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## JUDICIAL LEGISLATIVE WATCH REPORT

### CONGRESS

With control of a \$3 trillion government teetering on how each party plays its role over the next 12 months, the legislative process has become a strange political tango.

Once was the time when the cycle of reauthorizations determined the legislative schedule. As each program came up for renewal every three, five, or six years, the committee with substantive jurisdiction over the program would report legislation to substantively revise it—and to set estimates (authorizations) for its cost.

Beginning in 1978 and 1979, however, Senate conservatives began putting “holds” on what previously would have been routine authorizations for agencies like the Consumer Products Safety Commission and the Federal Trade Commission (run by Ralph Nader acolyte Mike Pertschuk). And they began threatening to add huge numbers of controversial amendments to these routine authorizations.

The result was that the “Nader era” came to a screeching halt. But the other result was that Congress stopped doing controversial reauthorizations for minor programs—or even fairly significant ones. It just left decisions on money—and most policy issues—to the “appropriators” who actually doled out the funding. This trend grew between 2001 and 2006, when Republicans tacked huge policy initiatives on to appropriations bills, frequently in House/Senate conference. The “REAL ID”/National ID Card initiative is only a small example of this.

The result is that, in 2007, the only programs that ultimately get reauthorized are the transcendently important ones and the completely unimportant ones. And even the granddaddy of all reauthorizations, the Defense Department (DoD) authorization, apparently saw the light of day only as a vehicle to make some political points.

After using the DoD bill to debate the Iraq War for a week (“Iraq Week”), Senate Democrats then saddled it with a non-defense-related amendment to grant special federal status to “hate crimes” against homosexuals, lesbians, and transvestites—a move intended to provoke a presidential veto of the entire DoD package.

As the DoD debate suggests, virtually everything Congress now does—or does not do—is political gamesmanship designed to benefit each party’s election outlook. Congressional Democrats have structured their agenda so that each legislative week is organized around a particular political theme: “Iraq Week”; “Children’s Week”; another “Iraq Week”; “Education Week”; and yet another “Iraq Week.”

Take the State Children’s Health Insurance Program (S-CHIP), which, by the time you read this, is expected to have been killed by another presidential veto.

The current program was enacted as a “Band-Aid” in the wake of the demise of the Clinton administration’s national health insurance initiative and currently costs \$25 over five years. Although the White House was willing to expand coverage to \$30 billion, congressional Democrats have insisted on increasing the program to \$60 billion (240% of its current size) —at a time when the debt limit has just been increased to nearly \$10 trillion.

And while Democrats touted an additional 4 million children they claimed would be added to the 6.6 million currently on the program, and spent a week repeating the mantra “for the children,” Republicans contended

- that part of the additional money would provide health insurance for adults, in a move intended to be a way station for federally provided national health insurance;
- that the program, far from being a benefit for the very poor, would cover families, in places like New Jersey, who earn over \$80,000 a year;
- that the program would shift families away from private insurance;
- that the bill, financed by a tobacco tax increase would require an additional 22 million smokers in order to be self-funding, as promised; and
- although the bill purported to ban benefits for illegal aliens, that it would weaken guarantees that would prohibit that from happening.

In the end, the bill garnered a supposedly veto-proof 67 votes in the Senate—assuming, correctly or incorrectly, that the administration could not arm-twist one senator into switching. But the bill fell short of the two-thirds majority required in the House to overturn the promised veto. And both Congress and the White House largely refused to budge from their respective positions.

So what’s at work here?

The answer is that Democratic polling had recently convinced them that the American people were more favorable to government-provided health care than they had been in 1994 and that expanded government health programs (“for the children”) could be a cutting-edge issue in the 2008 elections.

As a result, jittery Republican senators, like detail-averse Finance Committee Ranking Member Chuck Grassley (Iowa) and Orrin Hatch (R-Utah), quickly scrambled to negotiate a face-saving compromise—with the supposed trade-off for the large tax increase being more reliance on GOP-supporting private insurers.

But if the Democrats thought intransigence would inure to their political benefit, George Bush also had his own political imperatives:

For the White House, the most immediate political crisis was the hemorrhaging of the party's conservative base. Administration support for the immigration "amnesty" bill had created a massive rift that presidential advisers should have foreseen, but did not. And the White House push for ratification of the Law of the Sea Treaty (LOST)—as a "Bush legacy"—had only exacerbated the split.

As a result, the prolonged bloody battle over S-CHIP became a gladiator battle with each side playing primarily for the benefit of an audience.

And, as for the poll that started it all? Well, it was biased. The questions were asked in such a way as to produce a dramatically different result than if they had been asked only slightly differently.

But the mythology that the nation now badly wants government-mandated health insurance has embedded itself deep into the heart of the Democratic Party. Presidential candidate and Senator Hillary Rodham Clinton (D-N.Y.) is calling for the government to force all Americans to buy health insurance, Massachusetts-style, no matter what the personal consequences. Even competitor Barack Obama (D-I.L.) has shied away from this proposal.

And, given that the Clinton health plan's expansive portability, ban on preexisting conditions, and compulsive nature will surely cause the cost of mandatory health insurance to skyrocket, it may be—against all odds—that George Bush has been the more shrewd strategist in this particular battle.

## REPUBLICAN LEADERSHIP'S "INNOVATIVE" USE OF SENATE RULES ONCE AGAIN COMES BACK TO BITE THEM

First it was the "nuclear option" — the push by the Senate Republican leadership in the 109th Congress (2005-6) to eliminate binding Senate rules in order to ease the confirmation of Bush judges. The *raison d'être*, that the rules were no longer necessary because Republicans would never lose control of the Senate, now seems foolish.

Now, the new Republican leadership, led by Mitch McConnell (R-KY.), has misused the Senate rules again in an admittedly smaller manner, but one that has come back to bite it.

In the wake of published reports about Senator Larry Craig (R-Idaho), the leadership of Craig's own party called for an ethics investigation of the senator's arrest and misdemeanor guilty plea. The GOP leadership argued that any episode in a senator's personal life, no matter how unrelated to his legislative functions, potentially reflected badly on the Senate and hence was a matter within the Ethics Committee's jurisdiction.

The Republican leadership's hope was that the threat of placing a lengthy Ethics Committee spotlight on Craig's bathroom antics would force him to resign and abort the official investigation. He didn't. It didn't. And now the GOP is stuck with a prolonged ulcerating ethics embarrassment that it, through its own actions, has kept in the headlines.

The leadership is also stuck with the realization that, if it had not called for the bogus investigation, even the Senate Democrats were probably not hypocritical enough to have done so.

## COBURN, SCHUMER WAGE PARLIAMENTARY BATTLE OVER THE NATIONAL DATABASE BILL

It has not made it into the headlines. It has not even made it onto the Internet. But the latest parliamentary Kabuki dance between Oklahoma Republican Tom Coburn and New York Democrat Chuck Schumer is no less fascinating.

The battle is over legislation, passed by voice vote in the House, to dramatically increase the number of records on Americans kept at the West Virginia FBI database which was created to screen gun purchasers.

Immediately after the tragedy at Virginia Tech, the National Rifle Association (NRA) signed off on the long-time Democratic antigun legislation. And Schumer assumed he had a quick and easy legislative victory. That was before the NRA's membership rebelled at its support for gun control.

In the wake of this grassroots firestorm—from the right—against the NRA, Senator Tom Coburn (R-Okla.) placed a hold on the database legislation, which stalled it in its tracks.

Coburn, a single senator, had so much power because of two factors:

- First, over a period of three decades, Senate conservatives had used the threat of “killer amendments” to develop nonbinding Senate “holds” into “requests,” which, as a practical matter, the Senate leadership was loath to ignore.
- Second, there are a number of specific factors that frustrated Schumer.

When the House version of the bill came over from the House, it was (mistakenly) allowed to be referred to committee. This means that Schumer could only retrieve it from committee by reporting it, which would involve a markup where Coburn would be able to bombard it with amendments, or by discharging it.

To discharge the bill, the discharge motion would have to be reduced to a resolution. The resolution would have to be brought on to the “over under” calendar and then, after another legislative day, onto the Senate calendar. The motion to proceed to it

would be filibusterable, as would the actual resolution. And the only result of going through all of this procedure is that the House bill would be on the Senate calendar, as it would have been in the first place, had Schumer not mistakenly allowed it to be referred to committee.

So Schumer asked for “unanimous consent” (through floor manager Carl Levin (D-Mich.)) to discharge the House bill. But Coburn (through ranking Republican John Warner (R-Va.)) objected. This meant that the bill was, as a practical matter, stuck in committee.

The irony is that the committee had marked up a Senate version of the bill. But the Senate bill contained a Coburn amendment requiring the states to turn over massive amounts of information on illegal aliens and requiring the FBI to turn over that information to Immigration and Customs Enforcement (ICE) for deportation proceedings. This made the Senate bill unacceptable to the Democrats, as did pro-police language that Democratic Chairman Pat Leahy (D - VT) had himself added to the bill.

The situation was this: the Senate bill had been “ordered to be reported” and, hence, could be reported at any time.

But the conference-averse Schumer was reluctant to move the Senate bill, which contained the anti-immigrant language that was unacceptable to him, but was probably too popular to be struck on the Senate floor. And Schumer’s plan to have the House just rubber-stamp the Senate bill and send it directly to the president’s desk would thus have been impossible if the Senate bill had been the vehicle.

The House bill, on the other hand, contained none of the offending language, but was procedurally very difficult to extricate from committee without “unanimous consent,” which Coburn would not give.

Schumer could have added the proposal to another must-pass bill.

But the must-pass bill that was an obvious target was a Science-Justice-Commerce Appropriations bill that had left the Senate before Schumer realized that he needed it as a vehicle. This was particularly unfortunate for Schumer because of a strange quirk in the Senate rules which would have made his amendment to Science-Justice-Commerce in order, even though it was “legislation on an appropriations bill.”

Finally, Coburn was prepared to offer amendments to either the House or Senate version, which would

- prohibit post-traumatic stress disorder victims from having their names sent to the FBI’s database; and
- require a court order before personal information on Americans (such as psychiatric files) could be sent to the FBI database.

Since those amendments would have stated with specificity what Schumer claimed the effect of his bill would be without them, they would have been difficult to defeat on the floor. And, win or lose, Democrats were loath to create a series of antigun votes that could be used against them in the 2008 elections.

So the battle continues. And, by the time you read this, Schumer may have found a way to cut the Gordian knot. But if there is a case study of the way one senator conversant in the Senate rules can use his prerogatives to wield power, this is it.

## **THE COURTS**

### **THE SUPREME COURT**

#### **THE DOCKET**

The most important decisions the Supreme Court makes concerning American jurisprudence are made before the Court even begins its new Term. These decisions concern which 1% of the petitions for certiorari will be granted, and which will fall into the 99% in which the lower court opinion will be allowed to stand.

It takes four votes to grant certiorari. And the politics of deciding to hear a case is often as labyrinthine and, well, political as the legislative process across the street.

The question of whether the lower court opinion was wrong—or arguably wrong—is just the beginning of the analysis. How important is the issue? Are there procedural problems that could interfere with an adjudication on the merits; is this a good thing or a bad thing? Is there a split between circuits? And, in a tightly contested issue, are there enough votes in the Supreme Court for the “right” side to prevail on the merits?

Shortly before the first Monday in October and the beginning of the 2007-2008 Term, the High Court accepted 19 new cases—perhaps out of fear that, like last year, it would have so few cases that it would have to cancel days set aside for oral argument. This was particularly embarrassing in 2006 because the cancellation of work days happened right at the time when the justices were sending an emissary to Congress to demand a pay raise.

So, what does this year’s docket tell us about the “Roberts Court”? The answer is that, for all of the loud protestations in the press that the “conservative wing” is now shaping the Court’s agenda, its decisions speak more to continuity than to change:

- The plurality of the court’s docket will once again be criminal cases—with a good sampling of appeals by death row inmates for whom adjudication is literally a life-and-death issue.

- While there are certainly practices in death penalty cases that cause supermajorities of the Court to demur, as a general matter, there is a 5-to-4 conservative majority in favor of the death penalty
  - ◆ a fact that was recently highlighted when four members voted to grant cert. on a death penalty case, but there were not 5 votes to grant a stay of execution until the case could be heard.
- The docket represents a smorgasbord of the issues of our times that are thrust upon the Court, and that it samples in small portions:
  - ◆ the aftermath of the Enron fiasco; and
  - ◆ the status of detainees in Guantanamo.

Also considered are the following:

- at a time when serious crime rates are beginning to rise again, the question of the extent to which federal judges can be more lenient than statutorily mandated sentencing guidelines prescribe;
- the continuing efforts by the civil rights lobby to legislatively and judicially expand both old and new statutes to offset the fact that the federal government's aggressive intervention in race policy has thus far failed to create a "mocha" society;
- efforts by Republicans to create National ID Cards by, for instance, requiring picture identification to vote in states such as Indiana; and
- efforts to make implementation of the death penalty seem like going to a hospital for hip surgery.

Probably the most important cases on the Supreme Court docket are *Boumediene v. Bush*, No. 06-1195, and *Al Odah v. United States*, No. 06-1196, the detainee cases—but not for the reasons you imagine.

These cases will be the Court's third crack at the constitutionality of the detention and military trials of Guantanamo Bay prisoners under a system that Congress reenacted in 2006 as a result of an earlier Supreme Court decision.

But, even more important, these cases could determine the constitutionality of the "court-stripping" provisions that are increasingly proliferating in controversial federal legislation—added to the 2006 military tribunal legislation to prevent the courts from overturning it.

True, the Constitution allows the writ of habeas corpus to be suspended at times of “rebellion or invasion.” And the Court could look at innovative theories as to what these words mean in times of worldwide terrorism. But Congress perceived this “court-stripping” provision not as an exercise of its Article I [Section 9, Clause 2] powers, but of its Article III powers.

Article III, Section 2, states that the Supreme Court’s appellate jurisdiction is “with such Exceptions, and under such Regulations as the Congress shall make.” And, since Congress has the authority under Article III, Section 1, to refuse to create any inferior courts at all, it has always been assumed that Congress has the similar power to limit the jurisdiction of the lower courts it does create.

Hence, since the sweeping post-Civil War case of *Ex parte McCordle*, 74 U.S. 506 (1869), it has been assumed that Congress’ “court-stripping” power is virtually unlimited. That case held that Congress had the authority to retroactively withdraw jurisdiction to grant habeas relief to a civilian publisher convicted by a military commission of acts obstructing Reconstruction.

Although it was much criticized, this case has never been overturned.

*Ex parte McCordle* becomes particularly relevant because one of the little-noticed efforts by former Majority Leader Tom DeLay (R-Tex.) was a project to gradually increase the use of “court-stripping” to withdraw federal court jurisdiction over controversial issues—and to thereby reverse objectionable court decisions without resorting to constitutional amendments.

And, although congressional Democrats had no problem using “court-stripping” when it suited their purposes—as in the Civil Rights Act of 1990—DeLay (with the help of his minions) became the master.

DeLay’s first foray was an amendment to withdraw federal court jurisdiction to release convicted criminals as a result of prison conditions. But, with this entree, the practice has since proliferated. And, even very controversial measures, such as the severe limitation of habeas relief for death row inmates, have been sustained by the High Court.

The question of whether the Court will finally overturn *Ex parte McCordle* becomes even more interesting because the validity of “court-stripping” may determine whether congressional Republicans have any practical redress to judicial decisions dealing with flag-burning, civil unions, and the use of God’s name in the “Pledge of Allegiance”.

Crime and punishment, however, will not be the only issues before the Court. Three cases of particular interest to business will be:

*Stoneridge Investment Partners v. Scientific-Atlanta*, No. 06-43: In a case that will be—to say the least—closely watched on Wall Street, the High Court has agreed to

decide whether and under what circumstances lawyers, bankers, and accountants can be held liable for “participating” in securities fraud by their clients. And, in particular, the Court will look at whether this liability will lie in the absence of a piece of paper under the name of the lawyers, bankers, and accountants that can be specifically identified as “fraudulent.”

*CBOCS West v. Humphries*, No. 06-1431: This case deals with an old issue in a new context: whether federal prohibitions against racial discrimination implicitly ban retaliation against employees who complain about racial discrimination.

In its 2004-05 Term, the Court found an implicit congressional intent to punish “retaliation” in Title IX of the Education Amendments of 1972, prohibiting sex discrimination. By a 5-to-4 majority, with Sandra Day O’Connor casting the deciding vote, the Court extended Title IX to persons who complain about sex discrimination. [*Jackson v. Birmingham Board of Education*, No. 02-1672] So, with the departure of Sandra Day O’Connor, the Court’s decision in *CBOCS* could provide an interesting look into whether the new Court’s composition has fundamentally changed things.

At the crux of a case is an intellectual proposition that an 1866 Reconstruction statute (42 U.S.C. § 1981) was intended not only to outlaw discrimination, but to punish workplace retaliation. (As one reporter coyly notes, “[the 1866 statute] does not mention ‘retaliation.’”)

As a matter of fact, the proposition would have to be viewed as a little foolish, if it were not pervasive and embraced consistently by the federal circuit courts of appeals that have dealt with it.

True, the courts have, rightly or wrongly, found an implied legislative intent to cover “retaliation” in other statutes where the word “retaliation” does not appear. But, while some of these statutes were enacted during the Johnson administration, it was Lyndon Johnson, not Andrew Johnson.

As a result, there is at least some speculation that the Court has taken this “circuit non-split” case to reassert the obvious legislative intent: that of punishing discrimination, rather than protecting whiners.

One final observation on *CBOCS*: As with last year’s excursion into expanding the statute of limitations with respect to sexual harassment claims [*Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074], civil rights advocates and the press will, once again, try to paint a failure to dramatically expand the statute as a rollback of civil rights. And this may even be a preface to trying to use legislation to reverse this case to turn the *Ledbetter* case into a comprehensive “Civil Rights Act of 2009,” particularly if Democrats seize control of the Senate, House, and White House in the 2008 elections.

As an opening salvo to this potential legislative battle, Linda Greenhouse of the *New York Times* has accused the Court of “advancing a particular agenda”—painting the

case as analogous to the *Birmingham* case, but for the replacement of O'Connor with Samuel Alito. But, contrary to Greenhouse's fears, it is more likely than not that the Court has taken the case to reassert principles of discerning legislative intent with respect to 1866 sensibilities and not to reach back and allow retaliation with respect to the broad panoply of twentieth century civil rights statutes not currently before the Court.

*Department of Revenue of Kentucky v. David*, No. 06-666: The case will return the Court's attention to its favorite stepchild: the dormant commerce clause. And there is no area of the law in which the Supreme Court has been more consistent than using this legal concept to overturn state statutes that discriminate between in-state and out-of-state businesses.

So, it is probably portentous that at least four justices have voted to review this lower court decision allowing Kentucky to exempt interest from Kentucky bonds from state taxation while taxing interest from other states' bonds. No one is betting that this practice will withstand scrutiny.

## THE INFERIOR COURTS

It has not been a particularly good year or so for election-law "reformers."

The guts of McCain-Feingold's ban on "electioneering communications" (which even mention a candidate within 60 days of a general election) was struck down by the Supreme Court in its 2006 decision in *Federal Election Commission v. Wisconsin Right to Life*, No. 06-969.

The ethics/lobby reform bill was the best "reformers" could eke out of a fairly nasty scandal involving former House Majority Leader Tom DeLay. And, other than requiring lobbyists to file reports twice as often and to report "bundling", the final version of that bill was largely anemic.

In *Randall v. Sorrell*, No. 04-1528, the Supreme Court once again reaffirmed *Buckley v. Valeo*, 424 U.S. 1 (1976). And much-ballyhooed legislation to overturn that decision being pushed by Senators Arlen Specter (R-Pa.) and Chuck Schumer is not expected to go anywhere.

The death knell for the 1974 Federal Election Campaign Reform Act's (FECA) presidential campaign fund was finally tolled, when all of the major presidential candidates—both Republican and Democrat—indicated that they would reject matching funds long before the primaries. And, in fact, the decision by candidates like John Edwards to accept matching funds is now viewed as pretty much the obituary of a serious presidential campaign.

And now the Washington [State] Supreme Court, fresh from being batted down over union dues, has struck down Washington's statute prohibiting false statements about

a candidate for political office. In a fractured 5-to-4 decision, Justice James Johnson wrote for four of the five members of the majority when he said that placing the government as “the final arbiter of truth in political debate is fundamentally at odds with the First Amendment.”

What makes the Washington Supreme Court’s decision particularly remarkable is that the statute required that the false statement

- be made with actual malice;
- be material; and
- be made in advertisements or campaign materials.

Central to the outcome was a one-justice concurring opinion that revolved around the fact that the statute impermissibly allowed the punishment of non-defamatory speech, whereas it could have permissibly outlawed defamatory speech.

And, no doubt, part of the reason for the outcome may have been the court’s concern over the factual findings of the commission empowered with enforcing the statute. The defendant, Green Party state Senate candidate Marilou Rickert, had stated that her Democratic opponent had “voted to close a facility for the developmentally challenged.” But the commission determined that the juvenile detention facility was something different from a “facility for the developmentally challenged.” And it found that the Democrat had not actually voted to close it.

Many conservative First Amendment purists who battled McCain-Feingold and the 1974 Act will probably welcome extricating government from campaign regulation, even in cases of maliciously false statements.

Nevertheless, in the increasingly interesting world of Washington State jurisprudence, you have to wonder whether the current U.S. Supreme Court would come out on the same side as the highest state tribunal.