

Criminal Justice Washington Letter, 109th Congress, 1st Session, # 16;

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

Congress is presumed to adjourn by Thanksgiving, so the next edition of this newsletter will be after that adjournment. Partly the purpose of this edition is to alert readers what to watch for, probably in the mainstream press, about some enormously significant policy outcomes from Congress in the next two weeks. Edition #17 will review the results.

Unfortunately, the next edition will be the final one of this newsletter, after two years. I have been running it as a sole proprietor business, and have lost too much money to keep it going. [The IRS says I can only deduct business loses for two years.] It has been a joy to write, and I deeply appreciate the support all of you have shown by subscribing. Nothing would satisfy me more than to believe that I have left behind among the criminology community a stronger interest and realistic understanding of the fascinating crime policy process. If we are interested, then we will have become a constituency, and we will then find ways to bring our expertise into the policy process.

My website will remain, www.crimeletter.net, and I will continue to develop it. Keep an eye on it.

Following the money:

The three hurricanes have not only wrecked havoc with the Gulf Coast but with the federal budgetary process as well, and left behind, history may tell us, a new era in federal spending. Or at least that's what the rhetoric from Capitol Hill is saying, and the new era is one of deficit reduction. We shall see.

Of course the picture is clouded by many other factors (Iraq, Katrina, Harriet Miers, Scooter Libby, Bush's poll numbers, et al) that have coalesced to weaken the hegemony that the majority Republican Party has enjoyed for five years, and a few Democratic election victories this week have stoked that Republican disunity. [In Virginia, the Democratic candidate for governor won by 6% over the Republican, who failed to get traction with emotional pro-death penalty TV ads. See CJWL # 15.]

The Bush Presidency has been noted for following a legendary dictum attributed to Ronald Reagan that "deficits don't matter," and they didn't, for elections. The conservative Republican Party didn't act very conservative when it came to spending. Then Bush announced that New Orleans would be rebuilt "whatever the cost." He also said that the 2006 budget, at that time about to be passed already with some raised expenditures, would not be cut. Republican Party Deficit Hawks resisted, however, and almost every budget line went back to the drawing board, and the deadline of October 1 was bypassed with a continuing resolution. Now we are seeing the new numbers.

This second budget process did not go through the normal committees but was entirely re-made in the various House-Senate Conferences. The Department of Justice budget is included in a giant package called "C-J-S" (for Commerce, Justice, State Department), and versions of that budget had been passed by both Houses, and the bill was in the Conference for reconciliation. Major cuts or not, it stayed in the Conference, which is a secret process without minutes. Conferees are appointed by each House's party leaders, and this particular Conference had 32 members, 18 Republicans, which is

larger than most. There will be more on “government by Conference” in this newsletter, but that group, in secret, gave us the federal 2006 crime policy budget. The Conference Report must go back to each House but they now have no choice but to pass it.

Well, not quite “no choice.” The budget process is complicated, and there are other pieces of spending legislation, one of them relevant to our crime policy interest. A separate budget cutting bill has run into trouble and may or may not be resolved next week. It saves money by cutting Medicaid, food stamps, and education for displaced Katrina victims, and Republican moderates are holding out, as are all Democrats. This bill bypasses crime policies, but the coalition may hold for the amendment to the Defense Appropriation bill with an anti torture amendment. More on this later.

What DOJ got:

It wasn't that the Department of Justice was severely cut, but it was tampered with. It got \$21.4 billion, \$784 million above FY'05, and \$1.1 billion above the President's request; but state and local anti crime programs will be \$287 million below FY'05, about a 36 % cut. These cuts are found in a new federal Justice Assistance Grant program which consolidates several aid categories.

Some major programs will have stable funding, but with inflation, “stable” really means *down*. Community Oriented Policing Services (COPS) has some lines “stable,” some down. Escaping the ax are DNA assistance, “meth hot spots,” and technology programs. COPS aid to localities for police hiring and a parallel police corps program will be eliminated. Taking big hits are drug courts, down from \$25 million to \$10 million; state prison drug treatment is down from \$25 million to \$10 million; and Project Safe Neighborhoods, focusing on gun crimes and sought by the White House for \$74 million, was cut to \$15 million. Actually even the sacred cow Homeland Security (a separate line) was cut 28 %, to \$1.7 *billion*.

Here are some other programs that CJWL has been following:

- Byrne Memorial Justice Assistance Grants—down 33 %, to \$416.5 million;
- Capital Litigation Improvement Grants—part of innocence protection legislation, with \$20 million requested by the President, down to \$1 million; [This is effectively the end of the Protection of the Innocence legislative epic. It lasted about four years.]
- Prison rape Prevention—about cut in half from \$37 million to \$18 million;
- National Institute of Justice—about flat at \$10 million.

Speaking of Conference Committees:

A budget bill, of course, is a must-pass bill (unless another continuing resolution), but another “must-pass” bill is the USA patriot Act. Sixteen controversial provisions of it will expire at the end of the year unless renewed. Like the C-J-S Appropriations bill, both houses passed their versions and the real legislation is up to a Conference Committee. In this case, the real Conference Committee consists of two Republicans: Senate chair Arlen Specter, and House chair James Sensenbrenner, who held off appointing his conferees until last Thursday, November 10, the day before they met. Even Republican conferees believed that the chairmen had made a deal without their input.

The behind-the-scenes conflict is between the Senate version, with support from a coalition of the civil liberties community, medical professionals, librarians and business groups—they are not enthusiastic but they figure that's the best they can do—and the House version, supported by the White House, which had wanted the original bill renewed, with some additional subpoena powers. The President threatens to veto the Senate version.

Senators are united behind a bipartisan version (S-1389) sponsored by Specter, which would require four-year sunsets for “roving wiretaps” and allowing the FBI to seize business records, and the FBI would be required to produce a “statement of fact” detailing the need for those records.

The House version has a 10 year sunset, no prior statement of fact, and requires only that the records sought are “relevant” for an investigation. “Sneak and peak” searches of homes and businesses are allowed, and the subjects do not have to be notified for 180 days, with exceptions, compared to the Senate’s seven day delay. The current version requires no notification.

The Senate version appears to have more momentum than the administration-friendly House version, aided by a Washington Post story last week revealing that the FBI had issued about 30,000 “national security letters” per year since 9-11, compared to about 300 per year before 2001; and 88% are not related to terrorism investigations. Those letters were not created by the Patriot Act, but require companies to provide private information about their customers and to keep it secret. Both House and Senate versions add a level of judicial review for such letters which are now in-house.

Whatever happens now will be behind closed doors, but if the Senate version prevails the Bush administration will have suffered another political defeat. [Actually, neither version is what the White House wanted.]

The Torture Amendment:

The fiscal 2006 Defense Appropriation bill has more maneuvers than a master chess game—for example, there are two bills, one to authorize and one to appropriate, and they are before Congress at the same time--but I'll skip that arcane detail and try to focus on the point. Senator John McCain (R-Ariz.), himself a tortured prisoner of war in Viet Nam, added an amendment to the defense spending bill(s) that applies the U.S. Military Field Manual to interrogations of all detainees overseas. This conforms to the Geneva Convention and its prohibition against torture, and other international treaties. Last year Congress used the fiscal 2005 defense bill to create an anti-torture statute, but this year's version takes it a step further to re-define torture to include cruel, inhuman and degrading treatment.

The Bush Administration opposes the McCain Amendment, and states that the United States does not torture. In the 12 investigations of detainee abuse since Abu Ghraib, however, clear evidence has shown that orders from as high up as Secretary of Defense Donald Rumsfeld have authorized techniques that include sexual humiliation, forced nudity, dogs to terrify, simulated drowning, sleep deprivation, exposure to extreme temperatures, and mock burials. This year's measure targets that kind of inhumane treatment as torture.

The administration claims that the President must have a free hand to protect the country from “terror.” They argue the “ticking time bomb theory,” that there may be a

circumstance when torturing someone in custody might be the only way to find out of an impending attack and get information that could save lives. They cite no example in this country, they just say it could happen, and they don't want to tie the President's hands.

Vice President Cheney has been lobbying Republican Senators hard to add a *qualification* to exempt the CIA, although the McCain Amendment only applies to the CIA because the military has its own rules against torture, as found in the field manual. At this point, the Senate seems to be solid behind the McCain Amendment, having passed it 90-9 once, and again by a voice vote, but the House is a different story.

This too will go to the Conferees:

The House passed its defense spending bills about six months ago. It will probably be about \$445 billion, but the detainee amendments are taking all of the party caucus time, and the House is split. Vote counters say that a pending nonbinding "motion to instruct" the House conferees to embrace McCain's amendment will pass substantially.

There are powerful Republican Party leaders in both houses, however, who oppose the anti torture amendment and they are expected to be a majority in the Conference. Furthermore, President Bush continues to threaten a veto of the entire defense bill if the McCain Amendment, without the Cheney Qualification, is on his desk. November 18 is the deadline, for either a defense bill, or a continuing resolution. We should be reminded that President Bush has yet to veto a single piece of legislation. Will he start with a defense spending bill in wartime?

In what was perhaps an effort to mollify House conservatives, another budget amendment, introduced in the Senate to grant prisoners in Guantanamo Bay, Cuba, the right to habeas corpus challenges in federal courts, was defeated 49-42. Five Democrats voted with Republicans. One of the moderate Democrats said that these cases should stay in the military system, but it could have been aimed at the major target, getting the McCain Amendment, without the Cheney qualification, adopted by the Conference. McCain, himself, went along with it.

In another loud signal that Congress wants to be involved with detainees, the Senate passed another amendment, 82-9, to require a classified report on detention and interrogation practices and locations. Senator John Kerry drafted the language (remember him?) after another Washington Post article revealed that the CIA had been hiding perhaps a hundred prisoners at secret overseas sites called "black sites," for interrogation, and their budget items have been hidden in various ambiguous lines. This is in addition to the hundreds outsourced to torturing countries.

A rare sentencing compromise:

The House Judiciary Committee approved a comprehensive bill dealing with methamphetamine (HR-3889), and it will probably pass the full House; but the Senate companion bill (S-103) is somewhat different. Passage this year is problematic. Called the Combat Meth Act, the House bill goes in a number of directions, including prevention, production, distribution, some treatment, and sentencing. It authorizes \$99 million a year for five years, and the money is already in the current C-J-S appropriations bill. The Senate version contains no sentencing provisions, so we have another case of policy by Conference Committee.

What is most interesting here is that the original House version included a mandatory minimum 10 year sentence for a first offense of distributing five grams or more. The version that the Committee passed 31-0 gives judges some discretion for first offenses, what Committee Democrats wanted, but is severe for second and third offenses and higher level traffickers, and selling to minors, what Republicans wanted. The bill also redefines “kingpin” as a dealer who receives \$5 million in a year, up from \$1 million, and raises from 100 to 200 grams needed to impose a life sentence. But a third offense of 20 grams or more will also get life.

The bill reduces from 9 grams to 3.6 grams the amount of pseudoephedrine that can be sold per transaction, which means you can’t stock up on your over-the-counter cold remedies. See CJWL #13.

Eliminating the first offense mandatory minimum was the result of bipartisan negotiation and compromise, and represents a softening of the ideological polarization, not only of House members, but also of interest groups that have been pressuring them. What seemed like another highly politicized tough-on-crime bill somehow was eased into a reasonable compromise to respond to a media driven, but also real, social issue. Further research on this bill waits.

Further research on the crime policy making process waits.

To remind you, the next week will see incredibly important behind-the-scenes negotiations on two major pieces of legislation, the Patriot Act, with the Senate version or the House version, and the Defense Spending bills, with-or-without the McCain Amendment, with-or-without the Cheney qualification. Democracy or no democracy, we won’t be able to watch them, but the final edition of CJWL will try to sort them out.