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This online newsletter on the crime policy making process in Washington is bi-weekly when Congress is in session, irregularly otherwise, and is by subscription for \$20 a year. The website, www.crimeletter.net, has useful links, a statement of principles, assistance to participation, and a subscription link. Please forward it to anyone who might be interested, for we are trying to build an enlightened crime policy constituency that stands for policies based on research and experience.

“Each side has ratcheted it up . . .”

So says Senate Judiciary Committee Chair Arlen Specter on the judicial nomination wars that have been renewed in the Senate. The situation is well known by now. In the previous Congress the Democratic Senate minority used the filibuster to block 10 of President Bush’s most conservative nominees to the federal appeals court (they did it 19 times), and five others were effectively blocked by time running out and their hearings were not held. Three have withdrawn, but Bush has re-nominated 12—20 altogether, including the seven filibustered and the five who waited—and the battle lines, although re-drawn, are politically about the same. Bush now has four more Republicans in the Senate, 55-45 (one Independent always votes with the Democrats), but 60 is still the magic number to invoke cloture and confirm the judges. By all accounts, no minds have changed, including animosities.

As before, the Republican leadership threatens a parliamentary maneuver called “the nuclear option” where the Vice President presiding over the Senate will rule that a simple majority can change the rules and end debate, for which there is precedent, but as before the Democrats threaten some of their own parliamentary maneuvers to turn the Senate into turmoil and the Judiciary Committee a hell, with social security and the whole Bush agenda backed up and held hostage. [They can withhold unanimous consent to every routine move, and create a blizzard of amendments to everything.] Both sides have their fingers on a nuclear trigger.

Republicans think they have the 50 votes they need to invoke the nuclear option (the VP breaks ties), but the paralysis that will follow helps the Democrats on most issues, for they are in a defensive position. *Some crime policy legislation that could be bi-partisan is another matter.* Said one Democratic leader: “. . . It would make my life easier because nothing else would happen the rest of the year.” Republican lobbyists who want bills passed are not amused.

Arlen Specter has been trying to broker a deal to avoid filibusters and nuclear options, but consider: he is 75 years old, has Hodgkin’s disease and gets chemotherapy every Friday so he can preside the following week, and he is chair of another Senate Committee, Veterans’ Affairs; and he suffers the loneliness of being a Republican moderate. He has to deal with a President allergic to collaboration, and neither party shows any sign of compromise lest it appear weak and defeated. [It *would* be weak and defeated!] So it will probably come down to votes, cloture for all the nominees, and maybe a vote to end cloture, and the vote counters say that all of them will be close.

Does it matter?

Of course all of this is battling practice for the Supreme Court fight or fights to come, as the chief and others in their 80's plot their retirement. The substantive stakes are always uncertain when it comes to lifetime judicial appointments, and some observers believe that authoritative precedents will prevent the Bush appointees from delivering on his electoral debt. "Nine Scalias couldn't overturn Roe v. Wade," one analyst said. When it comes to crime related judicial law, however, nothing much has been said about what to expect. Crime policy has not been on the posturing agenda.

Every nominee, when questioned by the Judiciary Committee, says the same thing, that they will follow precedent and not let their personal ideologies control their legal reasoning; and just about nobody believes them, but no one knows for sure. To some extent, these judicial wars are turf wars to control "this hallowed chamber," and thus the Bush legislative agenda. These are political battles with a life of their own, but as long as judges make law there will be policy consequences. CJWL will try to project what all this might mean to crime policy if Bush is successful in wresting control of the Supreme Court and the rest of the federal judiciary.

Battling Think Tanks:

Appointment to the federal bench has always been a highly political process, largely patronage, but it has undergone radical changes since George Bush took office in 2001. When vacancies had occurred, senior Senators from the President's party sent names to the President, and they were then submitted to the American Bar Association for evaluation. Since the first Eisenhower administration, the ABA was the gatekeeper to all Article III federal courts, but no more.

The ABA always claimed that it evaluated on the basis of professional qualifications, not a nominee's philosophy or ideology. Prior to formal nomination, a 15 member Standing Committee representing the 12 judicial circuits would rank the candidates "well qualified," "qualified," or "not qualified." The committee served overlapping three-year terms with hundreds of hours of volunteer work. "Well qualified" used to be required for appointment, but Ronald Reagan started sending to the Senate candidates that were only "qualified." Still, it was a vetting that was done *prior* to nomination.

Shortly after taking office, Bush announced that he would no longer send names to the ABA, but the Standing Committee continued to evaluate them anyway. Most were "well qualified," but not all. Of 33 Bush candidates to the Circuit Courts, 19 were "well qualified." Of 102 candidates to the District Courts, 66 were "well qualified," and three were "not qualified," but all were confirmed. (One "not qualified" withdrew, but the Senate confirmed all of them to the District Courts.) Of the 12 Circuit Judges re-nominated, six were "well qualified," six "qualified." It didn't matter, at least to Bush, for the vetting process had been taken away from the ABA, and was in the hands of The Federalist Society. The Senate's patronage, although shaky, is still intact for senior Republicans.

Some notables: Jay Bybee, well qualified; Miguel Estrada, well qualified; Charles Pickering, well qualified; William Pryor, qualified, with a divided vote and a minority finding him not qualified. Pickering and Pryor were given unheard of recess temporary appointments. Another, Terrence Boyle, second up as presumably an easy one to

confirm, was overruled 150 times, the most of any Federal District Court Judge. Boyle had originally been nominated by Bush Senior, and blocked then by Democrats. Still, every Republican Senator on the Judiciary Committee, including Specter, supported every Bush nominee, a striking display of party discipline.

The Federalist Society for Law and Public Policy Studies:

That's its formal name. It admits to being a group of conservatives and libertarians that believes in "individual liberty and traditional values." The co-chairs are Robert Bork and Orrin Hatch. It was founded in 1982, claiming to be a reaction to the "excesses of the Warren Court." It is believed to have about 20,000 members, and reportedly every lawyer who is in a policy making position in the Bush Administration is a member of the Federalist Society.

Libertarians are insignificant as an electoral force, but they dominate the Justice Department and the White House Counsel staff. Their method of gaining power is not to be elected but to be appointed, and they have had stunning success. (An exception is Vice President Dick Cheney, if we can consider him being elected.) If we want to know what kind of a Supreme Court President Bush would like to appoint, the answer is, a Federalist Society court.

The ABA based its evaluations on stated criteria, although admittedly some were subjective: integrity, competence, respect for precedent, judicial temperament; but what do we know about the Federalist Society's criteria, and the evaluators? Nothing. [*Can any readers help out here?*]

The Federalist Society states that it does not take positions on issues of law or policy, but there is one position about which it is clear and resolute, and it pervades its literature. It loathes the American Bar Association.

What Can We Expect?

Although the Federalist Society does not take explicit positions, it does attack ABA positions, so it should not take much imagination to turn around their opposition to what the ABA is for to predict what Federalist judges would do if given the chance. Keep in mind, philosophically they are libertarians, and not to be confused with the evangelicals that were so instrumental in the Republican electoral victory. In fact, I searched in vain their website for hints of their attitudes about abortion, same sex marriage, and the values issues in general. [But perhaps if the ABA wasn't interested in them, there was nothing to attack.]

They do have a large number of what they call "Practice Groups," and each has a committee that produced papers on legal issues, and one of them was on Criminal Law and Procedure. It is 14 pages, single spaced, and practically all of it attacks the ABA. The following are the highlights about what we could expect from a Federalist bench on criminal law and procedure, but remember, these are inferences from what they oppose. The order here is theirs.

- Total opposition to the exclusionary rule. Good faith exceptions are not enough. Inventory searches are beyond the reach of the 4th Amendment.
- Hostility toward habeas corpus. No "second guessing" of state courts, no de novo review. (They seem obsessed with this.)

- Support for the death penalty, and opposition to covert efforts to abolish it on the basis of racial bias, which they consider flimsy evidence. Also they oppose moratoriums as evasions.
- Sentencing: actually little is said here, and libertarians have opposed what they consider the over reach of the criminal law, including over incarceration, but they haven't been outspoken about the later. The emphasis is on "overcriminalization," (too many acts defined as criminal), and that includes mandatory minimum sentences, but in forums it as an afterthought.
- Confessions: deference to state court findings on voluntariness of the confession, rejection of "technical Miranda compliance." (In fact, they would nearly always defer to state court findings.)
- Gun control they consider a neutral issue. No clear position.
- On drugs, no objection to education, no clear position on sentencing.
- On prosecuting juveniles in adult courts, they do not appear to object.

I want to repeat, these are not explicit positions of The Federalist Society, for it does not take positions, but it does criticize ABA positions—vigorously and explicitly—and if the Republicans can muster 50 votes for their nuclear option, there will be a Federalist Society federal judiciary. The above is my attempt to predict what such a Supreme Court would *want to do* in criminal procedure, if we don't believe them when they promise the Judiciary Committee to follow the law and put aside their personal preferences.

To explain the above, and whatever else comes before the judiciary, the criteria are transparent. They support prosecutors and oppose defense lawyers! They are refreshingly honest about it, although stated as a double negative: they oppose the ABA because the ABA opposes prosecutors and favors the defense. We should know what to expect.

Down the Road?

If the Federalist Society is a reaction to the ABA, the American Constitution Society is a reaction to the Federalists. Started a year and a half ago, with mostly law students, the ACS wants to do for the defense bar what the Federalists try to do for prosecutors, although its literature is more philosophical and not so group targeted. Still, the strategies of both groups are substantially the same, try to influence crime policy by putting its members into positions of policy making, both administrative and judicial. The think tank wars are just beginning.

If the Nuclear Option, There will be no Civilians:

It is tempting to believe that the nuclear option—and the end to cloture—are so extreme that it could not possibly happen, but that is not known at this time. They say the test will come in April, when the judges go to the Senate for confirmation. Until then, the Judiciary Committee hearings will be ritual, awaiting the showdown on the Senate floor. It is not profound to say that in legislative politics all issues are inter-related, but the nuclear option backup will include everything, including the following, but these are just a few.

- The big ones: social security, permanent tax cuts, the Iraq \$81.9 billion supplemental, medical malpractice, a big highway spending bill, bankruptcy overhaul, energy policy, clean air, asbestos litigation, and the 2006 budget. A \$3 billion job training bill has criminal justice consequences.
- The USA Patriot Act. Most of the controversial provisions will sunset at the end of 2005, unless reauthorized. Eight committee hearings have already been scheduled.
- A crime victims' Constitutional Amendment, to add to legislation from last year's Justice for All Act.
- A major immigration bill promised to House Judiciary Chair James Sensenbrenner last fall as part of a deal to pass the Intel Bill. It has been called the "Ve want to see your papers!" bill. Look for a national drivers' license.
- An election reform bill called The Count Every Vote bill is mostly about polling place irregularities, but also has a section calling for the federal right to vote for all ex-offenders who have served their sentence. In 14 states some or all persons are disenfranchised by a felony conviction, even after completion of sentence. Hillary Clinton is the sponsor, John Kerry a co-sponsor, but no Republican has yet signed on. The felons right to vote part has little chance (no Republicans), but the disenfranchisement movement is excited that it has been introduced in such a high visibility manner.
- A group of northeastern Democrats have introduced a bill to ban "cop killer" Five-Seven Handguns that can pierce policemen's' armored vests. Again, no Republican co-sponsors.
- There are plans to introduce a bill that would allow Pell Grants to go to prisoner education, and to former prisoners in college. Before 1995 there were 350 college degree programs for prisoners, and evaluations lowering recidivism were favorable, but Congress abolished the funding in 1994. This bill would restore it.
- Methamphetamine is targeted with a bipartisan bill called the Combat Meth Act (S-103) which aids law enforcement with grants for training, and treatment, but so far has no sentencing enhancement. (I am told sentencing will be added later.)
- A crack-powder cocaine bill reportedly addresses the sentencing discrepancy by adding years on to both type offenses.
- Reentry. A major initiative is working on a bill called The Second Chance Act, but it has not yet been introduced as intense planning and negotiations continue. There is bipartisan support, and if the problems are worked out it could move. CJWL is on it.
- Appropriations issues: A number of policy issues are being worked out in the budgetary process, essentially non-visible. Juvenile Accountability Block Grants, zero in the President's budget, will have some money restored, but not all. The same for the Byrne law enforcement grants, re-directed. There is money in the President's budget for two new federal prisons, but some question if there will be prisoners to put in them. Drug courts are in the

President's budget, but will Congress go along? We won't know how these things work out for many months.

There is no movement on a sentencing bill on the Supreme Court's decisions to make mandatory minimum sentences voluntary, as discussed in CJWL # 2 and 3. Republicans are reportedly waiting for the new attorney general, Alberto Gonzales, to take the lead, but in his first major address he didn't mention sentencing. Everybody expects a Republican bill, but there seems to be little imperative as Congress waits to see how the voluntary guidelines will work out in practice. Look for it next year.

A final note about CJWL: There have already been about 50 crime policy related bills introduced in both houses, and we deal here with just a few. It is not productive to report on them all. Many will not move through the legislative process. CJWL tries to make judgments of the political possibilities, and is always looking for relevant opportunities for expert participation.