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CONGRESS

POLITICS TAKES A FRONT SEAT

As Congress moves into the last three legislative months before the midterm election, the legislative agenda is being shaped by the increasing sense that control of both the Senate and the House may be at stake.

The question of “control” of the 110th Congress has never been far from the surface, but recent polls have put Congress into “full election mode.” And much of the reason is that issues like immigration, tax cuts, energy, and budget process reform are bombarding the Senate and House calendars (and the Senate and House floors) in the hope of curtailing the public’s plummeting opinion about Congress.

Polling done by the Pew Center for the People and the Press found that the percentage of respondents who believed the 109th Congress had accomplished less than usual had risen to 41%—up from 27% in 2002 and 16% in 2000. Furthermore, the same poll found that 53% of those polled didn’t want to see most lawmakers reelected—up over thirteen points from the two most recent polls.

In another survey published on April 10 and conducted by the *Washington Post* and ABC News, pollsters found that 52% of respondents thought that the Democrats would do a better job of “handling corruption in Washington,” while only 27% favored the Republicans in this regard. The *Post* went on to interview six political scientists—with the consensus being that the issue of “corruption,” combined with other Republican vulnerabilities, could serve as the impetus that shifts congressional control.

This sense that congressional control may be up for grabs is also reflected in the contributions to the two political parties—normally a bellwether for the conventional wisdom about which way the political

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winds are blowing. During the first calendar quarter, for example, the Democratic Senatorial Campaign Committee—the political arm of Democrats in the Senate—brought in \$56.4 million and had \$32.1 million in the bank. This topped the lackluster performance of the Republican counterpart—which historically has demolished the Democrats in fund-raising, but chimed in last quarter with only \$50.4 million and \$16.5 million in the bank.

The House counterpart—the Democratic Congressional Campaign Committee—also broke a historical trend by nearly matching the fund-raising of its Republican cousin—bringing in \$23 million and \$24.4 million, respectively.

Ethics Reform

Critical to Republicans’ efforts to retain control of the Senate and the House will be the question of whether they can diffuse the ethics issues surrounding D.C. lobbyist Jack Abramoff and his relationship with former House Majority Leader Tom DeLay.

The issue will be particularly important to Montana Republican Conrad Burns. Following articles detailing Burns’s ties to Abramoff, his upcoming Senate reelection bid fell from a “safe seat” to a “dead heat.”

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Endangered Republicans like Burns are staking their political fortunes on “ethics reform” legislation crafted by the House and the Senate. But that package has had to navigate a stormy sea.

To begin with, congressmen with reliably safe seats were less than enthusiastic about sacrificing their skybox seats, private jet flights, and expensive lunches. As a result, many of the drafts focused, instead, on punishing a broad swath of lobbyists, and leaving congressional perquisites relatively intact.

The Senate-passed bill, especially, angered several outside groups:

Particularly far-reaching was a provision—initially crafted by Arizona Republican John McCain and subsequently renounced by him—that would require public interest groups to monitor and report aggregate expenditures for “grassroots lobbying”—that is, efforts to shape public opinion. The fact that the McCain language and the Senate-passed section that copied it exempted “members” of conservative grassroots organizations, if anything, made matters worse by defining “membership” much more narrowly than many of the groups did.

Not surprisingly, ideological organizations forming the core of both the Republican and Democratic parties went ballistic over these efforts to vastly expand reporting requirements for what they viewed as constitutionally protected “speech.” The groups were particularly miffed because they felt they had been scapegoated by a Congress that was attempting to avoid accountability for its own misbehavior.

In addition, it probably didn’t help matters that Senate efforts to tie “earmark reform” to “ethics reform” inadvertently ended up outlawing most “riders” to appropriations bills—including pro-life, pro-gun, and other conservative initiatives that had been perpetuated, year after year, as amendments to the large money bills.

Finally, as a result of a Senate floor amendment by liberal Democrat Ron Wyden (D-Or.)—inexplicably aided by Republican conservatives Chuck Grassley (Iowa) and James Inhofe (Okla.)—the primary tool for achieving budget austerity by quietly killing bills proposing new programs (the “hold”) would have been outlawed by the Senate-passed version.

“Holds” aren’t mentioned anywhere in the Senate rules, and a “hold letter”—a letter notifying the Senate leadership that a senator has problems with a bill—is absolutely nonbinding. But, for most senators outside the leadership, this is the primary means of influencing legislation.

And, although “holds” have no legal force, the Senate leadership has been increasingly loathe to override a “hold” and thereby risk the chance that a single senator could throw the Senate into chaos through a single “killer amendment.” The “hold” has been even more sacrosanct under the leadership of Bill Frist (R-Tenn.)—a presidential candidate who has been reluctant to do anything that might jeopardize the potential support for his candidacy by his senatorial colleagues.

The House bill managed to sidestep all three of these problems, although its separately considered provisions to regulate political organizations like the Swift Boat Veterans (called “527s”) as rigidly as Political Action Committees (PACs) has not exactly been met with enthusiasm in the ranks of either liberal or conservative outside groups.

Last month, we detailed the Senate’s “lobby reform” provisions. This month, we turn our attention to the draft prepared by Chairman David Dreier (R-Cal.) and considered and passed by the House:

- The House would require quarterly electronic filings, rather than semiannual filings by lobbyists—and would place the filings on a publicly accessible database.
- The House would authorize the House Inspector General to audit lobbying reports.

- The House would require former members and employees to disclose that fact on lobbying reports for up to seven years, but would deal with conflicts of interest and influence buying by “requesting” caution and by “restating” current law.
- The House would require that lobbying reports contain lists of contributions and gifts, including gifts to non-political organizations founded or run by politicians.
- The House would increase civil penalties to \$100,000 and criminal penalties to five years.
- The Senate moved quickly to pass a scaled-down budget with no significant entitlement cuts. Its revenue estimates provided enough leeway for a short-term extension of the administration’s tax cuts, although not always enough to make those cuts permanent. With little spending austerity, the nonfilibusterable budget-balancing “reconciliation bill” was slated by the Senate to be little more than a vehicle for opening oil exploration and drilling in the Alaska National Wildlife Refuge (ANWR).
- With the departure of former House Majority Leader Tom DeLay, there was no one left in the House to easily reconcile the warring factions of Republicans—with the “moderates” strongly resisting any further major cuts in entitlements, and the conservatives demanding them. At press time, the House was struggling enormously, merely to produce a budget resolution in any form—much less one that made anyone happy.

With respect to the members and staffers themselves, the House would:

- (1) require members negotiating private employment agreements giving rise to an apparent conflict of interest to report those negotiations;
 - (2) outlaw any gift of travel to members and staff, including transportation, lodging, and meals—pending a report by the Committee on Standards of Official Conduct;
 - (3) prohibit members on reimbursed corporate charters from being accompanied by a lobbyist of the corporate owner; and
 - (4) eliminate reduced-price skybox seats at sporting events.
- With respect to earmarks, the House would require that they be listed.
 - Prospectively, the House would deny the taxpayer-financed portion of a congressional pension to members convicted of certain crimes of moral turpitude.

The bottom line? Neither the House nor the Senate bill inflicts much pain on the senators and congressmen whose misbehavior gave rise to this scandal. The good news is that legislators are having second thoughts about proposals to scapegoat public interest groups for legislator misbehavior.

The Budget

At press time, the House was still flailing away at its efforts to reconcile the budget-related demands of its two wings—and the Senate had conceded that no significant budget austerity was achievable this year:

All of this was complicated even more by the budget-busting supplemental and the White House’s threat to veto any bill that failed to adhere to the administration’s \$92.2 billion ceiling.

The bottom line? By this time next year, the White House’s \$2.78 trillion budget will seem austere by comparison.

Repeal of the Estate Tax/A Primer on the Congressional Budget Process, on the Eve of Senate Debate over Budget Process Reform

At press time, Senate liberals and conservatives were gearing up for what will surely be two of the defining battles of the 109th Congress:

- The first will be the fight over what to do about the estate tax (or, as the Republicans call it, the “death tax”).
- The second will be a debate—scheduled for the Senate floor in June—over how to revise the congressional budget process so as to make it easier for future tax cuts than it was for legislation to repeal the federal estate tax.

First, some background on the “death tax”:

Hard-core fiscal conservatives like Alabama Republican Jeff Sessions approached the “death tax” debate with a goal of nothing less than total permanent repeal of the tax on large estates.

Democratic policymakers, on the other hand, were hoping that this debate would cement their efforts to demonize tax cuts as benefits for the wealthy. Senators like Arizona Republican Jon Kyl—perhaps putting the cart a little bit before the horse—prepared compromise “backup” plans that merely adjust estate tax exemptions, rather than repeal the tax.

And all of this, at press time, was about to be fought out in the gauntlet that is the United States Senate.

Increasingly, proposals—particularly tax cut proposals—that involve any amount of controversy are made or broken on this obstacle course in the Senate. And, suffice it to say, the first hurdle is the challenge of rounding up the 60 votes necessary to overcome a filibuster of the bill—or even of the motion to proceed to the bill.

But the “Perils of Pauline” prospects for a proposed tax cut only start there. Under the “pay-go” rules adopted by the Senate, the tax repeal must fit into Congress’s budget ceilings during three different periods: the upcoming fiscal year, the next five fiscal years, and the five fiscal years after that.

And, for most of the spring, it has been unclear whether there was going to be a budget resolution for the upcoming fiscal year—and hence no real idea of whether the estate tax repeal had to be budgetarily acceptable in 2006 or 2007, 2006-10 or 2007-11, 2011-15 or 2012-16.

Furthermore, depending on the timing, no one knows how many of the other Bush tax extenders would be competing with the estate tax repeal for the limited amount of money set aside in the budget for “tax cuts.”

Finally, there’s the question of “scoring”: The method of figuring out how much a new program or tax cut is supposed to “cost” has become an elaborate politicized game.

For example, under accounting rules carried over from the 1986 Gramm-Rudman budget balancing law, bean counters are sometimes allowed to assume that the cost of new spending programs will be ameliorated by savings in other areas that those new programs could produce. Hence, a new program to “cure poverty” might be assumed to reduce the number of people qualifying for assistance under the Medicaid program—and thereby “save” money to compensate for some of its cost. This is

called “dynamic scoring,” as opposed to “static scoring,” which ignores subsidiary consequences.

Tax cuts, on the other hand, are “scored” in a way that is most disadvantageous to them. On one hand, the Budget Committee and the Joint Tax Committee “score” tax cuts by employing a cousin of “dynamic scoring,” called “behavioral scoring.” Hence, even in years when the estate tax has already been completely eliminated, its permanent repeal is “scored” to cost money—on the supposition that the elderly are not giving their property away (and, therefore, paying the gift tax) because they no longer fear that the property will be taxed at death.

On the other hand, the Joint Tax Committee and the Budget Committee refuse to assume that, by freeing more money for the private sector, tax cuts like the estate tax repeal will produce economic growth and, as a result, more revenues.

Ironically, any of the Republican senators or staff involved in the budget process—the Joint Tax Committee, the Congressional Budget Office, the Budget Committee, the Budget chairman, the parliamentarian, or the Senate Presiding Officer—could unilaterally reject to pro-spending, anti-tax biases in the budget process and could implement a system of budget “scoring” more consistent with Republican objectives. But, thus far, none has chosen to do so.

The bottom line? The congressional budget process was created by Democrats for the purpose of making it easy to raise spending and hard to cut taxes. And the process has performed its function admirably.

In twenty-six years, spending and taxes have increased to a level four times what they were at the end of the Carter administration. And most of this increase has occurred during a period of very low inflation.

In the seven budget-years of the Bush administration, spending has increased by over a trillion dollars a year. Republicans who are dissatisfied with this fact—and there are some—will have an opportunity on the Senate floor, in June, to try to change the budget by changing the budget process.

Interneine Warfare Erupts over \$100 Billion Supplemental Appropriations Bill

Having forced Senate conservatives to swallow a budget-busting budget resolution, the Senate leadership was hoping a restive group of about five

to ten fiscally conservative senators would be appeased by an offer to consider “budget process reform” in June. But that was not to be.

Resentment boiled to the surface the first week of the month when the Senate considered its “supplemental appropriations bill” created to cover operations in Iraq and Afghanistan—in addition to cleaning up the devastation caused by Hurricane Katrina.

With the administration threatening to veto any bill that came in above \$92.2 billion, the Senate was well on its way to topping that figure by almost \$20 billion when conservatives hit the angry Appropriations Committee chairman, Thad Cochran (R-Miss.), with procedures that had not been seen on the Senate floor for a decade.

Conservatives launched their attack with a so-called “clay pigeon” amendment—a strategy of offering a single multipart amendment and then having it divided into a large number of pieces. Thus, conservatives came close to derailing the “railroad to nowhere”—the \$700 million project to relocate railroad lines in southern Mississippi. They did win a small victory by deleting, by a vote of 51-to-44, a \$15 million seafood-promotion set-aside.

All of this led to angry exchanges between the Appropriations Committee chairman and dissident members of his own party.

Furthermore, as summer heats up and the regular appropriations bills for fiscal year 2007 come before the Senate, there is some bad news for Thad Cochran: conservatives have been studying up on the Senate rules. And, unlike Majority Leader Bill Frist (R-Tenn.), they now have the capacity to navigate their way through the frequently arcane rules and precedents of the Senate.

“Bridge to Nowhere” Moves Forward

On the subject of “budget process reform,” for months, the *Watch Report* has discussed the futility of pending legislation purporting, in the Senate, to severely limit “earmarks”—and, in the House, to require that “earmarks” be listed by the appropriators.

The point that we have been making has now become so transparently obvious that it has been echoed in a major national newspaper. Writing in the *Washington Post*, Michael Grunwald observed

that “. . . outside Washington, most Americans think of pork as wasteful spending. They don’t really care whether it’s earmarked. And they shouldn’t.”

The catalyst in Grunwald’s epiphany was the discovery that \$452 million designated for two remote Alaskan bridges, including the \$223 million “bridge to nowhere,” which had been removed from last year’s year-end highway authorization bill with some fanfare, had not actually been removed at all.

Although the language designating the bridges was removed, the \$452 million in funding for the two projects continued to go forward as an undesignated part of the \$286 billion transportation bill.

Freddie Mac Pays \$3.8 Million Penalty, \$410 Million To Settle Suits

In recent years, the *Watch Report* has documented the similarities between the transgressions of the congressionally chartered Federal Home Loan Mortgage Corporation (Freddie Mac) and the scandal-plagued Enron—how, for instance, Freddie Mac avoided reporting a \$2.76 billion loss by the use of “hedge accounting” while giving large bonuses to upper management.

The most recent chapter in Freddie Mac’s saga was written last month, when the mortgage firm resolved two of its long-standing nightmares by paying more than \$410 million.

On April 18, Freddie Mac agreed to pay \$3.8 million to settle charges of election law violations brought by the Federal Election Commission (FEC). Specifically, Freddie Mac was accused of using corporate resources to raise \$1.7 million at political fund-raisers for more than fifty candidates—primarily Republicans who had oversight over its budget, including House Financial Services Chairman Michael Oxley (R-Ohio).

Freddie Mac reportedly used expensive meals—many at Washington’s tony Galileo Restaurant—to pump money into the campaigns of the favored lawmakers.

Also the same week, Freddie Mac settled shareholder suits over its accounting practices by offering to pay \$410 million. The accounting “errors” had led to an embarrassing \$5 billion earnings restatement.

Energy

There is no lack of fallacious “conventional wisdom” springing forth from the “pain at the pump” coverage. And there is also no lack of partisans scurrying to take advantage of the media attention.

NBC launched its coverage by talking about “a nation of drivers and consumers doing a slow burn [and environmentalists] seeing red. . . .” In the meantime, advocates of drilling in the Alaska National Wildlife Refuge (ANWR) trumpeted that they could reduce the oil shortage by 1.5 million barrels a day, while environmentalists countered that a one-mile-per-gallon increase in Corporate Average Fuel Economy (CAFE) standards could save a million barrels a day.

Certainly, supply is a significant component of gasoline prices. And it is not irrelevant that

- Iraq is producing oil at only 50% of the prewar level;
- Nigerian production has fallen 25% due to political unrest;
- the continuation of Iran’s level of production may be tempered by Secretary of State Condoleezza Rice’s threat to “isolate” Iran—together with Iran’s counterthreat to provide nuclear technology to Sudan; and,
- in fact, about \$20 of the price of every barrel of oil consists of a “geopolitical premium.”

Furthermore, in the area of geopolitics, Communist China’s increasingly voracious appetite for oil is hardly irrelevant to the rising price of gasoline. And much of this situation is beyond the ability of any administration to control.

On the other hand, the fact is that

- roughly 20% of the cost of gasoline in the United States consists of taxes;
- differing levels of taxation are a major component of gasoline prices that range from \$6.73 in the Netherlands and \$6.13 in Great Britain, on one hand, to \$1.93 in China, on the other; and

- environmental objections have effectively eliminated the construction of all but a trickle of new refineries over the last few decades.

So, the problem is hardly that Congress and the executive branch are unable to do anything, in the short term, about the price of gasoline. Rather, the problem is that neither the Republicans nor the Democrats have any intention of doing what they can do.

This leaves frightened Republicans and hungry Democrats in the position of saber-rattling for political advantage. For their part, the Democrats’ thrust was spearheaded by Senator Charles Schumer (D-N.Y.), who called for a breakup of the five major oil companies. This isn’t going to happen—nor can anyone who witnessed the devolution and reemergence of the telephone monopoly hope that it will. The Democrats also issued their obligatory call for the development of impractical alternative energy sources.

However, when it came to striking fake blows at the oil companies, George Bush was hardly about to be bested by the Democrats when he said: “This administration is not going to tolerate—uh—manipulation.”

So, with some fanfare, Bush launched his own series of ineffectual responses, including moves to

- halt deposits to the Strategic Petroleum Reserve;
- order investigations of price gouging by oil companies;
- direct the Environmental Protection Agency (EPA) to ease regulations on fuel additives; and
- ask Congress to roll back tax breaks for oil companies.

For their part, congressional Republicans are moving forward in May and June with a series of tax incentives for energy sources that are either so impractical that it is Pollyannish to assume they will ever replace fossil fuels—or so dominant that they are unlikely to be affected by tiny tax breaks, as opposed to market incentives.

Gasoline Price-Fixing Already Before the Supreme Court:

Texaco, Inc. v. Dagher/Shell Oil Co. v. Dagher
Nos. 04-805/04-814
from the Ninth Circuit Court of Appeals

Ironically, while all this bruhaha has been going on during the first half of the year, the Supreme Court was considering the “mother of all gasoline price-fixing cases.”

In 1998, Texaco and Shell had formed two joint ventures to refine and market petroleum and, in effect, to fix prices of gasoline. And, although a pliable Federal Trade Commission approved the arrangement because of its economic “synergies,” Fouad Dagher brought a class action suit on behalf of 23,000 service station owners—challenging the companies’ actions under the Sherman Act.

The district court granted summary judgment to the oil companies, but the Ninth Circuit found there was a triable issue of fact as to whether there was a per se violation of the Sherman Act.

The Supreme Court granted certiorari to review the question of whether the Sherman Act imposes a “per se” standard on Texaco and Shell—or whether a “rule of reason” test is applicable.

“Global Warming”

Almost exactly a year ago, *USA Today* proudly pronounced the end to the debate over “global warming.” “The debate’s over: Globe is warming,” said the newspaper that is popular for its abbreviated articles and news nuggets.

And, if that weren’t enough, the newspaper, two days later, reprised its opinion that “global warming” was non-debatable, accompanied by an “opposing view” from Senate Environment and Public Works Committee Chairman Jim Inhofe (R-Okla.). “Yes, the globe is warming, even if Bush denied it,” said the headline.

So, it will hardly come as a shock that the major media outlets largely ignored a report, released last month, finding that apocalyptic predictions concerning “global warming” had been exaggerated.

Relegated to page A8 in the *Washington Post*, the study—headed by Duke University climate expert

Gabriele Hegerl—involved newly published research that “leaves the door open to avoiding the largest and most devastating consequences” of “global warming.”

The study, published in the scientific journal *Nature*, reached back seven hundred years to examine evidence as diverse as volcanic eruptions, tree rings, and the gas content of various levels of Antarctic ice. And, while its findings that “global warming” will have a significant impact aren’t likely to make it into a floor speech by the conservative Inhofe, one has to wonder whether the study would have received more attention had it reached a more cataclysmic conclusion.

The Judiciary

The Supreme Court

Court Hears Arguments on the Scope of Retaliation Doctrine

Burlington Northern and Santa Fe Railway Co. v. White
No. 05-259
argued April 17, 2006

After Sheila White filed a sexual harassment complaint against Burlington Northern, she was reassigned to a more physically demanding job and then suspended without pay for insubordination—a charge for which she was subsequently vindicated by a hearing officer, who ordered back pay.

Within about a month, the Supreme Court will decide whether White’s treatment constituted illicit “retaliation,” for purposes of Title VII of the Civil Rights Act of 1964.

Burlington Northern argued that any harm suffered by White was not only curable, it was “cured.”

White’s attorney countered that only a broad interpretation of retaliation prohibitions under the 1964 Act could effectively deter prohibited forms of discrimination.

And, since most of the circuits that have considered the issue have sided with Burlington Northern’s position, there is some speculation that a reversal is in the offing.

THE 16TH ANNUAL GAUER DISTINGUISHED LECTURE IN LAW AND PUBLIC POLICY
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The format of the 2006 Lecture will differ from the previous ones in that two speakers are scheduled. Governor Thomas H. Kean and Congressman Lee H. Hamilton, chair and vice chair of the National Commission on Terrorist Attacks Upon the United States, known as the 9/11 Commission, will deliver the Sixteenth Annual Lecture in New York City on September 21st.

After its delivery, the Lecture is printed, bound, and distributed gratis to university law libraries throughout the country, providing a permanent reference to these original discourses.

Past Lecturers have included Presidents Ronald W. Reagan and George H.W. Bush; Chief Justice of the United States William H. Rehnquist; General Colin S. Powell; Prime Minister Margaret Thatcher; Associate Justices Anthony M. Kennedy, Sandra Day O'Connor, and Stephen G. Breyer; Judge Kenneth W. Starr; Dr. Condoleezza Rice, National Security Advisor; and Judge William H. Webster, former Director of the FBI and CIA, and the immediate past chairman of the National Legal Center.

For more information on how to receive an invitation, please contact the Center by phone (202) 466-9360 or by e-mail at <ijacoby@nlcpi.org>.

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