

Criminal Justice Washington Letter; 108th Congress, 2nd Session, # 4,
Mike Israel, Editor: israelmike@crimeletter.net, March 19, 2004.

This newsletter on crime policy making in Washington now goes out only to subscribers. Both of you. It will be bi-weekly when Congress is in session and irregularly otherwise. Guest editorials and letters to the editor are welcome on substantive issues. The website, in development, will assist participation and input. Subscribers are free to forward this to anyone they want. www.crimeletter.net

It's All About the Money:

The focus of Congress now is on the fiscal year 2005 budget, and appropriations hearings dominate the agenda. Federal law calls for a Congressional Budget Resolution by April 15, which sets forth the policy goals of the budget. That deadline is almost never met—in fact, two years ago there *never* was a Budget Resolution—but incredibly this year there may be one on time, or close to it. This is a function of the election year pressure to finish early. There is also a desire to avoid ammunition for opponents.

The President has already sent to Congress his budget proposals, and CJWL # 2 listed a number of severe cuts in law enforcement programs totaling about \$1 billion. There are signs, however, that Congress won't go along. Juvenile Justice Programs were severely cut, with Accountability Bloc Grants cut to zero. A bipartisan Senate, however, has voted to restore to it \$600 million. The House is in mid-hearings. The deadline for the budget itself is October 1. Most years this date is fiction, but this year is different. The House won't balk. We'll see.

The reality is that budget cutting in an election year is like swimming upstream. Faced with choosing between mounting deficits and interest group pressure, federal elected officials would rather face the former than the later. Some programs have budget increases, at least in the Senate version, and not only the military. [\$33 million for college tuition assistance, for example.) Where there isn't pressure, programs are in trouble. Discretionary spending takes the hit.

In the House a group called the Blue Dog Coalition of 38 conservative Democrats has tried to join Republican Deficit Hawks to stem the flow of red ink. They want pay-as-you-go rules and discretionary spending caps (translation: tax cuts must be offset by spending cuts, or the inverse), but House GOP leaders are cool, and tax cuts are still on their agenda. The facts remain, taxes are one agenda item, and spending is another, and never the twain shall meet. This does not auger well for cost efficient policies. Keep reading.

Or Is It?

In the current manipulative climate appropriations bills are sometimes used to tack on substantive legislation that is for the most part not about the money, and we should expect some of that this year when Congress wants to wrap up everything this summer and go home to campaign. A case in point was when the Commerce, Justice, and State Appropriations Subcommittee of the House Appropriations Committee heard witnesses about the Supreme Court's budget, and Associate Justice Anthony Kennedy testified.

The chair, Frank Wolf (R-Va), who has been open to treatment alternatives to incarceration, must have known what Kennedy was going to say, and it was not about the Supreme Court's budget. Kennedy attacked mandatory minimum federal prison sentences as "unfair, unjust, and unwise." He testified that federal judges chafe under sentencing guidelines that narrowed their ability toward "downward departure." Judges that depart downward are courageous, he said.

He had said that last fall in a speech to the American Bar Association and it was seen as instrumental toward what came to be called "the judges revolt" against mandatory minimums. What was that message doing at a budget hearing? Kennedy said that Congressman Wolf and his subcommittee should "bring the searchlight on" sentencing and they should study whether drug rehabilitation programs would be money better spent than long sentences.

[Note to readers: Go to Project Vote Smart in Google, or to www.vote-smart.org/index.htm and type in your zip code, then click on to your Congressperson, and if he/she is on that appropriations subcommittee, and if you agree with Justice Kennedy, email and tell them.]

A Racial profiling Act:

Homeland Security has reignited the racial profiling issue, although for Middle Eastern looking men instead of African Americans, and racially based excesses in the war-on-drugs has added fuel to the fire. An identical bill has been introduced in both houses called the End Racial Profiling Act of 2004. The Senate bill (S 2132) is sponsored by Russ Feingold (D-Wis) and Jon Corzine (D-NJ) and cosponsored by 14 Democrats. John Kerry is a cosponsor, as is John Edwards.

The House bill (HR 2132) is sponsored by John Conyers (D-Mich), has 114 cosponsors, and actually has two Republicans who have signed on, including Chris Shays (R-Conn) as a sponsor. Press releases called the legislation bi-partisan, but not by much, and an intense search goes on for a Senate Republican sponsor. There has been virtually no national press on this.

A large part of the impetus for this bill came from criticisms of the USA Patriot Act passed six weeks after 9-11 which resulted in arrests and detentions of Middle Eastern men on what appeared to be vague suspicions. Homeland Security related issues give the bill its political bite, but war-on-drugs issues are the greater part of the sponsors' agenda. The igniting incident was in Tulia, Texas.

The Rogue Task Force:

To review, a drug bust in the tiny Texas Panhandle town of Tulia (population: 5,000) put 46 persons in jail on drug charges, 39 of them black and the rest either people of color or dating same, about one-quarter of the minority population of the town. Films of the ramshackle part of Tulia where the defendants lived raised the question in this viewer's mind of who-in-the-world they were selling drugs to! All of the evidence was from a single white undercover policeman, Tom Coleman, of ambiguous jurisdiction, who had no corroboration, produced no drugs, no drug money, had no records to speak of, and subsequent investigations found him to be unbelievable, and he will stand trial for perjury in May.

It turned out that some of those whom he testified had sold him drugs could prove they were elsewhere, and a heroic investigation by the Texas ACLU, the NAACP Legal Defense Fund, and some courageous local unpaid attorneys eventually led to every conviction being overturned (except for one defendant who died in jail). The Tulia case was brought to the attention of some Democratic members of the House Judiciary Committee, and forums were held on Capital Hill which led to a promise by the committee's chair, William Sensenbrenner (R-Wis) to hold hearings to consider legislative reforms.

Those hearings were continually postponed, and were never held. If they had, the target would have been the Byrne Law Enforcement Grants of \$674 million last year to multi-agency task forces as part of the war-on-drugs. That program rewarded arrests and provided incentives to get convictions, without regard to fairness or the rights of the accused. With the racial component added to drug hysteria, juries were ready to convict, and did, and after long sentences for those who went to trial, defendants usually pled guilty. They got long sentences too.

The groups that intervened on behalf of the indigent defendants rejoiced at their exoneration, and it was a press event when they got out of jail, but there was no reason to believe that there would be any changes in the system that produced such an injustice. The way the press handled it, as long as the innocent were released from prison, that was all that needed to be done. The system, after all, worked. The inaction by Congress reinforced this view.

The Remedy; Civil Legal Action:

Lawyers who worked for the ACLU and the NAACP believed there was Constitutional law to be addressed, including the racial component, and Brady prosecutorial misconduct issues; but the collective cases did not get far enough into the judicial system for a broad legal impact. If they had, there might have been case law with which to attack the Byrne Grants and their task forces that the federal money fed. But there were no criminal cases, so the interest groups had nothing but pleasant press stories of smiling minority persons walking out of jail, telling interviewers how they planned to get on with their lives, and public opinion would have no reason to be critical, hence, no Judiciary Committee hearings were compelled.

Ironically, the Byrne Grants seemed to be on the way to oblivion for budget cutting reasons, but that would not have brought systemic change. The interest groups were aiming at the confluence of two forces that combined to create Tulia, and freeing the 45 defendants didn't change that. The two forces, as they saw it, were racism, and the hysteria of the war-on-drugs, which together created political pressure to convict somebody, anybody, of something that police would lie about, prosecutors would cut corners over, juries would convict without skepticism, and judges would sentence severely.

So there were of course civil lawsuits for all of the defendants, and one—probably the biggest-- was settled about a week ago by one city in the task force, Amarillo, for \$5 million. A claims administrator will allocate the money, but the average will be about \$125,000 each, for four-plus years in jail, not to mention their humiliation. Mediation is continuing with other jurisdictions over what was called The Panhandle Regional Narcotics Trafficking Task Force. The settlement will disband that multi-agency task force, which one of the plaintiffs' lawyers

called a “rogue task force . . . unaccountable to any oversight mechanism.” The governor of Texas agreed.

Enter Congressional Legislation:

This bill has been worked on by a coalition since last fall. What little press there has been has called it a data collecting bill. Eighteen states already require police officers to record the race of drivers at traffic stops (but there are an awful lot of Philippine drivers being stopped on the New Jersey Turnpike). This bill, upon penalty of losing federal funds for covered programs like the Byrne Grants, not only requires the data but states must compare the race of stopped drivers with the demographics of the state. But this is not entirely a motorists-being-stopped bill.

This is a cause-of-action bill, facilitating law suits against presumed racially motivated punitive practices by police and prosecutors, with not only monetary awards but withholding of grants as the sanction. The key language on the proof of racial profiling is when “investigatory activities of law enforcement agents have had a disparate impact on racial, ethnic, or religious minorities (that) shall constitute prima facie evidence of a violation . . .” The factual basis can be in “routine activities,” which includes interviews of entrants into the country. There is an early warning requirement where jurisdictions must be aware of at-risk officers.

The factual basis of the bill notes that on average searches and seizures of African-American drivers yield evidence of crime only 8 % of the time, Hispanics 10 %, but white drivers yield evidence 17 % of the time. The legal basis is the 4th, 5th and 14th Amendments to the Constitution, the Constitutional right to travel, and the Interstate Commerce Clause. That is a lot of law.

Is the Bill Going Anywhere?

Without Republican support it is not going to be passed in this session. But the bill has just been dropped into the hopper and bipartisan dissatisfaction with the Patriot Act and its racial profiling undercurrent may be a significant factor, which adds to racial and police over-reaching issues found in the war-on-drugs and in highway stops. We’ll be watching; and next year is another year. This piece of proposed legislation will have a long odyssey.

Other Legislative Updates:

A House passed bill to create a separate crime for damage to the fetus of assaulted pregnant women (HR-1997) will be called to the Senate floor soon, and a passionate floor debate is expected. This has been called Laci’s Law, after the California pregnant murder victim Laci Peterson. In a deal with Senate leaders of both parties, committee hearings will be by-passed and only two amendments will be allowed, both by Democrats. One will bolster resources to combat domestic violence; and the other allows for a separate offense without conferring a distinct legal status on the fetus. The later would prevent using the statute for a legal challenge to Roe v. Wade. Opponents say that is the real agenda.

John Kerry has modified his opposition to the death penalty and now says that terrorists should be an exception. He says that he would want to “blow Osama bin Laden’s brains out.”

This reminds us of 1988 when the Democratic candidate, Michael Dukakis, in a televised debate, suffered political damage when he said that he was opposed to the death penalty, even if his wife had been raped and murdered. Goodbye Senate, hello Presidential campaign.

On the investigations front, reported on in CJWL # 2, the Senate Judiciary Committee will ask the Justice Department to take jurisdiction over the purloining of Democrats' computer files. These memos were about strategies and interest groups' support to thwart the confirmation of conservative judges to the federal Circuit Courts. The Committee's Sergeant at Arms, Bill Pickle (no kidding), had made a 65 page report which pretty much reiterated what had been reported in the press.

Nine Republicans on the Committee joined the chair, Orrin Hatch (R-Utah), to request that a U.S. Attorney with subpoena power investigate whether criminal charges are warranted. All of the nine committee Democrats wanted a *special* prosecutor, but the Republican request for a *professional* prosecutor probably will prevail.

Nobody knows if any Senators were involved, but two aides seem to be taking the heat. At worst minor larceny charges are possible. Why is this a hot button issue? One reason is that the thousands of pages of files have found their way to the director of a group called The Committee for Justice, which is launching media campaigns in support of Bush's nominees, in strategic states. When Orrin Hatch agreed to the DOJ intervention, it seemed to be an olive branch to the Democrats to soften their acrimonious relationship over the federal judges. We'll see.

On the other hand, an investigation of serious criminal intent will not go to a prosecutor but to the House Ethics Committee, and behind closed doors. That committee hasn't met in two years. This concerns (unsuccessful) efforts to change the vote of Rep. Nick Smith (R-Mich) late at night on the Medicare Prescription Drug bill last November. The legal question is if he was offered a specific bribe of campaign funds, or was it a generalized prediction that support might come his way? Serious criminal law, but an ethics violation? Watch for any political fallout.