

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

Mike Israel, Editor: israelmike@crimeletter.net, January 14, 2005.

This is the second year for this complimentary edition of an on-line newsletter on the crime policy process from Washington, bi-weekly when Congress is in session, irregularly otherwise. For the year, it is by subscription for \$20. The website, www.crimeletter.net, has useful links, past editions, a statement of purpose, and a subscription link page. The target readership is the criminology community of researchers, teachers, students, non-profit agency practitioners, advocates, and people informed on the substance of criminal justice issues. The newsletter tries to inform on the policy process in a time efficient manner for busy professionals. The readership can become a constituency that policy makers know will be watching. A statement of principles will follow in the second edition. A subscription form is at the end.

They're Back! (Amid Storm Warnings):

President Bush commented that his reelection had given him "political capital, and I intend to use it." He is spending a lot of real capital on the inauguration (\$40 mil), is preparing a 2006 budget that prunes much discretionary spending capital from social programs (his budget message to Congress is due Feb. 7), but his legislative agenda may cost more political capital than he and his majority party have to spend. Second term Presidents usually encounter legislative difficulties, but in his case conflicts within his own party began before the electoral votes were counted. In the lame duck December session he had to fight off revolts from House GOP conservatives to get the Intelligence Overhaul bill passed. Now, with his legacy at stake, he faces looming fights over social security, Iraq, taxes, immigration, tort reform, and epic battles over judicial confirmations. Crime policy won't be much different.

The future of American criminal justice is one of the high stakes in the sure to be contentious 109th Congress. It's hard to say what will be the biggest battles, but the make-up of the Supreme Court, the Federal Circuits Courts, sentencing guidelines and prisoner reentry (both discussed later), the USA Patriot Act reauthorized, and numerous budget battles in the climate of a nearly half a trillion dollar deficit create an atmosphere of tension while waiting for the confrontations. It feels like we are in the trenches in World War I, both parties looking out at no-mans-land, awaiting the suicidal charges.

The Republican leadership claims a mandate, which justifies their bold agenda. Bush, however, will never run again, nor will VP Cheney (bad ticker), and his approval rating has already dropped below 50 %, which is extraordinary for a presumed popular reelected President. The unspoken truth: Bush won it on tactics, and 9-11, which is not a mandate, and hence the December conservative defections.

In the House, Republicans gained three seats, and now lead 232-203, but four new seats were the result of Texas redistricting. Vote counters say that there are about 40 Republican Congressional deficit hawks that may not support Bush's economic agenda, and 50 or 60 Republican moderates on social issues.

In the Senate the Republicans picked up four seats to now lead 55-45, but five popular southern Democrats retired, which included two who usually voted with the Republicans (Georgia's Zell Miller and Louisiana's John Breaux). The most serious

Democratic loss was to South Dakota's Tom Daschle, the Democratic leader, but ironically that may help the party in the judicial nomination battles. The new Minority Leader, Harry Reid of Nevada, shows signs that he will be more stubborn and combative than the intellectual Daschle. Now it may be harder than ever for Republicans to get the 60 votes needed to invoke cloture in the Senate and get conservative judges confirmed.

In the two houses, electoral mandate or no, the moderates of both parties may be able to hold sway. Bush needs the Democratic moderates; and the Democrats, especially in under-the-radar legislation like sentencing and prisoner reentry, have a chance to form majority alliances with moderate Republicans. The GOP leaders privately acknowledge deep concerns about their ability to manage their rank and file members. Dissidents to the conservative agenda need only six Republican Senators and 15 in the House to stymie the leadership, and the so-called December revolt makes that a viable threat. [In both houses I am assuming that the two Independents will continue to vote with the Democrats, as they have been.]

The President may not have as much capital as he thinks, and he needs to move quickly because his influence over his party will decline with each month. Congressional leaders are the real agenda setters in the 109th Congress.

In the Republican House, All is not in Order:

In the previous Congress Republican discipline was ironclad in the House, tightly controlled by the conservative leadership, especially the House Majority Leader Tom DeLay from Texas. He wasn't called "The Hammer" for nothing as he used his powers of rewards and punishments to keep his party in line. He *was* one of the most powerful House leaders in its history. [I use the word *was* advisedly, and if that were still true criminal justice reform legislation would have no chance.]

Enter the House Ethics Committee. [Formal title, the Committee on Standards of Official Conduct.] It's an anomaly in that it is truly bi-partisan, but it has little teeth. DeLay has been investigated three times by this committee recently for complaints varied and interesting but space limitations here require they be bypassed. Suffice it to say, these incidents reveal an indifference to the appearance of impropriety.

More important, as you read this, a Texas Grand Jury hears evidence on criminality by DeLay. That story is also too baroque to tell here, but it had to do with his using his influence as a U.S. Congressman to intervene in Texas state redistricting politics in which he succeeded in gerrymandering out of office four Democratic rivals. It was hardly a major crime, but a Democratic District Attorney was not amused. DeLay has told reporters on different occasions that he expects to be indicted and that he does not expect to be indicted.

Politically motivated Grand Jury or not, the House Republican Party has an ethics rule that no one can hold a leadership position if under indictment, which means DeLay would have to resign his Majority Leader post with all of its power. Last November the House GOP Steering Committee brazenly changed the rule, explicitly so that DeLay would be safe and could remain in power even if under indictment.

The Republicans Back Down on Ethics Rules:

Reportedly many moderate Republicans in Congress heard about this from constituents and were not pleased. After intense behind the scenes negotiations, about

which there are conflicting interpretations, the House GOP leadership issued a new set of ethics rules. Unlike the more stable functioning Senate, the House has to adopt its own rules of conduct anew for every session, and that includes ethics rules for each party. The GOP adopted a set of rules, including one controversial new one that ethics complaints must have bi-partisan support before being investigated. Before, any complaint by a House member had to be investigated.

Democrats saw this as weakening even more the already weak Ethics Committee, but there were other changes with significant political impact. The Republicans reinstated their indictment rule—perhaps under pressure and perhaps from an epiphany by DeLay—and they also reversed a prior decision to define an ethical violation as specifically illegal conduct. As before, ethical conduct by members must “reflect credibly on the House of Representatives,” or face rebuke. This in effect reinstates the earlier ethics complaints against DeLay.

The consequences of this intra party conflict may be important for criminal justice policy initiatives to come before this Congress. The authoritative Congressional Quarterly reports that several senior Republicans—who asked not to be identified for fear of reprisal, which tells us something about the policy culture—said that their caucus will be wary of following DeLay, especially where there appears to be a dissonance between party ideology and a pragmatic public interest. That will happen often.

The Primary Criminal Justice Legislative Agenda: Sentencing and Reentry:

On January 12, the Supreme Court, in an eclectic 5-4 decision, struck down much of the sentencing guidelines in most American jurisdictions. Two sentencing cases were brought to the court on an expedited basis after last June’s Berkeley decision invalidated Washington State’s guidelines because judges could sentence upward on the basis of facts not proven to a jury beyond a reasonable doubt, and from that bedrock principle (by Scalia) there was no retreat. These cases, U.S. v. Booker and U.S. v. Fanfan, tested the federal sentencing guidelines created 21 years ago.

Federal courts impose 1,700 sentences per week, 60,000 a year, and the Solicitor General’s office predicted chaos if their sentencing procedures were overturned. “Chaos” was exactly the word found on many newspaper front pages the next day. Justice Stevens noted the 97 percent plea bargain rate in the federal system, which has already adjusted its indicting and plea taking procedures. Still, federal and state sentencing practices and rationales are before Congress and many states. It is the mandatory provisions that the Court has asked Congress to revisit. Sentences now could go up or down. My sense is that Congress will be looking for ways to legislate flexibility, politically incorrect for many years, but now somewhat functional.

One basic finding about Booker and Fanfan is that sentencing decisions (to incarcerate, presumably) fall under the Sixth Amendment’s right to a fair trial, and not under a lower due process standard. Consider this 5-4 vote: The controlling opinion by Stevens, joined by Scalia, Souter, Thomas, and Ginsburg; with another one by Rehnquist, O’Connor, Kennedy (even though his speech to the Bar Association ignited this issue), Breyer, and, well, Ginsburg again. Breyer was chief counsel for the Senate Judiciary Committee in the 1970’s, later a member of the U.S. Sentencing Commission, and was a major force behind writing the guidelines. His five-member opinion preserved the guidelines but only as advisory, not mandatory.

Most of the time Congress is ambiguous and the Supreme Court is called upon to bring clarity. This time it's the other way around. After 124 pages of opinions, Breyer concluded: "The ball now lies in Congress's court." Many interest groups will have opportunities to offer their assistance. There are sure to be hearings on a whole new body of sentencing law defining *reasonableness*, to be "tough and fair," says Arlen Specter, the new chair of the Senate Judiciary Committee.

Since nobody in this town really knows what is a rational sentencing scheme, researchers and professionals with relevant expertise will be called upon. This may be an unusual window of opportunity for the criminology community to participate in a policy area about which there has been significant research and controversial policy.

A Second Chance for the Second Chance Act:

It is one year since President Bush's last State of the Union address in which, in his last paragraph, he called for a new prisoner reentry initiative. During the course of the year three reentry bills were introduced in Congress but none even made it out of committee. The one with the broadest support was called The Second Chance Act and called for a range of services to the 650,000 each year returning to the streets from prison.

In a new Congress legislation has to be re-introduced, and already a new Second Chance Act is being readied for both houses with bi-partisan support (sponsors are: Republicans Sen. Sam Brownback, Kansas, and Rep. Rob Portman, Ohio; with Democrats Sen. Joe Biden, Delaware, and Rep. Danny Davis, Illinois). Supporting this year's initiative are a broad range of groups including criminal justice, public health, treatment, family and child welfare, education, employment, family violence prevention, housing, disability, and civil rights organizations. The bill will try to improve the planning and coordination of existing services for reentering ex-offenders with their families and their communities. [Any new social legislation this year will have to be parsimonious.]

Included in this coordinating effort will be faith based groups and organizations generally associated with conservative social movements. Keeping this coalition together and not fragmenting into different specialty bills, which happened last year, will be a challenging undertaking. CJWL will be watching, and informing readers of opportunities for their input. The President's State of the Union address this year will be February 2. The reentry coalition will be watching with great interest.

The Department of Justice—With a New AG:

Nine new cabinet members will have to be confirmed by the Senate, replacing Bush appointees who all "want to spend more time with their families." They all will be confirmed, but the new attorney general, Alberto Gonzales, formerly the President's personal counsel, is learning a little what it feels like to be a prisoner in Guantanamo. During his eight-hour grilling last week by the Senate Judiciary Committee, he was reminded that if he re-appears as a nominee to the Supreme Court the confirmation standard will be higher. Democrats are holding their fire for the lifetime appointments.

He dutifully disavowed torture, and that the Geneva Convention was "quaint," but it didn't apply to non-state actors like al Qaeda. He said Abu Ghraib "sickened and outraged" him, but it was an isolated problem of training and supervision, and the President still has the authority to do what is necessary to protect the American people.

He affirmed that as attorney general he would apply the rule of law, but he could not recall how he might have been involved in discussions about the infamous “Torture Memo” of August, 2002. [In a long story a few days before, The Washington Post wrote how he had been deeply involved with prisoner detention policies from shortly after 9-11.] Also, there was no sign that the Judiciary Committee would get about a dozen memos from the CIA, Pentagon, and the Justice Department requested by Judiciary Democrats. [But they already have a long paper trail secured by the ACLU in a suit.]

That memo was called by one witness, the dean of Yale Law School, as “The worst memo I’ve ever seen.” It redefined torture and justified its use. It was written *to* Gonzales, at his request, and was signed by Jay Bybee, and drafted by John Yoo, both Deputy AG’s, and James Ho, in the DOJ’s Office of Legal Counsel. It remained government policy until last November. [For subscribers who would like to see that 40 page torture memo, and the one that repudiated it, I can send it to you electronically.]

So what happened to those DOJ lawyers? They are no longer with the department. Were they fired, demoted, admonished? Jay Bybee is now a judge on the U.S. Court of Appeals, having slipped through the filibuster net; John Yoo is at the Berkeley Law School; but where is James Ho? At the hearing Gonzales was glowingly introduced by Republican Senator John Cornyn of Texas, the nominee’s home state. Sitting right behind him was, you guessed it, James Ho. He is chief counsel on the Senate’s Constitution Subcommittee, and Cornyn is chair.

No Longer the President’s Lawyer:

The critical questioning of Alberto Gonzales was not only by the Judiciary Committee Democrats but it was clear that at least some Republicans were not happy about the administrations’ policies and practices of prisoners and detainees, held without elemental due process, and they let their witness know it. There was no sense that his party was united behind him on all issues, and the Democrats reportedly were more civil than they had been toward his predecessor, John Ashcroft, whom they hated.

For his entire career in public service, save one year on the Texas Supreme Court, Gonzales has defined his job as being loyal to George Bush. His new role as lawyer for the American people will be tested early by reports from 26 FBI agents about torturous abuse of prisoners in Guantanamo, about which he was “surprised and shocked.” The Inspector General, who is in the Justice Department, has already begun an aggressive investigation with the help of batches of documents acquired by the ACLU. It is not a criminal investigation, but one for policy purposes. Gonzales indicated he was open to “ascertain the facts.”

There were a number of pledges by Gonzales to work with the Congress on policies such as fair sentencing, the crack and powder cocaine disparity, implementing the Innocence Protection Act, reentry legislation, prison reform, drug treatment, prosecutorial control over the plea process, and the “girlfriend problem” (lesser culpable accomplices getting the same mandatory minimum sentences).

Confrontations delayed:

Liberal interest groups and many editorial writers wanted the Senate Democrats to put up a fight over Gonzales, but it appears that the Democrats are open to giving him a chance and they will let him go through. The conventional wisdom is that they are

saving their political capital for the Supreme Court. The Chief, William Rehnquist's thyroid cancer is well known, and he is 80; Stevens is 84, O'Connor is 74, Ginsburg is 71, and Kennedy, Breyer, Souter, and Scalia are in their 60's.

In the previous Congress 10 of Bush's nominees to the Court of Appeals were blocked by Democratic filibusters, arguing they were too far to the right, and except for two who have withdrawn, Bush has announced they he will re-nominate all of them. Nothing could be more in-your-face by Bush to the Democrats!

Worse, reports are that Bush will nominate to the Chief Justice job either Scalia or Thomas (the youngest Justice at 56), the two most conservative on the court; and there are reports that two other potential Supreme Court nominees include Janice Rogers Brown and Miguel Estrada, both of whom have been among the 10 the Democrats have already filibustered. Whoever the first judicial nominee is will be the crucial test for control of the Congress, and it may include a confrontation on the filibuster rule, and the entire legislative agenda will be affected. To return to my World War I metaphor, we are in the trenches, waiting for the suicidal charges.

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