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Americans Demand New Direction in New Congress

With the midterm elections over, exit polling and voter reactions indicate Americans want reform on issues close to home, and not the partisanship and corruption of Congress's past. In a [post-election letter](#) from Executive Director Gary Bass, OMB Watch solicited responses from its email subscribers and appreciates the thoughtful and insightful comments. The [responses received](#) make one thing clear: Americans want our nation led down a new path - one with honest campaigns, an inclusive economy, and a clean environment.

The most common issue of concern among responses is the need for reformation of the election process. The Democrats' [100 hours agenda](#) includes many ambitious goals, but Americans are clamoring for the new majority to address lingering problems with our elections. "I think the 100 hours agenda is good," says Donna D., but she contends "critical issues are missing." She wants Congress to begin "protecting our vote with verifiable paper trails." Donna continues, "If cash registers can print receipts, why can't voting machines?" Lance B. echoes her concerns, calling for a policy to "eliminate or fix electronic voting machines" by employing "paper trails, open-source programming, and

bullet-proof security."

Americans also feel campaign finance and lobbying reform should be top priorities for the new Congress. Dick K. says: "I think there needs to be a fundamental change in the way we run campaigns for national office as well as limits on how lobbyists can access and contribute to national officers. Perhaps if the government funded national campaigns or there were limits on campaign spending at the least, the power of influence peddlers would be reduced."

Further responses express concern over the influence of corporations in elections and policy. Tom A. from San Dimas, CA maligns "the corporate interests in this country that put their profits ahead of the common good." Gale S. would like Democrats to add to their agenda "election reform with an end to corporate donations even through PACs, and a return of the fairness in broadcasting doctrine," adding, "Then this nation may heal."

Discontent with the lack of transparency in the voting process and a fear of corrupting influences in government may reflect a backlash against corruption which voters expressed in [exit polling](#). Seventy-four percent of respondents indicated "corruption and scandals in government" as extremely or very important in their Election Day decisions - and 41 percent said it was extremely important.

The only issue more important to voters than corruption in government, according to exit polling, was the economy. (Terrorism and Iraq were rated third and fourth respectively.) Eighty-two percent of respondents rated economic issues as extremely or very important. Responses received by OMB Watch bolster this finding. "With personal debt at a record high, with healthcare costs impacting more and more budgets, and with stagnant wages a fact of life, Americans are finally looking past the Bush rhetoric and demanding change," says Patricia C.

Some of the responses OMB Watch received take dead aim at the Bush administration's tax policy. "The fiscal burden on future generations that the last six years of tax legislation has created is unacceptable and must be addressed sooner rather than later," says Linda B. She continues with advice for the 110th: "The new Congress should therefore rethink the various revenue reductions enacted over the last six years and re-focus tax provisions to provide reasonable tax rates for ordinary Americans and a fairer share of the tax burden for those in the top five percent." One specific way of doing that, she says, is preserving the estate tax: "Estate tax repeal or reduction makes no sense whatsoever."

The Alternative Minimum Tax (AMT) is also of concern to Americans. Brent P. of Brownsburg, IN says: "The AMT and standard deductions need to be increased by \$10,000 and the AMT then needs to be indexed to inflation like the standard deduction. The tax revenue losses can be replaced by increasing taxes on the wealthy and estates over \$5 million." With [a recent study by the Tax Policy Center](#) (a joint project of the

Urban Institute and the Brookings Institution) showing that the AMT is likely to encroach upon more and more of the American middle class, Congress would be wise to act upon this voter sentiment.

The health of our environment is another major concern. In reaction to the Democrats' 100 hour agenda, Nancy asks, "Where in all these issues is environmental protection?" Specifically, voters are concerned about American energy policy. Jerry P. comments: "The new Congress will have ample opportunity to conduct effective oversight on global climate change and the deficiencies in current energy usage. Their outcome should be an aggressive new national energy policy that elevates renewable sources, conservation and responsibility reflective of our contribution to global carbon dioxide emissions."

On a related note, OMB Watch received many responses demanding action on climate change. "If the developed world cannot provide leadership in this issue, climatic change will become ever bigger and more quickly irreversible," says Deborah W. "To me, global warming is the biggest issue the planet faces," says Shirley B. of Maryville, TN.

The overarching message voters seem to be sending is their desire for substantive change. According to a [Democracy Corps poll](#) taken the weekend before the election, 79 percent of respondents indicated the following statement - Getting politicians to work for the public good, instead of the special interests - to be one of the top three reasons to vote for Democratic candidates. Voters have grown weary of partisanship and corruption, and they demand action. Can Democrats enact change? Not everyone is sure. "I am a life-long Democrat who has been disappointed in the party over the last ten years," says Bonnie B. of New Hampshire. However, like most Americans, Bonnie is hopeful, saying she "deeply hopes that the party makes substantial and relevant changes forward for the country."

Senate Committee Set to Vote on Dudley for Regulatory Czar

The Senate is likely to vote in December on the nomination of Susan Dudley to be the new regulatory czar, according to Sen. Susan Collins (R-ME). Despite widespread criticism from the public interest community on the nomination, a confirmation hearing in which Dudley evaded disclosing much about her views, and new concerns about a perception of a conflict regarding her husband serving as head of an office that writes environmental regulations, it appears that Collins's committee will move forward with the nomination.

Collins, the current chair of the Committee on Homeland Security and Government Affairs, was the only Republican member of the committee to attend the November 13 hearing on Dudley's confirmation to administer the Office of Information and Regulatory Affairs (OIRA) at OMB. OIRA is the office that makes final decisions about which federal agencies' regulations are approved, as well as what information is collected by federal

agencies.

The incoming chair, Sen. Joseph Lieberman (ID-CT), did not attend but submitted an extensive list of questions to Dudley prior to the hearing. The Democrats on the committee asked Dudley probing questions concerning her views on regulation of arsenic, ozone, the Toxics Release Inventory, and her writings on the economic benefits of regulations generally, as well as her ideas about managing OIRA if confirmed. Dudley has written extensively on the benefits of using market forces to regulate public interest protections rather than having governments issue protective standards. Dudley was most recently on the staff of George Mason University's Mercatus Center, where she was the director of regulatory studies.

The Dudley hearing was another example of how such nominating hearings have become exercises in obfuscation, with the nominee revealing little and vowing openness once confirmed. Generally, Dudley evaded answering specific questions while promising to use OIRA only as the implementing mechanism for agency regulations. Time and again she acknowledged that cost-benefit analysis was but one tool in determining the reasonableness of proposed regulations. Her writings, however, have strongly urged the use of free market solutions to health and safety issues.

Even when pushed on issues by Sens. Carl Levin (D-MI), Mark Pryor (D-AR), and Tom Carper (D-DE), Dudley evaded the questions with answers suggesting that the Senators were reading her writings too broadly or saying she would be willing to talk about these issues once confirmed. For example, Pryor seemed especially vexed by Dudley's position on the "senior death discount." On October 31, 2001, in public comments to the Environmental Protection Agency, Dudley criticized the EPA's stricter standards on arsenic in drinking water, arguing that "EPA's value [per statistical life] likely overstates the benefits of the rule. . . . This can be addressed with sensitivity that estimates benefits based on a value per life-year saved, or an *age-adjusted value per life*." [Emphasis added.] That is, assigning a monetary value to the life of someone affected by the standard would mean discounting the value of someone with an average of 10 years to live compared with the value assigned to someone with 70 years of life left. In her answers to Pryor, Dudley was deceptive in refusing to acknowledge that calculating *how many years* was an age-based criterion.

Dudley retreated from only one position. When Collins asked if Dudley really believed that states such as Maine, which are downwind of Midwestern power plant pollution, should be in the position of compensating polluters, Dudley admitted that she "was wrong" and suggested those words were an example of someone engaged in scholarly writings instead of a practical regulatory role.

Collins may have been impressed with this moment of candor as she told the press after the hearing that she was leaning toward supporting the nominee and expected to bring the nomination to a committee vote during the December lame duck session. No other members on the committee have taken positions. However, given the probing questions

by the Democrats and evasive responses from Dudley, it would appear that the concern over her nomination will not likely dissipate. Now that the record is closed, one would expect Lieberman to take position on the nominee once his office has reviewed her record.

A recent BNA article emphasized a potential conflict of interest for Dudley. Her husband is an EPA official responsible for regulatory analysis and policy development. The BNA article cites several ethics analysts who question the appearance of conflict and propose ways in which potential conflicts on EPA's regulatory issues might be avoided. No committee members asked Dudley directly about conflicts, but Collins opened the hearing saying that the committee needed to resolve whether there was anything regarding a conflict of interest that would prevent Dudley from doing the job. The Office of Government Ethics has provided a letter to the committee saying it believes Dudley complies with all rules governing conflicts of interest.

OMB Watch has joined with Public Citizen, the United Auto Workers, Natural Resources Defense Council, and the American Federation of State, County and Municipal Employees in sending a letter to Collins and Lieberman opposing Dudley and calling for the committee to reject the nomination. This letter follows on the heels of a letter signed by more than 100 organizations that indicated opposition to the Dudley confirmation.

The fact that Dudley is outside the mainstream in her views on regulatory matters and dodged the tough questions during her confirmation hearing has added to speculation that the Senate Democratic leadership may oppose bringing her confirmation to the Senate floor. There is uncertainty how long the lame duck Congress will stay in session, but increasingly it seems the Dudley nomination will take considerable floor time if the Democratic leadership opposes her nomination.

A few weeks ago, we requested that you to take action against this nomination. Now that it is clear that Collins wants to send her nomination to the floor, we ask you again to [contact your Senators](#), while they are examining Dudley's record, and urge them to oppose her nomination. Her refusal to honestly answer questions about her beliefs and plans as OIRA director prevents Senators from exercising their constitutional responsibility of advice and consent. If left with only her writings to gauge her beliefs, then the Senate should reject this nominee.

Democrats Pledge Ethics Reforms

Two weeks after the election, attention has turned to considering what the results mean for government priorities and the likely impacts on the way Congress operates. Democratic leaders in the House and Senate are working on an agenda for the 110th Congress that includes ethics and lobbying reform proposals as part of their ["100 Hours"](#) initiative. As incoming Speaker of the House Nancy Pelosi (D-CA) said, "We will start by cleaning up Congress, breaking the link between lobbyists and legislation and commit to

pay-as-you-go, no new deficit spending."

Lobbying reform is a high profile topic since [exit polls](#) revealed that corruption was one of the main issues to energize voters in this midterm election. Forty-one percent of those polled said that corruption and scandal was a very important issue in their vote for the House. This is consistent with a [Democracy Corps poll](#) taken the weekend before the election. According to the poll, ethics and corruption were among the top issues for Republicans who intended to vote for a Democrat.

Both the House and the Senate passed broad ethics bills (HR 4975, S 2349) this past year, but they were not able to resolve differences between the two bills. The primary obstacle was whether regulation of independent 527 organizations should be expanded. (It was included in the House bill, but not the Senate version.) In addition, the Senate bill, passed in March, includes a provision requiring disclosure of grassroots lobbying expenses over a certain threshold, but this requirement is not in the House version.

While details of the Democrats' lobbying reform proposals are not yet available, the agenda for change in January does not include the controversial 527 provision. As the [New York Times](#) details, "Their initial proposals, laid out earlier this year, would prohibit members from accepting meals, gifts or travel from lobbyists, require lobbyists to disclose all contacts with lawmakers and bar former lawmakers-turned-lobbyists from entering the floor of the chambers or Congressional gymnasiums." More ambitious proposals may also be added. Sen. Barack Obama (D-IL) told the *Times* "The dynamic is different now."

Reform advocates see the switch in power as an opportunity to restart lobbying and ethical reform legislation. On November 9, six reform groups held a press conference praising Pelosi and calling on her to uphold her pledge to change lobbying and ethics rules. These groups, Public Citizen, Common Cause, Democracy 21, the Campaign Legal Center, League of Women Voters, and U.S. PIRG, will be seeking the establishment of an independent office to investigate ethics violations, rather than leave enforcement to congressional ethics committees. Their [statement](#) said, "Put simply, the House and Senate ethics committees have no credibility with the American people, and for good cause. With the worst corruption and lobbying scandals in decades, the ethics committees took no public action to hold any member of Congress or any staff member accountable in connection with the scandals. Neither the House nor Senate ethics committees, furthermore, publicly undertook an investigation of Jack Abramoff and his numerous scandalous activities in connection with Members and staff." Obama supports this proposal, but it is opposed by Sen. Diane Feinstein (D-CA), who will chair the Rules Committee, because it would create new federal bureaucracy.

Reform issues that are back on the table also include earmark transparency and S. 1508, the Senate Campaign Disclosure Parity Act, which would require electronic filing of Senate campaign contributions. Currently, Senate candidates are not required to file their campaign contributions electronically, unlike all other federal candidates. The

[Campaign Finance Institute](#) reported that in six Senate races, voters could not retrieve information on election contributions made after June 30.

It is not clear how the House will proceed with its reform legislation, although it is part of the Democrats agenda for the [first 100 hours](#). Pelosi has been discussing the idea of breaking up the reform legislation into separate bills to allow more focus on the corruption issue. For example, there might be a bill on the enforcement issue separate from the ban on travel and gifts from lobbyists. It is likely that pay-as-you-go rule changes will also be part of this overall package of reforms.

FEC Expands Regulation of Voter Guides

A Nov. 9, 2006 enforcement decision by the Federal Election Commission (FEC) expands federal campaign finance regulation to voter guides that do not endorse or oppose candidates if the FEC determines the guide's overall content implies support or opposition to federal candidates. The case arose from a [complaint](#) filed in December 2004 by Edmund A. Hamburger of Pinellas Park, FL, which claimed "the Sierra Club was advocating the election of Senator Kerry to the Presidency of the United States." On Nov. 9, the Sierra Club chose to settle the case and pay a \$28,000 civil fine rather than incur further legal expenses, but denied any wrongdoing. The case could discourage future efforts by advocacy organizations to educate voters about candidates' track records.

The complaint against the Sierra Club cited four voter guides, titled "The Dirt," "Let Your Conscience Be Your Guide," "The Environment for Dummies," and "From one friend of our environment to another." The FEC dismissed the complaints against all but the "Let Your Conscience Be Your Guide" pamphlet, finding in July 2006 that there was probably cause to believe the Sierra Club made a prohibited independent expenditure by spending \$69,771 to produce and distribute it. The FEC essentially held that the Sierra Club could only pay for this type of voter guide with funds raised from individuals and subjected to FEC contribution limits and reporting requirements.

The Federal Campaign Finance Act (2 U.S.C. 431(17)) prohibits corporations from spending treasury funds on communications "expressly advocating the election or defeat of a clearly identified federal candidate," even when the effort is independent of candidate campaigns or political parties. This case is notable because it moves away from long-standing practice following the Supreme Court's 1976 decision in *Buckley v. Valeo*, which defined "express advocacy" as clear "vote for" or "vote against" statements. The FEC noted that Supreme Court's opinion in *McConnell v. FEC*, which upheld the Bipartisan Campaign Reform Act of 2002, said that Congress' authority to regulate election related speech is not limited to "vote for" or "vote against" statements, but can include communications that are "unmistakable, unambiguous, and suggestive of only one meaning" so that they can "only be interpreted by a reasonable person as containing advocacy of the defeat of one or more candidates."

This standard had not been previously enforced because two federal courts had held its application unconstitutional, requiring the "magic words" of express endorsement or opposition. After the *McConnell* decision, the FEC said it had authority to regulate implied support or opposition as well. In the [FEC press release](#) on the case, FEC Chairman Michael Toner said, "This is one of the most important express advocacy cases the Commission has resolved in recent years. I am very pleased that the Commission was able to conciliate this case and provide further guidance to the public on the appropriate scope of the express advocacy test." The statement went on to note that the Sierra Club case "represents the first major case to consider the reach of the express advocacy test in light of the landmark Supreme Court case, *McConnell v. FEC*."

The "Conscience" voter guide compared the environmental records of the Presidential candidates, George Bush and Sen. John Kerry (D-MA), as well as Sen. Mel Martinez (R-FL) and challenger Betty Castor. The heading said, "LET YOUR CONSCIENCE BE YOUR GUIDE", and the inside went on to say, "AND LET YOUR VOTE BE YOUR VOICE." It used check marks in boxes to compare the environmental record of the candidates, along with narrative descriptions that the FEC said "made it clear that a checkmark represented a favorable environmental record in the eyes of the Sierra Club," thus promoting Kerry and Castor and opposing Bush and Martinez. The [July memo from the FEC General Counsel](#) to the Commissioners responded to the Sierra Club's complaints that the standard is too vague by saying the "reasonable person test" is objective, and no express advocacy would be found "if there is genuine room for 'varied understanding of [reasonable] hearers.'"

It appears the check boxes in the "Conscience" voter guide tipped the balance in the eyes of the FEC, since the other three guides were deemed acceptable and did not use checkboxes. Attorney [Bob Bauer notes on his blog](#) that the "Dirt" guide also had a favorable narrative description of Kerry's record on the environment, saying it builds on "a thirty year record of supporting strong environmental protection" while Bush has "consistently chosen to protect the interests of his oil and gas industry campaign contributors at the expense of public health..." and urges readers to go and "dig deeper for facts about the candidates." The General Counsel's July report distinguishes this guide from the "Conscience" guide by noting, "It also contains no symbols, percentages, or any other similar indication that a candidate agrees with the Sierra Club position 100% of the time." It appears the FEC sees this as urging the public "to become better informed," as opposed to favoring one candidate over the other.

The Sierra Club's press release announcing the settlement called this a "subjective and murky interpretation" of the law, but said "we've decided we have better things to do with our money - like continuing to inform Americans where candidates stand on clean air, safe water and protecting our treasured lands." They note the FEC's decision is based on "a fuzzy definition that courts have found unconstitutionally vague" and that the Supreme Court's decision in *McConnell* "did not give the Commission authority to use this smell test." Instead, the Sierra Club says the case leaves nonprofits with less clarity about the law, which will "surely frighten some groups into silence, squelching efforts to

educate voters on important issues."

The impact of this case could be a widespread reluctance by nonprofits to provide voters with materials that mention one's conscience or values, or to use elections to hold politicians accountable for their records. It moves what was a clear cut area of law - the "magic words" definition of express advocacy - into vague and uncertain terrain similar to the IRS "facts and circumstances" test, which is used to determine when charities and religious organizations illegally intervene in elections. This has not worked well in tax law, and is not likely to work well in election law either. Nonprofits should continue to demand clear cut rules that allow them to express views on the actions and policies of elected officials and candidates for office.

Same Old Congress, Same Old Budgetary Gridlock: Long-Term CR Likely in December

Congress has made very little progress toward being able to finally adjourn for the year, leaving most of their appropriations work, a [set of popular tax breaks](#), and funding problems in the State Children's Health Insurance Program still unaddressed. With time running out, Congress will probably pass another extension of a [budget-cutting continuing resolution](#), once again neglecting its duty to enact the annual spending bills.

In order to keep the government running, Congress did recently pass an extension of the severe continuing resolution ([H.J. Res. 100](#)) it originally enacted before recessing to campaign in October. When Congress returns from its Thanksgiving recess, it will probably pass another extension of the same CR, which will likely last until early January, though some conservatives have made a push to have the next extension cover all of FY 2007.

Earlier this year, appropriators had promised to avoid a long-term CR, but a handful of conservative Senators are making a concerted effort to block the passage of "minibus" or "omnibus" appropriations bills that would attract spending earmarks. So obstructed, the lame-duck Senate only cleared one of 10 remaining appropriations bills - the Military Construction-Veterans Administration bill ([H.R. 5385](#)). [CQ Daily recently reported](#) that Senate Majority Leader Bill Frist (R-TN) now does not plan to try to pass more appropriations bills this year, and will likely encourage a long-term extension of the CR that will last through January.

This strategy, however, should only serve to *delay* the passage of an omnibus bill, since Congress will still probably use an omnibus vehicle to clear the 10 remaining appropriations bills. The result of delaying a vote on an omnibus bill may be to make the incoming, 110th Congress seem responsible for passing multiple earmarks and making unpopular spending choices in 2007. Even if an omnibus bill is passed in December, spending will be constrained by a tight cap on discretionary spending that the Defense and Homeland Security appropriations bills have [made even tighter](#). Human needs

programs may [suffer cuts](#) as a result.

Part of the reason conservatives in the Senate are advocating a long-term CR is because of the way the resolution is worded. This CR is structured in a way that cuts funding for all programs it covers. It funds all discretionary programs at the *lowest* of either the FY 2006 level, or the level passed by the House or Senate - making the highest possible funding the FY 2006 appropriations. After accounting for inflation and population growth, the CR will flat-fund many government programs and make more drastic cuts in other areas.

The longer this CR is extended, the deeper the funding cuts will be. It will also keep in place budgetary decisions that may no longer be appropriate or desired. This is particularly true for the Labor/HHS bill, which funds many programs that achieve important social policy goals. Neither the House nor the Senate passed a Labor/HHS bill, so the CR will continue to fund programs at the same level as last year's bill. Unfortunately, last year's Labor/HHS bill also cut funding for many vital programs below the level to maintain services. (For a list of all program cuts in 2005's Labor/HHS bill, see this chart from the [Coalition on Human Needs](#).)

Furthermore, the dependence on continuing resolutions may cause problems for agencies that already need to plan for the FY 2008 budget. By early February, all agencies are expected to estimate how much funding will be necessary to maintain current levels of services. If agencies do not know what services they will be providing in the current year, they may have trouble estimating how much funding it will take to maintain these services into the following year. And as things stand now, agencies may not have this knowledge until it is too late.

SCHIP Funding Still Unresolved

Congress has also failed to provide needed funding for the State's Children Health Insurance Program. If not addressed, a funding shortfall may cause over 500,000 children to [loose health insurance](#).

SCHIP is a joint federal/state program that shores up Medicaid coverage for low-income children. Unfortunately, increased health care costs and greater participation have put pressure on SCHIP programs in a number of states. Without more funding, administrators will either have to request additional state funds or begin to scale back services.

It should be noted that SCHIP is not funded through the appropriations process. Rather, as a mandatory block-grant program, its funding levels are guaranteed to stay at a fixed level each year, unless Congress takes action.

Unfortunately, the November election does not seem to have changed this Congress much. They will have three weeks in December to try to turn it around.

Threat of Estate Tax Rollback Finished For 2006

Outgoing Senate Majority Leader Bill Frist (R-TN) admitted last week the Senate was unlikely to pass any permanent reduction to the estate tax in 2006, despite repeated attempts and rhetorical ultimatums from Frist and his allies.

Frist has insisted for months that the so-called Trifecta's component parts - the first increase in the minimum wage since 1997, the extension of a package of popular tax credits, and a major rollback of the estate tax - would be voted on together as a package or not at all. But Frist appears unable to follow through on his threat. Last week, he admitted it was most likely the Senate would work on one or more of the individual parts of the Trifecta bill before finally adjourning for the year in December.

Frist [created the Trifecta bill this summer](#) in a sly, yet potentially brilliant legislative strategy aimed at enticing the three final votes needed to pass a drastic rollback of the estate tax. Unfortunately for Frist and his supporters, the vote count on the Trifecta legislation in late July was precisely the same as on a [House-passed estate tax repeal bill](#) in early June. In the end, the Trifecta strategy seemed to be based more on Frist's desire to excite his party's base than one based on a realistic assessment of legislative likelihood.

While Trifecta may be dead and gone, some of the individual parts are likely to arise soon, either in this lame-duck session or in the 110th Congress, as stand-alone pieces of legislation.

Minimum Wage

Members of both parties campaigned on an increase on the federal minimum wage. It is less likely to find time in the three weeks left of congressional action, but the incoming Democratic leadership has promised prompt action on a proposal to raise the minimum wage from \$5.15 to \$7.25 per hour over the next two years. In fact, it's a leading part of incoming House Speaker Nancy Pelosi's (D-CA) "[first 100 hours](#)" agenda. While many Democrats inside and [outside of Congress](#) are calling for the wage to be indexed for inflation to assuage future erosion of its value, Sen. Ted Kennedy (D-MA) and other leaders in the incoming 110th Congress will likely prefer to wait until more increases have been agreed to before locking in an automatic inflationary adjustment.

Because increasing the minimum wage is very popular - a [Pew Research poll](#) conducted this spring indicates that over 80 percent of Americans, and 70 percent of Republicans, support it - President Bush will be hard-pressed to veto it, particularly if the increase includes some targeted tax credits to small businesses affected by it. Unhitched from the estate tax reductions, an increase in the minimum wage is almost assured of passing.

Extension of One-Year Tax Credits ("The Extenders")

The second leg of the three-part Trifecta bill is a package of popular tax credits due to

expire at the end of 2006. Included in this package are a research and development credit for business, a state sales tax deduction, the work opportunity and welfare-to-work credit, and a college tuition deduction.

This package was originally part of the 2005 reconciliation tax bill and has gone through a series of changes over the last 20 months - moving from the reconciliation bill to a "trailer" bill, to the pension reform bill, and then to the Trifecta. The two-year, \$40 billion set of tax credit extensions is widely considered must-pass legislation, but this consideration has not helped move it along since 2005. In addition, some Democrats have expressed concern that, should they re-instate Pay-As-You-Go (PAYGO) budget rules next year - another item on Pelosi's "first 100 hours" agenda - they would then need to offset the \$40 billion costs. More likely, however, is the extenders will be overwhelmingly passed in December before PAYGO rules are reestablished.

The Estate Tax

Both the minimum wage and extenders package are likely to see action in Congress in the next few months, if not sooner. What the future holds for the estate tax, although, is much less clear.

The 2001 law that gradually phased out the estate tax does not expire until 2010, when it is scheduled to revert to 2001 levels - an outcome almost no one in Congress sees as a viable solution. Incoming House Ways and Means Committee Chairman Charles Rangel (D-NY) has not mentioned the estate tax and has [already ruled out](#) making Bush's 2001 and 2003 income tax cuts (also expiring in 2010) permanent. Action on the estate tax in early 2007 in the House is therefore less likely since it would have to go through Rangel's committee first.

On the Senate side, however, incoming Finance Committee Chairman Max Baucus (D-MT) has been a long-time supporter of estate tax repeal. At the helm of the Finance Committee, Baucus could exercise considerable influence over moving an estate tax compromise forward in both the Senate and the House. In 2006, Baucus often remarked he was interested in a reform that would retain about half of the revenue from the estate tax (approximately [initial signals](#) from the incoming chairman indicate he will have other priorities in 2007).

Supreme Court May Hear Secret Regulation Case

Several groups are appealing to the U.S. Supreme Court a Ninth Circuit Court of Appeals ruling on a secret Transportation Security Administration (TSA) regulation. The regulation requires airlines to check the identification of passengers. The Ninth Circuit held that, even though the rule is not publicly accessible, it does not violate the Constitution's protection of due process.

The lawsuit originated from an experience John Gilmore had when he attempted to

board a plane in California, bound to Baltimore-Washington International Airport, more than four years ago. A Southwest Airlines clerk required Gilmore to show a form of identification in order to board the plane. When Gilmore questioned the policy, he was informed that it was a government requirement which could not be shown to the public. TSA considers the regulation to be sensitive security information (SSI) and is, therefore, kept secret from the public.

The central question at issue in the case, [*Gilmore v. Gonzales*](#), was whether or not TSA's regulation violates due process. Gilmore argued that the law is unconstitutionally vague because it regulates public behavior but, due to its secrecy, does not inform people of what conduct is prohibited. On Jan. 26, the Ninth Circuit rejected this argument on the grounds that the regulation does not impose criminal sanctions and merely prevents people from boarding a plane. The court concluded the rule does not regulate public behavior because there are other forms of available travel. Moreover, people have "actual notice" of the identification policy because airlines publicly post the identification requirements.

Gilmore appealed the decision and petitioned the U.S. Supreme Court, which has yet to indicate if it will review the case. Several open government organizations submitted amicus briefs supporting Gilmore's arguments and encouraging the Court to take up the case. The groups contend that the TSA's secret regulation violates the basic principles of a free and open democratic society. "Unpublished, secret laws undermine the very essence of self-government," wrote the Electronic Privacy Information Center (EPIC) in an [amicus brief](#). "Central to the American form of government has been a longstanding commitment to public trials and to openness in government decisionmaking."

The Electronic Frontier Foundation and seven sign-on groups argue in another [amicus brief](#) that TSA's regulation not only violates the Constitution's protection of due process, but also the Freedom of Information Act (FOIA). "Congress created a mechanism to ensure that agencies would not be permitted to impose secret law when it passed the FOIA, a law that grants the public the right to obtain all government agency records with few exceptions."

Needing four justices to agree to a review, it is uncertain whether the Supreme Court will take up the case. If the Court declines to review the case, the justices will essentially allow the Ninth Circuit decision to stand.

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