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High Noon:

At this writing nothing much has changed in what has come to be called the nuclear option showdown on the federal judges. Much talk of a compromise has been unavailing, but there has been delay, which suggests that a deal is still possible. The situation may have changed before you read this, but the mood is one of great bitterness.

Senate Majority Leader Bill Frist will call for debate on one of President Bush's contentious nominees endorsed by the Judiciary Committee, Minority Leader Harry Reid will try to file a petition to invoke cloture requiring 60 votes to end debate, but Frist will raise a point of order that additional debate is dilatory and the presiding officer, Vice President Dick Cheney, will sustain the point of order. Democrats will appeal, and Republicans will move to table the appeal, which, as all parliamentarians know, requires an immediate vote without debate. That vote to table, requiring only a simple majority, the vice president able to break a tie, will be one of the major Constitutional showdowns in American history.

Changing the rules requires 67 votes, so Frist has to do it this way, for he now has 49 votes, with about six Republicans undecided. If he is able to table, he has enough votes to confirm the nominees, for every Republican Senator will vote for every Bush nominee. [Why that is, to me, is a great mystery,..]

Here is an example of Republican discipline. One of the nominees, Priscilla Owen, on the Texas Supreme Court along with Alberto Gonzales, now the U.S. Attorney General, wrote an opinion in a parental notification of abortion case that Gonzales, in his own opinion, called "an unconscionable act of judicial activism." (She had created some new guidelines for parental notification and warnings to the abortion recipient.) Last week Gonzales said, "I've never accused her of being an activist judge."

If the Republicans table the appeal, the practice of filibustering judicial nominees is dead, Bush can have anyone he wants confirmed, including for upcoming Supreme Court vacancies, for there is no sign that Republicans will question him. The Democrats will retaliate by using a variety of parliamentary maneuvers to bring almost all other Senate business to a halt, except national security, and the budget, and then the nuclear winter will begin. The nature of the Senate, and indeed all of American government, will be forever changed.

"A Leap Off the Institutional Precipice."

That's what Joe Biden (D-Del.), Ranking member of the Judiciary Committee, called it on the Senate floor. The filibuster is the Senate's signature parliamentary

weapon, or protection, depending on your choice of words. Scholars say that other rules and practices that have forced the upper chamber to reach broad consensus will be no more. Once a barrier is breached, restraint just isn't in the Senate's capacity.

Whenever one party controls the White House and both branches of Congress—as the Republicans do now, but Democrats have done for many years—the leadership will blow past the 51 vote threshold with not only controversial nominees but initiatives like more tax cuts, even repeal of the income tax, which, believe it or not, conservatives are planning. Democrats will too. When Bill Clinton was President, if he could have, he would have put Harvard Law School's Laurence Tribe on the Supreme Court.

Some Republicans are not very subtle about their desire for dominance, and disdain for checks and balances and policies of consensus. House Majority Leader Tom DeLay (before he was so embattled) has said: "The Republican Party is the permanent majority for the future of the country."

More Tough Sentencing:

In crime policy we have a history of the House easily passing popular legislation without evidence of effectiveness, but the Senate holds it up and it dies. Without the Senate's restraint—that check and balance—we will be facing a future of more mandatory minimum sentencing. In the past year the Supreme Court has made sentencing guidelines advisory, not mandatory, but the Court never questioned the power of Congress to legislate minimum sentences for given crimes, and that is exactly what the House is now doing.

By the time you read this the House probably will have passed a sweeping street gang bill with mandatory minimums, and coming soon will be another one for federal drug offenses. (See CJWL # 7, p. 4) Another is coming for courthouse crimes. In the past these bills might have been modified, or killed, in the Senate. This gives us an idea of what is at stake, and crime policy is similar to other human relations policy areas. There is ample reason for interest groups on both sides to pressure the leaders of both parties to hold their line.

Pork before Principle:

Probably some pork will go through first, like the highway construction bill, but Frist says he will call the vote before the Memorial Day recess, but it could happen any day. No compromise is possible that would undermine the leaders of both sides, so efforts by moderate Senators of both parties seem hopeless. Business interests have tried to convince Frist that there is too much to lose from private bills and classical pork, which will be held up, but to no avail. The Democrats, however, seem to be trying harder to show a conciliatory image and have made offers. They will let some of the seven judges go through. They say they will use the filibuster only in "extreme or extraordinary cases." Republicans think that means all of them.

Frist says he has already made his compromise offer, but I am afraid I have missed it. [One hundred hours of debate is not a compromise.] Actually, his offer is this: when Clinton was President, the GOP dominated Judiciary Committee failed to even consider 60 nominees. Frist promises they won't do that again.

The immediate stake, of course, is the Supreme Court. To replace the ill Rehnquist the Democrats wouldn't filibuster Bush's choice, for a conservative chief

justice won't alter the balance—the image of conciliation--but for Stevens (85 years old) and O'Connor (75), that's another matter. Scalia reportedly is showing up in public and being very charming, but if the Democrats feel they can use their weapon only sparingly they won't use it on the Chief Justice appointment. That's only one vote on the Court. They don't want Stevens and O'Connor replaced with conservatives, and that is their fundamental strategic position.

Language Counts:

As we head for the gunfight at the Senate corral, let's step back and listen to some of the voices. The breakdown of comity from this uncompromising conflagration is already showing itself in some of the language of political discourse. Reid recently called Bush a "loser," then apologized, but has also essentially called him a liar, and not apologized. We all remember what Chaney told Patrick Leahy, Ranking Judiciary Committee member, to do; but if you don't, it will not be repeated here.

Other examples of Reid's hyperbole include: Bush's "fictitious crisis on Social Security," "deficits that are absolutely unbelievable," "an intractable war in Iraq," "destroying public education," "attempting to change the very basis of this country," paying "no attention" to the uninsured, and leaving people "begging for prescription drugs." Even if colleagues privately agree with him, some Democrats fear that when Reid "shoots from the lip" it hurts their strategy of trying to make their side look reasonable, that they are the sensible ones, and the Republicans are off the wall. Looking reasonable is a hard sell for everyone now.

But personal attacks, which we see every day in the sound bites, are just the tip of the iceberg. Policy language shows signs of polarization that makes political compromise, which is necessary for policy to be made, unlikely. Here are some examples:

Government, a "Leviathan."

The likely first nominee to the federal appellate bench will be the California Supreme Court Justice Janice Rogers Brown. She was rated only "qualified" by the ABA, not "well qualified," which used to be a threshold, contrary to some Republican statements, and usually is in the minority in her own court. She has drawn criticism mostly from extra judicial *speeches*, not her written opinions, which have been described by one liberal observer as "less fiery than her speeches—although sometimes strikingly acerbic—and some of them are impressive and admirable in my view." (Stuart Taylor, National Journal) Her views are very conservative to be sure, and like most of Bush's nominees, embrace a radical libertarian brand of judicial activism on the right fringe of the legal-political spectrum.

But her conservatism is essentially not her problem. It's her style. Most notably, in a 2000 speech, she said: "*...where government moves in, community retreats, civil society disintegrates, and our ability to control our own destiny atrophies The result is a debased, debauched culture which finds moral depravity entertaining, and virtue contemptible.*"

She has portrayed the federal government as a "leviathan," that is "crushing everything in its path." Supreme Court decisions in 1937 upholding legislation like the

Social Security Act were “*the triumph of our own socialist revolution.*” In liberal democracy, “*all roads lead to slavery.*” And so on.

This rhetoric is found not in her opinions, but in speeches. Still, her judicial philosophy, a property rights version of natural law, is rejected by virtually all Constitutional scholars, among them conservatives like Robert Bork, whose name has become a verb for being rejected by the Senate for the Supreme Court on ideology. A left wing counter-part would be a radical re-distributionist, a Marxist, and can you imagine the reaction to that!

The Leader:

The Democrats say they would let some of the seven judges go through, but not Brown and Owen. Another is William Pryor Jr., former attorney general of Alabama, but who now sits on the Circuit Court as a recess appointment by Bush. Reportedly, he is the conservative judges’ Christian conservative leader. He makes the case that Democrats have discriminated against judicial nominees with deeply held religious views, which is red meat to the Republican base. He will no doubt get the predictable 10-8 party line Judiciary Committee vote and soon be before the Senate.

His voice has reached way outside his own state. In a brief defending a Texas statute outlawing consensual homosexual conduct, which the U.S. Supreme Court overturned 6-3, Pryor wrote that overturning the law would “*open the way for legalized prostitution, adultery, necrophilia, bestiality, possession of child pornography, and even incest and pedophilia.*” Is that “moral depravity!”

Christian Values?

Another factor Democrats dislike about Pryor is that he was a founding member of the Republican Attorneys General Association, which raised hundreds of thousands of dollars in political donations from corporations that state attorneys general regulate. They admit, however, that in Alabama Pryor filed an ethics complaint against State Chief Justice Roy Moore for disregarding a court order to remove the Ten Commandments from his courthouse. The complaint led to Chief Justice Moore being removed from the bench. That certainly supports Pryor’s claim that he will follow the law, not his personal ideology.

Another nominee, William Myers III, opposed by environmental interest groups, was for years a lobbyist for ranching and mining interests.

These four, Brown, Owen, Pryor, and Myers are the line in the sand for Harry Reid and the Democrats. They will give in on the three others, and if necessary for Myers, but not for the other three. Staff work by interest groups has informed them that aside from moral values in their opinions, or speeches, their judicial decisions were always on the side of business interests. It is their reading of the Commerce Clause, so they say, that guides their Christian values.

“The Polls Show”

It isn’t only in speeches and interviews that we find polarizing language. The Washington Post, a newspaper that endorsed John Kerry, ran a lead front page story with the headline: “*Filibuster Rule Change Opposed.*” The smaller headline beneath it said: “*66% in Poll Reject Senate GOP Plan*” The story reported that a strong majority of

Americans “*oppose changing the rules to make it easier for Republican leaders to (confirm) . . .*”

Public opinion, then, is on the side of the Democrats, right! Here are the exact words of the poll question: “*Would you support or oppose changing Senate rules to make it easier for the Republicans to confirm Bush’s judicial nominees?*” The word filibuster was not in the question, but was in the story. Whadayaknow, 66% opposed, 26% supported, and 8% had no opinion!

A follow-up question told the respondents that 35 federal appeals court judges nominated by Bush were confirmed while Senate Democrats blocked 10 others. Again, the Democrats were right, 48% to 36%.

The Post/ABC News Poll asked 1007 randomly selected adults nationwide a long list of questions, and the front page story in question was # 36. In 1921 Walter Lippman published a seminal work, Public Opinion, in which he warned us that it is a major fallacy of democracy to assume that there is a coherent public opinion on every issue. On most issues, most people neither know nor care. Questions worded like the above don’t measure a public opinion (that isn’t there) but create one. Don’t most people oppose changing the rules to make something easier!

Still, another poll with more neutral wording found 57% to 32% disapproved of changing the rules (Newsweek poll); and one private *Republican* poll showed 51% of Republicans opposed removing the filibuster, and the Wall Street Journal found 41% of Republicans opposed.

Trial by Television:

It used to be a given that Republicans out-spent Democrats 2 to 1, but not this time. MoveOn.org and other groups are outspending Republican groups about 5 to 3, and TV ads are running in states with possible swing-vote Senators (Maine, Ohio, Nebraska, Indiana, Alaska, Virginia, New Hampshire, and Pennsylvania). They want public opinion to get on their Senators’ case. Web site emails are flying, and tens of thousands of people are emailing their Senators; but that is still a small percentage of the population of most states.

An email from the Democratic Senatorial Campaign Committee from New York’s Chuck Schumer, DSCC chair, boasts that “*the latest public opinion polls show that the public opposes the so-called nuclear option by a margin of 2-1.*” Who wouldn’t oppose something called a “nuclear option.”

Public opinion doesn’t oppose the nuclear option 2-1. Contributors to on-line ideological fund raisers oppose the nuclear option 2-1.

In the House, no Sanctuary:

This kind of language of excess is found even in routine memos. When a committee “reports out” a bill to the whole House of Representatives—meaning approves it and sends it on with a recommendation—the bill itself is not only sent but a Committee Report, with expert testimony and letters on the record, accompanies the bill. Staff people for the majority party write a narrative of the report explaining why the bill was approved by the committee.

Recently the House Judiciary Committee reported out an abortion bill mainly concerned with parental consent, but a number of amendments were added. One of them

criminalized transporting a minor across state lines to get an abortion. Democrats offered some of their own amendments, including one by Jerrold Nadler of New York that would have exempted from prosecution grandparents or clergy who might take minors across state lines for an abortion. That amendment failed by a vote of 16 – 11.

The bill, of course, passed the Committee—in keeping with the times and to show that Democrats are not for moral values—and the Committee Report read: “*Mr. Nadler offered an amendment that would have created an additional layer of federal court review that could be used by sexual predators to escape conviction under the bill.*”

The staff of Judiciary Chairman James Sensenbrenner wrote the report, but the leadership would not retreat from that language. Nadler was livid (“You don’t report an amendment that way!”) and with the support of the Democratic leadership took to the House floor a resolution to revise the Report language. The Democrat’s resolution didn’t give the Republicans any room, and said the language “purposely and deliberately mischaracterized” the Democratic amendment. Still, incredibly, the House tabled, or killed, the resolution 220-196, and the bill then passed 270-157.

Nadler persisted and after days of passionate floor debate the language of the Report was changed, believe it or not, as an amendment to the 2005 supplemental appropriations bill for the war in Iraq. [If this astonishes you, get used to it.]

Nadler, in victory, said: “While I would have hoped this correction would have been accompanied by an apology and by an acknowledgement that this report was a violation of the tradition and norms of the House, that is perhaps, in the regrettably poisonous atmosphere of the present day, unobtainable.”

Barack Obama:

The freshman Democrat from Illinois is considered a rising star in politics, virtually a future Presidential candidate, but he has kept a low profile so far. He knows he is expected to serve a Senate apprenticeship before taking his turn in the spotlight. Recently he made his first statement on the Senate floor:

Noting that he had taught Constitutional Law at the University of Chicago, he said: “The notion that there is a Constitutional right to have judges receive an up or down vote is nowhere to be found in the Constitution.”

He is right. Of all the violence to language in Congress recently, perhaps the worst is the use of the word *constitutional* as an adjective to characterize whatever the partisan speaker is for.

Answer to last week’s trivia question: In the 1939 movie, “Mr. Smith Goes to Washington,” what did Mr. Smith (Jimmy Stewart) filibuster for? Pork, or pork barrel legislation. He wanted a private bill for a boys’ camp in his state. These things are usually handled routinely at the end of a legislative day, but if there’s a nuclear option, no pork.

This week’s trivia question: In a famous metaphor, the Senate serves as a kind of saucer into which is poured the hot coffee of legislative passion, to let it cool before drinking. The House is allowed to brew this hot coffee precisely because the senatorial saucer is there to cool things down. For a free drink, sometime, who said this?

