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Watch Report

An update on legislation, litigation and administrative activities affecting law and legal policy

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Coming on the heels of an April blizzard that covered much of the Northeast and left many without power for up to 29 hours, in the face of dangerously plummeting subfreezing temperatures—as much of the country experienced a snowy, "frigid," "record-breaking cold" on an Easter that was, in many parts of the nation, colder than Christmas—and as the whole country dug out from a February that, for the United States, was the third coldest on record, the United Nations' Intergovernmental Panel on Climate Change (IPCC) issued its report on how much the Earth was warming up.

If emissions are not reduced, said the IPCC, 20%-30% of all animal and plant species could face an increased risk of extinction, and widespread human suffering could include more frequent droughts, floods, and disease.

But, as much as the press trumpeted the study's findings, the fight over "global warming" had perhaps seen the culmination of its decisive battle five days before in the musty chambers of the U.S. Supreme Court.

THE SUPREME COURT IN MIDTERM

Part I: The Court Over the Past 12 Months

Breaking News: Anthony Kennedy Rebels, Jettisons Much of the Rehnquist/Roberts Jurisprudence

It was as if April Fool's Day had come a day late.

But the Supreme Court's April 2 five-to-four decision in *Massachusetts v. Environmental Protection Agency*, No. 05-1120 (2007), has shaken American jurisprudence in ways in which we cannot begin to understand.

Hailed by the mainstream media as a decisive blow against "global warming," the Supreme Court's demand that the EPA go back to the drawing board and reconsider its decision not to regulate "greenhouse gases" is out of character in so many respects. In fact, it would be hard to overstate the extent to which that case dramatically departs from the Court's precedents and its way of doing business:

- In a Court that limits the ability to wage political fights in judicial forums, this case invites a generation of litigants to bring the era's controversial issues before the Court—in the off-chance that another "*Massachusetts*-type" decision will allow them to "make history."
- In a Court that gives broad deference to an agency's interpretation of its statute—in contexts where Congress declined to explicitly give the agency that interpretive authority—*Massachusetts* takes a decision that was explicitly vested to the "judgment"

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of the Environmental Protection Agency (EPA) and shifts it to the courts.

- In a Court that defers to Congress in areas where deference may or may not be justified, *Massachusetts* takes an area that Congress has fought over for almost two decades and pointedly refused to reach a decision—and makes the decision for it ostensibly because Congress had resolved the issue in 1970 without realizing it.
- In a Court that is deeply divided between two entrenched warring factions, *Massachusetts* makes it even less likely that Senate Democrats would allow President George Bush to fill a slot vacated by Stevens, Breyer, or Ginsburg under the now-rejected theory that Kennedy's "conservatism" had already created a five-to-four conservative majority on the Court.

So what happened? And what are the consequences?

Before going into that, let's first take a look at the background:

Massachusetts v. Environmental Protection Agency

No. 05-1120
from the D.C. Circuit Court of Appeals

To review the bidding: This case was originally brought as a rulemaking petition during the heady days of the Clinton administration—no doubt, with the idea that a malleable agency might turn this into a "sweetheart suit." This was particularly clear when some fifty thousand "similar" communications flooded into the rulemaking agency.

But, when this didn't work, ultimately, 12 states and a variety of environmental organizations brought suit to force the EPA to regulate "greenhouse gases," including carbon dioxide.

Rebuffed by the D.C. Circuit Court of Appeals, the litigants asked for and were granted certiorari.

But most observers—including this one—assumed that the Court would continue a standing doctrine that had been the prevailing law since the early 1970s.

We were wrong.

In a five-to-four decision written by John Paul Stevens and joined by "swing vote" Anthony Kennedy, the Court held that:

- the plaintiffs had standing;
- the Environmental Protection Agency's "checklist" of reasons for not promulgating regulations, together with its preference for voluntary conservation efforts, were inadequate;
- carbon dioxide is a "pollutant" for purposes of the Clean Air Act; and
- only a scientifically documented analysis could offset the newly discovered (37-year-old) statutory requirement that the EPA regulate pollutants such as carbon dioxide.

Stevens' opinion focused on the statutory text of the Clean Air Act and, in particular, the language that provides for emissions standards for "any air pollutant … [from motor vehicles that] could reasonably be anticipated to endanger public health or welfare …."

His opinion, while not explicitly requiring the EPA to regulate carbon dioxide, states:

EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.

But, as startling as the five-to-four decision in the *Massachusetts* case was, it is perhaps even more surprising that the Court—in an underreported nine-to-nothing decision handed down the same day—threw open the courthouse doors to environmental litigants even more dramatically:

Environmental Defense v. Duke Power Company

No. 05-848
from the Fourth Circuit Court of Appeals

This case represented the first time since 1971 that the Supreme Court had granted certiorari to an environmental interest group when that petition was opposed by the executive branch. And it was only the

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third time in 30 years that the High Court had agreed to hear a case brought by an environmental group.

So, with the Burger and Rehnquist Courts—with arguably liberal majorities—refusing to become entwined in environmental activism, few were predicting that the Roberts Court would suddenly become the champion of liberal Clean Air Act jurisprudence.

Substantively, the question wrapped around the definition of "modification."

Duke was sued after the company made several significant updates to its preexisting coal-fired energy-generating plants. In some cases, the changes actually cost several times as much as the original plant and shut down generators for years.

But Duke made sure in each case that—whatever the total enhancement of energy-generating capacity—the hourly emissions would remain constant. Traditionally, this hourly emissions rate had been viewed as the determinant as to whether the company would be required to obtain the approval of the Environmental Protection Agency prior to moving forward with the work and whether it would have to install expensive pollution-control equipment.

Many observers assumed, once again, that the question would focus on whether Environmental Defense had standing to bring the suit. Originally brought by the Clinton administration in December 2000, Environmental Defense became the chief litigant when the Bush administration decided to reverse its position. Ironically, by 2005, the Justice Department, which had originally brought the case, was arguing against granting certiorari on an appeal to a Fourth Circuit decision that repudiated the department's initial position.

On April 2, in a unanimous decision, the High Court held, on what was characterized as a "technical issue," that the Fourth Circuit—which had bought into the hourly emissions measure of pollution—was in error.

What Really Happened?

As with *Roe v. Wade*, information on the behind-the-scenes jockeying will probably trickle out over a matter of years.

Did Stevens stroke Kennedy's ego, as Blackmun did with *Roe*'s undecided votes, waging a camaraderie campaign that ultimately won Kennedy's assent? It is strongly rumored that—with O'Connor gone—Stevens has been carefully cultivating Kennedy, especially prior to the Court's decision in this case.

Did Stevens, as some sources claim, convince Kennedy that the ability of Massachusetts to sue the federal government in order to shape federal policy was a "states' rights" issue? If he did—at the same time Stevens was working to shut down the pursuit of "states' rights" under the Ninth, Tenth, and Eleventh Amendments—then he is surely one of Washington's preeminent propagandists.

Was Kennedy overpowered by the unremitting media campaign against "global warming," and did he fear that a pro-business decision would result in another *Bush v. Gore*-type public relations black eye for the Court?

Given the Court's increasing leakiness, we'll probably know the answers to these questions someday. But we don't know now.

As with Roe v. Wade, information on the behind-the-scenes jockeying will probably trickle out over a matter of years.

We do know that the regulation of "greenhouse gases" has been a crusade for the mainstream media, which culminated at the time the decision was handed down:

- ABC News cancelled virtually all commercials on its April 2 broadcast so it could run what amounted to an infomercial on how "global warming" threatened the very existence of the nation of Kiribati—although not much has happened yet, despite over a century of carbon emissions.
- *The New York Times* and other major media outlets have taken to publishing multiple weekly features—presented as "news"—discussing the various as-yet-unrealized ramifications of "greenhouse gas" emissions.
- The media has once again trumpeted the "global warming"-related hurricane warnings of the same Colorado State professor who had predicted five major hurricanes would hit the United States in the 2006 season—only to have NO hurricanes in that category. When his gloomy 2006 predictions were confounded by the fact that El Niño (ostensibly a product of "global warming") prematurely brought the hurricane season to an end, the articles were buried deep in the back pages of America's newspapers.

The Consequences

For the Court

The Positioning of Anthony Kennedy

The first and most obvious question is whether the recent Kennedy migration on detainees and the environment is an ephemeral or isolated phenomenon—or part of a larger pattern.

In the 1970s, Justice Harry Blackmun of Minnesota—originally thought to be a conservative—was badgered as being one of the "Minnesota twins," an inferior clone of his Minnesota colleague, Chief Justice Warren Burger. This may have played a role in Blackmun's decision to stake out his own ideological turf, as did the extent to which he was lionized by the media following his opinion in *Roe v. Wade*, 410 U.S. 113 (1973).

In some respects, things have changed little in 35 years. Within three days of the *Massachusetts* decision, the media moved to canonize Kennedy and Stevens, in particular, who was heralded as playing "a leading role at a pivotal juncture."

Does this mean that Kennedy is the "new O'Connor"? Or even the "new Souter"?

Well, anyone who was under the impression that there was now a solid five-person conservative bloc in the Court has certainly been disabused of that notion. But whether there is a five-person liberal bloc on a wide range of highly politicized issues remains to be seen.

The Influence of John G. Roberts, Jr.

We made this point last October and again last month. And if Chief Justice John G. Roberts, Jr. had not become, in the words of Linda Greenhouse, "an avatar of a new era of consensus on a divided court," it might not be worth "beating a dead horse."

But the idea that Roberts could achieve consensus on the Supreme Court by reducing each case to legal esoterica is so delusional—and so widely held—that it's worth throwing one final shovel of dirt on its unlamented jurisprudential grave.

The theory first gained credence when nominee Roberts used it to try to convince a jittery Senate to confirm him. Liberal Democrats needn't fear Roberts' ascension to the nation's preeminent judicial post, Roberts argued, because the grounds for most decisions would be so arcane that there would be little difference between John Roberts and John Stevens.

It was hardly surprising that a gullible and unsophisticated Senate bought into this argument. This was particularly true because a still-looming "nuclear option" for abolishing the Senate rules in order to confirm Roberts continued to threaten to blow that institution apart.

But it was a slightly bigger surprise that members of the scholarly legal community began to buy into the proposition—particularly in view of the fact that this was largely the strategy that William Rehnquist had tried to employ for the last 20 years—generally without success.

The first, easily decided cases of this Term seemed to confirm that Roberts had succeeded in becoming, judicially speaking, the "uniter, not the divider." But analysts such as Pepperdine's Douglas Kmiec were soon forced to retreat by a not-unexpected five-to-four death penalty decision.

And the *Massachusetts* decision finally forced an abandonment of the misbegotten theory altogether. In the words of Greenhouse, writing in *The New York Times*:

> … the raised expectation of consensus magnifies a defeat like this one: [Roberts'] consensus project lost as well.

For Industry

The Automotive Industry

The Court's decision is genuinely bad news for Detroit—at a time when American automakers hardly need any more bad news.

Other industries can take some consolation in the fact that their competitors will be hit just as hard. But U.S. automakers—to a much greater extent than their foreign competitors—have been buoyed by sales of Sport Utility Vehicles (SUVs) and "gas-guzzling" trucks. These, in turn, have been facilitated by the fact that, for a decade and a half, Senate Republicans have largely held antibusiness environmental legislation in check.

In 1990, the rebellious Senate GOP halted what seemed to be a systematic march toward higher and higher legislated Corporate Average Fuel Economy (CAFE) standards—the mileage mandates for fleets of new vehicles. After a caucus convened at the request of

Senators Gordon Humphrey (R-N.H.) and Bill Armstrong (R-Colo.), the party—which was then in the minority—agreed to filibuster the CAFE bill, along with the rest of the Democratic agenda being pushed by Majority Leader George Mitchell (D-Me.).

Although most of the environmental legislation has been stuck, the Bush administration has unsuccessfully tried to curry favor with the Left by adjusting CAFE standards on small trucks.

And now, American automobile manufacturers are being pushed by the media to demand higher legislated CAFE standards on the grounds that statutory mandates will be less onerous than those that the EPA is likely to impose. The Left is also holding out the possibility that new CAFE legislation could preempt the burgeoning efforts of states like California to legislate automotive standards, and gasoline and tailpipe emissions requirements.

The theory that business should seek antibusiness legislation is based on the notion that Detroit is not without its clout in the legislative process:

Despite the creation of a new nonlegislative House committee to investigate "global warming," the legislative power in the House on that issue is still in the hands of the savvy and ruthless Dean of the House, Michigan's Energy and Commerce Committee Chairman John Dingell.

And in the Senate, the Ranking Minority Member on the Environment and Public Works Committee is one of the country's most implacable foes of "global warming" theories, Oklahoma Republican James Inhofe. On top of this, a newly reenergized Senate Steering Committee, led by conservative Republican Jim DeMint (S.C.), has proven more than capable of tying the 51-to-49 Senate into parliamentary knots over just about any contentious issue.

On the other hand, a contingent of congressional Democrats who understand that Detroit feels it needs a legislative solution are certain to drive a hard bargain. And even without a negotiating posture that inures to their benefit, seasoned Democrats are much better at the bargaining table than younger, less experienced Republicans.

Utilities

This is a double whammy for utilities. Although not directly affected by the *Massachusetts* decision, the broadened definition of "pollutant" is certain to affect them. And the *Duke* ruling will certainly stifle any continued efforts to avoid expensive pollution-control devices and EPA approval requirements by retrofitting preexisting generators.

The conventional wisdom is that those power companies that are allowed by state law to pass environmental expenses on to consumers—presumably with a substantial markup—might actually benefit from massive new costs imposed on them. If this were true, deregulated power companies in the West, Southeast, and Great Plains would, in theory, stand to benefit the most.

But that may be "whistling in the graveyard." And it certainly takes some creative thinking to arrive at the conclusion that massive mandated business expenditures that do not generate revenues could, nevertheless, be a positive development.

Cases Heard

Securities

As a general matter, Wall Street has fared well in its recent court battles:

- Last Term, the Supreme Court held that plaintiffs alleging they held on to stocks and thereby lost money as a result of bad investment advice were covered by the lawsuit prohibition provisions of a 1995 tort reform act, even though the transaction did not involve a "sale or exchange" supposedly required by the 1995 statute closing the courthouse doors.
- The Supreme Court has also recently held that losses from fraudulent conduct must actually be caused by the conduct and that state court doors are closed to many securities class action suits.
- Finally, two Enron-related appeals courts' decisions narrowed the possibility of class action securities suits—in a context where the facts were as adverse to business as any that are likely to arise.

In addition:

- an engine of class action securities litigation, Milberg Weiss & Bershad LLP, is currently on the ropes for allegedly funneling kickbacks to plaintiffs; and
- although Treasury Secretary Henry Paulson may not get his request for legislation to further "rein

in" securities litigation, it does appear that even congressional Democrats are prepared to ease accounting and auditing requirements imposed by Sarbanes-Oxley.

So it was with "a spring in its step" that Wall Street went into the Supreme Court shortly before Easter to ask for two additional favors:

Credit Suisse First Boston v. Billing

from the Second Circuit Court of Appeals
argued March 27, 2007

This class action antitrust suit against 16 investment banks alleges that the banks participated in a "tie-in" arrangement whereby initial public offering (IPO) purchasers were required to purchase shares at higher, fixed prices after the IPO (i.e., in the "aftermarket"). According to the complaint, this arrangement artificially drove up the price of the shares.

Although SEC-regulated entities are generally immune from antitrust suits, the Second Circuit, in 2005, ruled that these "tie-in" arrangements were not exempt—sending Wall Street into a panic over the possibility of liability that could reach into the billions of dollars.

Backed by the SEC, defendants petitioned for and were granted certiorari.

As we said last month, you can tell more about the probable outcome of a case from the justices' questions during oral argument than you could have a generation ago. And, for what it's worth, business came out of the March 27 "give-and-take" with a "good feeling" about where the justices are likely to come down—and it was particularly happy when liberal Justice David Souter asked whether "primary jurisdiction [of the SEC isn't] the most efficient answer to the problem."

So maybe, now that Easter has passed, "Chevron deference" will be resurrected and the SEC's interpretation (and jurisdiction grab) will prevail. But with the specter of "Enron" looming over the controversy, no one is (unnecessarily) betting a huge amount of money on the outcome.

Tellabs Inc. v. Makor Issues and Rights Ltd.

from the Seventh Circuit Court of Appeals
argued March 28, 2007

In 1995, congressional Republicans passed the Private Securities Litigation and Reform Act, which was just about the only significant legislated provision of Newt Gingrich's "Contract with America" that ever actually saw the President's desk.

There are varying opinions as to whether the statute has had any real impact on curtailing frivolous securities class action suits, but, litigiously, it's done pretty well in the courts. For instance, it garnered a broad interpretation of the issue of whether the law prohibits certain suits by persons who merely hold on to bad stocks as a result of bad investment advice (as opposed to buying or selling them). (ANSWER: It does preclude those suits. [*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371])

The present case arises from the provision of the 1995 law that requires plaintiffs to allege "facts giving rise to a strong inference that the defendant [intended to deceive]." And, specifically, the question is whether it is enough to allege that Tellabs executives "fraudulently" boosted share prices with unjustifiably rosy public statements.

All of this was against a backdrop in which the Fifth Circuit threw out a securities class action suit by Enron shareholders against banks and securities firms—alleging that they participated in "accounting fraud" that led to Enron's collapse. In a similar action, the Second Circuit in New York ruled that investors were precluded from bringing a suit against banks for their role in pricing IPOs.

Thus far, the Second, Fifth, and Eighth Circuits—and the SEC itself—have taken very restrictive views on what needs to be alleged in order to get through the courthouse door. The Seventh and Ninth Circuits, on the other hand, have been more permissive in allowing securities class action suits to go forward.

Following the surprise in the *Massachusetts* case, observers are more reluctant to guess whether "swing vote" Anthony Kennedy will reject "Chevron deference" and other hallmarks of the Rehnquist/Roberts Court in order to come down on the popular side of the Enron controversy. But with the SEC coming down on the side of very tight justiciability requirements—and with a congressional intent that was clearly focused on shutting the courthouse doors to as many securities class action suits as possible—and with three out of four of the non-Ninth Circuit appeals courts that have reviewed the matter coming down on the same side—no one is betting that this case will survive to see a settlement.

Congressional Democrats Begin To Move Money Bills

Appropriations season is in full swing. And a precariously balanced Congress, which precariously passed a jerry-built budget, must now brace for a series of high-profile battles with the administration—in a high-stakes game fought on the eve of an election that may determine control for a generation.

The initial House-passed resolution, approved in a squeaker vote of 216-to-210, managed to pass at all only by postponing any actual decisions on what to do about the Bush tax cuts. The most you can say is that the illusory $153 billion 2012 surplus contained in that budget would require Congress, at some point, to choose between extending the tax cuts and cutting enough spending to pay for them—or eliminating all or part of the tax cuts. This they did through a pay-as-you-go procedure that supposedly required that each dollar of tax cut or additional spending be compensated for with cuts elsewhere in the budget.

These so-called pay-as-you-go ("pay/go") rules were, only two years ago, being pushed by Senate conservatives behind closed doors as a mechanism for getting control of profligate Republican appropriators. Cooler heads were suggesting, at the time, that, if pay/go were passed, there would be no problem getting supermajority votes to waive the pay/go rules with respect to spending excesses—and that the chief victims of pay/go budgetary reform would be narrowly adopted tax cuts.

At the time, it was a "hard sell" to try to convince Senate Republicans that they would not always be in control of the "upper body." Not surprisingly, however, now that Democrats are in control of both the Senate and the House, lo and behold, pay/go rules are being blasted by the GOP as "the groundwork for a wave of tax increases after 2010."

House Democrats did set aside $180 billion after 2010 for "middle-class tax breaks" that they favored, which, presumably, would *not* include estate tax cuts, investment tax credit cuts, and across-the-board reductions in things like personal exemptions and tax rates providing benefits to all income levels.

And, while these are only the first tenuous steps in a long process that will last well into the fall, congressional Democrats feel they are, at least, moving the budget process forward—past the point where it got sidetracked in a parliamentary quagmire last year under Republican rule.

As evidence that hapless House Republicans are still in hopeless disarray, it is significant that, even with many liberal New England Republicans purged in the 2006 elections, the House GOP still fell 55 votes short on its budgetary counterplan, a scheme that would have funded the broad array of tax-cut extensions through large entitlement cuts. The loss of 40 Republicans on a measure that, last year, would have teetered at the brink of passage, shows three things:

- the devastating loss inflicted by the departure of master vote-counter Tom DeLay;
- the power vacuum that has been created by the fall in the White House's political stock; and
- the difficulty with which the House GOP is coming to grips with their loss of power and their efforts to figure out how to respond to it.

This means the chief strategy of House Republicans is hoping the Senate will bail them out of a situation where the House minority has no parliamentary protections—partly as a result of the efforts of the Republicans themselves. House Republican Tom Davis put it this way: "I spent my first 12 years in the House cursing the Senate, and now I love it."

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