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Will 2017 Be the Year of Criminal Justice Reform?

By BILL KELLER DEC. 16, 2016

It's no wonder criminal-justice reformers woke up from Election Day 2016 with a sense of existential gloom.

Given candidate Donald J. Trump's law-and-order bluster, his dystopian portrayal of rising crime and an ostensible war on the police, and a posse of advisers who think the main problem with incarceration is that we don't do enough of it, the idea that justice reformers have anything to look forward to is at best counterintuitive.

It is reasonable to expect that President Trump and his choice for attorney general, Jeff Sessions, will dismantle at least some of what their predecessors leave behind. Based on what they have said, the Trump-Sessions Justice Department may well roll back federal oversight of troubled police forces, escalate the war on drugs, enlarge the share of the corrections business that goes to private companies, accelerate deportations of undocumented immigrants and use the threat of financial sanctions to challenge so-called sanctuary cities.

Some combatants in the fight for a less punitive approach to crime will probably redirect their energies to the states and localities, where most criminal justice is dispensed and where officials — in red states and blue — have proved more receptive to change.

But those inclined to look for silver linings may find one on Capitol Hill.

The current, expiring Congress began with a groundswell of bipartisan support to reduce mandatory minimum sentences, give judges more discretion to suit the punishment to the offense, invest more in alternatives such as drug and mental health treatment, and encourage programs that prepare the incarcerated for life after prison. In months of negotiations, a package of sweeping criminal justice reforms was whittled down and some new mandatory sentences were grafted on. Then Senate majority leader, Mitch McConnell, declined to bring it up for a vote.

I can think of four reasons the prospects of federal reform are actually better in 2017.

First, it is not an election year. Nothing makes members of Congress squirm like the specter of attack ads portraying them as coddlers of criminals. There is reason to think those Willie Horton-style gotchas have lost some of their potency, but the prospect tends to make members of Congress more risk-averse in even-numbered years. And the lobbying alliance in favor of reform has grown and diversified and offers supportive candidates some political cover. It now includes significant numbers of police executives and prosecutors, who say our tendency to over-criminalize and over-punish wastes money and human potential without making us safer.

Second, President Obama will be gone. Some of the resistance to this year's sentencing bill was a reluctance to give the president a parting victory. His heartfelt embrace of criminal-justice reform in the final years of his presidency was — through no fault of his own — the kiss of death in a hostile Congress.

Third, at least one of the hard-core Senate opponents of sentencing reform will no longer be there. That would be Mr. Sessions, the Republican senator from Alabama. True, as attorney general he will be in a position to encourage a

presidential veto. But he will not be joining the obstructionists who this year never let a bill come to a vote at all. The chairman of the Senate Judiciary Committee, Charles Grassley, said in October that if his party leadership had brought the bill to the floor, it would have garnered 65 to 70 votes — enough to override a veto.

And fourth, the Republican leadership will be looking very hard for bipartisan successes to demonstrate that Washington is no longer in a state of ideological paralysis. On the short list of things Congress could do to reassure voters that government is back in business, criminal justice ranks near the top.

The subject attracts libertarians who have come to see the machinery of criminal justice as another example of overbearing government, conservative Christians who see the criminal justice morass as dehumanizing, fiscal conservatives who have noticed that incarceration is expensive, and policy wonks who see a “corrections” system that largely fails to correct.

As Jonathan Chait has pointed out in *New York* magazine, Democrats who join Republicans in ending the legislative impasse can expect to pay a political price. “Bipartisanship suggests high presidential approval, which leads to more success for the governing party in Congress and for the president’s re-election,” Mr. Chait wrote recently. “Helping the majority govern means helping the majority maintain power.”

He meant that as a caution for Democrats. If Congress works, Republicans will reap the credit. But for advocates of criminal-justice reform, therein lies an opportunity. They have a stronger hand to play than many of them think.

Bill Keller, a former executive editor of *The Times*, is editor in chief of **The Marshall Project**, a nonprofit news organization that reports on criminal justice issues.

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