Exec Sec

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

July 31, 2000

The Honorable John Ashcroft
United States Senate
Washington, D.C. 20510-2504

Dear Senator Ashcroft:

This responds to your letter to the Attorney General concerning the tragic death of Jake Robel. We appreciate the opportunity to review the legislation proposed by Jake's mother. We express our condolences to her and commend her for her effort to address this issue.

Your letter to the Attorney General sought information in three areas. We respond to each, in turn.

PROPOSED LEGISLATION

First, you asked for our views on draft legislation prepared by Jake's mother that would make background checks mandatory prior to releasing an arrestee or prisoner. The Department of Justice fully supports the suggested policy that jailers should, at an appropriate time, make a criminal records check with their state's and National Crime Information Center's (NCIC's) wanted person files before releasing any person in their custody. However, there are serious constitutional concerns as to whether such background and warrant checks for convicts and criminal suspects can be mandated under federal law. We discuss the most significant of these problems in an attachment to this letter (attachment A). We do note that each of the concerns discussed is independent and would need to be addressed to insulate the bill from constitutional attack. We are, however, grateful for your interest in this important matter and are eager to work with you to effectuate the policy goals which this legislation evinces.

NCIC INFORMATION

Second, you requested that we provide information, among other things, on the adequacy of current access to NCIC by state and local law enforcement agencies.

As you may know, the Federal Bureau of Investigation (FBI) operates the NCIC on a cooperative basis for all Federal, state, and local law enforcement agencies in the United States. Recently, NCIC expanded its computer capability ("NCIC 2000"). One of the most used files in

NCIC is its wanted person file. Each law enforcement agency is permitted, but not required, to enter its wanted persons who meet certain requirements. In terms of persons wanted for non-Federal offenses, in order to make an entry, the person (including a juvenile who will be tried as an adult) must be wanted (and have an arrest warrant issued) for a felony or serious misdemeanor offense. At the time of making the entry, the entering agency is supposed to indicate whether it will seek extradition of the individual if located in another state. The entering agency is also required to indicate whether it will place any limitations on its extradition efforts, such as the individual must be found in an adjoining state, within 1000 miles, east of the Mississippi River, etc. These limitations are placed to control costs in the criminal justice system and are usually related to the seriousness of the offense. Once an entry is made into NCIC in an acceptable format, the entering agency is notified automatically of any inquiry concerning the wanted person. It is the responsibility of the inquiring and entering agencies to communicate directly concerning what action to take pertaining to the particular individual. NCIC is merely a service that makes both agencies aware of their mutual interest.

NCIC believes that most persons wanted for the most serious crimes that are fugitives are voluntarily entered into NCIC by America's law enforcement agencies. As of February 7, 2000, there were 525,989 names of wanted persons entered in the NCIC. As of that date, the average daily number of inquiries for the NCIC was 2,180,257. Of this total, 1,198,174 inquiries concerned wanted persons (55% of the total). Since most wanted persons for serious crimes are already entered into NCIC and because most jailers check NCIC at some point while they have an individual in custody, NCIC does not anticipate that any mandated checks prior to an individual's release from custody would be beyond NCIC 2000's capacity to absorb. It should also be noted that NCIC 2000 now stores all inquiries and runs any new entries against the prior five days of inquiries (previously, it was only the last three days). This feature often allows the agency which enters the wanted person to get information on the wanted person's most recent whereabouts. In sum, State and local law enforcement agencies are well aware of NCIC's capabilities, and are constantly training their personnel to make full use of this valuable tool. In addition, pursuant to Congressional mandate, the FBI audits each state's NCIC program once every 2 years. During such audits, the wanted person's records file is reviewed to determine its accuracy, completeness, timeliness, security, and proper dissemination.

CARJACKING STATISTICS

Finally, you asked us to review the federal carjacking statute and to provide certain information regarding the number and nature of prosecutions brought under it.

The carjacking statute (18 U.S.C. § 2119), which was originally enacted in 1992, was amended in 1994 by deleting the prior firearm requirement and inserting as an element of the offense an "intent to cause death or serious bodily injury." The Department has urged the deletion of this element because we view the other elements of the statute to be sufficient and as it is often difficult to establish this element under the circumstances in many carjackings and, as

can be seen from Attachment A, there has been a steady decrease in federal prosecutions under this statute since the inclusion of this element. Attachment B reflects the carjacking prosecutions filed and number of defendants for Fiscal Years 1993 through 1999. Attachment C sets forth those carjacking cases where the Attorney General authorized seeking the death penalty for Fiscal Years 1994 through 2000 (as of February 18, 2000).

With respect to the tragic killing of Jake Robel, we know you are aware that a Missouri grand jury has indicted Kim Davis for first degree murder and the State prosecutor has indicated an intent to seek the death penalty. The determination whether to file any federal charges in this matter is being held in abeyance pending the outcome of the State prosecution.

We hope this information is helpful. Please do not hesitate to contact us if we can be of further assistance. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this letter.

Sincerely,

Robert Raben
Assistant Attorney General

Attachments

Attachment A

Potential Constitutional Concerns About "Jake's Law"

Description of the draft bill. The proposed bill would require members of correctional and law enforcement institutions to conduct records checks of convicts and criminal suspects before their release or transfer, *see* §§ 1-2, and if those checks indicate "pending charges or warrants," to refrain from releasing them, *see* § 3, and/or to follow certain procedures for transfer. *See* § 4. The proposed bill would also require correctional and law enforcement institutions to conduct an internal investigation of any member of these institutions whose failure to perform a records check results in the "accidental" release of a "convicted or 'suspected' criminal," and to discipline any members found to be negligent. *See* § 6. If the member's negligence were to result in the harm or death of another citizen, that individual would "face prosecution by the U.S. Justice Department." *Ibid.* Finally, the proposed bill would require that all correctional and law enforcement institutions have access to a common database with information pertaining to "'pending' charges/warrants on any convicted or 'charged' criminal" and that this database "be updated immediately" upon an individual's release or transfer. *See* § 5.

Congressional power. To the extent that the proposed bill would regulate the conduct of federal or tribal corrections and law enforcement institutions, or the interstate transfer of convicts and criminal suspects, it is within Congress' power. To the extent that the proposed bill would require state or local corrections and law enforcement institutions to conduct such checks and follow prescribed procedures, however, Congress' power to do so is less clear.

It may be that such background checks could be said to prevent the interstate movement of convicts and criminal suspects and thus that the Commerce Clause would be the source of Congress' power to regulate in this area. The Supreme Court's recent decision in *United States v. Morrison*, No. 99-5 (U.S. May 15, 2000), however, raises a question whether such a rationale would be constitutionally permissible. *See id.*, slip op. at 13.

Commanding actions by state and local officials. The Supreme Court has stated, "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). Although the proposed bill does not involve the administration of a "federal regulatory program," it may implicate principles of the states' "residuary and inviolable sovereignty." *Id.* at 919 (internal quotations omitted). To the extent that the proposed bill would require state or local officials to conduct records checks, to update a "pending charges/warrants" database, or to conduct internal investigations and discipline employees, the proposed bill raises serious constitutional questions under principles of federalism. Congress may be able to accomplish such goals, however, by conditioning the state and local receipt of federal funds for correctional and law enforcement institutions on the states' and localities' agreement to carry out the above.

stated requirements.

To the extent the proposed bill would require state or local officials to refrain from transferring convicts or criminal suspects unless prescribed procedures are followed, in the absence of federal substantive laws preempting state substantive laws, the proposed bill raises similar federalism concerns. Even though such provisions might not "command" state and local officials in an active sense, they appear to impose purely procedural rules in an area that is otherwise left to state substantive regulation. Just as it is unclear whether Congress may impose purely procedural, non-outcome-determinative rules on state courts adjudicating purely state-law causes of action, *see Johnson v. Fankell*, 520 U.S. 911, 919 (1997), it is likewise unclear whether Congress may impose purely procedural rules on state and local officials administering state substantive law. To reduce litigation risks, the proposed bill could again condition the receipt of federal funds for correctional and law enforcement institutions on compliance with these requirements.

Article II executive power. "[T]he executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974). The proposed bill, by stating that negligent members of correctional and law enforcement institutions whose negligence results in the harm or death of another citizen "will face prosecution by the U.S. Justice Department," might be read to mandate prosecution and thus to interfere with prosecutorial discretion. In order to avoid the significant separation of powers issue such a provision would raise, we recommend that the term "will" be replaced with "may." Moreover, the Department of Justice, while recognizing that administrative penalties may be appropriate, is opposed to criminal sanctions for mere negligent behavior in this context.

Due process and the Eighth Amendment. Section 3 of the proposed bill provides, "Any individual whose records check indicates 'pending' charges or warrants will not be released from any correctional/law enforcement institution until those charges/warrants are addressed." The meaning of the phrase "addressed," which is not defined in the statute, is unclear. With respect to pending charges, it may mean that an individual shall not be released from detention until pending charges are prosecuted, settled or dismissed. So interpreted, the proposed bill would effectively deny pretrial release on bail for a class of individuals in a manner that raises serious constitutional questions. The Supreme Court has upheld denial of pretrial release on bail only in limited circumstances -- where the denial has served a "compelling" governmental interest, *see, e.g., United States v. Salerno*, 481 U.S. 739, 748,754 (1987), and where there has been some individualized determination that the denial of bail was warranted in the particular case. *See generally id.* at 748-50, 52-54 (discussing case law). It is not clear from our review of the bill what the compelling governmental interest would be, and the bill appears not to contemplate any individualized determination that continued detention without bail would be justified. The complete denial of bail to all members of the class of individuals who have completed their term of imprisonment but face outstanding charges, we believe, would therefore raise serious concerns under the Due Process Clause and, probably, the Eighth Amendment. *See id.* at 754 (reserving

question whether "the excessive Bail clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail"). To remedy this constitutional concern, we recommend that the phrase "until those charges/ warrants are addressed" be replaced with "until the jurisdiction where the charge or warrant is pending is notified of the individual's detention and given an opportunity to execute the warrant or to request a determination from a judicial officer that the individual should be detained without bail." To reduce litigation risks, we further recommend that a time limit be specified for the permissible length of an individual's detention following notice to the other jurisdiction.

Attachment B

FEDERAL CARJACKING CASES

FY	Cases Filed	Defendants Filed
93	161	237
94	189	279
95	158	242
96	148	217
97	103	169
98	91	135
99	99	142

Attachment C

18 U.S.C. §2119
Carjacking Cases that are Death Penalty Eligible
Listed by Fiscal Year of the Attorney General Decision Date

Fiscal Year	Number of Defendants	AG Authorized Seek	AG Authorized Not Seek	Number of Cases
1994	0	0	0	0
1995	2	0	2	1
1996	9*	1	7	5
1997	16	1	15	7
1998	16**	2	12	7
1999	7	1	6	4
2000 (as of 2/18/00)	8	6	2	4
Totals	58	11	44	28

*For Fiscal Year 1996, the Attorney General deferred to state prosecution 1 case involving 1 defendant that was charged under 18 U.S.C. §2119.

**For Fiscal Year 1998, the Attorney General deferred to state prosecution 1 case involving 2 defendants that were charged under 18 U.S.C. §2119.

JOHN ASHCROFT
MISSOURI

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United States Senate

WASHINGTON, DC 20510-2504

March 29, 2000

The Honorable Janet Reno
The Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Madam Attorney General,

On February 22, 2000, in Independence, Missouri, a tragic crime occurred when a man, against whom an arrest warrant was pending, was released from a county jail, car-jacked a vehicle, and dragged its six year old passenger to death. I am requesting information from you and the Justice Department to assist me in crafting an appropriate response that will prevent such an unnecessary tragedy from recurring.

Young Jake Robel was killed when Mr. Kim Davis was released from the Carroll County, Missouri, jail, and several hours later stole the vehicle in which the 6 year old was sitting. Davis threw Jake from the vehicle, but Jake became trapped in the vehicle's seatbelt and was brutally dragged to death as on-lookers yelled at the driver to stop the car. This case has garnered significant attention in Missouri both for its brutality, and for the tragic fact that there was a pending arrest warrant for Mr. Davis at the time he was released from jail.

Obviously, we must do all we can to ensure that nothing like this ever happens again. Jake's mother has drafted proposed legislation that would make background checks mandatory prior to releasing an arrestee or prisoner. I have enclosed a copy of the text of that proposed legislation and request your comments on it.

In addition, I would appreciate information on the adequacy of current access to the National Crime Information Center (NCIC) system by state and local law enforcement agencies, including any barriers to access, as well as the sufficiency of existing funding for data collection and maintenance, and for training of state and local law enforcement on access and use of the system.

Finally, I would ask you to review 18 U.S.C. 2119, the federal carjacking statute, to ensure that crimes such as this one may be prosecuted in federal court. Please include any information or statistics on the number and location of prosecutions under this statute, including the number of cases in which the death penalty has been sought.

Thank you for your assistance in this matter. I look forward to your response.

Sincerely,

John Ashcroft

Proposed legislation from "The Organization for Jake's Law"
printed from the website: www.jakeslaw.org

A Bill Regarding Background and Warrant Checks for Convicts and Criminal Suspects

Be it enacted that:

Section 1: Individuals, whether convicted or being held on "suspicion" of charges, will not be released from any correctional/law enforcement institution prior to having a records check conducted by an authorized member of the said correctional/law enforcement institution.

Section 2: Individuals, whether convicted or being held on "suspicion" of charges, will not be transferred from one correctional/law enforcement institution to another prior to having a records check conducted by an authorized member of the said correctional/law enforcement institution.

Section 3: Any individual whose records check indicates "pending" charges or warrants will not be released from any correctional/law enforcement institution until those charges/warrants are addressed.

Section 4: Any individual whose records check indicates "pending" charges or warrants will not be transferred to another correctional/law enforcement institution unless a copy of those charges or warrants accompanies the said individual **and** the receiving institute is notified in advance of the existing charges and/or warrants.

Section 5: All correctional/law enforcement institutions will have access to a common database housing all information pertaining to "pending" charges/warrants on any convicted or "charged" individual. This database will be updated **immediately** when an individual is released from or transferred between correctional/law enforcement institutions.

Section 6: If an authorized member of the said correctional/law enforcement institution fails to perform a records check which results in the "accidental" release of a convicted or "suspected" criminal, that individual will immediately be placed on suspension from his/her job, an internal investigation will be conducted, and the investigative results will be reviewed. If investigative results determine that the said individual was negligent, this will result in disciplinary action, up to and including immediate termination of employment. Any authorized member of the said correctional/law enforcement institution whose negligence results in the harm or death of another citizen will face prosecution by the U.S. Justice Department.

Section 7: This legislation shall become effective on the first day of September 2000.