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Congress is pushing for an adjournment date of October 1, but that is not certain. [All of the House and one-third of the Senate want to go home and campaign for re-election.] There is always the possibility of a lame duck session after the election, but be reminded, any legislation that does not pass this fall dies, and has to be re-introduced in the 109th Congress next year, and the process has to start over from the beginning. September is a frantic month and many bills may be pushed through quickly.

A Crime Policy Election Issue:

For about a decade, crime policy issues have not played center stage during national elections, until now. John Kerry is jumping on the assault weapons ban as a wedge to attack George Bush's credibility and even tying it to terrorism and using it to show his support for cops.

As is well known, legislation banning 19 specific types of assault weapons and extended ammo clips expired last Monday, so if you want to buy an AK-47, an Uzi, a Tech-9, or even a Kalishnikov drop down to your local gun dealer, for they are now legal. [Early reports showed no rush to get them—they are expensive—and knock-offs have been available during the ban.]

American election campaigns typically avoid such hot button issues—candidates prefer safe, predictable positions—but gun control is now upon us. Most serious students of crime policy dread their being politicized for that leads to demagoguery, myths, hysteria, and policy making by antidote; and this one may be no exception. Kerry, however, faced with dropping poll numbers, felt he had to go into an attack mode and try to probe into any Bush weakness, using it to tackle his character who keeps-America-safe theme.

Kerry, before an audience of police officers and crime victims, said, "Today George Bush chose to make the job of terrorists easier and to make the job of police officers harder. . ." [See what I mean!] Indeed Bush had said that he would sign the ban if it had reached his desk, but he did nothing to move it to a vote in the House. If the President had picked up the phone, there would have been a vote. "He failed the test of leadership," said Kerry.

The Issue Expands:

As part of an over-all domestic campaign agenda, Kerry has proposed a \$5 billion crime fighting package beyond the assault weapons ban, he criticized Bush for deep cuts in Community Oriented Policing Services (Bush's proposed budget cuts COPS from \$482 million to \$97 million next year), targets gang violence with both enforcement and prevention programs, wants to hire 5,000 additional prosecutors over five years, and will increase scrutiny of purchases at gun shows. How he will fund this is unclear.

Kerry first stated that he supported the gun ban before it expired, which prompted one conservative columnist to say: “Well, there goes West Virginia. There goes Missouri. And there goes Ohio.”

The gun issue is packed with risk. Although Kerry manages to get himself photographed often looking like a hunter with a gun in his hands, he has become identified, with the help of the National Rifle Association, as anti-gun. Even many Democrats are wary.

Bill Clinton, for one, believes that the 1994 gun ban (with a 10 year sunset as part of the deal) was a main reason for the “conservative revolution” of that year that swept the Republicans into power in both the House and Senate. He said in his memoir that the Brady Bill for screening gun purchasers and the assault weapons ban inflamed the Republican base and increased their turnout, which remains to this day, having delivered West Virginia, Tennessee and Arkansas to Bush in 2000, and the Presidency. Many analysts think that it will again. In 1999 Vice President Al Gore cast one tie-breaking vote in the Senate on background checks for gun show sales, his only visible gun control statement, and it is believed that it cost him the election (among other things). Being anti gun is a kiss of death for anybody running for office in the south, or near south.

Any Substance at All?

The use of guns in crimes did in fact decline after 1994, but the drop started slightly before the ban and crime in general declined. From 1993 to 2002, the use of guns in the commission of murders, robberies, and aggravated assaults, per 100,000 people dropped from 192 to 124; and another study found a 66% drop in the use of assault weapons in crimes, comparing the five years before the ban with five years after. Yet another found the decline offset by a steady increase in crimes committed by other guns equipped with large capacity magazines.

The ban didn't do much to disarm the country, including criminals. The Washington area snipers murdered 10 people in 2002 with a Bushmaster XM-15, a legal version of the banned Colt AR-15. The Violence Policy Center estimates that there are a million “post ban” assault weapons manufactured in the United States since 1994. That same group found that of 211 police officers killed in the line of duty from 1998 through 2001, 41 were killed with assault weapons, many of them legal.

In the intense dispute that preceded the expiration of the ban—the word “debate” is inappropriate considering the shrillness of the rhetoric, including daily full-page ads by the NRA and the Brady Campaign—probably the main argument against the ban was that it was ineffective. Specific weapons were outlawed, but not the generic assault weapon. There wasn't one word about stiffening the ban. The gun control position was to maintain it, although, at best, of partial impact. Criminologists who have advocated sensible gun control policies were not heard.

The Impact on Future Policy?

The NRA has four million members, and is planning to spend \$20 million until the election to inform its supporters of Kerry's position. The anti-gun groups will spend about one-tenth of that. The NRA seems to be in the strongest position that it has ever enjoyed, with an agenda that includes overturning the Brady background checks and protecting dealers from liability. Republicans in the House have signaled an even more

aggressive agenda, which will include lifting registration requirements for handguns in the District of Columbia and a federal “right to carry” law. The Senate is another matter.

Yet, there is something curious about this. Polls show American public opinion (possibly 77 %, but at least two-thirds) supported the ban. Even a slim majority of NRA members, and a majority of gun owners, support the ban. Kerry’s anti-gun pro-cop position would seem to be popular, and the Senate passed the assault weapons ban renewal last spring with 52 votes. Even President Bush gave lip service to supporting it, but House leaders refused to schedule the bill, to take some heat off of him (indeed he was a flip flopper on this one). Why this disconnect between public opinion and gun policy?

It is a matter of saliency. Majorities favor gun control, but it’s only one of many issues on which they vote. Pro-gun is a single issue vote. Many are in strategic heartland swing states which can control the election. An intense, ideologically mobilized minority is a potent political force.

Kerry, reportedly, has made his own calculations. His strategy is to go for the vote of suburban women, whom he anticipates will support him on this issue and offset the male pro-gun vote. He is rolling his dice on this.

Both sides think the gun issue will give them an edge, will be pushing it, will buy ads on it, and the result will be a vulgarization of any kind of research based gun control dialogue. Both sides want to wake up the day after the election and read that the other side miscalculated. They want that more than to reduce gun violence.

DNA and Protecting the Innocent:

Where gun policy is clearly the kind of salient issue on which political careers can stand or fall, protecting innocent defendants with irrefutable DNA evidence would seem to be a safe bet that would threaten no elected official. Then why is the Advancing Justice through DNA Technology Act of 2004 (S-1700) in trouble in the Senate? It passed the House comfortably last fall.

This legislative idea was first introduced in the previous Congress and was called The Innocence Protection Act. It followed a scandalous episode in Illinois where nearly half of the 25 inmates on death row were exonerated, many with DNA evidence. That put an end to the premise of the certainty of guilt in death penalty cases.

That bill seemed to be headed for passage, but it bogged down in the 107th Congress and died, and in this Congress was reintroduced in weakened form, and absorbed into the DNA bill. This legislation authorizes one billion dollars over five years, and aims at helping the states reduce their backlog of biological evidence sitting untested in crime laboratories while death row inmates, who claim the tests could exonerate them, wait. One-third of the money is to improve the defense bar for indigent death row defendants, for trials and appeals. That is what’s left over from Innocence Protection, and that is what is in contention.

One would think that cash starved states would jump at the grants and would want to clean up many of their old cases, but the federal money comes with strings attached. To get their money, the states have to build “effective” systems to ensure indigent defendants in capital cases access to competent legal representation, along with resources for investigations and expert witnesses. Of course, any state can opt out.

Amend, Stall, Lack a Quorum, and Hope Nobody Cares:

The problem is, to get the bill passed, supporters must get a Senate bill passed that is virtually the same as the House bill (HR 3214) passed last year. In the September rush there are no House-Senate Conferences (but a few exceptions). The Republicans have closed them down, citing the press of time, but bills like this are a good part of the reason.

In the Senate Judiciary Committee, where the bill is being “marked up,” (meaning, looked at by the Committee members) Republicans have floated over three dozen amendments. If any one of them is adopted, that would effectively kill the legislation. It would then be substantively different from the House version and require a Conference to work out the difference, which would be proscribed from happening.

The first such amendment proposed that if convicts voluntarily submitted DNA samples for evidence in the case before them, law enforcement can use the test to see if there’s a match from other crimes. That would seem to be reasonable, but the bill’s supporters on the Committee, which are all the Democrats, are obliged to defeat the amendment in order to save the whole bill.

So far that is the only amendment to come to a vote, and it was defeated 9-7. Why no others? The Committee Chair, Orrin Hatch (R-Utah), has had to adjourn for lack of a quorum. [There are 19 members, 10 Republicans, nine Democrats, and a quorum is 10.] In the first mark-up, the Republicans simply got up and walked out, denying a quorum.

The Death Penalty Factor:

The movement against the death penalty has quietly changed its tactic and is playing down its moral argument, emphasizing now the risk of executing the innocent. They doubt that they can make the case, in this conservative Congress at least, that the death penalty is intrinsically wrong (which is what they believe), and they are re-focusing on its implementation. Innocence gives them their best argument.

A Justice Department report has found that 116 people have been released from death row since 1973, but the National District Attorneys Association say that 30 exonerations is more realistic. DNA played a role in 14 death row exonerations, says the Innocence project. [928 were executed.] In all kinds of cases, 151 have been exonerated by DNA analysis.

There is some dispute over what is a factual exoneration. The Innocence Project claims pardons and dismissals by prosecutors, as well as acquittals on re-trials, but prosecutors say that they are not all innocent, hence the discrepancy.

Supporters of the DNA Act are doing what they can to avoid the death penalty debate in this issue, but in point of fact, the bill targets death penalty and serious violent crime cases for DNA and counsel assistance. Death penalty verdicts are declining in America, which softens the opposition to the DNA Act. In 2003 there were 143 death sentences issued, the fewest since 1977, the year after reinstatement. In the 1990’s, an average of 290 people were sentenced to death each year. The last four years the average has been 174.

We will have to see if the Senate Judiciary Committee can make a quorum.

The Budget Rider Route:

Funding for crime policy programs is part of a huge appropriations bill called Commerce, Justice, State and the Judiciary, or C-J-S, and is around \$40 billion. There are 13 appropriations bills, and by law they have to be passed by October 1 when the fiscal year begins. A dirty little secret: most years they aren't. Congress passes a supplemental appropriations bill to keep things going until they pass the real one. This year, so they say, the C-J-S Bill is headed for passage on time.

This is a must-pass piece of legislation, and amendments, or "riders," sometimes are slapped on at the last minute if not objected to, and law is made by stealth. The assault weapons ban supporters have talked about using this route (but unlikely), as have DNA Act supporters. The DNA Act is strictly a money bill, so cutting a deal to attach it as a rider would not be too big a surprise.

Another way to get the same substantive result would be to forget about the bill and just authorize the money. We will be watching.

The Hate Crimes Bill as a Defense Rider:

Civil liberties groups have been trying to get a second federal hate crimes bill passed for years, and in 2000 they got close, but fell short. They probably will this time as well. This bill would add offenses motivated by sexual orientation, gender, and disabilities to the federal hate crime statute, and also provides federal assistance to states to investigate and prosecute all hate crimes.

The Senate passed it in June but as is typical there was opposition in the House. Supporters tried to add it to the must-pass Defense Authorization Bill as a rider. This would be about as non-germane a rider as one could imagine. Still, the move had a chance because Sen. John Warner (R-Va.), an influential Senator as chair of the Defense Committee, and who is the chair of the House-Senate Conference Committee on the defense bill, supported the hate crimes bill and several Republicans had joined him. [Only must-pass bills will have House-Senate conferences this month to reconcile their different versions of bills.]

House Republican leaders, however, have objected to this bill being part of the defense bill and have indicated that they would hold up the conference. Warner continues to support the hate crimes measure but said he won't hold up something necessary to national defense over an unrelated issue. The Republicans held the defense bill hostage until the rider was withdrawn, and at this writing, it will be.

Flag Burning, Again:

In 1989 the Supreme Court found that burning the American flag is political speech and acts of Congress criminalizing it are unconstitutional. Since then, in every Congress, a Constitutional Amendment removing flag burning from First Amendment protection has been introduced, passed by the House, but it has always died in the Senate. Defining desecration has always been problematic. This year appeared to be no exception, but the political climate may change that.

Even though the Senate calendar is jammed with appropriations bills and other business and is behind schedule, the Republican leadership says it will take another whack at flag desecration, and will move the bill to the Senate floor. The point is to force Senators Kerry and John Edwards, and Minority Leader Tom Daschle, not only to leave their campaigning to return to Washington to vote on it, but to put them in a no-win

situation. All three have voted against it in the past, so they have to vote against it again, which will leave them vulnerable to be attacked as unpatriotic.

A Clarification about the Last Edition:

In the 9-03-04 edition of CJWL, concerning the Abu Ghraib “chain of command” issue, I wrote that President Bush in February, 2002, issued a memo that the Geneva Convention did not apply to captured al Qaeda and Taliban. In point of fact, that memo specifically said that the Geneva Convention *did* apply. What I did not say in that edition, but what I had said in earlier editions, was that the memo went on to re-define the meaning of torture to be limited only to the infliction of severe physical pain. The Geneva Convention and the International Conference on Torture clearly defined torture to include fear and humiliation. That definition is what has brought criticism from the State Department, and many others throughout the executive branch.

Bush—actually it was members of his White House staff who wrote it—first said that the Geneva Convention is the policy of our government, but then defined it in such a way as to render it unrecognizable. That confusion was picked up on by the chain of command and contributed to the culture that led to an unknown number of prisoner abuses.