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This edition has been delayed, awaiting events that were imminent. Many still are. The Congressional leadership intends to adjourn Congress by Thanksgiving—for no necessary reason that I can see other than their wish to go home—which is only three weeks away. There will be a frantic push to finish some matters with deadlines, like the appropriations bills, especially the defense spending bill with the anti torture amendment, and the Patriot Act. Both are in Conference negotiations right now, and their reconciled versions will have to go back to both Houses for final approval. Look for a race to the finish. Senate Majority Leader Bill Frist talks of a December session to confirm the Supreme Court nominee, which might change everything in the schedule, but probably won't. For the next three weeks, finding agenda time is central, complicated by the following:

The fear factor is gone:

“If you believe the official line that Harriet Miers’s withdrawal of her nomination to the Supreme Court was entirely her idea, then you must have figured out what every college freshman learns around this time of year: When you flunk a take-home exam, it’s probably time to drop the course.” (Eugene Robinson, in The Washington Post)

President Bush pulled the Miers nomination because, simply, he didn't have the votes, either in the Judiciary Committee, or on the Senate floor. The Democrats were holding their cards, waiting to see how they could best exploit the corner in which Bush had painted himself, and the Republicans were (uncharacteristically) split. We should note, with interest, that the opposition to Miers from the right was from intellectuals, including writers and columnists, and not from the Republican rank-and-file. Many Republican Senators were wearing their party loyalty on their sleeve, which seemed inappropriate considering how weak she was, and supported her.

As the conservative columnist George Will put it: *“Conservatives aren’t supposed to be nice* (Bush had extolled Miers’ “good heart”) *but are supposed to be competent.”* The imploded nomination was largely a matter of conscience, but pulling it was all politics. There is an old political maxim: *If you don’t like the news, make some of your own.* Bush was uniquely able to do this, which he did, and he certainly changed the conversation in Washington by nominating Samuel Alito just a weekend later; but he traded in one battle for another, and the Senate Republicans will have to run with this nominee without him. He can no longer control his own party, and hold the other somewhat at bay, with fear. We all read frequently about his approval ratings, Iraq, Katrina, the CIA leak case, gas prices, his legislative agenda is dead, and Harriet Miers was the ultimate public image blunder.

No stealth nominee he:

With the right and the left waiting to spend many millions of dollars supporting or opposing a conservative nominee, Bush has so far this year tried to send up confirmable nominees without much of a paper trail. That worked all right with John Roberts because

he did have the requisite resume and he presented himself well, but of course he pushed that envelope too far with Miers. Alito, on the other hand, sat on the Third Circuit for 15 years and authored 240 opinions, including 41 dissents where, in mostly three member courts, he represented only his own views. There won't be any requests for White House memoranda this time, with subsequent refusals, and Democrats' dismay at the refusals.

I have read three of his opinions, and brevity is not one of his virtues. He never leaves anything out (which contributes to his reputation for being careful and thoughtful). He is nuanced, and although his findings could be characterized as conservative—for example, a dissent upheld the legal possession of a machine gun—his reasoning is not clearly so—the statute didn't Constitutionally prohibit them.

I point this out to illustrate why this confirmation process will not be quickly resolved. Let us sympathize with the hapless Senate Judiciary Committee staffers who will have to pour over those tedious opinions looking for nuggets to use for him (he really *is* against abortion!) or against him (what about settled law?). We should also sympathize with future Con Law students for as a former federal prosecutor he will likely draw a large number of criminal procedure cases to write. Tough going ahead.

“Let the Battle Begin:”

Is there any chance he won't be confirmed? It is too early to tell, but Republicans will be united with their 55 votes, and the Democrats will have to filibuster to beat him. At this point that seems unlikely because the bipartisan “Gang of 14” (see CJWL #9 in [Archives](#)), who have been meeting, is unlikely to find Samuel Alito to be an “extraordinary circumstance,” meaning too far out of the mainstream, which would kick in their agreement and they would band together to support a filibuster and thereby defeat this nominee. On the other hand, pulling Miers makes it hard to argue that Alito has a right to an up-or-down vote.

What is not unlikely, however, is the multi-million dollar battle between conservative and liberal interest groups, representing conservative and centrist ideologies (please note: Republicans are the majority), a show down that many have been wanting and expecting for the five years of the Bush Presidency. Get ready for TV ads and email blitzes, already begun of course, reaching out to you and me asking us to pressure our Senators. For reasons that will have to be explained by social psychologists, not those interested in law or policy, groups on the right and left, pro-life Christian conservatives and pro choice, seem to want to have this fight, and they probably will, in January.

In the meantime, agenda time will be scarce. Patrick Leahy, ranking Democrat on the Judiciary Committee, criticized Bush for what he called “a needlessly provocative nomination,” and signaled that they will be trying to slow down the process, partly looking for Alito vulnerabilities, and partly to show next year's voters that they have some fight in them. Republican Senators will be trying to show their base that they delivered with an appointee who will vote to overturn Roe v Wade, while repairing the image that it was their President who damaged the advice and consent process.

Under the radar:

Despite distractions, Presidential strategists are keeping their eyes open for wins they can slip by. Amid the Miers uproar last week, the Senate voted 97-0 to confirm Susan Bieke Nelson to the 6th Circuit U.S. Court of Appeals. She was originally

nominated in 2001 and was filibustered, along with Henry Saad and David Griffin. Senators Carl Levin and Debbie Stabenow from Michigan were rather honest about it, saying that they weren't consulted, and this was payback for the Republicans blocking two of President Bill Clinton's nominees to the same Circuit. Clinton's nominees didn't get hearings. Bush does have perseverance.

Scooter Libby falls on his sword:

I have been reading a number of insider reports that agree with me that Vice President Dick Cheney's Chief of Staff took one for the team in the CIA Leak Case, and that it was orchestrated to protect Cheney, at the least, and Bush's Deputy Chief of Staff Karl Rove, and (gasp) maybe even . . . dare we say it?

Insiders say that as late as last week Rove was also to be indicted, but after Special Prosecutor Patrick Fitzgerald met with Rove's lawyer, one Robert Luskin, for three hours, he withheld that indictment but kept the investigation open. Of course Scooter Libby (I. Lewis Libby Jr.) was not indicted for an underlying crime, but for lying about it (obstruction of justice, perjury, false statements). Still, Fitzgerald made clear in his 22 page indictment that it came from a national security investigation, and convicting him, he said at the press conference, "will vindicate the interest of the public in making sure he's held accountable."

Fitzgerald presented only the information needed to reach a legal judgment, but withheld much of the information the country needs to reach a political judgment about the administration's actions. Some in the press have been saying—and suggesting that is what the Special Prosecutor was asking for—that there are some issues that can only be resolved through congressional hearings, with the central figures testifying under oath. Democrats have been demanding them, Republicans have ignored them, but the Democrats have stepped up their pressure, especially on the Senate Select Intelligence Committee. That committee had investigated CIA intelligence failures, found what we already knew, that indeed there were intelligence failures, and promised a Phase II Investigation a year and a half ago on "why," apparently did nothing, but now promises a report in two weeks, thanks to polarizing Democratic pressure. They had said that it's inappropriate to conduct an investigation while a judicial process is underway. Phase II would presumably entail the blame game, or, who lied.

The Plame game:

Some would like to see an update of the classic Watergate question: What did the President know, when did he know it, and why didn't he do anything about it?

It's hard to believe that a Congressional hearing today would be very revealing, but a year from now things could be different. For one, if Libby goes to trial, Chaney certainly will be called to testify. Libby will be looking at possible jail time (he's exposed to 30 years), so he might want to re-think his loyalties and make his own deal, and tell us what he knows. What does Fitzgerald want from him? He will want to know who in the White House signed off on revealing Valerie Plame's identity as a CIA agent to discredit her husband, Joe Wilson, the vocal critic of the war in Iraq.

Also, a Congressional election could coincide, and much of the American press feels embarrassed that they were lied to in the run-up to the Iraq war, and probably won't let go of the story. The Democrats show signs that they intend to use the war as a

rallying cry for their own unity and a major vulnerability of the Bush administration and the Republican Party. [This assumes they can make the sale that they supported it because they were lied to, hence the seriousness of this indictment.] A trial of Scooter Libby will put the Iraq war on trial, which is exactly what the Democrats want.

What don't we know?

We don't know what deals were made by Fitzgerald. It defies credibility that Libby was the only one who lied. Cheney and Rove were central to the drama, talked all the time, as they did with you know who. It has been reported that the prosecutor made a deal with the columnist, Robert Novak, which explains why he skates free. He almost certainly made a deal with Rove. It's hard to believe that his lawyer, Luskin, *convinced* Fitzgerald to pull the indictment. Prosecutors do that for only one reason. [There was a report of new evidence, but why should it have taken two years to surface!]

We also don't know who leaked to Novak that Valerie Plame worked for the CIA, the national security breach, the alleged underlying crime. Novak has said he learned it from two officials. Libby was probably one of them, although if Fitzgerald has proof on this, he is holding it back. (Remember, Libby wasn't indicted for the security breach.) Perhaps he feels charging him with lying about it, and having that proof, makes the statement of a violation of public trust. The indictment literally says that Libby specifically talked to "Official A," a White House senior official, about Plame's identity, and Fitzgerald has Libby's notes to prove it, although he had denied it. Prosecutors often use this pseudonym for individuals who have not been indicted but still face a significant chance of being charged.

We also don't know who forged the documents that claimed Saddam Hussein was seeking uranium for nuclear weapons in the African country of Niger, which prompted the trip by Plame's husband Joe Wilson, the former African ambassador, whose finding disputed the claim. That was the first domino. And we don't know how a version of this tall tale got into Bush's 2003 State of the Union address, even though it was never confirmed and intelligence analysts doubted it.

Of course we also don't really know why Bush, or Cheney, has not done anything about it. Cheney replaced Libby with his next in line. The press and the Democrats are on them about it, and that largely explains why Bush rushed the Alito nomination onto the front pages—to change the subject. It is quite an irony that a controversial Supreme Court nomination is functionally damage control.

The Trial of the Century?

For now, everybody, including the President, is saying the appropriate things—only one person indicted, presumption of innocence, Rove is still trusted, Cheney too—but this is not a White House known for its openness. Some in the press say Cheney is already out of the loop, and a staff house cleaning may occur in December, and a Libby trial is being looked forward to like root canal. Fitzgerald is a conservative prosecutor who sticks to the facts and the law, but he will inevitably have to expose the machinery that sold the Iraq war on false premises, and sought to discredit its critics, particularly Joseph Wilson. [Note how any general who questioned the war's implementation had their careers cut short.]

A trial would take us through a minefield of explosive questions, starting with why Bush took us into a war against the advice of his state department and the international community. The immediate verdict of history appears to be that his neo-conservative advisers, of which Cheney was probably the leader, believed that taking down the Middle East's most belligerent dictator would bring stability to the region, protect Israel, and oil; but that was a theory, without a foreign policy consensus. Even at that time nobody in the administration believed that Iraq had anything to do with El Queda, terrorism, or 9-11. The human rights abuses were discovered later. The administration marketed the war, rewarded those who supported it (Condoleeza Rice is Secretary of State), and retaliated against those who did not (Colin Powell was marginalized and eased out). Joe Wilson was a lightning rod of retaliation.

Wouldn't we all like to be a fly on the wall when Libby and Fitzgerald sit down to talk about a guilty plea! Fitzgerald is a law 'n order straight shooter, but his press conference gave signals that he wants the truth, not just about what Libby himself did, but about the underlying policy of going to war without telling the country why.

Crimes against democracy:

Even if the war was manufactured by a "White House cabal" for its own purposes with undemocratic means, the question remains, is this the business of prosecutors, even "special prosecutors," and should the indictment and criminal sanction be used for policy criticism? Should that not be done by the democratic process! If the Bush White House, Karl Rove and Dick Cheney especially, acted unethically, or made bad policy, should not the voters be the ones to make that statement? If lying were a crime there wouldn't be a politician left in Washington. [Lying under oath, to a grand jury, is a crime.] Why investigate, possibly indict, and sentence them (lightly) for what is not a crime, but they lied about?

Outing Valerie Plame is not the heart of the matter. She worked in an office in Virginia. Retaliating against her husband is certainly unethical, but getting even is also part of the Washington culture. The crime, which is not a crime, was to lie our way into a war, and a losing war to boot. It was a crime against democracy.

In some ways, prosecutors, although from the executive branch of government, are like the judiciary—they take the cases that come before them—and do not seek political power. Special prosecutors, however, represent a policy initiative. The political process needs information, which is often a driving force behind the appointment of a special prosecutor, which seems to have a lot to do with it here.

Any savvy prosecutor knows that the power to indict a public official is a powerful political weapon. An indictment can ruin a career. In this case it might compromise a Presidency. The criminal justice system can not hide from this reality, but there is a rationale behind it that supports democratic government. Everyone who studies criminal justice knows that not all wrongs are crimes. Unethical behavior is also a wrong, and an informed public needs to know about it. If White House officials "misled" (the term Joe Wilson used in his Op Ed piece and later his book that turned the White House against him—he didn't say they lied) the American people, Congress, the press, and the soldiers in the field--that may not be a crime but it is a wrong. The criminal justice system addresses wrongs, and has the power to expose significant truths.

The policy directive:

The Robert Novak piece started it all. In the summer of 2003 the Democrats in Congress brought pressure on the Justice Department to appoint a special prosecutor with his own grand jury to investigate allegations that somebody violated national security laws by revealing that Valerie Plame worked for the CIA. Thus began the CIA Leak Case. Leaks are as common in Washington politics as fleas on a dog, and few thought this investigation would go anywhere, but it seemed to take on a life of its own. John Ashcroft, the Attorney General, recused himself, so his second-in-command, James Comey, appointed Patrick Fitzgerald as the special prosecutor.

Special prosecutors are often accused of not being accountable to anyone, which was the case with the Special Prosecutor Law following Watergate, which has expired. This special prosecutor, however, was accountable to his boss, Comey. Trouble is, Comey later resigned to go into the private sector. During much of the period of the Fitzgerald investigation, especially the wrap up period when supervision would seem to be most significant, there was no Deputy Attorney General.

Finally, last summer, Bush appointed Timothy Flanigan, a former White House deputy counsel, but he was not confirmed because of ties to the indicted lobbyist Jack Abramoff (another story) and he played a role in setting U.S. policy on torture. In August, the deputy attorney general job was filled with the temporary appointment of one Robert McCallum, a Yale classmate and longtime friend of the President. Does this sound familiar? Last week the President named Paul McNulty to the post. He was a terrorism prosecutor, and chief counsel for the House Judiciary Committee in its impeachment proceedings against President Bill Clinton. He may have trouble being confirmed. If there is indeed a trial of the century for crimes against democracy, it certainly had a strange origin.

Anything else going on?

Much legislation is on hold. The legislative calendar often has “TBA” after a bill listing. The Patriot Act and the Defense Appropriations bill with its anti torture amendment are still awaiting conference reconciliation. Both are must-pass, and the clock is ticking.

The House finally passed the gun dealer liability act by a 283-144 vote. The Senate had passed the bill in July 65-31. In both houses the vote was about 2-1. The bill shields gun dealers and manufacturers from civil liability for selling a gun to a dangerous person unless their actions were “knowingly.” Negligent is no longer the standard for a law suit by gun victims or their families.

Still lined up and awaiting agenda time are the bills limiting habeas corpus, extending Megan’s Law, punishing gangs, punishing meth, and helping prisoners re-enter society. More on them in the next CJWL.

A gubernatorial election in Virginia:

Two states, New Jersey and Virginia, will have state-wide elections November 8, and they will be watched as an indication of political party voting trends. The race for the governor of Virginia should be watched closely for its crime policy implications. The death penalty has become a volatile electoral issue there.

Virginia has a peculiar rule that governors cannot succeed themselves, so both candidates are non-incumbents. Virginia is a conservative state with the death penalty and uses it, and polls show the policy is popular; but urban growth in the north has edged the state toward moderation. The incumbent governor, Mark Warner, is a centrist Democrat and is considered a Presidential possibility. There are other issues like education and sprawl, but a lot of TV ad time has been taken up with death penalty ads.

The Republican candidate, Jerry Kilgore, a former attorney general and local and federal prosecutor, has run vicious attack ads against the Democrat, Tim Kaine, who opposes the death penalty. Kaine is the current Lieutenant Governor, but had been on the public defenders' staff, and had represented death row indigent defendants. "Kaine defends killers," says Kilgore. "That's the issue. He can't escape it." He says that his opponent will grant clemency to the condemned.

Kaine retaliates with his own attack ads, and hammers the theme that he will enforce the law, "because it's the law," and not commute any more death sentences than his predecessor. [Warner commuted none, of 11 executions during his four year administration.] Kaine cites his Catholicism as his reason.

There is no rational debate on this issue. Kilgore has taken the initiative with two ads showing murder victims' family members partly lamenting their loss but also charging Kaine with trying to "save murderers." One commercial had a victim's survivor say that Kaine "would not even execute Hitler."

A reporter in an interview had asked Kaine whether at least Hitler and two other dictators should have been executed, to which he replied: "They don't deserve to live in civilized society," but that "God grants life and God should take it away."

Kaine had advocated a moratorium, but now retracts that, either through legislation or gubernatorial clemency. His ads attack Kilgore's credibility for his attacks, to which Kilgore responds with attacks in kind.

Polls show them even, and newspapers stories of interviews with voters say that voters don't believe either side, and some tell reporters that they won't vote. Whatever the result it will be impossible to isolate the salient issue, but a Kilgore defeat will send some kind of message that running for office against the death penalty is not effective. The next CJWL will tell you the result.