the conference report specified, in detail, what projects were to be funded. And, while the officers and bureaucrats in the executive branch were not legally required to fund the projects designated by the subcommittee chairmen, everyone understood that the failure to follow the chairmen’s “non-binding recommendations” to the letter would result in serious appropriations cuts in future years.

## Taxes

For all of their “achievements,” congressional Republicans, in 2005, for the first time since the beginning of the Bush administration, failed to pass a major package of tax cuts or tax-cut “extenders.”

This, despite the fact that

- the House, with only four dissenting votes, passed legislation to blunt the impact of the Alternative Minimum Tax;
- the House passed a non-filibusterable, budget-balancing “reconciliation bill” containing a two-year extension of capital gains and dividend tax reduction; and
- the House, for the third time, voted to drop the sunset date for estate tax repeal—currently slated to return to 55% in 2011.

In the end, Congress settled for a \$7.8 billion tax package of Katrina relief.

This is not good news for tax cutters. Unless Republicans do better than expected in this fall’s elections, 2006 may be the Republicans’ last shot to permanentize tax cuts for capital gains, dividends, and estates.

And the question the GOP leadership is asking itself is: Will things be easier or harder in 2006?

On the “plus” side, tax “extenders,” in 2005, got tied up in conservative House Republican demands for \$50 billion in spending cuts. When moderate House Republicans rebelled, it was all the House leadership could do to keep the spending package from collapsing—much less fighting for tax extenders which generally are perceived as being targeted to the wealthy.

On February 2, the Senate took a final shot at trying to move the leftover bill from 2005—passing a \$70 billion package of AMT cutbacks and capital gains and dividend extenders—a package that Finance Chairman Chuck Grassley (R-Iowa) admits may be a “hard sell” for Republican moderates in its final form.

As for cuts that fail to make it into the conference report on the 2005 bill: When the Senate and House leadership plan for the annual non-filibusterable, budget-balancing “reconciliation bill” in 2006, they can choose to push additional entitlement cuts—or to focus on tax extenders. They can choose to use the “reconciliation”

process to push controversial environment-related goals, as they did in 2005—like drilling in the Alaska National Wildlife Refuge (ANWR). Or they can focus on tax cuts. If the leadership chooses to prioritize tax extenders above other budgetary considerations, it can enact them—even with all of the other problems it faces.

But the congressional leadership does face other problems. And extending the capital gains, dividend, and estate tax cuts will be complicated by a number of factors: The departure of former House Majority Leader Tom DeLay (R-Tex.) leaves a gaping leadership vacuum that cannot easily be filled by Dennis Hastert (R-Ill.), John Boehner (R-Ohio), or any of the other potential successors to formal or informal power on either the Senate or House side.

Furthermore, the roughly two dozen House Republican moderates have now had a taste of power. And the willingness of “blue state Republicans” to bolt from their scandal-ridden party in this election year is not going to lessen.

The bottom line? The best chance for across-the-board tax extensions was last year. And a rudderless leadership blew it when it thought it could have tax cuts, \$50 billion in largely entitlement spending cuts, and ANWR at the same time.

## Entitlements

**Social Security Reform:** Dead. Not only that, but Bush’s advocacy of privatization has turned into such an embarrassment that even a future conservative Republican administration will be reluctant to touch the issue.

**Medicare, Medicaid, and Health:** The prescription drug program—that \$1.2 trillion effort to buy the votes of seniors—has turned into a debacle. Twenty states have been forced to take stop-gap measures to prevent a cutoff of medicine; 14 Democratic governors have written Bush, chastising him for not taking action. One congressional Republican summed it up this way: “[S]ometimes, doing the right thing [sic] does hurt.”

But, not content to simply concede that it flushed a trillion dollars down the toilet—and to move on—the Bush administration has now announced a new election-year health initiative. If enacting health legislation was difficult in a nonelection year, however, it is not going to be easy now.

In addition, although snippets of Bush’s 2005 Medicaid reform program were passed with the grudging acquiescence of Oregon Republican

Gordon Smith, the administration—and conservatives—still cling to the hope that additional portions of that package can be enacted in 2006. The plan includes:

- giving more flexibility to the states in apportioning benefits—a move opponents fear will result in severe benefit caps;
- slashing pharmacist benefits;
- making it more difficult to transfer assets to offspring—and then claim poverty in order to secure Medicaid-funded nursing home care; and
- prohibiting state accounting practices that leave the federal government with a larger share of the cost under the Medicaid program.

These changes could only be achieved, if at all, on the annual, non-filibusterable, budget-balancing “reconciliation” bill. But, as we will see, Republicans teeter precipitously at the 50 votes they need to pass this bill. And they may have to choose among tax cuts, entitlement cuts, ANWR, and the variety of other issues battling for consideration on the “reconciliation” package.

## Energy and the Environment

**“Energy Reform”:** Since the beginning of the Bush administration, congressional Republicans have operated under the assumption that they would have one shot at “energy reform.” A \$10-\$20 billion bucket of energy-related “pork” could ride on the shoulders of Archer-Daniels-Midland, ExxonMobil, West Virginia coal interests, and other beneficiaries—and whatever could cruise along on the coattails of that “pork” could be signed into law.

For four years, the GOP held out hope that controversial proposals such as lawsuit protection for gasoline-additive manufacturers and drilling in the Alaska National Wildlife Refuge could be tacked onto their one-shot energy package. After the gasoline price spike caused by Hurricane Katrina, however, the managers relented—jettisoning tort reform and ANWR in order to take credit for passing *something* purporting to deal with the energy crisis.

As a result, Congress enacted \$14.6 billion of tax and spending incentives for energy production, exploration, and experimentation.

But the bottom line is that the train has now left the station. Furthermore, Alaska Senator Ted Stevens (R-Alaska) has alienated swing senators by attempting to force ANWR onto the conference report of the Defense Appropriations bill—and then buy support through \$29 billion of Katrina relief. Thus, strategies that might have worked—such as trying once again to tack ANWR drilling onto the budget-balancing “reconciliation bill”—will probably not work now.

**The Clean Air Act:** The conundrum over the Clean Air Act hasn’t changed in nearly a decade:

The statute remains in need of reauthorization. Congressional and Bush administration Republicans have tried to please both environmentalists and the Chamber of Commerce through a “cap and trade” program that would place a ceiling on “greenhouse gases,” but allow corporations to sell “pollution credits.”

But, rather than take “yes” for an answer, environmentalists are refusing to sign off on the Bush plan unless “greenhouse gases” are expanded to include carbon dioxide—a move that would enlarge environmental regulation in a breathtaking manner. Their champion in the Senate—presidential candidate John McCain (R-Ariz.)—is thus poised to block any effort by conservative Environment and Public Works Committee Chairman James Inhofe (R-Okla.) to push the Bush agenda.

**Endangered Species Act:** For years, this statute went without reauthorization. And the conservative House-passed bill of Resource Committee Chairman Richard Pombo (R-Cal.) probably doesn’t move the issue any closer to resolution. Although passed out of committee with eight Democratic votes—after extensive negotiations—Pombo’s legislation contains many items on business’ “wish list” and few provisions dear to environmentalists. Specifically, the bill would:

- eliminate the Environmental Protection Agency’s power to protect “critical habitats” as part of an effort to save endangered species;
- compensate private property owners for “takings” embodied in endangered species regulation; and
- revise scientific standards for implementing the Act—which, up until now, have frequently been derided by conservatives as “junk science.”

Not surprisingly, the Senate subcommittee chairman, Lincoln Chafee (R-R.I.), the Senate's most liberal Republican, has been loathe to put out a Senate version—a move that would:

- (1) give impetus to the House bill, while
- (2) giving the final say on the contents of Chafee's Senate bill to conservative Environment and Public Works Committee Chairman Inhofe (R-Okla.).

Instead, Chafee has commissioned a "study"—an action intended to quell restless Republicans whom he will need in his tough reelection bid, while halting progress on their conservative environmental proposal.

## Tort Reform

**Asbestos Reform:** With the passage of class action tort reform and gun liability tort reform in the First Session, George Bush has made no secret of his desire to follow up these legislative successes with legislation to resolve the tangled morass of asbestos litigation. Furthermore, Senate Majority Leader Bill Frist (R-Tenn.) promised that this committee-passed bill (S. 852) would be at the top of his agenda.

Nevertheless, this bill faces obstacles that earlier "tort reform" proposals did not—the most notable being that key Senate conservatives are willing to go to the mat in order to keep it from moving. Furthermore, soon-to-be presidential candidate Bill Frist (R-Tenn.) will need the support of these conservatives in his presidential bid—and is considerably less in need of support from asbestos-bill backers Arlen Specter (R-Pa.) and Orrin Hatch (R-Utah).

The bill pushed by Specter—S. 852—would create a trust fund to pay asbestos claims, funded by asbestos manufacturers and their insurers. The problem, for Republicans, is that no one is sure how much money will go into the fund or how much will be needed to pay the claims. And liable parties have been less than forthcoming about telling the Senate Judiciary Committee what they know.

Congressional watchdogs also have been remarkably unsuccessful in arriving at a definitive figure: The Congressional Budget Office reported that the trust fund would never exceed \$140 billion, but that claims could reach \$150 billion—leaving a \$10 billion deficit. The Congressional Budget Office concluded that the only certainty was

uncertainty. And an outside group estimated that claims would quickly exceed assets.

All of this has convinced many Republicans that the committee proposal—championed for many years by former Judiciary Committee Chairman Hatch—will be little more than a massive taxpayer bailout.

## Eminent Domain

Of all the controversial things the Supreme Court does, its decision in *Kelo v. City of New London*, No. 04-108, has had a remarkably shattering resonance. Demonstrators have gathered at Associate Justice David Souter's home in Weare, New Hampshire—demanding that the town seize his property and turn it into a hotel. States from coast to coast have moved legislation to limit the impact of *Kelo*.

And, in Washington, the House also passed legislation (H.R. 4128) that would prohibit the federal government from seizing land for economic development—and would penalize states that do so. In the Senate, Texas Republican John Cornyn introduced counterpart legislation, ominously numbered S. 1313. But the Senate bill did not reach hearing stage during the First Session.

## Pension Reform

Both the House and Senate have developed proposals to deal with the crisis in America's pension system—in particular, the possibility that the recent (and anticipated) spate of bankruptcies will send the Pension Benefits Guaranty Corporation (PBGC) into its own form of insolvency.

The House-passed bill—championed by Education and the Workforce Committee Chairman John Boehner (R-Ohio)—would implement a hefty tax increase, raising premiums from \$19 per participant to \$30 a head. In addition, Boehner's plan would change the method for computing potential pension liabilities—and would gradually phase in a full-funding requirement, although not so quickly as to upset business interests.

With the House Ways & Means Committee tacking on a few minor provisions, including a permanent extension of the saver's credit, the Boehner bill passed the House on December 15 by a vote of 294 to 132.

In the Senate, committee-passed legislation—passed on November 16 by a 97 to 2 vote—would also increase corporate premiums (i.e., taxes), require greater "transparency," and phase in a

full funding requirement (also not quick enough to give heartburn to the Chamber of Commerce).

The Senate bill had been sidetracked by “holds” from Maryland Democrat Barbara Mikulski and electorally endangered Ohio Republican Mike DeWine over provisions that would predicate a company’s funding status on its credit rating. In a move that has become the hallmark of Bill Frist’s Senate, however, Mikulski and DeWine were told nothing could be done during Senate floor consideration – when crafting a remedy would be easy – but that their concerns would be considered in conference (when neither Mikulski nor DeWine would have any more legislative leverage).

This issue may well have been resolved by the date of publication. But, at press time, the principal hang-ups were –

- (1) the question of whether to try to salvage the airline industry by including industry-specific exceptions for the 9/11-impacted sector; and
- (2) a White House veto threat if, as both Houses of Congress have tried to do, the final version of the bill is less onerous toward business than the administration desires.

Of course, at press time, the Oval Office had issued scores of veto threats and had never carried through with any of them—even when it clearly had the votes to sustain a veto. And, given that the pension reform bill cleared the House with 69% of the vote – and the Senate with 98% – this veto threat may be less than credible.

## Regulation

**Steroids:** Once convinced that “government-is-too-big,” congressional Republicans now seem largely unable to resist a “photo op” in order to explain how they would regulate the embattled industry du jour. And last year, at least, that industry was professional baseball.

The Senate came within hours of passing legislation (S. 1960) to federally regulate testing and punishments meted out by organized baseball. And House committees sent two similar bills to the floor—one from Tom Davis (R-Va.) of the Government Reform Committee and the other from Cliff Stearns (R-Fla.) of Energy and Commerce.

Professional baseball headed off these three proposals only by implementing its own policy –

with a 50-game suspension for the first violation of the no-steroid policy and a lifetime ban for the third.

Presumably, this truce will hold, so long as there are no more scandals. But the next sports steroid scandal that finds its way into a Jay Leno monologue will probably spell the end to Congress’ laissez-faire policy.

**Mine Safety:** Last year – with the cost of gasoline going through the roof – the energy companies could do no wrong. But all that has changed.

With the Democratic governor of West Virginia taking one day to slam through state mine safety legislation in the wake of 14 back-to-back mine-related deaths, defensive congressional Republicans are sure to follow by turning the spotlight on the Mine Safety and Health Administration (MSHA).

For its part, West Virginia’s new law would require:

- electronic tracking of miners;
- mandatory oxygen stations; and
- enhanced rapid response plans.

But, on the same day that the West Virginia legislature was acting, the Republican-controlled U.S. Senate also was holding hearings on the West Virginia tragedies. Interestingly – given the ascendancy of appropriations bills as the repository for most policy initiatives – the hearings were held not by the substantive committee with jurisdiction, but by the Appropriations subcommittee for health, education, and labor issues.

Mine-related accidents have gone down 60% since 1990. And no one is betting that the publicity-driven legislation will ensure that mine-related tragedies will never happen again, as West Virginia’s Democratic Governor Joe Manchin has promised. Nevertheless, in an election year, the GOP is not about to allow Democrats to seize control of this issue.

On top of all of this, the Supreme Court is slated to decide whether MSHA can be sued under the Federal Tort Claims Act every time it fails to enforce a federal regulation – and something bad happens. [*United States v. Olson*, No. 04-759] No one is betting that the High Court will open the floodgates for the federal government to be sued for every case of inadequate regulatory zealotry. But the fact that the *Olson* case has been brought against MSHA and involves a fatal mine collapse certainly gives its claimants a “ripped-from-today’s-headlines” cache.

## Telecommunications

The digital television travesty is a grenade waiting to explode in Congress' hands. To review the bidding: In order to raise revenue for its profligate spending—without conceding that it was raising taxes—Congress required broadcast stations to broadcast only in digital after February 17, 2009. This freed up portions of the broadcast spectrum for other purposes, including, directly or indirectly, selling them.

But it gradually dawned on Congress that, on February 17, 2009, large numbers of Americans—

including, particularly, the poor and elderly—would see their television reception go black.

So, last year, Congress passed a \$1.5 billion subsidy for consumers who don't subscribe to satellite or cable services—in the form of coupons to be issued by the Department of Commerce. But if seniors are unable to understand the prescription drug program, no one is betting that they will be able to convert their television sets from analog to digital.

The National Association of Broadcasters is still unhappy, and there are at least some in the Senate who would like Congress to relent on its deadline altogether.

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## THE MOST RECENT LEGAL STUDIES PUBLISHED

*COPYRIGHT IN THE DIGITAL WORLD: BASICS, LAW, AND POLICY* Authors: Bruce Joseph and Scott E. Bain, Wiley, Rein & Fielding LLP

The authors provide a basic primer on copyright law, followed by thoughts on basic copyright policy considerations arising in the digital environment, and analysis and advice regarding some of the key issues of copyright law now facing business, Congress, and the courts.

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*THE FIRST 72 HOURS OF A GOVERNMENT INVESTIGATION: A GUIDE TO IDENTIFYING ISSUES AND AVOIDING MISTAKES* Author: Sheila Finnegan, Mayer, Brown, Rowe & Maw LLP

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