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This online newsletter on the crime policy process in Washington is bi-weekly when Congress is in session, irregularly otherwise. It is by subscription for \$20 a year. A website, www.crimeletter.net has useful links, past editions, and a subscription page. The intention is to build an enlightened crime policy community of researchers, teachers, and practitioners that will become a constituency, with each reader acting on his or her own responsibility. The events described here especially invite participation. The website can help, or email me with questions.

A Constitutional Crisis Approaches:

Like wars that everyone says they don't want but nevertheless happen, the nuclear option confrontation appears to be drawing closer, and we may be in the post nuclear Congressional stalemate before the next CJWL is out. From here it looks like lose, lose, lose, for everyone. Although we all know that this is a dress rehearsal for the Supreme Court, there are high stakes as well for the U.S. Circuit Courts, and the future of Congress as well.

Some background: President Bush since taking office in 2001 has nominated 214 federal judges, 179 to the District Courts, all confirmed, and 35 to the U.S. Courts of Appeals, of which 10 have been blocked by Senate Democrats using the 60 vote cloture rule. Republicans have a 55-45 vote Senate majority (one Independent always goes with the Democrats), and every Republican has voted for every Bush nominee, but they need five Democrats to overcome the 60 vote requirement to end debate (the filibuster) and get a vote on the Senate floor on the nominees themselves.

There is an understanding that if a single Democrat on the Senate Judiciary Committee—now 10-8 Republican—supports a nominee, the party will not invoke cloture and allow that vote which predictably will confirm. This has happened 204 times, 25 times for Circuit Court nominees, but 10 times in the 108th Congress the Democratic discipline held and the Bush nominees were filibustered. [Actually there were 19 filibusters, for Bush sent some of them back and back.] Three of the 10 have withdrawn, but now in the new Congress Bush is sending seven of them back again.

The Stakes: A Remade Judiciary:

What the Democrats say about those seven is that they are simply too conservative—too far from the mainstream—for them to accept. Republican Senators say they are all “qualified,” and raise absolutely no questions about their level of conservatism, although they were all vetted for ideology before being appointed. Also, in that selection process, contrary to years of Senate culture, the Democratic leadership was not consulted. Realistically, there was no attempt to balance conservative with moderate judicial ideologies, which was the Senate judicial confirmation way of life before Bush.

The conservative vetting was done by the Federalist Society (see CJWL #4). Although President Bush does not consider the ratings of the American Bar Association, for which a *well qualified* rating used to be a prerequisite, four of the seven were rated only *qualified*, the other three *well qualified*. Of his 35 appellate court nominees, the

ABA ratings were about half *well qualified*. [I say “about” half because some ratings are equivocal.]

Four years ago the federal circuits were about evenly divided between Republican and Democratic appointments, but today Republican appointees make up 60 percent of the circuit judges (94 to 68), and dominate 10 of the 13 federal appellate courts. In six circuits there’s a 2-1 advantage. If all of Bush’s pending nominees are confirmed, 85 percent will be Republican appointed, going back to Ronald Reagan’s terms. (this conflict arguably started then, when the Democrats blocked Robert Bork.) The Judicial Conference, the policy making body for the federal courts, has asked Congress for 68 new judgeships, both Appellate and District Courts. It seems unlikely that they will be created, and even if they are, can you imagine the battle filling them!

The irony is that even after this “30-year culture war” to remake the federal judiciary into a conservative, Christian, originalist, libertarian, de-regulation, limited government, called “Constitution-in-Exile” movement, and Republican Presidents have appointed judges with that agenda in mind, the conservative wing of the Republican Party apparently feels that they have been unsuccessful. They think that their appointees have betrayed them, and the word “Souter” has become a verb, meaning to betray. “They don’t want judges that will (Justice David) Souter them.” A number of others, with their lifetime appointment, have adjudicated to the center and some even further left. The failure to reverse the rights of the criminally accused created by the judiciary in the 1960’s is one of their chief frustrations, and the policy agendas of the Constitution-in-exile movement.

Probably the number one target of ire is Justice Anthony Kennedy, for a number of reasons, most recently citing international precedents against the death penalty for juveniles, and his speech to the ABA about two years ago saying sentences are too severe and criticizing mandatory minimums. Judicial discretion in sentencing is the central crime policy issue in the current age and Kennedy gets the primary credit or blame, depending on what side you are on.

Roll call—One Vote, Either Way:

A close majority vote, constitutionally right or wrong, will decide the nuclear option, and it looks like this will happen the second week in May. [The 60 vote cloture rule was created by a close majority vote in 1975.] The Democrats will let William Myers (9th Circuit), the first nominee of the year, go through, even though vigorously opposed by environmentalist groups, and his ABA rating was divided between *qualified* and *not qualified*, but four Democrats in the Judiciary Committee voted for him. They want to appear centrist, and to save their battle for nominees they consider worse. Terrence Boyle (4th Circuit), probably will too, although only *qualified*.

Next up is the California State Supreme Court Judge, Janice Rogers Brown (for the D.C. Circuit), an African-American woman, and who would literally overturn the regulatory agencies of the New Deal, and was rated only *qualified*. Bush trying to put her on the D.C. Circuit sends a message that he has her in mind for the Supreme Court.

Scheduling her now was orchestrated by Arlen Specter, Judiciary Committee Chair, hoping the Democrats wouldn’t have the nerve to oppose her. He is wrong. Along with Brown will be Priscilla Owen of the Texas Supreme Court (5th Circuit), who was filibustered four times, although rated *well qualified*. Specter says that every day he

tries to reach a compromise—he wants trade offs for some of the judges--but Republicans insist on a majority vote and the Democrats find that unacceptable.

All 45 Democrats are united against the *nuclear option* rule change to end cloture, and will all vote “no.” It is so called by Democrats because they consider it to have extreme consequences on the way the Senate works and its comity. Republicans call it the “constitutional option.” Democrats threaten parliamentary maneuvers in retaliation to virtually bring the Senate, and all its impending business, to a halt (except for military and indispensable budgetary votes.)

David Brooks of the New York Times wrote: “That they have the right to do this is certain. That doing this would destroy the culture of the Senate and damage the cause of limited government is also certain.”

Seven Republican Senators are reportedly undecided, and they will settle it. Two other Republicans have already said they are in the “no” column: John McCain (Ariz.), and Lincoln Chafee (R.I.), which means the Democrats need four of the seven Republicans for a 51 vote majority. The vice president will break a tie and they need 51 votes.

The seven: Susan Collins and Olympia Snowe (Maine), Chuck Hagel (Neb.), Dick Lugar (Ind.), Lisa Murkowski (Alaska), John Warner (Va.), and Arlen Specter (Pa.).

Democrats think they can get Collins and Snowe, and Specter will probably go with his party, which means if the remaining four split, and the projections are accurate, the Democrats win. Hagel, Lugar, and Warner are weighing Presidential bids, and are not saying. Murkowski will probably go GOP. Want a prediction? Sorry. Surprises are possible.

Everybody Loses:

Earlier I mentioned Senate comity. Normally this body functions with civility and compromise, but not here. Both sides are armies on the march. Just to give a flavor: The Republican Majority Leader, Bill Frist, is taking the religious stage. On “Justice Sunday,” April 24, he is joining a group of prominent Christian conservatives in a telecast organized by the Family Research Council portraying Democrats as “against people of faith.” Frist’s office sends out an “advisory” twice daily from the “Advice and Consent Working Group” with a constant flow of Republican floor statements and news releases.

Democrats have hired producer Norman Lear for a \$5 million advertising campaign by People for the American Way in 18 states with GOP Senators who might waiver. [The TV ad features a clip from the 1939 film “Mr. Smith Goes to Washington,” in which Jimmy Stewart heroically rises to filibuster.] The Democrats are also reaching out to Christian radio listeners with ads aimed at that normally Republican constituency. The Democratic effort involves an interesting coalition of groups like MoveOn.org, organized labor, but also the National Right to Work Committee, NARAL Pro-Choice America, the Leadership Conference on Civil Rights and the NAACP, and AARP, but also Gun Owners of America. Minority Leader Harry Reid is running the “war room” out of his Senate office, coordinating telephone banks, letter writing campaigns, print ads, and rallies. Their aim is for voters to pressure their GOP Senators.

But nobody wins in a war. The non-partisan Cook Political Report said “Frist has backed himself in a corner where (he can’t) avoid pulling the nuclear trigger.” If he falls

short, his Presidential aspirations are dead, but he is also wounded as party leader, and even if he wins he is wounded in the whole Senate. Republicans are hurt if they win or lose the big vote, for winning means the Senate grinds to a halt and the Democrats will spend every waking moment until the next election accusing them of abuse of power.

If Democrats lose the big vote they of course will have to stand by and watch a Federalist Society controlled judiciary grow, with their supportive interest groups enraged and both will be tempted to over-react with extremes. Their scorched earth response will do their own agendas no good. Even if the Democrats win they will have to face an enraged Christian conservative movement that has beaten them recently and against whom they seem to have no effective arguments. Furthermore, there is no reason to believe that voters in coming elections will see them as valiant fighters against over-reaching power. They will be obstructionists, or losers.

Legislation that will Wait:

Justice about everybody in both parties are nervously watching the countdown to the nuclear option with an eye on what legislation would not be held up, and then will face extinction by neglect. Social security is not even in legislative form yet, and is next year's problem. Republicans want to get their energy bill through fast, and naturally Democrats are stalling. Highway and mass transit legislation has a chance because Democrats will benefit from it too. Although not high profile yet, there are a number of crime policy bills on legislative agendas, and what happens to them remains to be seen. They include an anti-gang bill, a new mandatory minimum drug sentencing bill, shielding gun dealers and manufacturers from liability is back, the Second Chance Act is too, and others. Briefly:

Deterring Gang Violence:

The Gang Deterrence and Community Protection Act (HR 1279) is patterned after the RICO (Racketeer Influenced and Corrupt Organization) statute and would prosecute street gangs the way RICO goes after organized crime. A criminal street gang is defined as any formal or informal group of three or more individuals that commits two or more gang crimes, one of which is violent, in separate criminal episodes. Several categories of gang-related offenses, including kidnapping and aggravated sexual assault, would be subject to mandatory minimum sentences of 30 years. This appears to run counter to the Booker et al Supreme Court decisions that soften mandatory minimums in favor of some discretion by sentencing judges.

This bill would authorize \$50 million per year for five years to fund local, state, and federal street gang enforcement teams in places designated as "high intensity gang areas." It would pay for 94 new gang-focused assistant U.S. attorneys, and maintain a new interagency data base. There is bi-partisan support, as there has been in past years, but also bi-partisan opposition. Some Republicans have said that prosecutors already have enough tools necessary, and a Senate bill, that is not moving, has two-thirds more money for a wider range of anti-gang activities, including prevention programs for at-risk youth and witness protection.

Democrats on the House Judiciary Committee strongly objected to the mandatory minimum sentences that try more juveniles as adults. The ranking Democrat, Robert

Scott of Virginia, said: “This bill eliminates individual consideration in favor of sound bites.”

It was reported out by the full Judiciary Committee and appears headed for passage in the House. The Senate stronger bill has bi-partisan support, but there is no sign of hearings scheduled. See above.

More Mandatory Minimums—Drug Traffickers:

Another anti-drug bill, this time with the creative title; “Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act,” (HR 1528) includes the kind of mandatory minimum prison sentences that most Republicans embrace and federal judges loathe. By-and-large it enhances sentences for drug dealing by about one-third for selling to juveniles under 18 in protected zones such as within 1,000 feet of schools, colleges, and even day-care facilities, treatment clinics, and libraries.

An expert witness at the Crime Subcommittee hearing showed crime-mapping diagrams of three medium sized cities which demonstrated that the protected zones enveloped 80 percent of all drug crimes in those cities. The argument was that this isn’t a drug-free zone bill but a mandatory minimum sentencing bill, Booker notwithstanding.

Although the bill was reported out by the subcommittee, the tone of the hearing and markup was somewhat skeptical. Interestingly, two Republicans, Louis Gohmert of Texas and Dan Lungren of California, voted “present” rather than the expected party-line “aye.” It is extraordinary for any Republican Congresspersons to have doubts about a mandatory sentencing bill.

A Democratic member who I won’t name said to me after the hearing: “It’s a stupid bill and we have no idea if it will do any good.”

It has been reported out by the sub-committee, and, like the gang bill, will probably pass the full committee and the House, but hasn’t been introduced in the Senate.

The Gun Liability Shield:

The Protection of Lawful Commerce in Arms Act (HR 800) failed to pass last September as part of a package that included the assault weapons ban and gun show loophole. With powerful support from the National Rifle Association, and bigger Republican majorities this year, it is back, and stands alone. It has already bypassed the committee phase and is before the whole House. There doesn’t seem to be the slightest chance that it won’t become law, if the Senate can take it up.

The bill protects gun dealers and manufacturers from legal damages if guns they distributed were used in gun violence, unless they had knowledge of the buyer’s intent. Negligence is not enough. Such lawsuits generally fail, but cost defendants large legal expenses. This year’s bill goes further than last years in that dealers not only can’t be sued, but are protected from administratively losing their gun dealer’s federal firearms licenses.

The Second Chance Act:

After dying last year without Republicans on board, even though President Bush supported the idea in his 2004 State of the Union address, this year the bill’s promoters, called the Reentry Working Group, have been working behind the scenes to fashion a

comprehensive bill supported by a bipartisan coalition in both houses. A lead Senate sponsor is Sam Brownback of Kansas, and the leading House sponsor is Rob Portman of Ohio, who is leaving the House soon to become the President's International Trade Representative.

This bill has been a long time in development and takes into account the best research on reentry issues. The reentry process begins at the point of entering prison, distinguishes between dangerous and low risk offenders, considers community safety, and has accountability attached. The intention is to help ex-offenders make the transition to life outside in five areas: jobs, housing, mental health, substance abuse treatment, and family life. An example of its application is to provide support and services for grandparents to care for their grandchildren during parental incarceration. This helps avoid foster care and makes family reunification easier upon prisoner, and parental, release.

The bill provides state and local governments with grants for treatment of the family unit, collects data about needs and community resources, and helps coordinate existing services, including faith based groups with mentoring. The price tag is \$110 million over two years, at first limited to demonstration grants. That is not big money, and there is some Democratic resistance to it for that reason, but the Reentry Working Group argues that it's a start and can be built upon. With the groundwork that has been done, the promoters are "cautiously optimistic" about its passage in both houses.

To remind us of the obvious, the Senate may be problematic. The bill will be introduced within days.

Others:

Some of the following may be long shots, others may slide by with low visibility, but we'll be watching. A parental notification and consent bill to cross state lines for an abortion (HR 748) passed the House Judiciary Committee. House passage is certain. A federal voting rights bill for persons released from incarceration (HR 1300) has been introduced for years, never goes anywhere, and has been introduced again. An early release for non-violent federal prisoners over 45 (HR 3575) allows half their sentence to be waived as "good time." Two other bills for federal prisoners include re-establishing parole (HR 4036), allowing release after one-third of the sentence; and another provides good time credit for being enrolled in designated educational, vocational, treatment, or assigned work programs. The last three are soon to be introduced.

One more is worthy of attention, and has 63 Congressional sponsors. The Removing Impediments to Student Education (RISE) Act (HR 1184) would amend the Higher Education Act and repeal the provision that denies aid to education for any student with a prior drug conviction. There have been over 160,500 low-to-middle-income students denied higher education support since it took effect in 2000, often for minor drug offenses including misdemeanor marijuana possession. It's in the Education and Workforce Committee.

Answer to last edition's trivia question: Russ Feingold, Democrat from Wisconsin, was the only Senator to vote against the USA Patriot Act in 2001. He was reelected last fall with 51% of the vote.

This week's trivia question: The first one to email me the right answer gets a free drink, sometime. In the 1939 movie, "Mr. Smith Goes to Washington," mentioned earlier, Jimmy Stewart (Mr. Smith) heroically rises from his seat in the Senate, takes two sandwiches out of his pocket and places them on his desk, and begins a filibuster which touches the conscience of his opponents and impresses everyone with his sincerity, and he wins the piece of legislation that had been denied him before his fight. A happy ending! For a free drink, what was the kind of legislation he was fighting for? Your answer must be in one or two words.