

**Criminal Justice Washington Letter**, 109<sup>th</sup> Congress, 1<sup>st</sup> Session, # 3;

Mike Israel, Editor: [israelmike@crimeletter.net](mailto:israelmike@crimeletter.net), February 11, 2005.

This online newsletter is on the crime policy making process in Washington, is bi-weekly when Congress is in session, irregularly otherwise, and is by subscription for \$20 a year. The website, [www.crimeletter.net](http://www.crimeletter.net), has useful links, a statement of principles, assistance to participation, and a subscription page. You are free to forward it to anyone who might be interested. The intent is to build an enlightened crime policy constituency that represents research and experience.

### **From the State of the Union:**

“I’m confident we have not put to death anyone who is innocent.” So said George Bush as Governor of Texas who presided over 152 executions, more than any governor in modern U.S. history. He harbored no doubts about the system or the effectiveness of defense counsel.

“Because one of the main sources of our national unity is our belief in equal justice, we need to make sure Americans of all races and backgrounds have confidence in the system that provides justice. In America we must make doubly sure no person is held to account for a crime he or she did not commit,” said George Bush in his 2005 State of the Union Address.

He added, “People on trial for their lives must have competent lawyers by their side.”

That was Democratic Senator Joe Biden of Delaware that you saw applauding wildly at that statement, after he and the other Democrats stayed seated at most of the other applause lines in the President’s speech. Republicans and Democrats alike were equally surprised, including Congressional insiders. A week later the President’s proposed budget included \$236 million in 2006, and one billion over five years, to improve DNA testing; and \$50 million over three years to train death penalty lawyers.

### **Some Background:**

Five years ago Democrats proposed an Innocence Protection Act to expand DNA testing and other reforms. This bill was fueled by the Governor of Illinois having commuted 12 of the 25 members of that state’s death row after DNA evidence exonerated them. Although seemingly on the fast track, the bill stalled. Two years ago the White House proposed another DNA initiative called The Justice through DNA Technology Act to clear away a backlog of hundreds of thousands of rape kits and other evidence left unexamined by overloaded labs. This bill was aimed at helping prosecutions and lacked reforms in the first bill, but it too seemed to be dead.

Eventually, as the 108<sup>th</sup> Congress was drawing to a close last fall and much legislation was being pushed through in a last minute sort of frenzy, House Judiciary Chair James Sensenbrenner, a conservative Republican, put together an “omnibus bill” called The Justice for All Act. It included the DNA piece, defense counsel assistance from the original bill, and added new rights for crime victims that conservatives wanted

and had been a Constitutional Amendment that wasn't going to pass. Scaled down to legislation and attached to the innocence provisions, a coalition was built to push it through both houses without hearings and the President signed it the weekend before the election. (See CLWL, 108<sup>th</sup>, # 15 in website Archives) It called for one billion dollars over five years, included some money for law enforcement, and prosecutors and judges as well would get training for death penalty cases.

**Why? (“To bring hope to harsh places”):**

Even though the Justice for All bill got through in the cloud of end-of-session dust, and significant money was *authorized* by the legislation, many were dubious that the money would be *appropriated*, and without money this legislation would be meaningless. To those doubters surprise, the President not only put it in the budget he sent to Congress but trumpeted it from his State of the Union platform. But Congress had in mind \$375 million over five years for improved representation, and Bush pegged it at \$50 million a year for three years. Keep in mind, however, that the President's budget is just the beginning of the appropriations process, and Congress can put it back in (in spite of the Bush promise to cut the deficit in half by 2009). Republicans fearful of being seen as soft on crime now have cover to appropriate money for defense lawyers.

Still, concern for claims of innocence in capital cases is not what we would expect from this President. The Washington Post called it a “harmonic convergence” of interests between assisting police and prosecutors, and counter intuitively helping death row lawyers fighting a system over which Bush once presided. Conservatives have an interest in making capital convictions and sentences appeal proof. Some on Capitol Hill thought he was merely trying to take credit for something that had already passed.

I am indebted to The Los Angeles Times for the following. A few days before the speech, Bush meet in the White House with about two dozen black pastors who had backed his reelection. Much of the meeting focused on ways to help troubled African American families. Out of this discussion came the anti-gang initiative that Laura Bush will head and Congress will be asked to put in \$150 million over three years to churches and other community groups that mentor at-risk children, especially 8-17 year old boys in cities prone to gangs. [There was an anti-gang bill in Congress last year that went nowhere.]

The black religious leaders came away with three pledges from Bush, the anti-gang initiative, a pledge to work to end racial disparities in the justice system, and funds for death row lawyers. “Our government will continue to support faith-based and community groups that bring hope to harsh places,” Bush said in the speech. He was constituency building. Now can we expect an initiative to bridge the crack/powder cocaine disparity?

**Buddy can you spare a trillion?**

Commenting on the Bush budget proposal for \$50 million a year to help at-risk boys avoid gangs, the president of a leading child advocacy group noted that it is about a million dollars a year per average state. Miniscule. He added: “If he wants that money to come out of existing programs, then we're against it.”

Of course it's going to come out of existing programs! To say that the \$2.6 trillion fiscal 2006 budget (which starts October 1) is controversial is quite an

understatement, and there is the predictable cacophony of criticisms of class warfare. But how would you like to make up a budget when your government faces a \$427 billion deficit, only 18% is discretionary, with deficit spending projected at \$6.1 trillion in 10 years? There is a federal debt that is approaching \$8 trillion. Want some good news? Although the total Bush deficit is a record, as a percent of the Gross Domestic Product at 3.6% it is less than it was under the Reagan and Bush-1 administrations. It is in this hard-line environment that federal criminal justice programs struggle to survive.

Bush wants to eliminate or slash 150 federal programs, and the Administration of Justice would get its share. COPS would go from \$499 to \$22 million, and the newly created Justice Assistance law enforcement grants to states would be cut from \$600 to \$60 million. The Edward Byrne anti-drug grants of \$794 million would be eliminated. (Many would cheer.) They have not proven their effectiveness, so says the Office of Management and Budget. Gone is \$300 million to states for incarcerating illegal aliens. The Office of Violence against Women is down \$19 million to \$383 million. Juvenile Accountability Block Grants of \$54 million are out. And so on. You get the picture, but Congress has the last say.

Discretionary spending in the Justice Department, if Bush has his way, would be cut 5.6 %, to \$19.1 billion. How about the National Institute of Justice's line for Research, Evaluation, and Demonstration programs? So far it is nothing, leaving it up to Congress, probably about \$15 million. It had been about \$30 million for years. It should be said that in some of these cuts there is a certain amount of moving the functions to other lines in the Homeland Security budget.

But not everything is down. In addition to the aforementioned DNA testing and innocence related improvements, the FBI is up about 9.3% to \$5.7 billion (counter-terrorism is in), but with no mention of its plagued computers, and the DEA is up 3.8% to \$63 million. Although \$1.3 billion of last year's \$3 billion for Justice Assistance would be eliminated, there is \$60 million for drug courts, \$150 million for state prisoner drug treatment, and \$75 million for several prisoner reentry programs scattered around the budget; and \$181 million for technology, up from \$25 million.

The fusion of a number of lines into a category called The Administration of Justice gets \$43.1 billion, which sounds like a lot, but it's in 10th place in the lineup of government categories. Just to give you an idea, excluding Social Security which gets \$544.8 billion but pays for itself (for now): Defense: \$447.4 billion; Unemployment and welfare: \$359.5 billion; Medicare and Medicaid: \$345.7 and \$268.4 billion. Education gets \$88.7 billion, over twice that of Justice. Get the idea! Pretty soon we'll be talking about real money.

### **Gonzales and Chertoff:**

Let's compare the cabinet nominations of Alberto Gonzales for Attorney General and Michael Chertoff for Director of Homeland Security, even though they went through different Senate committees. Gonzales of course met resistance by Democrats and a party line Judiciary Committee vote of 10-8, all Democrats voting against him. (See CLWL, # 1) Chertoff's vote in the Homeland Security and Government Affairs Committee was almost unanimous, with only one Democrat voting "present." The Gonzales confirmation vote in the Senate was 60-36 (Ah, that magic number, 60, the filibuster beater!), with six mostly red state Democrats voting for him, four not voting,

and every Republican voting *aye*. The Senate vote for Chertoff will mirror the committee and be almost unanimous. Gonzales faces a watchful eye of the Judiciary Committee, but Chertoff probably starts out with no such rigorous scrutiny.

Part of the different treatment can be explained by Gonzales going first (or second, after Condoleezza Rice) and the Senate suffering “confirmation fatigue,” but looking at the two records there could be reasons to give Chertoff a harder time than Gonzales, whose memos were *to* him, not from him, and they dealt with broad policy theories, not the administration of those policies. Chertoff, on the other hand, led the Criminal Division of the Justice Department after 9/11 and during the time of the reported tortures at Guantanamo, Afghanistan, and Iraq. He actually helped establish and directed the controversial detention policies, he was a proponent of the crackdown that swept hundreds into detention and vigorously defended the policies at the time, and he supervised the plea bargain with John Walker Lindh, the American Taliban.

Lindh was given 10 years in prison to prevent him from taking the stand in an evidence suppression hearing where apparently he was going to say that he had been tortured for days into confessing. His defense lawyer claimed that Lindh had been seriously wounded and untreated, malnourished, dehydrated, blindfolded, and duct taped to a stretcher in an unheated and unlit shipping container for days, threatened with death, and kept from his counsel, then given an offer of dropping the terrorism and attempted murder charges against him and allowing him to plead guilty to providing assistance to an enemy and carrying a weapon. But the limited time offer was only good before the suppression hearing, and he had to sign a statement swearing no mistreatment, or all deals were off. Chertoff directed the whole plea agreement, says his lawyer (now an appeals court judge), and some observers thought at least he should have been questioned about it as a key part of his whole policy role. He dodged that bullet.

### **Chertoff’s Testimony:**

Chertoff was careful and calm before the Homeland Security Committee, and answered their questions without ever asserting a right to confidentiality (which Gonzales did repeatedly, and claimed it constitutional). He did have some lapses of memory though. He did not repudiate the Justice Department detention policies he helped establish, but he said the question was if they were carried out appropriately, which he admitted that sometimes they were not. He admitted that at times arrests were made on the basis of questionable tips, held them in jail for too long, or even abused them. He scored points with Democrats by admitting that mistakes were made, and backed off the color coded alert system.

Chertoff also scored points with Democratic Senators by telling the Committee that he would distribute homeland security grants based on risk, instead of population. This had a huge political advantage for him. He already had the votes of middle American Republican Senators, and large coastal states like New York and California have Democratic Senators, and they are the states more at risk from terrorism. Under the present system, Kansas and Nebraska, for example, get homeland security grants based on population. Chertoff would divert some of those funds to big states where terrorists are likely to hit, and where Democratic Senators come from.

Even Hilary Clinton may vote for him. Why mention that? Chertoff was chief counsel to the Senate Whitewater Committee, and Clinton has twice voted “no” on him

for federal appointive jobs including the appeals court seat he now holds. Clinton, however, is passionate about her state's allocation of homeland security funds.

### **On Sentencing Guidelines, A Shot Across the bow:**

That's the metaphor some Capitol Hill people are calling the Supreme Court's Booker, and Fanfan decisions of January 12. In a word, the Court voided the mandatory sentencing guidelines from the 1984 Sentencing Reform Act and then made them voluntary in two separate five member opinions (Justice Ginsburg signed both). (See CJWL # 2) It seemed that a sentencing showdown was coming on fast for there was a belief that Congress wanted to respond to the Court with a bill, and that raised the anxiety level of many Washington groups. Nothing is more fearful than a sentencing bill out of the conservative House.

There were indications that the Republican majority wanted to address the problem left by the Court with more mandatory minimum sentences, and there were reports that Judiciary Chair James Sensenbrenner would reintroduce a drug sentencing bill from last summer that stalled in the uncertainty of the Blakeley aftermath, a bill with yet more mandatory minimums. As one minority staff person told me, "Nobody ever lost an election by being too tough on crime."

### **An Oversight Hearing, Leading to . . . .?**

The House Judiciary Committee's Crime Subcommittee held an oversight hearing (meaning, there was no bill to discuss) February 10 titled "The Implications of the Booker/Fanfan Decisions and the Federal Sentencing Guidelines." Two of the expert witnesses, present and former DOJ lawyers, wanted quick legislation with topless guidelines and mandatory minimums at the bottom. The two others, however, including the chair of the U.S. Sentencing Commission, called for caution. Most federal judges are sentencing within the guidelines voluntarily, they pointed out, and there seemed to be no crisis.

CJWL will be watching, but my guess is that there won't be a sentencing bill this year. That doesn't mean that nothing will be happening, however, for the sentencing community of practitioners and researchers will be building their cases. The absence of a bill is welcomed by many who are certain that a quick fix would have meant more mandatory minimums. They hope that by waiting they can build their intellectual case against them.

Many sentencing problems remain, however, including the crack/powder cocaine disparity, the factual basis of pre trial investigations (the PSI's), the truthfulness of plea bargaining cooperation, and the viability of mandatory minimums. Waiting is also merely a moratorium in the war between the majority in Congress and judges. The Republican controlled DOJ wants prosecutors to control sentencing and have the toughness of mandatory sentences as leverage for cooperation. In fact, Deputy AG James Comey has sent a memo to all federal prosecutors encouraging them to report to Congress, and the DOJ, any judge whose sentences fall outside the guidelines. What they will do with such a list of judges is not known by me.

By the time you read this the Second Chance Act, a prisoner reentry bill, will have been introduced into both Houses, but too late for this edition. Remember, \$75

million is already in the President's budget for various reentry initiatives. Because of a Congressional recess the week of February 21, the next CJWL will be in three weeks. Probably by then will be the first judicial nominations to the federal appellate bench, and the test of the Democratic filibusters and the Republicans' nuclear option. Stay tuned.