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This online newsletter on crime policy making in Washington is by subscription for $20 a year for individuals, $100 for departments, and $10 for students if required for a course. A website, www.crimeletter.net has useful links, past editions, assistance to participation, and a **subscription page.** The next edition will be in September, after the Congressional August recess.

What have we got?

"The President is a man of his word," said Tony Perkins, president of the Family Research Council. "He promised to nominate someone along the lines of Scalia or a Thomas, and that is exactly what he has done."

But wrote Linda Greenhouse of the New York Times: "Now the question is (will John Roberts, like Scalia and Thomas) commit himself to recapturing a distant constitutional paradise in which the court was faithful to the original intent of the framers or whether, like the justice he would succeed, he finds himself comfortably in the middle rather than at the margin.

"His resume suggests the later . . . ."

From the same paper, David Brooks: "(He is) the face of today's governing conservatism."

Senator Arlen Specter, who will chair his confirmation hearing starting September 6 and has a history of independence, said: "His goal (is) to be a modest jurist on a modest court that understands its place in the balance of powers inherent in our Constitution.

"(and) . . . .would respect Congressional action and judicial precedent."

Next, Richard Cohen in the Washington Post: "Everyone likes him. He sorely lacks the villainous aspect of the storied Robert Bork."

The influential and objective Congressional Quarterly: He is a "*tabula rasa*."

Now from John Roberts himself, as an advocate for the Justice Department: "Roe v Wade was wrongly decided and should be overturned."

As he told the Senate Judiciary Committee in his 2003 Court of Appeals confirmation hearing: "Roe is settled law."

And, "I'd have to say that I don't have an overarching guiding way of reading the Constitution. I think different approaches are appropriate . . . ."

But now he will be on the Supreme Court, where he can re-make the law:

John Roberts will be confirmed, possibly without a single negative vote, although it will be interesting to watch Presidential hopefuls, like pro choice Hillary Clinton. The Gang of 14 has already signaled that his nomination is not an "extraordinary circumstance" to justify a filibuster. Since he argued 39 cases himself before the Supreme Court, and won 25, he will know how to handle himself as a witness.

We have all read about as much as we want to about this Supreme Court nominee, but allow me to add this: Fresh out of Harvard Law School, where he was summa cum laude and managing editor of the Harvard Law Review, he became a clerk for the highly respected Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit in

1979. [After that he clerked for William Rehnquist.] Friendly was considered the pre-eminent appeals court judge of his era, and reportedly Roberts was his favorite law clerk. Friendly himself was from Harvard and had been a student of Felix Frankfurter. Yes, *that* Frankfurter, the liberal-turned-conservative who nevertheless argued that due process meant fundamental fairness.

Friendly had been a clerk for Justice Louis Brandeis and helped write his famous dissent in Olmstead v. United States, in 1928, about an illegal wiretap, where: ". . . .government officials shall be subject to the same rules of conduct that are commands to citizens. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. . . . . it teaches the whole people by its example. . . ."

Decades later that dissent would help form the basis for a string of precedents that fashioned a right to privacy (and the exclusionary rule), first argued by Brandeis, that the framers had "conferred, as against the government, the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men."

We may soon see if the lesson stuck. Two abortion cases are on the Supreme Court's docket, one on parental notification, and one on the late-term procedure called the "partial birth" abortion. But neither case directly challenges Roe and could be limited to the facts.

20,000 pages to read:

That is what awaits staffers in August from his memos as Associate Counsel to President Reagan from 1982-86, but they won't get the ones he wrote as assistant to the Attorney General in 1981-82. Democrats will try to make something of that, but the White House memos are about policy and the rest involve litigation, and lawyer-client privilege. As for the record that they do have, scholars have a research find on internal influence within a bureaucracy by a bright but junior staff person. They won't find much on crime issues though.

There is one memo on discrimination that I find interesting. He recommended that the government should not intervene on behalf of female prisoners who claimed they were discriminated against in a job training program. If male and female prisoners had to be treated equally, Roberts argued, "the end result in this time of state prison budgets may be no programs for anyone."

There is little doubt that a Justice Roberts will bring his conservative instincts to the court on issues like fourth amendment searches (cops can look into a car's trunk, if reasonable), seizures (for eating a french fry in a D.C. subway), habeas corpus (parole rules can be tightened in mid-sentence), and areas like deference to executive power (he worked for a President), deference to the states (no help for a toad who doesn't hop across a state line), and the priority of the text of statutes. He has quoted the three basic rules of statutory interpretation as taught at Harvard by Frankfurter: "1.) Read the statute; 2.) read the statute; and 3.) read the statute!"

One issue on which Roberts has no record is capital punishment, and four such cases are on the way. At his 2003 Senate hearing he was questioned on that issue by the very liberal Democrat, Russ Feingold (who ironically was in his law school class but they didn't know each other). Justice O'Connor, whom he will replace, had been with a 5-4 limited anti-death penalty majority recently.

Roberts indicated he was in favor of adequate representation for poor defendants facing execution because such claims were a major reason "these cases drag out so long," which, he said, undermines any deterrent effect. Feingold pressed him about the risk of executing the innocent, and Roberts responded that "getting it right in most cases isn't good enough."

This fall the court will hear of a Tennessee inmate who's DNA did not match that found in a murder-rape victim. The Sixth Circuit, sitting in banc, voted 8-7 that under a 1995 Supreme Court precedent this evidence was not sufficient to overturn the state court on the conviction and sentence. Anti death penalty advocates will be watching closely to see if Roberts believes that the states can be trusted with handling improved DNA science, or if federal review is necessary to insure against getting it right only *most of the time.*

What have we got? It will take many years to really find out.

Last week was like final exam week on Capitol Hill:

In a frenzy of all-nighters before their August recess, Congress passed an energy bill, a highway bill, ratified CAFTA, increased veterans' health care benefits, and the Senate passed the gun liability shield (S-397). The vote was 65-31, with 14 red state Democrats voting for it, including Majority Leader Harry Reid. There were literally 60 co-sponsors. [Only two Republicans voted against it, the most interesting being Mike DeWine from Ohio.] In September the House will pass it in the blink of an eye and the President will have his fifth bill signing ceremony in a little over a month.

There is both history and current maneuvering behind this. Last year after months of intense lobbying and deal making the gun liability bill was before the Senate with two controversial amendments, renewing the assault weapons ban and closing the gun show loophole. The National Rifle Association, which orchestrated the deal, changed its mind at the last minute and withdrew its support. The gun package bill lost, 90-8.

The NRA's move seemed curious to this newsletter at the time because gun dealer liability protection seemed much more important than the two gun control amendments. Civil liability protection for gun dealers and manufacturers was and is the main goal of the gun industry. The assault weapons ban was easily circumvented, and requiring registration and back ground checks for gun show sales seemed reasonable, although inconvenient. Why not accept the package last year?

This year the NRA got it all:

A good deal of liberal rhetoric attributes this year's legislative victory to the great power of the NRA, but in 2004 the NRA spent about $1.5 million on lobbying and the Brady Campaign against Gun Violence spent $960,000, not an overwhelming disparity. Probably more significant was last fall's election with Republicans picking up four new pro gun Senators. Most important was the defeat of the incumbent Democrat in South Dakota, Tom Daschle, the Senate Minority Leader, who was blamed for using his office to add the gun control amendments to last year's bill. Republicans didn't see a compromise, but a maneuver adding the killer amendments that would bring the whole thing down

To illustrate how gun controls' political position has eroded, the Democrats failed to add almost all of the amendments they proposed except one for a child safety lock.

Amendments that failed by big votes included exemptions for police officer and children, a hollow-tipped "cop killer" bullet exemption, and a terrorist watch-list exemption (the Justice Department objected saying it would alert the buyer that he was on the watch list).

As law, the bill removes negligence as grounds for a civil suit against a gun dealer who carelessly sells a gun to someone who was at risk for using it in a crime. The dealer has to *know* a buyer's criminal intent to be sued, which seems unlikely. Manufacturers are protected from liability for releasing a defective firearm.

There are 57 gun-related lawsuits known to have been filed nationwide, 50 by the Brady Center, but they're all moot now. The Brady Center says that the threat of civil judgments is the best deterrent against irresponsible dealers and manufacturers. A gun industry representative says that some suits are asking hundreds of millions of dollars in damages, but most manufacturers are small companies that could not even post a bond to appeal a verdict and would go out of business, *ending a critical source of supply for our armed forces, our police, and our citizens,* he said. So this is an anti terrorism bill!

There has never been a jury award to gun victims, but in the Washington area sniper case, where the dealer "lost" the sniper's rifle and 200 other guns as well, in a settlement the victims' families received $2.5 million. That could not happen now. Civil suits, as a backdoor means of gun control, have now been effectively blocked.

Torture—the issue that wont go away:

One interesting question about the gun liability bill is how it got on the Senate floor at a time when there appeared to be bigger ticket items. [*The power of the NRA*, said Democrats.] One of those big tickets was the $442 billion 2006 Defense Authorization bill ($50 billion for *our armed forces* in Iraq), a must-pass bill pulled from the Senate floor. Why?

An amendment was proposed by three Republican senators, Arizona's John McCain, with support from South Carolina's Lindsey Graham and Virginia's John Warner, to literally legislate against torture. This rider defined enemy combatant, bared the use of torture, extended the Geneva Convention to military interrogations, and possibly most important, defined "torture" as cruel, inhumane and degrading treatment of detainees short of extreme physical pain, similar to the publicized conduct at Abu Ghraib. It also aims to stop the holding of "ghost detainees" in Iraq.

If those three Republicans as a group sound familiar, yes, they were the leaders of the Gang of 14 who brokered the deal to prevent the nuclear option stopping filibusters. They are not the White House's favored Republicans, and in fact Vice President Dick Chaney twice climbed Capitol Hill to tell McCain that such legislation would interfere with President Bush's ability to protect the country from terrorist attack. The Senate Republican leader, Bill Frist, tried to invoke cloture on the defense bill to stop the torture amendment and failed, 50-48, 10 votes short of the 60 needed. He then pulled the whole defense authorization bill, and replaced it with the gun liability bill which he said would protect Americans from terrorists.

Delayed until September, McCain and Chaney both have time to make their cases, and it is unclear who in the Senate will side with whom. Bush, who has never vetoed a bill as President, threatens to veto this one, but Democrats wonder how a President can veto a defense authorization bill in the middle of a war. McCain, who himself was tortured for over five years in Viet Nam, has credibility on this issue.

The law as in the Army Field Manual:

The administration wants to quell this rebellion, but so far has not. Warner's position is unclear for two years ago as chair of the Senate Armed Forces Committee he went further than any Senate leader investigating Abu Ghraib. Assured of other investigations, and when the depth of the story started coming into view, he backed off. He seemed to have little stomach for climbing the chain of command to officials like Defense Secretary Donald Rumsfeld who gave some damaging orders in writing (approving the use of dogs to terrify, as one example).

There were eight investigations, seven by the military and one by the state department, and each found responsibility limited to soldiers and protected most officers. One, General Ricardo Sanchez, is being considered for promotion by Rumsfeld. Still, other data from human rights groups have revealed 28 homicides of detainees in U.S. custody, 13 tortured to death (only one in Abu Ghraib), and in Iraq 70% of those arrested and detained were by mistake. The government has turned over thousands of documents, some describing graphic abuse, because of court orders from actions by the ACLU. Videos and photos are withheld still. In spite of denials, the press has found abuse at Guantanamo Bay long after Abu Ghraib.

McCain and other Senators were sick of what they considered stonewalling by the administration and wanted investigations and accountability for those who either gave the orders or knowingly tolerated the abuse. Democrats are embracing McCain's legislation, but their position has always been for an independent investigation, similar to the 9-11 Commission, hoping to hold high officials, even Bush himself, politically accountable. Warner himself has deviated from McCain a little with his own amendment calling for clear regulations for detainee treatment, but the White House has spurned his as well.

In McCain's corner are 13 retired military officers, including a former U.S. Central Command Chief, General Joseph Hoar, who said; "Our servicemen were denied clear guidance, and left to take the blame when things went wrong. Most Senate Republicans support Chaney, arguing restrictions on interrogations hinder getting valuable intelligence. Trent Lott of Mississippi said "If it means we have to put a snarling dog in their face, do that." [No one has said just what valuable intelligence has been gained.] McCain has repeatedly said, "Torture doesn't work."

USA Patriot Act, the Conference, and the sunsets:

As we know, the anti-terrorism law passed hurriedly in the weeks after 9-11 called the Patriot Act has 16 provisions that will expire at the end of the year unless renewed by Congress, which means before adjournment sometime in the fall. (See CJWL, #6, p. 3) With one foot out the door, the Senate, without debate, by voice vote, reauthorized all of the expiring provisions. The House had done the same about a week before, 257-171. There had been months of intense debate and negotiations within four committees, the House and Senate Judiciary and Intelligence Committees.

The House Judiciary Committee held a dozen hearings on various portions of the law since April, and tensions between the two parties increased. On one occasion, the Republican Chair, James Sensenbrenner, became so incensed at the committee Democrats that he closed the meeting and walked out even as Democrats continued to testify with the microphones off. [More on tensions in that committee later.]

But it's not over. Since the Senate and House versions have differences, the real Patriot Act will be reconciled in a House-Senate Conference Committee, probably in September. If recent history is any guide, this Conference will be fairly large, will include everybody who wants to be anybody in Congress, and may go outside the parameters of the bills from the two houses. The final Conference Report has to go back to each house to be passed, but that is usually routine. The Conference is the functional policy maker.

A quick summery of the Conference issues: The House version makes 14 provisions permanent, and puts a sunset of 10 years (expires unless renewed) on roving wiretaps and searches of libraries, medical files, and other documents. The Senate makes the same 14 permanent, but puts only a four year sunset on roving wiretaps and various records, but adds new restrictions on the government's powers, including increased Justice Department reporting to Congress and a right to challenge secret searches (so called sneak-and-peak) in court. The Senate also has raised the standard for "lone wolf" search warrants that target supposed terrorists acting alone.

What has been called the "library records" provision (actually it includes business records, medical files, bookstore receipts, and many other documents) has different ways of getting a warrant in each version. In the House, administrative subpoenas are granted by an FBI designate. In the Senate, agents need FICA warrants (a special court, sitting in secret, called the Foreign Intelligence Surveillance Court). Subjects must be notified within seven days.

The Senate version signals at least temporarily a defeat for the Bush administration and Attorney General Alberto Gonzales who wanted total renewal with no sunsets and no new restrictions on their investigative powers. The Senate Select Intelligence Committee approved a version with everything the White House wanted, and will be represented on the Conference Committee, though with less clout than the Judiciary Committee. It should be said that administrative subpoenas are not new to federal investigators, for the FBI already has them in drug and health care fraud investigations.

Only a fly on the wall will see and hear what will be said in the Conference.

Dirty Laundry? Or something significant?

There has been an ongoing conflict between Republicans in Congress and the federal judiciary which may have peaked after Terri Schiavo, the brain damaged Florida woman, had her feeding tube removed under court order, and House Majority Leader Tom DeLay publicly stated: "…. The men responsible for this (will) answer for their behavior."   Republican Senator John Cornyn of Texas wondered of a cause-and-effect connection between some recent courthouse violence and "judges making political decisions yet are unaccountable to the public." Some have called these comments threats.

Three recent Supreme Court cases (Blakeley, Booker, Fanfan) exacerbated Congressional hostility by softening sentencing guidelines, and Republicans who believe in severe sentences have been in a surely mood, none more than James Sensenbrenner, chair of the House Judiciary Committee. He never met a mandatory minimum sentence he didn't like.

A seemingly small drug case:

A woman named Lissett Rivera was arrested in Chicago along with over 20 others, including street gang leaders, for distribution of more than 350 kilograms of cocaine. Most of the gang was sentenced to 10 year mandatory minimum sentences, under the federal guidelines (for possessing over five kilograms), but Rivera, apparently a minor player who possessed less than five kilograms, was sentenced to eight years, a downward departure the judge thought justified. Arguably the 10 years was called for because of the conspiracy, but the government did not initiate any appellate proceeding, which meant the 7th Circuit Court had no bases to raise her sentence. [Her case got to the appellate court for reasons not necessary to go into here.]

Sensenbrenner learned of the downward departure of her sentence from his committee's counsel, Jay Apperson, and claiming Congress' oversight authority, he wrote a five page letter to the Chief Judge demanding the higher sentence, but the judge would not comment. But the panel that heard the case issued a revised final paragraph adding a citation explaining why Sensenbrenner was wrong.

A few months ago, in a speech, Sensenbrenner said his committee was considering the creation of an office of inspector general to oversee the federal judiciary. As for his oversight authority, his committee certainly does have budgetary oversight. Beyond that the power generally means holding public hearings on policy, but intrusion into specific cases is unheard of.

Jay Apperson is well known and considered a powerful force in the making of crime policy, especially on sentencing. He has been at odds with federal judges before. A District Court judge in Minnesota, James Rosenbaum, had testified before Sensenbrenner's committee against raising the minimum sentences for first time drug offenders, and Apperson threatened to subpoena Rosenbaum's notes and accused him of perjury and misleading the committee. Rosenbaum hired an attorney and the threats died down.

Why Sensenbrenner got so interested in a single downward departure in sentencing is mysterious, but his chief counsel, Apperson, has been dismissed, and sources said it "had everything to do" with his role in the controversy. Sensenbrenner now has accountability problems of his own, could face a House Ethics Committee complaint for House rules prohibit communicating with judges on cases, and general rules of litigation prohibit contacting judges without notifying all parties, which he did not do.

In other Congressional sentencing policy forums recently there has been discussion about something called "the girlfriend problem," meaning that under the federal guidelines minor players like a passive girlfriend, or lookouts or steerers, should get the same sentences as dealers. This accessory issue is now in dispute. Congress has not legislated on this issue, but the court decisions have seemed to recognize it and made downward departures more accessible. Many in Congress, however, haven't gotten the point. [Eight years for less than five grams is still pretty severe.]

Comments on Sensenbrenner have been universally critical, ranging from "inappropriate" to "unethical." "They are trying to intimidate the judiciary," said one law professor. Probably any sanctions will be in the realm of political legitimacy.

Those of us who have been watching the House Judiciary Committee and its punitive Republican Chairman, James Sensenbrenner, suspect that he committee has now

lost its Karl Rove, its architect. Apperson was very conservative on crime issues, feared by Democrats because of his influence on policy, and respected for his savvy and clout. In the criminal justice advocacy community, his name brings cringes. The committee is unlikely to be the same.

[The facts from the above came from The Chicago Tribune.]

Other legislative issues will have to wait, for this edition is already too long. It should be an interesting fall, keep tuned.

No one got the last trivia question, but in 1812 Joseph Story was the third pick for the Supreme Court by President James Madison. He went on to side with the Federalists, Madison's enemies.