

WATCH REPORT

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

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CONGRESS

T*he Iraq resolution; the Republicans' government spending bill; the pork-laden terrorism bill; the ethics bill; lobby reform: all of these were supposed to be guaranteed quick enactment at the beginning of the 110th Congress—but none of them were enacted.*

"Immigration reform," on the other hand, involved so many tricky political cross-currents—on both sides of the aisle—that it had been thought to be unachievable.

Thus, in one short month, Congress moved from an agenda consisting of popular "can't-fail" measures that failed—to a "can't-pass" agenda that they somehow thought would pass. In retrospect, it is "interesting" that anyone assumed the "can't-pass" measures could pass, after the "can't-fail" measures had failed.

True, at press time, the Senate is going through an arduous, arcane procedure involving what is known as a "clay pigeon amendment"—probably, at best, only to produce a bill that will be "blue-slipped" and thrown in the wastebasket when it reaches the House. Furthermore, the procedure is so "locked in" that it will probably be impossible to cure the bill's constitutional infirmities on the Senate floor. We will talk about this strange second battle next month.

But, back when the immigration bill was on the Senate floor for the first time—and was open to the range of amendments that would make its ultimate enactment easier—a strange combination of conservative ardor and parliamentary prowess forced negotiators to go back to the drawing board. This month, we will talk about the first, and perhaps seminal, Senate battle over immigration.

Ironically, much of the impetus behind the immigration package came from the Bush administration's belated effort to carve out a legacy for the beleaguered President. And, like the Clean Air Act Amendments, the Americans With Disabilities Act, the Civil Rights Act of 1990, and the tax hikes of George H.W. Bush, these efforts are focused on areas of the congressional Democrats' agenda—areas like immigration and U.S. accession to various international agreements.

Indeed, Bill Clinton learned the same lesson when he signed the Republicans' welfare reform proposal—while failing to pass comprehensive health care legislation or post-Columbine gun control: in modern times, the only way for a President to sign major legislation often has been to embrace the other side's priorities.

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And, like his father and Bill Clinton, “W” has, to some extent, responded to adversity by jettisoning some of his natural allies and embracing his former foes—not always with complete success.

The Immigration Bill

As late as 6:30 p.m. on June 7, former Clinton press secretary George Stephanopoulos was telling ABC News (his current employer) that the outcome on the immigration vote was in doubt.

But, by that time, the “fix” was in.

And this was the strategy: The staff of conservative Senate Steering Committee Chairman Jim DeMint (R-S.C.) had worked to ensure that large numbers of “killer amendments” would be threatened by a variety of conservative senators. Also coordinating this effort was former Mel Martinez staffer Brian Darling—currently Senate liaison for a conservative think tank.

These amendments covered the sorts of issues that would be political suicide for Democrats (and Republicans) seeking to save the bill. And they were intended to force Senate Majority Leader Harry Reid (D-Nev.) to prematurely file for “cloture” in order to prevent votes on them.

Reid was not in favor of the “grand compromise” to begin with. Organized labor is a looming presence in Nevada, and labor, although mostly holding its tongue, was strongly opposed to the guest worker program contained in the bill.

So, by giving Reid an excuse to file for a premature and suicidal cloture vote—and blame the Republicans for its inevitable defeat—DeMint & Co. allowed Reid to do what he wanted to do, without taking recriminations from powerful Democrats like Ted Kennedy.

Finally, DeMint & Co. went into the Republican conference and—following a strategy initially developed in 1990 to kill a CAFE bill—convinced GOP senators to vote (almost as a bloc) against prematurely cutting off the right to offer Republican amendments.

But the real surprise is not that “immigration reform” appears to be dead for the 110th Congress—notwithstanding fervent efforts of the White House to the contrary—but that it was ever thought to be doable at all.

The fact that the immigration bill became “unstuck” at all is a tribute to the negotiating prowess of a man

who is surely the Senate’s most effective legislator: Massachusetts Democrat Ted Kennedy.

Kennedy has become such a parody of himself in the popular media that it is easy to overlook his mastery of the Senate, as an institution.

To begin with, Kennedy has worked to forge strong personal ties with some of the Senate’s central conservative figures, including Orrin Hatch (R-Utah) and, more recently, Wyoming Republican Mike Enzi. One conservative group was recently told that Enzi could not get involved with its issue because it would endanger his relationship with Kennedy.

In addition, Kennedy invariably observes the formal courtesies, including copious thank-you letters to senators and staff, and gracious floor statements.

Finally, Kennedy, while keeping his eye on his core objectives, is willing to make large numbers of concessions in order to secure a deal. Thus, to the consternation of some of his fellow Democrats, Kennedy persuaded Republicans during Bush’s first term to expand the Medicare program with a \$1.2 trillion prescription drug add-on.

And, though many in his own party felt Kennedy had not gotten enough, he got a benefit 12 times as large as one that Bill Clinton had failed to achieve—and the hapless GOP got no political benefit whatsoever from the massive expansion of government under its watch.

If Kennedy, then, would have been a big “winner” had immigration reform prevailed, it is hard to choose among the multiplicity of “losers”:

- ♦ “movement conservatives,” who were treated by the White House and Congress as “irrelevant” in a rush to arrive at a package that everyone quietly acknowledged was “amnesty”; or
- ♦ business, which had lobbied for more foreign high-skilled workers and a hiring “safe harbor”—and instead got:

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- a points-based skilled worker immigration system that no longer looked at whether a candidate for entry has actually received a firm job offer from a particular employer; and
- an electronic employee verification system that would have had to screen every current and prospective employee—and that, in tests, had registered up to a 20% “false-positive” rate for immigrants and a 13% “false-positive” rate for American citizens; or
- + states like Montana, Idaho, Maine, and New Hampshire, which have taken substantial steps toward rejecting the “REAL ID” program—only to find out that this bill would have prohibited most private (or public) employment within their jurisdictions; or
- + labor, which hated the guest worker program for exactly the same reason business initially supported it—but was being pushed by Democratic officeholders to “grin and bear it”; or
- + presidential candidate John McCain, who may have been able to survive his antigun support of semiautomatic bans, his pro-abortion love of stem cell research, and his controversial sponsorship of McCain-Feingold limits on conservative public policy ads—but may have even more difficulty in an environment where every Iowa/New Hampshire/South Carolina/Florida mixed crowd he addresses contains more than a few “border control” advocates who hate him.

For their part, “movement conservatives” made their displeasure known—and the phones were so tied up that it was impossible to make a call *out* of the Capitol for at least a day after the immigration “compromise” was announced.

Business, for its part, had been given an ear throughout the negotiating process—and was expected to do much of the “heavy lifting” in selling the package. And when Silicon Valley spokesmen began denouncing the “points system” and the Electronic Employment Verification System (“EEVS”), it clearly did not help prospects.

And, as for the GOP presidential sweepstakes: With both Giuliani and McCain suffering from potentially fatal self-inflicted wounds, the serendipitous resurrection of Romney could also breathe life into

some of the hitherto lesser candidates, including Ron Paul, Mike Huckabee, and Duncan Hunter.

While much of the immigration package had been thoroughly aired in the press, the details of the EEVS still remain a mystery to most:

The Electronic Employment Verification System (“EEVS”)

In the double-think of Washington, some business groups that had been focused on the supply of highly educated, relatively low-cost non-American workers were caught off-guard by the massive new federal requirements that the “compromise” would have forced on them.

It wasn’t even that employers viewed these massive new requirements on employers as a good thing because they offered a “safe harbor.” With their attention on amnesty and guest worker programs, business representatives had failed to even consider that they were signing off on an enormous employee screening program that would have to approve every American employee—according to standards wholly within the discretion of the government—and that many American citizens would not pass muster under the system.

This is not just idle speculation. Government terrorism experts had done experiments on a small scale with employee screening systems and had found—in terms that seem like a quaint euphemism—up to 20% “false-positives.”

Said the *New York Times*, “[E]mployers expressed alarm as they learned that the Senate bill would require them to check a government database to verify that all current and former employees—aliens and citizens alike—were eligible to work in the United States.”

This may actually have been a bit of an understatement. When they found out the details of the package, business lobbyists and officers from companies like Hewlett-Packard and Oracle—companies that had supported the concept of an expanded foreign-born worker pool—were sufficiently dumbfounded that they went very public with their displeasure.

Granted, part of the problem was the bill’s shift from an immigration policy that relied on a job offer from a specific U.S. employer. Rather than tailoring the bill in this way to the actual needs of U.S. companies, the “compromise” would have replaced current policies

with a “point system” based on education and similar factors.

But the employment verification system was equally troubling:

Most observers assume, first of all, that it’s the administration that would decide whether a “REAL-ID-compliant” driver’s license is a sine qua non requirement for every current or prospective employee in America. And this raises the threshold question of what happens to Montana, Idaho, New Hampshire, Maine, and other states that, to various degrees, have rejected the federal drivers’ license requirements.

Under the “discussion draft” of the bill, anyone who lived in a state like Montana, Maine, New Hampshire, or Idaho could, theoretically, be denied employment of any sort—at least without obtaining a passport. And obtaining expedited passports has not been that easy this year.

This is because the bill required all present and future private sector employees to be screened by the electronic employment verification system (“EEVS”). And in section 306(a)(4)(i) of the discussion draft, the bill allowed for EEVS approval of continued employment of current employees only if a private employer meets “strict standards for identification documents that must be presented in the hiring process, including the use of secure documentation that contains a photograph, biometrics *and*/or complies with the requirements [of the] REAL ID Act...” [emphasis added] (And wouldn’t have been the employer who determined whether it’s an “and” or an “or.”)

For those who had assumed they could just type a Social Security number into a terminal and receive a verification that would give them a “safe harbor,” the truth was troubling: no National ID Card; no job.

The Bottom Line

The central lesson on immigration policy was handed down in 1986 by the passage of the Simpson-Mazzoli immigration reform bill. This was supposed to be a measure that traded “compassion” for immigrants with stepped-up enforcement to block further illegal immigration. Instead, the “compassion” trumped the “enforcement,” and the population of illegals exploded to at least four times what it had previously been.

Thus, the lesson of Simpson-Mazzoli was this: There is no reality, even remotely, as important to fed-

eral immigration policy as the question of whether new illegals are given reason to believe that their migration will ultimately be rewarded with U.S. citizenship.

If, as in 1986, they are extended that hope, then the population of illegals will explode—and no fence or verification system or force of border guards will be effective in keeping them out.

Controversy Erupts over Law of the Sea Treaty, Compliance with International Labor Organization Standards, Fast Track

Background: The Increasingly Tone-Deaf Bushites

It was supposed to be a perfunctory gesture: Conservative representatives were invited to the White House last month for a briefing in which the administration announced its intention to accede to the Law of the Sea Treaty (“LOST”).

Normally, attention-starved conservatives would be so grateful to be regarded as not-irrelevant that it would elude them that Bush, with the stroke of a pen, was conceding a battle that they had fought for decades. However, when the representative of a prominent think tank raised objections, the lovefest turned nasty.

Conservatives had long objected to the relinquishment of control over oceanic resources to international auspices, and their hatred of LOST was deep, primordial, and largely—well—lost on the relatively inexperienced Bushites.

Fast Track

By the time you read this, the battle over whether to renew George Bush’s “fast-track” authority will presumably just have reached its conclusion. At stake was whether the White House would be able to negotiate trade deals without Congress being able to amend them—and the Senate being able to filibuster them.

At press time, the Bush administration is betting that, as a result of a “deal,” it will be able to count on Democratic support for “fast track” and for a series of upcoming trade agreements with Peru and Panama—and later with Colombia and South Korea.

However, the price of that support has not come without controversy. In April, the National Association of Manufacturers (“NAM”) raised hackles when it very publicly opposed provisions in a then-prospective White House/Democrat trade “deal” that would bind the United States to abide by five core International Labor Organization standards.

NAM stated that it had no objections to “high labor standards,” but balked at subjecting U.S. labor practices to foreign challenge. The U.S. Chamber of Commerce subsequently echoed NAM’s concern that international trade standards could be enforced against individual businesses, amid not-so-reassuring assurances that this would not be the case.

At the same time, the Pharmaceutical Research and Manufacturers of America (“Pharma”) worried that Bush, by negotiating accelerated Third World access to generic drugs, may have polluted intellectual property rights of drug companies.

But it is probably some indication that congressional Democrats thought they were getting a pretty good deal that Ways & Means Chairman Charles Rangel bristled at NAM’s statement, arguing that the United States had already agreed to the ILO provisions in 1990 under Bush I—leading to the obvious question of why any new provisions were necessary, if America was already bound.

And so, over business objections, during the first week of May, the White House and Congress announced their trade “deal”—requiring U.S. trading partners to abide by international labor and environmental standards.

But the “deal”—with its labor and environmental standards—was not the only arrow in the administration’s quiver, as it campaigned to woo skeptical Democrats to potential trade agreements.

In addition, it has attempted to demonstrate that it is serious about enforcing foreign commitments already on the books—particularly vis-à-vis our troubling trade relationship with Communist China (the “PRC”).

In February, the United States filed a complaint with the World Trade Organization (“WTO”) alleging that the PRC was unfairly subsidizing Chinese textile export industries.

In March, it reversed a position that was almost two decades old—and indicated that it would let American

companies demand countervailing duties to offset those Chinese subsidies.

Then, in April, the administration filed more complaints with the WTO concerning China’s lax enforcement of intellectual property piracy laws, a step strongly favored by Democratic-party-supporting Hollywood interests. The White House also made it plain that it was pushing the PRC to relax import restrictions on U.S. books, CD’s, and DVD’s.

In connection with broader talks between the Chinese and Treasury Secretary Henry Paulson, on May 23 they produced limited agreements to open Chinese markets. Those May agreements:

- committed the two countries to twice the number of daily passenger flights;
- granted American carriers unfettered access to cargo;
- presaged “joint cooperation” on clean-burning coal technologies—and a removal of trade barriers on pollution-control devices; and
- contained tepid provisions allowing foreign financial firms to expand their Chinese operations.

But, suffice it to say that whatever progress was made during May was not enough to satisfy sanction-hungry congressional Democrats. And, Ways & Means Chairman Rangel issued a letter criticizing China for, *inter alia*, “massive and constant interventions in the currency markets” Wrangling will presumably continue into the summer.

In the past, Bush has subordinated his trade grievances against China to the need for Chinese cooperation on broader geopolitical issues, such as North Korea and Iran. But Democratic control of Congress has deprived the White House of the luxury of being able to secure landmark trade deals—and then go lax on the enforcement of them.

Gun Control

Normally, we don’t spend a lot of time on gun control. However, there is, in the works, “gun control” legislation that would create an enormous FBI database of information previously denied to the FBI. And, while supposedly compartmentalized, the information could soon bleed to other FBI operations, agencies, and purposes.

The bill, sponsored by Carolyn McCarthy (D-N.Y.) in the House and Chuck Schumer (D-N.Y.) in the Senate, is H.R. 297 (in the House, where it would probably move first). It would require that all government agencies, at federal, state, or local levels, turn over, to the FBI, every document or piece of information that is “relevant” to whether a person is prohibited from possessing, acquiring, or disposing of a firearm. And the question of “relevance” would be solely within the discretion of the Attorney General.

Press accounts downplay the potential scope of such a power, but—for Democrats who have whined incessantly about the AG’s warrantless demand for personal documents—the scope of the AG’s powers under this bill would be sweeping, indeed. Among the categories that would disqualify a person from owning a gun, and hence trigger record-submission requirements, are:

- the fact that he is an illegal alien (18 U.S.C. § 922(d)(5) & (g)(5));
- the fact that he is “an unlawful user of or addicted to any controlled substance” (18 U.S.C. § 922(d)(3) & (g)(3)); and
- the fact that he has been “adjudicated as a mental defective or has been committed to any mental institution” (18 U.S.C. § 922(d)(4) & (g)(4)).

With respect to this final category, the pressure to expand its scope in the wake of the Virginia Tech shootings has been enormous, so that:

- according to a May 9, 2007, letter from DOJ, the “adjudicating” can be done by any “lawful authority,” including, presumably, a school psychologist, a VA post-traumatic stress counselor, or a Medicare-appointed psychiatrist assigned to evaluate seniors for Alzheimer’s (*also see* 27 C.F.R. § 478.11); and
- according to the same letter, “mental defective” includes any person who “[i]s a danger to himself or to others, or [l]acks the mental capacity to contract or manage his own affairs”—and “danger” means “*any* danger, not simply “imminent” or “substantial” danger” [emphasis added]

Therefore, the FBI could override privacy laws and suck in:

- all federal and state tax returns (because illegal aliens otherwise “off-the-grid” are beginning to file taxes);

- all Medicare and Medicaid records dealing with prescription drugs (including, particularly, Zolofit) and Alzheimer’s diagnoses;
- all IDEA records concerning behaviorally challenged kids, particularly those placed on Ritalin by a psychiatrist;
- any business record “relevant” to the presence of illegal aliens;
- library card records; and
- drug treatment, diversion, and arrest records, whether or not prosecution ensued.

Failure to comply with the Attorney General’s demands will result in the loss of 5% of a state’s “506” funds.

As the proliferation of state seat belt and drunk driving laws suggests, state legislatures will cave into virtually any federal demand in order to avoid the loss of even a small amount of federal largesse—much less a large amount.

And, while the liberal Democrats pushing the legislation justify it on the basis that their massive database could only be used for barring gun purchases, events after 9/11 demonstrate that huge caches of information probably will not stay segregated indefinitely.

THE JUDICIARY

The Supreme Court

State Banking Regulation and “Consumer Protection” Statutes

Anyone who has spent a substantial amount of time observing the Supreme Court can appreciate what a genuinely funny exercise that can be—both in a “funny-strange” sort of way and also in the “funny ha-ha” sense of the word.

But few recent forays have been as unintentionally hilarious as the Court’s effort to sort out the federal preemption doctrine vis-à-vis nonbank operating subsidiaries of national banks.

If this sounds a little dry, consider that, in an era when 37 states have enacted legislation to address “predatory lending” by financial institutions, at stake in this case was nothing less than the states’ ability to apply

this and other “pro-consumer” regulations to national bank subsidiaries within their borders.

First, the background:

Watters v. Wachovia Bank

No. 05-1342

from the Sixth Circuit Court of Appeals

decided April 17, 2007

12 U.S.C. § 484(a) seems to vest the federal government with broad and generally exclusive authority to regulate national banks. It provides that “[n]o national bank shall be subject to any visitorial powers except as authorized by Federal Law” Pursuant to that statute, the Comptroller of the Currency issued 12 C.F.R. § 7.4000, which gives him exclusive visitorial powers over national banks, subject only to very narrow exceptions. In addition, 12 C.F.R. § 7.4006 states that “State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank.”

The Court, in a five-to-three decision, held that, because of preemption, state banking regulators have no authority over the subsidiaries of national banks.

All of this became an issue because Michigan’s state banking laws require state-chartered nonbank operating subsidiaries of national banks to register and file an annual report with the state.

So, the question was whether the National Bank Act preempted Michigan’s registration and reporting requirements.

The Court could have employed at least a couple of tests to determine the standards for preemption:

Michigan argued that preemption lies only when “Congress has expressly and clearly manifested its intent to preempt state laws”

The Sixth Circuit, on the other hand, had employed a “conflict preemption” test—and had looked to “[whether] state law stands as an obstacle to [a federal purpose].” If it does, preemption stands unless the Court finds that the feds have “exceeded [their] statutory authority or acted arbitrarily.”

The Court, in a five-to-three decision, held that, because of preemption, state banking regulators have no authority over the subsidiaries of national banks.

Irony #1: At the center of the decision to slap down state “consumer protection” laws was a five-person decision written by none other than Ruth Bader Ginsburg. She was joined by Souter, Breyer, Kennedy, and Alito.

Irony #2: The three-man dissenting opinion defending the right of a multiplicity of states to harass national bank subsidiaries was written by John Paul Stevens—but joined by Roberts and Scalia.

Irony #3: While the state of Michigan had dangled a Tenth Amendment argument in the hope of snaring the Court’s conservative bloc, the conservatives largely voted with Michigan based on its liberal arguments, while generally ignoring its conservative ones.

Irony #4: What Stevens, Roberts, and Scalia focused on, instead, was the congressional intent of the 38th Congress. Given that the National Bank Act was enacted in 1864, during the Civil War, it is not entirely clear that nonbank operating subsidiaries were foremost on legislators’ minds. This would make this, hands down, the most strained recitation of “congressional intent” in the Court’s 2006-2007 Term—in a field of strong contenders.

Irony #5: Who should come forward to blast Ginsburg, Souter, and Breyer for ignoring the public good but—congressional Democrats.

Neither party has a monopoly on hypocrisy in Washington. But there is a particular humor in watching liberal Democrats who worship at the shrine of the Supreme Court when it decides in their favor—only to fricassee the Court the moment it hands down an opinion contrary to their views, even on a relatively obscure issue.

And no one is more worshipful and/or disdainful—depending on the circumstances—than House Financial Institutions Committee Chairman (and Massachusetts Democrat) Barney Frank.

Frank chimed in within 24 hours of the Court’s decision to blast the Comptroller (who was not even one of the two principal parties to the litigation, much less the arbiter) for “succeed[ing] in reducing and eliminating a lot of state consumer laws.” “It means we have to act,” concluded the Massachusetts Democrat.

But, if the emerging epicenter of the mortgage crisis is subprime loans, it is significant that only roughly a tenth of these come from national banks. So, Frank’s

effort to craft new expansive legislation to cure the *Wachovia* case may be a solution in search of a problem.

Aside from that, there is NO Washington interest group that has been as invariably capable over the last few years of getting the Bush administration and congressional Republicans to do what it wants as the big banks. Thus, the success of any Frank legislation may depend on “regime change” (here, not in Iraq).

MISCELLANY

“Junk Science” News of the Month

Scientists meeting in Toronto last month for the American Society of Microbiology reported that “global warming” threatens to wrack the United States with epidemics of malaria, yellow fever, meningococcal meningitis, year-round flu, diarrhea, and the hantavirus—with the latter being produced by large populations of white-footed deer mice that would proliferate as a result of wet winters caused by El Niño.

Ironically, this horrific news was reported on the same day that it was revealed that Senator Tom Coburn (R-Okla.) had placed a “hold” on a Senate resolution to honor Rachel Carson. Carson’s prediction of a “silent spring”—an alarming prospect that, like “global warming,” has never actually come to pass—is widely credited for bans on pesticides like DDT—and blamed by many for the subsequent uncontrolled mosquito outbreaks in the Third World that have exacerbated, *inter alia*, malaria, yellow fever, and diarrhea.

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