

WATCH REPORT

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

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CONGRESS

Immigration

Senate Falls Short of Majority Needed for Cloture on Immigration Bill

No one will really be able to pronounce the Dracula-like immigration bill “dead” until the 110th Congress adjourns *sine die* in 2008.

But it suffered another huge setback on June 28, when a band of conservatives—led by Senate Steering Committee Chairman Jim DeMint (R-S.C.)—once again succeeded in submerging it in a massive parliamentary quagmire.

In fact, the successful conservative strategy for the “end-of-June go-round” was exactly the same as the successful conservative strategy for the “end-of-May go-round”:

Make it impossible for the bill’s managers to play “let’s make a deal” by negotiating and adopting the amendments necessary to garner the support required for passage.

First, some background:

At the beginning of June, the pundits had all-but-buried the immigration reform proposal negotiated between Republicans and Democrats in the Senate. The Senate had fallen short, by 15 votes, of the senators necessary to close debate on the contentious issue. And Majority Leader Harry Reid (D-Nev.) had pulled the bill from the floor, opining that, while he would “never say never,” he was disinclined to bring the issue back up again unless circumstances changed considerably.

Then, a couple of things happened.

George Bush’s much-heralded visit to the Tuesday Republican lunch in the Mansfield Room—the first since the early days of his presidency—did not change many Republican minds, but it did put pressure on Reid.

As we indicated last month, the Nevada Democrat does not much like this bill. But he does not want to take the blame for killing it. And, although it defies popular wisdom, the Senate Majority Leader is actually one of the least powerful figures in Washington. His job is to expedite the flow of the hundreds of pieces of legislation thrust upon him by the powerful committee chairmen who are his constituents. And he probably has less ability to say “no” than a freshman senator with a “hold letter.”

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His power to circumvent the extensive matrix of “holds” and filibuster threats by the institution’s most junior members is achievable only by the expenditure of considerable amounts of the Senate’s time and his own political capital. And, generally, the consensus of his caucus determines the legislation on which its time and its capital will or will not be spent.

The consensus of the Democratic caucus with respect to the immigration bill changed dramatically after the bill was jerked from the floor—fueled by the fact that many of the diverse interests that had been blasting the bill in order to change it suddenly balked at the prospect that there might be no bill at all.

Thus, the U.S. Chamber of Commerce and the National Association of Manufacturers joined together in a plea to resurrect the legislation. Detractors as disparate as Oracle and the U.S. Catholic Conference also seemingly reversed their positions.

The second time around, Kennedy kept a tighter hand on the rein—dictating the procedure that he would require the hapless Majority Leader to use.

That procedure pitted Kennedy and Jim DeMint, on the Republican side, against one another in a parliamentary Armageddon between the two masters of Senate procedure.

The situation was this: In the previous go-around, only 45 senators had voted to “invoke cloture,” thereby cutting off unlimited debate and allowing the bill to pass. This was 15 votes short of the 60 needed for that parliamentary maneuver—with many of the Republicans who supported the bill nevertheless opposing “cloture” because there had not been sufficient time to consider Republican amendments.

In order to “buy off” enough votes to achieve the necessary 60 senators, Kennedy & Co. agreed to let 26 amendments come before the Senate for consideration. But there were at least a couple of problems with this:

- First, some of DeMint’s amendments were so politically frightening to Democrats that it was critical to Kennedy that he block Senate consideration of any amendments he didn’t want the Senate to consider, while moving the ones he did.
- Second, under the Senate rules, any senator has the right to offer amendments, within limits, at any time. And, under Senate rules, every time a new amendment is offered, it opens up a complex

matrix of potential amendments to amendments that could then be offered.

So, to block all of DeMint’s amendments, but allow consideration of all 26 of his own, Kennedy got Reid to offer what was called a “clay pigeon amendment.” It would be offered as a single amendment, but it would break up into 26 “pieces” that would be voted on separately. After “cloture” had been invoked on the bill and all debate was ended and the time had completely expired, any undisposed of divisions remaining of these 26 pieces would then be voted on in order, without debate.

The success of Kennedy’s strategy would require some strained interpretations of the Senate rules. For example, the Senate parliamentarian would have to hold that the 26 parts of the Kennedy-Reid amendment were all simultaneously “pending” for the purpose of the Senate cloture rule (Rule XXII), but not for other purposes.

After receiving the denied parliamentary rule, 64 senators voted on June 26th to allow the bill to come back up on the Senate floor—four votes to spare—and the 373-page “clay pigeon” amendment was laid down.

But this created three insurmountable problems:

- The amendments to be voted on were frozen in their most extreme versions—and could not be negotiated down to compromises that could be accepted without killing the “grand bargain.” They could only be tabled, one after another, thereby provoking the antipathy of their sponsors. And the managers didn’t have a whole lot of votes to spare.
- Once again, the Senate was locked into a “make or break” cloture vote before the Senate was ready to advance to that stage.
- The bill would have required most employees to have a driver’s license, complying with the “REAL

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ID” Act. And at least six states—New Hampshire, Maine, Washington, Montana, South Carolina, and Oklahoma—had rejected compliance with that Act. Montana Democrat Max Baucus had offered an amendment to remove the “REAL ID” compliance, which was a part of the “clay pigeon amendment.” But, unlike other parts of the amendment, there were not enough votes to table it and get it out of the way. And Senate procedure would not allow the body to just jump over the amendment to something else. So, the Senate got stuck on the Baucus amendment and couldn’t move to anything else.

In the end, once again, the Senate fell short of a majority—much less the 60 votes needed for cloture on the bill.

And Harry Reid—who, perhaps, isn’t so hapless after all—succeeded in killing Ted Kennedy’s bill without leaving his fingerprints on it.

THE SUPREME COURT

2006-2007 Term Comes to an End

Perhaps it just seems this way. But, as the Supreme Court geared up in June for its final assault on its 2006-2007 Term, the press attacks on the Court—and the mounting alarm over the Court’s supposed precedent-smashing ideology-driven agenda—seemed to be more strident than usual.

Part of this was presumably an orchestrated campaign by Ralph Neas of the Leadership Conference on Civil Rights, who is mounting a congressional effort to legislatively overturn the *Ledbetter* case. This will be discussed in more detail below. But, suffice it to say that the effort would be similar to the campaign that legislatively overturned a series of Rehnquist Court civil rights decisions and produced the Civil Rights Act of 1990.

But accusations that the “conservative” wing of the Court was sexist and bigoted were only the beginning. Although reporter Linda Greenhouse was not quite willing to use the news pages of the *New York Times* to accuse Chief Justice John Roberts and Associate Justice Samuel Alito of being liars, she was perfectly willing to

quote Professor Ronald Dworkin as saying, in connection with the Court’s decision as to the waivability of filing deadlines:

Justices Roberts and Alito had both declared their intention to respect precedent in their confirmation hearings, and no doubt they were reluctant to admit so soon how little those declarations were worth.

As readers of National Legal Center publications know, the outcomes of cases before the Roberts Court have not only been (relatively) predictable, based on precedent and on the Court’s “Mega-Rules of Construction,” they are regularly successfully predicted.

Occasionally, the Court surprises, as when “swing vote” Anthony Kennedy threw out doctrines of judicial deference to Congress and the executive branch in order to insert the Court into a battle between the Environmental Protection Agency (“EPA”) and the states over whether the EPA would be required to regulate “greenhouse gases.”

And, it’s probably worth noting that when the Court does something dramatic, it’s usually in connection with the really big, high-profile cases. So, it may seem that the Court is more groundbreaking than it is.

But, with the exception of two environmental decisions, the remarkable thing about the Court’s 2006-2007 Term was how unremarkable it was.

Sex Discrimination

The most roundly criticized decision of the Court’s Term was its five-to-four opinion concerning the 180-day statutory filing requirement with respect to sex discrimination complaints under Title VII of the 1964 Civil Rights Act. That case was:

Ledbetter v. Goodyear Tire & Rubber Co.

No. 05-1074

from the Eleventh Circuit Court of Appeals
decided June 11, 2007

The first surprising thing about the outcome in *Ledbetter* was the fact that anyone was surprised. Last October, we predicted that the Court would decide for Goodyear, in accordance with copious precedents—and a fairly clear historical rejection of the Ninth Circuit view on which *Ledbetter*’s claim was based.

The other surprising thing is the fact that four of the nine justices voted to overturn a fairly well established precedent—and dissent.

These were the facts:

After years of substandard performance reviews by a variety of supervisors, Lilly Ledbetter brought a Title VII employment sex discrimination suit alleging that she had received a lower salary than her more highly rated male competitors.

The Goodyear plant in Gadsden, Alabama—where Ledbetter worked—operated under a system of regular employment reviews that determined who would or would not receive merit raises, and how much.

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The threshold question was how many of Ledbetter's annual reviews were cognizable by the courts and the Equal Employment Opportunity Commission, in view of the statutory requirement that a charge against a company must be filed within 180 days "after the alleged unlawful employment practice occurred."

The Supreme Court had held that this language barred complaints about conduct more than 180 days old. And it had specifically repudiated an earlier Ninth Circuit view that a complaint could be brought on the basis of an ongoing course of conduct extending to the present.

This should really come as no surprise. Goodyear's allegedly discriminatory conduct consisted of a series of unfavorable performance reviews. And, if each new review triggered a renewed cause of action with respect to an employee's entire history with the company, the filing deadline would be meaningless. This would be particularly ironic in view of the fact that the performance review system presumably was instituted to avoid litigation.

By a five-to-four ideological vote, with Samuel Alito delivering the majority's opinion, the Court held that Title VII sex discrimination employment claims are only cognizable if filed within 180 days of unlawful conduct—and that aggrieved litigants cannot use the fact

of a lower current salary as a backdoor mechanism for reviewing decisions made a decade ago.

Alito argued "legislative intent," as evidenced by the statutory language, observing that the "short [180-day] deadline [in filing claims] reflects Congress' strong preference for the prompt resolution of [allegations] ..."

Ruth Bader Ginsburg—who wrote the dissent—argued social policy. An employee suffering from sex discrimination would now have the choice between letting her claim expire or bringing a "less-than-fully baked case," she argued. "That situation cannot be what Congress intended."

This invocation of Congress's "legislative intent"—which will, no doubt, be repeated by congressional Democrats thousands of times over the next year—was, itself, a "less-than-fully baked" argument. In fact, it represents one of the more misinformed readings of the legislative process to recently emanate from any source:

Congress had not "intended" for Title VII to cover sex discrimination at all—much less the "hostile work environment" embellishments that have sprung from it. Rather, the prohibition against sex discrimination was offered as a "killer amendment" by a Democratic senator who intended to use it as a "Trojan Horse" to bring down the bill.

The Civil Rights Act had procedurally ripped the Senate apart for a decade—as powerful Southerners used every parliamentary trick available to kill the legislation—and supporters employed every "carrot" available to win support. And the notion that any aspect of the 1964 Act resulted from a considered balancing of competing policy questions represents a laughable reinvention of history.

So the Court's rejection of Ledbetter's novel legal theories was hardly a surprising outcome—in view of the history, the statute, the precedents, and the realities of workplace decision-making.

But what was surprising was the vicious (and apparently orchestrated) personal attacks on the justices in the press as a result of this decision—which we will describe in more detail because they appear to be the first shot in a larger war to statutorily revisit Title VII and sex discrimination during the 110th Congress.

The editorial page of the *New York Times* was, by no means, an isolated example of this orchestrated campaign. But it was representative. In an editorial titled "Injustice 5, Justice 4," the *Times* opined:

The Supreme Court struck a blow for discrimination this week by stripping a key civil rights law of much of its potency.

The editorial went on to (incorrectly) accuse the Court of abandoning “longstanding precedent,” capping the paragraph with the view that “a court that once proudly stood up for the disadvantaged is increasingly protective of the powerful.”

Ledbetter was characterized as “underpaid” by the editorial that made a big point of her “smaller raises.” But at no point in the six-paragraph piece did the *Times* mention that the raises were merit raises that were based on employment reviews and evaluations.

Other attacks on the Court also ignored this central fact—as did reports such as the one in *USA Today* that tried to define the issue as one of “paycheck inequities that become obvious only over time.”

Given that Ledbetter had been consistently rated near or at the bottom of supervisors at Goodyear’s Gadsden plant—and seems, sometimes, to have been lucky to hang on to her job at all—it could hardly have been a shock that she ended up being paid less than her more highly rated male colleagues.

Where from here? Well, Ginsburg, in her dissent, invited Congress to revisit the issue and overturn the Court’s decision. And presidential candidate Hillary Rodham Clinton chimed in within 24 hours of the decision with her intention to introduce such legislation.

As a result, we can expect to hear a lot over the next 16 months about the “sexist decision in the *Ledbetter* case.”

Antitrust

Bell Atlantic Corp. v. Twombly

No. 05-1126

from the Second Circuit Court of Appeals
decided May 21, 2007

This was a class action for, *inter alia*, treble damages and injunctive relief under the Clayton and Sherman Acts. The thrust of the complaint was that the telecommunications giants conspired with one another not to compete in—and to exclude other competitors from—their respective geographic markets in connection with telephone high-speed Internet, and other communications services.

The Telecommunications Act required that the remnants of AT&T—the so-called Baby Bells—allow other carriers access to their facilities at “just, reasonable, and nondiscriminatory” rates. But the small carriers complained that the Baby Bells dragged their feet on allowing access—and that the strange gerrymandered map of national telephone service was implicit proof that the Baby Bells had an explicit (but secret) agreement not to compete with one another.

Thus, plaintiffs could allege parallel action, diminished competition, and benefit to the companies—but only an inference of actual agreement.

Substantively, the issue was whether these actions constituted a “conspiracy, in restraint of trade or commerce”

But the real issue was whether the Federal District Court for the Southern District of New York erred in dismissing the complaint for failure to state a cause of action.

The Second Circuit held that—while the plaintiffs would have to back up their conspiracy allegations to avoid a motion for summary judgment—their assertions were enough to avoid dismissal at the pleading stage, even in a section 1 Sherman Act case. This was in line with the Second Circuit’s case law [e.g., *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551 (1977)]—which had not, until May 21, been repudiated by the Supreme Court, despite the fact that the circuit hears a lot of antitrust cases.

Rather, the Second Circuit had used, as a “gate-keeper,” the motion for summary judgment—holding that an antitrust plaintiff must show “at least one ‘plus factor’ that tends to exclude independent self-interested conduct as an explanation for defendants’ ‘parallel behavior’” in order to avoid a summary judgment motion.

But, by a vote of seven-to-two—with David Souter writing the opinion of the Court—the Supreme Court reversed the Second Circuit’s decision. In particular, the Court held that where conduct could be explained by independent self-interest, a plaintiff must allege “some factual context suggesting agreement”—and that, in this case, plaintiffs “ha[d] not nudged their claims across the line from conceivable to plausible.”

Despite the headlines (“High Court Raises Bar on Antitrust Lawsuits”), this does leave open the question

of whether this case says anything at all of importance—or merely punts.

Clearly, showing the Court a map of the strange self-imposed markets of the Baby Bells was insufficient. On the other hand, the Court's opinion complained that plaintiffs failed to list "a single fact in a context that suggests an agreement."

Would "a single fact" have overcome Souter's concern over a "sprawling, costly and hugely time-consuming [discovery]"? Maybe not. But the Court seems to be leaving itself a lot of wiggle-room, even though this case, it apparently thought, was little more than a conspiracy theory masquerading as a complaint.

Labor Law

Roughly a third of the Supreme Court's caseload consists of slapping down weird decisions by lower courts that are—frankly—just plain goofy. A disproportionate number of these aberrant decisions come from the Ninth Circuit itself. But there is something about the "left coast" that seems to produce these strange rulings in other courts as well.

It couldn't have been a secret to anyone why the Supreme Court chose to grant certiorari with respect to the Washington Supreme Court's foray into workers' rights—or what the outcome would be. The case was:

Davenport v. Washington Education Association

from the Washington Supreme Court
decided June 14, 2007

Twenty-one years after the *Beck* decision, you would have thought there would be little question of the constitutionality of a voter-approved referendum exempting nonunion employees from the political portions of union dues, unless they explicitly "opted in." But not only did the Washington Education Association challenge the new law, the Washington Supreme Court struck it down.

The background is this: Following the U.S. Supreme Court's 1986 "*Beck* decision"—imposing some limits on the use of union fees from nonmembers for political purposes—the voters of the state of Washington, in 1992, enacted a statute restricting the use of "agency fees" required to be paid by union nonmembers as a condition of employment. Specifically, these fees could not be used for political purposes without the affirmative consent of the nonmember.

Not surprisingly, the Washington Education Association's response to this—a six-page letter requiring nonmembers to write to their counsel within 30 days in order to "opt out"—was found by the state trial court to be noncompliant with the voter-approved statute.

But, in a six-to-three decision, the state's highest court found that the statute was violative of the First Amendment. The court's rationale was, essentially, that, balancing the competing "free speech" interests of the union and nonmembers, complying with the statute would be more expensive for the union than opting out would be for the nonmembers.

Even union friends questioned the strange rationale of the Washington court. And, following a January 10 oral argument before the U.S. Supreme Court, during which justices seemed to signal their sympathy with the statute, the assumption was that the High Court would reinstate the voter-approved law. And everyone assumed that the chief question would be how much "collateral damage" the unions would suffer as a result of the Court's ruling.

And this assumption was, in fact, correct.

The Supreme Court reversed, in a unanimous decision, holding that "[t]he notion that this modest limitation ... violates the First Amendment is, to say the least, counterintuitive."

In an increasingly common trait of the Roberts' Court, Antonin Scalia, writing for the Court, explicitly limited the decision to, for example, public sector unions—although there can hardly be any question as to how the Court would decide the issues, it is explicitly refusing to decide in this case.

Roughly a third of the Supreme Court's caseload consists of slapping down weird decisions by lower courts

A disproportionate number of these aberrant decisions come from the Ninth Circuit itself. But there is something about the "left coast" that seems to produce these strange rulings in other courts as well.

Securities

It has been a contentious summer in the area of securities regulation and litigation.

First, there was the battle over how to rein in the Enron-related overreactions embodied in Sarbanes-Oxley.

Then, there was the fight between the White House and the SEC over whether investors should be allowed to sue third parties to recover fraud-related losses—with Treasury answering “no” and the SEC “yes.”

And, of course, there were House Financial Institutions Chairman Barney Frank’s (D-Mass.) June 26 hearings bashing the SEC for lax enforcement.

But, for all the Sturm und Drang, the Supreme Court had the last word. The case was:

Tellabs Inc. v. Makor Issues and Rights Ltd.

from the Seventh Circuit Court of Appeals

argued March 28, 2007

decided June 21, 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])

This case arose 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 was 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 had thrown out a securities class action suit in the “mother of all corporate fraud cases”—Enron. In that case, Enron shareholders were foreclosed from

suing banks and securities firms—alleging that they had participated in “accounting fraud” that led to Enron’s collapse.

In proceedings below, the Second Circuit in New York had ruled that investors were precluded from bringing a suit against banks for their role in pricing IPO’s.

When the case came before the Supreme Court, the Second, Fifth, and Eighth Circuits—and the SEC itself—had already 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, had been more permissive in allowing securities class action suits to go forward.

Following the surprise decision in the *Massachusetts* case, observers were reluctant to guess whether “swing vote” Anthony Kennedy would 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 had reviewed the matter coming down on the same side—everyone assumed the Court would hold that the case was precluded by the 1995 Act.

They were right.

In an eight-to-one decision penned by Ruth Bader Ginsburg, the Court held that the complaint must be backed by “cogent and compelling” facts suggesting an intent to deceive investors that are at least as probative of deception as of an opposing inference.

First Amendment/ Campaign Finance Reform

As we have seen, little of the Court’s output was a surprise to observers of the Court. But the award for Most Predictable Opinion of the Year goes to:

Federal Election Commission v. Wisconsin

Right-to-Life

No. 06-969

from the D.C. District Court

decided June 25, 2007

The issue was the constitutionality of the ban on “issue ads”—broadcast advertisements run within 60 days of a general election (30 days of a primary) that mention a candidate in a way that might be construed as favorable or unfavorable.

In *McConnell v. FEC*, the Court had upheld the ban, per se, by a five-to-four decision, with O’Connor casting the deciding vote. But the thinking was that her replacement—Samuel Alito—would come down on the other side of the issue. And this was one area where observers expected the Court to take a 180-degree turn as a result of the change in its composition.

They were not disappointed.

In a five-to-four decision penned by Roberts, the Court held that the statute was unconstitutional, as applied to Wisconsin Right-to-Life.

Roberts went through all of the niceties of pretending that he had not just overturned the *McConnell* case, including, of course, the difference between the facial unconstitutionality of McCain-Feingold and its unconstitutionality “as applied to” a particular circumstance. This caused Thomas, Scalia, and Kennedy—who wanted to overturn *McConnell* explicitly—to refuse to

sign Roberts’ opinion. But no one else was fooled by Roberts’ feigned reticence.

Ironically, perhaps the biggest “winner” from this decision was John McCain himself. McCain’s sponsorship of this bill—which was scathingly opposed by pro-life, pro-gun, and other constituencies in the conservative movement—was a continuing irritant in his efforts to reach out to primary voters. And it was the “issue ad” provisions that were limited by this decision—not the limits on national party soft money—that were at the core of their concerns.

Now that the “issue ad” matter has been laid to rest, McCain can refocus his attention on assuaging conservative anger over his support for amnesty for illegal aliens.

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