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CONGRESS

PROSPECTS FOR THE LAME DUCK

When you read this, the nation will be only a few days from the seminal elections that will determine who controls Congress – perhaps for decades to come.

The elections also will determine the contours of the “lame duck” session that will follow it – whether a defeated, dispirited Democratic contingent sits back in resignation as the Republicans triumphantly pass their agenda – or whether the Republican leadership-in-name-only finds itself unable to accomplish anything but to prepare to go back into the minority, perhaps for a generation.

Senate Majority Leader Bill Frist (R-Tenn.) and House Speaker Dennis Hastert (R-Ill.) launched a bold gambit when they decided to defer most substantive accomplishments past the elections in order to devote September to five election-oriented measures designed to draw attention to the Republicans’ strongest political issue – terrorism.

But the downside of the Frist/Hastert strategy is that a whole series of issues remain on the table that – unless the Republicans do considerably better than anyone anticipates – may never be resolved in a way that the GOP would view as acceptable. Without rehashing the discussion of those issues in last month’s *Watch Report* except insofar as necessary to provide background, here are some of the recent developments.

Immigration

As conservative Republican congressmen who have wandered even a little bit “off the reservation” on the immigration issue can testify, there is

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no area that stirs more anger and vitriol in the GOP base than the issue of immigration. Congressman Mike Pence (R-Ind.) – supremely self-confident of his own abilities and once regarded as a Republican leader and rising star – found this out the hard way when he thought that he could broker a compromise between the House and Senate positions on immigration in order to produce a legislative “achievement” prior to the November elections. The blistering barrage of attacks on Pence have left his staff stunned.

Since last month, the House has tried to appease this angry cohort by passing shriller and shriller legislation to mollify this bloc – reiterating its support for a border fence and taking another step toward a national ID card by requiring photo identification to vote. But even if the voting measure were to pass the Senate – which is unlikely – comparable efforts have been declared unconstitutional in Georgia and Missouri.

The House also – in a move sometimes violative of both the House and Senate rules – attempted to

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stick a wide variety of Republican priorities on the Terrorism Appropriations Bill and the Defense Authorization Bill, including immigration-related measures to

- allow easier deportation of aliens who are members of “violent street gangs” (proposed for the Defense Authorization Bill);
- imprison those who build tunnels under the U.S. border (proposed for the Terrorism Appropriations Conference Report); and
- build a 700-mile fence along the U.S.-Mexican border (proposed for the Terrorism Appropriations Conference Report).

In the case of “street gangs,” in particular, there is a lot more than meets the eye: The bill defines “street gangs” according to an open-ended definition that is similar to—but even broader than—the definition of “racketeer” under the Racketeer Influenced and Corrupt Organizations Act (RICO). Thus, a family—or a business—would be defined as a “street gang” if one of its members or employees committed two of a fairly long list of relatively innocuous offenses.

All of this would probably have little impact under this deportation proposal. But it is closely followed by other House-passed legislation to use the definition of “street gangs” to impose criminal penalties on families and businesses that fall within the statute’s arcane definition. And, in fact, House Judiciary leaders had wanted to stick the broader “gang” proposal onto a must-pass vehicle, but that effort had been aborted earlier in the process.

The “street gang”/deportation language, however, remained on the table till the end—and avoided being stuck on the defense authorization for the war in Iraq only after tradition-minded Senate Armed Services Chairman John Warner (R-Va.) rejected both Frist’s and Hastert’s demands and refused to allow some of the more politicized items to be tacked onto the armed forces spending bill.

Warner—who also was one of only five Republican senators to oppose the “nuclear option” for forcing through judicial nominations in a manner contrary to the Senate rules—has increasingly become the protector of the Senate as an institution at a time when the body is being filled up with young inexperienced Republicans who wish the Senate operated more under the authoritarian model of the House.

But this leaves congressional Republicans with only three measures to show for their September terrorism marathon:

- a \$448 billion stripped-down defense authorization bill—with \$70 billion for Iraq and Afghanistan;
- a 700-mile fence on a 2,000-mile border; and
- a bill putting vague limits on coercive interrogation of detainees and setting up a system of military tribunals to try captives outside the regular U.S. federal court system.

All of this came against a background of multiple lawsuits challenging administration terrorism policy—and an Attorney General using a Georgetown University Law School forum to warn the courts that “[t]he Constitution . . . provides the courts relatively few tools to superintend military and foreign policy decisions, especially during wartime”

Lobbying Reform

In the wake of the scandal involving lobbyist Jack Abramoff, legislators became convinced that they had to pass something—anything—purporting to deal with the problem in order to avoid electoral retribution. So the Senate crafted a “lobby reform” legislative package that did nothing to prevent future scandals, but was dramatically counterproductive in other ways. For example, it contained provisions to:

- effectively eliminate the only procedural tool that had been useful in stopping expensive new programs: the “hold”;
- regulate ideological interest groups by requiring them to report—at least in the aggregate—their efforts to promote their issues with the public; and
- outlaw the appropriations “riders,” which have been used to enact a good portion of the agenda of business and social conservatives.

The House, for its part, responded to the Abramoff scandal by, mercifully, passing a version of the legislation that was ineffectual, but not dangerous.

True, some versions of the bill would eliminate most expense account lunches at lobbyists’ expense. But what this means is that a lobbyist wishing to buy access to a congressman will be forced to hold a fund-raiser for the officeholder’s campaign. This means that the cost of access will suddenly become much higher and limited to the very well-to-do.

The good news is that, since the initial flurry of activity surrounding this bill, something interesting has happened: the public has responded to the controversy with a resounding yawn. While questions concerning high gasoline prices and the war in Iraq have flickered in and out of the public preoccupation—depending on how things were going in those areas—neither the Democrats nor the Republicans have felt they could turn the Abramoff scandal into a hot election issue with impunity. And, without politicians to fan the flames, the voters have just not cared that Congress has not acted on “lobby reform” legislation.

So, once the elections are over and the incentives for passing this legislation are even less, the question is whether there will be any incentive at all to pass legislation that—while encouraging \$10,000 fund-raisers—would also jettison many congressional flights on private planes, plus skybox tickets to sold-out sports events.

The one person with a continuing motive for passing “lobby reform” is retiring senator and presidential candidate Bill Frist, who would not be forced to live under the new rules—but would benefit from the addition of another legislative “accomplishment,” irrespective of how hollow or ineffectual.

The Estate Tax

The gradual phase-out of the federal estate tax is scheduled to disappear in 2012—allowing the tax on inheritance to recur in full force at the previous rates.

Proponents of repeal had 57 votes in the Senate in favor of shutting down the filibuster on the motion to proceed to a House-passed bill permanently repealing the tax. And another six or so senators had promised small businesses in their states that they would vote to eliminate or severely cut the “death tax”—and were scampering frantically for “cover” following their votes opposing cloture on full repeal.

So, under the circumstances, with between 57 and 65 senators either fully supporting repeal of the estate tax—or else being under intense pressure to support estate tax relief in some form—it would not have been difficult for an effective legislative strategist to figure out how to force this legislation to the president’s desk.

The coalition favoring “death tax repeal” pushed the House to tie the issue together with Democrats’ electoral priorities—including an increase in the minimum wage. And House Ways & Means Committee Chairman Bill Thomas (R-Cal.) did just that—effectively taking the minimum wage off the table as a political issue.

But this was just the beginning—not the end—of the strategy. And while supporters of antibusiness “gang” legislation continued to try to append their proposal to every legislative vehicle in sight, tax-cut proponents simply faded into the sunset after their estate-tax-cut/minimum-wage-increase package was rejected by the Senate.

Given that some of the half-dozen “swing” votes will lose a great deal of their incentive to cut the estate tax once the elections are over, prospects for repeal or reduction are not likely to be brighter in the “lame duck” session—particularly if Republicans lose seats.

Appeasing the “Social Conservative” Base

Almost as an afterthought, it occurred to embattled Republicans that their “terrorism” agenda would do little to invigorate the socially conservative evangelical base, which could determine the outcomes of many elections. In particular, the “Arlington Group”—a closed-door coalition of social conservative leaders—had been a

potent electoral force, but was now floundering on the failure of Congress to enact legislation banning homosexual marriages at the federal level.

And, if this were not scary enough, the GOP could hardly have been unaware that, in May, a restive social conservative base had toppled two veteran Pennsylvania state Republican lawmakers: David Brightball of Lebanon and Robert Jubelirer of Altoona.

In addition, it suddenly occurred to the House leadership that very little had been done—legislatively—to appease the other 800-pound gorilla of the Republican base: the gun lobby.

So—in a flurry of election eve activity—the House moved on a variety of legislative proposals dealing with abortion and guns.

- It passed pro-life legislation to make it a federal criminal offense to transport a young woman below eighteen across state lines in order to defeat a local parental consent requirement.
- It tried to force Senate Armed Services Chairman John Warner (R-Va.) to accept defense authorization language that would authorize judges to carry guns—a measure that it erroneously imagined would be a sop to the pro-Second Amendment community.
- It docketed—but did not push—NRA-backed legislation to dramatically expand the amount of personal records maintained by the federal center required to clear most commercial firearms purchases.
- It pushed out of the Judiciary Committee two composite measures to do things such as
 - ▶ imposing criminal penalties only for false gun-related statements that are material, rather than for all misstatements, as under current law;
 - ▶ giving broader discretion to test automatic firearms without obtaining a license; and
 - ▶ for the first time, introducing the imposition of civil penalties on gun dealers—ostensibly as an intermediate measure short of revoking a dealer’s firearms license.

But, in trying to appease the NRA, the hapless House Judiciary Committee Chairman James Sensenbrenner (R-Wis.) became impaled on internecine Second Amendment politics—and found, for his efforts, that most of the hard-core pro-gun activists actually opposed his NRA-backed efforts to impose civil penalties on gun dealers and expand the range of personal information provided to the federal government.

REPUBLICANS HOLD UP BUSH NOMINATIONS

It may be an indication of the waning popularity of the Bush administration that at least a couple of its key nominations were stalled, through most of September, not by Democrats—but by Republican senators.

The FDA Administrator

The “perils of Pauline” confirmation process for Acting Food and Drug Administration (FDA) administrator Andrew von Eschenbach left Senate Health, Education, Labor and Pensions (H.E.L.P.) Committee Chairman Michael Enzi complaining that the FDA confirmation was second in difficulty only to a Supreme Court slot.

For a half year, Democrats—led by Washington State’s Patty Murray—had blocked von Eschenbach’s confirmation in protest of the agency’s refusal to allow over-the-counter sales of the contraceptive Plan B.

Once Plan B nonprescription sales were approved, however, at least two Republican senators raised problems with the FDA. South Carolina conservative Republican Jim DeMint objected to the continued sale of the abortion drug RU-486. And Louisiana Senator David Vitter threatened to hold up the nomination until the Bush administration took action to allow the reimportation of inexpensive drugs.

All of this comes at a time when the FDA is seen as being under fire and hunkering down following the Merck Vioxx imbroglio. One federal watchdog agency attacked the regulatory body as “feckless”—even after its crackdown on the approval of new drugs and the expansion of the uses of existing drugs led to a 14% drop in the Nasdaq Biotechnology Index. In fact, the FDA approved only one out of 14 nonpriority drug approval applications in fiscal year 2005—for an incredible success rate of only 7.1%.

Genentech—currently embroiled in a contentious battle before the U.S. Supreme Court over the future of patent law—was only one of the 60% of applicants held up pending the receipt of more data.

This is not to say the FDA is not without its fervent supporters. An ad hoc group consisting of business and Naderite groups—joined by the last three Secretaries of Health and Human Services (including conservative Tommy Thompson)—banded together in an odd-couple coalition last month to lobby for more money for FDA during the upcoming fiscal year.

At a press conference to announce their joint efforts, former Associate FDA Director William Hubbard told newspapers that the “strange bedfellows [aggregated in the room] all converge at the same place, and that is that FDA has to be strengthened or we’re all going to suffer.”

The Ambassador to the United Nations

And, while we’re on the issue of suffering, the long battle over the career of Acting United Nations Ambassador John Bolton continued to be hung up over the political vicissitudes of Rhode Island liberal Republican Senator Lincoln Chafee.

Bolton’s long and distinguished career had encompassed not only his work in the State Department and as a legal adviser to the executive branch, but also private sector employment, which included work on behalf of plaintiff Senator James L. Buckley (C./R-N.Y.) in the landmark First Amendment case of *Buckley v. Valeo*, 424 U.S. 1 (1976).

And Bolton’s stance against the anti-U.S. sentiment in the UN had actually gained him ground in the Senate—winning public accolades from the initially skeptical moderate George Voinovich (R-Ohio)—even in the face of his colleague’s tough reelection battle in that restive state. This became even more true following the tirade against the United States by Venezuelan President Hugo Chavez.

But what hung up the Bolton confirmation through September was the fear that forcing Chafee even to vote on Bolton—irrespective of which way he voted—could threaten his tenuous reelection campaign—a campaign that could be central to the question of whether Republicans

continue to control the Senate. This became even more of a concern following the race-related scandals that threw the Virginia Senate seat of Republican George Allen into play.

THE COURTS

The Supreme Court

Suit on Tobacco Punitive Damages Moves Toward Resolution, as Another Lower Court Takes a Liberal View on Tobacco Class Actions

Some good news and some not-so-good news reached the corridors of the tobacco industry over the past few months:

The good news was the Supreme Court’s decision to review—for a second time—an Oregon court’s \$79.5 punitive damage award to the relatives of a smoker who died of lung cancer as a result of cigarette use. The case is:

Philip Morris USA v. Williams

No. 05-1256

from the Oregon Supreme Court

This case arose when a jury in a state court in Oregon handed down, *inter alia*, an award of \$79.5 million in punitive damages against the cigarette company Philip Morris. This judgment was, in turn, upheld by a state appellate court based, in part, on a determination that Philip Morris’s conduct was “reprehensible” and, in part, on the harm the company’s business did to nonparties.

This compared to a \$521,485.80 compensatory damage award that the court finally gave to the actual plaintiff—a chain smoker who spent half of his waking hours smoking. But smoker Williams’ personal damages were limited by the fact that he obstinately continued to smoke up to three packs a day in the face of arguments and articles on the dangers of tobacco—forced on him by his doctor and his family.

So—with Williams’ own culpability limiting the amount of the compensatory award—the question is: Is it consistent with the Supreme Court’s recent Due Process limitations on excessive punitive damages to award punitive damages that are 152 times the amount of actual damages, based on the “reprehensible” nature of the defendant and on injury to persons not actually parties to the litigation?

The trial court had capped the jury's compensatory damages at \$521,485.80, and reduced the jury's \$79.5 million punitive damage award to \$32 million. But the state appeals court reinstated the \$79.5 million figure. And, after the Oregon Supreme Court denied review, the U.S. Supreme Court granted cert., vacated, and remanded to the state intermediate appellate court, raising questions as to whether the punitive damage award was so excessive that it violated the Constitution's Due Process protections.

Upon remand, the intermediate court upheld the \$79.5 million award. And the Oregon Supreme Court concluded that ". . . Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris . . . knew . . . that the scheme was damaging the health of a very large group of Oregonians – the smoking public"

Suffice it to say that the court upheld the \$79.5 million punitive damage award as well.

The case now returns to the Supreme Court with Philip Morris arguing on the basis of the Supreme Court's actions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), and, conveniently, *Philip Morris v. Williams*, 540 U.S. 801 (2003), itself.

BMW established a three-part "guidepost" test that looks to the reprehensibility of the misconduct, the ratio of punitive to compensatory damages, and the level of penalties contained in legislative analogs.

Philip Morris will argue that, if courts can get around "ratio" component of constitutional limits on excessive punitive damage awards by finding the defendant "reprehensible," any limits are effectively meaningless. It will also suggest that the Oregon Supreme Court's liberal approach conflicts with the conservative jurisprudence on this issue of, ironically, the Ninth Circuit, [e.g., *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020 (2003)].

Williams will argue that previous Supreme Court limitations on punitive damage awards for harm to nonparties limit only punitive damage awards for dissimilar conduct and dissimilar claims. And he will certainly cite the fact that reprehensibility is explicitly made a criterion for punitive damages by *BMW*.

But the assumption is that the Supreme Court is bothering to hear this case a second time so it can yell at the lower court for obstinately refusing to implement what we all assumed was settled law.

All of this was against a backdrop in which the U.S. District Court for the Eastern District of New York, on September 27 in a 540-page opinion, certified, as a class, as many as sixty million smokers who were enticed into smoking "light" cigarettes – in the expectation that they would be more healthful than ordinary cigarettes. The suit was brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) – a statute that, ironically, House Judiciary Chairman James Sensenbrenner (R-Wis.) is currently working to replicate and expand in the interest of going after "gang" violence, as noted earlier.

Because of the RICO cause of action, the monetary stakes for the tobacco industry could be, at the very least, \$600 billion – a sum that, presumably, is intended to bankrupt the industry and eliminate smoking as a social phenomenon. And this is just the beginning – with the judge in the case indicating that he would consider extending the class to cover "low tar" smokers as well.

But, despite its enormous breadth, the certification of the class could hardly have been a surprise – given that plaintiffs had successfully forum-shopped the case to arch-liberal Eastern District Judge Jack Weinstein – the avatar of "progressive" causes.

The defendants, Philip Morris and R.J. Reynolds, promised to file an interlocutory appeal – which, in this case, probably will have more than the usual slim chance of success. Nevertheless, the stock market had somehow not prepared itself for this outcome – and tobacco stocks plummeted as a result of the certification.

The trial date has been set by Weinstein for January 22, 2007, but no one expects the case to proceed ahead on schedule. Only last year, the Second Circuit reversed a similar 2002 Weinstein ruling that broke precedent in order to certify a nationwide class action suit against tobacco companies.

States, Environmental Groups Attack "Global Warming" Through Multiple Lawsuits

The courts have also become the forum of last resort for environmentalists who have run up against a wall in both the executive and legislative

branches in their efforts to regulate carbon dioxide as a “greenhouse gas.”

Efforts to regulate CO₂ through legislation have been at an impasse for over a decade: Although timid congressional Republicans have been more than willing to impose limits on “greenhouse gases” in connection with “cap-and-trade” legislation that allows businesses to buy and sell “pollution credits,” they have drawn the line at the genuine far-reaching step of adding a substance as common as carbon dioxide to those statutory caps.

Furthermore, assuming the champion of CO₂ regulation, Arizona Republican John McCain, moves on to chair the Senate Armed Services Committee after the beginning of the year, there will be even less impetus toward expanding environmental regulation in the 110th Congress.

Efforts to regulate CO₂ through the executive branch—and through treaty commitments—have also fallen on hard times. Although environmentalists initially had reason for optimism following the election of George Bush—with an emphasis on bipartisan governance and the appointment of liberal Republican Christine Todd Whitman as EPA head—relations soon dissolved into acrimony.

The “greens” chose to blast Bush for his environmental failings (remember “mercury”?), rather than praising him for his liberal gestures. And, with the rejection of “greenhouse gas” regulation through the Kyoto Protocol, any residual good will collapsed.

This left the courts.

And at the top of the judicial agenda was a leftover “sweetheart suit” from the end of the Clinton administration. It was:

Massachusetts v. Environmental Protection Agency
No. 05-1120
from the D.C. Circuit Court of Appeals

In the waning days of Democratic control of the White House, several environmental groups had filed a rulemaking petition that was intended to

“force” a malleable Environmental Protection Agency (EPA) to regulate emissions of “greenhouse gases” and, in particular, carbon dioxide. There was certainly a chance that the EPA would go along—particularly after 50,000 remarkably similar communications flooded into the rule-making agency. And, if not, there were those—ultimately, 12 states and a variety of environmental organizations—who were poised to initiate litigation.

Unfortunately for the litigants, the Republicans took over the White House in 2001 and—after a flirtation with environmentally liberal EPA administrator Christine Todd Whitman—a less-than-wholly-environmentally-enthusiastic Bush administration ultimately “lost interest” in the prospect of expanding CO₂ regulation, particularly at the point the states asked the Supreme Court to grant certiorari.

As a result, there is at least some thinking that the states are stuck on the “Titanic” of lawsuits—a costly, almost-sure-loser in which the largest question may be how firmly the justices will shut the courthouse door to future efforts of this sort.

The first—and perhaps last—issue will be whether the states and environmental groups have “standing.”

But even if they get by this high threshold, the second question will be whether the Clean Air Act (CAA) even allows the EPA to regulate carbon dioxide.

And, if the plaintiffs get past that hurdle, they will have to show the court that they can use the CAA to require the EPA, through litigation, to do so. This is against a backdrop of decades in which congressional Democrats have tried to amend the CAA to regulate carbon dioxide—without success.

But where one door closes, another one opens. And just last month—on September 20—California Attorney General Bill Lockyer sued the major automakers on “public nuisance” grounds—basing his allegation on the argument that cars “spew dangerous greenhouse gases and foster global warming.”

IMPORTANT
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