

Criminal Justice Washington Letter, 109th Congress, 1st Session, # 17;

Mike Israel, Editor: israelmike@crimeletter.net. December 30, 2005

This is the last of these newsletters, at least for the time being, but the website: www.crimeletter.net will be maintained and upgraded, and you should find it useful. I will also maintain my data base of email addresses, and from time to time may send you timely notices of opportunities to participate, and other more than routine information. Let us all try to maintain our network, for we have become a constituency, sometimes with a voice.

It has been a long time since the previous edition, but Congress surprised me with a two to three week recess, and the endgame of this session has been interminable. The 109th Congress will not begin its second session until late January, with much left undone, but the confirmation hearings for Supreme Court nominee Samuel Alito by the Senate Judiciary Committee have begun, with the vote to confirm scheduled for January 17. But who knows.

Keep in mind that legislation introduced in the first session of a Congress is still alive in the second session. More on that to come.

“We do not torture.” George Bush.

We have all been reading about this controversy, but four rather specific issues should be highlighted. The Bush administration has claimed that because of the nature of the terrorism enemy, American law and culture against traditionally recognized torture requires adjustments. For one, they argue, CIA agents or contractors operating abroad are immune from the American policy, whatever it is. The President has sole control of foreign policy. For another, prohibitions against “cruel, inhumane, or degrading” treatment articulated in international agreements do not apply, because they are terrorists, not legal prisoners of war. For another, even if there were policy prohibitions, there should be immunity from liability for agents acting under what they consider in good faith to be necessary contingencies or superior orders. Last, definitions of what kinds of interrogation techniques are inhumane remain elusive. Let’s have a look.

- As for territorial jurisdiction, Secretary of State Condoleezza Rice made a speech in Kiev stating that American policy on treatment of detainees applies worldwide, not just inside the United States. She made no mention of secret prisons overseas or rendition to torturing countries, and a speech is not an official act, but in this case it had the effect of changing the policy. She did not define the policy, but she stripped it of claims of territorial distinction.
- The United States has used some interrogation techniques prohibited by the Geneva Convention, other international agreements, and even the U.S. Army Field Manual, which include sleep deprivation, simulated drowning, sexual humiliation, and various forms of disorientation. Republican Senator John McCain, a well known Viet Nam torture victim himself, with an eye on the Presidency, introduced legislation to make the Army Field Manual apply to foreign policy (read: CIA). His strategy was policy amendments to both defense authorization and appropriations bills—must-pass bills, but why both, apparently

just for emphasis—and his anti-torture legislations passed with enormous margins in both houses of Congress for both bills. The margins were so great as to be veto-proof, which Bush had vowed he would do, but didn't.

- Both Bush and Vice President Cheney had opposed the McCain amendments saying that so-called “torture lite” methods were necessary executive powers in wartime. Eventually their opposition narrowed to specifically exempt the CIA alone (but they were the only ones it applied to), and the final compromise was to provide some good faith immunity to interrogators in emergency situations in which torture may get information that will save lives. This has been called “the ticking time bomb exception,” of which there has never been a proven example. (The ACLU has documented 44 deaths of prisoners in US custody since 9/11, 21 officially classified as homicides, with the CIA implicated in four.) We may hear again about that immunity compromise.
- The last issue may become the most nettlesome. Cruel, inhumane, degrading has not yet been defined. As I write, the Army Field Manual is being revised, purportedly for clarification. Drafts have circulated, and all methods of stress and disorientation have not been prohibited. The torture issue is not over, as torture is defined, and the limits of discretion.

Furthermore, when Bush signed the bill he said that it was up to him to interpret what the wording in the statute means. Some are saying that this means that Bush will simply disregard it. As another compromise, the defense spending bills also included another amendment, which McCain agreed to, that Guantanamo detainees did not have the right to habeas corpus hearings in American federal courts but they did have access to military tribunals for hearings on why they are detained. There are conflicting reports on how many of those hearings have been held, but at least some process of review has begun for the hundreds still there.

The Public Policy Issues:

Underscoring all of the debate is the administration's claim that it has “saved lives.” The unaddressed question remains, is torture, in whatever form, on balance good public policy? The same question should apply to other Bush administration conduct like the National Security Administration's electronic surveillance of international communications. If it is correct that this conduct does in fact *save lives*, then the debate is not whether to do it but *what* exactly the government should do.

McCain has argued effectively in Congress that torture does not give up accurate information, but the government says that it doesn't torture, it disorients, and detainees then will talk. The government also says it doesn't “spy” on citizens but gathers information about terrorist activities, and the nature of terrorism--with ambiguous Congressional authority--gives it the authority to do so, as found in the Constitution's Article II. [But why not drop in on the F.I.C.A Court for a warrant, even though this special court turned down six of about 19,000 requests in three years? No time.]

Many take it as an article of faith that there will be more terrorist attacks like 9/11 and the question is not “if,” but *when*. If that is the premise that drives policy, then effectiveness must be part of the equation, and predictions have to be better than guesses.

There is a tantalizing politics that seems to underlie all discussion: If there is another attack, who will be blamed! [*Acting tough will immunize our party from responsibility.*] Whatever the political fallout, wouldn't we like to see policy not driven by myths and fears of political survival!

Methods from the Red Army:

The Pentagon effectively signed off on a strategy shortly after Iraq fell under pressure to find WMD's from information gleaned from anybody they could capture. That strategy, which got out of control and led to Abu Ghraib, followed the Red Army method of breaking the will of those interrogated. In the years since the end of the cold war, the American military lost its system of paid informants in a policy decision by President Clinton, and there never was much of a spy network. So they turned to what they knew, interrogation, with pressure. Also, they had practically no Arabic speaking trained personnel to conduct long-term trust building interrogations.

A classified program at Fort Bragg, N.C., known as S.E.R.E. (Survival, Evasion, Resistance, Escape) was based on studies of North Korean and Vietnamese methods to break American prisoners. American Special Forces began to be trained in resisting these abuses if captured (although rare), which included prolonged isolation, sleep deprivation, stress positions, and exploitation of phobias. Secretary of Defense Rumsfeld approved most, but not all, of the tactics, not just for our forces' training but for interrogation methods for "high value" detainees.

When some critics within the Pentagon and even in the Justice Department warned that these methods constituted torture, Rumsfeld justified them by saying that they were for training, and under the guidance of American psychologists; but flipping S.E.R.E. to be used by us, not just to protect us, was not a very big moral and policy leap. Within training, abuse is carefully measured, but in a war zone environment brutal tactics against strangers who look threatening couldn't be controlled. In one case, an Iraq major general was asphyxiated in a sleeping bag by American interrogators. This technique had command authorization, but now three soldiers face murder charges.

Yet the Pentagon cannot point to any intelligence gains from these techniques which have such a high cost in America's image, and division at home. These are techniques designed by communist interrogators to break a prisoner's will rather than learn useful intelligence, but are now the product of national policy, not a by-product. And nobody believes that we have broken the will of terrorists' intentions to wreck violence upon us!

Are We on a list?

The Foreign Intelligence Surveillance Act was passed in the 1970's after a period of excessive Presidential power seeking by President Nixon, and it created the F.I.C.A. court to limit warrantless wiretaps, even in wartime. That and other Congressional acts, plus the impeachment of Nixon, represented a rejection of a theory of inherent Presidential powers in the interest of national security. There was at that time sustained wiretapping of political opponents of the President (like Martin Luther King Jr.), and the creation of an FBI "enemies list" of thousands of Americans mostly identified with left wing groups.

In those days we used to read about Soviet Sleeper Cells within the United States, waiting for their chance to wreck havoc and literally overthrow the government. No such sleeper cells ever emerged, but now we are hearing about them again. When The New York Times reported a Bush authorized program of secretly wiretapping an unknown number of people (in the thousands) by the National Security Agency, we again hear that the government is uncovering sleeper cells, this time of terrorists, not communists, and is *saving lives*. Bush has claimed that “The United States and our partners have disrupted at least ten serious al Qaeda terrorist plots since September the 11th, including three al Qaeda plots to attack inside the United States.” (Oct. 6, 2005, at National Endowment for Democracy)

USA Today, however, has reported that “at least” six of the ten had been preliminary ideas for attacks, rather than actual planned attacks. Let’s take a look at what the policies have netted::

- Bush and Attorney General Gonzales have recently claimed arrests of more than 400 suspects, with over half convicted. The Washington Post analyzed Justice Department records and found that 39 people (not 200) have been convicted of crimes related to terrorism and national security, but most were relatively minor, like making false statements and immigration violations. The median sentence was 11 months.
- In two separate programs immediately after 9/11, the DOJ first detained about 1200 men as suspected terrorists, and later 4000 more, from Arab and Muslim countries, and called it “preventive detention.” Not one stands convicted of a terrorist offense, a record of zero for 5000. (Some have been deported, however.)
- There have been two convictions of actual terrorism crimes, both from a single case, that of Richard Reid, the notorious shoe bomber. That capture was by airline passengers, however, and not detected beforehand.
- The Lackawanna Six (near Buffalo), was allegedly an al Qaeda Sleeper Cell, but all agreed to plead guilty to material support charges. The six did go to a training camp in Afghanistan, but upon their return, they did nothing. They said they wanted nothing to do with it.
- The Portland case, were seven men arrested from evidence gained from F.I.C.A. warrants, but again, all plead guilty to material support. Both of these groups, decidedly small fry, led to lesser plea bargains after the government threatened the prospect of classifying them as “enemy combatants,” which would mean imprisonment without end and loss of rights to counsel or to communicate with anyone in the outside world. The seven also allegedly went to an Afghanistan camp, but apparently only went to Egypt. [Were these voluntary plea bargains!]
- Speaking of plea bargains: A group the government called the Virginia Jihad Network consisted of 11 young men indicted for undergoing paramilitary training in the United States, reportedly to go to Afghanistan to defend it from the Americans, but they said they wanted to defend Kashmir from India. They wore military uniforms and had bought guns, and played a game in the woods called Paintball where special guns fired

paint filled bullets that splattered their victims. The government called this military training. They said it was a game. Six plead guilty and testified for the government against three who actually went to a bench trial. Two cases were dropped. One, Seifullah Chapman, plead guilty to a 65 year sentence! [This is the closest to dangerousness that my reading could find—they actually had some real guns—but even if they were guilty they planned nothing in the United States.]

- Lyman Faris, a Columbus, Ohio truck driver, was heard on a NSA wiretap plotting to blow up the Brooklyn Bridge, with a blow torch (a history of mental illness), and plead guilty to immigration fraud. The then Attorney General John Ashcroft said at his arrest that he got “chillingly close” to blowing up the bridge. He’ll do 20 years. There was a report that Faris had sent a message to al Qaeda that the bridge could not be blown up, but he was unstable.
- Jose Padilla’s case will be heard by a civilian Court after he had been detained for three and a half years not charged with any crime. The administration first had said that he was plotting to detonate a dirty bomb in the United States, but has since admitted that all he did was search the internet. Then, they said, he was going to blow up an apartment building, but that was dropped. His lawyer pleads, please indict him, for something! Now the DOJ says he was raising money to send overseas to “murder, kidnap and main.”
- There are other strange cases, like Brandon Mayfield, an Oregon lawyer, held for two weeks on suspicion of involvement with the Madrid train bombing. Wrong man. He is suing. Steve Kurtz, an art professor, was denounced as a bio terrorist. The bacteria were harmless, but the case is still pending. The South Florida professor, Sami Al-Arian, was actually tried for aiding terrorists, was acquitted of half the counts and the jury deadlocked on the rest. Re-trial has not yet been decided. His was a First Amendment case for he did indeed speak in favor of some terrorist groups. He lost his job.
- One of the strangest also occurred in Columbus, Ohio, and involved a member of a Somali community there along with Lyman Faris. In June, of 2004, Presidential candidate John Kerry was scheduled to make a campaign stop in Columbus, a highly contested state. On the day before, Ashcroft dramatically announced the indictment of one Nuradin Abdi, who was planning to blow up an (unnamed) shopping mall. (The indictment was four months old, but was unsealed the day before Kerry’s visit, and Abdi had been in custody for six months as an enemy combatant.) Members of his family deny the trips to the Middle East Abdi allegedly made, and a magistrate ordered him to a federal psychiatric facility. Appearing in court, he failed to recognize his family, smiled vacantly, appeared unconscious of his surroundings, banged his head repeatedly on a table, and grinned at nothing. His attorney, family, and community find little else to conclude that he has lost his mind under the conditions of his incarceration. (from the [Columbus Free Press](#))

“There are bad people out there,” says Bush:

There certainly are people with bad thoughts out there. Senate Judiciary Chair Arlen Specter, with his own foul thoughts about what has happened Congressional oversight, says his committee will hold hearings on the NSA wiretapping policy. That appears to be the best chance for the administration to be asked, and held accountable for, whose lives have they saved? From my reading, I have found none.

Unfortunately, in my view, Specter says that his committee will ask the administration for their legal justification for bypassing an act of Congress, the F.I.C.A. act. The expansion of executive power is limitless in wartime, which we are arguably in since 9/11, unless checked by another branch of government. Some say Congress is awakening to its obligation. If the issue is framed as one of law and not effectiveness, I fear, the political fallout will substantially support Bush. Saving lives is an irrefutable argument, if true. Congress will check that executive power only if it's unpopular.

But the al Qaeda sleeper cells are the same kind of myths as the Soviet ones. The ticking time bomb scenario is found in television thrillers, but is a fantasy. Not one has ever been reliably found, and that includes an international search. On the other hand, criticisms of the NSA programs are also over-stated. We constantly see words like “spying,” and “eavesdropping,” and indeed there are fourth amendment issues, but there are also public policy questions if this is a good way to investigate threats of terrorism.

The NSA program is one of data mining, or scanning countless thousands of email and telephone intercepts, looking for some indication of dangerous activity. There are reports that it is not all from overseas, where the President does have authority, and sometimes they focus on a suspect and even with a two week window to get a virtual rubber stamp F.I.C.A. warrant the government fails to do so.

The Bush administration is probably correct when it says that it gains valuable information about terrorist groups, how they function, their chain of command, even Osama bin Laden's health. Surveillance is indeed justified, but we are learning about radical Islam, not the terrorists themselves. Investigative reporting tells us that the terrorists aren't using telephones and emails but personal contacts, and secure websites. They know each others' passwords and leave messages in Drafts Folders.

The problems of torture and warrantless wiretapping add up to a crisis. We are not getting good intelligence, the fish that we are catching are small fry, and even those small fish we may not be able to keep. Constitutional lawyers are saying that the legality of every terrorism case in the four years of the NSA program can be challenged if any part of the case came from those wiretaps, bringing the entire terrorism criminal process to a standstill. The Padilla case doesn't make it look like the courts will approve of enemy combatant detentions of U.S. citizens or even aliens who are having bad thoughts on U.S. soil. Can you imagine the press reporting that a possibly dangerous person, like, say, Seifillah Chapman, must be set free from his 65 year sentence! Have you ever heard of a 65 year voluntary plea bargain?

The Bush administration's anti terror methods are often repeated in history. They exploit, even exacerbate the threat, then turn to the public and say that you need us to protect you. Trust us, put your faith in our power, and never ask how we connect means and ends.

USA Patriot Act: To be Continued:

AS CJWL has been reporting, 16 provisions of the Patriot Act were to expire at the end of the year, unless extended. They were extended, by the House and Senate, for five weeks. The Senate had wanted a six month extension, but the House leadership balked and passed the five week one, and then went home. So the “Senate” accepted the House version. I say the word “Senate” loosely, for Republican Senator John Warner, from nearby Northern Virginia, convened the session alone, chaired it, cast the only vote, then adjourned.

How all this happened is too Byzantine to be told with justice. As we recall, the bill was passed weeks after 9/11 in 2001 and gave the government some tools to make it a bit easier to “fight terror.” Most important, the bill changed the standard to get a domestic warrant even for business records from probable cause to a National Security Letter, which meant simply asking for one and stating that a suspect might be engaged in terrorist activity. The act emboldened the DOJ to step up its surveillance, 30,000 National Security Letters were sent to businesses, libraries, hospitals, and the like, although nothing in the act allowed for warrantless wiretapping

The President wanted the entire act renewed as it was. The House passed its version months ago which included some civil liberties protections, which the White House agreed to; and the Senate passed its version late in the fall, which was much more liberal than the White House wanted. A House-Senate Conference Report was something of a compromise, strengthening the standards needed to get wiretaps requiring “specific facts,” based on “reasonable grounds,” that were reviewable, and it went back to both Houses with final passage expected. The House did, the Senate did not.

A group of five conservative Republican Senators joined most of the Democrats to filibuster the Conference Report. The cloture vote was 52-47; eight votes short of the 60 needed to move it, enraging Bush and the Republican Senate leadership. This odd coalition wanted more restrictions on wiretaps and on the conditions for the FBI to demand business records of suspected groups. February 3 is the new deadline.

In the week starting January 30, the Senate probably will vote on the Alito nomination, commence hearings on the NSA wiretaps, deal in some way with the Patriot Act, and hear Bush’s State of the Union speech. Forget your job and watch C-Spann.

The Meth Bill—an incredible compromise:

A punitive methamphetamine bill with mandatory minimums had been on the fast track all fall, responding to lurid news reports of an alleged epidemic, and the House Sub-Committee passed it on a party line vote in October. The Methamphetamine Elimination Act (HR 3889) targeted the manufacture and distribution of pseudoephedrine, its main ingredient, by lowering the amount needed to trigger five and ten year mandatory minimum sentences from 50 grams to a mere three grams for the maximum sentence.

Incredibly, a deal was made before the bill got to the full Judiciary Committee that eliminated the mandatory minimums for the five and ten year sentences, which would have swept up many more low level addicts and given them kingpin-sized sentences. The full Judiciary Committee passed the amended bill 31-0, and it became an amendment itself to the Patriot Act. Assuming any version of the Patriot Act passes, the compromise will become law.

How this bipartisanship on a sentencing bill came about is a story that deserves research. Part of the impetus for the compromise was a desire by both parties to pass a meth bill this year, and if necessary drop the controversial parts to get it passed. The bill mainly increases international regulation and limits purchasing it at pharmacies. We will all now have to ask for and sign for most current cold remedies.

A handful of Republicans on the House Judiciary Committee expressed growing reservations about mandatory minimum sentences. Led by Bob Inglis (R-S.C.), who apparently had the support of four to six Republicans, they forced the compromise by threatening an open fight over the sentencing part. There still are stiff sentences for making or selling where a child resides and it is now easier to prosecute dealers, but the successful effort to eliminate mandatory minimums from this bill may signal a new era of rational legislating by the House Judiciary Committee.

Still Undone:

In addition to the Patriot Act, there are a number of controversial crime bills awaiting Congressional action in the second session of the 109th Congress. The Streamlined Procedures Act (S-1088) is in its sixth draft before the Senate Judiciary Committee, and if passed would severely limit habeas corpus access for state cases to federal courts. The Second Chance Act (HR 1704, S 1934) reportedly has the bipartisan votes for passage if it could be moved on the calendar. Designed to facilitate successful return from prison, even this moderate bill would be considered a major achievement toward non-punitive legislative interventions. More can be read at a website: www.reentrypolicy.org.

Also be looking for possible movement on a new gang bill (S 155), a new Megan's Law version (S 1086), a flag protection bill (S 1370), which is an alternative to the Anti Flag Burning Constitutional amendment, and about 30 others in the crime policy realm.

ACJS, Baltimore, March 2:

I take the liberty of concluding this final edition of CJWL with a plug for readers who will be at the annual meeting of the Academy of Criminal Justice Sciences in Baltimore, March 1-4. There is a section to the organization called Information and Public Policy which is having a luncheon on Thursday, March 2, 11:30--12:45, in the Bristol Room. Tickets are required but they are free. There will be a speaker from the Washington crime policy making community. Ideas will be tossed around on how to continue a crime policy making discussion.

Finally, I wish to thank readers who have shown such intense interest in this newsletter. I started writing it in September, 2002, for all ACJS members. I have learned in my three-and-a-half years in Washington that influence comes from building a constituency that interacts. That's only the beginning, for influencing policy is a skill that requires special knowledge, but people who have information who communicate with each other is the beginning of the process. I passionately hope that all of us can do that.

