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COLUMN: LEGISLATION

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TEXT:

[*47] 1995 -- The Year That Was . . .

A Wrap for Contract With (on) America?

1995 Began with the inauguration of the newly Republican-dominated Congress. The first order of business for the House was to promise the passage of new laws within the first 100 days of the session, lumped together in a decorative but ill-conceived package titled "Contract With America." One of the components of the "Contract" called for the passage of "tougher" crime laws, bundled together into a set of ten bills named the "Taking Back Our Streets Act" (TBOSA).

Not to be outdone, the Senate responded with its own bill, S-3, containing such legislative proposals as the total abolition of the exclusionary rule; the creation of a new obstruction of justice offense aimed at lawyers, prohibiting the filing of any pleading containing a false statement of *fact or law;* and the creation of an exemption for federal prosecutors from adherence to state and local ethical rules of conduct governing all other lawyers.

While the Republican Congress got off to a heady start, it later stumbled into obstacles created largely by the formation of new and unusual coalitions. NACDL was strategically positioned to jump right into the fray, joining forces with groups who previously were considered "unlikely bedfellows." For example, libertarians (Rep. Henry Hyde (RIL), the Cato Institute, etc.) joined forces with us on forfeiture reform. The National Rifle Association (NRA) and other Second Amendment groups, along with libertarians, joined forces with us on "counter-terrorism" and law enforcement abuse issues. Welcome results of such alliances include an acknowledged increase in NACDL's presence on the national legislative scene; and our increased ability to garner support for other aspects of our legislative agenda. One prominent example is a recent NRA board policy change from what existed in the early days of Congress when the House passed its bill weakening the exclusionary rule. The new board policy resolves the NRA to work to strengthen the exclusionary rule and to oppose any efforts to weaken it. Another example is the recent commitment by several prominent Second Amendment organizations to join NACDL in opposing pending *habeas corpus* "reform" bills.

How does the end-of-year scorecard read on the Contract's "Taking Back Our Streets Act" and S. 3, the Senate draconian counterpart? From NACDL's perspective, things could have been much worse. The House managed to pass five new crime bills; providing for mandatory restitution to crime victims; further limiting the exclusionary rule to allow a "good-faith" exception for *warrantless* search and seizures; limiting death penalty appeals; increasing penalties for child pornography; and providing "block grants" for community police officers. The Senate has passed only three of the bills: one increasing penalties for child pornography; one regarding the block grants for police officers; and, on December 22, a version of the House bill requiring mandatory victim restitution (but, under the Senate's amendment, a federal judge *may* forego issuing a victim restitution order in "extraordinary circumstances").

The block grant bill would eliminate funding for the 100,000 "cops on the beat" provision in the 1994 Crime Act. President Clinton promised all year to veto any bill eliminating this funding. Thus, it came as no surprise when President Clinton vetoed the police block grant legislation on December 19, when Republicans appended it at the last minute to

their 1996 appropriations ("spending") bill for Commerce, Justice, and State, the Judiciary, and Related Agencies (H.R. 2076).

This brings the total number of 1995 fully enacted criminal justice bills contained in the Taking Back Our Streets Act (House) and S. 3 (Senate) to a grand total of *one* (increasing child pornography penalties). Furthermore, the House failed to even raise two of its TBOSA proposals: the repeal of the Assault Weapons Ban that was contained in the 1994 Crime Act; and the mass federalization of, and creation of new mandatory minimum sentences for, state street crimes involving guns.

What does 1996 hold for the "Contract on America" and S. 3? Nothing good, that's for sure. The Senate is poised to take up S. 3, including provisions to abolish the exclusionary rule and shift the burden of proof to the defendant to establish the involuntariness of a confession. Also lurking on the horizon for 1996 are truth-in-sentencing mandates for states who want funds to build more prisons, prosecutorial un-ethics, obstruction of justice for lawyers, more mandatory minimum sentences, as well as the further restriction of the "mandatory minimum safety valve." The House is scheduled to resume its attempt to pass its "counter-terrorism" and *habeas* "reform" bill.

Other 1995 Legislative Action

There were some other unfortunate legislative proposals passed by Congress last year.

Congress voted to eliminate funding for the Death Penalty Resource Centers through the appropriations bill for the judiciary, as a *quid pro quo* for the courts getting their funds for 1996. Substantial lobbying efforts by NACDL and others did result in a provision providing the Resource Centers a **[*48]** "wind down" period until April 1, 1996 (the House initially voted to shut them down point blank, in October). Also, as part of the same "spending" bill, Congress appended a substantive bill called "STOP," which would forbid the federal courts from considering even *meritorious* prison condition litigation. Fortunately, when President Clinton vetoed the 1996 appropriations bill for Commerce, Justice, and State, and the Judiciary, and Related Agencies -- on the ground that it would "de-fund" his COPS police program and "retreat in our fight against crime and drugs" -- he also vetoed these measures.

Late in October, Congress passed and President Clinton signed a bill rejecting the Sentencing Commission's proposed amendments to the Federal Sentencing Guidelines that: (1) would have largely equalized the racist disparity between crack and powder cocaine penalties, at the lower powder levels; and (2) would have equitably reduced penalties for low level "money laundering" offenders.

Continuing his "tough on drugs" campaign, in late December President Clinton publicly promulgated an "Executive Order" (a device best described as "presidential legislation"), directing Attorney General Janet Reno "to develop a universal policy" requiring all persons arrested on federal charges to undergo drug testing before being considered for bail. Refusal to submit to a drug test could result in pre-trial detention.

On the positive side, however, following the largest grassroots lobbying effort in NACDL's history (generated by NACDL Indigent Defense Coordinator Paul Petterson), which included thousands of calls, letters and faxes, Congress approved funding for Defender Services for fiscal year 1996 at 90.35 percent of the Judiciary's request. This represents a significant increase over the 1995 funding (85.13 percent of the request), and over $ 12 million more dollars for federal indigent criminal defense.

Also, penalties for marijuana cultivation were significantly reduced under the Sentencing Guidelines by an amendment providing that all marijuana plants are to be treated as 100 grams of marijuana per plant, instead of 1 kilo per plant, as provided by the prior guideline for cases involving more than 50 plants. While the amendment was made retroactive, it does not eliminate the five year statutory mandatory minimum sentence. Thus, the primary benefit will be to those who either cultivate under 100 plants or qualify for the mandatory minimum safety valve under *18 U.S.C. § 3553*(e).

Substantially due to NACDL, the supposedly "non-controversial" "Death Capital, USA" bill about which I have written earlier has been halted indefinitely. Thanks are due to the substantial efforts by Legislative Director Leslie Hagin, Legislative Committee Co-Chair Lis Semel, NACDL Director Marvin Miller, and esteemed counsel David Bruck. This bill would allow the Bureau of Prisons (BOP) to move and house all federal death row inmates to one high tech death row and chamber in a specially-constructed facility in Terre Haute, Indiana. Substantial concerns were raised about the significant adverse implications the bill would have upon the attorney-client relationship, and the federal funding of the facility.

Progress is also underway in efforts to amend the Federal Rules of Criminal Procedure to allow attorney-conducted *voir dire* in federal criminal trials. NACDL member and San Francisco attorney James Farragher Campbell is testifying

before the Federal Judicial Conference in San Francisco. His testimony was drafted with Michael Stout, NACDL Board Member and Co-Chair of the *Voir Dire* Committee. Another public hearing is scheduled on the proposal for early 1996 in New Orleans.

Counter-Terrorism and *Habeas* Update

The House "counter-terrorism" and *habeas corpus* "reform" bill, which was stalled for several months but then suddenly scheduled to reach the House floor in mid-December, was abruptly pulled from the schedule for the year by the Republicans on December 18, due to a lack of support strong enough to assure passage.

The counter-terrorism bills of both the House and Senate have largely been viewed as direct and emotional responses to the Oklahoma bombing tragedy. NACDL and many other groups have opposed them from the outset, due to the enhanced powers provided to federal law enforcement agents and the expanded intrusion the bills allow into personal privacy.

NACDL, through intensive efforts by Legislative Director Leslie Hagin, Treasurer Bill Moffitt, Legislative Co-Chairs John Flannery and Gerry Goldstein and others, has been at the forefront of a broad-based coalition of organizations joining together in opposition to this repressive legislation. Using the lessons of Waco and Ruby Ridge to convince Congress and other interested lobbying groups that these bills would significantly infringe on personal freedom and provide too much control to law enforcement agents has been quite successful.

Recently, Legislative Director Hagin wrote a masterful and prominent article for the December 15, 1995 edition of the very influential *Gun Week,* titled "Why Gunowners and Civil Libertarians Should Oppose Pending 'Counter-Terrorism' and *Habeas* 'Reform' Bills." *Gun Week* Executive Editor, Joseph Tartaro, strongly commending Leslie's article to his readership, stated: *"Habeas* reform is an important issue that should be of special interest to gunowners who may not always appreciate how important a writ of *habeas corpus* could be to them. . . . Leslie Hagin of the National Association of Criminal Defense Lawyers . . . may be a newcomer to our pages, but she is far from a newcomer to constitutional concerns. Hagin's examination of the historical roots of *habeas corpus* protection and her illustration of how it serves to safeguard the rights and property of law-abiding gunowners, as well as others should open many eyes." Tartaro proceeds to label efforts of political conservatives to limit *habeas* "a knee-jerk response to criminal justice reform," concluding that ." . .Readers who in the past have seen the *habeas* protection merely as a refuge for scoundrels will find Hagin's article very enlightening." Copies of this persuasive article are now being circulated widely. You may obtain copies, suitable for sharing, through the national office.

The Senate passed its version of the antiterrorism/habeas bill in June (S. 735). Although the House version (H.R. 1710) passed the House Judiciary Committee in June, it has been stalled, largely due to the fears of conservative Republicans in the wake of the Waco and Ruby Ridge hearings that it is dangerous to give more power to law enforcement agencies. Another significant factor in the bill's inertia has been Democratic opposition to the tying of the counter-terrorism bill to the *habeas* bill, which severely limits the rights of death row and other prisoners to seek redress via *habeas* petitions.

NACDL and other groups have strenuously objected to the House bill since its inception as H.R. 1710. On December 5, 1995, due to the efforts of Reps. Henry Hyde and Bob Barr (a former U.S. Attorney (N.D. Georgia) and current first-term congressman **[*49]** from Georgia), a compromise bill was introduced (H.R. 2703, "The Comprehensive Anti-Terrorism Act of 1995"). This bill was designed to allay the fears of the conservative Republicans that the bill gave too much power to law enforcement.

On December 13, 1995, this compromise bill was replaced by a second compromise bill, H.R. 2768 (*"The Effective Death Penalty* and Anti-Terrorism Act of 1995").

While this latest compromise bill (H.R. 2768) does correct a few objectionable provisions of H.R. 1710, most notably the deletion of some of the sections expanding the government's wiretap powers, the deletion of expanded authorization for military involvement in civilian law enforcement situations, and the narrowing of the overly broad definitions of "terrorism" and "terrorist organization," it is significantly worse with respect to individual privacy rights.

The most regressive features of H.R. 2768 are Sections 302, 305 and 307. Section 302(a) and (b) eliminates the crucial "detached and neutral magistrate" oversight role of the judiciary in the FBI's acquisition of consumer and financial information during "counter-intelligence" investigations. Under the first compromise bill, the FBI could only procure this information after an independent judicial officer made specific, statutorily mandated findings, and ordered the information turned over to the FBI. The latest compromise bill allows the FBI to access an individual's bank accounts, employment, travel and credit charge information without a court order or even evidence of criminal activity!

Section 305 maintains its predecessor compromise bill's creation of a "good-faith" exception to the statutory suppression remedy for illegal wiretapping contained in *18 U.S.C. section 2515.*

Section 307 amends *18 U.S.C. § 2518*(6) of the wiretap statute to substantially reduce the role of the judiciary in scrutinizing and overseeing wiretaps. Under current law, courts may require the government to furnish reports to the issuing judge at specified intervals demonstrating the progress made to date towards the achievement of the authorized objective and the need for continuation of the wiretap. Section 307 admirably makes such reporting mandatory, but regrettably eliminates judicial authority to order interval reports, and allows for only a single report to be made after 15 days.

Title VI of the bill, containing immigration-related provisions, retains its predecessor's permissive use of "secret evidence" to convict or deport a person under the limitless umbrella of "national security." The bill still allows the President and cabinet members the unilateral power to target unpopular groups by designating them "terrorist" organizations, and to ban or deport any member of the group. Worse, it permits the prosecution of any American who even *unwittingly* contributes to such a group, even if solely for humanitarian reasons.

The *habeas* provisions are contained in Title IX of H.R. 2768. In an effort to secure "effective [speedy] death penalties," the bill effectively guts the constitutional protections afforded through *habeas* petitions by harshly restricting federal judicial review of a broad spectrum of unconstitutional convictions and sentences, and not just in capital cases.

NACDL Legislative Director Leslie Hagin has prepared and distributed sample letters opposing this bill through the Legislative Committee for submission to House members. Please send a letter like the one that appears in this issue's NACDL News section to your representatives. This may be the most repressive legislation in recent history. Our lobbying efforts have made and can continue to make a difference. We need and welcome your participation in this battle.

1996 NACDL Fifth Annual Legislative Fly-In

The Fifth Annual NACDL Legislative Fly-In will be held May 21-22, 1996 at the Grand Hotel in Washington, D.C. Please make your reservations now. Particularly in this election year, with so much significant criminal justice legislation "on deck," it is *imperative* that Congress hear the voice of the defense bar. As demonstrated by our efforts this past year, together we can make them listen. Please join us!