

WATCH REPORT

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CONGRESS

Who would have thunk it?

Senate Republicans Run Procedural Rings Around Majority Leader Harry Reid

In the 96th Congress (1979-80)—with Democrats controlling 58 seats in the U.S. Senate—Majority Leader Robert Byrd (D-W.Va.) took to the Senate floor in an extraordinary speech to complain that the Republicans were using parliamentary tactics to take control of the Senate schedule. The following January, the GOP won control of a majority of the seats in the Senate.

In the 109th Congress—with Republicans titularly controlling 55 seats in the “upper body”—it was the Democrats’ turn to run procedural rings around the hapless and inexperienced GOP—and to seize control of the agenda. To no small part because they wrote the national legislative agenda, it was the Democrats’ turn to take control of a majority of Senate seats in January 2007.

So it is more than an idle exercise to consider who’s actually running the Senate this year.

Congressional Democrats understood this and—in their “100-hours agenda”—passed a series of measures through the House that were intended to exploit the most popular elements of their platform, without unnecessarily scaring large conservative cohorts such as “pro-gun” Republicans.

But their efforts were crushed in the Senate by a surprisingly vigorous coalition of Senate Republicans. And—although it’s still early in the session—it has to be interesting that, in a virtual smorgasbord of parliamentary tactics, Senate conservatives, in a period of less than two months:

- killed the \$400 billion omnibus appropriations bill by threatening a filibuster by South Carolina Senator Jim DeMint to the three successive motions necessary to send the bill to conference (the motion to disagree with the House, the motion to request a conference, and the motion to authorize the chair to appoint conferees);
- almost killed the ethics bill by bombarding it with earmark-related “killer amendments” by Senators Judd Gregg (R-N.H.) and Jim DeMint and—in the

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process—shifting the leadership’s attention long enough to strike the popular provisions to regulate “grassroots lobbying”;

- sent the popular minimum wage bill into a negotiating quagmire by offering “killer amendments” embodying \$8.3 billion of tax cuts—in a strategy left over from last year’s “death tax” coalition;
- stymied the resolution to condemn the Bush administration’s handling of Iraq by a filibuster by Senator John Cornyn (R-Tex.) and Jim DeMint to the motion to proceed to the resolution—thereby precluding the Democratic leadership’s ability to play “let’s-make-a-deal” by offering the amendments necessary to buy off the votes required for cloture (because, at the motion-to-proceed stage, the bill is not yet amendable); and
- forced the Democrats to invoke cloture on the \$463.6 billion continuing resolution—thereby positioning themselves to blast them for profligate spending, even though the bill was no more expensive, in the aggregate, than the Republicans’ budget in 2006.

Make no mistake about it: This reenergized conservative coalition within the Senate Republican Party reinvigorates the prospects for this demoralized group in 2008. This, notwithstanding the opinion of one misinformed prominent conservative columnist who upbraided Senate Republican Leader Mitch McConnell (R-Ky.) for using procedural tools to forestall defeat on issues like Iraq, when, in the opinion of the columnist, he should have submissively accepted the loss.

In fact, the Republican minority would have continued to dominate the Senate had not McConnell and Minority Whip Trent Lott (R-Miss.) lost their nerve and voted to shut down the Republican filibuster of the Democrats’ follow-up continuing resolution (CR) to fund the government after the Republicans’ December CR expired on February 15.

McConnell had basically inherited the position of Republican Leader after his service in the #2 job of Republican Whip—in the Senate GOP’s variant of primogeniture. But in the legislative battles for which he was known, McConnell had stumbled over many of the same parliamentary issues that Republicans now exploited with precision.

A decade and a half earlier, for example, McConnell had allowed the Motor Voter bill to pass into law, rather than filibuster the motion to proceed to it—a tactic that

McConnell, at the time, regarded as illegitimate. (This was the technique used in 2007 to stall consideration of the Iraq resolution in the Senate.)

And a little over a half-decade ago, McConnell had allowed the McCain-Feingold bill to pass into law, rather than allowing senators like Bob Smith (R-N.H.) to offer “killer amendments” such as a partial birth abortion ban. (The same type of “killer amendments” sent both the ethics and minimum wage bills into at-least-temporary quagmires.)

Of course, none of this would have been possible had the Republicans, as they had wanted to do, succeeded in dropping the “nuclear option” on the Senate rules in the two preceding Congresses.

Be Careful What You Ask For

Throughout the 108th and 109th Congresses (2003 through January 2007), fledgling House-trained Senate Republicans—convinced that they would remain in the majority forever and that the Senate rules were nothing more than an impediment—tried to take a series of steps to decimate the Senate rules.

They:

- tried to create the precedent that a 51-vote majority could ignore the Senate’s written rules at any time without debate (the so-called nuclear option);
- passed “earmark reform” language, drafted by Arizona Republican John McCain, that defined “earmarks” so broadly that traditional pro-life, pro-gun, and other conservative appropriations riders would have been out of order; and
- passed legislation to effectively do away with Senate “holds” by requiring them to be published in the record in order to be honored.

Led by the equally inexperienced Bill Frist (R-Tenn.) and with McConnell’s support—the Senate GOP had become so frustrated that its members became infatu-

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ated with an argument by former Senate staffer Martin Gold that it was possible to eliminate pesky Senate rules without debate by a simple 51-vote fiat. And despite claims that they might be able to implement Gold's strategy and abolish some rules by fiat (such as unlimited debate on judicial nominations), while preserving others, Washington insiders understood what was at stake: most Senate Republicans had decided that they would rather risk having no binding rules in the Senate because of their belief that they were not likely to lose control of Congress in our generation.

Fortunately for Republicans, this ill-advised "nuclear option" failed. Because, as we have seen, the first two months of the 110th Congress have witnessed a revival of Republican fortunes based wholly on their mastery of parliamentary procedure.

"What goes around, comes around." Now in the minority, Senate Republicans are:

- complaining that their own overly broad definitions of "earmarks" are disqualifying their pro-life amendments; while,
- in the words of conservative movement founder Paul Weyrich, "thanking the Good Lord" that they don't have to live in the minority under the shadow of the "nuclear option."

The award for being "hoisted on one's own petard" goes to Senator Tom Coburn (R-Okla.). When the Senate was considering Republican-drafted ethics and earmark reform legislation in 2006, the *Watch Report* predicted that the overly broad definition of "earmarks" would result in the deletion of pro-gun and pro-life amendments from appropriations bills.

In early February, Coburn's "baby AIDS testing" program was deleted from the continuing resolution on the grounds that it constituted an "earmark"—in violation of the unlegislated "voluntary" prohibitions on earmarks imposed as a result of Coburn's own agitating.

But, if Senate Republicans, with some exceptions, have demonstrated a newfound mastery of their institution, what has changed? And, in particular, why has a group of senators who were so maladroit in the majority suddenly become the masters of the institution in the minority?

There certainly was no indication in the last four years—when Republicans had titular control of the Senate—that the GOP had any interest in or was even capable of mastering arcane Senate parliamentary procedure.

Part of the explanation lies in the "changing of the guard" at the 33-year-old caucus that coordinates strategy for the conservative half of the Republican Party in the Senate, the "Senate Steering Committee." Previously chaired by senators like Jesse Helms and James McClure during periods when they dominated the Senate, the chairmanship has now shifted from the reticent Alabama Republican Jeff Sessions to the considerably more activist South Carolina freshman Jim DeMint.

Congressmen Move Aggressively To Circumvent New "Reforms"

Rules are made to be broken. And for all the posturing Congress has done on "earmark reform" and "ethics reform," members have broadly and unabashedly moved to circumvent the new rules—long before they were dry on the page.

It would be hard to be too cynical about "reform." As for "earmark reform," last year Senate conservatives killed the omnibus appropriations bill primarily because of the large number of these special-interest politically driven riders. As a result, even though comprehensive ethics reform legislation had stalled under the weight of draconian "earmark reform" amendments, congressional Democrats committed that their \$463 billion appropriations legislation funding the government from February 15 through the end of the fiscal year on September 30 would—

- comply with the Republicans' overall spending cap (although, in the process, it would reorder some priorities); and
- would contain no earmarks.

Everyone expected that Congress would continue "business as usual." And, although explicit binding legislative earmarks would disappear, the plan presumably would be to replace them with extensive "report language in conference reports, dubbed the "statement of managers." Although technically nonbinding, report language ordering the funding of a pork-barrel project was effectively the same thing as an actual earmark—as few bureaucrats would deliberately disobey the chairman responsible for their appropriations. In fact, this report language is actually called "nonlegislative earmarks" in Washington parlance.

What actually happened was even more interesting. Apparently fearful of the repercussions from pages of

“unappropriated earmarks” in the conference report—which would be publicized at the same time they are sanctimoniously denouncing earmarks—appropriators, instead, included enough money in the bills to cover the earmarks and ensured that the money would be spent for pork-barrel projects by means of phone calls to agency budget officers from congressmen and congressional staff.

The administration countered by prohibiting agencies from spending money on nonlegislative earmarks, thereby setting up a fight that still rages.

The situation with “ethics reform” is, if possible, even funnier.

New rules prohibiting congressmen from receiving lobbyist payoffs only required a simple resolution in the House, so they were enacted even while broader ethics rules were stuck in the Senate. But congressmen found the holes in the ethics rules with even more alacrity than the holes in the earmark rules. Thus:

- Rather than buying a congressman’s ear with a \$200 lunch at Charlie Palmer’s or Capital Grill, a lobbyist seeking comparable access must now host a political fund-raiser for the member—preferably at a Capitol Hill townhouse, which has now become the “cost of admission” to the inner circle of Washington power brokers.
- Rather than providing the congressman a ride on a corporate jet that the company already owns—thereby allowing the member to circumvent the nightmarish airport hassles that Congress has inflicted on everyone else—the company must now make a contribution to an organization set up by the congressman, which will, in turn, reimburse the costs of the private jet.

As you can see, Congress has not outlawed the practice of buying members. Rather, it has simply dramatically raised the price tag.

Incidentally, all of this comes on the heels of the unlamented death of a linchpin of the Federal Election Campaign Act of 1974 (“FECA”)—the presidential campaign fund. This is because prominent Democrats like Barack Obama and Hillary Clinton have made it known that they will refuse to accept federal money (and, more importantly, the attached federal strings) for their presidential runs.

This is actually a more important development than most people realize for this reason:

As you may remember, the Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), held that it was unconstitutional to limit campaign expenditures. This holding is made all the more significant by the fact that the Supreme Court, just this past Term, refused the invitation of Howard Dean and the state of Vermont to revisit the expenditure-related holdings in *Buckley*. [*Randall v. Sorrell/Vermont Republican State Committee v. Sorrell/Sorrell v. Randall*, Nos. 04-1528/04-1530/04-1697]

But the Supreme Court, in *Buckley*, did say the government could, in effect, bribe campaigns into compliance with expenditure limits by offering them “matching funds”—which presumably would be set at a level which would make it political suicide to forgo them. Thus, the presidential campaign fund was left intact by the Court.

For a long time, it was an orthodoxy of the left wing of the Democratic Party to support legislation that would set up senatorial and congressional “matching funds”—as the only constitutional vehicle for regulating campaign expenditures. As more and more Americans “voted with their 1040” and refused to contribute to the presidential fund, it became more and more tempting for well-heeled campaigns like that of George W. Bush to choose, instead, to rely on their own fund-raising prowess and reject federal support.

But, with the early decisions by very liberal Democratic candidates to eschew “matching funds,” the presidential “matching funds” system becomes, at the very least, less important at the highest levels of presidential politics—except to the extent that its continued existence may encourage third-party “spoiler” candidacies in the future. Both parties may, one day, rethink whether their taxpayer-funded political conventions are worth this cost.

GLOBAL WARMING

UN Panel Bars Further Debate on Global Warming

It’s official: Just in time for the coldest weather in 11 years—and 15 feet of snow in northern New York—a UN panel, the IPCC, issued a statement barring further debate on “global warming.”

And the speech police quickly went to work enforcing the ban on public discussion. Four liberal senators—Socialist Bernie Sanders (Vt.), and Democrats

Pat Leahy (Vt.), John Kerry (Mass.), and Dianne Feinstein (Calif.)—wrote to the American Enterprise Institute, trying to stifle a conference on “global warming” featuring climate scientists with mixed viewpoints about its seriousness and cause.

The senators argued that the fact that Exxon Mobil contributed to AEI (although less than 1%) made any conference an exercise in “your donor’s” self-interest (although Exxon Mobil claimed to know nothing about the project until it read about it in the newspapers).

And the analogy they were trying to draw was clear to anyone within the Beltway: The senators intended to compare AEI to the variety of tax-exempt organizations set up by Tom DeLay (R-Tex.) and others for the purpose of disguising the identity of the ultimate sponsors. It was also clear that the intent was to taint not only the credibility, but also the ethics of AEI and anyone who dared engage in political speech questioning “global warming.”

It can hardly come as a surprise that people talking about the “certainty of global warming” in the middle of a particularly harsh stretch of winter might feel vulnerable.

This charade reached its peak when a February 14 House Energy and Commerce subcommittee hearing on “Climate Change: Are Greenhouse Gas Emissions From Human Activities Contributing to a Warming of the Planet?” was cancelled as the result of a massive blizzard, ice storm, and deep-freeze cold spell that successively hit the city of Washington.

Scientists had been quick to blame unusually mild weather earlier in the winter on “greenhouse gases.” But, faced with record cold and snow in early February, they were quick to take advantage of that as well. On programs as dumbed-down as the February 6 *ABC Evening News*, one reporter echoed the party line that “global warming” did not necessarily imply “warmth”—but merely temperature extremes. Hence, what we are really talking about is not “global warming,” but “global extremism”—a fact that should come as a relief to anyone worried about glaciers and the arctic ice cap.

And, if the weather was not enough to make the “global warming” crowd look goofy, there was the fact that the UN hardly has “clean hands” on the matter of environmental pollution: “Greenhouse gas” emissions are expected to rise from 26 billion cubic tons to 40 billion cubic tons by 2030—three-fourths of that increase is expected to come from the Third World. Forty percent will come from Communist China alone.

China is the world’s #2 source of “greenhouse gases”—trailing only the United States, which it will ultimately surpass. And it seems unlikely to retreat from its policy that “development is the first urgent task.” Although perfectly willing to mouth platitudes about “global warming” threaten[ing] China’s food security,” China believes—probably correctly—that the only real way to avert the millions of malnutrition deaths that have characterized Chinese history is to work itself out of Third World status. And doing this is going to require pollution.

Humorously, China—which couldn’t care less about “global warming” as an issue—is perfectly willing to milk the controversy for its own financial benefit:

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- China, for example, has graciously let it be known that it will help European companies bound by the Kyoto Protocol to set up an arrangement whereby they can pollute more by investing lots of money in pollution-reduction programs in China.
- Along the same lines, the Chinese government has magnanimously made efforts to allow European companies to pay nonpolluting Chinese companies for “carbon credits,” which will allow them to spew more “greenhouse gases” in places like China.

China’s environmental record has become another arrow in a broader battle over China’s devastating impact over heavily unionized Rust Belt industries. Seeing concessions to Democrats as the only conceivable strategy for winning “fast track” extension and approval of more trade deals, the White House has agreed to require trade partners to adopt counterproductive labor laws similar to ours—a move that presumably would make our dying industries “competitive.”

Internecine Jurisdictional Warfare in the House

The jurisdictional war between House Speaker Nancy Pelosi (D-Calif.) and Energy and Commerce Committee Chairman John Dingell (D-Mich.) about House juris-

diction over “global warming” is far from over. But a small skirmish has come to an end.

For months, the *Watch Report* has talked about the looming standoff—with mainstream Democrats working to make regulation of carbon dioxide a central element of their 2008 election push, but with Dingell, whose constituents include major automobile manufacturers, resisting.

To circumvent Dingell, Pelosi proposed the creation of a new House committee—with authority to hold hearings and call attention to issues of climate change, but with no jurisdiction to report legislation.

After a three-week turf battle, Pelosi and Dingell reached an agreement that included these concessions to the Michigan Democrat:

- The special committee will expire at the end of next year.
- Dingell will have first crack at witnesses, in the event of a conflict.
- The new committee will have to consult with the Speaker’s office prior to issuing subpoenas.

The question of who won and who lost this battle of the titans is not entirely clear. At stake are not only questions of whether carbon dioxide is regulated as a “greenhouse gas,” but whether corporate average fuel economy (“CAFE”) standards are raised in order to cut carbon emissions by automobiles.

Good News

There is some good news on the “global warming” front: According to Stephen Hawking and a number of recent books by William Burrows, British astronomer Martin Rees, and others, the Earth is in danger of being plunged into a cataclysmic freeze by a collision with one of more than 150,000 asteroids.

And although most asteroids are reported to “congregate” between Mars and Jupiter—a verb more frequently applied to innercity gangs—855 asteroids with a diameter of one kilometer or more pass within a mere 30,000,000 miles of Earth.

According to *USA Today*—which has been at the forefront of arguing that “global warming” from man-made sources cannot legitimately be debated—such a collision “could lead to a ‘nuclear winter’ and an end to most life on the planet.” Although the newspaper is understandably reluctant to point out the benefits of this, one of them would surely be a massive expansion of the polar ice caps (perhaps even to the Equator) and

a dramatic reemergence of shrinking glaciers (in glacier-starved locations such as Los Angeles, Phoenix, Houston, Honolulu, and Miami).

Free Traders Buffeted By Political Winds

Even in the best of years—with Republicans in the majority and Tom DeLay (R-Tex.) handling the whip counts—the issue of trade was always the question on which the House was most precariously divided—sometimes by as little as a single vote.

Suffice it to say that—even with “fast track” procedures for expedited approval of trade agreements in place—the era of free trade agreements is now deeply threatened, at least for the 110th Congress. And, if “fast track” itself is not reauthorized in the current political climate, this only raises the bar for future trade agreements—allowing them to be filibustered in the Senate and requiring a 60-vote margin for approval.

Bush’s problem is compounded by the fact that the U.S. trade deficit for 2006 reached a record high for the fifth year in a row—coming in at \$763.6 billion. This is over twice the trade deficit during the first year of the Bush administration—which was \$362.8 billion.

Congressional Democrats were quick to respond to this bit of bad news—writing to the White House to demand that action be taken to punish unfair trade practices, such as currency manipulation, in Europe and the Far East.

Free traders leapt to point to positive news, including

- the fairly consistent increase in U.S. exports;
- the relatively stable trade deficit during most of the fall;
- the extent to which the dramatic year-end reversal was due to a \$1.59 increase in the cost of a barrel of oil; and
- the fact that the U.S. economy has continued to grow in the face of the gaping trade deficit—up 3.5% in the fourth quarter.

But none of this will be very helpful in getting “fast track” renewed.

This is particularly true because the trade deficit with China alone was \$232.55 billion—representing a

15% one-year increase. And, even more than other areas, trade with Communist China ignites the opposition of a coalition of both liberals and conservatives.

To try to address this bipartisan restiveness over the lopsided Sino-American trade relationship, Treasury Secretary Henry Paulson has laid out an agenda for resolving long-standing gripes with the emerging Communist giant. Among the areas that are being discussed are

- the massive patent and copyright fraud that almost certainly goes on with the tacit acceptance of the Chinese government;
- China's currency policy, and, in particular, arguments that it manipulates its currency in order to bolster its trade balance;
- the United States desire that Chinese financial markets be opened to foreign firms;
- China's dismal environmental record that, as we have seen, will result in almost an additional six billion cubic tons of "greenhouse gas" emissions by 2030; and
- perhaps to the amusement of the Chinese, U.S. concern over the low level of health and pension benefits afforded Chinese workers.

Unions Move To Rewrite Labor Law

During the 2006 elections, labor unions focused on the types of issues we have already discussed: ethics, trade, and the minimum wage.

But, as payment for the importance of their political muscle in the Democratic victories, Big Labor is also moving quietly to achieve a more immediate goal: changes in federal and state labor laws that would make it easier for them to organize and to force workers to contribute to their political war chest.

In states like Iowa, unions are making concerted efforts to repeal Right-to-Work laws that allow workers in unionized industries to opt out of union membership.

But, at the federal level as well, the AFL-CIO and others are pushing legislation to allow an industry to be organized by merely securing signatures on cards, rather than having to win a federally supervised election. Dubbed the "Employee Free Choice Act," the bill is expected to easily clear the House—but to be hung up on a Senate filibuster (and a potential veto threat).

Good News and Bad News for Hedge Funds

The good news for hedge funds is that a Bush administration working group—led by Treasury Secretary Henry Paulson—decided not to call for the imposition of new federal regulation of hedge funds.

Rejected were proposals to give the government the authority to inspect the books of hedge funds or to require regular reports.

The decision represented a move by the more pro-business officials closer to the White House to rein in the more liberal regulators.

Last summer, on a 3-to-2 vote, a federal appeals court overturned hedge fund regulations slammed through the Securities & Exchange Commission ("SEC") by former SEC Chairman William Donaldson—on the grounds that the SEC lacked the statutory authority to promulgate them.

And, although incoming Chairman Chris Cox decided not to appeal the court's decision, he is moving ahead with new regulations to require greater wealth for hedge fund investors—a move that presumably will be unaffected by the working group's decision.

The bad news for hedge funds is that the SEC is continuing to move vigorously under its current authority. And anyone who thought that hedge funds could relax following the departure of Donaldson has probably been forced to rethink that position.

Good News for Corporate Attorneys

On the heels of continuing Supreme Court jockeying over the Private Securities Litigation Reform Act of 1995—successful "Contract With America" legislation to curtail securities suits by investors—the SEC has filed a brief with the High Court urging a tougher standard for investors wishing to sue corporations and accountants.

The case arises out of a series of inaccurate statements made by Tellabs' chief executive Richard Notebaert concerning the company's earnings and

sales—statements that, when corrected, caused the corporation's shares to drop from a high of \$67.13 to \$15.87.

The 1995 Act requires a fraud complaint by investors to state facts “giving rise to a strong inference that the defendant acted with the required state of mind.” And, because the Senate killed the Reagan administration's 1982 criminal code recodification, which would have reduced the 10b5-type securities-fraud-related state-of-mind requirements to “recklessness” or even less, it is still possible that Tellabs could escape liability because its statements, while inaccurate, were unintentionally so.

The Seventh Circuit Court of Appeals had held that the case could go forward because all the law required was that investors had to show that the facts were such that “a reasonable person” would infer, as a result of the allegations (if proved), that corporate executives acted with the requisite state of mind.

In the SEC brief, the agency argued that plaintiffs should be required to show “a high likelihood” that the defendants acted with the required intent. Joined by the Justice Department, the Court also was urged to allow

the trier of fact to “weigh any facts that provided for an innocent explanation of the conduct of the company and its executives.”

In its first outing before the High Court last Term, the 1995 Act was interpreted broadly. The statute, by its terms, applied to the sale or exchange of securities. But the Court held that the term “sale or exchange” also applied to circumstances in which the plaintiff merely held onto shares (without selling or exchanging them) as a result of self-interested advice by their brokers.

It is also significant that the Rehnquist/Roberts Court has given broad deference to agency interpretations of their own statutes. ■

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