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Mike Israel, Editor: israelmike@crimeletter.net, October 11, 2005.

This newsletter on the crime policy making process in Washington will continue bi-weekly this fall as long as Congress is in session. There is no good guess as to when they will adjourn. No date has been set for the Harriet Miers confirmation hearing, which is a sign of the uncertainty of the calendar.

Amid the turmoil:

While Rome burns, legislation waits. This edition of CJWL will push back the Supreme Court appointment, the House majority leader's indictment, the Senate majority leader's being investigated, the White House aide's possible indictment, the impending budget crisis, and lead with a bill that hasn't even been introduced yet in the Senate. My point is that all the headline conflagrations have consequences toward policies, some not in the headlines, but of great importance. As we watch the big shows, bad crime policies continue while programmatic help struggles for a place on the agenda..

The Second Chance Act has been introduced in the House (HR 1704) and aims to help the 650,000 persons who reenter society each year from prisons and thousands more from jails. Included in the bill are resources for substance abuse and aftercare treatment programs; family and child welfare assistance; education, employment and housing assistance; and mentoring and violence prevention interventions. It will fund demonstration projects to assist local governments that are designed both for public safety and reducing recidivism. Faith based groups can participate.

Most readers of this newsletter probably support this legislation, although most of us would like to see a greater commitment by the federal government. The funding is negotiable, but \$100 million for three years is the likely price tag. [Remember, the whole budget is about two trillion a year.] It is not a panacea (no mental health care, for example) but managers of the bill say it is a starting point—a foot in the door—for this politically sensitive policy area. Helping returning prisoners leaves any politician vulnerable to being called soft on crime. Passing this modest bill would be a major breakthrough in non punitive legislative crime policies.

Below the radar:

Many strategists believe that any crime bill that is not a tough sentencing bill only has a chance if it operates below the radar, or without a lot of public notice. They would like it to be invisible, which this bill almost is, but ironically, that which protects it is also what denies it any pressure to get it moving. Keep in mind, political effectiveness relies not only on support, but the intensity of that support. Majorities alone don't decide everything. A bill like this needs an engine to drive it.

The campaign for this bill has been a marathon, not a sprint. A prisoner reentry bill was introduced in the 108th Congress (2003-2004), and in spite of a considerable amount of organizing, forums, petitions of support by many groups, and high expectations, there wasn't a glimmer of success. Three separate bills were introduced—one strong, one moderate, one focused mainly on housing—but there was no coalition behind any of them and Congressional hearings weren't even scheduled. Also, there was

virtually no Republican support, a kiss of death, even with narrower Republican majorities than is now the case.

But reentry legislation supporters were buoyed in January 2004 by President Bush's State of the Union Address when, in his last paragraph, they were surprised to hear him call for action and say: "[W]e know from long experience that if they (reentering prisoners) can't find work, or a home, or help, they are much more likely to commit crime and return to prison."

If Bush did anything more to push reentry legislation it was missed by me, but at his recent press conference he did praise Harriet Miers for her volunteer work for Exodus Ministries, a charity that works for rehabilitating ex-convicts.

That last paragraph of Bush's speech was the product of his faith based advisors. One of the barriers to a legislative coalition last year was the unwillingness of many liberal Democrats, especially in the House, to support any legislation where federal money would go to faith based groups who wanted preferences in staffing the mentoring programs. This year's version has language that satisfies the liberals' concern for the separation of church and state. For other reasons last year, there were no Senate Republicans on board, only about two in the House, hence no coalition, no bill.

This year: coalition:

This year the groundwork was better spaded—although how this was done will have to await further research—and 137 groups and organizations have signed letters supporting the bill which has 82 bipartisan cosponsors in the House, including the chair of the House Judiciary Committee (James Sensenbrenner (R-WI), the Crime Subcommittee, Rep. Howard Coble (R-N.C.) and the subcommittee's ranking Democrat Rep. Bobbie Scott (D-VA.). Time was lost when the original Republican cosponsor, Rep. Rob Portman (R-OH.) left the House to become U.S. Trade Representative, so Rep. Chris Cannon (R-UT.) had to be recruited to take over as Republican champion. Portman was more influential than Cannon, but from much spadework (read: unofficial lobbying) Republican support was enlisted.

The Senate version of the Second Chance Act is promised to be introduced very shortly by Senators Arlen Specter (R-PA) and Joseph Biden (D-DE), chair and ranking member of the Senate Judiciary Committee, and Sen. Sam Brownback (R-KS), an influential members of the Senate Republican's conservative wing. Others from both parties are expected to join them as cosponsors. The Senate version, as yet unpublished, is said to be stronger than the House version.

The two-year momentum around this legislation has led to a Department of Justice Conference on Reentry (interest was so high that registration had to be closed), the Council of State Governments published a major report, and the National Association of Counties and the United States Conference of Mayors gave support, and the National Governor's Association established a Prisoner Reentry Academy. All of this is serious heat.

This year the ducks are in a row. Both House and Senate staff members for both parties are working to get this bill passed this fall. The support is so strong that hearings may even be waived and agreements made so that both houses will get similar bills that will be passed by voice vote and no conference committee will be needed.

Is there any problem? Yes. The leadership has to get this bill on the busy schedules of both houses, and you may have noticed that Congress has other things on its mind. What this bill needs is, to apply a general metaphor, “three men in a room,” which means those in power have to not only support it, but push it. Read on to see how this is now problematic.

Defense Appropriations in Wartime, with a no-torture amendment:

On Congress’ plate are the behind schedule appropriations bills. [There are 12 separate bills, plus two Katrina supplemental add-ons, and only two have been passed as the government runs on a Continuing Resolution.] The fiscal year started October 1, and being late is not uncommon, but appropriations are a high priority this time of year. No exception is a \$440 billion military spending bill (HR 2863), which includes \$50 billion in contingency war funding. This is what is called “a must pass bill.”

An accepted legislative strategy to get controversial legislation through is to add it to uncontroversial bills as an amendment, especially a major bill that has to be passed. Sometimes this is a stealth maneuver, but this one was done with the world watching, and the President directly confronted. The Senate literally voted 90-9 for a rider to the defense bill to overrule the administration’s policy on interrogating prisoners in Iraq and Afghanistan, and to ban “cruel, inhuman or degrading treatment or punishment” against anyone *in U.S. government custody*. President Bush says he will veto it.

Everyone in the administration and the top military command say they are against torture, and prohibit it, but they reject the rule of the Geneva Convention that defines torture to include degrading treatment like sexual humiliation, nudity, using dogs to terrorize, fear of drowning, and secret interrogations in general. They say torture means physical pain only. Last year’s defense bill also included a prohibition against such degrading forms of torture, but the administration interpreted it to mean only on American soil, not overseas. Bush has also always maintained that whatever its policy was, it did not apply to “unlawful enemy combatants,” like non-uniformed foreign fighters held in Guantanamo. [All terrorist enemy fights are non-uniformed.] This year’s version is explicit and applies to anyone in custody.

Under the leadership of Sen. John McCain (R-AZ), what the Senate did was to make American policy toward detainees conform to the U.S. military field manual, as recommended by over two dozen retired senior military officers, including Colin Powell and John Shalikashvili, two former chairmen of the Joint Chiefs of Staff. On the Senate floor, McCain (a former tortured prisoner of war himself in Viet Nam) cited The Universal Declaration of Human Rights adopted in 1948 as the UN was formed, The International Covenant on Civil and Political Rights, to which the U.S. is a signatory, and The Convention Against Torture ratified by the Senate during the Reagan administration.

What will Bush do?

Only nine Republican Senators, including Majority Leader Bill Frist, voted against the amendment. Their reasons read muddled to me, but none flatly said that the President should have this power as defender of national security. They defended Bush’s position on substantive grounds, not his right to order it. An amendment that would have procedurally slowed the process of implementation was defeated 50-49. This was a bipartisan rejection of Bush, but exactly why had different interpretations. Some

Democrats called it a proxy vote against the war, but Republicans, including McCain, said it was only about human rights of detainees.

Still, President Bush, who has never used the veto in his Presidency, has threatened to veto this defense appropriations bill in wartime, and we all know how he has used his image of tough on terror as a personal mandate to lead, but does anybody believe he will do that!. The House had passed its defense bill months ago and some say that House leaders, in Conference, will delete the prisoner treatment amendment. But the lower body has passed its own defiance of the executive department's treatment of detainees in its defense appropriations bill with a rider requiring an annual report to Congress on U.S. citizens being detained on suspicion of terrorism.

Remember, House-Senate Conferences are to reconcile different versions of a similar bill, and are appointed by the leadership of each house. Their meetings are in secret without any written record, except the results. The Conference Committee is the final policy maker, so the Republican majority *leadership* has the country's torture policy in its hands.

Leadership! What Leadership?

How is the majority party's leadership doing? The House Majority Leader, Tom DeLay, is under indictment in his home state of Texas for money laundering. While he awaits trial he has given up his leadership post, which will remain vacant until January when someone else will be elected. There is no chance for his case to be resolved by then. Next year he will have problems beating his case, getting re-elected (it looks close), and even if he survives the first two, he will have lost control of his "K Street Project" to control major lobbying as a money supply to his party. His four admonishments from the House Ethics Committee are the least of his troubles. Tom DeLay presided over what Jonathan Alter of Newsweek called "the single most corrupt decade in the long and colorful history of the House of Representatives."

The Speaker of the House, Dennis Hastert, has his own problems. After stating that there would be no re-visiting of the 2006 budget (with its bloated highway and energy pork), he has had to back down because a group of 110 conservative Republican Congresspersons called the Republican Study Committee (nearly half of all Republicans) has found over \$500 billion in cuts over 10 years that they demand to offset the cost of Katrina, and Iraq as well. All budget deals have now fallen through.

In the Senate, its Majority Leader, Bill Frist, is under investigation by the Securities and Exchange Commission and the New York U.S. Attorney for possible insider trading. In order to avoid a conflict of interest, he placed his stock in his family's hospital business in a blind trust, but he sold it just days before it tanked. Good fortune is not against the law, it was said for him. There's an old saying among prosecutors: they don't believe in coincidences.

DeLay, Hastert, Frist, all have lost credibility. Functionally, there is no leadership on Capitol Hill.

In the White House, who is "The Man?"

"The Man" used to be Karl Rove, a White House policy advisor, called "Bush's brain," is widely believed to be the architect of Presidential strategy. He is always photographed smiling. A Special Prosecutor, Patrick Fitzgerald, whose day job is U.S.

Attorney in Chicago, has called Rove before his Grand Jury for a fourth time, and this time has told him that he can no longer assure that he won't be indicted. This concerns the baroque story of somebody telling the journalist, Robert Novak, that Valerie Plame was a CIA agent. (She is the wife of Ambassador Joseph Wilson who revealed the embarrassing fact that there were no nuclear materials being sent to Iraq.) Such an "outing" is a serious crime. If Rove is indicted, and that is something we will know soon, he will have to resign his White House job. Even if he is not, his power has also been compromised, and he hasn't been seen much lately.

The same is true of Scooter Libby, Vice President Dick Cheney's Chief of Staff, who also faces possible indictment. Dick Cheney was a powerful force in conservative policy. No more.

The Man, for now, is Patrick Fitzgerald.

The golf trips:

If Bush didn't need more setbacks, his nominee as Deputy Attorney General, Timothy Flanigan, withdrew his nomination under a cloud for his ties to the indicted lobbyist, Jack Abramoff (a buddy of DeLay's—a golfing buddy—golfing in Scotland and Southeast Asia, as pay-offs for special legislation), and Flanigan had also played a role in formulating policies for the torture of suspected terrorists.

Also along on that golf trip was a White House official named David Safavian, head of the Office of Procurement until he was arrested for a role in the Abramoff investigation. Prosecutors may be trying to use Safavian to testify against Abramoff, their big fish, but the Justice Department is in disarray, Flanigan's appointment lingering for four-and-a-half months, with vacancies in the Criminal Division as well. The whole thing has the smell of cronyism, ideology (the Federalist Society turns up everywhere), and everywhere there is money from the K Street Project.

"All we did was play golf," said Safavian. But five people went to St. Andrews, Scotland, in 2003, for \$100,000, paid for by Abramoff, which is illegal. [Lobbyists can't pay for policy makers' trips.] DeLay has said they went to talk to members of Parliament, and golf was incidental, but Parliament was not in session at that time. There were similar trips to Asia, also for golf, on the cuff. Who really paid for those trips? Indian tribes hired Abramoff to lobby for them to protect their gambling casinos. One tribe paid him \$130 million.

Are you getting tired of all this? Suffice it to say, the House, the Senate, and the White House are suffering a vacuum of leadership, which creates the context in which the Second Chance Act and the defense appropriations bill's anti-torture memo will be resolved. As for the future, the central question is how that vacuum will be filled, probably by Democrats, but not for certain, and with what policy agendas.

Hurricane Harriett:

When Bush named his personal counsel, Harriett Miers, to fill the crucial swing-vote Supreme Court vacancy he thought he would be avoiding a fight, which he wanted to do for the reasons above and many others that are well known. He wanted to avoid a fight from the Democrats, and he did, from the Democrats, but now he has a fight on his hands from Republicans who feel he betrayed them by not nominating someone who is not only a conservative, but the right kind of conservative.

There appears to be mounting pressure for her to withdraw her name—she'll probably withdraw herself to save him some face—but he claims to be steadfast. He is banking that Republican discipline will hold, as it always has, but this stretches it to the limit. Democrats are in a quandary, for they are tempted to support her for fear that anybody else will be worse, from their point of view, but they don't want to cede to Bush the cronyism charges, which has a sub-text of incompetence. To be able to use that politically, they will have to oppose Miers.

What I find most significant is the fact that the Judiciary Committee Chair, Arlen Specter (R-PA), has not yet given a date for her confirmation hearing. Bush has asked for a replacement for Sandra Day O'Connor by Thanksgiving. O'Connor, who continues to sit on the Court until her replacement is confirmed, will have Thanksgiving dinner in Washington.

It has been said that if Bush loses Miers, "his Presidency is through."

One More Scandal:

Can you handle one more? This may amount to nothing, but if something turns up, the repercussions could be the most serious of them all. Bush has always said that for making appointments to the federal courts there will be no "litmus test" on any issue, but he has also promised his conservative base that he will remake the Supreme Court in a right-ward direction. Conservatives have always believed that to mean that he would appoint justices that would over-turn Roe v. Wade, which is the number one agenda of his base. They feel they worked hard to put him there for that singular reason, and they want him to deliver.

Conservatives accepted John Roberts even though he was not considered a certain vote against Roe because his credentials were so strong that no one was in a position to oppose him. Even the liberals were split. Harriett Miers, however, did not have the same unassailable resume, so her lack of a track record on Roe was cause for something of a conservative revolt, which is at this writing still building steam.

Bush, at his press conference, tried to reassure conservatives, saying trust me, she is solid. "I know her heart." This might not be a good time in the history of the U.S. Presidency to expect the trust of this President, but Bush has been steadfast to his base with his lower federal court appointees. Ten were even filibustered by the Senate Democrats, which raised Bush's stock in the eyes of conservatives. He was probably surprised by the conservative reaction to Miers.

Why conservatives should trust Bush:

Along comes one James C. Dobson, the influential founder of the conservative evangelical group Focus on the Family, who has come to Bush's aid. He said he is supporting Mier's nomination because of something he has been told, but cannot divulge. He has acknowledged speaking to Karl Rove about Miers before the choice was announced.

On his radio program, Dobson said, "When you know some of the things that I know—that I probably shouldn't know—you will understand why I have said, with fear and trepidation, that I believe Harriett Miers will be a good justice." Subsequent comments made it clear that his main concern was to stop abortions, and that was the

reason for his support. The White House put him on a conference call with conservative activists around the country to reassure them that Miers shared their views.

Democrats on the Judiciary Committee are talking about calling Dobson to testify, and that testimony is under oath, and refusal to answer a question of fact can be the equivalent of contempt, though it's rarely applied. If it comes out that the White House had given "inside information" to Dobson, that would be "reprehensible," say Democrats; but what could be worse is if the White House had asked Miers for inside information. Such a revelation would contradict Bush's claim that he didn't ask her, and worse, it exposes that a Supreme Court nominee has made a prior judgment of a case before hearing it.

If Bush clocked Miers before appointing her, that would be no crime, and there is no ethics committee reviewing the White House, but it would be a betrayal of the culture of judicial appointments, and the Constitutional independence of the judiciary. For a President in his second term, assuming impeachment is unrealistic, the only sanction is the verdict of history. For George Bush that is already pretty grim.

Congress is in recess this week, so the next CJWL will be in three weeks, Around October 24.