

WATCH REPORT

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C O N G R E S S

An Overview of the 110th Congress Part II: The House

With all of the “spinning,” partisan jockeying, and mass speculation that have accompanied the Democratic takeover of the Senate and the House, it is easy to miss the one consistent theme in the Democrats’ strategy (and it is a novel and surprising strategy for Democrats): They are trying not to scare anybody.

More specifically, the new Democratic leadership is trying to sell itself as a group of middle-of-the-road gradualists who will not pose a significant threat to any powerful interest—even those interests forming the core of the GOP’s base.

Hence:

- Incoming House Speaker Nancy Pelosi—at considerable risk and embarrassment—endorsed for the number two spot in the House leadership a conservative-to-moderate Democrat, John Murtha (D-Pa.), even though Murtha’s scandal-plagued past and consequent loss ended up making Pelosi seem clownishly ineffectual.
- Congressional Democrats have made it clear that they have no intention to take on the powerful “gun lobby”—even though these organizations form the epicenter of the Republicans’ base of power.
- Liberal Barney Frank—the incoming chairman of the Financial Services Committee—in a speech to the Boston business community on the day after the election offered a grand “compromise” to corporate America designed to ease business fears.
- The same Nancy Pelosi who was willing to push John Murtha for Majority Leader rejected scandal-plagued Alcee Hastings for Intelligence Committee chairman—over the strong objections of the Congressional Black Caucus.

The new Democratic leadership is trying to sell itself as a group of middle-of-the-road gradualists who will not pose a significant threat to any powerful interest.

More on much of this, later.



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The House Leadership

As we saw last month in connection with the Senate, last month's leadership elections were a victory of vote-counting deal-making competence over public perception and grand strategy.

Maryland Democrat Steny Hoyer made this clear when he bested both Murtha and Pelosi in order to secure the Majority Leader's office. However, to achieve this, he conducted a personal campaign that left Murtha visibly embittered and that could make Democratic moderates even harder to corral.

On the Republican side, many members were uncomfortable about retaining John Boehner (R-Ohio)—who was perceived as being a central element of the 109th Congress's failed leadership team. But overconfident Mike Pence (R-Ind.)—who might otherwise have had an easy shot at victory—simply alienated too many conservative colleagues with his efforts to broker a “compromise” on the immigration issue.

The Appropriations Committee

Empires and epochs come and go. But the Appropriations Committee—with its “pork-laden” way of doing business—lives on.

Just as the transfer of appropriations power from the “king of pork,” Robert Byrd (D-W.Va.), to Republican Ted Stevens (R-Alaska) in the Senate did nothing to staunch the flow of special interest money, likewise, the ascendancy of David Obey (D-Wis.) to the House Appropriations Committee is not expected to stop the distribution of federal largesse to congressional districts either.

Obey is a liberal, but he is no slouch when it comes to using the federal purse to gain reelection—as evidenced by projects ranging from two-and-a-half million dollars in improvements for Wisconsin's Rice Lake Regional Airport to grazing research being done by the University of Wisconsin.

But other Democrats—both on the Senate and on the House side—have made no secret of the fact that they consider it only fair to distribute “pork” to Democrats after a decade of Republican abuse. One national newspaper quoted incoming Senate Transportation Subcommittee Chairman Patty Murray (D-Wash.) as

saying, “What is good for the goose is good for the gander...I tell my colleagues, if we start cutting funding for individual projects, your project may be next.”

The first test for the unseasoned House Democrats is coming early this year: On the Senate side, the powerful Senate Steering Committee—a caucus of conservative Republicans newly chaired by South Carolina Republican Jim DeMint—tanked Republicans' efforts to pass a pork-laden omnibus spending bill during the “lame duck” session. Instead, Congress passed a temporary “continuing resolution” that momentarily perpetuated spending at last year's level—and under last year's restrictions.

This denied livid Republican Appropriations Committee members one last shot at feeding at a trough full of pork—the type of pork that arguably cost the GOP control of the Senate.

But, aside from that, the consequences of this action are interesting on many levels.

First of all, this means that the Democrats must spend their “first hundred days” slogging their way through the gory details of the \$400 billion of as-yet unappropriated discretionary spending in the federal budget, rather than focusing on bold new initiatives. They will certainly report out some legislation in the early days—most notably, the long-promised increase of the minimum wage to \$7.25. But don't expect the flurry of activity that occurred in the first hundred days of the Gingrich Speakership—a flurry that, even at that frenzied level of activity, produced little in lasting legacies.

Second, presumably, congressional Democrats will be unwilling to simply extend the continuing resolution to the end of the year—thereby gratuitously extending Republican policies on the gamut of federal questions for an extra six-to-nine months. But this potentially sets

up at least one and perhaps a series of showdowns between Congress and the White House over whether to shut down the government over an appropriations impasse.

The conventional wisdom in Washington—after Newt Gingrich's ill-considered attempt in 1995 to use the threat to close the government as an appropriations bargaining tool—is that it is political poison to be seen as trying to close the doors of the federal bureaucracy. But all of this has given rise to an elaborate game of “Who shut down the government?”—in which both parties jockey to convince the public that the closed bureaucracy is the other guy's fault.

But to even play the game, Bush will have to abandon his nearly consistent refusal to veto legislation—something that the broad scope of Democrats' appropriations-related demands will presumably force him to do.

All of this is in addition to the question of whether the congressional procedure for considering spending bills has changed as a result of the raging controversy surrounding hundreds of special interest “earmarks.” And, in that regard, some things may change:

- With increasing scrutiny on “earmarks” and with proposed resolutions requiring the disclosure of “earmark” sponsors, the Appropriations Committee may well go back to the old way of doing business with fewer legislative “earmarks”—but with all of the congressional projects listed in the committee's conference report. As a practical matter, this is no less binding, as no agency is about to incur the wrath of its Appropriations subcommittee by ignoring its spending priorities. And yet—voilà—the legislative “earmarks” disappear.
- The use of appropriations bills as the vehicles for governmental policy may or may not subside. The GOP made virtually all federal policy changes on appropriations bills—from National ID card requirements to anti-abortion and pro-gun initiatives. Frequently, these sections first appeared in the conference reports of these bills—in blatant violation of the “scope of conference” rules of both Houses.

In the case of Republicans, part of the problem was that Senate Majority Leader Bill Frist (R-Tenn.) and House Speaker Dennis Hastert (R-Ill.) were hardly parliamentary geniuses, and the simple expedience of tacking the Republican agenda onto these enormous must-pass bills made up for their inability to pass free-standing legislation.

More senior Democrats—like Robert Byrd, Defense Appropriations Subcommittee and Commerce Committee Chairman Daniel Inouye (D-Haw.), and Judiciary Committee Chairman Joseph Biden (D-Del.)—at least have staff who are familiar enough with the Senate as an institution so that they will not be forced to use this avenue.

On the other hand, writing virtually all major policy changes into massive omnibus appropriations bills has become a cheap, expedient, and easy way of doing business—whether or not the new overseers have the technical ability to do otherwise. And it makes Appropriations Committee legislators into powerhouses who can control not only the purse strings, but also the substance of legislative policy.

This leads us to the final point:

Conservative Republicans—led by the Senate Steering Committee—have threatened to block “unanimous consent” agreements on appropriations bills unless Democrats return to the practice of reporting House-passed appropriations bills with discrete “perfecting” amendments, rather than catch-all “substitute” amendments. If they are successful, these massive money bills would go to the Senate floor with hundreds of one-sentence amendments making discrete changes, rather than having a single amendment that replaced all of the House language—whether changed or not—with the Senate version of the bill.

If this happens, it will give individual senators a great deal more ability to influence controversial policies embedded in these massive bills. To begin with, a senator could threaten to force the Senate to go through hundreds of amendments, one by one. Or he could filibuster a single committee-reported amendment, as New Hampshire Senator Gordon Humphrey (R) did successfully in the late 1980s over Senate amendments seeking to loosen federal restrictions on abortion. But even more important, this change would make it more likely that spending bill conference reports would have

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to be sent to the House and Senate with debatable, amendable, discrete “amendments in disagreement” covering each area in which the House and Senate diverged, rather than a single unamendable take-it-or-leave-it conference report. This would give the party out of power the ability to actually fight—and amend—highly controversial policies inserted into appropriations bills, particularly policies that were not considered in either House but were first inserted in conference.

The Budget Committee

Last month, we talked about the budget process—and how the Budget Committee chairman, however well-meaning, had simply been out-manuevered by the more experienced, more highly skilled appropriators.

If this was the case under GOP rule—where a majority of the majority caucus actually favored cutting entitlements—this will be even more true with the Democrats, who have absolutely no taste for slashing these massive engines of government growth.

One final point: Once a year, the Budget Act allows Congress to pass a budget-balancing bill that is called a “reconciliation” bill—which cannot be filibustered in the Senate and which is immune from most amendments. When they were in control, Republicans worked to expand the role of non-filibusterable “reconciliation”—pushing for more than one bill a year and expanding the “budget-balancing” concept to include topics like drilling in the Arctic National Wildlife Refuge (ANWR).

Now that Democrats are in control—the “reconciliation bill” will probably be used primarily to raise taxes—it will be interesting to see how Republicans regard the use of the procedural tools they developed to further Democratic aims.

The International Relations Committee

Battering the Bush administration over the ill-fated war in Iraq will be the first, second, and third major foreign policy objectives of the new Democratic Congress.

Beyond that—wisely or foolishly—Democrats have signaled their intention to pass legislation to ease travel restrictions to Cuba, perhaps as part of a larger appropriations measure.

It is interesting to note, incidentally, that even before the 110th Congress convened, Democrats signaled their intention to bypass the International Relations and other substantive committees on this issue—and to tack it directly onto a large appropriations package.

Aside from provoking a potential presidential veto of a spending bill—even as part of an appropriation—there is the obvious problem that the desertion of the Democratic Party by Florida’s Cuban-Americans in 2000 cost Al Gore the White House. And the antipathy of the Cuban-American community could make it difficult for any Democratic presidential candidate to win the electoral votes of that populous state.

The Judiciary Committee

There is no committee in Congress that will be more fundamentally changed by the elections than the House Judiciary Committee. Under the chairmanship of Wisconsin Republican James Sensenbrenner, the committee had become the epicenter for “Big Government Conservatism.”

It had passed out bills to:

- implement an “enforcement only” immigration policy that included national ID cards and automatic felony status for illegal immigrants;
- create draconian new “gang violence” provisions—patterned after the Racketeer Influenced and Corrupt Organizations Act (RICO)—which would require long mandatory prison terms for informal groups (which could include one’s family) where one member commits two relatively small violations of federal law (including virtually all gun-related paperwork violations); and
- rubber-stamp some of the broadest assertions of executive branch power vis-à-vis Congress.

Suffice it to say that liberal Ranking Democrat John Conyers will be pursuing a different agenda.

But political reality will circumscribe Conyers’ freedom of movement. At least for the first two years, for example, Democrats are expected to resist the temptation to push legislation opposed by the powerful “gun lobby.” This still allows them to pursue “gun control lite”—a strategy of passing only tepid anti-gun measures

pushed by Republicans and tepidly okayed by the malleable National Rifle Association.

This would include:

- legislation, sponsored by New York Democrat Carolyn McCarthy, that would dramatically expand the types of information in the West Virginia data bank that determine whether applicants will or will not be allowed to purchase guns;
- possibly, legislation to impose for the first time civil penalties on federal gun dealers; and
- legislation to dramatically expand federal funds for enforcement of “gun crimes,” including, in some cases, simple paperwork violations.

The House Rules Committee

The Senate and the House Rules Committees differ fundamentally in their respective functions:

- In the Senate, the Rules Committee has jurisdiction over infrequent Senate rules changes—and over elections. The terms under which particular bills are considered in the Senate—which amendments may or may not be offered and what length of time will be allotted for debate—are governed by “unanimous consent agreements,” which are negotiated separately for each bill. Every senator has a veto over every “unanimous consent agreement.”
- In the House, on the other hand, most bills that come to the floor have specifically tailored rules governing their debate that are written by the House Rules Committee. House members can vote against these take-it-or-leave-it rules allowing or prohibiting amendments and allotting time, but opposition to rules is normally a charade in which the outcome is a foregone conclusion.

Suffice it to say that, given the make-or-break influence that the House Rules Committee has over legislation, neither the chairman nor the members have much say over the larger issues. Rather, Pelosi and Hoyer will make the major decisions on what bills will come to the floor, when they will be considered, and the general scope of amendments (and particularly controversial amendments) that may or may not be offered.

The flurry of press interviews following the November 7 elections, however, did produce some interesting comments from two senior members of the Rules Committee.

First, some background: Democrats have long chafed over what they claim are restrictive and undemocratic Republican rules for debate that, they claim, stifle dissent and prevent popular amendments from being considered by the House. Republicans argued that the Democrats did the same thing when they were in control, and that they were simply giving liberals “a taste of their own medicine.” The media dutifully chimed in with its “studies” blasting Hastert & Co., but the question of whether the Republicans or the Democrats were more restrictive is probably an argument that is not likely to be resolved.

But the interesting thing is that, after the elections, two senior Rules Committee members—one Democrat and one Republican—were quoted in the media as calling for more open, permissive rules. Democrat James McGovern (D-Mass.) told the *Boston Globe*:

Those kinds of shenanigans [i.e., restrictive rules] are not going to be allowed to carry the day anymore. The will of the House and the Senate are going to be respected.

Similarly, Georgia Republican Rules Committee member Phil Gingrey pleaded for “the Democrats [to] offer more open bills, maybe more than we did.”

Polemics are one thing in a vacuum. Magnanimity in the heat of debate—when it means your prized legislative objective will be lost to a “killer amendment”—is quite another. And—for Republicans who tried to unilaterally abolish Senate rules in connection with the “nuclear option” in order to force the consideration of judicial nominees—it may be a little much to expect that the Democrats will be more decent than they were.

The Transportation and Infrastructure Committee

You can expect the Democrats to revisit a proposal to allot \$4.7 billion for transit and rail security—which was scuttled last year in a House-Senate conference by GOP leaders—in addition to a GOP-blocked Democratic amendment to require inspection of cargo on passenger planes. UPS—which generally uses its

own fleet—was a major contributor to the Republican Party and, whether as an attachment to this or some other vehicle, it is likely that the Democrats will seek revenge against the shipping giant.

The Financial Services Committee

It is hard to imagine a more partisan liberal Democrat than the new chairman of the Financial Services Committee, Massachusetts Democrat Barney Frank. On the other hand, it is hard to imagine that anything Frank could do would cause more damage than his “conservative” predecessor, Ohio Republican Mike Oxley—co-author of the notorious Sarbanes-Oxley Act.

Frank has never been accused of being reclusive or modest. And less than twenty-four hours after the elections made him the heir apparent to the Financial Services Committee, Frank was in the news offering a “grand bargain” to the business community. Speaking at a meeting of Boston business leaders the day after the election, Frank called for “public policies that’ll get some bigger share of the increased wealth into wages.” “[I]n return,” said Frank, “you’ll see the Democrats as internationalists.”

Well, it was vintage Barney Frank—making demands that were outside his committee’s jurisdiction in exchange for concessions that were also outside his committee’s jurisdiction, and that he is, to say the least, unlikely to be able to deliver.

But it is an indication that Frank—who had no problem wielding power when he had none—will use his new position as a “bully pulpit” on a wide range of issues.

Last month, we talked about the prospects for federal laws directly affecting banks and credit card companies. But there is another side to the jurisdiction of the Financial Services Committee. And that is the regulation of securities trading and, in particular, any fine-tuning that needs to be done to Sarbanes-Oxley.

Business and the SEC have now spent nearly a half-decade playing a game of “chicken” over the accountant certification requirements that Sarbanes-Oxley imposes on corporate executives with respect to SEC-mandated filings. Passed in the media-driven frenzy caused by the Enron controversy, terrified Republicans timidly rubber-

stamped the radically far-reaching ideas of liberal Maryland Senator (and then-Senate Banking Committee Chairman) Paul Sarbanes—including an effective federalization of accounting standards and a mandate that a corporate CEO certify his or her filings.

In late November, an ad hoc committee of professors and business executives issued a call for a loosening up of these Sarbanes-Oxley requirements. And their arguments were formidable. Fewer than one-tenth of the companies that went public last year did so in the United States. And—although no “moderate”—even New York Senator Charles Schumer (D) has expressed flexibility in this area.

Why is Frank so solicitous of business?

The answer is that, traditionally, businesses have given roughly half of their contributions to Democrats and half to Republicans—while labor unions have given 90% of their contributions to Democrats. That changed when the GOP took control of both Houses of Congress. But Frank and his Democratic colleagues are hoping that, by threatening and/or cajoling the corporate community, they can neutralize its support for Republicans in 2008.

Like its Senate counterpart, Financial Services also deals with “housing and urban affairs.” And, in this regard, Chairman Barney Frank will push legislation to “build, rehabilitate, and preserve” a million-and-a-half units of housing for the poor.

Energy and Commerce

Last month, we predicted a continued deadlock between the Bush administration and Congress over the major elements of the environmental agenda. And our assessment on that issue has not changed.

In fact, it is reinforced by the reemergence of Energy and Commerce czar John Dingell (D-Mich.), who is expected to be the administration’s strongest friend in battling any proposal that could hurt Detroit and the American automakers.

Having said that, while the administration may not have adopted a new energy policy, it has adopted a new tone. The White House now talks about working together with Democrats to curb “greenhouse gases” and to achieve other energy objectives. At least initially,

the overtures seem to consist of concessions that aren’t really concessions:

- encouraging Detroit to voluntarily move to cars that operate on ethanol or other alternative fuels—something that some analysts believe Detroit will have to do anyway in order to survive economically;
- reducing tariffs (i.e., taxes) with respect to ethanol (i.e., promoting “free trade”); and
- “piecing together a framework to replace the Kyoto accord after it expires in 2012” (i.e., throwing the Kyoto accords overboard without saying they’re doing so).

So, the question is whether this policy-change-sans-policy-change is simply another PR effort.

While Bush is not in a position where he can begin to sign Democratic environmental legislation without looking foolish, neither can he relish the prospect of vetoing a succession of “climate change” measures sent to him in anticipation of the 2008 elections. So if he could spend the next two years negotiating a relatively modest “climate change” package—rather than fending off press inquiries directed at his veto messages—he might be willing to do that.

There is, as always, a caveat: As with early administration excursions into education policy, a White House that is disadvantaged by circumstances and out-negotiated may end up conceding more than it originally intended.

One final issue that was not discussed last month: With the rising hysteria over “greenhouse gases,” the obvious question is whether this leaves an opening for the renewed interest in the use of nuclear power. And, prior to November 7, the answer to that question might well have been “yes.” But there is a problem. And the problem is well above the pay grade of the Energy Committee chairman—on either the House or Senate side.

For three decades, a battle has been raging over a plan to store the nation’s nuclear waste at Yucca Mountain—a site less than 100 miles outside Las Vegas, Nevada. And with the \$9 billion proposal to send 77,000 tons of nuclear waste to a single location being held up by lawsuits and funding cutbacks, the plan has

just developed an additional, possibly fatal problem: Its biggest opponent has now become the Senate Majority Leader.

Permanent Select Committee on Intelligence

Certainly, the most humorous aspect of the post-election jockeying was the awkward process of snubbing a liberal black in order to select a chairman for the Intelligence Committee. First on the seniority list was Jane Harman (D-Cal.)—a California woman whom Pelosi regarded as a competitor.

Next was Alcee Hastings (D-Fla.)—a black man who, as a federal judge, had been successfully impeached for allegedly conspiring to accept a \$150,000 bribe. Had the war in Iraq been less central to the Democratic takeover—or had attacks on the stewardship of the Intelligence Committee been less central to the Democratic takeover—Pelosi might have been loathe to snub the Black Caucus as one of her first major acts. But it wasn’t. They weren’t. And she did.

Ways & Means

Presumably, the first casualty of the Democratic takeover will be any effort to make permanent the estate tax cuts scheduled to expire in 2011.

In addition, congressional Democrats have already signaled their intent to tighten up foreign source income rules that allow corporations to avoid taxes of some income by incorporating in a foreign country.

But taxes may have to take a backseat to the Ways & Means Committee’s stewardship over the massive entitlements—with particular emphasis on fine-tuning the GOP’s prescription drug package.

The November 7 elections sent the pharmaceutical industry scrambling to make new friends on the Democratic side of the aisle. The coalition of drug-makers (or “Pharma”) had invested large amounts of cash on the most powerful Republican lobbyists in town.

It hired former Tom DeLay staffers working for the Alexander Group to produce a \$1.2 trillion prescription drug entitlement program favorable to the industry. And it was rewarded for its investment by a bill that (1) sent billions of federal dollars flowing to the pharma-

ceuticals without any real mechanism for imposing price controls, (2) avoided explicit provisions authorizing reimportation of prescription drugs from Canada, and (3) bought off the pivotal skeptical conservatives needed for passage with a Medical Savings Account tax-cut provision.

This was not the first—or the last—time Pharma sought to influence Capitol Hill by hiring the top staffers of the most powerful legislators. Earlier, when Bob Dole had been an up-and-coming star—before he became “the face of erectile dysfunction”—the pharmaceutical industry hired former Dole staffer Linda Nersessian to plot its legislative strategy.

So with victorious Democrats openly threatening to require entitlement programs to negotiate the prices of prescription drugs—in addition to threats to force the Food & Drug Administration (FDA) to take a new look at its procedure for approving new drugs—pharmaceuticals have been frantically shopping for Democratic lobbyists who could heal some of the wounds created by their support for Republicans. ■

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We begin 2007 with renewed dedication to our mission to foster knowledge about law and the administration of justice in a society committed to the rights of individuals, free enterprise, private ownership of property, balanced use of private and public resources, limited government, and a fair and efficient judiciary.



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