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This newsletter is bi-weekly when Congress is in session, irregularly otherwise, and can be forwarded. The website is [www.crimeletter.net](http://www.crimeletter.net), and is open. It has helpful links and a subscription page.

At this writing it appears that Congress will adjourn for the year on October 8, but there may be a lame duck session after the election. But be reminded, any legislation not passed in this session dies, and has to be reintroduced in the next Congress. This means that a bill has to go through the entire process over again, and the new Congress may be under different control, and committees will be changed.

This edition is being released a little early. Note the last story on mandatory minimum sentences. This is a call for informed people to write to their representatives. My website will help you to identify them and know where to email them, or go directly to <http://www.vote-smart.org/index.htm> (it's in Links) and indicate you are writing about HR-4547.

**The 2004-2005 Fiscal Year Budget:**

Surely I am going insane. I must be delusional! Still, what follows must be true because nobody could make this up.

The federal fiscal year starts October 1, and Congress is mandated to pass a budget by that date, and it won't; but most years it doesn't. The federal government is facing a deficit that is expected to reach \$ 422 billion this year—thanks to a war and three tax cuts—so what did Congress do? It passed another \$ 145 billion tax cut, asked for by President Bush, without any plan to pay for it. That is four tax cuts in four years, and this time there were no hearings, markups, floor debate or amendments.

*If you're interested, a Brookings study finds that people with between \$ 50,000 and \$ 75,000 a year income will enjoy an average tax benefit of \$ 353. Those making over \$200,000 will benefit \$ 2,400. Don't spend it all in one place. [The money will be borrowed from foreign banks].*

Then, even as they added to the deficit, Republicans in the House have proposed a Constitutional Amendment for a balanced budget in five years! This has absolutely no chance, but it will have to be dealt with as important legislation is backed up in both houses.

If it seems that the Republicans have lost their senses, let us consider the Democrats. They charged it's the height of hypocrisy to be for a balanced budget while the fiscal deficit is the highest in history in dollar terms; but with the election near they would not let themselves be branded as sounding like they are for tax increases. The Democrats could have stopped the tax cut along with a handful of Republican moderates who held out. John McCain of Arizona, Lincoln Chafee of Rhode Island, and Olympia Snowe and Susan Collins of Main infuriated Bush and Republican leaders, but their ability to block the cuts evaporated without the Democrats.

The tax cut was a significant victory for Bush who championed it at every campaign stop. All summer it appeared that the Republican moderates, by teaming up with Democrats, would keep the Bush administration from having its way. John Kerry

said he supported the cuts (but not for the top two percent), as did Majority Leader Tom Daschle, who is in a tough re-election fight. The capitulation was the absence of any concurrent spending cuts with which to pay for it.

All Republican moderates were sent a message. Crime policies, out of the range of politics and sound bites, will be hammered by the winds of this hurricane.

### **Now, About the Budget:**

The appropriations bill that includes the Justice Department, called C-J-S (HR 4754) for Commerce-Justice-State and the Judiciary will not pass in time and a supplemental appropriations bill will keep those agencies going until it does pass. Although there are some differences in the House and Senate versions, there probably won't be many surprises. The House passed its version in July, and the Senate has just reported out its committee report to the floor. It's a \$40 billion package, \$20.8 billion for Justice, up five percent.

The House version, unlikely to be changed very much, combines two law enforcement grant programs into one. The Edward Byrne Memorial State and Local Law Enforcement Assistance Grants and the Local Law Enforcement Block Grants (LLEBG) will now be a single program called the Justice Assistance Grant (JAG), as requested by the President. JAG gets \$ 634 million, \$126 million more than was in Bush's request, but \$ 250 million less than they both combined received this year, 2004. The year before, 2003, they both got a combined \$ 1.4 billion. Note the trend.

This is a good example of policy making through the budget process. The Byrne grants especially have been very controversial in recent years, with outcries of prosecutorial misconduct, racial bias, and draconian sentences for low level drug offenders. The Tulia, Texas episode, reported in this newsletter, is one of the latest examples. The government's response to that pressure was to quietly budget the program toward oblivion.

The C-J-S budget also has major cuts in the COPS program, providing \$ 113 million, compared to \$ 756 million last year and \$ 1.15 billion the year before. Law enforcement interest groups like the International Association of Chiefs of Police (IACP) and the National Association of Police Organizations (NAPO) have been lobbying hard to restore at least some of the cuts. The JAG budget is unlikely to be changed, but the COPS line may have a little better luck. We'll be watching, but the trend continues.

### **Also in the C-J-S Bill:**

The budget process, which always goes down to the wire and usually beyond, annually becomes the forum for tangential high profile issues like civil liberties, gun control, and others; and other low profile matters that could be called "pet projects," or pork. As the last CJWL said, supporters of the assault weapons ban who lost their substantive fight to get it renewed are watching for the chance to add the ban to the must-pass C-J-S bill.

An example of a low profile use of this process is an initiative by Frank Wolf (R-Va.), chairman of the C-J-S subcommittee, to change civil service rules to give the FBI more flexibility to recruit and pay agents. He represents a Northern Virginia district that is home to many federal agents. Wolf has put in a provision in the House version to allow pay raises, bonuses, and later retirement past the mandatory age limit of 57. The

director would have the authority to pay certain employees of the bureau Executive Schedule I salaries, which reach \$175,700 per year.

The Senate, however, does not view the FBI quite so warmly. Some on the Senate Judiciary Committee have criticized the bureau's role in intelligence failures prior to 9-11. Wolf and others in Congress have said that the FBI's lapses can be attributed to its pay schedule which makes it difficult to retain senior managers and analysts. The Bush administration is supportive of Wolf's agenda, but wants a separate bill raising FBI pay and benefits, for if its part of C-J-S the administration can't take credit for it.

### **Some Surprises in C-J-S:**

As one of the smaller slices of the pie, the judiciary would get \$ 5.4 billion, which has the effect of a freeze at 2004 levels. Chief Justice William Rehnquist, writing as the Presiding Officer of the Judicial Conference of the United States, wrote a letter to Congressional leaders asking for two things: 1.) The federal judiciary be exempt from any continuing resolution and their budget needs be addressed before October 1; and 2.) The judiciary be funded at the levels of the House bill, which itself is too low but not as low as the proposed Senate version. Rehnquist wrote that unless the judiciary receives increased funding, the judiciary will have to fire or furlough 10 to 20 percent of all staff, the equivalent of 2,000 to 5,000 probation, pretrial services, and clerks' office employees.

Another interesting Judiciary line would be a pay increase of the hourly rates for panel attorneys handling capital cases to \$ 160 per hour. This may be an abbreviated back door means to partly compensate for the apparently unsuccessful Innocence Protection Act, which, as part of the DNA Technology Act of 2004, included one-third of a billion dollars over five years to improve the quality of assigned counsel in death penalty cases. The money, of course, won't come close.

### **The DNA Bill Goes to the Senate Floor:**

As the last edition of CJWL reported, because of the press of time, the only way that this bill can become law is if both the House and Senate versions (S-1700, HR-3214) are substantially the same, thus not requiring a House-Senate Conference to resolve the differences. Republican opponents tried to add 21 amendments during the Senate Judiciary Committee's markup, and all were defeated by a coalition of all of the nine Democrats on the 19 member committee, and two Republicans, Orrin Hatch of Utah, the Chair, and Mike DeWine of Ohio. Those 11-7 vote stood firm and the bill was reported out to the Senate floor.

The bill is a merger of appropriating funds to states to improve their DNA data bases, and innocence protection for capital cases, through access to DNA testing and improved counsel. After five years of negotiations, the bill stands ready to be passed with bi-partisan support (the House passed it 357-67 last fall), but determined opposition by three influential Republican Senators appear to have the bill blocked. They can withhold unanimous consent to move the bill to a vote, thus requiring full debate, and under the time-line circumstances that will be the bill's death knell.

The three opponents are Senators Jeff Sessions of Alabama, John Cornyn of Texas, and Jon Kyl of Arizona. Ironically, perhaps, some of their concerns about the bill have also been raised by the Justice Department and appear to be reasonable and within negotiable boundaries. The prime example is a demand by the three Republicans that if

an inmate contesting his conviction for a particular crime voluntarily gives a DNA sample, that same sample can be used as part of investigations for other crimes. They also want a victims' rights provision.

In another back door maneuver, supporters of the bill in the House Judiciary Committee, with a voice vote without a hearing, approved a new bill (HR-5107) that combines the text of the DNA bill with a modified version of a separate Senate bill (S-2329, sponsored by Kyl) that would confer eight specific rights on crime victims. These rights are generally accepted and found in state statutes and include practices like notification and the right to speak at sentencing. The sponsor of the House bill, James Sensenbrenner (R-Wis.), chair of the Judiciary Committee, a generally tough-on-crime guy, is trying to use the gambit of offering his bill as an amendment to a popular victim's rights bill that is expected to sail through. The Victims' Rights bill was originally a proposed Constitutional Amendment but some Democrats in the Senate managed to convert it to legislation, in exchange for support. It subsequently passed the Senate easily, but still has to get on the House calendar.

Congressional Quarterly predicts that in spite of all these moves, the DNA bill and Innocence Protection have no chance. Why? How can legislation with such broad support not pass? Two reasons.

### **How Can Protecting the Innocent not Pass?**

1.) **Priorities.** Although a bi-partisan majority supports the compromised DNA Protection Act, for many it is not a high priority. [Translation: it is not salient to their state.] The Republican leadership senses this and is unwilling to antagonize their determined minority enough to push the bill to a floor vote. This could also be called "using the clock" (a football term) by the determined minority, meaning to stall the vote until a time when debate and modification are impossible. To understand support for legislation it is inadequate to simply count the votes, but the intensity of the minority is a key factor.

2.) **Hostility to advocacy groups.** In the 1990's, non-profit anti-capital punishment groups had established capital punishment resource centers that had received some federal funds, which Congress took away in 1996. Under the current bill, states receiving the federal dollars could conceivably funnel their funds into like-minded organizations, or the states could create them and run them. Many similar groups exist today, but under their own fund raising resources.

"I don't want to send any of the moneys of this government . . . to these kinds of groups," Sessions said. "If it is the goal of the proponents of this legislation to fund these groups, I would resist this as hard as I can."

To put it another way, part of their position is personal, in a group identity manner. But conservatives are not the only minorities to be able to block popular measures. A few intensely committed Democrats were able to keep the victims' rights package off of the Constitutional Amendment agenda and onto legislation.

### **Homeland Security is becoming a Major Pork Barrel:**

To return to the budget process, the newly created Department of Homeland Security has its own \$ 33.1 billion budget bill (up nine percent), and to say that it has

become politicized would be an understatement. Many Senators who couldn't get their pork attached to their appropriate budgets (C-J-S for example) have tried to add them to the DHS bill. Democrats, who have been critical of DHS have been quite willing to use the bill as a vehicle for their amendments, but Senate rules require 60 votes to adopt such amendments and most efforts are unsuccessful.

Some of the Democrats' amendments falling short so far have been funds for explosive detection devices at airports, firefighter grants, port security programs, emergency communications, and \$ 15.8 billion for police and first responder grants. Last year they tried the same things and they were rejected by nearly identical votes.

Still, local police departments do get substantial grants from DHS, and it is understood, but not admitted as policy, that they use those federal dollars to make up for the lost dollars from LLEBG and COPS. Again, this is common back door policy making. Large police agencies know that what they won't get from one line they may get from another. In the end, the Homeland Security funds will pay for the same things that the COPS and LLEBG funds had funded, but not as much.

### **Speaking of Pork:**

One of the budget bills has been passed, and, as usual, it is for defense spending at \$ 417.5 billion, already signed by the President. One of its lines is for \$ 88.6 million in aid for 22 drug interdiction initiatives. It just so happens that of those 22 programs, 19 are based in states represented by a member of the House or Senate Appropriations Committees. Both parties get to take the pork out of the barrel.

Two examples: The Alaska National Guard Counterdrug program gets \$ 2.6 million. Ted Stevens (R-Alaska) is chair of the Committee. The West Virginia National Guard Counterdrug Program also gets \$ 2.6 million. Robert Byrd (D-W.Va.) is the ranking Democrat on that committee. Aren't Alaska and West Virginia big drug trafficking states!

But back to C-J-S. In the DOJ's Office of Justice Programs resides the National Institute of Justice's line for Research, Evaluations, and Demonstration programs. Two years ago it was for \$ 30 million. Next year it will probably be for \$15 million. *[The money can not be allocated to committee members' districts. Research grants are competitive, allocated by committees, not pork.]*

### **Sentencing—Awaits the Supreme Court:**

The Supreme Court opens its new term on October 4, and first on its calendar are two cases, U.S. v. Freddie J. Booker and U.S. v. Duncan Fanfan, that are vehicles for the reconsideration of Blakeley v. Washington, which invalidated the sentencing guidelines of the state of Washington. Those state guidelines are similar to the federal sentencing guidelines in effect since 1987, and many other state systems. The Justice Department asked the court to hear those cases on expedited appeal to clarify the consequences of Blakeley. (See CJWL, 7-23-04, # 11, in *Archives* in the website.)

What is at stake is the theory of sentencing that affects most criminal courts in America. The Blakeley court found that sentence enhancements could not be made on the basis of facts that were not presented to a jury, and evaluated on a beyond-reasonable-doubt standard. The word "turmoil" has been used repeatedly as 64,000 federal criminal defendants are sentenced under the guidelines each year (1,200 a week), and a large

percentage of them—in many states as well—may be invalidated. Many sentencing hearings have been postponed awaiting Booker.

### **Mandatory Minimums Persist:**

Back to my delusions. I must be dreaming! One would think that in this Blakeley climate, any legislation to increase mandatory minimum sentences would be Constitutionally suspect, but that is exactly what House Republicans have done. The Crime Subcommittee of the House Judiciary Committee voted out a bill to increase mandatory minimum sentences for certain kinds of drug deals. The title of the bill is, shall we say, creative: “Defending America’s Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2004 (HR-4547).” Although passed by a voice vote, the Democrats did vigorously oppose it.

This bill enhances mandatory minimum sentences for a group of drug deals that include taking place near schools, day-care facilities, libraries, and drug treatment facilities. The Crime Subcommittee Chair, Howard Coble (R-N.C.) said the bill “recognizes the difficulty of turning around a life of addiction.” The way to protect America’s most vulnerable, then, is to lengthen the sentences for those who would bring them into the criminal network, and for which they too would be sentenced.

The bill also reverses recent changes in the federal sentencing guidelines that slightly soften sentences for low-level drug offenders compared to major traffickers. Organizations that opposed this bill included the Judicial Conference of the United States (again, William Rehnquist, chair), the American Bar Association, the Leadership Conference on Civil Rights, Families Against Mandatory Minimums (FAMM) and many others.

Arguments to hold off any new sentence enhancements until the Supreme Court clarifies the due process issues so far have been unsuccessful. The full committee is expected to pass the bill and send it to the House floor. The Senate may not take it up, but nothing is certain.

Why did the House Republicans do this when it was facing a possible immediate reversal or at least confrontation by the Supreme Court?

One of the groups that opposed it, called “Justice at Stake,” observed: “The stakes are high: the Court could strike down parts of the Federal Sentencing Guidelines and spark the biggest national debate over criminal sentencing in a generation. (This bill is) already a harsh new attack on the courts”

The biggest conflict in Washington is between Congress and the Courts, and this bill is a pawn in that chess game. The groups opposed to this new mandatory minimum bill are calling on people to write to their representatives, and now is the time. Be sure and identify your expertise. You can see the bill by going to <http://thomas.loc.gov/> and type in HR-4547.

There are other lower profile crime policy bills awaiting last minute Congressional action, or inaction. The next edition will try to summarize the end of term legislative results. We may not know if there will be a late-fall lame duck session right away.

