

To the Information and Public Policy Section, ACJS, and friends:

From Mike Israel, Washington Rep.

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As you know, Congress ran out of town last week to gird for their elections in four weeks. They will return for a post election session on November 13, but that will doubtless be in an entirely different political climate. That kind of session is usually called a "lame duck" session, but this year it will really be a *lame duck* session. This memo is to fill you in on what they left behind. [They have to meet because they haven't even passed the 2007 budget, except for Defense and Homeland Security. All the other federal departments will function on continuing resolutions under last year's budget.] What follows are some of the key criminal justice legislative goals not achieved, for good or ill, and the chances of their being resuscitated in the lame duck appear slim.

The Do Nothing Congress (well, almost nothing):

Harry Truman ran on that phrase in 1948, and since he was elected, it's been a popular cliché by minority parties ever since. In my last report, I had written with some optimism about The Second Chance Act, a three year, \$40 million bill to assist about 650,000 prisoners re-entering society after their incarceration. I had believed that since it passed the House Judiciary Subcommittee with bi-partisan and leadership support and reported to the full House, there was a good chance that it would be passed by unanimous consent (called "U.C."), meaning with minimum debate and no amendments from the floor. I had also hoped that the Senate, also with bi-partisan leadership support, would favorably report an identical bill and pass it also by U.C. Then there would not have to be a House-Senate Conference, and the President had said that he would have signed it. The ducks were all in a row.

In the final week before recess, the House passed 160 bills, all by U.C, but HR 1704, The Second Chance Act, was not among them. They did pass a bill to designate the federal building located a 2 South Main Street in Akron, Ohio, as the "John S. Seiberling Federal Building," and a bill to designate the Post Office located at 5755 Post Road, East Greenwich, Rhode Island, as the "Richard L. Cevoli Post Office," and 158 others. I guess you get the idea.

There was another end-around push that also failed. House Speaker Dennis Hastert (before his current troubles), at the urging of Judiciary Committee Chair James Sensenbrenner, wanted the Second Chance Act along with an anti gang bill (S-155 Gang Prevention and Effective Deterrence Act) attached to the defense appropriation bill. This is a fairly common end-of-session strategy, attach a controversial piece of legislation as an amendment to a must-pass bill, although non-germane, and it sails in with the tide. The gang bill, a punitive crack down type get-tough-on-crime with mandatory minimum sentence enhancements for gang related crimes was attached along with the prisoner reentry bill as a coalition maneuver, but it didn't work, for either.

The defense bill had enough baggage, including a \$70 billion add-on included in the \$532.8 billion package. [At least this year the Iraq war was included in the main defense bill. The last three years the budget line for Iraq was zero, and then it was paid

for with supplemental bills as stand alone legislation.] This year, although the defense bill is as always must-pass, it doesn't swallow easily.

After the defense bill cleared both houses of Congress, slightly different, it went to a House-Senate Conference for reconciliation in the last days of the session. There, in Conference, Hastert tried again. He again tried to add two non germane amendments, which again failed; but this time they were two different ones, on immigration and court security. That tells us something about the priority level of The Second Chance Act, and the gang act too for that matter. The leadership supported them, but didn't put their money on them. In the homestretch, immigration was the horse they rode.

This is called *adjournment as a campaign strategy*. When the going got tough, the tough got going—home to stump—and anything that was not Iraq or terrorism was left behind.

Also Left Behind:

In addition to the gang bill, and a federal death penalty bill I discussed in my Report of April 5 (HR 5040) which went nowhere, five gun bills were also not passed. After many months of sound and fury about these bills by the National Rifle Association and the Brady Campaign to End Gun Violence, the end result was little movement. The NRA had enjoyed a victorious two-year period, blocking renewal of the assault weapons ban, and a law protecting gun manufacturers and sellers from civil liability by gun crime victims. But they ran into a road block of either distraction or inertia, and their reputation for indomitable legislative power is at least tilted.

HR 5005 would have barred federal law enforcement from tracing guns used in crimes back to previous owners, sellers and dealers. This was an NRA priority and would have made it more difficult for cities like New York to obtain data establishing links between dealers and criminals. A coalition of cities are in the process of using civil suits to get at out-of-state gun dealers for selling to third party "straw purchasers" who immediately give the weapons to individuals who could not pass Brady law background checks. That strategy is still in play.

HR 1384 would have allowed the interstate sale of handguns at gun shows and the transfer in person rather than requiring shipment, which also circumvents the background check. HR 5013 would have prevented law enforcement from confiscating guns during an emergency, like another Katrina. This bill actually was passed in the House, but died in the Senate. But we'll watch the lame duck session on this one.

Two other gun bills also died of neglect, in spite of some Democratic support. One (HR 1415) would have helped the states with new funding to improve the National Instant Criminal Background System (NICS). The other (HR 5092) would change the federal regulations on gun seller licenses. The Brady Campaign sent a barrage of angry emails charging that this bill would "gut ATF's power to revoke the federal firearms licenses of corrupt gun dealers."

It's true that bill would make it more difficult for ATF to revoke a seller's license, but easier to *suspend* the license. Some Democrats argued that a lighter sanction would more likely to be enforced. That kind of bipartisan cooperation is rare, especially in gun legislation, but seems appropriate to me. Still, although the bill actually passed the House, there was no movement in the Senate.

The Crack in Justice not Mended:

The Federal Anti-Drug Abuse Acts of 1986 and 1988 established mandatory minimum sentences triggered by specific quantities of cocaine, not the role or participation of the cocaine seller. What has come to be known as the 100-1 ratio—100 times the quantity of powder cocaine brings the same sentence for crack cocaine offenses. This disparity falls most heavily on African Americans and an over incarceration that has been widely criticized ever since. The United States Sentencing Commission has recommended against it, calling for a one-to-one ratio, as well as numerous forums and reports. The Congressional Black Caucus (CBC) has become the leader for reform, and is arguably the number one player in crime policy at the federal level, and the crack-powder cocaine disparity is probably their number one priority.

The movement is called “Mend the Crack in Justice Campaign,” and a bill, The Drug Sentencing Reform Act, was “dropped,” meaning introduced, but no hearings were scheduled. The bill targets a 20-1 disparity, not 1-1, but in spite of what appears to be sincere conservative Republican support, the bill has gone nowhere.

Conservative Federal Judgeships:

The battle for federal judgeships has been a rallying cry for conservatives since Bush took office, and here again what did not happen is significant. Five Bush appointees to the U.S. Circuit Courts were not passed by the Senate, in a variety of procedural ways. This has to be seen as a rejection, not indifference. They all are extremely conservative: Terrence Boyle (conflict of interest) and William Haynes (of the Torture Memo) to the Fourth Circuit Court of Appeals; William Myers (anti environmental) and Norman Randy Smith to the Ninth Circuit; Peter Keisler to the D.C. Circuit; and Michael Wallace to the Fifth Circuit. Wallace was rated “unqualified” by the ABA. This is very rare and the ABA rating has been ignored by the Senate, until now. Smith has a chance to have something worked out.

Another Bush appointee who was not confirmed was John Bolton, as U.S. Representative to the United Nations. He had been turned down by the Senate Foreign Relations Committee in the previous Congress but Bush nonetheless made him a recess appointment and he has served about three years. But his time is up, and the Senate will let his recess appointment expire. You remember him: the U.N. ambassador who doesn't particularly believe in the United Nations!

Nuremberg, 2006?

It's called the Military Tribunal Bill (S-3930), and although the President called for it in the interest of “clarity,” it is anything but that. As we know, it suspends habeas corpus for detainees, for the third time in the nation's history. That, to me, is the heart of the controversy. The vote in the Senate to delete that section from the bill and restore habeas corpus failed 51-48, largely on party lines. There was a passionate and articulate debate in the Senate Judiciary Committee, but only three Senators were present.

Afterward, I overheard a conversation in which one of the lawyers who testified in favor of restoring habeas corpus made a comment, which I quote as best as I can remember. [At issue are the nearly 400 detainees in Guantanamo, some of whom have already had military commission hearings. Witnesses described them as a “farce.”]

“If only they had been given some kind of fair hearing, we would have had no problem with that. But after what they got, we had no choice but to go for habeas.”

Now, of course, they have no choice but to appeal to the Supreme Court. It looks like it will be a close call. If habeas corpus is restored, all of the other claims (not necessarily rights) will come into play.

As far as the nation’s public policy on the limits of interrogation of terrorism suspects is concerned, the real resolution of that question is being determined at this moment. Somewhere in the Arizona desert, several hundred new CIA recruits are being trained in interrogation techniques. How they are trained is what our policy will be, and S-3930 doesn’t precisely tell them what they can do. There is discretion in the implementation. That story is yet to be told.

On the Waiting List:

The electronic surveillance bill, passed by the House with expanded wiretap powers and only a cursory oversight, has been postponed until the lame duck for the Senate. Judiciary Committee Chair Arlen Specter wants judicial oversight. We’ll see.

The House passed a bill to limit the scope of prison industries (HR 2965), in spite of expert testimony that it provides useful work for inmates and helps prepare them for reentry. We have no indication of what the Senate might do in the lame duck. The Democratic Party was divided on this, with representatives from big cities with high unemployment putting constituents’ jobs over prisoner rehabilitation.

Many advocates who have been working to reduce prison sentences, like mandatory minimums and the crack cocaine disparity, have been anticipating and dreading the introduction of a “topless guidelines” bill; and it finally happened. Dropped by James Sensenbrenner, just before leaving town, it is called the “Sentencing Fairness and Equity Restoration Act (HR 6254).” This is a legislative Booker fix. Booker is the Supreme Court case that makes sentencing guidelines advisory, not mandatory, and in a few cases judges have used it to depart downward in sentences. This bill would put roadblocks in front of downward departures, but make upward departures solely the province of the judge. Will it move? Stay tuned, but if Sensenbrenner, who is finishing his six-year stint as chair of the House Judiciary Committee (see my Report of May 22), pushes it, there will be an insurgency by the CBC and its allies. I will invite our Section to sign on..

Man Bites Dog:

Men rarely bite dogs, but when they do it is extraordinary news. Here is a comparable example—of something about as rare. The U.S. House of Representatives Ethics Committee has met, and has an agenda! Its formal title is The Committee on Standards of Official Conduct, and I’m not positive but I don’t think it has met for two years. Not only has it met—its members leaving their campaigns and coming back to Washington—but it has issued 48 subpoenas, to members of Congress, staff, and of course, Congressional pages.

If you don’t know what I’m talking about, read a headline. The question is, how many Republican Congresspersons and maybe even Senators Mark Foley will take down with him. As House Speaker Dennis Hastert et al scramble to try and save their hides, the public question they are asking is about their conduct, their social and ethical

behavior. That's all very interesting, and Democrats of course are enjoying their Christmas present, but I think this page scandal opens the door to something else, namely, the shallowness of the legislative process.

Mark Foley *was* (sic) a six term Republican Congressman from Florida's Tampa area, and enjoyed a safe seat, seniority on the Ways and Means Committee, and was even part of his party's floor leadership as deputy whip. He was highly thought of in the missing and exploited children community (that is, the care givers community). In the past year and a half he introduced three bills to deal with problems of exploiting children sexually. Finally, James Sensenbrenner co-opted all three of his bills and sponsored a jumbo bill himself which was a compilation of Foley's three bills. [Foley did get credit as a co-sponsor.]

The sweeping bill is called the Adam Walsh Child Protection and Safety Act, and it was passed and signed into law last June. My reading of this bill is that it mostly trends on old ground, reinforces the Megan's Law bill passed maybe 10 years ago, adds the internet element to it, and provides money to the states to hire pedophile investigators. Before the Foley scandal, I still saw this bill as a transparent political exploitation of the Christian conservative base, which weren't getting some of the things they wanted from the Republican majority like anti same sex marriage and flag burning amendments.

It is an irony to be remembered that Mark Foley may do serious time convicted by his own legislation with its severe sentencing. Such a fate may depend upon the meaning of the word "solicit," and whatever new facts an investigation may unearth, but so far there's no evidence that any 16 or 17 year old pages have been seriously hurt. What the Mark Foleys in Congress victimize most is the legislative process. But the Ethics Committee won't be looking at that.

Tough on Crime?

Here is a bit of trivia about which you can apply your own relevance. As I write there are four federal prisoners who were members of Congress when convicted of crimes committed in their Congressional role: Bob Ney, Randy Cunningham, Frank Bailance, and James Traficant. William Jefferson may join their ranks. Foley might be the sixth. You'd think this group would pass a prisoner reentry bill!

I will report again at the end of the lame duck session, whenever that is. If there is a movement to oppose the topless guidelines bill, I probably will again ask for us to sign on. Also, as you watch your Congressional and state elections, I would be interested in learning about tough-on-crime campaigning that either works or doesn't work. Please email me if you have some interesting examples.

