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Mike Israel, Editor: israelmike@crimeletter.net, May 28, 2004.

This newsletter on the crime policy process is bi-weekly when Congress is in session, irregularly otherwise. The website, www.crimeletter.net, has past editions, assistance on participation, useful government links, and a subscription form. Please feel free to forward it to anyone interested, including students, agency and hill staff.

Because of Congressional recesses after Memorial Day, the next two editions will be three weeks apart, June 18 and July 9.

The following is from a press release dated May 14, 2004, titled “The State of Corrections:”

Lanham, Md – Ill treatment and torture of incarcerated individuals whether by military personnel, intelligence personnel, or civilian corrections staff is condemned by corrections professionals. Corrections professionals believe that the mistreatment of offenders must not be tolerated and we abhor human rights violations anywhere in the world, including in our own country.

This is the first paragraph of a statement signed by the Presidents of the American Correctional Association, the Association of State Correctional Administrators, the International Association of Correctional Officers, and International Community Corrections; the Executive Directors of the American Jail Association, American Probation and Parole Association, Correctional Education Association, the National Sheriffs’ Association, the North American Association of Wardens and Superintendents, and the CEO of the National Partnership for Juvenile Services.

On the second of the two page statement, they say the following:

A correctional system is more unique than any other institution of society. Correctional staff has a tremendous amount of authority over the offender population. Because of this authority, we can not overemphasize the importance of training, proper supervision, communication, accountability and openness.

The ACA seemed to be the moving force behind this joint statement. Taken as a whole, the emphasis is on proper training, supervision, transparency, and accountability for offenders and staff, including supervisors. There certainly is no inference that following orders is an excuse for human rights violations, nor is there the defense of exigencies (“These are unusual times”). Both have been floating as Abu Ghraib defenses. The statement avoided the issue of cooperation with coercive interrogators.

The Chain of Command factor:

As strong as the ACA statement is, however, it does not address the chain-of-command factor, how high up did the orders come from? The American correctional leadership apparently believes that it is incomprehensible that such abuses as those revealed in Iraq could come in the form of correctional policy at home. There might be abuses in the cells, and supervisors might share responsibility—probably by looking the other way—but American correctional professionals do not *order* abuse, humiliation, or any definition of torture, so it is believed.

Still, the scandals are spreading. Two prisoner deaths in Afghanistan have been declared homicides by Army pathologists, and the FBI is investigating three cases for

criminal prosecutions (not court martial), and some will be close to home. There are reportedly video tapes of abuses during strip searches (which by themselves are considered legitimate for security reasons) comparable to Iraq in the federal prison in Brooklyn, N.Y., and the Bureau of Prisons has taken two steps to address the problem: 1.) a new zero tolerance policy for abuse of inmates; and 2.) forbidding any videotaping of strip searches.

Probably the American focus will not be so much on overt torture, however broadly it may be defined, but on neglect. Some prisons have cut back on testing for disease so they will not have to treat large numbers at huge costs. Quiet investigations and new rules prohibiting humiliation are probable, along with more aggressive supervision, especially at night. Last year when Congress passed the Prison Rape Elimination Act the Justice Department was mandated to collect data on that problem and create a mechanism for dealing with it. The factual basis for the bill reported that prisoner-on-prisoner rape was commonplace and that officials allowed it. There is another bill floating around the Congressional process dealing with neglected mental illness in prison with violence and suicide the consequence, and officials deal with it only with lockdown. We can faintly hear a cry for national prison standards, legislatively imposed, with an independent body to enforce them. The question before us is whether that cry escalates.

How High Up?

There seems to be a three tier dynamic illustrated by Abu Ghraib. At the lowest level are the soldiers, MP's and civilian contractors, who do the dirty work and of course mainly take the fall. Of the six MP's still facing court martial, two are prison guards at home. One of them, Charles Graner, when confronted with the photographs of naked detainees being abused, replied: "The Christian in me says its wrong, but the corrections officer in me says, 'I love to make a grown man piss himself.'" "There was nothing extreme," said the guard Lynnde England. Although the soldiers will be the first and easiest to punish, changing this culture may be the most intractable.

At the second tier are the supervisors who orchestrate or at least sanction the behavior. They give ambiguous orders, rarely in writing, and leave no trail to prosecute. They use euphemisms like "sleep management," "stress positions," and "favorable conditions for interrogation." They say, "Loosen this guy up for us," and "Make sure he gets the treatment." Civilian and military intelligence officers frequently visited Tier 1A at Abu Ghraib and reportedly often took detainees to a wood hut outside for interrogations.

Administrative reassignment is the usual remedy, if any. How many of these officers are sanctioned, and how public, is a sign of the seriousness of the reform. Quietly leaving them alone reinforces the "few bad apples theory," which in turn protects the policy. In the present case, military officers with stars on their sleeve seemed to know quite a bit. The top general in Iraq has already been reassigned.

The highest tier is where policy should have the most responsibility. They will of course skate from any prosecution, but politics is their accountability, and the Bush administration is not happy that this scandal broke six months before a Presidential election. In a parliamentary system, like most democracies, the "government will fall," which means the immediate calling of a national election.

What might the national policy makers have done to share the accountability for holding a naked prisoner on a leash? What drives the dynamic is an ideology that defines the enemy and prisoners as “terrorists,” part of an apocalyptic war on “terror,” which demand adoptive strategies to carry out the orders from above. There was also a more explicit demand to ratchet up the interrogation pressure to find information that had political value at home. Even the Secretary of the Army signed off on interrogation methods to create those favorable conditions for interrogation.

Does all this have a familiar ring to it from the generation long war-on-crime? Change at this level must be systemic, requires courageous leadership, and takes a long time. Public opinion has to concur.

Election Year Fallout:

Reportedly there are six military investigations into prisoner abuse, including in Afghanistan, where some reports from the foreign press are horrendous; plus another by the US Senate, plus the International Red Cross report, the Taguba report, and the journalism by Seymour Hersh in The New Yorker, and who knows what the world press has yet to discover! Some of the words heard often are “atrocities,” and “war crimes,” and perhaps the most dreaded word of all, “policy.” The military investigations reportedly have credibility, and when they are released there will be political upheaval. They want to know what happened in that wood hut outside Abu Ghraib, and so do we all.

I have heard more mention of Amnesty International and Human Rights Watch and international covenants like the Geneva Conventions against torture in the last weeks than in all the time since the end of the cold war. There is a memo by White House counsel Alberto Gonzales of January, 2002, recently unearthed by Newsweek, warning President Bush that the administration could be prosecuted for war crimes unless the President officially declared the Taliban to be not enemy combatants, which he did.

The Gonzales memo focused on a little known 1996 law passed by Congress known as the War Crimes Act, which instituted criminal penalties, including the death penalty, for Americans for “grave breaches” of the Geneva Convention. The violations such as “outrages upon personal dignity,” and “inhuman treatment” of prisoners are undefined, but that the White House counsel thought that there was legal jeopardy in our policies is significant.

When the President complied by signing a February, 2002, declaration not to grant Al Qaeda and Taliban fighters prisoner of war status, some are now saying that laid the groundwork for the interrogation abuses revealed in Abu Ghraib. This, they say, is how torture took root. The memo expressed a fear that a future Justice Department, not friendly to the administration, could use the War Crimes Act to prosecute very high administration officials. Interestingly, the Gonzales memo was quickly followed by another one from Secretary of State Colin Powell arguing vigorously that the Geneva Convention did in fact apply to the upcoming Taliban conflict. Mostly the Powell memo was one of strategy, that such an executive order would hurt our international standing (he was certainly right about that), but he was also clear that the U.S. should never be party to policies in conflict with the intent of the Geneva Convention (he was wrong on that).

The Wall:

The “wall” metaphor is for the recognition that separate authorities govern law enforcement and foreign intelligence, and the wall can be found in conflicts between the FBI and the CIA, the State Department and the Defense Department, and now in the cultures of American corrections and international prisoner detentions. It’s the *wall* that justifies torture, as necessary to combat “terror.”

But the wall is showing cracks. The USA Patriot Act, intended to bridge the FBI-CIA gap, has a consequence of no toleration for dual standard (but both standards are lower). After the 2004 election, whoever wins the Presidency, nobody expects Colin Powell and Donald Rumsfeld to continue as before. As for the corrections culture, we will have to see, but there are new elements of international human rights standards that are now in discussions of American correctional policy.

In Europe there is a powerful independent prison commission known as the Committee for the Prevention of Torture, established in 1987, perhaps as a response to official torture practiced by European countries in their vain efforts to maintain their colonial empire. The C.P.T. has unlimited access to prisons, juvenile centers, psychiatric hospitals, and police station holding areas. Its power is its ability to make human rights violations public. The Prison Rape Elimination Act passed by Congress last year is precisely this model of information collecting and transparency. There are many *walls* affected.

The Judges Deadlock Unlocked:

There is other business afoot in Washington, but as we’ll see, Abu Ghraib hangs over everything. There has been no news for months in this newsletter on the partisan battle over the President’s judicial nominees, until now. To review, Democrats in the Senate used the filibuster to block six conservative judicial appointments to the Federal Circuit Court, and threatened to do the same to three others confirmed by the Judiciary Committee. President Bush retaliated by appointing two of the blocked judges to the bench anyway using his “recess appointment” power, which means he can unilaterally appoint them and they sit until the present term of Congress is up.

Senate Democrats were so infuriated by this end run that Minority Leader Tom Daschle (D-N.D.) announced that there would be a blockade of *all* of Bush’s nominees, not only to the federal courts but to the regulatory commissions as well. The Democrats surprised themselves when their 45 or so votes to prevent cloture (end debate and vote up-or-down on the nominees) remained solid and the blockade held. What the Democrats wanted was to end what they considered the extreme right-wing appointments, and be consulted on all the others and to the commissions, and most important, no more recess appointments.

Finally a deal was brokered. Bush agreed not to make any further recess appointments before the November election, and the Democrats in return agreed to allow Senate votes on 25 non-controversial nominations, 20 to District Courts and five to the Appellate court, and 70 more to the commissions. The two party caucuses ratified the deal. Both sides of course claimed a victory, but Congressional Quarterly said that Bush gave in.

The deal had a little more nuance, however, for seven of Bush’s nominees were not included in the 25 who got passes. Two were the recess appointments, Charles

Pickering of Mississippi and William Pryor, the Alabama Attorney General, who now have no chance to be appointed permanently unless the election produces a 60 vote Republican filibuster proof majority. The other five are Brett Kavanaugh from the White House, Priscilla Owen of the Texas Supreme Court, Carolyn Kuhl a local judge in California, and Janice Rogers Brown from the California Supreme Court, and William J. Haynes.

Who is William J. Haynes?

He is the chief civilian lawyer in the Pentagon for the Defense Department and was approved by the Judiciary Committee two months ago, without much notice; but the vote was 10-9, all Democrats voting against him. That was before Abu Ghraib. He seemed to be innocently caught in the Democrats hold of all nominations, but recent events brought him under scrutiny. The Judiciary Committee Democrats asked for a new hearing on Haynes but didn't get one. Haynes "clearly was—or should have been—involved in many of the issues now in controversy." So wrote Ted Kennedy (D-Mass.) in a letter to Chairman Orrin Hatch (R-Utah). The Democrats thought he had been evasive on questions about Constitutional rights for detainees, and they voted against him, but he was not one of those they were willing to put up a fight over at the time.

But Senator Kennedy is not only on the Judiciary Committee but he is also on the Armed Services Committee, and that is where he will question him about his oversight of legal standards of conduct in military prisons and detention facilities, including whether he approved of abuses revealed in the report by Maj. Gen. Anthony Taguba, including sleep deprivation and stress positions for use in interrogations. (See CJWL, #7.) The Democrats deal with Bush has kept Haynes off of the federal bench.

One more thing: Alberto Gonzales had been mentioned as a U.S. Supreme Court appointee by Bush, should there be a vacancy. No more.

An Election Note:

The McCain-Feingold law limiting political campaign contributions does not limit so-called soft money from non-party groups called 527's, a reference to the tax code. These are supposedly independent groups, but that is a myth. Here is an example. The National Rifle Association has given \$1.4 million to Republicans so far, and zero to Democrats. The Brady Campaign to Prevent Gun Violence gave \$12,200 only to Democrats (\$1200 to Wesley Clark). That's about a 100 to 1 disparity!

The discrepancy from Political Action Committees is only about 10-1 in favor of Republicans. A variety of PACs so far have given \$500,000 to Republican committees, \$50,000 to Democrats. Both of these are drops in the bucket, for Bush and Kerry between them will spend about \$350 million, and that's not counting what the national committees will spend. We are all going to be seeing a lot of television ads in the next five months.