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This online newsletter on the crime policy process in Washington is bi-weekly when Congress is in session, irregularly otherwise, and 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 constituency of the research, teaching and practitioner community, and to assist in relevant participation on the reader's own responsibility.

“I believe we have a fair and independent judiciary today.”

So said, believe it or not, the Republican Senate Majority Leader Bill Frist, as Congress returned from its spring recess into an overheated political climate where federal judges are, so to speak, in the dock. After a midnight emergency session of both houses that passed hurried legislation aimed at reinserting the feeding tube of the unfortunate Terri Schiavo, and signed immediately by the President, and which the federal courts turned back, and which public opinion disapproved by around 80%, Frist's comment, echoed by a few other Republican leaders, cooled some of the passion, at least in the Senate.

On the House side, however, Majority Leader Tom DeLay said: “We will look at an arrogant, out-of-control, unaccountable judiciary that thumbed their noses at Congress and the President.” DeLay's comment was described as “breathtaking,” and was a not-too-veiled reminder that Congress has powerful tools to police federal courts, that include:

- Removing or limiting appellate jurisdiction;
- Eliminating or reducing in size the two lower federal courts;
- Impeaching judges (a live option in the 19th century);
- Lower the judicial budget (the Judicial Conference has asked for a supplemental appropriation of \$12 million for judges' security; and earlier had asked for another \$102 million to handle the expected 18,000 appeals after Booker and Fanfan, which puts the Republicans in a good mood);
- Changing Senate rules to end the filibuster and give this President a free hand to appoint conservative judges.

Only the later is realistically on the table, but comments about the first four options illustrate a new level of how the Republican majority has taken a hostile and aggressive posture toward the judiciary. DeLay, speaking to a conservative group in Washington, talked of a “judiciary run amok.” (It is rare that the press pays attention to what elected officials say to interest groups.)

“I am in favor of impeachment,” said the chief of staff of Republican Senator Tom Coburn of Oklahoma at the same meeting. “Mass impeachment.”

Senator John Cornyn, also a Texas conservative along with DeLay, made comments described as “horrifying” connecting recent violence against judges in Atlanta and Chicago by deranged defendants with frustration over what to him are political and unaccountable decisions. These conservatives of the President's party will not accept any

moving to the center on judicial nominations, or any compromise on the looming nuclear option (see CJWL # 4 and 5). The Shiavo case seems to be hindering their position.

The Real Issue—Bush, 2008:

It was widely reported how public opinion resoundingly rejected the intervention of Congress and the President in Schiavo, and in this country 80% never agree on anything, but we don't see much backing off by conservative Republicans, especially in the House. James Sensenbrenner, chair of the House Judiciary Committee, has said through a spokesman (he is ill) that his committee was likely to take up the issue of how federal judges handled the Schiavo case.

This seems extraordinary. Many of us might think, don't they have the sense to back away from an unpopular cause! But in some emotionally charged issues there is a different political logic. Being part of the minority who believe that federal judges should be punished for their "unaccountability" (code word for immorality) has become a test of loyalty; which puts particular pressure on George Bush. Evangelical Christians and social conservatives are demanding that Bush must win the filibuster fight.

For Bush to do that, he must rely on Bill Frist. That is why Frist is trying to put some distance between himself and House Republicans like DeLay and Sensenbrenner with his softer tone. (DeLay's ethics problems are an albatross on the Republican Party's neck) He needs moderate Senate Republicans support, which he hasn't got, and Cornyn and Coburn aren't helping. He'd like to ignore the House.

Bush's legislative agenda has bogged down. His early legislative victories like class action lawsuits and bankruptcy revision are behind him (one commentator called them "low hanging fruit."), but social security isn't looking good, medical malpractice and asbestos lawsuit reforms are meeting stiff resistance. The Iraq \$81 billion supplemental appropriation is "must pass," but isn't moving; nor is energy policy, highway and mass transit, extending his tax cuts, and the gay marriage ban appears dead. Job Training Reauthorization passed in the House but there's no movement in the Senate. Before the recess both houses barely passed 2006 budget resolutions (218-214 in the House, 51-49 in the Senate), but they were widely different, and a Conference compromise seems unlikely. It is legislatively required by April 15, but there's no chance. (*The Budget Resolution is not the final appropriations, but another step.*)

Bush needs a big win, and to do it he needs every Republican vote he can get. The filibuster fight is his Armageddon, the great battlefield at the end of the world where the powers of good meet the powers of evil. And there is more at stake than this year's legislative agenda. Bush is a second term President without an heir apparent. When names are dropped of possible GOP 2008 candidates, they are all from the moderate wing (if you call Condeezza Rice moderate). Bush and his handler, Karl Rove, have always wanted a realigned conservative Republican Party. Bush needs a successor, someone to endorse, and if Frist can deliver those seven held up conservative judges for him—and the only way that can happen is with a parliamentary jihad of killing the filibuster, the nuclear option--the President will owe Frist bigtime.

Frist will not run for reelection as a Senator from Tennessee in 2006, and he is reportedly assembling a campaign staff made up of operatives with conservative campaigns on their resume. There is no movement toward a compromise with Senate

Democrats, who are united to maintain the filibuster and deny confirmation to the Bush appellate judges. The 2008 Republican nomination is under way, over the judges.

Meanwhile, Business Goes On:

The so-called USA Patriot Act was passed six weeks after the 9-11 attack, although a number of Congresspersons and Senators later admitted that they hadn't read it. The Justice Department rushed it to Congress saying they needed new weapons in the *war on terror*, and those three words have since opened most legislative doors. Some Senators, however, most notably Pennsylvania's Republican Arlen Specter, who is now chair of the Senate Judiciary Committee, were able to modify it by having 16 controversial sections "sunset" (expire) after four years. At the end of this year the time is up, so they must be reauthorized (and several other provisions are also on the table), or terminate. Senate and House hearings have already begun and are likely to last for months.

The administration has proposed some modifications, but apparently all of the criticism is in the direction of protecting civil liberties over security, and what the President and Attorney General Alberto Gonzales want is in the other direction. Gonzales, however, has taken a softer tone than his predecessor, John Ashcroft, and says he will listen to its critics. So far, after both House and Senate initial hearings, both parties in Congress are showing skepticism of the administration's position. The House Judiciary Committee gave Gonzales a good grilling, and Republicans joined in. At the very least, they want realistic Congressional oversight, and another sunset. Ashcroft was allergic to oversight. Gonzales says he will work with Congress.

"Cooler heads can now see that the Patriot Act went too far, too fast . . ."

A spokesman for the American Civil Liberties Union said this, but it is very interesting that the predictable liberal groups are not in the Patriot fight alone. A remarkable coalition of left and right groups, most notably the ACLU and People for the American Way, joined with the American Conservative Union and Republicans with bona fide conservative credentials. Senator Larry Craig (R-Idaho), rock solid, especially on law and order, has teamed up with Richard Durbin (D-Ill.), a flaming liberal, to introduce an alternative bill called the Security and Freedom Ensured Act. A companion bill will be in the house from "Butch" Otter (R-Idaho). Former Congressman Bob Barr of Georgia—again, far right—chairs a group called Checks and Balances to oppose Patriot. He admits his purpose is to give Republican Senators cover so they do not appear to be simply supporting the ACLU.

Still, the Bush Administration, along with the Attorney General, say they want every provision renewed, and made permanent, with security measures strengthened.

Patriot Act—Some Contentions to Expire:

- Roving Wiretaps: Feds can tap any telephone, cellular or internet connection, with a warrant, they think a surveillance target may be using. The warrant goes to the suspect, not the phone. The administration wants to extend the time limit.
- Business Records: Also with a warrant, the FBI can demand "any tangible thing," such as books, records, documents, related to an "authorized

investigation” of international terrorism. Opponents say this could be a very broad request. The administration’s modification would be to allow those served to contest them in court, with attorneys, but that would impose secrecy on those served. This is the provision opposed by librarians that is a magnet for privacy criticism.

- FISA Warrants: The Foreign Intelligence Surveillance Act of 1978 allows search warrants of suspected foreign spies. Patriot expands that authority to include suspected terrorists. Opponents say that authority was always there if used reasonably. The administration wants to lower the legal threshold for the warrant, and expand the time limit.

Other Controversial Contentions:

- Sneak and Peak: Feds can get search warrants without telling the targets in advance or immediately afterward. Critics say this has been used in investigations unrelated to terrorism and has changed the meaning of the Fourth Amendment. *In 2003 the House voted 309-118 to block this piece, but it didn’t make it in the Senate in a parliamentary maneuver.*
- National Security Letters: This includes data that does not require a warrant, like telephone records and subscriber information. Patriot expands these criteria. Last September a federal judge ruled this unconstitutional, and a bill is pending to modify the ruling. This is a large piece of the “administrative warrants” (no judicial oversight) that the administration wants to expand.
- Definition of domestic terrorism: Critics say this defines domestic terrorism too broadly (example: “acts dangerous to human life”). A reading of this statute sees the intent to include criminal acts aimed at a large population, possibly to influence government policy, but this is an example of hurriedly written language that is vulnerable to over reaching.

The Furor:

The attorney general, to his credit, has admitted the patriot Act needs some adjustments, but he avoids specifics. Rushed through after 9-11 in a climate where Congress was under pressure to “do something,” it did. Some thoughtful legislators on both sides of the aisle, knowing full well they were in no position to oppose anything that appeared to be for national security, voted for the bill but have since expressed their reservations. Senate Judiciary Committee Chair Specter once had a rare opportunity to question Ashcroft and sarcastically demanded, “Ever hear of probable cause!” He meant that even without Patriot, competent law enforcement could get a warrant from a judge to seize a library computer if there was a reasonable belief that the search and seizure might produce evidence of a terrorism conspiracy.

Ashcroft, Bush’s first attorney general, had a credibility problem, not only with civil liberties groups but with Congress. His philosophy of government’s role in national security could be summed up as: “Trust me.” Many didn’t. It doesn’t help his successor, Gonzales, that from all accounts there has been scant progress toward effective intelligence of domestic terrorism activities. Intelligence is becoming a cottage industry in both higher education and in law enforcement training, but it will take a generation to

produce professionalism that can be trusted with broadly written legislation like USA Patriot.

The debate is conducted with bumper stickers, in part because the details are so arcane. Probably the most criticized provision, often called the “library provision,” (“business records” above), allows the government the demand library, medical, subscription records, entire databases (like all the files of an immigration group), when it is investigating a single person, makes it a crime for anyone to reveal that the requests have been made (the “gag rule”). Critics—and that applies to the bipartisan coalition mentioned earlier—will be looking for ways to amend the legislation to limit extraordinary powers to relevant terrorism cases with appropriate rights to counsel and legal review, and public disclosure in a reasonable time frame.

The Big Picture:

There are reasons for unease. One of the problems, as noted, has been the lack of Congressional oversight. The FISA law requires it, but it is not being done now. Democrats have complained, and Congress has the power to subpoena administration officials and question them, but there is no likelihood that the Republican Congress, even with Arlen Specter in charge of the Senate Judiciary Committee, will use that power. The Bush Administration has gotten a pass, and that is unlikely to change. Gonzales says he will be more open to talking to the Committee, and he has been more forthright than Ashcroft, but the administration line is still to support the Patriot Act.

One idea to improve Congressional oversight is to have Congressional staff members with appropriate security clearance review all requests for warrants and subpoenas, and follow up on the results of searches. This will require hiring a cadre of new staffers, for the present staff couldn't possibly take this on. Where and from whom will they get their training? Staffers know as much about intelligence, security, privacy, and terrorist cells as Congress.

We should not forget that the government “rounded up” (that's a pejorative characterization, but there's no other way to put it) hundreds immigrants (many illegal) with no ties to terrorism and detained them for months, often in deplorable conditions, sometimes further abused them, without counsel, or access to family members, without an accounting to the public, and now even claims the right to transfer them to foreign countries for interrogation. Critics say that this process of rendition is used to subject these suspects to torture. We don't even know how many have been detained, or given to rendition, or to where.

The authority for rendition comes not from the Patriot Act, but from a classified directive from President Bush shortly after 9-11. “This is a very different time and a very different climate than the one we saw in the aftermath of September 11,” said Anthony Romero, executive director of the ACLU. In reality, the administration is confronting a Congress that will not be as willing as it was in 2001 to grant or uphold such sweeping investigative powers. Both Specter in the Senate and James Sensenbrenner, chair of the House Judiciary Committee, have already shown skepticism of White House arguments for extending the Patriot Act, and at least will demand more candor about how those powers are being exercised.

A week ago the Justice Department released data that the secret sneak and peek provision has been used 155 times, most in the last two years, and roving wiretaps 49

times. Every application for a warrant was approved (but no warrants for libraries). Have they found anything? Classified.

There is much more criminal justice related activity on Capitol Hill, but will have to wait for further newsletters.

In response to widespread demand—from my other reader—the trivia question returns. The winner gets from me a free drink, any domestic beer, at an appropriate time.

The USA Patriot Act passed the Senate by the vote of 49-1. For a free drink, who was that lone Senator? (His name is one of those being dropped as a Presidential candidate for 2008, and there is an exploratory committee. Now wouldn't that be an interesting campaign issue!)