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## RHETORIC VS. REALITY: A CLOSER LOOK AT THE CONGRESSIONAL CRIME BILL

### INTRODUCTION

If Americans think that Congress is going to be effective in fighting violent crime, they are likely to be disappointed. Congressional rhetoric on violent crime is very tough, but the reality of the anti-crime legislation is very different. Major differences between versions of federal anti-crime legislation await resolution by Senate and House conferees as they attempt to reconcile the crime bill passed by the Senate last November (S. 1488 and S. 1607) and the one approved by the House last month (H.R. 4092).

While both versions of the bill and related measures contain superficially attractive language on such items as increased police presence, bans on "assault weapons," and the federal "three-strikes-and-you're-out" provision, it is a safe bet that the bill which finally reaches the President's desk will not reduce violent crime. For example, the "get-tough" provisions, including an expansive new death penalty for about sixty different federal crimes, would be used exclusively by a shrinking federal law enforcement team which deals with just a tiny fraction of all violent crime. In 1990, state courts, not federal courts, handled over 98 percent of all violent crime convictions.<sup>1</sup> Thus, in dealing with the violent street crime that plagues so many inner-city residents, these elaborate death sentence threats will go largely unused. Moreover, the House version of the crime bill contains a racial quota system (the so-called Racial Justice Act) that would make the imposition of the death penalty virtually impossible. Complains Senator Orrin Hatch of Utah, ranking Republican on the Senate Judiciary Committee, "While pretending to get serious about crime, they have inserted into the House crime bill a set of provisions that would in effect abolish the death penalty nationwide—both at the federal level and among the states."<sup>2</sup>

1 See "The Crime Bill: Much Ado About Nothing," National Center for Policy Analysis *Brief Analysis* No. 106, April 15, 1994.

2 Senator Orrin Hatch, "Dear Colleague," April 25, 1994.

The one truly useful proposal, billions of new dollars for state prisons, is the target of substantial liberal congressional opposition. If opponents are successful in the conference committee, even this reasonable proposal likely will be of little benefit to Americans desperately seeking relief from the continuing scourge of violent crime.

In fact, expectations are so low that many knowledgeable analysts simply hope that the federal crime bill will do no harm to the existing criminal justice system, a tragic testimony to the lack of political leadership in Washington. The fact that the "Racial Justice Act" is being seriously considered reveals the legitimacy of such concerns.

## WHAT TAXPAYERS NEED IN THE CRIME BILL

Nevertheless, while the shape of the congressional response to violent crime may not inspire confidence, it may still be possible to salvage sound policy prescriptions and have a meaningful crime bill this year. Such a bill would have as its primary focus the goal of providing maximum assistance to the states in their battle against violent crime. It is the states, not the federal government, that bear the greatest responsibility for combatting violent crime. Moreover, federal policies, particularly requirements tied to federal grants, should not hamstring state and local law enforcement officials. Accordingly, the final crime package should contain provisions that include:

- 1) **Federal funding for imprisonment of violent criminals.** At least \$10 billion should be available to the states for the construction and operation of state prisons as an incentive for them to reform their sentencing laws. This would make the bill's "truth in sentencing" provisions a reality, ensuring that violent criminals serve their time.<sup>3</sup>
- 2) **A serious death penalty.** This means establishment of a federal death penalty for truly federal crimes—a death penalty that will not take more than a decade to carry out after sentence is imposed.
- 3) **A restraint on federal courts that put violent criminals back on the streets.** This would mean, as a matter of federal policy, cutting back on prison population caps and other controls imposed by federal courts on state prison and local jail systems.
- 4) **Improvements in the prosecution and punishment of federal violent crimes, particularly sexual assaults.** This would include increasing penalties for violent federal crimes and expanding the range of admissible evidence in federal sexual assault cases, especially to serve as models for state law.
- 5) **Restoration of the strength of federal law enforcement agencies.** While talking tough on crime, the Clinton Administration has cut agent and prosecutor strength in such key federal law enforcement agencies as the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA). If Congress is serious about toughening federal law enforcement, this policy should be reversed.

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3 For an excellent discussion of "truth in sentencing," see James Wootton, "Truth in Sentencing: Why States Should Make Violent Criminals Do Their Time," Heritage Foundation *State Backgrounder* No. 972/S, December 30, 1993.

## WHAT TAXPAYERS DO NOT NEED IN A FEDERAL CRIME BILL

In fashioning a new federal crime policy, Congress must make sure that it does no harm to the efforts of state and local law enforcement officials. This means:

- 1) **No death penalty quotas.** The “Racial Justice Act” included in the House version of the crime bill would enable a prisoner convicted of a capital crime to offer statistical evidence that imposition of a death sentence in his case would be racially discriminatory. Such data would automatically require the state to prove that racial discrimination was not involved, imposing a burden that would be difficult, if not possible, to overcome unless the government previously had established a quota system based on local racial demographics. Under the terms of the House bill, this would be applied retroactively, in effect giving convicted felons yet another avenue of appeal to avoid the death penalty. This new system of “Outcome-Based Executions” would undermine the principle of individual justice.
- 2) **No new federal rules hamstringing state law enforcement.** This includes, for example, the House-passed “Repeat Violent Offender Incarceration Act,” which, while sounding innocuous enough, actually may require states to “assure” that they are reducing prison time for drug traffickers.
- 3) **No new federal rules governing state and local police work.** This includes congressional restrictions on federal funding for police officers that would have the effect of turning cops into social workers. Under no circumstances should federal policy encourage any kind of hiring or promotion quotas for police officers. As Representative James Sensenbrenner, the Wisconsin Republican who is the ranking Member of the House Subcommittee on Crime and Criminal Justice, observes, the House version of the crime bill recommends that states and cities “seek and recruit members of racial, ethnic and gender minority groups.”<sup>4</sup> No personnel decision in the criminal justice system is more important than the hiring of a police officer, whose individual merit—especially courage, judgment, integrity, and intelligence—is critical in making life and death decisions.
- 4) **No expansion of taxpayer funding of social programs.** Liberals in Congress view public anxiety over crime as an excellent reason to fund more government social programs. The House bill contains \$8 billion worth of social welfare spending,<sup>5</sup> even though most taxpayer funding for social programs has little or nothing to do with genuine law enforcement. The bill includes funding for such things as arts and crafts programs and basketball leagues, replete with absurd federal requirements governing youth basketball participation. It is even more remarkable that Members of Congress would resort to social welfare spending in combatting crime when one considers that such spending is now at all-time high

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4 Rep. F. James Sensenbrenner Jr., “A Real Crime Crisis and A Fake Crime Bill,” *The Washington Times*, April 6, 1994, p. A-19.

5 *Ibid.*

and that welfare spending per capita, in constant dollars, is five times as high as in 1965, the beginning of the "Great Society."<sup>6</sup>

## THE DEVELOPMENT OF THE FEDERAL CRIME BILL

In May 1989, President George Bush unveiled his comprehensive violent crime control proposal to a large gathering of police officers. President Bill Clinton hopes soon to stand before a similar audience to announce completion of this process started five years ago by his predecessor.<sup>7</sup> Before this can happen, however, Congress must agree on the details of this complex and politically divisive legislative package. To that end, House and Senate conferees are working to resolve many crucial policy differences between their respective bills.

In resolving these differences, Members of Congress must answer three basic and critically important policy questions:

- 1) **How should the federal government spend \$22 billion to combat violent crime in America?**
- 2) **What should be the role of federal law enforcement in relation to violent street crime?**
- 3) **To what extent should the federal government involve itself in the administration of capital punishment at the state level?**

If the conferees reach a consensus on these three questions, they will have resolved the most significant issues presented to them by the federal crime legislation, including whether to spend money on prisons or so-called prevention programs, whether to expand federal law to cover nearly all crimes involving firearms, and whether to impose insurmountable burdens on prosecutors in states with capital punishment.

### WHERE WILL TAXPAYERS' DOLLARS GO?

The crime legislation authorizes huge amounts of new federal spending whose targets are easily identified: **police, prisons, or prevention.**

When the Senate passed its crime bill last November, it created a violent crime reduction trust fund of \$22 billion from anticipated savings over the next five years from attrition in the federal workforce. How to spend this \$22 billion will present some tough choices for the conferees. Making matters even more difficult, the House bill includes nearly \$28 billion in new spending. In fact, taken together, the two bills include nearly \$40 billion worth of ideas. Some of the ideas are good, some are bad, and others are simply irrelevant to the serious task of fighting violent crime.

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6 See Robert Rector, "Combatting Family Disintegration, Crime and Dependence: Welfare Reform and Beyond," Heritage Foundation *Background* No. 983, April 8, 1994, p.5.

7 The Crime Control Act of 1990 was not viewed as important anti-crime legislation. It included only provisions that enjoyed the unanimous support of the conferees. Thus, despite lopsided victories in the House and Senate on President Bush's proposals, the final bill was largely a wasted effort.

The major spending proposals are:

- ✓ \$9 billion (Senate bill) and \$3.5 billion (House bill) for “cops on the beat.”
- ✓ \$13 billion for state prisons (House bill), \$3 billion for regional prisons (Senate bill), \$4 billion for correctional options and alternatives to prison (Senate bill).
- ✓ \$9 billion (House bill) and \$1.2 billion (Senate bill) for miscellaneous crime prevention/social programs, many of which fall under a new program entitled the “Ounce of Prevention” initiative.

**The Police.** The Clinton Administration seems most interested in securing federal money for police and prevention. The President promised 100,000 more police in his election campaign and continues to emphasize this issue in his crime speeches. At least three key problems remain, however, concerning the benefits and nature of this initiative. First, how can financially strapped local jurisdictions pay the 25 percent matching fund requirement in both bills and afford the cost of keeping the new police on board as the federal contribution steadily declines? Second, will local governments retain genuine control over hiring decisions and the type of work that the new officers will perform, or will the federal government require these individuals to fit into a mold pre-designed in Washington, where many see community policing as another form of social welfare service? Third, how will the criminal justice system handle the violent criminals added to the pipeline as a result of more arrests (assuming Washington allows them to make arrests)? There are about 550,000 arrests for violent crime in the entire nation each year, and one violent crime arrest each month by an additional 100,000 police would more than double the current number.

Attorney General Janet Reno has championed the “prevention” programs ever since she arrived in Washington. She appears convinced, despite overwhelming evidence to the contrary, that traditional social welfare programs will strengthen families and reduce juvenile crime. And even though the public is generally favorable to making violent criminals serve their full time, a change that requires greater prison capacity, the attorney general is no advocate of additional prison capacity.

If the conferees follow the Clinton Administration’s lead with regard to community policing, they will be left with about \$30 billion of additional programs and only \$13 billion of the original \$22 billion available to spend. This will result in one of two outcomes: 1) a confrontation between supporters of money for prisons and proponents of more social welfare spending under the guise of “prevention” spending or 2) the familiar dodge whereby Members of Congress merely authorize spending on all of the proposals, leaving it to congressional appropriators to make the hard choices and decide in the years ahead who gets real money.

**Prisons vs. Prevention — A False Dichotomy.** Any confrontation between prisons and prevention should involve a serious discussion about the nature of crime prevention. Congressional proponents of more social spending insist that more prisons will not reduce crime; instead, federal legislation must be aimed at the “social conditions” from which violent criminals often emerge. Representative Cardiss Collins (D-IL), clearly expressed this view on the House floor during the crime bill debate: “Any crime measure that budgets more for prisons than job training is not sufficient to the task of fighting crime.”

Once again, congressional liberals are wrong. Drawing a distinction between prisons and prevention poses a false dichotomy. Removing violent criminals from the streets is crime prevention, as relevant statistics prove. For example, recidivism declines when younger violent criminals serve longer percentages of their prison sentences,<sup>8</sup> repeat offenders commit a large number of crimes when they are out of prison,<sup>9</sup> and there is an inverse relationship between rates of incarceration and rates of crime.<sup>10</sup>

The preventive effect of incarceration also is supported by the four basic purposes for prison: incapacitation (the offender obviously cannot commit crimes against law-abiding citizens when he is in prison), retribution (justice is strengthened when offenders pay their debt to society), deterrence (offenders are less likely to commit crimes if the punishment is swift and severe), and rehabilitation. There is widespread debate among students of the American criminal justice system as to the effectiveness of rehabilitation, but this issue also represents an area of potential agreement for pro-prison and pro-social welfare advocates. And while retribution may involve philosophical considerations and deterrence may turn largely on empirical data, there can be no doubt about the value of incapacitation in preventing crime. Anyone who has been victimized by someone who should have been in prison at the time—and there are perhaps thousands of such victims each day—can testify to the certainty that imprisonment prevents crime.

**More Social Welfare Spending — In a Crime Bill?** It is beyond dispute that an enormous variety of social programs, including welfare spending, continue to receive a major portion of government spending. These programs include urban and community aid, social services, training and jobs, housing, education and energy assistance, medical assistance, food stamps, and cash assistance. As Heritage Foundation Senior Policy Analyst Robert Rector has noted, “From the start of the War on Poverty in 1965 to the present, welfare spending has cost the taxpayers \$4.9 trillion in constant 1992 dollars. This is greater than the cost of defeating Germany and Japan in World War II, after adjusting for inflation.”<sup>11</sup> Thus, the argument that government has ignored social spending as a means of attacking the “root causes” of crime is inconsistent with the facts. (It is true, of course, that federal policy makers have failed to address the “root causes” of crime in terms of exploding illegitimacy, family disintegration, and the collapse of traditional values in many crime-ridden communities.)

Congressional opponents of more prison spending claim that building prisons has not reduced crime because crime has not declined. This is akin to arguing that using a bucket to bail a leaking boat does not reduce the amount of water in a boat with a hole in the bottom because the water is still coming into the boat—never mind that the boat would sink without using the bucket. If a lack of concrete results for dollars spent is the basis for em-

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8 U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* (NCJ-116261), April 1989, p. 3.

9 U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, *Protecting America: The Effectiveness of the Federal Armed Career Criminal Statute*, March 1992, p. 29.

10 U.S. Department of Justice, Office of Policy Development, *The Case for More Incarcerations* (NCJ-139583), October 1992, p. 10.

11 Rector, *op. cit.* p. 6.

barrassment, congressional advocates of another round of Great Society-style social spending should have the good sense to break off the public discussion.

**What Kind of Prevention Programs Are They, Anyway?** Finally, it must be observed that many of the programs being proposed are an odd assortment of social programs that appear to be the product of “pop” psychology. Under the House version of the crime bill, Congress would authorize spending taxpayers’ money for arts and crafts, Olympic training, self-esteem classes, conflict resolution training for violent teens, and midnight basketball leagues. Naturally, federal programs mean federal rules which, in the case of the new midnight basketball leagues in the House bill, are neat and precise: each league must have eight teams with no more than ten players on each team, and half of the players must live in government-subsidized low-income housing projects. In a country where the average murderer spends only eight-and-a-half years behind bars because of insufficient prison capacity, it is curious to insist on spending limited taxpayer dollars on arts and crafts.

## THE ROLE OF FEDERAL LAW ENFORCEMENT

The second question Members of Congress must address concerns the role of federal law enforcement in combatting street-level violence. Both crime bills, but particularly the Senate version, contain several new offenses and penalties aimed at such crime. In addition to death penalty offenses for murder with a firearm, drive-by shootings, and car-jackings, the bills establish new crimes for gang activity, criminal use of firearms, and juvenile crime. Provisions relating to sexual and domestic violence would be enforceable only on federal lands such as Indian reservations.

The much-discussed “three-strikes-and-you’re-out” provision would not expand the jurisdiction of federal law enforcement, but it would increase the penalty for conviction of a federal violent crime after two similar federal or state convictions. President Clinton has developed an attractive “tough on crime” soundbite in pushing for this penalty, but the reality is that current federal law already severely punishes such offenders.

It used to be easy to spot the difference between the role of a Member of Congress and the role of a state legislator in crime legislation. The Constitution clearly distinguishes between the national responsibilities of the general government and the domestic and particular responsibilities of state governments. State legislators, not Members of Congress, have direct responsibility for enacting the rules that govern state and municipal law enforcement.

In the 1980s, Congress spent most of its legislative energy focusing on drug abuse, grant programs to assist state and local law enforcement, and procedural reforms affecting federal prosecutors. Within the past few years, however, the direct involvement of federal law enforcement in countering urban violence has emerged as a major issue. Senator Alfonse D’Amato (R-NY) initiated much of the debate in 1991 with an amendment that would give federal law enforcement jurisdiction over nearly all crimes committed with a gun. This idea is very popular in Congress. D’Amato’s amendment has passed the Senate twice by overwhelming margins. Not surprisingly, it also has been strongly opposed by many prominent conservatives, including Supreme Court Chief Justice William Rehnquist.

Meanwhile, as the legislative debate has continued, federal law enforcement has become ever more involved in the fight against street violence. Since possession of a firearm by a felon is a violation of federal law, it has been relatively easy for the federal government to arrest and prosecute tens of thousands of violent criminals. This new role has been well received in states where violent crime has soared and criminal justice systems have been largely dysfunctional. For example, local law enforcement officials in Philadelphia, Pennsylvania, have praised federal authorities for the aggressive role they played in attacking drug trafficking gangs from 1989 to 1992; the federal government was able to “lean forward” and assist a local government that was unable to detain offenders pre-trial because of a court-imposed cap on its jail population.

Notwithstanding the success of high-impact operations like the one in Philadelphia, Members of Congress should be cautious about continuing to expand federal jurisdiction. Once again, virtually all violent crime enforcement falls upon state, not federal authorities, and there is an ample menu of specific policy initiatives that state officials can pursue in controlling violent crime. Former Attorney General William Barr has outlined two dozen specific recommendations that would help state officials combat violent crime.<sup>12</sup>

There are several other reasons why Members of Congress should be cautious in expanding the federal role in combatting domestic street crime.

First, limited resources will not permit greater involvement by federal law enforcement. Generally lost in all of President Clinton’s rhetoric about fighting crime are his significant cutbacks in federal law enforcement. There are hundreds fewer agents and prosecutors now than there were in the Bush Administration. Moreover, the President’s proposed budget for FY 1995 seeks to cut prison construction by 30 percent (adding to a sharp cut in 1994) and Department of Justice law enforcement agencies by 1,523 positions. Former Deputy Attorney General Philip Heymann summarized the Clinton Administration’s policy by stating that, “With fewer federal investigators and fewer federal prosecutors in the years ahead there will not be more federal law enforcement but less....”<sup>13</sup> It would be misleading for Congress to expand the federal role in law enforcement while following the lead of the Clinton Administration by slashing the resources of these law enforcement agencies. Meaningless rhetoric on the crime issue only adds to the taxpayer’s discouragement with government; both Members of Congress and state legislators should recall that the first duty of government is to protect American citizens, not simply to talk tough about crime.

Second, Congress should avoid passing laws that continue to undermine the distinction between federal and state jurisdiction regarding street crime. Given the independent nature of United States Attorneys, it is likely that some would attempt to operate like local district attorneys. Furthermore, elimination of the federal-state distinction runs counter to the notion of a limited federal government acting only in accordance with enumerated powers. While such a traditional notion of constitutional law is hardly the guiding influ-

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12 For an excellent and detailed discussion of the Barr recommendations to state and local officials, see Mary Kate Cary, “How States Can Fight Violent Crime: Two Dozen Steps to a Safer America,” Heritage Foundation *State Backgrounder* No. 944/S, June 7, 1993.

13 Philip B. Heymann, “The Lock-’em-up Debate; What Pols Won’t Say: 3 Strikes — And We’re Out of Money,” *The Washington Post*, February 27, 1994, p. C1.



ence of Washington's current policy-making process, the loss of even more ground in this area must be avoided.

## ENDING STATE DEATH PENALTIES

The third question that Members of Congress must resolve pertains to the imposition of capital punishment at the state level. By the slimmest of margins, the House passed the so-called Racial Justice Act, which purports to remedy racial bias in the administration of state death penalties but which actually would end the death penalty not just for future cases, but also for all offenders currently under sentence of death.

According to the provisions of this remarkable proposal, if a defendant offers statistical information indicating a disparity between the race of the offender or the victim in a capital case and the racial composition of the general community, a presumption of racial bias is established. At this point, the prosecutor must prove there was no discrimination. In other words—in violation of the canons of logical debate—the government must prove a negative. Even if evidence is presented that is relevant to the government's reason for seeking the death sentence, it will not respond fully to the possibility that racial prejudice was an additional factor. Moreover, the prosecutor must do this *retroactively*, recovering evidence from potentially thousands of cases dating back to the re-establishment of capital punishment in 1976. Prosecutors agree that this measure will lead to an injustice far worse than the one its sponsors now think exists. To avoid the statistical disparity which triggers the presumption of bias, the government will be forced to keep track of the racial composition of offenders and victims and to make sure that such composition matches that of the local community. This quota system is completely contrary to the basic principles of the American criminal justice system: that justice is color-blind and that every case must be judged on its own merits.

If Members of Congress accept this proposal, they will further damage the criminal justice system. Even worse, the realization by citizens and state law enforcement officials that Congress has imposed this system on them, it will further erode the credibility of Congress as an effective institution of government, underscoring the difference between the tough rhetoric of Congress's latest war on crime and the legislative reality of its latest anti-crime package.

## CONCLUSION

To craft a truly effective anti-crime policy, Members of Congress ideally would need to start from scratch, beginning with the recognition that state legislators have primary responsibility for fighting violent street crime. Streamlining the court systems, enacting rational sentencing laws, and improving the quality of police recruiting and police detection of crime are all within the jurisdiction of the several states.

A serious federal anti-crime policy would have as its main focus the elimination of every form of federal interference in the crucial mission of public safety by the states. Through unfunded mandates that consume their scarce fiscal resources, the federal government forces states to divert funds from public safety. Because of activist federal judges who micro-manage state prison systems and continually grant new legal opportunities to death row inmates, states remain handcuffed in their struggle against violent criminals. These are the problems that should be addressed in federal anti-crime legislation.

In the meantime, Congress can salvage good policy in a measure that otherwise holds little promise of reducing the violence on America's streets. First, in apportioning federal funds, Congress should set aside not less than \$10 billion as an incentive fund for the states to encourage sentencing reform. States must stop revolving door justice by increasing the amount of time served by violent criminals from the current 38 percent to something much closer to 100 percent. Second, not one dime should be spent on more misguided social welfare programs. Members of Congress should reject the advice of those who still insist, despite two decades worth of evidence to the contrary, that violent criminals also are victims of society to be helped through more social spending. It is time for Members of Congress to start listening to the real victims of violent crime.

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