

WATCH REPORT

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

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THE SUPREME COURT

Part II: The Court Over the Last 12 Months *Mega-trends: The Shifting Dynamic of the Court*

It is always risky to make predictions about the secretive Supreme Court. Earlier this year, for example, Pepperdine University law professor Douglas Kmiec—buoyed by a series (11 out of 14) of early, unanimous opinions—praised Chief Justice John Roberts for achieving greater consensus, only to be chastised the next day when the Court handed down a couple of contentious five-to-four decisions.

“The Roberts honeymoon may be over,” moaned Kmiec ruefully. But for the “honeymoon” to be “over,” there would have to have been an engagement and a wedding. There was not.

Normally, the High Court decides the easy cases first. The 11 nine-to-nothing decisions were easy because there was no dissent. The five-to-four death penalty decision, on the other hand, was also easy, because many capital punishment cases (by far, the plurality of the Court’s work) have pretty much divided the Court into predetermined blocs on most cases in that area.

Exceptions occur in special cases, of course, such as the Court’s unanimous rejection in December of the Ninth Circuit’s strange holding that the death penalty could not be imposed when spectators wore buttons bearing the victim’s photo.

Kmiec will hardly be the first observer embarrassed in his efforts to attempt to analyze the Supreme Court.

This being said, Court crystal-ball-gazing is less difficult than it used to be. There has been unprecedented openness by the members themselves—in addition to former clerks.

But, on top of that, the evolution of oral arguments is also making the Court’s thinking more transparent:

Once upon a time, justices prided themselves in lacerating questions from the bench that ripped open the tender underbelly of both sides’ positions. A member’s willingness to attack his own position was viewed as a source of pride—of mental agility and even open-mindedness.

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Suffice it to say that that's not the operative dynamic anymore. Increasingly, oral arguments appear to be opportunities for justices who have not yet discussed a case with one another to attract the support of undecided members—and to advance judicial philosophies that have become more and more calcified. Therefore, to a greater and greater extent, in oral argument, what you see is what you get.

Unfortunately, this newfound transparency has done little to illuminate the second mega-trend in the Supreme Court—the much-discussed (but little-understood) reduction in the Court's caseload. The docket has now shrunk to about 70-to-80 cases a year—or less

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than half of the Court's caseload a generation ago.

We do know that part of this development is the result of statutory changes reducing the number of cases the Court must accept.

We also know that part of the reason is that the Court no longer seems to feel com-

elled to wade into arcane financial cases of narrow application, particularly tax cases, simply because they involve a lot of money. This is probably a blessing, given that the High Court has not always handled esoterica as well as one might have hoped.

Whatever the reason, the trend was dramatically enhanced this Term with the number of cases granted certiorari frozen at 30 from August into mid-September 2006. This compares to 60 cases by October 17 in the 2005-2006 Term.

And things didn't immediately get better. The Court granted cert. on only two cases in November—and only eight in December—before an embattled Court was embarrassed into accepting 20 cases for review in January.

Thus, the Court ultimately began to fill up its docket—after having to cancel December oral argument days because of insufficient caseload. But this means that oral argument on a good portion of the Court's caseload didn't even occur until April. Thus, the

delay in accepting cases will guarantee that even more of the Court's important decisions than usual will be delayed until the end of June.

So—given the limited pronouncements that the Supreme Court has thus far made—is there anything that the Court has done in the past year that says anything in a long-term fundamental way about the Court?

There are, of course, the observations we have been making for years—and are still true:

- that an increasing number of cases are being resolved through a painstaking analysis of statutory words [last Term, for example, *Martin v. Franklin Capital Corp.*, No. 04-1140 (the word “may”); *Rapanos v. United States*, No. 04-1034 (the word “adjacent”); and *Bank of China, New York Branch v. NBM L.L.C.*, No. 03-1559 (the words “by reason of”)];
- that, in parsing the all-important statutory language, “judicial conservatism” is increasingly defined, above any other consideration, as deference to the opinions of other branches of government, even though this deference can produce very liberal results [*S.D. Warren Co. v. Maine Board of Environmental Protection*, No. 04-1527] (*Massachusetts v. EPA*, No. 05-1120 (2007), was the shocking exception.);
- that, after some early prominent cases to the contrary, the Court seems to have lapsed back into an almost-automatic acceptance of earlier Courts' broad readings of the permissible powers of the federal government under Article I, Section 8, and the Ninth and Tenth Amendments [*Ashcroft v. Raich*, No. 03-1454];
- that, coupled with the Court's incremental narrowing of Bill of Rights provisions in the Fourth Amendment and elsewhere, this has tended to

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expand the power of government at all levels [Hiibel v. Sixth Judicial District Court, No. 03-5554];

- that the Court is perfectly willing to raise procedural issues that will defer its having to answer really thorny questions, but that it balks at litigants who use procedure to defraud the courts with impunity [Kontrick v. Ryan, No. 02-819];
- that, all other things being equal, the Court looks down on “per se” tests and tends to support jurisprudential standards that give the courts leeway [Texaco, Inc. v. Dagher, No. 04-805].

That being said, other than Massachusetts, is there anything new? And, in particular, does the presumably earthshaking addition of John Roberts and Samuel Alito fundamentally—or even slightly—change anything?

For all the Sturm und Drang, the Court isn't much changed from the Rehnquist Court.

There are, of course, the questions of style: Some observers feel the justices allow attorneys to talk a little bit longer before pelting them with questions.

Others have argued that Roberts' questioning is somewhat more legalistically precise and piercing than Rehnquist's used to be.

And, yes, in addition to the process issues, there may be some isolated areas where the Court could actually throw *stare decisis* aside and reverse itself—and these are sometimes the high-profile items—as when the Court seemed to reverse itself and allow the states to outlaw a few hundred of the 1.3 million abortions each year.

But they are a small portion of what the Court does.

Certainly, the most promising area for reversal is the Court's much-criticized decision in *McConnell v. Federal Election Commission*, No. 02-1674 (2003), in which it upheld the McCain-Feingold ban on major ads by interest groups that even mention the names of candidates within 60 days of a general election. The Court had an opportunity this past Term to change course by slapping down the previously constitutional McCain-Feingold law in the case of *Wisconsin Right to Life v. Federal Election Commission*, No. 04-1581 (2006). In that case, plaintiffs argued that, while McCain-Feingold

might be facially constitutional, it was unconstitutional when applied to them.

The High Court seemed to express sympathy for Wisconsin Right to Life's position, while not actually reversing itself—instead, sending the case back to the lower courts with instructions not wholly consistent with the Court's previous position—only to have it bounce back again.

A greater number of cases are being taken solely for the purpose of reversing specific federal appeals court rulings the justices find objectionable.

An increasing number of cases are being taken not to establish broad principles in an important area of the law, but simply because the High Court believes that a specific decision of a lower court is out of line—and contradicts holdings already handed down by the Court.

Each year, almost exactly one-quarter of the Court's docket consists of appeals from the Ninth Circuit, and most of these cases fall within this category. But the errant San Francisco tribunal is not alone.

Part of the problem comes from the fact that appeals courts in other parts of the country have been willing to explicitly “overrule” well-established Supreme Court precedent in important areas because they view the High Court's rulings as “arcane.” In the 2005-2006 Term, the Second Circuit was slapped down by the justices when the New York tribunal “overturned” *Buckley v. Valeo*, 424 U.S. 1 (1976), and allowed Vermont to impose limits on campaign expenditures.

This Term, it was the Federal Circuit's turn to go to the woodshed. This specialized Washington-based court has been on a very long leash because no one wants to think about the mind-numbing patent and intellectual property issues falling within its purview.

There has been growing discontent over the Federal Circuit's stewardship of its specialized jurisdiction.

But there has been growing discontent over the Federal Circuit's stewardship of its specialized jurisdiction. And, in one of the first major cases handed down by the Supreme Court during the 2006-2007 Term,

the justices repudiated the Federal Circuit's requirement that patent licensees withhold payment (or suffer a breach from the licensor) in order to have a justiciable "case or controversy" over the validity of the patent.

The case, *MedImmune v. Genentech, Inc.*, No. 05-608, was brought by the company that developed Synagis, a treatment for childhood respiratory illnesses. But, because the patented process was indispensable to the continued production of Synagis—and because Synagis accounted for 80% of MedImmune's revenues—terminating royalty payments for the purpose of testing the validity of Genentech's patent wasn't a reasonable option.

Not surprisingly, after the Supreme Court found that Genentech's patent could be judicially challenged without ceasing royalty payments, the Patent and Trademark Office proceeded, on February 21, to revoke the patent at the center of the controversy.

The move, which could cost Genentech hundreds of thousands of dollars, would, unless reversed, benefit not only MedImmune, but also Johnson & Johnson, Abbott Laboratories, and ImClone Systems. Although products developed with the patented process, which covers techniques for making monoclonal antibodies, constituted fourth-fifths of MedImmune's revenues, they were responsible for less than 3% of Genentech's earnings per share.

The justices followed up the MedImmune case with another repudiation of the Federal Circuit when they handed down their unanimous opinion in *KSR International Co. v. Teleflex Inc.*, No. 04-1350.

That case construed section 103 of the Patent Act, which prohibits patents for innovations that are "obvious."

In *Graham v. John Deere Co.*, 383 U.S. 1 (1966), the Supreme Court had laid out three tests for determining "obviousness." But analysts had argued that the Federal Circuit had taken one of the three—whether there is "suggestion, teaching or motivation" which would have led a person of ordinary skill in the art to combine the relevant prior teachings in the manner claimed—and turned it into a single sine qua non. Obviously, having to show "suggestion, teaching or motivation" made it harder to demonstrate that something is "obvious"—and made it easier to obtain and defend a patent.

But the High Court, without dissent, invalidated the patent and threw out the Federal Circuit's line of precedents.

Not surprisingly, Anthony Kennedy, writing for the Court, justified his decision by arguing that the Federal Circuit "threatened to stifle ... creativity." Also not surprisingly, critics immediately blasted the Court for "add[ing] a new level of uncertainty."

The Court will find a way to assert jurisdiction when it feels justiciability issues are being used to defraud it, even at the expense of ignoring the underlying statute entirely.

The Court's willingness to go to great lengths to thwart what it views as fraud on the judiciary is well established.

But this Term, the issue was taken a step farther: In a Court that prides itself on a Jesuitical adherence to statutory language—above almost every other consideration—what happens when a litigant defrauds the courts and then claims that statutory law unequivocally bars the judiciary from doing anything about it?

That issue pits two of the Court's leading shibboleths against one another:

the inviolability of clear statutory language, particularly when it has no constitutional infirmities

versus

the aversion to having litigants file fraudulent submissions—and then tell judges that they're statutorily barred from taking punitive action—or even from withholding judicial action that would seem to condone the fraud.

Not surprisingly, in both instances where the conundrum has arisen, the High Court has ignored the law and punished the fraud. Equally unsurprisingly, it did so this Term by a razor-thin five-to-four margin. The case was *Marrama v. Citizens Bank of Massachusetts*, No. 05-996 (Feb. 21, 2007).

Title 11, U.S.C. § 706(a) states: "The debtor may convert a case under [chapter 7] to a case under chapter 11, 12, or 13 of this title at any time"

But when flooring contractor Robert Marrama sought to invoke his seemingly inalienable right to convert his chapter 7 bankruptcy proceeding (liquidation) into a chapter 13 bankruptcy proceeding (court-supervised repayment of debt), the problems started. As

debtors began scrutinizing the original chapter 7 “statement of assets,” it became clear that \$96,000 of Marrama property, in the words of Marrama’s attorney, “somehow ... didn’t get onto the form.”

And, although Marrama never quite admitted to lying about his assets, the suspicious circumstances and lack of explanation led the bankruptcy court to refuse to allow Marrama to convert into chapter 13—a decision that was affirmed by the Bankruptcy Appellate Panel, the First Circuit Court of Appeals, and the Supreme Court.

In an opinion by John Paul Stevens, the five justices in the majority held that the statute didn’t explicitly take away the bankruptcy court’s right to deny a conversion to chapter 13 based on “fraudulent conduct.”

But, in terms of reading the statute, the four-person dissent penned by Justice Samuel Alito was far more intellectually honest, pointing out that the statute was “unambiguou[s]” in its requirement that debtors be allowed to shift from chapter 7 to chapter 13 at will.

The Court loves technology, innovation, and commerce and—all other factors being equal—it will try to promote technological progress.

The “all other factors being equal” is a big, big condition. In a city where excessive government regulation entangles and destroys many businesses, some feel the Court has been much too deferential to agencies’ self-serving and expansive reading of their jurisdiction—expansions that can stifle commerce.

Some feel the Court has been much too deferential to agencies’ self-serving and expansive reading of their jurisdiction.

This being said, it is no coincidence that a large and increasing portion of the Court’s docket deals with business.

In the initial round of cases accepted for oral argument, 43% were explicit business-related cases. Given that another 35% were criminal law cases—with a heavy emphasis on death penalty appeals—this left only about a fifth of the docket for everything else.

And, aside from the heavy corporate representation on the Court’s agenda, it is even less of a coincidence that a Court that is not known for its expansive interpretation of the Bill of Rights and the Fourteenth

Amendment started off the Term with a broad expansion of the Due Process Clause—through its reaffirmation and strengthening of the constitutional prohibition on excessive punitive damages.

Moreover, the Court clearly likes to think of itself as an entity that, notwithstanding its archaic formalities, is nevertheless in step with the times. In recent years, it has:

- judicially expanded copyright protection to companies that make or operate computer systems that facilitate copyright infringement;
- taken on a broad range of questions dealing with intellectual property—ranging from copyrights to patents to trademarks;
- and now, considered, this Term, at least two lines of Federal Circuit patent cases that, some have argued, tend to lock up technology and discourage innovation.

A lot of pop-psychoanalysis has been done about the arcania and ramifications of cutting-edge technology that has recently come before the Supreme Court (and that, some argue, the Court is ill-equipped to fully appreciate). At least one writer has pointed out the contrast between an institution that leaves out white quill pens for attorneys arguing before it—and shortly thereafter hears arguments about the effect of international transportation of software master versions.

And, of course, there is the irony of justices who retain messengers so that they won’t have to send their drafts electronically sitting on cases that may decide the future of the Internet.

And all of this leads, finally, to the question of whether there is an almost psychological imperative to demonstrate that the Court is not out-of-date—and whether this imperative is constraining the Court to accept cases and render decisions that it should have avoided.

Rightly or wrongly, the Court has recently been blasted by Stanford law professor Lawrence Lessig for “expand[ing] the Copyright Act in the Grokster case to cover a form of liability it had never before recognized in the context of copyright” — the practice of providing technology that induces copyright infringement.

Lessig blamed the Court’s decision for giving rise to the recent \$1 billion suit by Viacom against YouTube for, in the words of the complaint, “harness[ing] technology to willfully infringe copyrights on a huge scale.” But

Lessig clearly fails to share the enthusiasm of Viacom's attorneys, arguing that:

... by setting the precedent that the Court is as entitled to keep the Copyright Act "in tune with the times" as Congress, it has created an incentive for companies like Viacom, no longer satisfied with a statute, to turn to the courts to get the law updated.

No one is saying that Lessig is underestimating the ability of the Court to grapple with technology, but he is considerably overestimating Congress's ability to do so. This reporter was heavily involved in legislation to impose a tax on recording devices in order to compensate "artists" for material inappropriately or unlawfully recorded on those gadgets. And the process—during which skybox tickets to sporting events (compliments of the recording industry) mysteriously turned up in the boxes of key Senate staff—went far beyond the normal vicissitudes of the legislative ebb and flow.

A big, controversial gun control case coming up the pipeline could sorely test the Court's collegiality and love for narrow construction.

The rumble of distant drums threatens the High Court's Edenic existence.

On March 9, a three-judge panel of the D.C. Court of Appeals—in a two-to-one decision written by conservative judge Laurence Silberman—overturned Washington's strict ban on gun ownership. The majority held, in the process, that the Second Amendment conferred individual firearms rights, not just the right of states to maintain militias.

The dissenting judge, Karen Henderson, did not squarely dispute the thrust of Silberman's argument, but contended that the Second Amendment did not apply to Washington, D.C., because it wasn't a state.

All of this:

- caused George Washington University law professor Jonathan Turley to predict to the Associated Press that the case was "well positioned for review of the Supreme Court"; and
- caused columnist George Will, on the other hand, to caution that congressional Democrats will risk their shaky majority by allowing it to be appealed and to become an issue.

Now, the full Court has, in a divided ruling, refused a rehearing en banc.

But all of this is creating consternation on both sides because no one knows, for sure, what the full D.C. Circuit would do—or what the Supreme Court would do if it agreed to take the case. And, in addition, there is the possibility of inserting the case into the legislative process at this point by prohibiting Washington from pursuing the litigation further—presumably as a rider on an appropriations supplemental or on the regular D.C. Appropriations Bill.

If the case does reach the High Court, this could set up one of the most interesting Supreme Court battles in recent years.

No rule is without exceptions. But, normally, the Rehnquist/Roberts Court has not been eager to insinuate itself into political issues like abortion and gun control. And recent excursions into politically charged issues such as abortion-related parental consent laws, limits on campaign expenditures, and laws permitting the use of "medical marijuana" essentially have been thrust upon the justices by bizarre decisions in the First, Second, and Ninth Circuits.

So the notion that the justices might voluntarily venture into the mother lode of all political issues—gun control—is causing some excitement among Court-watchers.

Given that two of the current nine justices would not be on the Court—had not pro-gun advocates help swing the 2000 elections in Arkansas, Tennessee, West Virginia, and Florida into the Republican column—the political crosscurrents are even more pronounced.

In addition, Clarence Thomas has already publicly voiced his enthusiasm for hearing a Second Amendment case, even though his most recent foray into federal gun policy left Second Amendment groups disappointed. In the 2004-2005 Term, Thomas had voted, in *Small v. United States*, No. 03-750, to broadly construe the class of felons prohibited from ever owning a gun—extending that bar to cover persons convicted in foreign courts that fail to observe American requirements of due process and criminalize activities that would not be outlawed in the United States. Ironically, Thomas was thrust into the dissent in that case by the "pro-gun" votes of some of the Court's liberal wing.

Congressional Democrats Concede the Need To Clean Up Sarbanes-Oxley

It is probably a testimony to how bad things are getting that much of the impetus for “Sarbanes-Oxley Reform” is coming from the Left.

Sarbanes-Oxley was enacted in a “feeding frenzy” by Democrats attempting to take advantage of the collapse of Enron—and by Republicans hoping that the biggest expansion of federal regulation in a generation would insulate them from its political consequences.

- The law basically federalized the accounting industry by setting up a Public Company Accounting Oversight Board to oversee accounting standards. In the ensuing five years, the number of major accounting firms has been cut in half. And lawmakers are afraid that competition in the industry, such as it is, may collapse even further.
- The law also required chief financial officers and chief executive officers to certify the accuracy of their companies’ filings, under penalty of perjury—an exercise that caused chaos with companies making initial filings under this requirement.
- Finally, the law required, in section 404, “audits of internal control”—a move that has more than doubled the cost of audits in Fortune 500 companies.

As a result of all of this, the United States has gone from a place where, in 2000, nine out of ten IPOs were done here—to a situation where only 10% of IPOs are done in America. Policy makers in Europe and Asia have gloated over our stupidity in unilaterally destroying U.S. dominance in the world’s financial markets.

And studies commissioned by sponsors as diverse as liberal New York senator Charles Schumer (D-N.Y.) to the U.S. Chamber of Commerce have pinpointed Sarbanes-Oxley as “one key factor” threatening American

dominance in global financial markets.

But, having, in the words of one liberal Democratic congressman, “overreached a bit,” there seems to be little thirst on either side of the aisle to repeal or dramatically cut back on Sarbanes-Oxley.

The liberal Democratic House package, rather, would tweak the 2001 law in three ways:

- Audits would supposedly be “risk-based” and “top-down.” What this means is not exactly clear, but presumably less time would be spent trying to avoid CEO incarceration by scrutinizing insignificant aspects of corporate operations.
- Corporate auditors would not be required to “reinvent the wheel”—particularly in cases where federal and/or state regulators had already done part of their work in connection with similar government-mandated financial analyses.
- Smaller auditors would be encouraged to “form coalitions” with larger firms to try to remedy the fact that Washington has essentially destroyed a good portion of the accounting industry.

Suffice it to say that if suppositions about the politicized overreaction to the Enron scandal are anywhere near correct—and if politicians have in fact destroyed U.S. preeminence in the world’s financial markets for their own partisan benefit—then the proposed legislative Band-Aid seems to be a run for political cover, with a bare minimum of legislative retrenchment.

And, although bills like Congressman Ron Paul’s (R-Tex.) legislation to repeal section 404 of Sarbanes-Oxley once seemed impossibly overambitious, it now seems that Republicans—particularly Senate Republicans who have an unlimited right to offer amendments—would be foolish to let Democrats off the hook with the slender remedy that they have proposed. ■

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Are You Prepared?

New article, *Success or Failure During Times of Crisis: Corporate Business Continuity*, now available on the Center's website

As business continues to become more and more global, corporations must anticipate and prepare for disruptive events wherever they may occur. Today's businesses face challenges that range from computer viruses to natural disasters to terrorist attacks to pandemics. Boards of Directors and senior management have an obligation to make crisis management a high priority and to implement business continuity and disaster recovery programs.

The National Legal Center has tapped the expertise of two authorities on the subject of business continuity. Former General Counsel of the Department of Homeland Security, and now a partner with Alston & Bird LLP, Joe Whitley, and Ava Harter, Senior Attorney at The Dow Chemical Company, have written

an article that addresses the evolution of the business continuity plan, some of the lessons learned since 9/11, the emerging legal obligations in a post-9/11 and post-Katrina world, and the creation of a business continuity plan. This article, *Success or Failure During Times of Crisis: Corporate Business Continuity*, is available on the Center's website at www.nlcpi.org. We hope you find it useful.

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