The Heritage Foundation Issue Bulletin

No. 184 | The Heritage Foundation · 214 Massachusetts Avenue, N.E. · Washington, D.C. 20002-4999 · (202)546-4400 · Telex:440235

November 8, 1993

WHAT'S WRONG WITH THE BROOKS AND BIDEN CRIME BILLS (H.R. 3131, S. 1488, S. 1607)

INTRODUCTION

The fear and frustration gripping America because of violent crime is the direct result of one tragic fact. A dysfunctional criminal justice system continues to release extremely dangerous career criminals into the community when they should still be in prison. The common factor in nearly every violent crime receiving widespread publicity, including the recent murders of Florida tourists and the killing of basketball star Michael Jordan's father, is that the suspects were previously convicted of violent crimes, yet had soon been permitted to return to the streets. Arrest, conviction, and imprisonment did not stop them.[1]

This is why President Bill Clinton's plan to combat violent crime, now being considered by Congress, completely misses the mark. The main features of the President's plan are contained in legislation offered in the House (H.R. 3131) by Jack Brooks, the Texas Democrat, who is Chairman of the House Judiciary Committee, and in the Senate (S. 1488, S. 1607) by Joseph Biden, the Delaware Democrat, who heads the Senate Judiciary Committee.

The House and Senate bills supported by Clinton ignore the real problem by merely proposing to:

- ✔ Add only 60,000 more police across the entire country over the next six or more years;
- ✔ Control gun possession for everyone except violent criminals, for whom getting guns will remain easy;
- ✔ Overturn landmark Supreme Court decisions favorable to law enforcement;
- ✔ Offer more spending promises, amidst a deficit crisis, on programs for non-violent offenders and unnecessary study commissions; and

1 Half of all current state prisoners, approximately 350,000 inmates, have three prior felony convictions, "Survey of State Prison Inmates, 1991," Bureau of Justice Statistics, U.S. Department of Justice.

- ✔ Establish softer penalties than President Bush's plan would have done for gun crimes by violent criminals.

Yet the Brooks and Biden bills do not target the root cause of the wave of violent crime—the career criminals who are not kept off the streets. Among the most serious problems with these bills and the Clinton plan:

- ✔ One-third of Clinton's promised new police positions are not for police officers at all, and many others will not be available for many years. Moreover, the bills do not indicate where the money for community policing positions will come from. And more police to deter crime in some neighborhoods is no substitute for longer incarceration of career criminals.
- ✔ The bills authorize billions of dollars for "boot camps" and other "alternative" punishments, and for drug treatment programs within prison walls. Yet drug treatment programs show limited effectiveness, and money spent on treatment and alternative punishment means less money available for building prison space to keep career violent criminals off the streets.
- ✔ While they increase the number of crimes subject to the federal death penalty, the bills contain death penalty procedures that will make it difficult, if not impossible, to impose the death penalty.
- ✔ The bills contain *habeas corpus* reforms that likely will spur more petitions, not fewer.
- ✔ The Brooks bill would automatically give a violent criminal a new trial when an invalid confession was used in the original trial, even if such use had a harmless effect.
- ✔ The bills drop all the mandatory minimum sentence provisions for serious firearms offenders that were contained in last year's crime bill, and S. 1607 repeals mandatory sentences for certain drug offenders.

Competing Republican measures avoid these deficiencies. These bills, based on the original Bush crime bill introduced last year, would, among other things, spend $3 billion over the next three years on new regional prisons to house the most dangerous violent criminals. These alternative bills recognize that only a partnership between federal, state, and local law enforcement agencies which targets the most dangerous criminals, particularly those who use firearms, and removes them from the streets will give Americans real security from the threat of violent crime.

A DECADE OF WEAK CRIME LEGISLATION

Congress is frequently accused of being enmeshed in gridlock, unable to produce legislation on important matters of public policy. When it comes to crime legislation, however, this criticism is seldom heard. Indeed, anti-crime legislation has been a consistent exception to Congress's "productivity" problem over the past decade. On this subject, there has been no lack of desire or ability to produce new laws.

Lawmakers have responded to the public's growing fear of crime by passing four major federal crime bills in less than a decade.[2] A fifth bill came within a few votes of reaching President Bush's desk last year. Together these bills have added hundreds of new crimes, penalties, and procedures to the U.S. Code. Most significantly, the combined effect of this legislation, coupled with a dramatic increase in the federal law enforcement budget,[3] has greatly expanded the role of the federal government in the fight against violent crime and drug trafficking.

The Truth Behind the Signing Ceremonies

Despite this apparent agreement between Republicans and Democrats on the importance of fighting crime and drug abuse, sharp differences have remained unresolved on the most important criminal justice issues. A bipartisan coalition of moderate and conservative members in both houses still has been unsuccessful during the past decade in winning passage of their three top priorities. These are a comprehensive federal death penalty, *habeas corpus* reform (limiting repetitious legal challenges by death row inmates), and exclusionary rule reform (by allowing in-court use of evidence seized without a warrant by police officers acting in good faith).

These three reforms so far have been blocked by a small liberal group of highly influential lawmakers despite the support for the measures by large majorities in both houses of Congress. The group has been able to do this because they are high-ranking members of the House and Senate Judiciary Committees. For example, on several occasions over the past ten years, proposals to reform the exclusionary rule have been adopted by the House, and *habeas corpus* reform amendments have won approval in the Senate. Yet with the exception of the death penalty for murderous drug traffickers, a narrowly tailored provision that was passed in 1988, no amendment concerning these three major issues has ever survived a House-Senate conference.

The New Strategy

Apparently fearing that their blocking tactics might no longer be successful, the Judiciary Committee liberals devised a new strategy in 1991. Rather than relying solely on obstruction, they offered their own versions of these proposals. Their legislation had the same titles as the anti-crime amendments, but in reality were quite different. What was called *habeas corpus* reform, for example, turned out to be a plan to gut current law by overturning more than a dozen Supreme Court decisions which had established some limitations on *habeas corpus* petitions.

In the end, the strategy worked. Many Members of Congress and the media became so confused by the complicated legal debates over the differing proposals that they did not appreciate the real effect of the measures. As a result, in 1991, the Senate agreed to a "reform" of the exclusionary rule offered by Judiciary

---

2 The Comprehensive Crime Control Act of 1984, the Anti-Drug Abuse Act of 1986, the Anti-Drug Abuse Act of 1988, and the Crime Control Act of 1990.

3 Spending for federal law enforcement rose by nearly 60 percent in the Bush Administration.

Committee Chairman Joseph Biden. This amendment actually restricted, not expanded, the current admissibility of certain evidence. Later that year a liberal version of *habeas corpus* reform passed the House by a few votes. Judiciary Committee Democrats wasted no time in crafting a conference report containing these destructive amendments, among other anti-law enforcement proposals. President Bush fiercely opposed the conference report and announced he would veto it if it was not significantly amended. As a result, this "crime bill" died in the Senate in 1992 after several attempts to overcome a threatened Republican filibuster.

This is the same crime bill that President Clinton has endorsed and now serves as the core of H.R. 3131, introduced by Representative Jack Brooks, and S. 1488 and S. 1607, introduced by Senator Joseph Biden.

Unlike Presidents Reagan and Bush, President Clinton has chosen not to transmit to Congress an actual legislative proposal. Instead, he held a press conference this August at which he outlined five components of crime legislation that Congress should approve. The crime bills introduced by the Chairmen of the House and Senate Judiciary Committees largely include the President's five elements.

The President chose this unusual course for two apparent reasons. First, his support for the 1992 crime bill conference report made it unnecessary to fashion a new bill from scratch. Any new ideas, such as grants for more police, could simply be added to the 1992 bill. Second, forming a new bill would have required the agreement of at least four parties—the White House, the Justice Department, moderate Democrats such as Senator Biden and Representative Charles Schumer, the New York Democrat who is Chairman of the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee, and liberal Democrats such as Senator Howard Metzenbaum of Ohio and Representative Don Edwards of California, who is Chairman of the Subcommittee on Civil and Constitutional Rights. Given Attorney General Janet Reno's personal opposition to the death penalty and her preference for social programs addressing the "root causes" of crime, agreement on a new crime bill would have been extremely difficult. By deferring to the preferences of Chairmen Brooks and Biden, the President at least temporarily avoided a clash within his own party.

THE PRESIDENT'S FIVE PRIORITIES

President Clinton has called on Congress to pass a crime bill containing at least the following five elements:

1. **More Police;**
2. **Gun Control;**
3. **Boot Camps and Drug Treatment;**
4. **Federal Death Penalty; and**
5. ***Habeas Corpus* Reform**

Element #1: More Police

Putting 100,000 more police on America's streets was the centerpiece of candidate Clinton's anti-crime message during his presidential campaign. This promise apparently was well received by the voters. Even though George Bush had an exceptionally strong record on law enforcement, he did not maintain an edge over Clinton on the crime issue—in contrast with Bush's battle with Michael Dukakis in 1988.

The President's plan for adding 100,000 police includes the following specifics:

- ✔ An additional 50,000 new officers over the next six years in community policing programs, at a cost to the federal government (in addition to state and local costs) of $3.4 billion (Senator Biden increased this to 60,000 officers and $5.2 billion in S. 1607;
- ✔ Between 4,000 and 5,000 "Police Corps" officers after 1999, when they complete four years of government-supported college education (The federal government's cost: $100 million);
- ✔ An additional 4,000 security guards and police officers for public schools over five years, at a federal cost of $475 million;
- ✔ An additional 5,000 security guards and police officers for public housing over five years at a federal cost of $700 million;
- ✔ Up to 25,000 "National Service" participants (college students) working in law enforcement-related fields for one or two years;
- ✔ Between 6,000 and 7,000 officers for community policing in "Empowerment Zones" and "Enterprise Communities," at a cost to the federal government of $500 million; and
- ✔ An additional $10 million for the Labor Department to retrain up to 1,500 former military personnel for police positions.

Analysis: The Administration argues that more police will suppress crime because criminals are less willing to break the law in the presence of police officers. More suppression means less crime and fewer arrests, which will alleviate some of the burden currently weighing down the criminal justice system.

Supporters of the President's plan also point out that community policing, in particular, has become an extremely useful program for developing stronger ties between police and the communities they serve. The visible presence of law enforcement officers "walking the beat" not only discourages potential law breakers, but it also gives a sense of security to citizens.

A closer examination of this proposal, however, reveals at least the following three serious flaws:

Flaw #1: It is too little, too late. As much as one-third of the proposed 100,000 new positions are not police officers. The list includes up to 35,000 unsworn security personnel and "National Service" students who are serving

one or two years in public safety organizations to pay back college loans. These individuals are not authorized to make arrests, and most will not be engaged in confrontations with criminals. This is hardly what Americans expected when they expressed strong support for more "cops on the beat." Furthermore, approximately 5,000 of the new police officers who would come from the Police Corps program will not be on the job until 1999 at the earliest, because they must complete four years of college education before they begin service.

Flaw #2: The money may come from other law enforcement programs. There is a big difference between an authorization to spend money for state and local law enforcement and an actual appropriations bill containing the funding. The President's proposal would merely give permission to congressional appropriators to search for some extra money to fund the police programs. The Brooks and Biden bills propose nearly $3.4 billion to $5.2 billion over five or six years for just half of the 100,000 police jobs, and there are several other expensive provisions in the bills. Yet, federal funding for state and local anti-crime grants have been frozen at slightly less than $500 million for the past three years. So if Congress is to expand the level of financial assistance for state and local government without violating its overall budget constraints, the money likely will have to come from the federal law enforcement budget—which has already been targeted by the Clinton Administration for sharp reductions.

Flaw #3: More police alone will not keep criminals off the streets. Perhaps the most significant flaw with merely promising more police is that it fails to address the real problem. Suppressing crime through more police seeks to stop crime the same way locks on doors, bars on windows, citizen patrols, and anti-car theft devices do. They reduce the opportunities for criminals. But there is a hard core of career criminals on the streets; they are not easily deterred, and they are the main cause of the crime wave. As long as they continue to be released from prison long before their sentences have been served, Americans will not enjoy genuine security. To keep these criminals off the streets—rather than merely dissuade them from operating in certain neighborhoods—requires more prosecutors, judges, and prisons.

With more police on the streets, more arrests will and should be made. This places an increased burden on the courts, prosecutors, and prisons. But the President ignores the entire criminal justice pipeline. Ironically, when the system receives more offenders than it can handle, more offenders must be "let off" in various ways (such as dropped charges, plea bargains, and probation). Criminals then can return to the streets with greater confidence in their ability to "beat the system."

Element #2: Gun Control

The second element of the President's anti-crime plan is gun control. Clinton has challenged Congress to enact the Brady Bill, a proposal named after President Reagan's Press Secretary, James Brady, which would establish a national waiting period for background checks of handgun purchasers. He also has proposed a ban

on the importation, manufacture, sale, and possession of so-called assault weapons.

Analysis: The debate over the Brady Bill, which is a provision of the Brooks bill only, is largely a symbolic one. Those supporting the Brady bill are cast as being "for" a tough measure to deny guns to criminals. Those opposing the bill are said to be "against" that goal.

In reality, the legislative differences between the gun control and the anti-gun control forces are minor. The Brady Bill would establish a five working-day waiting period for the purchase of a handgun, during which time local law enforcement officials would be able to conduct background checks on the prospective gun buyers. These checks would include a search of the criminal history records currently available to law enforcement agencies at the state and federal levels.

Major improvements in the automation and accuracy of these criminal history records would permit fast and reliable access. When this is achieved, or after five years, whichever is sooner, the Brady Bill's waiting period requirement would sunset, because by that time a background check could be conducted almost instantly. Lawmakers opposed to the Brady Bill favor an instant check system. Their proposal calls for the development of an automated system over the next five years for determining, at the time the handgun is being sold, whether the buyer is a convicted felon. The only difference is that no *national* waiting period would exist during this period of time.

Since many Americans already live in jurisdictions with either a waiting period or some other preferred method to screen gun buyers, the actual effect of the Brady Bill would be minimal. The real difference between the two sides has more to do with underlying philosophies for dealing with violent crime. Many gun control supporters believe crime is the result of the environment within which criminals live. They cite such factors as the availability of guns, television violence, and economic and educational deprivation. The anti-gun control proponents, on the other hand, are more interested in the accountability of the violent criminal.

In the case of a ban on assault weapons, the 101st and the 102nd Congresses dealt with this issue at great length. Assault weapons, as defined by past legislation, are the semi-automatic firearms popular with violent criminals because of their menacing appearance. Among the features of such weapons are folding stocks, pistol grips, large ammunition clips, and bayonet attachments.

The controversy over the proposal to ban the weapons arises from the inability to define, to the satisfaction of most lawmakers, the words "assault weapons." Aside from their appearance, assault weapons actually are no different from any other semi-automatic firearm. The simple fact is that all semi-automatic firearms function in the same way. Opponents argue that a ban might eventually and easily be expanded to include many more popular types of semi-automatics, such as widely owned target shooting and hunting rifles.

So strong is this objection that neither the Brooks nor the Biden bill includes a proposal on assault weapons.

Element #3: Boot Camps and Drug Treatment

The third component of President Clinton's anti-crime plan is an expansion of boot camps and drug treatment for prisoners. The Brooks and Biden bills authorize $600 million and $800 million respectively in new spending for "boot camps" and other "alternative punishments" at the state level. The bills also propose "residential drug treatment" grants of $300 million over three years for state prisons, and they require federal prisons by 1997 to provide drug treatment to every prisoner with a substance abuse problem. State prisoners under the age of 29 would be eligible for the alternative punishments programs even if they are violent criminals.

Proposal	Jurisdiction	Eligible Prisoners	Funding
Alternative Punishments (including boot camps)	State and Local Governments	Offenders Under Age 29	$600 Million Over Three Years
Residential Drug Treatment	State Prisons	No Restrictions	$300 Million Over 3 Years
Residential Drug Treatment (for all prisoners with substance abuse problems: implemented by 1997)	Federal Prisons	No Restrictions	No FundingProvided
Boot Camps and Regional Camps for Treatment Programs (S.1488 and S. 1607)	States	Non-Violent Drug Offenders	$200 Million (S. 1488) $2 Billion (S. 1607)

Analysis: The shortage of federal funding for state law enforcement programs is by far the biggest problem with the boot camps and drug treatment proposals. The President has said that funding for more police is his top priority. But there will be difficulty in finding money even for that, let alone these other measures. It is very doubtful, therefore, that any money will be available in practice for these new projects. Law enforcement officials at the state and local level will be particularly irritated if funding for drug treatment is taken from programs that support their anti-crime efforts.

The provision concerning residential drug treatment for federal prisoners raises a more serious funding problem. This section requires the federal Bureau of Prisons to provide by 1997 the opportunity for residential drug treatment to every prisoner with a substance abuse problem. By the end of fiscal year 1995, at least 50 percent of this goal must be achieved, and by the end of 1996, the requirement increases to 75 percent. If Congress does not provide additional funding to the Bureau for this mandate, other Bureau programs may suffer — such as prison construction, which already has felt substantial reductions.

As for drug treatment grants to the states, it is important to note that treatment for prisoners already is widely available. A third of all state inmates have participated in drug treatment programs while in prison, and among those who had used a drug during the month before their current offense, nearly half received treatment after entering prison.[4]

While some may argue that this is short of what is needed, it must also be understood that treatment is often unsuccessful. A 1991 survey of state prisoners who had used drugs during the month before their crime, for example, found that

31 percent had been in treatment before and 25 percent had been in it twice.[5] Moreover, the prospect of serving prison time in a "residential treatment" program, defined as confinement "set apart from the general prison population," may have the effect, at both the federal and state level, of drawing prisoners who are marginally in need of treatment but attracted to the "soft time."

Finally, some serious consideration should be given to the proposal that federal tax dollars be used for putting young violent offenders into "alternative" corrections programs. Releasing such criminals into community-based programs poses real risks to public safety.

Element #4: The Death Penalty

The President has called for the enactment of a comprehensive federal death penalty as his fourth priority. He supports the 1992 crime bill death penalty language that contained more than fifty capital offenses. The Biden and Brooks bills have slightly fewer offenses because the death penalty for drug kingpins was dropped from both bills at the insistence of the Justice Department. The reason is that the provision would have permitted the death penalty for a major drug kingpin convicted solely of trafficking extremely large quantities of drugs. No proof of a specific murder would have been required.

Analysis: One criticism often leveled against a federal death penalty is that it is largely symbolic because nearly all murders are in violation of state law and fall outside federal jurisdiction. Indeed, many of the federal capital offenses found in H.R. 3131, S. 1488, and S. 1607 are extremely limited in their reach, such as terrorist murders or assassination of the President. However, a few of the offenses in the Biden and Brooks bills could apply widely. For example, imposing the death penalty for killing with a firearm in the course of a federal violent crime or serious drug trafficking offense could apply to much of the violence now occurring on the streets of nearly every city in America.

This proposal does prompt objections among those concerned about principles of federalism. The aggressive use of such a federal death penalty would tend to lead to a more frequent use of the death penalty in states where capital punishment rarely, if ever, occurs. Thus a state reluctant to impose the death penalty would, in effect, be overriden by the federal government.

Federalists need not worry, however, about the Democrats' death penalty proposal. Capital punishment at the federal level will occur only when the statutory procedures allow. And the Biden and Brooks bills contain death penalty procedures that will make it difficult, if not impossible, actually to impose a death sentence.

---

4 "Survey of State Prison Inmates, 1991," Bureau of Justice Statistics, U.S. Department of Justice.

5 *Ibid.*

First, the bills allow for "standardless jury discretion." This means that any juror can block the sentence of death, regardless of how aggravated the crime may have been. This is inconsistent with current law, which permits juries to be instructed that a death sentence must be imposed if they determine that the aggravating factors outweigh the mitigating factors.[6]

Second, the procedures contain no *habeas corpus* limitations. Thus, federal capital defendants can endlessly delay their executions, as most state prisoners currently do. The *habeas* reform proposals in H.R. 3131, S. 1488, and S. 1607, as ineffective as they are, apply only to state prisoners.

Third, the bills prohibit federal prosecutors from using elements of an offense as aggravating factors. As an example, consider a case of a person convicted of murdering a child in the course of violating the federal law against child sexual abuse. Under the Brooks and Biden bills, the government could not use the fact that the victim was a child as an aggravating factor—contrary to current law.[7]

Element #5: *Habeas Corpus* Reform

The last element of the President's anti-crime package is *habeas corpus* reform. In his August statement, the President drew attention to a bill introduced by Senator Biden which is now incorporated into S. 1488 and S. 1607. He described the bill as a "breakthrough" because it enjoys the support of district attorneys, state attorneys general, as well as Administration officials. The President characterized the Biden proposal as one which "will, for the first time, limit inmates to filing a single, federal *habeas corpus* appeal within a six month time limit." It will also, he said, require death penalty states to provide every indigent capital defendant with a team of highly qualified and experienced defense lawyers.

The Brooks bill also contains a *habeas corpus* proposal, which differs in some important aspects from the Biden version. One key difference is that H.R. 3131 substantially expands the control and influence of activist criminal defense lawyers in matters relating to the representation of indigent capital defendants.

Analysis: The battle over *habeas corpus* reform in recent years has been extremely complex and divisive. At its root, the debate is about the extent and nature of federal court review of actions by state criminal justice systems, actions which involve difficult legal and constitutional questions. It is divisive because in many cases it is also about life and death.

The primary goal for supporters of *habeas corpus* reform is to limit significantly the ability of prisoners on death row to delay the imposition of capital punishment by raising frivolous legal claims in federal courts. The Biden and Brooks bills apply to non-capital cases as well. The current system allows such prisoners to attack their convictions by repeatedly filing federal *habeas corpus* petitions, requesting federal judges to review their cases after they have lost all of their direct

---

6 See *Boyde v. California*, 110 S.Ct. 1190 (1990) and *Blystone v. Pennsylvania*, 110 S.Ct. 1078 (1990).

7 See *Lowenfeld v. Phelps*, 484 U.S. 231 (1988).

appeals and their state-level *habeas corpus* claims. These filings can result in years of delay, and consume enormous amounts of the time, energy, and money of the already over-burdened legal system.

Senator Biden deserves credit for initiating negotiations with prosecutors in crafting his *habeas corpus* proposal. One result of this is that representatives of the National District Attorneys Association and some state attorneys general have expressed support for his bill. However, a growing number of state prosecutors are expressing opposition to the language, now that they have fully examined what their Washington representatives achieved.[8]

The objections to the Biden and Brooks bills are that they not only fall far short of what is needed to end *habeas corpus* abuse, but they also dramatically weaken existing law. The claim is that *habeas corpus* abuse would be worse, not better, if these proposals became law. The bills broaden the legal basis on which *habeas* claims could be made, make it easier to file a second, third, or fourth petition than it is today, and mandate the states to bear large costs in providing to indigent capital defendants the best defense attorneys available in all phases of capital litigation.

Retroactive Decisions. Under current law, a convicted criminal is generally unable to challenge his conviction based upon subsequent changes in the law. "New rules" are not normally retroactive to past cases. The Supreme Court announced this in the 1989 landmark case of *Teague v. Lane*,[9] in which the Court held that a defendant's claims of constitutional violations in most cases must be judged in accordance with the law existing at the time his conviction became final. Without such a principle, the Court explained, appellate judges would have to be prophets and there would never be finality in the criminal justice system. All of this means that a prisoner may not challenge his conviction in a *habeas corpus* petition on the grounds that the Supreme Court has established a "new rule" in a particular area of the law that may be relevant to the prisoner's original case.

Reversing *Teague* through federal legislation, or at least substantially reducing its effect, has been a top goal of Democratic leaders on Capitol Hill for the past few years. The aim has been to define by statute "new rule" in a manner that is narrower than the definition in *Teague* and later cases. Achieving this change would mean that many more decisions would be retroactive to past cases, allowing prisoners new opportunities to overturn their convictions using *habeas* petitions.

New Grounds for Petition. Since the primary purpose of *habeas corpus* reform is to drastically limit the ability of a prisoner to file a second or successive petition following disposition of the first, any exception to this "one bite" rule would have to be minor. President Bush proposed that such petitions be permitted only when

---

8 California Attorney General Dan Lungren is leading the drive to defeat the Democrats' *habeas corpus* proposal.

9 489 U.S. 288 (1989).

they raised constitutional claims involving new evidence of actual innocence. But the Clinton approach, embodied in the Biden and Brooks bills, is very different.

New petitions would be permitted under several circumstances. Among them:

- ✔ A retroactive Supreme Court decision which changes the law in existence at the time the prisoner's case became final;
- ✔ The emergence of new evidence, such as a relative's affidavit asserting an alibi for the petitioner, even if it is unrelated to a violation of constitutional rights; and
- ✔ The discovery of additional evidence relating to mitigation against the sentence of death. (This is a direct repudiation of the 1992 Supreme Court decision in *Sawyer v. Whitley*,[10] which held that successive *habeas* petitions may not attack a sentence of death on the basis of new mitigating factors.)

New Standards for Defense Counsel. California Attorney General Daniel Lungren refers to the lengthy provisions involving mandatory standards for defense lawyers as the "Capital Defense Attorney Employment Act of 1993." He rightly objects to the new federal standards being forced on the states even though they are not required by the Constitution. Moreover, the proposal establishes mandatory standards on state trials and appeals, not just federal *habeas* proceedings, and, in the case of H.R. 3131 and S. 1488, cuts off law enforcement funding for states that do not "choose" to comply.

OTHER BIDEN-BROOKS CRIME BILL PROPOSALS

There are several other problems with H.R. 3131, S. 1488, and S. 1607. Two provisions are particularly in need of modification:

1. **Repeal of the Harmless Error Rules.** H.R. 3131 overturns *Arizona v. Fulminante*[11] and possibly other "harmless error" cases. In Fulminante, the Supreme Court held that a criminal conviction should not be reversed when a defendant's invalid confession was admitted into evidence if it appears beyond a reasonable doubt that without the confession the other evidence was sufficient to convict the defendant. H.R. 3131 would require convictions in such cases automatically to be reversed for new trials.
2. **Deletion of Mandatory Minimum Sentences:** Mandatory minimum sentences have become an issue of great controversy. The debate usually focuses on the wisdom of mandatory sentences for certain types of drug offenders. The Biden and Brooks bills go much further by dropping all the proposals for new mandatory sentences for serious firearm offenders that were contained in last

10 112 S.Ct. 2514, (1992).
11 111 S.Ct. 1246, (1991).

year's crime bill. For example, the 1992 crime bill contained a ten-year mandatory minimum sentence for anyone who used a semi-automatic firearm in the course of a violent crime or serious drug trafficking offense. H.R. 3131, S. 1488 and S. 1607 do not contain this proposal. Instead they simply instruct the Sentencing Commission to "provide an appropriate enhancement" for this offense. Furthermore, S. 1607 repeals mandatory minimum sentences for non-violent drug traffickers. This could substantially weaken the ability of federal prosecutors to obtain the cooperation of such offenders because they would no longer have an incentive to provide valuable information regarding trafficking conspiracies.

REPUBLICAN ALTERNATIVE PROPOSALS

The Republican leadership in both the Senate and the House began working on violent crime bills in the spring of this year, and introduced their comprehensive plans in early August. Large parts of the bills (H.R. 2872 and S. 1356) look very much like the proposals transmitted to Congress by President Bush on two occasions during his Administration. The strength of these bills is that they contain both important reforms for the federal system and incentives for system reforms at the state evel.

The provisions in these bills dealing with the federal death penalty, *habeas corpus* reform, and the exclusionary rule contain none of the flaws found in H.R. 3131 and S. 1488. The measures also include proposals that would have a significant effect on the ability of federal and state prosecutors to convict criminals committing acts of sexual violence.

A major provision in the Republican bills deals with regional prisons. The bills propose to spend $3 billion over the next three years to build and operate large regional prisons. This would be undertaken in financial partnerships with groups of states. In a contrast to normal congressional practice, the Republicans also explain how they would pay for the prisons by identifying specific spending cuts.

These new prisons would be used to house criminal aliens and certain categories of the most dangerous violent criminals currently located in state prisons. For a state to be eligible to participate in this program, it must demonstrate its commitment to combatting violent crime by reforming its criminal justice system. The key reform is so-called truth-in-sentencing, which means that violent criminals and serious drug traffickers must serve at least 85 percent of their sentences.

CONCLUSION

The anti-crime plans offered by President Clinton and congressional Democrats will do nothing to address the wave of violent crime now plaguing America. At best, these plans offer unfunded promises to state and local law enforcement. Given the pressing need for additional resources throughout the criminal justice system, such empty-handed promises cannot be viewed as acceptable solutions.

Beyond the hollow nature of these proposals lies the damage that would be done when the criminal justice system is weakened by provisions overturning Supreme Court decisions favorable to law enforcement. If Congress were to enact these provisions, it would be a major setback for crime control. Instead, Congress should adopt measures that would remove violent criminals from America's streets.

Prepared for The Heritage Foundation by
Paul J. McNulty*

Paul J. McNulty is Executive Director of the First Freedom Coalition,
former Director of Policy and Communications, U.S. Department of Justice, and
former Minority Counsel for the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives