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TELECOPIER COVER MEMORANDUM

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Ricki -

The crime bill discussions are really
on the wrong track. The attached
memo explains where we should be.

Some of the "god guys" here are
trying to get a meeting with
Bruce Reed. Can you help?

Thanks! - Ron W.

MEMORANDUM ON THE 1993 CRIME BILL

I. Background.

Congress has enacted omnibus anti-crime legislation in four out of the last five election years (1984; 1986; 1988; 1990). Efforts to enact such a bill last year were thwarted when the conference report accompanying the bill was successfully filibustered by Republican Senators.

Typically, these bills have included increased criminal penalties, expansion of the authority of law enforcement agencies, and a restriction of defendants rights. Had it been enacted, last year's bill would have been no exception -- it would have reinstated the federal death penalty for over 50 crimes, restricted access to habeas corpus and created or increased a series of mandatory minimum sentencing statutes.

There were several redeeming aspects of last year's conference report. It included a modified version of the Brady bill, which would have created a national five day waiting period for the purchase of handguns. And it would have authorized more aid to state and local law enforcement, including creation of a federal Police Corps to bolster local police agencies.

As a candidate, President Clinton said that he would have signed the conference report. He said he supported capital punishment and the Police Corps, but he said little about death penalty procedures, habeas corpus or mandatory minimum sentences. He also pledged to support funding for 100,000 additional police officers to combat street crime, a promise which does not require new authorizing legislation.

II. Options.

The Administration must first decide if it wants to propose crime legislation to Congress. It would seem advisable for it to do so on both substantive and political grounds. Substantively, there are a number of important policy questions inherent in the crime bill debate with respect to which the Administration should play a leading role. Crime is a subject on which legislators have been easily swayed by public fears and hysteria, and if the Clinton Administration wants to shape and preside over a rational, effective federal criminal justice system, it must lead the way. Politically, crime is an issue of great public concern, and if there is to be a crime bill, the Administration should receive due credit for shepherding it through the Congress.

If it decides to propose crime legislation, there are three basic options. The Administration could (1) propose a bill identical to last year's conference report; (2) propose a bill identical to last year's conference report except for the addition of a specific

authorization for funding 100,000 new police officers; or (3) propose its own bill which would represent an improved version of last year's conference report.

This third option is preferable. Last year's conference report was flawed in many respects. It served a valuable political purpose during the campaign, but it is not fully consistent with the kind of progressive, prevention-oriented criminal justice policy that Attorney General Reno has advocated -- with substantial public approval -- during and since her confirmation hearing.

For better or worse, this bill will likely be the most significant criminal justice legislation to be debated during the Clinton Administration. It should represent the Clinton/Reno vision of how federal law enforcement and anti-drug policy will be improved over the course of the next decade. It should be designed to actually reduce crime in the coming years, a lofty aspiration that none of the crime bills of the Republican years could legitimately claim. In short, it should be a crime bill that the President and the Attorney General are really proud of.

III. Ways in Which the Conference Report Could Be Improved.

A. Guns.

Gun control is one of the most meaningful crime prevention strategies available to the federal government. Of course the Clinton/Reno crime bill should include the Brady bill provision from last year's conference report, but it should also contain all or some of the following proposals:

1. ban assault weapons (S. 653) or add them to the Brady bill waiting period.
2. strengthen enforcement of licensing requirements (S. 496). BATF does not have the legal tools to police the existing regulatory scheme.
3. impose a federal limit on the number of gun purchases per month. Such a limit would reduce gunrunning and build on the recent legislative success in Virginia.

B. Sentencing.

The Sentencing Reform Act of 1984 created the United States Sentencing Commission, an expert body charged with the task of formulating a rational, cohesive and effective sentencing system. The guidelines have been in effect for five years, but during that time Congress has persisted in enacting crime bills that are inconsistent with the new guideline system. There is particularly strong evidence that mandatory minimum sentencing laws are ineffective and detrimental: they crowd prisons with non-violent offenders who

could be more constructively punished in the community, and they have a racially disparate impact. To reverse this trend, the new crime bill should:

1. strike new mandatory minimums and increased mandatory minimums from conference report. The Clinton/Reno DOJ should at least not propose new or increased mandatorys.

2. include language to permit the court to depart below the minimum sentence established in statute.

In addition, DOJ should consult with the Sentencing Commission on other sentencing provisions (e.g., increased maximums; mandatory consecutives; directions to the Commission) to ensure that any proposed legislation is consistent with the guideline system.

C. Habeas corpus.

The following principles should govern habeas reform:

1. Federal courts should always be available as a last resort to hear proof of probable innocence (S. 221).

2. Any reform proposal should include strong counsel standards and should require that counsel be appointed by an independent authority, not the trial judge. Competent counsel is key to a streamlined system. The 40% success rate of habeas claims is attributable in large measure to incompetent counsel.

3. To assure protection of federal constitutional rights, it is critical to preserve federal court jurisdiction to exercise independent judgement on the merits of all federal constitutional claims. With regard to Teague, there should be a "clear break" standard to prevent Supreme Court from undermining habeas rights by defining "new rights" in an overbroad fashion.

4. Federal courts should be permitted to hear claims that were not raised in state court if prisoner can show "ignorance or neglect" of trial counsel. There should be a default rule, but it should not punish a habeas petitioner who can demonstrate that his or her attorney was at fault.

D. Death Penalty.

Obviously the new bill will include an expanded federal death penalty. The following improvements, however, should be considered:

1. The death penalty should not apply to non-death offenses. Imposition of the death penalty in such cases is probably unconstitutional (Coker v. Georgia), and is in any event a disproportionate punishment.

2. The new bill should address federalism concerns: the death penalty should not be available in a federal prosecution that could have been prosecuted in the courts of a state that does not have capital punishment, and in which there is no overriding federal interest (i.e., federal jurisdiction should not be invoked solely for the purpose of imposing capital punishment in a state that has chosen not to enact a death penalty statute). A narrower application of this principle is found in section 102 of conference report, which bars imposition of the death penalty with respect to crimes committed on Indian reservations unless the tribal governing unit has adopted the death penalty.

3. The new bill should include technical changes to ensure that the death penalty is administered under the most rigorously fair procedures.

E. Police Corps.

The Police Corps proposal is an innovative crime-fighting device and should be included in the new bill with great fanfare. Some technical corrections to the conference report are necessary -- notably, the federal reimbursement for Police Corps recruits should be equal to the reimbursement provided under the national service program. Law enforcement is a form of national service, so there should be parity.

F. Treatment in Criminal Justice.

An overriding goal of the Reno Justice Department should be to assure the availability of treatment for all substance abusers in the federal, state and local criminal justice systems. Research demonstrates significant crime prevention due to treatment in criminal justice. Toward this end, the new crime bill should:

1. encourage state criminal justice systems to institute or expand comprehensive treatment programs (including replication of Miami drug court approach) through the Byrne block grant mechanism.

2. ensure that all substance abusers in federal criminal justice system receive treatment. While this is largely an appropriations issue, the authorizing legislation should provide incentives for prisoners to succeed in treatment (these are now lacking now due to absence of parole), and require outreach.

G. Asset Forfeiture.

There is an asset forfeiture reform proposal working its way through the DOJ bureaucracy. If the new crime bill includes an asset forfeiture title, the following should be included:

1. The new bill should designate a portion of seized funds for substance abuse treatment and prevention activities. In 1991, the Senate unanimously adopted a Kennedy amendment to use Customs Service Asset Forfeiture Funds for treatment, accepting the argument that these funds should be used to fight the war on drugs on all fronts.

2. The Administration should consider strengthening due process protections in civil forfeitures. There are reports of significant abuse under current law, especially in federally "adopted" state cases.

IV. Summary

The Administration should announce that it is commencing a process to draft comprehensive anti-crime legislation that will be submitted to Congress on a date certain. This announcement will tend to "freeze" legislative activity in this area (*i.e.*, it will tend to deter crime-related floor amendments in the Senate) until the bill is submitted. The drafting process should involve interested members of Congress.

The goal of this process should be the submission of anti-crime legislation that is based on last year's conference report but that contains improvements designed to reflect the President's and the Attorney General's crime prevention priorities. These improvements would not in any sense undermine the "toughness" of the conference report. They will form the basis for improvements in the criminal justice system that will actually improve the administration of justice and reduce crime in the United States.