

December 2006

## CONGRESS

### SUPPORT FOR “NUCLEAR OPTION” COMES BACK TO BITE BROWNBACK

**A Word About the Elections:** *Over the next two months, we intend to provide you with a detailed analysis of the House and Senate committee makeup – and the ramifications for policy shifts. We do not intend to go into this detail now.*

*In addition, a large number of sententious, largely self-serving pronouncements have been made about the supposedly “seismic” election results that have left Democrats with a whopping one-vote margin in the Senate and perhaps not even a working majority in the House, given the resurgence of conservative Democrats in “red state” districts. We do not intend to add to this commentary, except to say this:*

*When this observer came to Washington in 1975, Republicans held only 38 seats in the Senate – and only 144 seats in the House – less than one-third of the body. Yet, through parliamentary and strategic prowess, the GOP controlled the important aspects of the Senate agenda – and were soon to launch an issues initiative that would produce what was in fact a seismic shift.*

*In 2006, the GOP controlled 55 Senate seats. Yet the Democrats, through parliamentary and strategic prowess, controlled the important aspects of the Senate agenda.*

*For those who spent the last two years making stentorian pronouncements about how Republicans were “demographically” destined to retain political control in perpetuity, this has been a wake-up call. They can only hope that their efforts to obliterate the Senate rules in anticipation of their perpetual reign will not come back to haunt them.*

*And for individual men – men like “presidential aspirants” George Allen (R-Va.) And Rick Santorum (R-Pa.) – November 7 made all the difference in the world.*

*But a Senate divided by a single seat is hardly a mandate. The government is currently teetering on the tiniest of fulcrums. And which way it falls will depend on how well each party – to use reality-show parlance – “plays the game” over the next two years.*

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No one was more certain that the Senate filibuster rules should be obliterated to allow every judicial nominee to receive an up-or-down Senate floor vote than Kansas Republican senator and potential presidential candidate Sam Brownback. So it comes as a particular irony that the hapless senator spent October “holding up” the Bush administration’s Western District of Michigan’s federal district judge nomination – based on a news report that the nominee had presided over a homosexual commitment ceremony for a lesbian couple.

The nominee – Janet T. Neff – was reported out of the Senate Judiciary Committee, when Michigan activists noticed an announcement in the *New York Times* that Neff had apparently led the Massachusetts “commitment ceremony” between Karen Adelman and Mary Curtin, together with a minister from the United Church of Christ. To make matters even worse for Brownback, both Adelman and Curtin are former employees of the Human Rights Campaign – a group promoting acceptance of homosexuality.

Experienced Republican operatives who had been around Washington more than a few years – and even those who hadn’t – could have told Brownback and Majority Leader Bill Frist (R-Tenn.) that “holds” and threatened filibusters had been used extensively by the Senate GOP to thwart

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liberal nominations of both Republican and Democratic presidents.

And, while Associated Press reports concerning the Neff/Brownback controversy were inaccurate when they stated that “[a] single senator can block a nomination from moving forward by placing a hold on it . . .” — it is true that Majority Leader Frist (who is also running for president) has been much more reluctant than his predecessors to ignore Republican senators’ holds.

Bob Dole — as Majority Leader — had regularly ignored “holds.” And Trent Lott, in the same post, had waited until late at night — long after senators and staff had left the Capitol — before posting a “hotline” message that a senator wishing to preserve his “hold” on a matter would have to come to the Senate floor within an impossibly short period of time.

But suffice it to say that the failure of a Majority Leader to honor “holds” placed by senators of his own party does come with a price. And, for Lott, the price was that his bruised colleagues refused to come to his defense when a racially insensitive remark brought him into the center of controversy.

One final development concerning “holds”: As previously reported in the *Watch Report*, the Senate, earlier this year, stuck an amendment onto the “lobby reform” bill that would effectively abolish “holds” by requiring them to be published in the *Congressional Record*. One of the bill’s managers was none other than Trent Lott — never the Senate’s biggest fan of “holds” — who, in exchange for allowing the ban on “holds” to come to the floor before the time for offering amendments on that bill had expired, promised that the

“holds” provision would not be in the version of the bill reported out of House/Senate conference.

Of course, if the GOP loses the White House in 2008, the unavailability of the judicial filibuster — or even of the ability to place “holds” on legislation — will be even more unfortunate for conservatives like Brownback — as Democrats move to pack the courts with liberal activists.

## Congress To Finish Work without Passing Major Environmental Legislation

With Democrats convinced that they will take over the White House in 2009, any microscopic incentive for agreement on legislation (in either the 109th Congress or the 110th Congress) to impose a statutory cap on “greenhouse gases” — but allow environmentally friendly corporations to sell their “pollution credits” — has vanished entirely.

There is, of course — in the minds of environmentalists, at least — always the possibility that the liberal states will achieve everything they failed to achieve legislatively through litigation. Pending before the Supreme Court is

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

That case — originally brought as a “sweetheart suit” in the waning days of the Clinton administration by several environmental groups and 12 states — attempted to “force” a malleable Environmental Protection Agency (EPA) to regulate emissions of “greenhouse gases” and, in particular, carbon dioxide.

The existence of a sympathetic defendant became considerably less of a reality after George W. Bush took over the White House in 2001 — and completely disappeared when environmentalists naively assumed they could turn Bush into a friend by blasting him for relatively minor transgressions (e.g., mercury regulation).

So the Bush administration “bailed ship” on “greenhouse gas” regulation through litigation. And, 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.

As evidence of the high hurdle that the states would have to surmount to convince the Supreme Court to overturn the D.C. Circuit, the states will have to overcome at least three obstacles:

- The first—and perhaps last—issue will be whether the states and environmental groups have “standing.” And it is significant, in this regard, that the Supreme Court—even in its liberal days—has not shown a great deal of sympathy toward environmental activism through interest-group litigation.

Only three times in over 30 years has the Supreme Court granted certiorari in a case brought by an environmental group. And not since 1971 has the Supreme Court—prior to this Term—granted an environmental group’s petition for certiorari opposed by the executive branch.

- If this weren’t enough of an obstacle, the second question before the High Court will be whether the Clean Air Act (CAA) even allows the EPA to regulate carbon dioxide—even if it wanted to.
- And, if the plaintiffs get past that hurdle, they will have to show the Court that they can use the Clean Air Act to require the EPA, through litigation, to do what it may not have been able to do, even if it had wanted to do it. And this is against a backdrop of decades in which congressional Democrats have unsuccessfully tried to amend the Clean Air Act to regulate carbon dioxide—a fact that will have particular resonance in the Roberts Court.

But, even assuming that environmentalists see what everyone else does—that they’re not going to win their lawsuit—they are probably now committed to waiting until 2009 and hoping Democrats take control of Congress and the White House.

Already the polemical groundwork is being laid to argue that a phenomenon that is not universally embraced is beyond the realm of scientific debate.

Last month, the increasingly liberal National Academy of Sciences published a study by James Hansen, head of the National Aeronautic and Space Administration’s (NASA) Goddard Institute for Space Studies in New York. Hansen is not exactly an unbiased observer in the area of “global warming”—and, in fact, is notable for having gotten into a tug-of-war with the Reagan administration (for which he titularly worked)

over whether to give testimony on “global warming” that was contrary to the administration’s stance on the issue.

In his most recent study, Hansen raised dire prospects of higher sea levels and species extinction—in addition to an “increase . . . in the likelihood of strong El Niños,” such as occurred between 1983 and 1998.

An El Niño is a dramatic shift in the temperature of the tropical region of the Pacific Ocean.

Ironically—and, understandably, not receiving much publicity—Colorado meteorologists who had predicted that “global warming” would produce an unusually severe hurricane season this year were forced to cancel that prediction only a week or two into the fall season. This means that it is unlikely that any major hurricane will hit the United States during 2006.

Ironically also—and receiving no attention whatsoever—was the reason given for the lack of natural calamities: The development of an El Niño in the Pacific Ocean had prematurely brought an end to the severe hurricane season.

## The Executive Branch

### Controversy over “Signing Statements” Continues To Boil

Not particularly surprising to anyone, the controversy over the Bush administration’s use of “signing statements” in connection with legislation it views as unconstitutional has not subsided.

And now, the “research arm of Congress”—the Library of Congress’s Congressional Research Service (CRS)—has chimed in with a 27-page analysis arguing that the White House’s use of signing statements is an attempt to “condition Congress” to the executive branch’s broad construction of its own powers, particularly vis-à-vis the legislative branch.

Calling the legal assertions made in the signing statements “dubious,” the CRS attacked, in particular, assertions that

- the president has exclusive authority over foreign affairs; and
- the executive branch has unchecked authority to withhold information from Congress.

As we predicted when the controversy first broke, none of this has deterred the Bush administration from staying the course in its commitment to the use of signing statements. The day after the CRS study hit the press, it was revealed that the White House was issuing a signing statement to accompany legislation funding the Federal Emergency Management Agency (FEMA).

But the CRS report is still significant because it came from the research arm of what was the [nominally] Republican-controlled Congress—although the fact that congressional Republicans have failed to “clean house” at CRS, the Government Accountability Office (GAO) and the Congressional Budget Office (CBO) has meant that these legislative branch agencies have continued to vex the GOP leaders.

## The Courts

### The Supreme Court Speculation Grows over the Shape of the “Roberts Court”

With the arrival of “the first Monday in October” and the ensuing two-month season of oral arguments before the High Court, legal analysts have descended from their ivory towers to “read the entrails” of the Supreme Court—and to discern what impact the confirmation of Justices Roberts and Alito will have on federal jurisprudence.

Three months ago, the *Watch Report* offered an assessment of what to expect from the Roberts Court. In addition, the National Legal Center has published its annual analyses of the major business-related cases in the upcoming Term.

But the interest in the impact of the recent changes in the Court’s composition—the first in a decade—has been so intense that it seemed useful to review and comment on some of the opinions that have been brought to the table since those publications went to press.

#### Issue #1: That the Court Achieved Consensus in a “Transition Year” by Agreeing Not To Decide Anything

Linda Greenhouse, writing in the *New York Times*, put it this way: “During the first term under the leadership of Chief Justice John G. Roberts Jr., the justices were able to find common ground with some regularity by agreeing not to decide much . . . .”

Of course, this was what nominee Roberts promised a skeptical Senate in the first place: that, if he could hone controversial cases to a fine enough legal point, he could achieve tranquility and consensus in an otherwise tempestuous context.

#### Issue #2: That the Court, in the Upcoming Term, Will Be Unable To Continue Its Experiment with Comity Because the Cases Selected for Hearing Have “Few Off-ramps”

This widely held opinion is probably not true—at least as a general rule. This erroneous notion has gained credence because the one issue that many observers really care about—the constitutionality of partial birth abortion bans—could, in fact, produce a reversal of the High Court’s earlier precedents.

But in business-related cases, at least, it is hard to find a case accepted for review that is not either (1) a slam dunk or (2) a case that will turn on justiciability issues. Thus, the litigative “freeway” has ended—and the Court’s docket consists of nothing but off-ramps.

In particular, of the first 38 cases accepted by the Court for review, three large clumps of business cases are apparent:

- **Type 1:** Those cases that appear to be selected for argument because the lower court made an obvious, egregious error.
- **Type 2:** Those cases that will probably pivot around issues of justiciability.
- **Type 3:** Those cases which will revert to a narrow examination of statutory language that will have little precedential value in other areas.

Although trying to second-guess the Supreme Court is always risky—and the Supreme Court will surely surprise us in connection with some of these cases—this is how the Supreme Court’s docket appears to some observers:

- **Type 1:** Those cases that appear to be selected for argument because the lower court made an obvious, egregious error:
  - ▶ **Punitive Damages:** *Philip Morris v. Williams*, No. 05-1256: An Oregon intermediate court was ordered to reconsider, under Due Process protections, a punitive damage award that was 152 times the actual damages and that

punished the defendant for actions vis-à-vis persons not party to the litigation. Upon reconsideration, the lower court reached exactly the same conclusion as it had before being reprimanded by the Supreme Court. Expect a second reprimand.

- ▶ **Patents:** *MedImmune, Inc. v. Genentech, Inc.*, No. 05-608, and *KSR International Co. v. Teleflex, Inc.*, No. 05-1350: The Federal Circuit –with jurisdiction over patent cases–has been on a very long leash with respect to these complicated issues. And it has used its discretion in ways that have not always been uncontroversial. Specifically, it has held:

- that there has to be a breach of a patent agreement before a party can challenge the patent’s validity; and

- that it should be much easier to patent pre-existing technology –and thereby impose a roadblock to further innovation –in cases where there is no preexisting written “teaching, suggestion, or motivation” pointing to what otherwise would have been viewed as an obvious, unpatentable innovation.

There is certainly some thinking that the High Court has agreed to hear both of these cases so it can tighten the Federal Circuit’s leash.

- ▶ **Comparative Negligence:** *Norfolk Southern Railway Co. v. Sorrell*, No. 05-746: An intermediate Missouri state court interpreted a federal employer liability “comparative negligence” statute in a way that probably understated the significance of the employee’s negligence. There is a view that the Court took this obscure case to overturn that decision.
- ▶ **Antitrust:** *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, No. 05-381: In this case, the Ninth Circuit unceremoniously tossed out the Supreme Court’s reigning precedent in the area of what constitutes monopolistic “predatory selling” because defendant Weyerhaeuser was allegedly attempting to monopolize supply, rather than demand. The High Court may or may not hold that trying to monopolize supply is comparable to trying to monopolize demand. But it will almost surely draw the line at some point differently from the Ninth Circuit.

- ▶ **Labor Law:** *Washington v. Washington Education Association/Davenport v. Washington Education Association*, Nos. 05-1567/05-1589: These cases, which will be discussed in greater detail later, spring from a Supreme Court decision that has been interpreted to mean that non-union workers paying “agency fees” to unions have a right to a refund of those portions of their money that are used by unions for objectionable political purposes. The Washington Supreme Court held that that decision not only didn’t require these non-union workers to approve political uses of their money, but that, in fact, the states were constitutionally barred from requiring that.

It would be a surprise if this strange interpretation of the First Amendment survives Supreme Court scrutiny.

- **Type 2:** Those cases that will probably pivot around issues of justiciability:

- ▶ **The Environment:** *Environmental Defense v. Duke Energy Corp.*, No. 05-848; *Massachusetts v. Environmental Protection Agency*, No. 05-1120:

In these two cases –

- an environmental group –stepping into a suit brought by and then abandoned by the government–challenged the Environmental Protection Agency’s (EPA) interpretation of what constitutes a “modification” of a power plant; and

- twelve states sued to require the EPA to regulate carbon dioxide as a “greenhouse gas” –when it is not clear that the EPA is statutorily authorized to do that, even if it wanted to.

In both of these cases, the Court has asked the parties to provide briefs on whether (1) the lower court had jurisdiction or (2) the plaintiffs have standing. It would certainly not be unexpected if both of these cases were resolved on justiciability grounds –without creating any new precedents, even on procedure.

- ▶ **Sex Discrimination:** *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074: This case is explicitly about what is or is not justiciable by virtue of falling within the 180-day limitation period for bringing most sex discrimination complaints.

- ▶ **Antitrust:** *Bell Atlantic Corp. v. Twombly*, No. 05-1126: This case is explicitly about what constitutes a sufficient pleading in a Clayton or Sherman Act antitrust case—and, in particular, whether a conjecture is enough to get the plaintiff past the pleading stage.
- ▶ **Telecommunications:** *Global Crossing Telecommunications, Inc. v. Metrophones*, No. 05-705: This case is explicitly about whether section 201(b) of the Communications Act of 1934 creates an implicit cause of action—thereby allowing a pay phone operator to sue a long-distance carrier for a portion of the proceeds from making long-distance calls on its pay phones.
- **Type 3:** Those cases that will revert to a narrow examination of statutory language that will have little precedential value in other areas:
  - ▶ **Bankruptcy:** *Marrama v. Citizens Bank of Massachusetts*, No. 05-996: When the Bankruptcy Act says a debtor “may” convert a Chapter 7 bankruptcy to a Chapter 13 bankruptcy, this case will examine whether the word “may” means that a court must allow such a conversion, even when it feels the debtor is acting in bad faith.
  - ▶ **Banking:** *Watters v. Wachovia Bank*, No. 05-1342: This case will presumably interpret the word “visitorial” in the National Bank Act for the purpose of determining the extent to which states may regulate nonbank subsidiaries of national banks.

**The Bottom Line:** At least in docket selection, Roberts has succeeded brilliantly in steering the Court into cases that have obvious resolutions or revolve around procedure or hone in on statutory words with little relevance beyond the present case. Whether he will succeed in holding the Court together on this course remains to be seen.

### Court To Hear a New Case on the Political Use of Union Dues

After decades of squabbling over the implications of the Supreme Court’s decision in the infamous 1986 *Beck* case, the issue of the permissible use of union fees for political purposes is now before the High Court again. The cases—which involve one of the most important and politically active unions—are:

*Washington v. Washington Education Association/Davenport v. Washington Education Association*  
No. 05-1567/No. 05-1589  
from the Washington Supreme Court

At stake are laws of as many as 15 states that require labor unions to obtain permission from non-union members before they can use “agency fees” for political purposes. “Agency fees” are assessments that workers who choose not to join a union are nevertheless required to pay to the union to compensate it for its “representation” of them in collective bargaining settings.

The *Beck* case had required that non-union members paying agency fees must be notified of the political uses of their involuntary payments—and, in fact, the case law gives them the right to a refund for objectionable expenditures. But it did not go so far as to say that the union had an affirmative responsibility to get their permission before it uses their payments for political purposes.

The fact that it is not clear whether or not this requirement exists is not for lack of trying. For two decades now, Republicans—at both state and federal levels—have attempted to enact legislation to broadly define the *Beck* holding to

- expand the right of workers not to join a union; and
- to maximize the ability of a non-union worker to prohibit any money he is required to pay to the union from being used for political purposes.

Although these efforts have not borne much fruit at the federal level, a number of states have enacted this “*Beck* legislation” —also called, for the sake of making them politically alluring, “paycheck protection provisions.”

In the world of real politik, at the core of the controversy is the unstated fact that more than 90% of union political funds have traditionally gone to Democrats. And this doesn’t include expensive “issues ads” designed to benefit the Democrats.

By contrast, business traditionally divided its political expenditures almost equally between Democrats and Republicans—at least until the GOP’s ascension to power altered corporate America’s pragmatic calculations.

On top of that, a union-backed Democratic candidate with a chance of success will normally

receive a large number of “maxed-out” \$5,000 contributions from a variety of labor union affiliates, while a Republican candidate is forced to go door-to-door in order to eke out business contributions — one-by-one — which are normally below the maximum allowed by law.

So, at stake is nothing less than the balance of power between the two major political parties.

The case comes to the Court as an appeal — by the state of Washington and five teachers — of a 6-to-3 state Supreme Court ruling striking down a state law that requires a union to obtain the consent of a non-union worker paying “agency fees” before it can use his payments for political purposes. The law had been adopted by voters as part of a campaign finance reform referendum.

Specifically, the state court held that the state law violated unions’ First Amendment rights by presuming that workers would object to labor leaders’ spending choices.

As of the early part of October, the Supreme Court had accepted only 38 cases for argument — only slightly over half of the number of cases granted certiorari by that time in recent years and a quarter of the cases that would have been heard by the Warren Court.

So — as the Court gets more and more selective — there is more of a presumption that it hears the cases it does hear for a particular purpose. And the purpose for which many presume it is hearing this case is to rebuke the Washington Supreme Court for its genuinely bizarre reading of the First Amendment.

The state’s highest court had held that the law violated unions’ free speech rights because it presumed workers would object to the political purposes to which labor leaders applied union funds. But, since the state could presumably exempt non-union members from the agency fee entirely, it is hard to see how its First Amendment rights of unions are inhibited by a measure that falls short of that.

Aside from that, commercial First Amendment litigants haven’t fared particularly well in the Supreme Court, of late — with the Court holding in

*Johanns v. Livestock Marketing Association*, No. 03-1164 (2005), for instance, that a person’s First Amendment right not to be compelled to finance advocacy that he opposes NEVER applies to government-funded speech.

And, although the Court has recently been somewhat more sympathetic to arguments that campaign laws unconstitutionally interfere with political discourse, it would be a mistake to assume that the Washington Supreme Court is not about to be overturned.

## The States

### Schwarzenegger Signs Animal Rights Legislation

In the rapidly expanding field of doggie rights, California Governor Arnold Schwarzenegger signed a series of “animal protection” measures on the eve of what was once thought to be a difficult reelection campaign.

One measure prohibited tethering a dog, unattended, for over three hours.

Another prohibited leaving animals locked up or unattended in vehicles in hot or cold weather OR without immediate access to adequate ventilation, food, OR water. Police would be authorized to break car windows in order to “take animals away to safety” — presumably to animal shelters that regularly perform euthanasia on unwanted pets or to “no-kill” shelters.

In addition, violators would be subject to up to six months in prison. And — lest anyone misunderstand the concept of “prison” (particularly in California) — this would involve leaving the human violator locked up and unattended, without immediate access to adequate ventilation, food, or water.

Governor Schwarzenegger — who admitted to taking muscle-enhancing substances earlier in his body-building career — was photographed showing the engrossed bill to an inattentive dog and saying to the animal, “I’m going to sign a bill for you. What do you say?” The dog’s answer, if any, was not immediately available.

