



NATIONAL
LEGAL
CENTER

for the Public Interest

Legislative and
Judicial Watch Report

Vol. 28 • No. 12 • December 2007



JUDICIAL LEGISLATIVE WATCH REPORT

LESSONS FROM THIRTY-TWO YEARS IN WASHINGTON

This will be the last installment for this reporter after roughly twenty years of preparing literally hundreds of these newsletters—and eighteen years with the U.S. Senate.

It is always a balancing act trying to be topical when the final draft is submitted over a month before publication, but let me make a few predictions on the headlines in the days and weeks before you read this:

- ◆ Congress and the president will have agreed, at the last minute, on a massive appropriations bill covering most of the discretionary functions of the government without having to shut down the bureaucracy. Particularly when combined with the anticipated supplementals, it will set record levels of spending.
- ◆ Congress will have dragged on beyond its targeted adjournment date. In the waning hours, large numbers of senators will have taken the floor during interminable quorum calls to proclaim that, despite a \$3 trillion budget, our country's government is worse than it has ever been. Democrats will blame Republicans; Republicans will blame Democrats; no one will blame themselves.
- ◆ The vicissitudes of presidential candidacies will rise and fall. As the first caucuses and primaries approach, contenders once thought to be inevitable will be sliding toward has-been status. Candidates once regarded as jokes will appear, for the first time, to be viable.

CONGRESS

OVERVIEW

Gloom has settled over congressional Republicans. Senate Minority Leader Mitch McConnell (R-Ky.) is privately telling allies that Republicans will be lucky to retain the forty-one votes in the Senate that they need to filibuster legislation vital to the preservation of their party.

Others believe McConnell is deliberately “low balling” the situation in order to make himself look better if Republicans end up in the midforties in the Senate after the 2008 elections, as they believe he expects.

True, Republicans have to defend twenty-two out of thirty-four Senate seats up for election. And, true, a number of Republican seats are vulnerable because of retirement and other factors, including New Mexico [open], New Hampshire [John E. Sununu (R)], Colorado [open], Maine [Sue Collins (R)], Idaho [open], etc.

But the possibility of a Democratic presidential landslide that reshapes the legislative map is becoming less likely as Senator Hillary Clinton (D-N.Y.) solidifies her hold on the nomination.

Clinton is a polarizing figure who invokes an almost intense antipathy among 40–50 percent of the population. And while the good news for Clinton is that she has been vetted and is unlikely to produce any new “skeletons,” the bad news is that she has been vetted. People who hate her are not likely to change their views, formed over a decade and a half.

Furthermore, Clinton will pose real problems for red state Democrats in the House who are the basis of the tenuous Democratic majority there. Although these candidates enjoy a healthy lead in the polls (19 percent, according to a *New York Times* poll) at a time when no viable challenger has emerged, their approval drops thirteen percentage points when the name of Hillary Clinton or Barack Obama is mentioned. And, at this point, this means that these Democrats in Republican districts are only six points ahead of no one.

So there is more than a slight chance that the 2008 elections will produce a continuation of divided, gridlocked government. And, given the frightening ideas about big government being pushed by both parties, that may be the best outcome we can hope for.

THE 110th CONGRESS: CHANGE AND CONTINUITY

The U.S. Senate is a strange and unique institution—unlike any other legislative body in the world in its labyrinthine procedures and bizarre ways of operating. There was even a time when freshman senators were expected to spend their first term in silence, watching and learning the traditions and norms of this odd institution.

No longer.

Since the resignation of Trent Lott (R-Miss.) as Republican Leader, the Senate has been steered by relative newcomers.

When Bill Frist (R-Tenn.) was elected Majority Leader, he had less seniority than a majority of sitting senators. Well into Frist’s tenure, neither he nor his staff knew it was even possible to construct an “amendment tree”—a series of amendments configured so that no further amendments can be offered to a particular piece of legislation.

To his credit, the current Majority Leader, Harry Reid (D-Nev.), is more aware of the Senate’s traditions and norms than his predecessor. Nevertheless, watching Reid try to put an amendment tree in place to shield the hate crimes amendment to the fiscal year 2008 Department of Defense (DOD) authorization made it clear that he was hardly a master of the Senate rules.

And the Senate leadership's relative lack of experience has, for over half a decade, given rules-savvy members of the minority a huge influence over the agenda of the Senate as an institution.

Under Frist, forty-year veteran Ted Kennedy (D-Mass.) ran circles around the hapless Tennessean, causing the feckless, floundering leader to threaten to use the "nuclear option" to obliterate the Senate rules. With the exception of a few tort reform measures, Republicans achieved little over Kennedy's opposition.

Reid has done a much better job representing his party, but it would be a mistake to assume that he is in control of what goes on in the Senate.

Thus far this year:

- ◆ The "unstoppable" ethics bill was passed only after an amendment filibuster of earmark-related amendments forced the deletion of grassroots lobbying reporting requirements opposed by conservatives.
- ◆ The popular two dollar minimum wage increase—perhaps the only real partisan achievement of the Democratic Congress—was passed only in exchange for \$5.3 billion in tax cuts for business.
- ◆ Free-standing anti-Iraq War legislation was killed by a filibuster threat—and even antiwar amendments on legislation to fund the Iraq War have capsized.
- ◆ The immigration bill supported by the leadership of both parties was killed by a Rube Goldberg-like parliamentary mousetrap set up by freshman Republican Jim DeMint (S.C.).
- ◆ The pork-laden Republican continuing resolution for fiscal year 2007 was killed by a DeMint threat to filibuster the motions to send it to conference—and Democrats were subsequently browbeaten into crafting their own continuing resolution without a lot of the Republican pork and within the strictures of the GOP spending levels.
- ◆ As a result of the conservative filibuster of the continuing resolution and of the ethics bill, the number of explicit earmarks has plummeted. One recent study showed that the congressional earmarks on the annual DOD budget had dropped from \$15 billion in 2006 to \$6.5 billion in this year's House version and \$8.2 billion in the Senate.
- ◆ The few politically charged bills that have been allowed to reach the president's desk, including the \$60 billion children's health initiative, have been allowed to do so only after congressional Republicans had a veto commitment and a vote count showing that they had the strength to sustain the veto.

- ◆ At press time, the same appears to be the case for the wide panoply of free-standing appropriations bills.

Congressional Democrats, meanwhile, are faced with a central moral and political dilemma with respect to the whole range of issues with which they have dealt—from Iraq to children’s health insurance to the minimum wage:

- ◆ Do they want to be intransigent and lose legislatively in order to preserve a political issue for the 2008 elections?
- or
- ◆ Do they want to eke out a compromise with Republicans that diffuses the issue as a political tool but accomplishes some of their legislative objectives?

The question is trickier than it seems. Thus far this year, Democrats have tended to favor issues over accomplishments. But the result of deliberately doing less than they could have done to limit the war in Iraq is a 14 percent congressional approval rating that spans all segments of the political spectrum.

As you read this, congressional Democrats will be frantically trying to thread this political needle with respect to SCHIP, the children’s insurance program vetoed by Bush in an effort that was sustained by the House on October 18.

The ideal scenario for them would be to jimmy the \$60 billion price tag just enough so that the Bush administration will still veto the bill, but there would be 290 votes in the House to override that veto.

RICO-TYPE GANG LEGISLATION STALLED BUT POISED FOR ENACTMENT

Politicians really do not learn from experience.

It was perhaps understandable in 1968 that legislators failed to comprehend that a bill purportedly going after the Mafia would be used against legitimate businesses and antiabortion protestors. But the expansive drafting of the Racketeer Influenced and Corrupt Organizations Act (RICO) defined racketeers to include businesses or groups that committed two or more crimes from a long list of fairly innocuous predicate offenses.

So it is somewhat more perplexing that in 2007 Senate Republicans are fervently pushing a bill to make a formal or informal group, including a business, a criminal street gang based on the commission of three or more crimes from a long list of fairly innocuous predicate offenses.

And while some versions of this decade-old proposal would require a crime of violence involving injury to property—or even person—it would be foolish for automakers, pharmaceutical companies, toy makers, or gun shops to assume that this concept would not ultimately be extended to the manufacture and sale of their dangerous products.

This effort by Republicans to create a new RICO goes hand in hand with continuing efforts to expand the consequences of federal money laundering statutes—even at a point where it is clear that prosecutors are using money laundering to compound the consequences of regulatory violations by legitimate businesses.

Indeed, two conservative members of New Orleans’ Fifth Circuit recently complained that the government’s expansive use of this statute represents “prosecution run amok.”

We will soon find out how amok the government has run, as the U.S. Supreme Court hears the question of whether hiding the proceeds of an illegal operation—whether drug dealing or securities fraud—is, in and of itself, money laundering.

At issue specifically is a man who was stopped on a Texas highway with \$83,000 under the floorboards of his car (*Cueller v. United States*, No. 06-1456). But—lest anyone think this is a criminal case and not a business case—the issue could just as well apply to Enron.

In fact, Enron has even clearer problems than drug dealers with a statute punishing “[transmission of funds in a way designed to] conceal or disguise the nature, the location, the source, the ownership, or the control” of the proceeds of an illegal activity.

So, even if the Supreme Court holds that the money laundering statute only covers disguising cash when it is with the intent of creating the false impression that it was obtained legitimately, large corporations should probably be more concerned than they are about the extent to which the statute is turning up in draconian terrorism—and gang-related legislation.

This is particularly true, given the predispositions of Attorney General Michael B. Mukasey, whose most pronounced tendency on the bench was sentences for white collar criminals that were substantially harsher than the Second Circuit as a whole.

THE COURTS

THE SUPREME COURT

The Supreme Court, which has traditionally been a political institution with pretenses of being a nonpolitical one, is being even more overtly politicized.

The most recent example of this was the costly public relations campaign waged to influence the Court in *Stoneridge Investment Partners LLC v. Scientific-Atlanta Inc.*, No. 06-43.

That case will determine 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 decide whether this liability will lie in the absence of a piece of paper under the name of the lawyers, bankers, or accountants that can be specifically identified as fraudulent.

No one is questioning that the Court's decision in this case will have enormous financial ramifications and will either open or close an entire field of profitable litigation. But what was most startling about *Stoneridge*, which was up for oral argument on October 9, was the way deep-pocketed businesses and plaintiffs' lawyers waged a costly public relations campaign as though this were a legislative, rather than a judicial, battle.

In what was characterized as "a political campaign," both appellants and respondents tracked down congressmen, state attorneys general, the Solicitor General, major lobby groups, and current and former Securities and Exchange Commission (SEC) officials and members in the hope of using their names to buttress each respective side's case. In one instance, lawyers tried to secure a meeting at the SEC itself by threatening to issue a press release attacking the agency.

The question is: what would cause such legally savvy litigants to conclude that spending large amounts of money on—essentially—a public relations campaign would influence the Court?

Part of the answer is desperation. Plaintiffs appear to be convinced that the Court has become a hopelessly conservative institution, particularly with respect to antitrust and securities suits, and this is, legally speaking, their Hail Mary pass.

This view is buttressed by the fact that the Court has, in recent terms:

- ◆ thrown out a suit against Merrill Lynch for biased, self-interested research under the 1998 Securities Litigation Uniform Standards Act (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371); and
- ◆ imposed standards of pleading for antitrust cases that require more than a conspiracy theory in order to allege collusion on the basis of parallel behavior (*Bell Atlantic Corp. v. Twombly*, No. 05-1126).

The problem with this is that this Supreme Court has consistently construed federal securities laws broadly (*Securities and Exchange Commission v. Edwards*, No. 02-1196). And the outcome in the *Merrill Lynch* case was, ironically, a result of one of those broad readings.

But there may be more at stake here:

The Court all but invited litigants to lobby it when, by a 5–4 vote, it threw out its standing rules, its sovereign immunity rules, and its rules with respect to statutory construction in order to show how very serious it was about global warming (*Massachusetts v. Environmental Protection Agency*, No. 05-1120).

In a decision in which Justice Anthony Kennedy provided the swing vote, the High Court decided in that case that:

- ◆ the states had standing to force the Environmental Protection Agency (EPA) to act on greenhouse gases;
- ◆ notwithstanding its language, the statute was open to the interpretation that it was not illegal for the EPA to regulate greenhouse gases; and
- ◆ notwithstanding a statute that seemed, at its most liberal reading, to allow EPA to decide whether it wanted to regulate or not, the EPA *must* issue greenhouse gas regulations—or justify in much stronger terms why it refuses to do so.

What a lot of analysts took from the decision in the *Massachusetts* case was that a really intense public relations campaign could sway Kennedy and, hence, could sway the Court.

And lobby they have.

But there may be another consideration at work here. Particularly in the area of civil rights cases like *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074 (2007), the Supreme Court's decision may be just a way station to a legislative remedy—if there is no judicial one.

Hence, the Supreme Court now finds itself at the center of at least two intense political campaigns:

- ◆ the campaign over the Court's delicately balanced composition, which will form a centerpiece of the 2008 presidential battle; and
- ◆ the campaign over the Court's decisions once they are actually handed down.

CONGRESS/THE EXECUTIVE BRANCH FEDERAL REGULATION

DEMOCRATS GO SLOW ON MEASURES TO SCARE BUSINESS

It normally takes about two years for a party—newly in power—to forget the lessons that put it there.

And congressional Democrats have thus far exercised unexpected restraint in avoiding many of the veto bait proposals they would probably like to see because they would scare potential business contributors—and because they would be vetoed.

This rule is not without exceptions. Obviously, the congressional Democratic leadership believes global warming and the regulation of greenhouse gases is a winning political issue, although, even in this area, House Energy and Commerce Committee chairman John Dingell (D-Mich.) was able to stop the House from sticking an increase in Corporate Average Fuel Economy (CAFE) standards on its version of the energy bill.

But a major test of the Democrats' willingness to defer gratification will be the extent to which House Financial Services Committee chairman Barney Frank (D-Mass.) and the House leadership will be able to resist the temptation to push punitive legislation on subprime lending institutions.

In fairness, Frank has worked hard to rein in his reputation as a firebrand. After a public hearing attended only by liberal politicians advocating federal legislation to further regulate subprime lenders, Frank scheduled a private meeting on October 26 with the financial institutions to discuss working with defaulting borrowers to avoid foreclosure.

Frank clearly intends that this meeting be perceived by attendees as a legislative velvet glove with a fist inside. But, given the closeness between Republicans—including the Bush administration—and banks, this may be, for the time being, all glove and no fist.

For their part, the liberal politicians at Frank's hearing are pushing to extend the community reinvestment rules that govern commercial banks to subprime lenders. And, with traditional banks like Bank of America being invited to Frank's meeting, the Massachusetts liberal clearly hopes that both liberal politicians and banking competitors will think increased regulation is a really neat idea.

THE FEDERAL COMMUNICATIONS COMMISSION MULLS NEW OWNERSHIP RULES

Given the attention that has been given to conservative talk radio, a festering disagreement over whether to tighten or loosen the media ownership rules is the center of a regulatory fight that may go on for years.

In mid-October, the chairman of the Federal Communications Commission (FCC), Kevin J. Martin, circulated a proposal to relax the ownership rules—in particular, to repeal the rule that prohibits one person from owning a newspaper and a television or radio station in the same market.

In particular, the change would be a boon to Rupert Murdoch, who would like to continue his control of the *New York Post* while he controls New York's Fox television station.

At press time, Martin appeared to have the votes of three of the five FCC commissioners. The big question was whether he would proceed with such a sweeping deregulation if he had to roll over the other two to do it. Negotiations were underway on the extent to which the ownership rules would be relaxed, with current rules allowing:

- ◆ the ownership of two television stations in the same market only if there are at least eight local stations and if one of the two is not among the top four; and
- ◆ the ownership of no more than eight radio stations in each of the largest markets.

The battle over ownership rules was already on the table before the Martin proposal after a group called, ironically, Free Press published an analysis claiming:

- ◆ that talk radio programming is overwhelmingly conservative;
- ◆ that this is true notwithstanding a voracious demand for progressive radio programming; and
- ◆ the success of hosts like Rush Limbaugh—and the failure of ones like Al Franken—is the result of media concentration of radio station ownership under current FCC rules.

The conservative Free Congress Foundation will publish shortly a rebuttal to the Free Press study. And, not to steal its thunder, Free Congress will find:

- ◆ that the daily listenership of talk show host Rush Limbaugh at any given time (roughly 5 million) represents less than 10 percent of the daily readership of America's largely liberal newspapers;
- ◆ that talk radio is a smaller voice than the liberal nightly news broadcasts and the equally liberal prime time programming; and
- ◆ that the Free Press study is little more than an effort by those with a viewpoint that hogs the overwhelming share of the sources by which Americans receive information to squash any small dissenting voices that might exist.

Whoever is right, both Free Congress and Free Press clearly understand how much is at stake and how hotly this issue will continue to be contested.

POSTSCRIPT

One would think that thirty-two years of experience in Washington would have produced more useful aphorisms than they have. But here, for what it is worth, are some observations:

That there are two types of power brokers in Washington: those who exercise power by virtue of position, and those who exercise power by virtue of skill.

That, on issues of importance, those with skill normally trump those with position.

That the world moves with its own momentum, and the most powerful men of our generation have been able to do little more than fritter around the edges. It is no coincidence that the largest growth in any government in history has occurred with our government—and has taken place under two perceived conservatives, Ronald Reagan and George W. Bush, both also perceived as power-wielding presidents.

That most major legislation is largely an accretion of decisions that have been made before and that continue to creep forward, like a mudslide, from year to year and decade to decade.

That, sitting on the Senate floor, waiting for Senator Robert Byrd to finish a half-hour speech on his cat before one can offer an amendment, the exercise of power seldom feels like an exercise of power.

That liberalism and conservatism are not ideologies but shifting composites—and that some conservatives have more in common with liberals than with other conservatives.

That defeat with dignity is seldom the moral victory its practitioners imagine.

That victory feeds on itself, and, similarly, defeat feeds on itself.

That valedictories are seldom final until the participant actually dies.