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THE JUDICIARY

The Supreme Court What the 2005-2006 Term Says About the Roberts Court

In last month's *Watch Report*, we reviewed important business-related decisions of the Supreme Court's 2005-2006 Term. Due to space limitations, we were forced to defer any broad generalizations – which we present now.

The More Things Change, the More They Remain the Same: Two years ago, if asked, most observers would have said the U.S. Supreme Court was divided into two factions: four liberals and four conservatives, with a “swing” vote (Sandra Day O'Connor).

Today, after a battle that threatened to tear the Senate apart as an institution – and after three bloody confirmation fights – the composition of the Court appears to be . . . four liberals, four conservatives, and a “swing” vote.

So what happened?

It's too early to tell for sure. And it is unlikely that new “swing vote” Anthony Kennedy will ever be a “David Souter” or a “Harry Blackmun” – or even a real “Sandra Day O'Connor.” For example, he had no trouble voting to obliterate the exclusionary rule in a case where the Court had held that the failure to knock-and-wait had created a genuine Fourth Amendment violation. [*Hudson v. Michigan*, No. 04-1360 (2006)]

However, in a world where the Court is increasingly being asked to rubber-stamp vast nonstatutory assumptions of executive power, Kennedy's “swing vote” in *Hamdan v. Rumsfeld* suggests that he may be the guy who determines whether that happens or not.

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No Surprise: Kennedy Is the “New O'Connor”: But, for Democrats hoping to prevent the Court from veering dramatically to the right, it is significant that there is no “new Kennedy,” whereas there are two “new Scalias.”

Judicial “Conservatism” Is Increasingly Being Interpreted by the Court To Mean Deference to Sometimes Very Nonconservative Power Grabs by the Executive Branch: There are two “sub-theories” to this:

Richard A. Epstein, writing on situational constitutionalism in the *Wall Street Journal*, hypothesizes that “[t]he court's two wings share one trait: They defer only to the government officials they trust.”

But this may go a little too far – and also not far enough.

Recent Supreme Court decisions dramatically expanding or ratifying the expansive jurisdiction of the Securities & Exchange Commission have been unanimous. [*Securities & Exchange Commission v. Edwards*, No. 02-1196 (2004); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371] Similarly, this year's

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decision to defer to the almost unlimited discretion of the EPA and state environmental agencies was, effectively, unanimous. [*S.D. Warren Co. v. Maine Board of Environmental Protection*, No. 04-1527]

Roberts Purports To Believe that, by Issuing More Narrowly Focused Rulings, He Can Achieve Greater Consensus on the Court: At confirmation hearings, the chief justice nominee talked about achieving “unanimity and tranquility” in the Court—and purports to believe that honing in on narrow issues of law will somehow lead to more consensus than dealing with the “big issues” head-on.

Three points:

Point 1: Contrary to every popular notion about the Supreme Court, a substantial portion of the Court’s work is accomplished—and has always been accomplished—by unanimity (or near-unanimity). This year, that figure has gone up very slightly, with 46 of 82 decisions handed down without dissent—a level of 56.1%. And this doesn’t include opinions handed down with one or two dissents.

Point 2: The 2005-2006 Term has witnessed unanimity in some cases where you would not have thought it possible. But there were at least three divergent reasons why dissidence sometimes dissolved into raging consensus:

In *Wisconsin Right to Life Inc. v. Federal Election Commission*, No. 04-1581 (2006), the Court decided to punt. A pro-life group had sought to persuade the justices to reconsider

their 5-to-4 decision upholding the McCain-Feingold Campaign Reform statute. But, with the “swing vote” in the McCain-Feingold case—Sandra Day O’Connor—leaving the Court—and with her replacement—Samuel Alito, not fully in place, the Court issued a *per curiam* opinion to the D.C. federal district court panel—asking it to think about the facially valid statute, as it applied to Wisconsin Right to Life’s particular circumstances. When the case inexorably bounces back up again to the High Court, the situation presumably will be more settled.

In another case, the Court’s conservatives seemed to almost have resolved themselves to treat last Term’s 5-to-4 controversy as settled law. In *United States v. Georgia*, No. 04-1203, the Court was asked to revisit the question of what types of suits against states under the Americans With Disabilities Act (ADA) are prohibited by the bar against suing states contained in the Eleventh Amendment. The Court had previously said that ADA title I employment discrimination suits against states were verboten. Then, two years ago, in a 5-to-4 decision—with O’Connor casting the deciding vote—the Court seemingly reversed course, allowing title II public accommodations suits against states in cases involving courts. [*Tennessee v. Lane*, No. 04-1667] With the issue of the constitutionality of title II public accommodation suits by prisoners now before the Court—and with O’Connor having been replaced by conservative Samuel Alito—many assumed *Tennessee v. Lane* was “toast.” But, in a unanimous decision, the Roberts’ Court held that the Eleventh Amendment did not bar prisoner suits against states under title II of ADA. Was it all those lectures about “stare decisis”? Or were the justices’ hearts simply rent by Goodman’s descriptions about his inability to turn around in his cell or go to the bathroom?

In at least one case, the Roberts Court did achieve unanimity (with one concurrence)—dodging a very touchy issue in the process—by falling back on procedure. In *DaimlerChrysler v. Cuno*, No. 04-1704 (2006), the Supreme Court was asked to decide whether state investment tax credits and state franchise and municipal property tax abatements violated the Commerce Clause’s prohibition on discrimination against businesses from other states. In a decision penned by Roberts (with Ginsburg concurring in part and concurring in the judgment), the

Court held that the plaintiff lacked standing to bring the suit.

The *DaimlerChrysler* outcome was presumably what Roberts had in mind when he promised the Senate judicial tranquility through narrow adjudication.

William Rehnquist was the king of legal obscurity, and he navigated its byways with proficiency.

Roberts, on the other hand, has, in the opinion of some, issued and joined in opinions that were very broad indeed – and unnecessarily so: In *Rumsfeld v. Forum for Academic and Institutional Rights*, No. 04-1152, for example, writing the opinion for a unanimous Court, he held that the federal government has “authority to require campus access for military recruiters” irrespective of whether a university accepts a dime of federal funds.

And, while some law professors marveled at the proficiency with which Roberts, in their opinion, dodged constitutional issues in the *Rumsfeld* case, those who had been involved in the 30-year battle by schools like Grove City College and Bob Jones University to avoid federal control by avoiding federal grants were – to say the least – not as sanguine.

And the decision in *Rumsfeld* was hardly an aberration. Roberts joined opinions by Scalia in criminal and environmental cases that reached far beyond the specific legal issues at hand.

Generally, the Court Has Become Pretty Predictable.

- It spends about a quarter of its time taking outrageous decisions from below in order to slap down a circuit that has gone “off the reservation” – usually the Ninth Circuit [e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (Fla. S. Ct.)].
- It doesn’t like “per se” tests or doctrines that fail to require a plaintiff to prove an important element of the underlying cause of action. [*Texaco v. Dagher*, No. 04-805; *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, No. 04-1329]
- It will continue to give broad deference to federal agencies’ expansive interpretations of their own

jurisdiction. [*S.D. Warren Co. v. Maine Board of Environmental Protection*, No. 04-1527]

- It is quickly backing off any flirtation it might once have had with expansive interpretations of the Ninth, Tenth, and Eleventh Amendments [e.g., *Rumsfeld v. Forum for Academic and Institutional Rights*, No. 04-1152].
- It doesn’t like litigants who seek to cover severe court-related misbehavior by arguing that the courts are jurisdictionally barred from doing anything about it. [*Arbaugh v. Y & H Corp., d/b/a The Moonlight Café*, No. 04-944]
- Contrary to the ill-informed expectations of the Second Circuit, it seems disinclined to overturn the fundamental rules governing the constitutionality of political speech – contained in *Buckley v. Valeo*, 424 U.S. 1 (1976) – and it may even be on the verge of using those rules to overturn the most recent campaign finance bill, McCain-Feingold.

On Issues of Style, the Tenor of the Oral Arguments Has Changed Somewhat: Journalists ranging from Linda Greenhouse of the *New York Times* to Linda Biskupic of *USA Today* surveyed litigators who regularly argue cases before the Supreme Court – and their observations seem remarkably similar in many respects:

- Without Sandra Day O’Connor to jump in with the first question before even the most rudimentary opening statement, advocates may now go on for minutes before questioning from the bench sends the proceedings spiraling into a legal melee.
- Whereas Rehnquist was inclined to state his position, Roberts is more likely to ask pointed questions that, in the words of dotting admirers, “find the heart of the issue and focus the attention of others on it.” These same admirers venture to suggest that Roberts’ experience as a Supreme Court litigator may give him an advantage over former Chief Justices Rehnquist and Warren Burger in terms of his ability to influence other justices on questions of style.
- Perhaps for this very reason, justices are said to be bursting in to interrupt attorneys – and each other – less frequently.

Congress

Congress Descends into a Political Food Fight

Election years have never been a time for deep legislative thought. But with control of both the House and the Senate up for grabs, both parties have launched a series of “symbolic” legislative battles intended to solidify their political bases and position them for the November elections—without giving a great deal of effort to actually prevailing on any of those issues.

There is little legislative business that Congress actually MUST do. But the Republican leadership decided earlier this year to do, if possible, even less than necessary.

It was decided that the GOP would look foolish if it failed to pass the two regular appropriations (money) bills dealing with terrorism and the Pentagon.

But the remaining 11 appropriations bills were treated as expendable—to be handled in a post-election session or rolled into a “continuing resolution” unless they could be passed without effort or controversy. The budget resolution was finally slipped through the House—months late—so that Hastert, Boehner, and others, could not be accused of being unable to produce a budget. And then it was consigned to permanent oblivion, in lieu of trying to slog through a hopeless House-Senate conference.

Tax cuts with substantial supermajorities in both Houses were sent to the Oval Office for signature. But a frightened House also capitulated on passing a pivotal element of the Democratic agenda—the extension of Lyndon Johnson’s Voting Rights Act.

In the Senate, the summer season was kicked off with a vote on a filibuster of a motion to proceed to a House-passed bill to permanently repeal the federal estate tax—currently scheduled to recur in full force in 2011.

Normally, the right to schedule the Senate—and, therefore, to make a motion to proceed to a piece of legislation—is considered a prerogative of the Majority Leader. And a filibuster of a motion to proceed is considered something of an affront to the leadership of the party in power—so much so that Majority Leader heir-apparent Mitch McConnell (R-Ky.) allowed the election-altering

Motor Voter Bill to pass the Senate a decade and a half ago, rather than sully himself by fighting the motion to proceed to that legislation.

So, with more than 60 senators committed to major reductions in the “death tax” in some form—or at least to letting the Senate debate the issue—it would have seemed hypocritical and two-faced for a half-dozen to a dozen of them to block an effort to even get to the bill and thus allow the bargaining to begin.

But that, in fact, is what happened. With only 57 votes—three votes short of the 60 needed to shut off debate—the Senate refused to shut down the filibuster of the motion to begin floor consideration of the death tax bill. This, despite the fact that senators like Arizona Republican Jon Kyl were lined up to offer “compromises” should “cloture” on full repeal fail.

This left cloture opponents like Senator Blanche Lincoln (D-Ark.) scrambling to demonstrate that they hadn’t lied when they told constituents they opposed allowing the estate tax to spring back to life in 2011. And, at least theoretically, it opened up the possibility of sticking the total death tax repeal—with its 51 to 57 votes—onto a must-pass bill like, for instance, the Voting Rights extension, the regular appropriations bills, the immigration bill, the host of anticipated continuing resolutions, the “pension trailer” bill crafted to embody the “deals” struck in order to pass earlier tax reductions, and even the minimum wage increase being demanded by the Democrats.

And, in fact, the House quickly came to this realization and stuck a death tax reduction proposal onto the Democrats’ bill to increase the minimum wage.

But, in the Senate, the Senate Majority Leader and unannounced presidential candidate Bill Frist (R-Tenn.) failed to realize that his failure, by three votes, to obtain cloture didn’t spell the end of the war over the death tax. So before the death tax repeal had cooled in its grave, Frist had moved onto another doomed issue—a constitutional amendment to prohibit homosexual marriage—followed by consideration of a constitutional amendment to ban flag-burning (which lost by one vote).

Clearly, issues with 57 votes—and constitutional amendments with 66 votes—continue to be “live” issues if their sponsors and champions choose to

pursue them. Certainly, the level of bargaining that has obtained passage of the administration's antiterrorism initiatives would have produced victory on the estate tax repeal—even in the Senate—had the strategy been applied there.

It was becoming clear, however, that the objective of bringing up all these issues was not to actually “win”—but, rather, to energize the Republican Party's conservative base (and perhaps in the process to also energize the presidential campaign of Bill Frist).

The Democrats were not wholly innocent, either, when it came to the cynical use of issues. But—even though Democrats were in the minority in both Houses and lacked control of the White House—they forced the GOP to pass the anti-GOP Voting Rights extension—and to say “thank you” for the legislative and political head-butt. This, ostensibly for the purpose of avoiding Republican electoral attrition in the black community at a time when George Bush's approval rating in that cohort was 2% (seriously!).

And they forced House Republican Whip Roy Blunt (R-Mo.) to concede the necessity of a vote on increasing the minimum wage—long a central priority of the Democrats' labor union base—although, in the end, the House leadership outmaneuvered them by passing a bill that coupled the minimum wage with repeal of the death tax.

Congress Continues the 16-Year Battle Over Stem Cell Research

With senators nervously aware that it was an election year that could determine which party controlled the Senate, Congress's “upper body” nervously moved toward legislation to dramatically expand experimentation with embryonic stem cells for treatment of a wide variety of human maladies.

The “stem cell lobby” had done an effective job, trotting out one sad case after another of persons who, it contended, might benefit from farming embryonic stem cells. Only eight Republican senators opposed the Democrats' stem cell proposal—and one of those, Orrin Hatch of Utah, hovered in the phone banks of the Republican cloakroom, frantically trying to convince the White House to “let him off the hook” on the stem cell vote.

In fact, surprisingly to many, the only thing that stood in the way of enactment was President Bush, who had been loathe to use the veto in the past, but had—to everyone's surprise—taken his stand on this politically risky (perhaps even suicidal) issue. In his solitary stand, Bush had been abandoned by even the Senate Republican leadership, who stood in the cloakroom trying to intimidate Senate staff and senators who had dared to side with the pro-life lobby and the White House in opposition to harvesting embryonic stem cells.

The year was 1992. And the “President Bush” was President George Herbert Walker Bush.

But—lest anyone be deluded into thinking that, legislatively, there is anything new under the sun—it could just have easily been summer 2006, when Senate Majority Leader Bill Frist devoted the week of July 17 to legislation to dramatically expand federal involvement in embryonic stem cell experimentation—experimentation viewed by proliferators in the Republicans' conservative base as “abortion.”

To seasoned Senate observers, this was just another misstep by the unseasoned Frist. It was a time when issues like death tax repeal and the flag-burning constitutional amendment constituted “killer amendments” that could stop anything on the Democratic agenda without actually having to vote on the Democrats' proposals on the merits.

And yet, Frist chose to give the Democrats an unhampered shot at approving House-passed legislation that would allow federal support for experiments on embryos donated for *in vitro* fertilization. This, notwithstanding the fact that:

- going into a tough election with control of the Senate at stake, Democrats succeeded in forcing a vote on an issue on which 70% of the American public were polled as disagreeing with the GOP position;
- at a time when Democrats had blocked a vote on the merits on Republican issues like repeal of the estate tax, they have forced Frist to give them politically beneficial votes on issues on their agenda—unencumbered by popular items on the Republican agenda; and
- irrespective of whether Bush's veto was ultimately sustained (it was), the issue of “stem

Bush over his willingness to veto this—and nothing else.

The political damage caused by allowing the bill to come to the floor was tempered by only two “cover” votes for conservative Republicans.

- one on a proposal to provide enhanced federal funding for nonembryonic stem cell research—a bill whose political value was made moot when it was rejected by the conservative Republican House; and
- a second on a bill to prohibit “farming” embryonic stem cells specifically for the purpose of doing research on them.

Special Section

The Courts vs. the Other Branches: Who Has a Right To Interpret the Constitution?

Notwithstanding the fact that seven out of nine members of the Supreme Court—and roughly 60% of the inferior federal courts—were appointed by Republicans, the judiciary still continues from time to time to crank out opinions on politically sensitive issues that annoy and exasperate officers and employees of the executive and legislative branches.

And, never inclined to sublimate temporary political expediency to larger theoretical issues, both branches are throwing down challenges to the courts’ self-claimed hegemony over constitutional interpretation.

Court-Stripping

It is an obscure legal issue that has bubbled below the surface of national policy debates for the last 30 years. But now, because a broad swathe of the Republican election agenda will prevail or fail—based on its viability—it is bubbling to the surface.

It is the question of whether Congress can prohibit the courts from issuing decisions—on constitutional issues—that it doesn’t like.

Article III, Section 2, of the Constitution vests the Supreme Court with broad appellate jurisdiction “with such Exceptions, and under such Regulations as the Congress shall make.” It also gives Congress the power to refuse to create any other courts at all, if it so chooses—and, by

inference, presumably to limit their jurisdiction as well.

The problem is that the Republican congressional leadership has now decided its restive conservative base will stay home and not go to the polls—and cost it the election—unless it can “deliver” on issues like homosexual marriage bans, prohibitions on flag-burning, the protection of the words “under God” in the Pledge of Allegiance, the issue of abortion (and, in particular, prohibitions on interstate transportation of minors for the purpose of getting an abortion), and immigration.

And, in at least some of these cases, there is a central constitutional issue on which congressional Republicans have over 50 votes in both Houses—but not the two-thirds necessary to send a constitutional amendment to the states. So, whether the GOP wins or loses on these issues—and possibly whether it wins or loses control of Congress—may depend on whether it can, with its majority vote, strip the courts of jurisdiction to allow things like homosexual marriage, flag-burning, and the removal of “under God.”

Surprisingly, the Civil War case of *Ex parte McCordle*, 73 U.S. 318 (1868), 74 U.S. 506 (1869)—which would seem to allow Congress to strip the courts of jurisdiction over just about anything—still appears to be largely good law.

So former House Majority Leader Tom DeLay (R-Tex.) and his talented, underrated staff moved quickly upon DeLay’s ascendancy to Whip to freeze the House into a position in favor of “court-stripping,” beginning with an amendment to strip the courts of the ability to release prisoners on the basis of prison overcrowding. The House proceeded to strip the courts of jurisdiction over a wide variety of things—most notably most habeas appeals by death row inmates—and the courts have gone along with this.

The Senate is another matter. The Senate has certainly approved larger packages containing significant “court-stripping” provisions—most notably the removal of jurisdiction over death row petitions and, from the liberal perspective, over certain civil rights suits (in the Civil Rights Act of 1990).

But the Senate—unlike the House—has yet to reach the point where senators would be embarrassed to vote against a popular measure simply because it revolves around a “court-stripping” provision.

So—expect the possibility that Senate Republicans will, going into the elections, not only force Senate Democrats to vote on politically sensitive social issues, but also force them to embrace the doctrine that Congress can ultimately control what the courts do on constitutional issues.

ABA Slaps “Signing Statements”

And—on the subject of whether the other branches can second-guess the courts on questions of constitutional interpretation, an American Bar Association panel specifically constituted for that purpose not surprisingly found last month that the Bush administration abused its authority by signing 750 pieces of legislation conditioned on “signing statements” outlining those aspects of the signed legislation that it viewed as unconstitutional — and, therefore, would not comply with.

The task force’s findings — which were presented to the ABA’s receptive House of Delegates this past month—questioned efforts by the White House to sign bills dealing with terrorism, in particular, while stating that it would not abide by their mandates.

In fairness, the panel’s Republicans—including former Oklahoma congressman and columnist Mickey Edwards and former FBI Director William Sessions—were largely mainstream Republicans. The much larger contingent of liberals, on the other hand, included ideological icons like former D.C. Circuit Judge Pat Wald and Stanford Law School Dean Kathleen Sullivan.

So, the relationship between the ABA and the GOP—which was pretty much irreparably torn asunder when the ABA was ousted by the Republicans from its official position of vetting federal judges—will hardly become more cordial as a result of the ABA’s most recent move.

Substantively, the ABA’s public repudiation will make it difficult for the administration to abandon the use of “signing statements” altogether in connection with enacted legislation. But the broad anti-“signing statement” consensus that the ABA

reflects may have the practical result of increasing the use of the veto.

True, the “stem cell” bill vetoed by Bush differs from “signing statement” bills in fundamental ways: The stem cell bill was anathema to the White House in every way, and was sent to the President’s desk primarily to get its political hotpotato out of the hands of endangered congressional Republicans. Most bills accompanied by “signing statements,” on the other hand, are large composites with some provisions Bush favors — and some he opposes.

But bills opposed in most respects by Republicans — such as — the McCain-Feingold Campaign Finance legislation—may now face more serious veto-related scrutiny.

New Regulatory Czar

The important Office of Information and Regulatory Affairs (“OIRA”) at the Office of Management and Budget will soon have a new leader with President Bush’s nomination of Susan Dudley to be Administrator

Ms. Dudley, Director of the Regulatory Studies Program of the Mercatus Center at George Mason University, will replace Dr. John Graham, founder of the Harvard Center for Risk Analysis.

As knowledgeable companies know, OIRA is immensely influential in the agency rule making process with responsibility, among other things, for conducting a cost benefit analysis of proposed rules and overseeing information quality guidelines applicable to federal agencies.

XBRL (What?)

Get ready; it’s coming. SEC Chairman Chris Cox continues to push for acceptance of XBRL or eXtensible Business Reporting Language, for the disclosure and communication of business and financial data. There has been significant international adoption of XBRL and acceptance growing in the U.S.

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