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108TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 108–588

TERRORIST PENALTIES ENHANCEMENT ACT OF 2004

JULY 7, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING AND ADDITIONAL VIEWS

[To accompany H.R. 2934]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2934) to increase criminal penalties relating to terrorist murders, deny Federal benefits to terrorists, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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29–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Terrorist Penalties Enhancement Act of 2004".

SEC. 2. PENALTIES FOR TERRORIST OFFENSES RESULTING IN DEATH; DENIAL OF FEDERAL BENEFITS TO TERRORISTS.

(a) IN GENERAL.—Chapter 113B of title 18, United States Code, is amended by adding at the end the following:

"§ 2339D. Terrorist offenses resulting in death

"(a) Whoever, in the course of committing a terrorist offense, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

"(b) As used in this section, the term 'terrorist offense' means—

"(1) a Federal felony offense that is—

"(A) a Federal crime of terrorism as defined in section 2332b(g) except to the extent such crime is an offense under section 1363; or

"(B) an offense under this chapter, section 175, 175b, 229, or 831, or section 236 of the Atomic Energy Act of 1954; or

"(2) a Federal offense that is an attempt or conspiracy to commit an offense described in paragraph (1).

"§ 2339E. Denial of Federal benefits to terrorists

"(a) An individual or corporation who is convicted of a terrorist offense (as defined in section 2339D) shall, as provided by the court on motion of the Government, be ineligible for any or all Federal benefits for any term of years or for life.

"(b) As used in this section, the term 'Federal benefit' has the meaning given that term in section 421(d) of the Controlled Substances Act, and also includes any assistance or benefit described in section 115(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, with the same limitations and to the same extent as provided in section 115 of that Act with respect to denials of benefits and assistance to which that section applies.".

(b) CONFORMING AMENDMENT TO TABLE OF SECTIONS.—The table of sections at the beginning of the chapter 113B of title 18, United States Code, is amended in by adding at the end the following new items:

"2339D. Terrorist offenses resulting in death.
"2339E. Denial of federal benefits to terrorists.".

(c) AGGRAVATING FACTOR IN DEATH PENALTY CASES.—Section 3592(c)(1) of title 18, United States Code, is amended by inserting "section 2339D (terrorist offenses resulting in death)," after "destruction),".

SEC. 3. DEATH PENALTY IN CERTAIN AIR PIRACY CASES OCCURRING BEFORE ENACTMENT OF THE FEDERAL DEATH PENALTY ACT OF 1994.

Section 60003 of the Violent Crime Control and Law Enforcement Act of 1994, (Public Law 103–322), is amended, as of the time of its enactment, by adding at the end the following:

"(c) DEATH PENALTY PROCEDURES FOR CERTAIN PREVIOUS AIRCRAFT PIRACY VIOLATIONS.—An individual convicted of violating section 46502 of title 49, United States Code, or its predecessor, may be sentenced to death in accordance with the procedures established in chapter 228 of title 18, United States Code, if for any offense committed before the enactment of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322), but after the enactment of the Antihijacking Act of 1974 (Public Law 93–366), it is determined by the finder of fact, before consideration of the factors set forth in sections 3591(a)(2) and 3592(a) and (c) of title 18, United States Code, that one or more of the factors set forth in former section 46503(c)(2) of title 49, United States Code, or its predecessor, has been proven by the Government to exist, beyond a reasonable doubt, and that none of the factors set forth in former section 46503(c)(1) of title 49, United States Code, or its predecessor, has been proven by the defendant to exist, by a preponderance of the information. The meaning of the term 'especially heinous, cruel, or depraved', as used in the factor set forth in former section 46503(c)(2)(B)(iv) of title 49, United States Code, or its predecessor, shall be narrowed by adding the limiting language 'in that it involved torture or serious physical abuse to the victim', and shall be construed as when that term is used in section 3592(c)(6) of title 18, United States Code.".

PURPOSE AND SUMMARY

H.R. 2934 would provide for increased penalties, including up to life in prison or death, for terrorist offenses that result in the death of another person. H.R. 2934 also provides that any person convicted of a "Federal crime of terrorism" is ineligible to receive any benefits from the Federal Government for any term of years or for life.

BACKGROUND AND NEED FOR THE LEGISLATION

Since September 11, 2001, Federal and State officials have worked hard to prevent further terrorist attacks on U.S. soil. Despite some changes to the law to increase penalties after the deadly terrorist attacks, a jury still cannot consider a sentence of death or life imprisonment for terrorists in many cases even when the attack resulted in death.

Existing law does not consistently provide adequate maximum penalties for fatal acts of terrorism. For example, in a case in which a terrorist caused massive loss of life by sabotaging a national defense installation in violation of 18 U.S.C. § 2155, sabotaging a nuclear facility in violation of 42 U.S.C. § 2284, or destroying an energy facility in violation of 18 U.S.C. § 1366, there would be no possibility of imposing the death penalty under the statutes defining these offenses because they contain no death penalty authorizations.

In contrast, dozens of other Federal violent crime provisions authorize up to life imprisonment or the death penalty in cases where victims are killed. There are also cross-cutting provisions which authorize these sanctions for specified classes of offenses whenever death results, such as 18 U.S.C. § 2245, which provides that a person who, in the course of a sexual abuse offense, "engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life."

Current law allows Federal courts to deny Federal benefits to persons who have been convicted of drug-trafficking or drug-possession crimes. 21 U.S.C. § 862. As a result, these convicts can be prohibited, for periods of up to life, from receiving grants, contracts, loans, professional licenses, or commercial licenses that are provided by a Federal agency or out of appropriated funds. But despite the fact that terrorism is at least as dangerous to the our national security as drug offenses, presently there is no legal authority to deny Federal benefits to persons who have been convicted of terrorism crimes.

THE COMMITTEE'S AMENDMENTS

There were several amendments offered during markup. Mr. Carter offered an amendment, which was accepted by a voice vote, to narrow the definition of "terrorist offense" for purposes of this legislation by removing the reference to 18 U.S.C. § 2331 in that definition.

Representative Green offered an amendment, which passed on a voice vote, to authorize the death penalty, in accordance with specified procedures, for violations of 49 U.S.C. § 46502 (2000) or its predecessor committed prior to the enactment of the Violent Crime

Control and Law Enforcement Act of 1994, but after the enactment of the Antihijacking Act of 1974.

Mr. Green's amendment addresses a problem in the law relating to the availability of the death penalty for persons convicted of causing death in the course of hijacking an airplane. Based on a 2003 ruling by the District Court in the District of Columbia, *U.S.* v. *Safarimi,* 257 F. Supp. 191 (D.D.C. 2003) the government may not seek the death penalty in air piracy cases that occurred after the Antihijacking Act of 1974 and before the Federal Death Penalty Act of 1994 (which repealed the 1974 Act). This would make the death penalty unavailable for individuals who killed innocent passengers in four hijackings in the 1980's. This was clearly not the intent of Congress when it passed the Antihijacking Act of 1974.

The Committee discussion on Mr. Green's amendment included a discussion regarding whether this proposed amendment would be an unconstitutional *ex post facto* law. Mr. Green offered a legal opinion prepared by the Department of Justice, which is included in the Committee record. Based on this legal opinion and the discussion of Members of the Committee, the Committee concluded that this amendment would not constitute an *ex post facto* law for the following reasons:

1) The law as it existed during the time period of the offense is not more favorable to defendants than the proposed amendment would be. "It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law." *Dobbert* v. *Florida,* 432 U.S. 282, 294 (1977).
2) The Committee concluded that either the original regime in the Antihijacking Act of 1974 or the regime of the Violent Crime Control and Law Enforcement Act of 1994 currently applies to aircraft piracy committed between the time of the two Acts.
3) Because the proposed amendment appears to be entirely ameliorative when compared with either the Antihijacking Act of 1974 or the Violent Crime Control and Law Enforcement Act of 1994, the Committee concluded that it would not violate the *ex post facto* clause.

Mr. Flake offered an amendment, which was accepted by a vote of 18–9, to prohibit the death penalty from being applied for a violation of 18 U.S.C. § 1363 (destruction of buildings or property within special maritime and territorial jurisdiction of the United States). The Committee does not intend to prohibit a person for being eligible for a death sentence in any circumstance that may fall under this statute as well as others, but rather intends only that the death penalty may not flow from this specific charge. If a defendant is charged for other crimes which warrant a death penalty, but also is charged with a violation of this statute, that individual may still be eligible for the death penalty for those violations of other criminal provisions under Title 18.

Representative Jackson-Lee offered an amendment, which was accepted by voice vote, to prohibit corporations convicted of terrorist activities from receiving any of the Federal benefits specified in the legislation.

Representative Scott offered an amendment, which failed by a vote of 7–18, to strike the provisions of this legislation that allow

a death sentence for an individual who attempts or conspires to commit a terrorist offense when that attempt or conspiracy results in the death of another.

HEARINGS

The Committee on the Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on H.R. 2934 on April 24, 2004. Testimony was received from four witnesses, representing four organizations, with additional materials submitted.

COMMITTEE CONSIDERATION

On April 24, 2004, the Subcommittee on Crime, Terrorism, and Homeland Security met in open session and ordered favorably reported the bill H.R. 2934 with an amendment, by a voice vote, a quorum being present. On June 23, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 2934, with an amendment, by a voice vote, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that there were two recorded votes during the committee consideration of H.R. 2934.

1. Amendment offered by Representative Flake was agreed to by a rollcall vote of 18 yeas to 9 noes and 1 pass.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon			
Mr. Bachus			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller		X	
Ms. Hart	X		
Mr. Flake	X		
Mr. Pence	X		
Mr. Forbes	X		
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff			X
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman	X		
Total	18	9	1

2. Amendment offered by Representative Scott was not agreed to by a rollcall vote of 7 yeas to 18 noes.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot		X	
Mr. Jenkins		X	
Mr. Cannon			
Mr. Bachus			
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake			
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn		X	
Mr. Conyers			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff		X	
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	7	18	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Rep-

resentatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2934, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 30, 2004.

Hon. F. JAMES SENSENBRENNER, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN:

The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2934, the "Terrorist Penalties Enhancement Act of 2004."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS HOLTZ-EAKIN, *Director.*

Enclosure.

H.R. 2934—Terrorist Penalties Enhancement Act of 2004.

CBO estimates that implementing H.R. 2934 would have no significant cost to the Federal Government. Enacting the bill could affect direct spending and revenues, but CBO estimates that any such effects would not be significant. H.R. 2934 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, and would impose no costs on state, local, or tribal governments.

H.R. 2934 would establish a new Federal crime for terrorist acts that result in death and would deny Federal benefits to convicted terrorists. Because those prosecuted and convicted under H.R. 2934 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Collections of such fines are recorded in the budget as revenues, which are deposited in the Crime Victims Fund and later spent. In addition, enacting H.R. 2934 could reduce the number of persons benefitting from Federal assistance programs. CBO expects that any additional revenues and direct spending, or any effects on Federal assistance programs, would not be significant because of the small number of cases likely to be affected.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2934 will help ensure consistency in the prosecution of those who commit terrorist attacks.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title. Table of Contents

This section establishes the short title of the legislation as the "Terrorism Penalties Enhancement Act of 2004."

Section 2. Penalties for Terrorist Murders

This section authorizes a court to impose a sentence of up to life imprisonment or the death penalty for conduct resulting in death that occurs in the course of various offenses committed by terrorists. This section also adds the new section 18 U.S.C. § 2339D that would add terrorist offenses resulting in death to the list of offenses in 18 U.S.C. § 3592(c)(1), which permits the jury to consider imposition of the death penalty.

This will make the option of capital punishment available more consistently in cases involving fatal terrorist crimes. The imposition of capital punishment in such cases will continue to be subject to the requirement under 18 U.S.C. § 3591 that the offender have a high degree of culpability with respect to the death of the victim or victims and to the requirement that the jury conclude that the death penalty is warranted under the standards and procedures of 18 U.S.C. § 3593. This section would also ensure that the same disincentives that the law creates with respect to drug crimes are available in the terrorism context as well. Specifically, it would give Federal courts the authority to deny Federal benefits to any individual or corporation convicted of a terrorist offense listed in 18 U.S.C. § 2332b(g)(5)(B).

Section 3. Death penalty in Certain Air Piracy cases Occurring Before Enactment of the Federal Death Penalty Act of 1994

Section 3 embodies the Green amendment described above in Committee Amendments section that clarifies that the death penalty is available for certain air privacy crimes committed between the enactment of the Antihijacking Act of 1974 and the enactment of the Federal Death Penalty Act of 1994.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

CHAPTER 113B—TERRORISM

Sec.
2331. Definitions.

* * * * * * *

2339D. Terrorist offenses resulting in death.
2339E. Denial of federal benefits to terrorists.

* * * * * * *

§ 2339D. Terrorist offenses resulting in death

(a) Whoever, in the course of committing a terrorist offense, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

(b) As used in this section, the term "terrorist offense" means—

(1) a Federal felony offense that is—

(A) a Federal crime of terrorism as defined in section 2332b(g) except to the extent such crime is an offense under section 1363; or

(B) an offense under this chapter, section 175, 175b, 229, or 831, or section 236 of the Atomic Energy Act of 1954; or

(2) a Federal offense that is an attempt or conspiracy to commit an offense described in paragraph (1).

§ 2339E. Denial of Federal benefits to terrorists

(a) An individual or corporation who is convicted of a terrorist offense (as defined in section 2339D) shall, as provided by the court on motion of the Government, be ineligible for any or all Federal benefits for any term of years or for life.

(b) As used in this section, the term "Federal benefit" has the meaning given that term in section 421(d) of the Controlled Substances Act, and also includes any assistance or benefit described in section 115(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, with the same limitations and to the same extent as provided in section 115 of that Act with respect to denials of benefits and assistance to which that section applies.

* * * * * * *

SECTION 60003 OF THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

SEC. 60003. SPECIFIC OFFENSES FOR WHICH DEATH PENALTY IS AUTHORIZED.

(a) * * *

* * * * * * *

(c) DEATH PENALTY PROCEDURES FOR CERTAIN PREVIOUS AIRCRAFT PIRACY VIOLATIONS.—An individual convicted of violating section 46502 of title 49, United States Code, or its predecessor, may be sentenced to death in accordance with the procedures established in chapter 228 of title 18, United States Code, if for any offense

committed before the enactment of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322), but after the enactment of the Antihijacking Act of 1974 (Public Law 93–366), it is determined by the finder of fact, before consideration of the factors set forth in sections 3591(a)(2) and 3592(a) and (c) of title 18, United States Code, that one or more of the factors set forth in former section 46503(c)(2) of title 49, United States Code, or its predecessor, has been proven by the Government to exist, beyond a reasonable doubt, and that none of the factors set forth in former section 46503(c)(1) of title 49, United States Code, or its predecessor, has been proven by the defendant to exist, by a preponderance of the information. The meaning of the term "especially heinous, cruel, or depraved", as used in the factor set forth in former section 46503(c)(2)(B)(iv) of title 49, United States Code, or its predecessor, shall be narrowed by adding the limiting language "in that it involved torture or serious physical abuse to the victim", and shall be construed as when that term is used in section 3592(c)(6) of title 18, United States Code.

* * * * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MAY 5, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr., Chairman of the Committee, presiding.

[Intervening business.]

Chairman SENSENBRENNER. The next item on the agenda is H.R. 2934, the "Terrorist Penalties Enhancement Act of 2003." The Chair recognizes the gentleman from California, Mr. Coble, the Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security.

Mr. COBLE. That was North Carolina, Mr. Chairman.

Chairman SENSENBRENNER. North Carolina.

Mr. COBLE. Mr. Chairman, the Subcommittee on Crime, Terrorism, and Homeland Security reports the bill H.R. 2934, the Subcommittee amendment in the nature of a substitute, and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, the bill will be considered as read and open for amendment at any point, and the Subcommittee amendment in the nature of a substitute which the Members have before them will be considered as read, considered as the original text for purposes of amendment and open for amendment at any point.

[The Subcommittee Amendment in the Nature of a Substitute follows:]

SUBCOMMITTEE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2934

[Showing the text as ordered reported by the Subcommittee on Crime, Terrorism, and Homeland Security on 21 APRIL 2004]

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Terrorist Penalties Enhancement Act of 2004''.

SEC. 2. PENALTIES FOR TERRORIST OFFENSES RESULTING IN DEATH; DENIAL OF FEDERAL BENEFITS TO TERRORISTS.

(a) IN GENERAL.—Chapter 113B of title 18, United States Code, is amended by adding at the end the following:

''§ 2339D. Terrorist offenses resulting in death

''(a) Whoever, in the course of committing a terrorist offense, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life.

''(b) As used in this section, the term 'terrorist offense' means—

''(1) a Federal felony offense that is—

"(A) international terrorism or domestic terrorism (as defined in section 2331);

"(B) a Federal crime of terrorism as defined in section 2332b(g); or

"(C) an offense under this chapter, section 175, 175b, 229, or 831, or section 236 of the Atomic Energy Act of 1954; or

"(2) a Federal offense that is an attempt or conspiracy to commit an offense described in paragraph (1).

"§ 2339E. Denial of Federal benefits to terrorists

"(a) An individual who is convicted of a terrorist offense (as defined in section 2339D) shall, as provided by the court on motion of the Government, be ineligible for any or all Federal benefits for any term of years or for life.

"(b) As used in this section, the term 'Federal benefit' has the meaning given that term in section 421(d) of the Controlled Substances Act, and also includes any assistance or benefit described in section 115(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, with the same limitations and to the same extent as provided in section 115 of that Act with respect to denials of benefits and assistance to which that section applies.".

(b) CONFORMING AMENDMENT TO TABLE OF SECTIONS.—The table of sections at the beginning of the chapter 113B of title 18, United States Code, is amended in by adding at the end the following new items:

"2339D. Terrorist offenses resulting in death.
"2339E. Denial of federal benefits to terrorists.".

(c) AGGRAVATING FACTOR IN DEATH PENALTY CASES.—Section 3592(c)(1) of title 18, United States Code, is amended by inserting "section 2339D (terrorist offenses resulting in death)," after "destruction),".

Chairman SENSENBRENNER. The Chair recognizes the gentleman from North Carolina, Mr. Coble, to strike the last word.

Mr. COBLE. I thank the Chair.

Mr. Chairman, the Subcommittee on Crime, Terrorism, and Homeland Security recently held a hearing and markup on this important piece of legislation which provides enhanced penalties for terrorist offenses resulting in death and the denial of Federal benefits to anyone convicted of a terrorist offense.

At present, the jury is denied the ability to consider the death penalty or life imprisonment in many terrorist cases, even those resulting in death. In contrast, there are other Federal—other Federal provisions authorize the death penalty or life imprisonment for crimes resulting in death. Furthermore, while those convicted of drug-related crimes can be denied benefits, such as grants, contracts, loans, and professional licenses, those convicted of terrorist offenses cannot be denied such benefits. It hardly seems fair to allow a person who has committed terrorist offenses against our citizens to benefit from the generosity of those same citizens.

These inconsistencies in the law need to be altered, it seems to me, and because the potential threat here is so great, we hope that the change—that changing the law to allow death sentences or life imprisonment will serve to deter would-be terrorists.

I hope my colleagues can support this necessary and important bill, and I yield back my time, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I am opposed to H.R. 2934, the "Terrorist Penalty Enhancement Act." This bill provides for a massive expansion of the Federal death penalty, both for crimes that supporters of the death penalty might think warrant the death penalty as well as crimes many would not expect to be associated with death.

The bill creates 23 new death penalties by making all 43 Federal crimes of terror under 18 U.S.C. 2332b(g)(5) now death penalty eligible. But it also adds a sweeping catch-all death penalty provision and makes any Federal crime that meets a broad definition of domestic terrorism or international terrorism a death penalty-eligible crime should death occur as a result of conduct of such crime. Moreover, the bill makes attempts and conspiracies to commit such crimes death penalty-eligible for all people that are involved in any way.

Now, we have seen how this works in conspiracies and aiding and abetting in drug cases when a girlfriend can get decades of hard time while the kingpin boyfriend gets less time. This bill does not limit crimes to the death penalty eligibility to heinous crimes or offenses. It is so broad that it includes present offenses that, but for this bill becoming law, could require sentences of just a few months or even probation.

In addition to deaths that occur as a result of the direct intent to murder, maim, kidnap, or destroy a nuclear facility or other such serious heinous crimes, crimes such as material support for a terrorist organization, injury, not destruction or damage but injury to a Federal building, are also included. They're included whether the crimes occur in the context of an effort to violently overthrow our Government or in the context of a traditional protest against Gov-

ernment policies. If death results, even if it was not specifically intended, anyone who was involved in committing or who attempted or conspired to commit any of the covered offenses would now be death penalty eligible.

The provisions of the bill create a death penalty liability tantamount to a Federal felony murder rule with all of the aspects—with the additional aspect that all co-conspirators, aiders, and abettors would also be subject to the death penalty. This presents constitutional issues as to the appropriateness of the death penalty under these circumstances.

The Attorney General, who ultimately approves death penalty cases, has a broad directive—has issued a broad directive to Federal prosecutors to pursue the most severe penalties, including more death penalties. With the broad expansion of the death penalty in this bill, he can pick and choose death penalty cases not necessarily on what someone did, but on who they are or what they are labeled, using nationality, citizen status, or other subjective factors.

If, for example, a Middle Eastern group is labeled a terrorist organization, their crime could be a capital offense. Will the same prosecutorial zeal be unleashed against abortion protesters when they've committed a similar act?

Now, Mr. Chairman, there are a number of unsavory reasons for charging a death penalty offense under the provisions of this bill, even when no reasonable expectation—there's no reasonable expectation that the death penalty will actually be imposed, for example, to help in the negotiations, getting a guilty plea out of somebody who is innocent, or for whom the evidence is shaky, or simply to get a more prosecutorially favorable jury.

In a death penalty-qualified jury, anyone opposed to the—anybody opposed to capital punishment could be stricken for cause without the use of a peremptory strike. The so-called death-qualified juries are notoriously believed to be more prosecutory—more prosecution oriented and they're also not broadly based, especially when you consider the polls that reflect that half of the African American community is opposed to the death penalty and, therefore, ineligible for service, whereas only about 20 percent of the rest of the country opposes the death penalty. So just charging the death penalty entitles the prosecutor to this advantage.

Mr. Chairman, the provisions of the bill will be duplicative of many State jurisdictions and often conflicting. One such conflict would be where the residents of a particular State have chosen not to authorize capital punishment and the Federal Government pursues the death penalty against the State's public policy.

Another concern, of course, is the frequent death rate—excuse me, frequent error rate in applying the death penalty. In the last 10 years, more than 100 people on death row have been found factually innocent of the crime for which they received the death penalty.

Mr. Chairman, I'd ask unanimous consent for an additional minute.

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. With this kind of record of administering the existing death penalty laws, we should await the passage of the Innocents

Protection Act before such a wholesale addition to death penalties occurred.

Another difficulty occurs when we try to cooperate with other countries. We're already experiencing difficulties from the rest of the civilized world because of our proliferation of the death penalty. Many countries, for example, will not extradite suspects if they may be subject to the death penalty, and when you have such controversial issues as to whether or not someone supports an organization's social or humanitarian program, knew or should have known that it had been designated a terrorist organization, can only exacerbate such difficulties.

Mr. Chairman, in spite of the over-breadth of the bill and all of the concerns, at the recent hearing on the bill, incredibly, no witness was able to conclude that it would apply to either the 9/11 offenders or to the Oklahoma bombing case.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. SCOTT. Mr. Chairman, 5 more seconds? I hope we will defeat the bill. It's unnecessary and unjustified at this time, or at least pass limiting amendments.

I thank you.

Chairman SENSENBRENNER. Without objection, all Members may include opening statements in the record at this point.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

I thank Chairman Sensenbrenner and Ranking Member Conyers for their efforts in holding today's markup of the Terrorist Penalties Enhancement Act, or H.R. 2934. Because of the nature of the implications that it can have on our criminal justice system and on the U.S. Constitution, it is critical that we do a thorough job of analyzing its purposes and effects.

As it is drafted, I oppose this legislation because it is overbroad and vague in its attempt to deter and punish terrorists. My opposition to the Terrorist Penalties Enhancement Act does not equate to sympathy for terrorist activity. My opposition does, however, equate to an initiative to protect the civil rights and civil liberties of non-terrorists. This legislation, while on its face purports to address those crimes that all Americans will rally against, especially after 9/11. It is very easy to put forth legislation under the guise of securing the homeland while advancing a separate agenda at the same time. The bill that is before us today seeks to do just that. Senator Arlen Specter introduced its companion bill, S. 1604, on September 10, 2003; H.R. 2934 authorizes the death penalty for any act of domestic or international terrorism that results in the death of a person. While I wholeheartedly advocate the prosecution of domestic and international terrorists, I do not support legislation that is overbroad or that overextends its purported purpose. We as legislators must be very careful not to encroach upon the fundamental freedoms that are guaranteed under the U.S. Constitution. The Terrorist Penalties Enhancement Act has serious implications that far exceed the necessity of punishing terrorist activity.

NECESSITY OF INTERNATIONAL SIGNATORIES AND A COALITION

On December 10, we will celebrate the 56th anniversary of the adoption of the Universal Declaration of Human Rights in 1948 by the United Nations General Assembly. These thirty articles identify rights to which all human beings are entitled.

Adherence to international law is a very important issue that has not been consistently addressed by the current Administration. Section 2339D of the bill references the definition of "terrorist offense" as used in Section 2331 of Chapter 113B of title 18, United States Code and includes "international terrorism" in the scope of the law. We have not yet formed a coalition of members of the international community to formulate a single system of regulations or guidelines for homeland security or to deal with terrorists that is reliable enough to create further legislation that applies the death penalty. The record of extradition between the U.S. and other nations has tremendous gaps and functional problems that would create an impedi-

ment to the even-handed application of this legislation, as drafted. It is logically impossible to legislate internationally when we have not included international parties as signatories to the legislation. H.R. 2934 has international intentions with national jurisdiction.

RACIAL AND ETHNIC PROFILING AS A RESULT OF H.R. 2934

Just a short time after 9/11, a group of terrorist suspects were assembled. In just over one year, over 87,000 people were interrogated, all of them Arabs. Of these, at least 1,200 were detained, many without charges. They were declared to be "material witnesses" for a trial that has not taken place to date. The names of these detainees were not released. They could not communicate with anyone outside, and they were frequently transported. The above set of events circumvented their right to legal counsel and prevented them from filing suit against the government for their illegal detention—in the name of homeland security.

To further illustrate the potentially harmful effects that this legislation can have on my District, Houston's Joint Terrorism Task Force, created a few weeks before the first World Trade Center bombing in 1993, has investigated over 100 hate crimes since 9/11. Because Houston is viewed as one of eight U.S. cities most vulnerable to a potential terrorist attack, it is likely that this number will continue to grow. Furthermore, Houston is the only area in the U.S. with critical infrastructure in all risk categories.

Houston also has the nation's second-largest Muslim population, numbering 350,000, and 80 mosques. Yet investigators are quick to stress that they do not use a broad brush to target Middle Easterners. The Council on American Islamic Relations, an Islamic civil rights group with offices in Houston has commented on the effects of post-9/11 law enforcement. Council spokeswoman Rabiah Ahmed said that while the FBI is doing important outreach in the fight against hate crimes, the agency is sometimes guilty of "profiling and unequal treatment of Muslims."

The terror suspects were charged months after their detention. Only one of the 1,200 was charged with terrorist related action. Most of the group was deported for immigration-related infractions.

This bill, as drafted, will result in racial and ethnic profiling and subsequent excessive or premature punishment that could affect many communities of law-abiding people. In Houston alone, the Arab community represents a portion of my constituency that has grown from a few hundred to over 65,000 in the last 20–30 years.

Furthermore, the extension of the death penalty in Section 2339D of the Act is dangerously broad. Until we first correct our legal definition of a "terrorist offense," I think it unwise to extend the death penalty as a direct corollary to that definition. Passing this bill as drafted would be akin to the blind leading the blind—to death. Terrorism philosophically is still a very new thing to America and to the entire world, and we could very easily and logically label every crime a "terrorist offense" if a death follows. We as legislators would be playing a dangerous game by expanding the death penalty based on an already tenuous definition.

Our efforts must continue to advance the cause of democratic principles, respect for international law, and a government based on transparency and accountability. It is a difficult task to legislate safeguards for security while preserving individual liberties. Provisions that are facially "anti-terrorist" do not necessarily secure our homeland. Therefore, the bill that we analyze and will mark up today must be revamped with the above in light of the above considerations.

I respectfully oppose this legislation as drafted, and request that we instead work to create a more tight and narrowly-tailored definition of "terrorist offense."

Thank you.

[Intervening business.]

Chairman SENSENBRENNER. The Committee will resume consideration of H.R. 2934, the "Terrorist Penalties Enhancement Act." Are there amendments? The gentleman from Texas, Mr. Carter.

Mr. CARTER. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 2934, offered by Mr. Carter. Page 2, strike lines 1 through 2——

Mr. CARTER. Mr. Chairman, I ask unanimous consent to waive the reading.

Chairman SENSENBRENNER. Without—well——

Mr. CARTER. To suspend the reading.

Chairman SENSENBRENNER. The request is moot, and the gentleman will be recognized for 5 minutes.

[The amendment offered by Mr. Carter follows:]

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2934 OFFERED BY JOHN R. CARTER

Page 2, strike lines 1 through 2 and redesignate succeeding paragraphs accordingly.

Mr. CARTER. Thank you, Mr. Chairman.

I'd like to thank you for allowing my legislation, H.R. 2934, the "Terrorist Penalty Enhancement Act," to be considered by the Committee. I am pleased that 83 Members of my—83 of my colleagues have agreed to cosponsor H.R. 2934, which will provide new and expanded penalties to those who commit fatal acts of terrorism.

We must protect our neighborhoods from the threat of violent crimes which, unfortunately, in today's world includes the threat of terrorist attacks. Congress must act to protect U.S. citizens from such attacks and to bring to justice those who have threatened our freedom.

My straightforward legislation will make any terrorist who kills eligible for the Federal death penalty. This legislation will also deny these same terrorists any Federal benefits they otherwise may have been eligible to receive.

During the Subcommittee consideration, my colleague Mr. Green offered an amendment which expands Federal benefits denied to include welfare and food stamps. I am pleased this amendment was adopted.

As a former State district judge for over 20 years, I have presided over five capital murder trials, three of which have resulted in the death penalty. From my experience, I believe the death penalty is a tool that can deter acts of terrorism and that can serve as a tool for prosecutors when negotiating sentences. In fact, in the Subcommittee hearing, Professor Joanna Shepherd from Emory University testifies that the death penalty does deter crime, which is indicated through her research.

President George W. Bush has expressed his support for this legislation. In his speech to the FBI Academy, President Bush said, "For the sake of the American people, Congress should change the law and give law enforcement officials the same tools they have to fight terror that they have to fight other crime." In Hershey, Pennsylvania, President Bush again emphasized the inequity in current law.

I agree with President Bush. We ought to be sending a strong signal. If you sabotage a defense installation or a nuclear facility in a way that takes an innocent life, you ought to get the death penalty, the Federal death penalty.

This legislation today puts all would-be terrorists on notice that they will receive the ultimate justice they should in the case where they decide to plan and execute future attacks on the American people. The amendment I am offering would strike from my bill the definition of international or domestic terrorism as defined in section 2331. Two weeks ago, I was fortunate to testify on behalf of H.R. 2934 when it was considered before the Subcommittee on Crime, Terrorism, and Homeland Security. Since this hearing, concerns about the inclusion of section 2331 in this legislation have been raised. In order to address this matter at a later time, I offer this amendment and request it be adopted.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Texas, Mr. Carter. Those in favor will say aye? Opposed, no?

The ayes appear to have it. The ayes have it, and the amendment is agreed to.

Are there further amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I have a unanimous consent request that letters from the University of Memphis, the Criminal Justice Law Letter, Criminologist, and Rowan University, and the ACLU be inserted in the record in contradiction of the testimony from Dr. Shepherd that was just cited.

Chairman SENSENBRENNER. Without objection.

[The material referred to follows:]

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April 27, 2004

RE: HR-2934

The Honorable Howard Coble
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
2468 RHOB
United State House of Representatives
Washington, D.C. 20515

The undersigned faculty of the Department of Criminology and Criminal Justice at the University of Memphis ask that the Subcommittee on Crime, Homeland Security, and Terrorism consider the following facts concerning the death penalty and deterrence.

- The effect of executions on homicide rates has been exhaustively researched by criminologists. Overwhelmingly, this research fails to support the conclusion that executions are a greater deterrent to murder than are long prison sentences.
- The American Society of Criminology, the leading professional organization of criminologists, has noted in its policy position on capital punishment that "social science research has found no consistent evidence of crime deterrence through execution."[1]
- Recent research, using sophisticated statistical techniques and disaggregated homicide data, has failed to find evidence that executions have a deterrent effect greater than that of imprisonment; several of these studies find an **increase** in homicides after highly publicized executions.[2]
- A recent exhaustive review of the research literature, written by the lead researchers in the area, concluded that "a significant general deterrent effect for capital punishment has not been observe and in all probability does not exist."[3]
- No criminologists have studied the deterrent effect of executions on potential terrorists. Criminological theory and experience, however, indicate that it is extraordinarily unlikely that the threat of executions could deter terrorists.

W. Richard Janikowski, J.D., Chair
David R. Forde, Ph.D., Associate Professor
David J. Giacopassi, Ph.D., Professor
Donna Huddleston, M.A., Instructor
Jerry R. Sparger, Ph.D., Professor
K.B. Turner, Ph.D., Assistant Professor
Margaret Vandiver, Ph.D., Professor

cc: The Honorable Robert C. "Bobby" Scott

[1] http://www.asc41.com/deathpenalty.html

[2] Cochran, J.K., M.B. Chamblin and M. Seth (1994) "Deterrence or brutalization? An impact assessment of Oklahoma's return to capital punishment" *Criminology* 32:107-134; Sorensen, J., R. Wrinkle, V. Brewer, and J. Marquart (1999) "Capital punishment and deterrence: Examining the effect of executions on murder in Texas" *Crime & Delinquency* 45: 481-493; Thomson, E. (1997) "Deterrence versus brutalization: The case of Arizona" *Homicide Studies* 1: 110- 128; Thomson, E. (1999) "Effects of an execution on homicides in California" *Homicide Studies* 3: 129-150.

[3] Bailey, W.C. and R.D. Peterson (1997) "Murder, capital punishment and deterrence: A review of the literature." In H.A. Bedau (ed.), *The Death Penalty in America: Current Controversies* (pp. 135-161). New York and Oxford: Oxford University Press, p. 155.

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April 28, 2004

The Honorable Howard Coble
Chair, Subcommittee of Crime, Terrorism, and Homeland Security
2468 RHOB
United States House of Representatives
Washington, D.C. 20515

Dear Rep. Coble,

I write for the record in opposition to HR 2934, The Terrorist Penalties Enhancement Act of 2003, for I am concerned that the Congress might take action on this bill thinking that the research community has found that the death penalty has a deterrent effect, and will improve public safety. Your subcommittee has heard from a group of economists who claim their analysis finds a cause and effect of publicizing the death penalty and reduction of all murders. I might remind you that their spokesperson, Joanna Shepherd, says she is only reporting their research, not recommending that policy.

I find it curious, and want your committee to know, that this economists group is virtually the only researchers who make such a finding. The overwhelming majority of social science research, including criminologists, psychologists, sociologists, and legal researchers find the opposite. They not only find no deterrent effect for the death penalty, but the same finding for severe punishment in general, including mandatory minimum sentencing. Tough sentencing may well satisfy retribution, but has no utilitarian effect of diverting offenders themselves away from crime, or dissuading others. What works as punishment is certainty, not severity, and only if it is accompanied by social disgrace.

The death penalty for terrorist acts can deliver on neither, and not only does it carry no disgrace, but martyrdom. The spectacle of a domestic terrorist going through the death penalty procedures in America would be giving publicity for a recruitment drive.

How then can we explain the full weight of social science research contradicting the economists' findings using multiple regression statistics? Their flaw is the same today as it was in the 1970's when the work of Isaac Ehrlich was refuted, and refining their statistics does not remove that flaw. They have no social controls. Statistical significance, without controls, explains nothing. They have no baseline comparisons with which to explain their findings. Without that, their work can not be called science.

Succinctly, it means nothing to chart murder rates going up or down and correlating them with executions unless executions is the only variable affecting those murders. Other things are happening in American society. Crime rates go up and down for many reasons, no single intervention can take credit or blame without controlling for all else. During the moratorium, crime was on the rise, and in the 90's crime was declining.

Shepherd cites 13 recent papers in the economics literature that find a deterrent effect. In all of social science there are virtually no papers that confirm that. I can only believe that economics research, without social controls, is unable to explain a complicated behavior like murder. Economists assume rational behavior. That assumption can not explain irrational behavior like murder, and especially suicidal terrorist behavior. Shepherd says that there is a strong consensus among economists that capital punishment deters crime. They are alone among researchers.

As for me, after a 36 year academic career as a criminologist, I now edit an online newsletter on crime policy in Washington, the "Criminal Justice Washington Letter." The website is www.crimeletter.net. With my experience and wide contacts in the criminology profession, I am comfortable that I am in touch with the mainstream research on crime policy issues.

Very truly yours,

Michael Israel

Michael Israel
Editor, Criminal Justice Washington Letter

Cc: The Honorable Robert C. "Bobby" Scott

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April 27, 2004

The Honorable Howard Coble
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
2468 RHOB
United State House of Representatives
Washington, D.C. 20515

To The Honorable Howard Coble:

I oppose HR-2934, The Terrorist Penalties Enhancement Act of 2003. I do not believe that the death penalty deters crime or terrorist actions. The statement given by Joanna M. Shepherd in support of HR-2934 is not factually accurate. For instance, three of the studies she cites have been called into question.

The **Cloninger and Marchesini** study compares relatively brief and arbitrary time periods in Texas. They claim that there were more homicides during a court imposed stay on executions than during the prior period when executions were conducted and the first couple of months after they were resumed. They also adjust their data to fit their hypothesis. They conclude from this limited sample that executions deter homicides. However, their own research is belied by the fact that the homicide rate in Texas continued to climb after executions were reinstated. They simply did not look at other data because it refutes their hypothesis.

The **H. Naci Mocan and R. Kaj Gittings** study uses the term "commutations" incorrectly. There is also the more fundamental issue that the "news" of "commutations" was unlikely to reach the people who were committing, or likely to commit, homicides. This would be even more significant, one would think, in considering whether or not there was any deterrent effect regarding terrorist acts since terrorist acts are often undertaken as an act of martyrdom.

Finally, the study by **Dezhbakhsh and Rubin** is also suspect. First, they do a county by county analysis based on what appears to be incomplete data. Second, this paper has been around for years and just now was updated and accepted for publication yet they have not released their data to others for study. Third, they do a regression analysis which controls for a number of variables, some of which are straw persons, being set up to knock down. For instance, they posit that Republican voter registration is correlated with tough on crime policies and NRA membership reflects the number of guns in the community. But, fourth, and most importantly, their figures do not make sense -- if they were right that each execution saves 18 lives (with a margin of error of 10, so 8 to 28) the death states would have had a

234 more homicides in 2000 than 1999 (or between 104 to 364) since executions dropped from 98 to 85. And, in the years 1977 to 1981 (where executions averaged one per year, there would have been 1746 more homicides per year or a total of 8730 more homicides for that 5 year period than in 1999. This is not the case. However, their paper provides only conclusions not underlying data.

While they take on some criticisms of other studies, often by using proxies (e.g., NRA membership for gun ownership), there have been other criticisms of their work. For instance, the murder rate is affected by the fact that there is now far superior trauma care and not as many people die who are wounded. The prevalence of cell phones has thwarted some homicides and has caused medical care to be summoned earlier. Hence, whatever the data shows since the resumption of executions in 1977, it is not possible to attribute fluctuations in the murder rate to the presence or absence of executions.

All of three these "studies" fly in the face of long term and broad based research which shows that there is no deterrent effect to the death penalty and that there may be a brutalizing effect which causes an increase in homicides. In other words, long term longitudinal studies and studies comparing murder rates in jurisdictions with and without the death penalty have all concluded that a society does not deter by killing prisoners.

However, even Dezhbakhsh and Rubin say, "Finally, a cautionary note is in order: deterrence reflects social benefits associated with the death penalty, but one should also weigh in the corresponding social costs. These include the regret associated with the irreversible decision to execute an innocent person. Moreover, issues such as the possible unfairness of the justice system and discrimination must be considered when society makes a social decision regarding capital punishment."

We know that these underlying problems are real. The death penalty system in America is not adequate to the task of imposing the "final punishment" in a just and non-discriminatory fashion. Innocent people have been sentenced to death. The marginalized of society get death -- the poor, people of color, mentally disabled and those abused as children. It is not the worst of the worst; it is primarily the poorest of the poor and those who cannot defend themselves. The rest of the Western world has abandoned the killing of prisoners and we too should abandon this anachronism.

Therefore, I urge you to vote against HR-2934, The Terrorist Penalties Enhancement Act of 2003.

Respectfully submitted,

Robert M. Sanger
Certified Criminal Law Specialist

Cc: The Honorable Robert C. "Bobby" Scott

Robert M. Sanger, senior partner in the Santa Barbara firm of **Sanger & Swysen**, is an experienced trial lawyer who has practiced in Santa Barbara since 1973. Mr. Sanger is a **Certified Criminal Law Specialist**, certified by the State Bar of California Board of Legal Specialization. He has handled complex criminal and civil cases in the State and Federal courts throughout California as well as other jurisdictions, and numerous homicide and death penalty cases at both the trial and appellate court levels. Born in Arlington, Virginia, 1949; Admitted to Practice Law: 1973, California; 1974, U.S. District Court, Northern, Central, Eastern and Southern Districts of California; District of Arizona; Western District of Oklahoma; 1975, U.S. Tax Court; 1979, U.S. Supreme Court; 1981, U.S. Court of Appeals, Ninth Circuit; U.S. Court of Appeals, Tenth Circuit. Education: University of California at Santa Barbara (B.A. 1970); University of California School of Law at Los Angeles (J.D. 1973). Author: Frequent contributor of articles and book reviews published in the *American Bar Association Journal*, *The Federal Lawyer*, the *California Attorneys for Criminal Justice Forum* and the *Santa Barbara County Bar Association Quibbler*. The ***Santa Clara Law Review*** recently published a lengthy article by Sanger on California's death penalty system, 44 UCLRev 101 (2003).

Law and Justice Studies

The Honorable Howard Coble
Chair, Subcommittee on Crime, Terrorism, and
Homeland Security
2468 RHOB
United States House of Representatives
Washington, D.C. 20515

April 28, 2004

Re: HR-2934, The Terrorist Penalties Enhancement Act of 2003

Dear Rep. Coble:

This letter is to express my concern, as a criminologist who has been conducting empirical research on crime since 1988, that Congress will be considering the above referenced bill with the mistaken impression that research evidence supports the assumption that the death penalty deters. I received my J.D. from University of Pennsylvania Law School in 1982 and, my Ph.D. in Criminology from University of Pennsylvania in 1996. I have published numerous articles in peer-reviewed journals, regularly taught undergraduate and graduate courses relating to crime causation and corrections, testified as an expert witness, and been doing research relating to the death penalty since 1996. Currently, I am a Full Professor of Law and Justice Studies at Rowan University. As a former prosecutor and police academy and in-service instructor I appreciate the importance of effective law enforcement, but as a social scientist I cannot ignore the overwhelming research evidence demonstrating that the death penalty does not deter.

There has been some research, such as the well known study by Ehrlich, that claimed to find a deterrent effect; but a panel of the National Academy of Sciences reanalyzed Ehrlich's data and found no deterrent effect, and the vast majority of the studies have failed to show that capital punishment deters. Studies by criminologists have compared murder rates before and after an execution, compared rates in states and countries with and without the death penalty, and used time series approaches that look at the long-term association between the death penalty and murder. Many of these studies utilize multiple regression techniques that control for some of the multitude of other factors that might affect murder and all crime rates, including, but not limited to, demographics, economics, public attitudes, and effectiveness of criminal justice programs. The results of course will vary depending on which factors a researcher chooses to include in his or her statistical model. This is why social scientists look to see what the weight of the evidence reveals. Over 200 studies have looked for a deterrent effect and most of these studies have failed to find it. Some have actually found that murders increase after an execution, which has been called a brutalization effect. The counter intuitive finding in a study that claims crimes of passion are deterred by the remote possibility of the death penalty raises questions about whether the statistical model adequately controlled for all the factors that influence murder rates. It also should be noted that at the same time executions were increasing during the 1990s, all crimes were decreasing, and there is no reason to think other crimes would be influenced by the death penalty for capital murder. Similarly, many murders would not even qualify as capital murders, so that any analysis that is not limited to capital offenses is suspect.

Leaving aside the fact that terrorists, many of whom seek martyrdom, are extremely unlikely to be deterred, the research evidence simply does not support expanding the use of the death penalty on the grounds that it deters. Thank you for your consideration.

Respectfully,

Wanda D. Foglia, J.D., Ph.D.
Professor of Law and Justice Studies

C: The Honorable Robert C. Scott

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April 29, 2004

Rep. Bobby Scott, Ranking Member
Subcommittee on Crime, Terrorism and Homeland Security
House Judiciary Committee
Rayburn House Office Building, Room B-336
Washington, DC 20515

Re: Intent requirements for death sentence under H.R. 2934, the "Terrorist Penalties Enhancement Act"

Dear Rep. Scott:

At the hearing that was held on April 21 on H.R. 2934, the "Terrorist Penalties Enhancement Act," there was some disagreement about whether imposition of the death penalty under the proposed legislation requires an intentional killing. Witnesses who supported the legislation argued that only an intentional killing under federal law is eligible for the death penalty, and, as a result, the proposed legislation could not apply to acts of political protest or civil disobedience unless the defendant intended to kill the victim.

My testimony included examples where the defendant may not have specifically intended to kill anyone, i.e., the defendant did not kill on purpose. You asked me to explain specifically what level of intent is required under federal law to impose a death sentence. You also asked me whether these intent requirements would, as supporters argued, effectively preclude a death sentence for any act of civil disobedience or political protest.

Federal law does <u>not</u> require the government to establish that the defendant who commits a crime for which death may be imposed actually intended to kill the victim. Rather, a death sentence is also available for an "act of violence" if the defendant knows that the act would "creat[e] a grave risk of death" such that "participation in the act constituted a reckless disregard for human life . . . ." In fact, 18 U.S.C. § 3591, which applies to federal death sentences and would apply to the proposed legislation, lays out four possible levels of intent for which a death sentence may be imposed. A defendant may be sentenced to death if the defendant:

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the

victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act . . . .

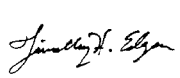
18 U.S.C. § 3591(a)(2).

These intent standards do not rule out the potential for a death sentence in the case of a defendant whose violation of a federal law as an act of civil disobedience in the course of a political protest results in a death as described in the examples in my testimony. For example, a prosecutor who sought the death penalty for felony violations of the Freedom of Access to Clinic Entrances (FACE) Act that resulted in the death of a woman seeking medical treatment could argue that a protestor's actions met the requirements of paragraph (D), depending on the facts of the case. Additional factors might help the prosecutor argue that the intent standard was met. For example, if the woman who later died had made clear to the defendant that she was in need of medical treatment and defendant ignored her, or the defendant engaged in some harmful physical act (e.g., shoving, pushing) that contributed to the death, the prosecutor would use these or other facts to establish the level of intent required by federal law.

While the supporters of the legislation may not intend such an extreme result, the examples I lay out in my testimony help show how the proposed legislation's expansion of the federal death penalty, as currently drafted, is exceedingly broad. The statute covers any politically-motivated federal crime, punishable by more than one year in prison, where death results. The expansion is not limited to intentional killings, but also includes deaths that result from a lesser intent standard. Under the proposed legislation, any person who commits a felony federal crime as an act of civil disobedience in the course of a political protest could face a death penalty if death resulted. Whether a death penalty could be obtained would depend on the facts of the case, but the legislation would certainly not limit death sentences only to intentional killings.

I hope you will find this helpful in considering H.R. 2934.

Sincerely,



Chairman SENSENBRENNER. Are there further amendments?

Mr. GREEN. I have an amendment.

Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute, offered—to H.R. 2934——

Mr. GREEN. Unanimous consent that it be considered as read.

Chairman SENSENBRENNER. Without objection.

[The amendment offered by Mr. Green follows:]

AMENDMENT TO H.R. 2934

OFFERED BY MR. GREEN OF WISCONSIN

Add at the end the following:

SEC. ___. DEATH PENALTY IN CERTAIN AIR PIRACY CASES OCCURRING BEFORE ENACTMENT OF THE FEDERAL DEATH PENALTY ACT OF 1994.

Section 60003(b) of the Violent Crime Control and Law Enforcement Act of 1994, (Public Law 103–322), is amended, as of the time of its enactment, by adding at the end the following:

"(2) DEATH PENALTY PROCEDURES FOR CERTAIN PREVIOUS AIRCRAFT PIRACY VIOLATIONS.—An individual convicted of violating section 46502 of title 49, United States Code, or its predecessor, may be sentenced to death in accordance with the procedures established in chapter 228 of title 18, United States Code, if for any offense committed before the enactment of the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103–322), but after the enactment of the Antihijacking Act of 1974 (Public Law 93–366), it is determined by the finder of fact, before consideration of the factors set forth in sections 3591(a)(2) and 3592(a) and (c) of

title 18, United States Code, that one or more of the factors set forth in former section 46503(c)(2) of title 49, United States Code, or its predecessor, has been proven by the Government to exist, beyond a reasonable doubt, and that none of the factors set forth in former section 46503(c)(1) of title 49, United States Code, or its predecessor, has been proven by the defendant to exist, by a preponderance of the information. The meaning of the term 'especially heinous, cruel, or depraved', as used in the factor set forth in former section 46503(c)(2)(B)(iv) of title 49, United States Code, or its predecessor, shall be narrowed by adding the limiting language 'in that it involved torture or serious physical abuse to the victim', and shall be construed as when that term is used in section 3592(c)(6) of title 18, United States Code. ".

Mr. GREEN. Thank you, Mr. Chairman.

As the distinguished Committee of the—Chairman of the Subcommittee has said, this bill is all about punishing terrorists for crimes that they have committed. The amendment that I offer here is meant to close an unintended potential loophole that covers a small but important category of defendants who committed air piracy offenses resulting in death after the enactment of the Anti-Hijacking Act of 1974, but before the enactment of the Federal Death Penalty Act of 1994.

In 1974, Congress enacted the Anti-Hijacking Act making the crime of air piracy the one and only crime under Federal law for which Congress passed comprehensive procedures to ensure that the death penalty could be constitutionally enforced. Over the years after the passage of the Anti-Hijacking Act of 1974, the crime of air piracy was repeatedly cited by Members of Congress and the executive branch as an example of a crime for which Congress hadn't enacted the necessary constitutional provisions to enforce the death penalty.

In 1994, in an effort to make the death penalty widely available for numerous Federal offenses and to enact uniform procedures to apply to all Federal capital offenses, Congress passed the Federal Death Penalty Act of 1994, explicitly including air piracy among the list of crimes to which it applied, at the same time repealing the former death penalty procedures of the Anti-Hijacking Act of 1974, then codified.

On September 29, 2001, the United States obtained custody of Zaid Safarini, the operational leader of the deadly attempted hijacking of Pan Am Flight 73, which resulted in the deaths of at least 20 people, including two U.S. citizens, and the injury of more than 100 others. Safarini and his co-defendants were indicted by a grand jury in the District of Columbia in 1991. The Government filed papers stating its intention to seek the death penalty against Safarini. The district court, however, ruled that the Government could not seek the death penalty in the case or, by implication, in any other air piracy case from the pre-FDPA period, essentially because, among other things, Congress had not made clear which procedures should apply to such a prosecution.

A further complication exists in that there are two provisions of the Anti-Hijacking Act of 1974 which, if taken away from the pre-FDPA air piracy defendants, could pose *ex post facto* concerns in light of another U.S. Supreme Court decision.

Safarini has since pled guilty to the charged offenses and is scheduled to be sentenced in May 2004. This amendment addresses the issues identified by the district court in that case by explicitly stating that Congress intends for the provisions of the 1994 law to apply to this category of defendants, while also explicitly preserving for such defendants the two provisions of the 1974 Anti-Hijacking Act to which they are arguably constitutionally entitled concerning the statutory, aggravating, and mitigating circumstances set forth in the Anti-Hijacking Act.

This amendment is particularly important because the terrorists who committed these acts of terrorism should be punished accordingly. There should not be possibility that these terrorists would be able to walk out of jail to cause more harm. Without this amendment, anyone who is convicted under this Act would be sentenced

under the Sentencing Guidelines of November 1, 1987, and would have a maximum penalty of life in prison. This means that this small category of hijackers would be eligible for parole after serving 10 years in prison and would be released after serving a maximum of 30 years.

In the context of these individuals responsible for the hijacking incidents during this period, most of the perpetrators were no older than in their 20's when they commit their crimes. The imposition of pre-guidelines sentence of life imprisonment for these defendants means that many, if not all of them, could be expected to be released from prison well within their lifetime. Given the gravity of these offenses, coupled with a longstanding congressional intent to have the death penalty available for the offense of air piracy resulting in death, such a result would clearly be at odds with the clear directive and legislative history of Congress. This amendment will bring parity to all punishments for crimes of terrorism. It will clarify that Congress' intent is to ensure that all terrorists are punished for their heinous crimes, and it would not allow a loophole for a very small category of defendants to swallow up the good intent of the law.

Thank you, Mr. Chairman.

Mr. NADLER. Mr. Chairman, could I have a question of the sponsor?

Chairman SENSENBRENNER. Does the gentleman yield?

Mr. NADLER. Would the gentleman yield for a question?

Mr. GREEN. Yes.

Mr. NADLER. I'm trying to understand your amendment. Are you proposing with all this—I don't mean this disparagingly, but all this verbiage, with all this language, are you saying in essence that someone who committed certain crimes before the date of enactment that we're going to increase this penalty retroactively, that we're going to impose the death penalty retroactively?

Mr. GREEN. No, because that would create *ex post facto* problems. What this simply does—and we had legal research done, a legal opinion done. This doesn't present *ex post facto* problems because it clarifies which procedures are in effect, and the passage of this amendment does not—it actually makes their situation better. It ameliorates their situation, not makes it worse.

Mr. NADLER. How does it ameliorate the situation?

Mr. GREEN. It makes it—it ameliorates it because it provides clarity as to their rights and which provisions and procedures cover them. So if, in fact, it made it worse, you would have an *ex post facto* problem. But the legal analysis that I've been given suggests that it does not. It provides a clarification.

Mr. NADLER. Would the gentleman further yield?

Mr. GREEN. Sure.

Chairman SENSENBRENNER. Without objection, the gentleman will be given an additional 2 minutes.

Mr. NADLER. Thank you. I've just read this hastily, I admit, just having seen this.

Mr. GREEN. And it's complicated.

Mr. NADLER. It says any individual convicted of violating a certain section may be sentenced to death in accordance with the procedures established in chapter 228 of title 18, if for any offense committed before the enactment of the 1994 bill but after the en-

actment of the 1974 law, it is determined by the finder of fact, et cetera.

Without this amendment, could a person be sentenced to death for a crime committed before 1994 but after 1974 who—as described here?

Mr. GREEN. I'm sorry. I didn't follow your question.

Mr. NADLER. Would someone as described in this section, someone convicted of a certain crime after 1974 but before 1994, without this enactment would he be subject to the death penalty under the circumstances stated here?

Mr. GREEN. In other words, if this amendment does not pass?

Mr. NADLER. Yes.

Mr. GREEN. My understanding is that it is unclear and they may well not be subject to the death penalty.

Mr. NADLER. It's unclear, but this would clarify that he would be subject to the death penalty?

Mr. GREEN. Correct, and——

Mr. NADLER. So wouldn't that be an *ex post facto* law then?

Mr. GREEN. I have the legal analysis here, and it says that there is not an *ex post facto* problem because essentially what this amendment does——

Mr. NADLER. Why is there not an *ex post facto* problem?

Mr. GREEN. I'm going to answer that.

Mr. NADLER. I'm sorry.

Mr. GREEN. It creates a hybrid between the 1974 and 1994 provisions which that hybrid is more favorable to the defendants than the procedures available under either the 1974 or the 1994 act.

Mr. NADLER. But if the gentleman would further yield, it creates a hybrid which puts more favorable procedures into effect. Let's assume that that's an accurate description. But it also subjects someone to the death penalty that would not have been subjected to the death penalty.

Mr. GREEN. Well, of course, under 1974, they were subject to the death penalty——

Mr. NADLER. You just said they weren't.

Mr. GREEN. A court decision has thrown that into doubt, but the clear intent of Congress——

Mr. NADLER. But if it's in doubt——

Mr. GREEN.—they were, and the 1974 explicitly listed this crime——

Mr. NADLER. But wait a minute. But a court decision interpreting the existing law has thrown into doubt whether certain people in certain circumstances are subject to the death penalty, this would clarify that they are. Insofar as this would—insofar—whatever else it may do, insofar as it overturns a court decision that said that they're not subject to the death penalty and says, yes, they are, that would seem to be *ex post facto*.

Chairman SENSENBRENNER. Without objection, the gentleman will be given 2 more minutes.

Mr. GREEN. I raised the same questions, but, again, I have been given an analysis here that says that because—that that isn't the case, that it isn't an *ex post facto* problem because it merely clarifies and it creates a procedure that is a hybrid——

Mr. NADLER. You said that before.

Mr. GREEN. Well, that's the answer.

Mr. NADLER. All right. Who—I have two questions, first of all. Number one, whose analysis is this? And could we see the detailed legal analysis? Because it certainly seems to be *ex post facto*. And, second——

Chairman SENSENBRENNER. Would the gentleman from Wisconsin yield?

Mr. GREEN. Yes, I'd be happy to.

Chairman SENSENBRENNER. I think this is a good time to adjourn the Committee so that we can get——

Mr. NADLER. I agree, look into this.

Chairman SENSENBRENNER. I said we would adjourn the Committee at 12:15, and I think that during the next week perhaps the legal analysis of this amendment can be done on both sides so we know exactly what we're dealing with.

The Committee stands adjourned.

[Whereupon, at 12:16 p.m., the Committee was adjourned.]

BUSINESS MEETING
(continued)
WEDNESDAY, JUNE 23, 2004

The Committee met, pursuant to notice, at 10:09 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

[Intervening business.]

Chairman SENSENBRENNER. The next item on the agenda is H.R. 2934, the "Terrorist Penalties Enhancement Act of 2003." During a previous meeting of the Committee, before further consideration of this bill was postponed, the gentleman from North Carolina, Mr. Coble, had, on behalf of the Subcommittee on Crime, Terrorism, and Homeland Security, reported the bill favorably with a single amendment in the nature of a substitute and moved its favorable recommendation to the full House.

By unanimous consent, the bill was considered as read and open for amendment at any point, and the Subcommittee amendment in the nature of a substitute was considered as read, considered as the original text for purposes of amendment, and open for amendment at any point.

An amendment offered by the gentleman from Texas, Mr. Carter, had been adopted by a voice vote, and pending at the time the consideration was postponed was an amendment offered by the gentleman from Wisconsin, Mr. Green, which the Members have before them.

Is there further debate on the Green amendment? And I would ask unanimous consent since a couple of weeks have gone by since we debated this that Mr. Green may have an additional 5 minutes to explain his amendment.

Is there objection?

No objection. So ordered.

And the gentleman from Wisconsin is recognized for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman.

First, Mr. Chairman, I ask unanimous consent to distribute a letter from the Department of Justice that specifically——

Chairman SENSENBRENNER. Without objection.

Mr. GREEN. And as this letter is being passed out, this letter from the Department of Justice specifically addresses the reasonable concerns that were raised by a few Members on the other side about the constitutionality of this amendment. And I think it is clear from the opinion that there is not a constitutional problem. There is not an *ex post facto* problem.

Let me also say this is the letter that all of you—I know Congressman Nadler, you should have received in your office last week. We had this sent over to you.

Chairman SENSENBRENNER. Without objection, the letter will be inserted in the record at this point.

[The material referred to follows:]

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 26, 2004

The Honorable Mark Green
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Green:

We have been asked to address the following two related legal questions, concerning a proposed amendment to H.R. 2934, a bill that would specify the death penalty procedures to be used for capital air piracy cases, where the offense was committed between 1974 and 1994:

> (1) "Under the Safarini district court opinion, these defendants are not subject to the death penalty now, so how can this amendment, which would subject them to the death penalty, not violate the *ex post facto* clause?"
>
> (2) "I am not able to understand how an offender subject to prosecution today under the provision it amends will be better off after the amendment passes than he is without it passing. I can't imagine an offender in that situation saying anything other than 'please, don't help me by making me more subject to the death penalty than I am today, no matter how favorable you make the criteria.'"

****

The proposed amendment would not violate the *Ex Post Facto* Clause. In terms of substantive punishment, aircraft piracy resulting in death has been punishable by the death penalty since 1958, so any defendant affected by the amendment had "fair notice" of the potential punishment he faced. Further, the Supreme Court's Dobbert v. Florida, 432 U.S. 282 (1977) opinion squarely holds that capital sentencing procedures may be applied to defendants who committed their crimes before the procedural statute was enacted, at least where – as with the proposed amendment – the new procedures provide more protection to the defendant than those in effect at the time of his crime. The district judge in the U.S. v. Safarini, 257 F. Supp. 2d 191 (D.D.C. 2003) case based his ruling on the uncertainty of which procedures should apply and specifically suggested that the problem could be cured by a clear congressional enactment.

Initially, it is important to remember what the district court in the Safarini case actually ruled. The district court did not make any rulings to contradict the fact that, at the time Safarini committed his offense in 1986, the maximum penalty for his air piracy offense was death. Instead, the district court's ruling was issued in response to the government's request to implement capital sentencing procedures which were an amalgam of the Federal Death Penalty Act of 1994 ("FDPA") and the Anti-Hijacking Act of 1974. The district court ruled that, as a matter of statutory construction, and "in the absence of clear Congressional intent to the contrary," it could not employ such procedures. The opinion did not foreclose the possibility of Congress enacting new procedures. Indeed, the court's opinion acknowledged that "it may well be that such a statute, if enacted by the legislature, would pass muster under the *Ex Post Facto* clause . . . ." 257 F. Supp.2d at 202. Further, in oral arguments before the district court addressing the government's motion for the court to reconsider its ruling, the district court stated: "Since we know that Congress follows judicial proceedings, why wouldn't it be appropriate for the government to ask Congress to reinstate, insofar as this defendant is concerned, the death penalty that indeed was in place at the time the government alleges these events occurred . . . ? * * * You could do that. You could ask Congress." (Transcript, U.S. v. Safarini, Motion Hearing, July 21, 2003, at p.4.)

With that background in mind, the short answer to the two questions posed is that the Supreme Court has addressed these exact issues and has said that the *Ex Post Facto* Clause is not violated when a newly-enacted, constitutional set of death penalty procedures is applied to crimes previously committed, rather than the constitutionally defective death penalty procedures that were in place when the crime was committed.

In Dobbert, the defendant committed murders between December 1971 and April 1972, at which time Florida law provided that a person convicted of a capital felony was to be punished by death unless the verdict included a recommendation of mercy by a majority of the jury. In June 1972, before Dobbert had been tried on the murder charges, the Supreme Court issued its decision in Furman v. Georgia, 408 U.S. 238 (1972) (holding that a statutory scheme which allowed the jury unbridled discretion in deciding whether to impose the death penalty violated the Eighth and Fourteenth Amendments) and, shortly thereafter, the Florida Supreme Court held that the Florida death penalty procedures were unconstitutional in light of Furman. Late in 1972, the State of Florida enacted new capital sentencing procedures that, among other things, required the jury to render an advisory decision to the judge, based on aggravating and mitigating circumstances, as to whether the death penalty should be imposed.

In Dobbert, the petitioner essentially made the two arguments implied by the questions posed here. First, Dobbert argued that applying the new death penalty statute to him would violate *ex post facto*, because there was no death penalty "in effect" at the time of the murders given that the capital sentencing provisions on the statute books in Florida at the time of

the murders were later held to be unconstitutional by Furman and its Florida analog. The Supreme Court rejected this argument, stating that "this sophistic argument mocks the substance of the *Ex Post Facto* Clause." 432 U.S., at 297. The Dobbert Court stated:

> Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.
>
> * * *
>
> Here the existence of the statute served as an "operative fact" to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution.

Dobbert, 432 U.S., at 297-98.

Second, Dobbert argued that the new statute could not possibly be ameliorative to him. The Supreme Court rejected this argument, noting all of the procedural protections afforded in the new statute that were not afforded in the previous statute. See id. at 294-97. The fact that the old statute was unconstitutional, while the new statute was constitutional was, according to the Supreme Court, the "ultimate proof" that the new statute was not more "onerous" than the old statute and its application to Dobbert did not violate *ex post facto*. Id. at 296-97.

The Dobbert case has been applied by several circuit courts of appeals in upholding, against *ex post facto* claims, death sentences imposed under capital sentencing statutes that were amended after the time of the offense to repair a procedural defect or omission. See Evans v. Thompson, 881 F.2d 117, 119-21 (4th Cir. 1989) (at the time of offense, state law provided that death sentences reversed for procedural error were automatically converted to life sentences; held no *ex post facto* violation in permitting defendant to be resentenced to death under later-enacted statute that allowed a new capital penalty hearing before a specially empaneled jury whenever an initial death sentence had been reversed for procedural error; statute afforded defendant fair warning of possible penalty); Coleman v. Risley, 839 F.2d 434, 441-43 (9th Cir. 1988) (resentencing under new capital sentencing statute, which corrected fatal defects in statute in effect at time of murder, did not violate *ex post facto* clause; statute did not change punishment or quantum of proof necessary to establish guilt); Jordan v. Watkins, 681 F.2d 1067, 1079 (5th Cir. 1982) (defendant sentenced to death under impermissibly mandatory capital sentencing

statute that existed at time of offense could validly be resentenced to death under subsequently-adopted capital sentencing procedures that cured fatal defect in prior statute).

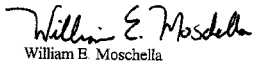
More recently, a number of state supreme courts have cited Dobbert in upholding, against *ex post facto* challenge, the application of newly enacted state capital sentencing statutes to defendants who committed their crimes before the new statutes were enacted. In response to Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that the Arizona death penalty statute was unconstitutional, "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty"), a number of state legislatures amended their existing death penalty statutes, to ensure that a jury, and not a judge, would make findings concerning aggravating factors necessary for imposition of the death penalty. Typically, prosecutors in these states sought to apply the new death penalty procedures to defendants who committed their crimes before the death penalty procedures were changed. Uniformly, thus far, application of these newly enacted death penalty statutes have been upheld, citing Dobbert, rejecting *ex post facto* challenges. See State v. Lovelace, ___ P.3d ___, 2004 WL 856787 at *4 - *5 (Idaho 2004); State v. Ring, 204 Ariz. 534, 545-47, 65 P.3d 915, 926-28 (Ariz. 2003) (en banc); Brice v. State, 815 A.2d 314, 320-21 (Del. Supr. 2003).

Here, the amendment at issue is consistent with the principles discussed in Dobbert. First, hijackers who committed air piracy resulting in death between 1974 and 1994 were given "fair warning" that their offense was punishable by death. Congress has long made clear its intent to make the crime of air piracy punishable by death. Congress first made air piracy punishable by death in the Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1504, 72 Stat. 731, 811. After the Supreme Court decided the Furman case, Congress reaffirmed its intent to maintain air piracy as a capital offense by passing the Anti-Hijacking Act of 1974. In 1994, Congress once again expressed its intent to keep air piracy as a capital offense in the FDPA. The legislative history of the FDPA makes clear that Congress believed that the capital sentencing procedures of the Anti-Hijacking Act of 1974 were still constitutional at the time the FDPA was passed in 1994. See H.R. Rep. 103-467, 1994 WL 107578 at 7-8 (Leg. Hist.).

Second, the capital sentencing procedures for affected aircraft piracy cases will be ameliorative in comparison with the originally applicable 1974 procedures. The required findings of the presence of specified aggravating factors and the absence of specified mitigating factors under the 1974 procedures would be perpetuated, and the defendant would also have all the protections of the current, generally applicable death penalty procedures in the FDPA (chapter 228 of title 18), which are more favorable to the defendant in a number of respects than the 1974 procedures. If Congress chooses to enact the amendment under discussion, it would, in our opinion, be acting within its authority to specify to the courts a set of constitutional capital sentencing procedures to be used for defendants who committed air piracy resulting in death between 1974 and 1994.

If we can be of further assistance regarding this or any other matter, please do not hesitate to contact this office.

Sincerely,



William E. Moschella
Assistant Attorney General

Mr. GREEN. The opinion makes it clear that there is not an *ex post facto* problem. First off, the U.S. Supreme Court has ruled that there isn't one this case for a variety of reasons. I guess very briefly and most importantly, capital punishment has been applicable to air piracy cases for almost 50 years. Secondly, the changes that were made that this amendment deals with were entirely procedural, first off, and second, they are ameliorative; that is to say that they were beneficial to those who would be punished under this law. So there is not an *ex post facto* problem here.

We should also say by way of interest that this would not apply to anyone who is currently in U.S. custody. The underlying case that has been referred to, that terrorist has already been convicted and has already been sentenced. The others that we would hope this would one day apply to have not yet been apprehended who had committed these crimes during the very specific period of time that is involved.

Very briefly, this amendment is intended to close an unintended potential loophole in these cases that applies to the single category of defendants who committed these crimes resulting in death after the enactment of the Anti-Hijacking Act of 1974 but before the enactment of the Federal Death Penalty Act of 1994, a very narrow class indeed.

This amendment makes it clear which set of procedural guidelines would apply, and again, as is made clear by the U.S. Supreme Court as laid out in the opinion letter that I have had distributed, there is not a constitutional problem, because the changes were entirely procedural, and in fact, they would accrue to the benefit of those who would potentially be charged under this.

And with that, Mr. Chairman, I yield back my time.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, as I understand it, when the crime would be committed, there is no death penalty. If this amendment is adopted, there will be a death penalty. The gentleman from Wisconsin suggests that that's—I think the term is ameliorative or helpful to the defendant. I am not sure how many defendants would want that kind of help.

Ex post facto is a change in the law with a retroactive application, and unfortunately, I agree with the gentleman from Wisconsin's constitutional analysis that it is legal, but that does not make it right. I would hope that the amendment would be defeated, and I would yield to the gentleman from Wisconsin if you want to——

Mr. GREEN. I thank the gentleman.

Ameliorative is actually the term from the Supreme Court, not mine. And again, I would advise Members that the opinion from the Department of Justice quoting at length from a Supreme Court decision makes it very clear that it is not *ex post facto*; that these were procedural changes. In fact, they were quote, unquote, ameliorative in the sense that they clarified and actually enhanced the procedures to which someone would be entitled, and under longstanding constitutional principles, this simply is not *ex post facto*.

Mr. SCOTT. Reclaiming my time, I would suggest to the gentleman that the procedural change rather than substantive, if it had been substantive, it would have been clearly illegal under *ex post facto*, and so, since it's just procedural, it's technically legal.

I would suggest that there are some people who think that the difference is in fact substantive. And frankly, I'm not surprised. We had a similar case in Virginia where the lawyer argued that it may be procedural to some, but it is certainly substantive to his client, because his client will be put to death under the new law, whereas he would not have been put to death under the old law.

That may be procedural to some, but I think it is extremely substantive to others. And I would hope that we would comply with the spirit of *ex post facto* and defeat the amendment.

I will yield.

Mr. GREEN. I guess just as a final point, the District Court opinion which raised the question about and actually led us to this point in the sense of making the point that it was unclear which procedures would apply specifically in its own terms invites Congress to clarify which procedures would apply and says in the opinion that if Congress were to do so, it would not be *ex post facto*.

So both the opinion which created the initial question and the subsequent opinion from the U.S. Supreme Court have made it clear that it is not. Because there are procedural changes and the nature of these changes, it is not *ex post facto* and therefore not unconstitutional.

Mr. SCOTT. Reclaiming my time, I would concede that the gentleman is technically correct, but just because it's legal doesn't mean it's right. I would hope we would defeat the amendment.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Wisconsin, Mr. Green.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it, and the amendment is agreed to.

Are there further amendments?

There are no——

Ms. JACKSON LEE. I have an amendment at the desk.

Mr. FLAKE. I have an amendment at the desk.

Chairman SENSENBRENNER. The gentleman from Arizona, Mr. Flake.

Mr. FLAKE. Mr. Chairman——

Chairman SENSENBRENNER. Does the gentleman have an amendment?

Mr. FLAKE. Yes, I have an amendment.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 2934, offered by Mr. Flake and Mr. Delahunt. Page 2, line 4——

Mr. FLAKE. I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered.

The gentleman is recognized for 5 minutes.

[The amendment offered by Mr. Flake and Mr. Delahunt follows:]

H.L.C.

AMENDMENT TO THE SUBCOMMITTEE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2934

OFFERED BY MR. FLAKE AND MR. DELAHUNT

Page 2, line 4, after "2332b(g)" insert "except to the extent such crime is an offense under section 1363".

Mr. FLAKE. Mr. Chairman, my amendment, offered with Congressman Delahunt, would exclude from death penalty-eligible offenses related to 18 U.S.C § 1363, injury to buildings or property with special maritime and territorial jurisdiction of the United States. While I believe it is the intention of H.R. 2934, I believe the intention is praiseworthy, I am not convinced that this crime is suitable for death penalty prosecution in all cases.

I am a supporter of the death penalty, and I am concerned that if we do this, we will be giving ammunition to death penalty opponents by applying the death penalty to this type of crime in the name of the war on terrorism. I should note that groups like the American Conservative Union, Americans for Tax Reform and the Free Congress have expressed their concern about the breadth of the crimes covered in this bill.

It is important to note that the destruction of Federal buildings by fire or explosion is already punishable by the death penalty if death results. Also, even if the harm to the Federal building does not come from fire or explosion, the existence of multiple murder victims, the risk of death to others and the heinous nature of the murder and the fact that the murder occurred during the destruction of Federal buildings are all aggravating factors which a jury may consider in determining whether the death penalty should be imposed of those guilty of capital offenses.

What would happen in a scenario when a Federal building is damaged as protestors are deliberately pushing forward on a crowd to push open a door, and someone gets trampled and dies in the melee? It appears that all of the participants and anyone who helped to plan or stage the event could be eligible for the capital terrorism charge because of their violation in a context where they were seeking to coerce a Government act to let them into the Government building.

Whether it is civil rights, abortion or an NRA protest, all could be charged with a death penalty offense. I should note that prosecutors generally charge, as in the present case, they are required

to charge the maximum offense that they believe that the evidence supports.

It is also important to note that while a death must necessarily result from the crimes in order to make them eligible for a death penalty prosecution, the defendant would not have necessarily have intended to victim in order to be eligible, and I think this is what is important. You do not have to intentionally kill the victim in order to be eligible.

Federal law does not require the Government to establish that the defendant who commits the crime for which the death penalty may be imposed actually intended to kill the victim; rather, a death sentence is also available for an act of violence if the defendant knows that the act would create a grave risk of death such as participation in an act—that an act constituted reckless disregard for human life.

This, to me, seems to be quite subjective on the part of the Government who is proving the case. In fact, the statute which applies to Federal death sentences and would apply to the proposed legislation lays out four possible levels of intent for which the death penalty may be imposed: a defendant may be sentenced to death if the defendant intentionally kills a victim, intentionally inflicted serious bodily injury that resulted in the death of the victim; intentionally participated in an act, contemplating that the life of the person would be taken or intending that lethal force would be used in connection with that person other than one of the participants in the offense; and if the victims died as a direct result of the act.

All of these three are fine. The fourth one is what causes problems: (d) intentionally or specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person other than one of the participants in the offense such that participation in the act constitutes a reckless disregard for human life and the victim died as a direct result of the act.

These intent standards do not rule out the potential for a death sentence in a case if the defendant whose violation of the Federal law was as an act of civil disobedience in the course of a political protest if it results in the death that I have described. Again, you could be in a situation where there's a protest; somebody pushes through the door of a Federal building; somebody is killed in the melee; and the planners or any participants in that protest could be subject to the death penalty.

I would submit that what we are doing here is giving Government the authority and the ability to basically scare you out of rightful protest because you don't have to intentionally kill the victim in order to be charged.

The bottom line is that if the death is associated with the destruction of a Federal building, they are already death penalty-eligible offenses in the U.S. Code. As a death penalty supporter, I don't wish to offer death penalty opponents the appearance that the death penalty is being used egregiously in the name of the war on terror.

And with that, I yield back.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble, Chairman of the Subcommittee wish to be recognized

Mr. COBLE. No, I do not, Mr. Chairman.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

I commend the gentleman——

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

I commend the gentleman for his amendment. I support the amendment, but I submit it does not go far enough. The basic problem or one basic problem with this bill, and I think the bill should be much further modified and probably reconsidered is that it broadly—let me say, I do oppose the death penalty. But that aside, this applies the death penalty in an ill-considered way, in a much too broad fashion that I suspect even most supporters of the death penalty wouldn't support.

It creates a sweeping catch-all death penalty for any Federal felony that meets the Federal code's definition of terrorism. The Federal code's definition of terrorism is very broad and does not involve only what we would normally consider a terrorist action.

The definitions are anything that involves a violation of State or Federal criminal law such as, for example, a blocking of an abortion clinic by a protest group that appears to be intended to influence Government policy or a civilian population by intimidation or coercion. So if you are blocking the door to someone who wants to come in, you would seem to meet that definition—and involves acts dangerous to human life, and with the traffic congestion at the door that Mr. Flake reflected, it might meet that definition, too.

So in this case, blocking an entrance to an abortion clinic and maybe getting a little obstreperous could meet the definition of terrorism and could, if someone, by accident gets killed or connected with that gets killed, subject someone to the death penalty. So what this overbroad definition, and as the death penalty in this catch-all provision applies to it, would subject a lot of people in protest groups, whether on the left in antiglobalization protests, an antiwar rally, or the right, an antiabortion demonstration, potentially to the death penalty, where I don't think anybody in his right mind, frankly, intends that to happen.

And I think it is a basic drafting problem with the existing law defining terrorism and with this bill, and I think that this bill should be redrafted either to eliminate the catch-all provision or to target the death penalty much more closely to acts that are defined as deliberate acts of the Federal crime of terrorism in more narrow circumstances. And if I had time now, I would draft that amendment, but I've just seen this bill or just read it for the first time, really, and I don't have time to do that right now.

I urge the adoption of Mr. Flake's amendment. It goes in the right direction. But I would suggest that this bill be withdrawn now; that someone, that the sponsors take a careful look at the definitions and the catch-all provision here, because I do not think it is really the intention of the sponsors—I hope it is not, I trust it is not—to subject people to a death penalty who are engaging in political protest if something goes wrong.

It is just too broad here, regardless of your opinion of the death penalty. Mr. Flake's amendment is an attempt at ameliorating this. It's a good attempt, but it doesn't go far enough, and I do not think

we have—I would hope that this could be brought back in a week or so——

Ms. LOFGREN. Would the gentleman yield?

Mr. NADLER. One second—and that we could properly consider a narrowing amendment so that the death penalty is applied where the sponsors, I assume, want it to be applied.

I am not going to support it in any event, to be honest, because I do not like the death penalty. But certainly, even people who support the death penalty, I don't think they want it applied as this bill, the way it is drafted, I think, inadvertently would apply it.

I'll yield.

Ms. LOFGREN. I would just like to speak.

I actually have frequently voted in favor of the death penalty. I do not oppose the death penalty. But I think the gentleman's point is well-taken. And I think we could collaboratively come up with something that would avoid the result, and I would be—if we were able to do that, I'd be happy to support it as someone who has, in fact, supported the death penalty on many occasions.

I think to take a week to fix this would be a smart thing to do, and I would certainly be willing to help if there is interest in doing that, and I thank the gentleman for yielding.

Mr. FLAKE. Would the gentlelady yield?

Mr. NADLER. I will yield.

Mr. FLAKE. I would submit that my amendment actually does that. It simply excludes from death penalty-eligible offenses those related to 18 U.S.C. § 1363; this is injury to buildings or property within special maritime and territorial jurisdiction of the U.S. So I would submit——

Mr. NADLER. Reclaiming my time, reclaiming my time, I think that is one thing, that is one exclusion that ought to be made. I am not at all sure it is the only exclusion. I suspect, although I do not know exactly; I haven't had time to really go through this; I suspect that if you looked at this, if a bunch of us looked at it, we'd find we wanted to narrow it further. All I ask is that——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. I ask for an additional 30 seconds.

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. All I'm suggesting is that we take a week or the week after the break, and a bunch of people from both sides of the aisle can sit down and if, indeed, your amendment does everything that people want it to do, fine; if not, maybe we will have a different amendment and come back and do it. At least we'll all be properly prepared.

I yield back.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Carter?

Mr. CARTER. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CARTER. Mr. Chairman, I oppose this amendment. Every crime that was included in 18 U.S.C. 2332(b)(g)(5) was determined to be a Federal crime of terrorism because of its serious nature. These crimes were agreed to in the PATRIOT Act on a bipartisan, bicameral basis.

H.R. 2934 makes every crime in this section eligible for life in prison or the death penalty if death results of another person. Each of these offenses require proof of at least three separate intents in order to get to the death penalty: one, the intent of the underlying offense; two, the intent that the violent act influence the Government; and three, that the intent engage in an act of violence knowing it creates a grave risk of death.

Mr. Flake would like to exclude section 1363, buildings or property within the special maritime or territorial jurisdiction, from the death penalty eligibility. I believe the exclusion of terrorist acts which destroys Federal buildings and in which a loss of life occurs is irresponsible. Should intent be sufficiently proven, there is also the exhaustive death penalty procedures that must be followed before we reach the ultimate results.

Mr. Chairman, I believe in the finders of fact in the criminal justice system, and I urge my fellow colleagues to oppose this amendment.

I yield back my time.

Chairman SENSENBRENNER. The question is on——

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, Ms. Lofgren?

Ms. LOFGREN. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. Certainly, people can disagree on this measure, and I'm someone who actually did work on the PATRIOT Act and did vote for the PATRIOT Act, although I think that experience has shown that the administration of the act should lead us to reviewing that measure, because there are certainly some unexpected consequences and interpretations that I think I don't think any of us really intended at the time, and, you know, I, as someone who has supported the death penalty in appropriate cases, I think the interplay of the PATRIOT Act and this measure would lead to results that would—I think it is correct that both liberal, moderate and conservative groups have raised the alarm, because it would end up with the result of the death penalty for activities that do not rise to that level, which is why I think we'd be better off taking another week to work through it.

And I yield to the gentleman from New York.

Mr. NADLER. Thank you.

I thank the gentlewoman for yielding. I would like to reply to Mr. Carter. He cited the PATRIOT Act's definitions, and indeed, he cited them correctly. Unfortunately, the PATRIOT Act, we may recall, was passed in great haste. I don't think the exact definitions were given sufficient consideration.

But let's take a look at how blocking abortion clinics, for instance, could meet the exact definitions that the gentleman just cited and yield, under this bill, the death penalty: blocking access to abortion clinics, for example, could, quote, involve, unquote, violations of Federal law punishable by more than 1 year in prison and may certainly, quote, appear to be intended, unquote, to influence Government policy or a civilian population by, quote, intimidation or coercion, depending on how you are blocking it.

Blocking clinics under some circumstances could involve, quote, acts dangerous to human life, unquote, in that such actions could threaten the lives of the protestors if protestors block traffic, for example, get in the way of the cars, or interfere with the ability of women to get needed medical treatment.

Now, I do not know that a court would apply the death penalty in that case, but it clearly could meet the definitions in this bill or in the PATRIOT Act, to which this bill would apply the death penalty, which is why I am saying I think before we leap, we ought to just wait a week, sit down, take a look and see if we can get a consensus of the Members who support this bill, of the Members who support capital punishment and say maybe we ought to narrow it a little here, because I do not think we ought to leave it to any court that people in an anti-globalization protest or in an abortion protest should potentially be subject to the death penalty because they meet the literal words of a definition that clearly was not intended for these kinds of things and should not be intended for these kinds of things.

Yes, there are three different intents required in the PATRIOT Act, but the way they are drafted I submit, and it is clear, could apply to people whom none of us would want to be subject to the death penalty. Mr. Flake's amendment goes a step in that direction but not far enough, and that is why not only the ACLU but the American Conservative Union, the Free Congress Foundation, the Gun Owners of America, noted left-wing groups, I am sure you will all agree, urge that we narrow this.

So I just urge that the bill be withdrawn now for a week or so, considered, and maybe you'll decide, maybe the majority; the majority controls; maybe the majority will come back with the exact same words, in which case I will vote no. But I just think we ought to take a look for a week, and maybe we can come to a better consensus that will get more support and that will do what the majority wants to do but not go so far as these words appear to go without, I am sure, anybody's real intent to go that far.

I thank you, and I yield back.

Chairman SENSENBRENNER. The time belongs to the gentlewoman from California.

Ms. LOFGREN. I would yield back.

Chairman SENSENBRENNER. The question is on the—the gentleman from California, Mr. Schiff.

Mr. SCHIFF. I thank the gentleman and move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. I wanted to ask a question of the author of the amendment, if I could, and I would be happy to yield such time as he may need to respond.

And that is a question of how this amendment would be interpreted in practice. And that is that as the amendment is drafted, it provides that when you look at it in the context of the bill, that for those who commit terrorist offenses resulting in death, the death penalty would be available, and I support that, except to the extent that the crime that is committed meets within the definition of section 1363.

Now, one possible way of interpreting that is if someone blew up a building, like the Oklahoma bombing, that would actually be a violation of 1363, among other things. And you could make an argument that by virtue of your amendment, because the acts of blowing up a Federal building meet within 1363, you have taken the death penalty off the table.

It is a counterintuitive point, but I wonder if you'd have the argument that Congress intended clearly that where you met the definition of this section that the death penalty would not be available. And I know that is not the result that you are aiming at, but I wonder if the gentleman has considered that may be how the argument would be made in the court or the Court of Appeals, and I wonder if you have had any feedback from the Department of Justice on the amendment generally, and I would be happy to yield to the gentleman.

Mr. FLAKE. I have not considered that. I would just submit that this simply—the bill itself seeks to expand the application of the death penalty to a new class of people, those who put at grave risk or whatever others involved in a protest or who attempt to influence the Government.

We had no trouble executing Tim McVeigh. The charges against Nichols, although he did not get the death penalty, he was certainly eligible for it. What I worry about with this bill is that it not only puts—what it does, really, is put people in danger who are simply protesting of being subject to the death penalty, and prosecutors will use that as a way to basically scare people out of protesting.

Mr. CARTER. Will the gentleman yield?

Mr. FLAKE. That's my concern here.

Mr. SCHIFF. Reclaiming my time, I would be happy to yield to the gentleman.

Mr. CARTER. I think that any good defense lawyer would certainly make that argument, and I agree with you on that. And it's a good point well taken.

But to address some of the things that Mr. Flake is talking about, in order to reach this, the courts have ruled that this has got to be willfully and maliciously destroy the property. And using—going back to the example that you gave about the explosion of the building, take the example of someone who loads up a truckload of explosives and crashes through the door killing numerous people with the intent of detonating the bomb, but it does not go off.

That, I mean, that is another scenario you could look at that you would want to go forward on the death penalty with this.

Mr. SCHIFF. I would be happy to yield again. I would only emphasize before I do that I understand where the gentleman is coming from and what he's attempting to do. I'm not sure the language accomplishes the goal. It may open up a risk the gentleman is not intending to open up, and I am just trying to get a sense, frankly, of whether the danger that the gentleman is trying to address is a realistic danger.

Indeed, all of the sections of the bill and the current law can be pushed and pressed to make the death penalty apply in circumstances where we would not have it apply, and we are reliant on the Attorney General and on the prosecutors throughout the

country to exercise strong judgment. It is the most important judgment we call upon them to exercise.

And I appreciate the efforts of the gentleman to try to define more properly where we want it addressed, and I think some of the amendments that have been made in Committee already, taking out the broad definitions of international and domestic terrorism I think addressed probably some of the most grave threats of over-interpretation of the statute, but I am not sure that the amendment hits the mark, and I'll be happy to yield the balance of my time to the gentleman.

Mr. FLAKE. I thank the gentleman.

I would just say I fail to see how restricting——

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. FLAKE.—the application of this section affects others in statute.

Chairman SENSENBRENNER. The question is on the amendment—the gentleman from Virginia, Mr. Scott?

Mr. SCOTT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, first, I would like unanimous consent to enter into the record a statement on behalf of the amendment by the gentleman from Massachusetts, Mr. Delahunt.

Chairman SENSENBRENNER. Without objection.

[The prepared statement of Mr. Delahunt follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, since the enactment of the PATRIOT Act, large numbers of our fellow citizens have felt increasingly uneasy—not just about the threat of terrorism, but about many of the measures being taken to respond to it.

For this reason, I have strong reservations about the far-reaching provisions in the legislation before the Committee today. Specifically, it is difficult for me to understand why we need to extend the death penalty to all of these offenses.

Even if we expand the crimes covered by the death penalty under US law, we must continue to engage in multilateral efforts to combat terrorism. And many nations have determined that the potential risks of executing the innocent outweigh the need for the death penalty.

This bill may further obstruct our ability to cooperate with other countries that have specifically rejected the death penalty for terrorists. For example, earlier this month, Britain agreed to extradite Abu Hamza, accused of 11 terrorist offenses under federal law. While Mr. Hamza has been charged with certain offenses which are death penalty eligible, Britain only agreed to release him to US custody after obtaining assurance that Attorney General Ashcroft would not seek the death penalty in Mr. Hamza's case—to do otherwise, would violate the obligations of Britain under the European Convention of Human Rights which prevents Britain from extraditing an individual to a country where they may face execution.

To date, our country's record on the death penalty is spotty. Since the death penalty was reinstated in 1976, 909 people have been executed in the United States. During the same period, 143 individuals have been exonerated after spending years on death row for crimes they did not commit. Some came within days or hours of being put to death.

Further, DNA has exonerated 12 of the people freed from death row and 120 people wrongfully convicted of serious crimes. In at least 34 of these cases, the same test that exonerated an innocent person has led to the apprehension of the real perpetrator.

There are already 20 federal crimes of terrorism on the books that carry the death penalty. While many of us oppose the use of the death penalty under any circumstances—including me based on my many years as a prosecutor and my own personal experience with cases where mistakes were made—it is unclear to me why we would apply the death penalty in a circumstance where the penalty will clearly go beyond the nature of the underlying offense.

HR 2934 makes many federal felonies death-eligible offenses even though the existing penalty for such a crime is not even life imprisonment. The bill will also include certain non-violent offenses—such as injury to a building or property within federal jurisdiction.

The amendment that I am offering with my colleague, Mr. Flake, would ensure that crimes under Section 1363 are not eligible for the death penalty.

Specifically, our amendment would exclude crimes involving injury to buildings or property. Under current law, a person convicted under this section may face five years in prison if the damage is to any property and up to twenty years if the damage is done to a dwelling. In the entire history that this statute has been on the books, there have been few occasions where prosecutors have even sought to charge a defendant under this statute.

With our allies, the United States needs to restore its credibility in order to confront potential terrorist threats. At the same time, however, we must not disregard the proper balance between the requirements of national defense and the preservation of the freedoms and values that define our society.

For this reason, I ask my colleagues to join me in support of the amendment offered by the gentleman from Arizona.

Mr. SCOTT. And just remind people that this underlying bill includes abortion protestors and any other kind of protests and also includes conspirators and attempts, so it is extremely broad, and when you trigger the death penalty just by the damage to a building, I think you have got an extremely overbroad piece of legislation.

I think the amendment narrows it to those kinds of—eliminates one which one would not consider a heinous crime, and I would hope that we would adopt this amendment. I mean, the idea that you would have a death penalty for damage to a building in the middle of a protest is extremely overbroad, and I would yield to the gentleman from Arizona.

Mr. FLAKE. I thank the gentleman for yielding.

I just wanted to further answer the question from the gentleman from California. I just fail to see how restricting the application in this one section affects the other sections that already apply the death penalty, and those include section 46–502, 32, 1114, 1117, 844. There are several other sections that apply the death penalty in these cases, and I just don't see how that the fear that you expressed, and I appreciate your doing it in good faith actually would affect this amendment.

I thank the gentleman for yielding.

Mr. SCOTT. I yield back the balance of my time.

Mr. COBLE. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. COBLE. And I will not consume 5 minutes.

The gentleman from Arizona, if he would look at me for a minute, I would like to put a question to him. It appears much confusion has surrounded this discussion. Mr. Flake, if you will give me a couple examples where the death penalty will not be imposed if your amendment passed, whereas otherwise, it would be imposed.

Mr. FLAKE. I thank the gentleman for the question.

As I mentioned, you could have a situation where there is a protest that takes place at a Federal building, and during the protest, people are pushed through the door; the Federal building is dam-

aged. Anybody under this, a prosecutor could easily, as Mr. Nadler explained, say that, well, there is the intent to do this, the intent to do this, the intent to do that and the intent to do the other, and individuals participating in the protest were put at grave risk of harm.

And so, the prosecutor could apply the death penalty to anybody participating in that protest. Now, whether the death penalty would actually be carried out is another story. And those on the Committee and others will make a good argument that in the end, the death penalty may not be applied, because that standard is pretty high. But to be charged with the death penalty is another matter completely. And in my view, what you do with this is simply scare people out of rightful, legitimate civic protest.

And so, under this, the way this expansion goes, anyone participating in a protest that starts out peaceful, ends up breaking down a door and somebody accidentally gets killed in the melee could be charged with the death penalty: anybody who planned the protest, anybody who participated in it.

If my amendment passes, then, that standard would be raised substantially. You would have to prove further intent and willingness to have someone killed, and we already have that in statute several other places. So that's what I'm getting at here.

Mr. COBLE. I'll reclaim my time. I thank the gentleman. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Arizona, Mr. Flake.

Those in favor will say aye.

Opposed no.

The ayes appear to have it.

Mr. FLAKE. Mr. Chairman, I would ask for a recorded vote.

Chairman SENSENBRENNER. Recorded vote is ordered. It was in favor——

Mr. FLAKE. Wait, wait, wait, wait, wait, no, no, no, record will be corrected

Mr. CARTER. Mr. Chairman, I would ask for a recorded vote.

Chairman SENSENBRENNER. The record will be corrected to say that Mr. Carter asked for a recorded vote.

Those in favor of the Flake amendment will, as your names are called, answer aye; those opposed, no, and the Clerk will call the roll.

The CLERK. Mr. Hyde?

Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

Mr. Goodlatte?

Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Mr. Cannon?
Mr. Bachus?
Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye.
Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.
Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no.
Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye.
Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye.
Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye.
Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Carter?
Mr. CARTER. No.
The CLERK. Mr. Carter, no.
Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mrs. Blackburn?
Mrs. BLACKBURN. No.
The CLERK. Mrs. Blackburn, no.
Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman?
Mr. Boucher?
Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.

Ms. Waters?
Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Mr. Delahunt?
Mr. Wexler?
Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye.
Mr. Weiner?
Mr. Schiff?
Mr. SCHIFF. Pass.
The CLERK. Mr. Schiff, pass.
Ms. Sanchez?
Ms. SANCHEZ. Aye.
The CLERK. Ms. Sanchez, aye.
Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their votes?
The gentleman from California, Mr. Gallegly?
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly, no.
Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their votes?
If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 17 ayes and nine noes.
Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters.
Ms. WATERS. Waters, aye.
The CLERK. Ms. Waters, aye.
Chairman SENSENBRENNER. The clerk will report again.
The CLERK. Mr. Chairman, there are 18 ayes, 9 noes, and 1 pass.
Chairman SENSENBRENNER. And the amendment is agreed to.
Are there further amendments?
Ms. JACKSON LEE. Mr. Chairman?
Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee?
Ms. JACKSON LEE. Mr. Chairman, I have an amendment at the desk.
Chairman SENSENBRENNER. The Clerk will report the amendment.
The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 2934, offered by Ms. Jackson Lee of Texas. Page 2, line 12, insert "or corporation" after "individual".
[The amendment offered by Ms. Jackson Lee follows:]

H.L.C.

AMENDMENT TO THE COBLE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2934 OFFERED BY MS. JACKSON-LEE OF TEXAS

Page 2, line 12, insert "or corporation" after "individual".

[redacted]

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman, I think we've already had a very vigorous——

Chairman SENSENBRENNER. Would the gentlewoman yield?

Ms. JACKSON LEE. I yield.

Chairman SENSENBRENNER. I think this amendment is a constructive addition to bill and would urge the Members to support it.

Ms. JACKSON LEE. Well, I thank the distinguished Chairman. I'll just simply say it adds corporation to this legislation, and I think as the Chairman has already noted, we have had a broad discussion on the broadness of this legislation, which I may agree of its vast reach, but that it is a vast reach, but I do believe in making this legislation complete to add the word corporation, and with that, I yield back and ask my colleagues to support the amendment.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS

Thank you Mr. Chairman and Mr. Ranking Member for first allowing the Subcommittee on Crime, Terrorism, and Homeland Security to mark this bill up last month and now for giving the Full Committee a final opportunity to analyze it.

Because of the nature of the implications that it can have on our criminal justice system and on the U.S. Constitution, it is critical that we do a thorough job of analyzing its purposes and effects.

I offer an amendment proposal that reads as follows:

Page 2, line 12, insert "or corporation" after "individual."

This amendment simply seeks to broaden the application of the preclusion of benefits in Section 2339E to more clearly include corporate perpetrators or corporate members who either act or fail to act, resulting in the facilitation of terrorism. The thrust of this proposal is to include the policy of mandating corporate responsibility

as it relates to ventures that may give fodder to a potential terrorist or terrorist group.

The term "Federal benefit" is described in Section 421(d) of the Controlled Substances Act as:

> (A) . . . the issuance of any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
>
> (B) does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility; and
>
> (2) the term "veterans benefit" means all benefits provided to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States.

As drafted, Subsection (a) references the preclusion of an "individual" from receiving "Federal benefits" upon conviction of a terrorist offense. In legalese, a corporation may be defined as an individual.

However, it may be inferred from the language of this provision that the preclusion of benefits applies to individual persons only. Application of this preclusion to persons only would fail to hold corporations accountable for their actions or omissions that play a major part in or facilitate the commission of a terrorist act.

For example, in the recent subway bombing in Madrid, Spain on March 12, it was discovered that the perpetrators made use of cell phones and that their acts were, in part, facilitated by the fraudulent use of the Subscriber Identity Module, or SIM card. If it was found that the SIM card had been negligently designed or that the manufacturer of that SIM card had produced a design defect that facilitates fraudulent use, such manufacture should be at least partly liable under this legislation. This amendment proposal acts as a deterrent to corporations and manufacturers from abrogating their responsibility to produce a product with integrity.

Many corporations have provided a product and/or service that may be misused in the commission of a terrorist offense. Passing this amendment requires no material change to the thrust of this legislation; rather, it (1) ensures that corporations act responsibly to avoid aiding or supplying services to terrorist groups, (2) clarifies the language in Section 2339E to regulate the behavior of corporations immediately upon enactment to avoid wasteful litigation for declaratory relief, and (3) prevents our Federal government from subsidizing a corporation that facilitates terrorist offenses.

To reiterate, this amendment proposal will not alter the purpose of this legislation. However, it will improve its scope to provide more thorough deterrence and threat of punishment to all possible perpetrators of or contributors to terrorist offenses.

I ask that my colleagues on both sides of the aisle support this amendment, and I thank you for your consideration.

Chairman SENSENBRENNER. The question is on the Jackson Lee amendment.

Those in favor will say aye.

Opposed no.

The ayes appear to have it, the ayes have it, and the amendment is agreed to.

Are there further amendments?

The gentleman from Virginia, Mr. Scott?

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk. I think it is designated 03.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to the amendment in the nature of a substitute to H.R. 2934, offered by Mr. Scott. Page 2, strike line 8 and all that follows through line 10 and make appropriate redesignations and conforming changes.

[The amendment offered by Mr. Scott follows:]

H.L.C.

AMENDMENT TO THE COBLE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 2934

OFFERED BY Scott

Page 2, strike line 8 and all that follows through line 10, and make appropriate redesignations and conforming changes.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this amendment will remove the general provisions of the bill to make all attempts and coconspirators eligible for the death penalty if death results for all offenses under 23–332(b)(g)(5). We should not enact such a blanket death penalty provisions and certainly not in connection with offenses where murder is not the cold-blooded, calculated intent to kill which is necessary to justify the ultimate sanction of execution.

Without the amendment, if you have an abortion protest that gets out of hand, all of the protestors could be death-eligible. Some of the offenses under the bill involve crimes motivated by mischief, such as computer hacking or other kinds of emotion-based relationships such as supporting or harboring a terrorist. Maybe we should jail mothers for harboring their children, but I am not sure that the death penalty would be appropriate in those cases.

If there is specific evidence of the requisite intent to prosecute capital murder, it should be done. But people should be prosecuted for what they did, not what we call them. Designating someone a terrorist under a definition as broad as attempting or conspiring to influence the conduct of Government by intimidation or coercion is far afield from the cold, calculating attempt to murder people generally associated with the death penalty.

I would also note that many of these crimes but for this designation would be fairly low-level felonies. They would be converted to death penalty-eligible by virtue of this bill unless this amendment is adopted. I would hope that we would adopt the amendment.

I yield back.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Carter?

Mr. CARTER. If I understand this amendment, Mr. Chairman, it is an attempt to eliminate conspiracy and attempt from the bill, and I oppose this amendment.

This legislation and the substitute amendment specifically require that the death of another person must occur before the death penalty can be considered by the prosecutor, the judge and the

jury. The fact that a person merely attempted to carry out a terrorist attack but was thwarted, killing individuals in the process, should not be a reason to remove the consideration of the death penalty as a possibility.

Furthermore, a person who plans and facilitates a terrorist act but who does not commit the actual offense is just as culpable. There are other terrorism offenses where we have recognized that the conspiracy or attempt to commit these crimes if it results in the death of another should be considered as serious as the underlying crimes subject to the penalties.

For example, 18 U.S.C. 2332(a), use of certain weapons of mass destruction, the defendant is eligible for the death penalty if he conspires or attempts to use a weapon of mass destruction and the death penalty [sic] results from that conspiracy or attempt. To do what this—what is proposed here, Mr. Chairman, would, in a situation where one of these terrorist leaders plans a suicide attack, in my opinion, cons these guys into going out and blowing themselves up and results in massive deaths of individuals, we would not be able to reach the man who planned the attack and conspired to have his agents go out and blow up these other folks.

Clearly, that is something that seems to be going on every day. So we need to be seriously concerned about the limitations that this would throw in here, and I urge my colleagues to oppose this amendment and yield back my time.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. I move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. I thank you, and I thank the gentleman for yielding.

Mr. Chairman, the gentleman uses the word terrorist attack, which is not the language that is used in the actual legislation. Terrorist attack could be an abortion protest. Any action designed to try to change Government action would stimulate this bill. That is not—a civil disobedience is not a terrorist attack. This bill, if an abortion protest gets out of hand and somebody dies, that would be in a terrorist attack, and all the coconspirators and all the people involved would all of a sudden be eligible for the death penalty.

I think that is entirely overbroad. That is not a terrorist attack. That is a civil disobedience, and there is no intent, no direct intent, although, you know, you could—should have calculated somebody might die if you have a big protest, and people moving, the mob runs up against the fence or something and somebody dies.

That is not the kind of thing that we anticipate, that we really call a terrorist attack. So if you look at—we're talking about attempts, coconspiracy, things like harboring a terrorist that a mother may be involved in, those are not the kinds of things that ought to put people—we ought to be putting people to death over.

And frankly, you shouldn't be able to charge it, because once you charge it, you get the benefit of a death-qualified jury, which has other effects, but coconspirators and attempts, just because they are involved in the abortion protest shouldn't subject them to the death penalty.

I thank the gentleman. I yield back.

Mr. WATT. I yield back, Mr. Chairman.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Virginia, Mr. Scott.

Those in favor will say aye.

Opposed, no.

The noes appear to have it. The noes have it.

Mr. SCOTT. rollcall.

Chairman SENSENBRENNER. rollcall will be ordered. Those in favor of the Scott amendment will, as your names are called, answer aye, those opposed no, and the Clerk will call the roll.

The CLERK. Mr. Hyde?

Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly?

Mr. Goodlatte?

Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Mr. Cannon?

Mr. Bachus?

Mr. Hostettler?

Mr. Green?

Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no.

Ms. Hart?

Ms. HART. No.

The CLERK. Ms. Hart, no.

Mr. Flake?

Mr. Pence?

Mr. PENCE. No.

The CLERK. Mr. Pence, no.

Mr. Forbes?

Mr. FORBES. No.

The CLERK. Mr. Forbes, no.

Mr. King.

Mr. KING. No.

The CLERK. Mr. King, no.

Mr. Carter?

Mr. CARTER. No.

The CLERK. Mr. Carter, no.

Mr. Feeney?

Mr. FEENEY. No.

The CLERK. Mr. Feeney, no.

Mrs. Blackburn?

Mrs. BLACKBURN. No.

The CLERK. Mrs. Blackburn, no.

Mr. Conyers?

Mr. Berman?

Mr. Boucher?
Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye.
Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt?
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren?
Ms. Jackson Lee?
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Ms. Waters?
Mr. Meehan?
Mr. Delahunt?
Mr. Wexler?
Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye.
Mr. Weiner?
Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Ms. Sanchez?
Ms. SANCHEZ. Aye.
The CLERK. Ms. Sanchez, aye.
Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to wish to cast or change their votes?
The gentleman from California, Mr. Gallegly?
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly, no.
Chairman SENSENBRENNER. The gentleman from Wisconsin, Mr. Green?
Mr. GREEN. No.
The CLERK. Mr. Green, no.
Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no.
Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no.
Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?
If none, the Clerk will report.

The CLERK. Mr. Chairman, there are seven ayes and 18 noes.

Chairman SENSENBRENNER. Are there further amendments?

Mr. FEENEY. Mr. Chairman, if there are no further amendments, Mr. Chairman, may I be recognized?

Chairman SENSENBRENNER. The gentleman from Florida, Mr. Feeney?

Mr. FEENEY. Mr. Chairman, during the Subcommittee meeting on April 24, the record includes a suggestion that there may be, in quotes, disparate treatment of African-Americans in the judicial system and the large numbers of those on death row.

Contrary to the suggestion in the record, empirical evidence shows that there is no disparate treatment, and according to a June 6, 2001, report by Attorney General Janet Reno, after an extensive review of all Federal death penalty procedures, there was, according to the report in quotes, no evidence that the minority defendants are subjected to bias or otherwise disfavored in decisions concerning capital punishment.

To the contrary, the report reflects that at each stage of the process, white defendants and not minorities were disproportionately recommended for the death penalty. Mr. Chairman, I would ask that the Attorney General's June 6, 2001, report, as well as a September 12, 2000, report concerning the same matter be inserted into the record at this time.

Chairman SENSENBRENNER. Is there objection?

The Chair hears none.

[The 2001 report follows:]

U.S. Department of Justice

The Federal Death Penalty System:

Supplementary Data, Analysis and Revised Protocols for Capital Case Review

June 6, 2001

THE FEDERAL DEATH PENALTY SYSTEM:

Supplementary Data, Analysis and Revised Protocols for Capital Case Review

U.S. Department of Justice

Washington, D.C.

June 6, 2001

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THE FEDERAL DEATH PENALTY SYSTEM:

Supplementary Data, Analysis and Revised Protocols for Capital Case Review

U.S. Department of Justice
Washington, D.C.
June 6, 2001

INTRODUCTION

This report completes a survey and assessment of the federal death penalty system. At the direction of Attorney General Janet Reno, a study of decision-making processes and demographic factors in federal capital cases was carried out last year. The Department of Justice published an initial report setting out the results of this study on September 12, 2000 (hereafter, the "Sept. 12 report"). Attorney General Reno wished to supplement the information that was available at the time of the Sept. 12 report, and the Department undertook further information gathering and analysis. Noting the pendency of this follow-up study, President Clinton delayed the first scheduled federal execution in the modern period, and directed that the results of the Department's analysis be reported to the President by the end of April 2001.

Further study has now been carried out, and its results have been analyzed. The findings under the augmented data, and related policy decisions, may be summarized as follows:

The proportion of minority defendants in federal capital cases exceeds the proportion of minority individuals in the general population. The information gathered by the Department indicates that the cause of this disproportion is not racial or ethnic bias, but the representation of minorities in the pool of potential federal capital cases. A factor of particular importance is the focus of federal enforcement efforts on drug trafficking enterprises and related criminal violence. The prosecution of drug crimes has generally been a key priority both of Congress and of federal law enforcement for many years. Federal authorities are often better able to carry out effective prosecutions in this area for such reasons as the complexity of drug enterprise cases, their multi jurisdictional character, and the availability to federal prosecutors of greater investigative resources or more effective legal tools.

In areas where large-scale, organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups, the active federal role in investigating and prosecuting these crimes results in a high proportion of minority defendants in federal cases, including a high proportion of minority defendants in potential capital cases arising from the lethal violence associated with the drug trade. This is not the result of any form of bias, but reflects the normal factors that affect the division of federal and state prosecutorial responsibility: the nature of the offenses subject to federal jurisdiction, the demographics of

crime in areas where that jurisdiction is exercised, the respective capacities of federal and state law enforcement authorities, and the cooperative arrangements and divisions of responsibility that federal and state authorities develop in light of these considerations.

Within the universe of federal cases that may be pursued as capital crimes, cases in which the death penalty is actually sought depend on subsequent exercises of prosecutorial judgment and discretion. Under existing Justice Department procedures, United States Attorneys cannot decide unilaterally whether to seek the death penalty in cases involving capital charges, but are required to submit all such cases to a central review procedure. These cases are reviewed by a committee of senior attorneys, and the Attorney General personally makes a final decision whether to seek a capital sentence. The Sept. 12 report found that at no stage of the review process were decisions to recommend or approve the seeking of a capital sentence made at higher rates for Black or Hispanic defendants than for White defendants. For example, in the cases considered by the Attorney General, the Attorney General approved seeking the death penalty for 38% of White defendants, 25% of Black defendants, and 20% of Hispanic defendants.

The data available in the preparation of the Sept. 12 report was limited to information concerning cases involving capital charges that were submitted to the review procedure. Data was not available concerning cases in the United States Attorneys' offices which would factually support charging an offense punishable by death, but which were not actually charged as capital crimes and submitted for review. Attorney General Reno accordingly directed that more complete information be obtained. The United States Attorney offices submitted this supplementary information subsequent to the Sept. 12 report.

Like the data considered in the Sept. 12 report, the augmented data provides no evidence that minority defendants are subjected to bias or otherwise disfavored in decisions concerning capital punishment. Within the broader universe of potential capital cases, capital charges and submission to the review procedure for a decision about seeking the death penalty did not occur with any greater frequency in cases involving Black or Hispanic defendants than in cases involving White defendants.

While the Department's review of existing federal death penalty procedures has produced no evidence of bias against racial or ethnic minorities, it has suggested that changes could be made to promote public confidence in the process's fairness and to improve its efficiency. For example, as noted above, consideration of the broader universe of potential capital cases reinforced the findings of the Sept. 12 study which tended to refute any assumption of bias against racial or ethnic minorities. However, obtaining information about this broader class of cases required an extraordinary effort because the existing review procedure does not regularly obtain information about cases in which a capital charge is factually supportable, but the U.S. Attorney office decides to charge (or accept a plea to) a noncapital crime. Hence, in the future, U.S. Attorneys will be required to submit information, including racial and ethnic data, about potential capital cases, as well as those in which a capital offense is actually being charged. This should help to maintain public confidence in the fairness of the process by making more complete racial and ethnic data available for both actual and potential federal capital cases on a continuing basis.

Part I of this report describes the legal rules and administrative procedures governing federal capital cases, including the existing safeguards against racial and ethnic bias. Part II describes the central findings of the Sept. 12 report, the reaction and policy decisions of Department and Administration officials at the time, their direction that more extensive data collection and analysis be carried out, and the results of further study. Part III analyzes the data as it bears on the role of racial or ethnic factors. Part IV discusses the

contemplated revision of the Department's protocol for reviewing capital cases.

PART I: LEGAL RULES AND ADMINISTRATIVE PROCEDURES

Decisions of the Supreme Court beginning in the early 1970s imposed new restrictions on capital punishment, producing a temporary cessation in the use of the death penalty as a criminal sanction. Most states subsequently reformed their death penalty laws and procedures to conform to the new standards. Congress initially sought to do the same for federal cases through provisions of the Anti-Drug Abuse Act of 1988, which made the death penalty available for certain drug-related offenses. The federal death penalty was effectively revived on a broader basis through provisions of the Violent Crime Control and Law Enforcement Act of 1994, which added death penalty authorizations to many additional offense provisions, and established general statutory procedures for seeking and imposing capital sentences. The federal offenses for which the death penalty is currently authorized generally require as a necessary element the killing of a victim, but they include a few non-homicidal offenses, such as treason and espionage.

These federal legislative enactments have been paralleled by the Justice Department's adoption of administrative standards and procedures for death penalty decisions in federal cases. Following the 1988 enactment, the Department adopted a policy that required United States Attorneys to submit to the Attorney General for review and approval any case in which the United States Attorney wished to seek the death penalty. Following the 1994 enactment's expansion of federal death penalty authorizations, the Department adopted the current protocol for death penalty cases. The current protocol requires United States Attorneys to submit to a centralized review process all cases involving a pending charge of an offense for which the death penalty is a legally authorized sanction, regardless of whether the United States Attorney wishes to seek the death penalty.

Both the legal rules and the administrative procedures that currently govern federal capital cases incorporate extensive safeguards against any influence of racial or ethnic bias or prejudice. The main features of the existing system are as follows:

A. FEDERAL DEATH PENALTY LAW

The federal cases in which a defendant is eligible for a capital sentence are generally those in which: (1) the defendant is charged with a crime for which the death penalty is a legally authorized sanction, (2) the defendant intended or had a high degree of culpability with respect to the death of the victim, and (3) one or more aggravating factors specified in a statutory list are present in the case. The statutory aggravating factors include such factors as the commission of a killing in the course of another serious offense, the defendant's having a prior criminal history involving serious violent offenses, the commission of a killing after substantial planning and premeditation, killing multiple victims, or endangering the lives of other persons (in addition to the person killed) in committing the crime. 18 U.S.C. 3591-93.[1] To seek a capital sentence, a prosecutor must file a notice of intent to seek the death penalty. The notice must identify the aggravating factor or factors which the government proposes to prove as justifying a sentence of death. 18 U.S.C. 3593(a).

The prosecutor is constitutionally prohibited from engaging in discrimination or favoritism based on invidious factors, such as race or ethnicity, in deciding whether to seek a capital sentence, and is likewise prohibited from making any appeal to racial or ethnic prejudice in remarks to the jury. A showing that the prosecutor or other decision makers in the case acted on the basis of racial or ethnic bias would entitle the defendant to relief from a capital sentence.[2]

In cases where a capital sentence is sought, the defendant is entitled to the appointment of two lawyers to represent him, "of whom at least 1 shall be learned in the law applicable to capital cases." 18 U.S.C. 3005. Indigent capital defendants have a continuing right at all stages of litigation and review to provision of needed defense resources, and to appointment of defense counsel who satisfy specific years-of-experience standards or "whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." 21 U.S.C. 848(q).

In the selection of the jury, potential jurors are subject to questioning ("voir dire") concerning bias, including possible racial or ethnic bias against the defendant. If it appears that a potential juror harbors such bias against the defendant, defense counsel can challenge the person "for cause," and the court will exclude the person from the jury. The parties in a capital case are also afforded a large number of peremptory challenges - 20 for each side - which they can use at their discretion. Fed. R. Crim. P. 24(b). For example, defense counsel who suspect that a potential juror or jurors might be affected by racial or ethnic bias against the defendant can use peremptory challenges to exclude these persons from the jury. However, neither the prosecution nor the defense is permitted to use peremptory challenges to exclude persons from the jury because of their race or ethnicity.[3]

If the defendant is convicted of a capital offense, the guilt-determination phase of the trial is followed by a special hearing to determine whether a sentence of death is justified. The hearing is normally held before a jury of 12 members. At the hearing, the prosecutor presents evidence in support of the aggravating factors for which notice has previously been provided, and the defense is free to present evidence concerning any mitigating factors. The government must prove the existence of aggravating factors beyond a reasonable doubt, and the jury must unanimously agree that such a factor or factors have been established. The defendant need only establish the existence of mitigating factors by a preponderance of the evidence, and each juror is free to conclude that such factors have been established, regardless of whether other members of the jury agree. To recommend a sentence of death, the jury must determine that the defendant had the requisite culpability with respect to the victim's death, and must unanimously agree that the aggravating factor or factors it has found sufficiently outweigh any mitigating factors to justify a capital sentence. If the jury does recommend a capital sentence, the court is required to sentence the defendant accordingly. If the jury does not unanimously agree that the death penalty should be imposed, the defendant is given a lesser (non-capital) sentence. 18 U.S.C. 3593-94.

The rules for capital sentencing hearings require special instructions and certifications to guard against any possible influence of bias or prejudice. The court instructs the jury that, "in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be." On returning a recommendation concerning the sentence, the jury must also return to the court a certificate signed by each juror, "that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race,

color, religious beliefs, national origin, or sex of the defendant or any victim may be." 18 U.S.C. 3593(f).

In cases where a capital sentence is imposed, the court of appeals' review of the case includes a determination of "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." If the appellate court finds that the sentence was based on such improper factors, it must send the case back to the trial court for another capital sentencing hearing or imposition of a noncapital sentence. 18 U.S.C. 3595. Following the appeal, there is regularly further judicial review in capital cases, including a motion for collateral relief under 28 U.S.C. 2255. The defendant may thereafter apply for executive clemency. As noted above, the defendant has a continuing right to adequate resources and representation by competent counsel at all stages of the process.

B. THE CAPITAL CASE REVIEW PROCEDURE

The Justice Department's capital case review procedure is governed by a protocol set out in section 9-10.010 et seq. of the United States Attorneys' Manual (USAM). The procedure "is designed to promote consistency and fairness." The protocol provides that "[a]s is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty." USAM 9-10.080.

The protocol requires United States Attorneys to submit cases involving a pending charge of an offense for which the death penalty is a legally authorized sanction, regardless of whether or not the U.S. Attorney recommends seeking the death penalty. The death penalty cannot be sought without the prior written authorization of the Attorney General.

The U.S. Attorneys' capital case submissions are sent to the Criminal Division and must include a death penalty evaluation form for each defendant charged with a capital offense, a detailed prosecution memorandum, copies of indictments, written materials submitted by defense counsel in opposition to the death penalty, and other significant documents and evidence as appropriate. The Capital Case Unit of the Criminal Division reviews the submission, seeks additional information when necessary, and drafts an initial analysis and proposed recommendation.

The case is then forwarded to a committee of senior Justice Department lawyers, the Attorney General's capital case review committee. The review committee meets with the Capital Case Unit attorneys, the U.S. Attorney and/or the prosecutors in the U.S. Attorney's office who are responsible for the case, and defense counsel. During this meeting, defense counsel are afforded an opportunity to present any arguments against seeking the death penalty for their client. The review committee considers "all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty." USAM 9-10.050. The review committee thereafter meets to finalize its recommendation to the Attorney General, to whom all submitted materials are forwarded. The Attorney General makes a final decision as to whether a capital sentence should be sought in the case.

As a safeguard against any possible influence of racial or ethnic bias, the review process is carried out in a

"race-blind" manner. The United States Attorney's office does not provide information about the race or ethnicity of the defendant to review committee members, to attorneys from the Criminal Division's Capital Case unit who assist the review committee, or to the Attorney General. The only individuals in Washington, D.C., who are ordinarily given racial or ethnic information are paralegal assistants in the Capital Case Unit who collect the statistics under separate cover from the United States Attorneys.[4] This information provides the pool from which most of the data of the Sept. 12 report on race and ethnicity in federal capital cases was drawn.

PART II: STUDY OF THE SYSTEM

A. THE SEPTEMBER 12, 2000 REPORT

On September 12, 2000, the Department released the results of a survey of the federal death penalty system. The findings from that survey are set out exhaustively in the Sept. 12 report and its accompanying statistical tables, and need not be repeated here in detail. The central findings regarding racial and ethnic proportions were as follows:

First, in cases submitted by the United States Attorneys for departmental review, the proportions of Black and Hispanic defendants were greater than the proportions of Blacks and Hispanics in the general population. Of the 682 defendants reviewed under the Department's death penalty decision-making procedures in the period 1995 to 2000, 134 (20%) were White, 324 (48%) were Black, and 195 (29%) were Hispanic. (Sept. 12 report at 6.)[5]

Second, recommendations and decisions to seek the death penalty were less likely at each stage of the process for Black and Hispanic defendants than for White defendants. In other words, United States Attorneys recommended the death penalty in smaller proportions of the submitted cases involving Black or Hispanic defendants than in those involving White defendants; the Attorney General's capital case review committee likewise recommended the death penalty in smaller proportions of the submitted cases involving Black or Hispanic defendants than in those involving White defendants; and the Attorney General made a decision to seek the death penalty in smaller proportions of the submitted cases involving Black or Hispanic defendants than in those involving White defendants. (Sept. 12 report at 7.)

In the cases considered by the Attorney General, the Attorney General decided to seek the death penalty for 38% of the White defendants, 25% of the Black defendants, and 20% of the Hispanic defendants. (Sept. 12 report at 7.) The finding that the death penalty was sought at lower rates for Black and Hispanic defendants than for White defendants held true both in "intraracial" cases, involving defendants and victims of the same race and ethnicity, and in "interracial" cases, involving defendants and victims of different races or ethnicities. (Sept. 12 report at 25-26.)[6]

B. RELATED JUSTICE DEPARTMENT AND ADMINISTRATION DECISIONS

In announcing the results of the Sept. 12 report, Attorney General Reno noted that the information showed racial/ethnic disparities in the federal death penalty system, in comparison to the general population. Specifically, as noted above, in the 682 cases submitted to the Department's death penalty review procedure by U.S. Attorney offices between 1995 and July 2000, 20% involved White defendants, 48% involved Black

defendants, and 29% involved Hispanic defendants. She further noted, however, that statistical disparities relating to race and ethnicity are not unique in any sense to the federal death penalty context, but are "true of the entire criminal justice system, both state and federal." With respect to the decisions made in the Department's review process, she noted that the proportion of cases in which seeking the death penalty was actually authorized was higher for White defendants than for defendants of other races/ethnicities. Specifically, as noted, in the cases considered by the Attorney General, the death penalty was authorized 38% of the time for White defendants, 25% of the time for Black defendants, and 20% of the time for Hispanic defendants.[7]

Attorney General Reno did not believe that the findings of this study showed that racial or ethnic bias affected the decision-making process in federal death penalty cases. However, the available information was generally limited to the information submitted by U.S. Attorney offices in connection with the capital case review procedure. She accordingly directed that further study be carried out to illuminate any statistical disparities at other stages of the process, such as decisions whether to pursue federal rather than state charges in potentially capital cases.

Attorney General Reno rejected the idea of declaring a moratorium on the federal death penalty pending the completion of further study for several reasons: (1) defendants in federal capital cases are competently represented (including representation by two attorneys at least one of whom is experienced in capital litigation, with sufficient defense resources), (2) there is no issue of federal capital convicts being innocent of the crimes for which they have been sentenced to death, (3) the evidence and the law have justified the decisions in all cases to seek capital punishment, and (4) the study's findings did not show bias - as opposed to disparities which could result from non-invidious factors - in federal capital cases.[8]

However, President Clinton thereafter issued a reprieve which delayed for six months the first scheduled federal execution in the contemporary period, pointing to the pendency of further study and analysis of the issue of racial and ethnic disparities. He directed that the Department's analysis be reported to the President by the end of April 2001.[9]

C. THE SUPPLEMENTARY STUDY

The follow-up to the Sept. 12 report outlined by Attorney General Reno included solicitation of external research proposals, submission by the United States Attorneys within 60 days of data about potential capital cases in their offices that were not submitted to the Department's capital case review process, and other examination of factors used to decide which homicide cases are taken into the federal system when there is joint state and federal jurisdiction.

With respect to the potential solicitation of external research proposals, the National Institute of Justice held a meeting with researchers and practitioners on January 10, 2001. The discussion at the meeting indicated that attempting to obtain a comprehensive understanding of the statistical proportions found in federal capital (and potential capital) cases would entail a highly complex, multi-year research initiative. It further indicated that even if such a study were carried out, it could not be expected to yield definitive answers concerning the reasons for disparities in federal death penalty cases. It was also clear that this approach could not produce policy-relevant findings within the time frame specified by President Clinton, or in time to inform decisions about carrying out death sentences whose execution dates were approaching.

It was possible, however, to carry out promptly the more defined tasks identified by the President and the Attorney General. The U.S. Attorneys submitted information concerning cases in their offices in which the facts would have supported a capital charge, but which were not charged as capital crimes and submitted to the departmental review procedure. Analysis of this additional information produced findings which were similar in character to the findings of the Sept. 12 report.

Within the broader pool of potential capital cases, the racial and ethnic proportions were again found to be different from those in the general population. This broader pool of cases involved 973 defendants, in comparison with the 682 defendants in the cases submitted to the departmental review procedure.[10] Of the 973 defendants in the broader class, 17% (166) were White, 42% (408) were Black, and 36% (350) were Hispanic.[11]

The augmented data was also similar to the original data of the Sept. 12 report in that it provided no evidence of favoritism towards White defendants in comparison with minority defendants. Rather, potential capital cases involving Black or Hispanic defendants were less likely to result in capital charges and submission of the case to the review procedure. Specifically, capital charges were brought and the case was submitted for review for 81% of the White defendants; the corresponding figures for Black defendants and Hispanic defendants were 79% and 56% respectively.[12]

Likewise, considering the process as a whole, potential capital cases involving Black or Hispanic defendants were less likely to result in decisions to seek the death penalty. Specifically, the Attorney General ultimately decided to seek the death penalty for 27% of the White defendants (44 out of 166), 17% of the Black defendants (71 out of 408), and 9% of the Hispanic defendants (32 out of 350).[13]

It was also possible to carry out within a reasonable time frame additional consultation concerning the reasons for the exercise of federal jurisdiction in potential capital cases. The information obtained indicates that the racial and ethnic proportions found in the general pool of potential federal capital cases, and differences among the racial and ethnic proportions in different districts, result from non-invidious causes. Some of these causes are general in nature, and apply to the findings in many districts; others reflect unique conditions in particular districts and the relationship between federal and state authorities in those districts. Part III of this report provides more specific analysis of this information.

PART III: ANALYSIS OF THE DATA

As discussed in Part I of this report, a wide range of protections and remedies exist, both legal and administrative, to guard against any influence of racial or ethnic bias in the administration of capital punishment at the federal level. Nor is there anything in the character, training, or background of federal prosecutors that would dispose them to act from such invidious motives. Rather, they are experienced legal professionals whose values and practices are shaped by general societal attitudes and the specific values of the legal system that strongly condemn discrimination based on race or ethnicity.

Given the absence of any reason to expect a priori that racial or ethnic bias would play a role in federal capital punishment decisions, the question then becomes whether there is empirical evidence which nevertheless demonstrates that the system is subverted by such bias. The findings of the Sept. 12 report and the further study conducted thereafter do not support such a conclusion. The following analysis considers

this issue first in relation to the general pool of potential federal capital cases, and thereafter in relation to the decisions made at subsequent stages of the review process.

A. POTENTIAL FEDERAL CAPITAL CASES

In assessing the implications of statistical data as possible evidence of bias or prejudice, it is necessary to distinguish between statistical disparities on the one hand and discrimination on the other. For example, in a federal district that prosecutes a large number of securities fraud cases, a finding that the defendants in these cases are practically all White would not imply that federal prosecutors in these cases are engaging in favoritism to potential Black and Hispanic defendants, or discriminating against White defendants. Rather, it may just be the case that most persons who commit these crimes in the district are White. Account must be taken of the differing incidences of crimes in different demographic groups.

This point applies to the pool of potential capital cases as in any other area. Both common experience and empirical data indicate that the offenses that may lead to homicides and capital charges are not evenly distributed across all population groups. Since crime and victimization are not evenly distributed across the general population, there is no reason to expect that the racial and ethnic proportions in potential capital cases will be the same as, or similar to, the racial and ethnic proportions in the general population.[14]

Turning to the area of federal capital cases, it must also be understood that federal criminal jurisdiction is limited, and generally supplementary, in character. The Sept. 12 report (at p. 4) explained:

> In evaluating the data . . . the reader should bear in mind that the vast majority of homicides in the United States, like most violent crimes, are investigated exclusively by local police officers working hand-in-hand with local prosecutors, who file charges against defendants in state courts, either as a capital case or non-capital case. When a homicide is prosecuted federally - either as a capital or non-capital case - it is often because of the availability of certain federal laws or because of a federal initiative to address a particular crime problem. Criminal organizations often operate in multiple jurisdictions, making it difficult for any single local prosecutor to investigate or prosecute a case. Additionally, many states lack the equivalent of the federal witness protection program and the ability to conduct complex long-term investigations using resource intensive investigative techniques such as court-ordered wiretaps and undercover operations.
>
> Apart from these differences in laws and resources, which often affect whether a particular homicide is prosecuted in state or federal court - either as a capital or non-capital case - state and federal law enforcement officials often work cooperatively to maximize their overall ability to prevent and prosecute violent criminal activity in their respective communities. Such cooperation is a central feature of current federal law enforcement policy. In some areas, these cooperative efforts lead to agreements that certain kinds of offenses, particularly violent crimes, will be handled by federal authorities . . . . In some cities, a large number of cases involving multiple murders by drug and other criminal organizations are investigated by joint federal and local task forces and prosecuted federally due to some of the factors cited above, such as the geographic reach of the organization and the availability of a witness protection program.

As discussed in Part II of this report, the proportion of Black and Hispanic defendants in the pool of potential federal capital cases exceeds the proportion of Blacks and Hispanics in the general population. The Department's follow-up study of this issue produced no evidence that this statistical disparity results from bias or prejudice, as opposed to non-invidious factors like those discussed above, which can result in

disparities in any part of the criminal justice system. To see concretely how these factors can affect the demographic proportions in federal capital cases, it is helpful to examine more specifically the nature of these cases, and the reasons for the exercise of federal jurisdiction, in a number of particular districts.

1. Eastern District of Virginia

In the 1995-2000 period considered by the Sept. 12 report, the U.S. Attorney office for the Eastern District of Virginia charged capital offenses in 66 cases and submitted these cases to the Department's capital case review procedure. Of these 66 defendants, 5 were White, 59 were Black, and 2 were Hispanic.

While the defendants in these cases were predominantly Black, analysis of the underlying grounds for federal prosecution shows only legitimate, non-invidious reasons for the district's actions. Of the 66 capital cases submitted by this district, 51% involved drug-related murders, 29% involved killings committed by inmates at the Lorton correctional facility, and 20% involved a mixed bag of offenses as discussed below. The reasons for the exercise of federal jurisdiction in these cases were as follows:

Drug-related killings

Most of the capital charges in the Eastern District of Virginia (51%) resulted from drug cases. The cases in this category originated primarily from large-scale trafficking organizations involving multiple murders, as indicated by the fact that 70% of them were charged under the provision defining the Continuing Criminal Enterprise (CCE) drug offense, 21 U.S.C. 848, or as conspiracies in relation to a CCE murder; 12% were charged as murder in aid of racketeering under 18 U.S.C. 1959, or under both 18 U.S.C. 1959 and 21 U.S.C. 848; and 18% were charged under 18 U.S.C. 924(j) (causing death through use of a firearm during drug offense). Most of these drug-related murder cases arose from federal, state, and local task forces.

The defendants in these cases are not White because the members of the drug gangs that engage in large-scale trafficking in the Eastern District of Virginia are not White. However, the large federal role in that district in prosecuting serious drug crimes generally, and potentially capital drug-related homicides in particular, has nothing to do with the race of the defendants. Rather, the factors which have contributed to this assumption of federal responsibility include the following:

First, Virginia prosecutors have had little ability to use state grand juries in investigations. The availability of compulsory process to federal prosecutors through the use of federal grand juries has provided a critical advantage in the investigation of ongoing drug conspiracies, which account for most of the drug-related murders in the district.

Second, until recently, each defendant was entitled to a separate trial in the state system. This is a severe disadvantage in prosecuting cases involving multiple defendants, whose joint activities may have resulted in numerous killings. There is no comparable problem in federal prosecutions, in which it is usually possible to secure a joint trial for defendants who have engaged in this type of coordinated criminal activity.

Third, Virginia has many prosecution units. The Eastern District of Virginia has within its boundaries 43 counties, each with its own Commonwealth's Attorney, and 21 independent cities, most of which also have their own Commonwealth's Attorneys. The state Attorney General does not have general prosecution

authority throughout the state. Thus, in the state system, defendants who commit crimes in more than one jurisdiction must be prosecuted in each jurisdiction separately. Again, this is a serious disadvantage in attempting to prosecute drug trafficking activity, and related violence and homicides, which cut across jurisdictional boundaries within the state. The U.S. Attorney, in contrast, can prosecute a defendant or defendants in a single trial for activities committed in the various state jurisdictions which constitute federal crimes.

Fourth, Virginia prosecutors are generally in a less favorable position to prosecute conspiracy cases. Their offices often have limited resources and cannot devote the manpower to investigate ongoing conspiracies, particularly when the organizations permeate numerous other jurisdictions as well. Task forces including both law enforcement officers and prosecutors make the most sense in these cases. Combining the abilities of local law enforcement officers and the prosecution advantages of the federal system, it is possible to make many serious cases which might otherwise go unsolved or resist successful prosecution.

Cases from Lorton

As a result of recent reforms, persons sentenced to imprisonment for the commission of felonies under the District of Columbia Code will serve their sentences in the regular federal prison system. However, prior to these reforms, incarcerated D.C. felons were housed in a separate prison located in Lorton, Virginia. The Eastern District of Virginia was responsible for prosecuting killings committed by inmates at that institution, which accounted for 29% of the cases it submitted to the Department's capital case review procedure. Not surprisingly, the incarcerated felon population deriving from a majority Black urban jurisdiction (D.C.) has been predominantly Black, and the defendants in potential capital cases arising from killings by inmates in that incarcerated felon population have been Black.

Other cases

The remaining 20% of the cases submitted by the Eastern District of Virginia involved five espionage defendants, two bank robbery defendants, two kidnapping defendants, three carjacking defendants, and one murder in a federal enclave. The five espionage defendants were White. Their race, of course, had nothing to do with the decision to prosecute these cases federally; espionage, by its nature, is a crime that only the federal government prosecutes. Likewise, the murder in a federal enclave implicated obvious federal interests.

The carjacking case involved three members of the same family who hijacked trucks and killed the drivers. They committed their crimes in more than one state and in more than one local jurisdiction within Virginia. Federal prosecution made possible a joint trial of these crimes, which otherwise would have had to be tried separately in various local Virginia jurisdictions.

The bank robbery was a complicated case in which the need to utilize the powers of a federal grand jury made federal prosecution appropriate. The two kidnapping cases arose from abduction-murders in which state prosecution was not an option, because it was not provable which particular states the victims were in at the time the kidnappers killed them. This is not an impediment to a successful federal kidnapping prosecution.

2. District of Puerto Rico

The District of Puerto Rico submitted 72 cases, all involving Hispanic defendants, to the Department's capital case review procedure. The District of Puerto Rico has an unusually large number of homicide cases because the U.S. Attorney has agreed with the local authorities that the U.S. Attorney's office will prosecute fatal carjacking cases. The obvious reason the defendants in these cases were Hispanic is that the population of Puerto Rico is generally Hispanic.

3. District of Columbia

The United States Attorney's office for the District of Columbia submitted cases involving 23 defendants to the Department's capital case review procedure, of whom 22 were Black. Most of these cases (66%) involved defendants charged in multi-defendant racketeering (RICO) and Continuing Criminal Enterprise (CCE) drug offense cases. Of the remainder, 13% involved federal carjacking charges, 13% involved killing a federal witness, 4% involved killing a law enforcement officer, and 4% involved terrorism.

The U.S. Attorney's office is responsible for the prosecution of local crimes under the District of Columbia Code, as well as being responsible for the prosecution of federal offenses in D.C. Hence, in contrast to other districts, the U.S. Attorney office in D.C. has jurisdiction to prosecute crimes occurring in its geographic area regardless of whether it brings federal charges. The choice for that office in murder cases is between pursuing a murder prosecution under local D.C. law in the D.C. Superior Court, or bringing a federal charge and prosecuting the case in federal district court.

Because of D.C.'s demographics, cases involving serious violent crimes - whether prosecuted under federal law or local D.C. law - usually involve Black defendants. Where the choice is made to proceed in federal court, the decision has nothing to do with the defendant's race or ethnicity. Rather, it depends on the availability of a federal offense that applies to the criminal conduct, and whether there are prosecutorial advantages in litigating in one forum rather than the other.

For example, as noted above, most of the cases from D.C. submitted to the review procedure involved drug-related killings. The U.S. Attorney's office has frequently brought federal prosecutions involving drug trafficking groups and street gangs as a valuable alternative to single-incident murder cases in the local Superior Court for several reasons:

First, the federal courts are better suited and better equipped to handle multi-defendant complex criminal prosecutions than the local Superior Court. The federal district court in D.C. has extensive experience in handling these complex cases, which raise significant witness and jury security issues.

Second, use of the federal RICO and CCE offenses makes it possible to join together evidence relating to drug trafficking, murders, and other violence in a single case. This is a major advantage in comparison with single-incident prosecution of murders in the local Superior Court.

Third, the Federal Rules of Evidence are superior from a prosecutorial standpoint to the evidence rules applied in Superior Court proceedings - for example, in relation to the admissibility of evidence of the defendant's commission of similar or related crimes on other occasions.

Fourth, federal RICO/CCE prosecutions allow the government to: (1) introduce evidence of acts committed by violent defendants when they were juveniles, (2) avoid statutes of limitations issues for crimes

other than murders (e.g., assaults and drug trafficking), (3) avoid venue problems in prosecuting multijurisdictional criminal operations, and (4) achieve consolidated trials of related criminal activity where severance would more likely occur in a Superior Court prosecution.

4. Central District of California

The Central District of California submitted cases involving 15 defendants to the Department's capital case review procedure, including three White defendants, four Black defendants, and six Hispanic defendants. The 40% (six out of 15) figure for Hispanics in this district was somewhat greater than the proportion of Hispanic defendants in submitted cases generally (29%). However, the proportion of Hispanic defendants in federal capital cases in this district is increased by federal prosecution of members of the "Mexican Mafia." This prison gang has been a serious problem in the California correctional system. The problem can be ameliorated through federal prosecution, which results in the defendants serving their sentences in the federal prison system.

Thus, the causes of the exercise of federal jurisdiction in potential capital cases are varied. Some, such as a federal enforcement emphasis on the prosecution of drug enterprises and related violence, are common to many districts. Others, such as the Eastern District of Virginia's jurisdiction over killings by inmates in D.C.'s prison, and the agreement concerning carjacking prosecutions in the District of Puerto Rico, are specific to particular districts. The common feature of these causes is that they may result in racial and ethnic disparities in federal capital cases when coupled with the demographics of crime in the areas where federal jurisdiction is exercised, but they do not involve any influence of racial or ethnic bias on federal prosecutorial decisions. Rather, as with the division of federal and state responsibility in other areas of prosecution and law enforcement, they reflect non-invidious decisions based on relative federal and state capacities, and cooperative arrangements developed with state and local authorities that take account of those capacities.

A final question in this area is that of "geographic" or "regional" disparity in federal capital cases, which was also identified as a matter meriting further examination in the follow-up to the Sept.12 study. This question, which relates to the fact that some districts have generated larger numbers of potential capital cases than others, can be taken in two ways:

Taken in one way, the reference to "geographic" disparities may reflect a concern that such disparities result from racial or ethnic bias. Articulated more fully, the thought would be that U.S. Attorney personnel in some districts, for reasons of racial or ethnic bias, may have a particular desire to secure the death penalty for minority defendants. Hence, they exercise federal jurisdiction to prosecute more potentially capital cases involving such defendants, so as to be able to convict them federally for capital crimes and secure their execution. This might account for the unusually large number of capital case submissions from some districts.

If this were actually what was going on, one would expect the districts with unusually large numbers of capital case submissions to seek the death penalty with special vigor in relation to minority defendants. The data do not support this notion. For example, aside from the Eastern District of Virginia and the District of Puerto Rico, which have been discussed above, the districts with the largest number of capital case submissions have been the District of Maryland, the Eastern District of New York, and the Southern District of New York. The figures from these districts are as follows:

- The District of Maryland charged capital crimes and submitted to the Department's review procedure cases involving 41 defendants, of whom 36 were Black. However, it recommended the death penalty for only five of the 36, a proportion of 14%. This is below the national proportion of 25% for recommendations by U.S. Attorneys that the death penalty be sought for Black defendants in submitted cases.

- The Eastern District of New York submitted cases involving 58 defendants to the review procedure, of whom 19 were White, 20 were Black, 12 were Hispanic, and 7 were in the "Other" category. It only recommended the death penalty for one of the Black defendants, and for none of the Hispanic defendants.

- The Southern District of New York submitted cases involving 50 defendants to the review procedure, involving 4 White defendants, 17 Black defendants, 28 Hispanic defendants, and 1 "Other" defendant. This was a considerably higher proportion of Hispanic defendants than the national norm - but the district recommended the death penalty for none of them. The district recommended the death penalty for 5 of the 17 Black defendants, a proportion of 29%, which differed little from the national norm of 25%.

In short, there is nothing in the data from these districts which suggests that their high incidence of capital case submissions had anything to do with a desire based on racial or ethnic bias to secure capital sentences for minority defendants.[15]

A second way of taking the reference to "geographic" disparities would be as reflecting a sense that it is intrinsically necessary or desirable for capital cases to be distributed in some proportionate manner among the various districts, independent of any concern about racial or ethnic bias. In this sense, however, geographic "disparities" are neither avoidable nor undesirable. As this report has explained at length, the federal criminal jurisdiction is supplementary and complementary to state and local law enforcement jurisdiction. This necessarily results in large differences among the districts in enforcement priorities and in the division of responsibilities with their state and local counterparts. For example, in districts which accord a high priority to federal prosecution of violent drug gangs, that focus tends to generate a high volume of federal prosecutions involving drug-related killings. Other districts may not prioritize such prosecutions to the same degree because (for example) drugs are generally less of a problem in their areas, state and local authorities have relatively good capacities for dealing with such crimes, or there is relatively little advantage in federal, as opposed to state or local, prosecution in these cases.

There is nothing illegitimate about a district focusing on the actual needs of the geographic area for which it is responsible in decisions about the exercise of federal jurisdiction. Rather, a U.S. Attorney who failed to do so would be derelict in his or her basic responsibilities. To the extent that this results in varying numbers of federal capital cases among the districts, it is no different than, nor any more objectionable than, the "disparities" among the districts which occur equally in non-capital cases.

B. SUBSEQUENT DECISIONAL STAGES

With respect to recommendations and decisions by the Attorney General's review committee and by the Attorney General, there is little to add to the discussion in Part II of this report. Decisions to seek the death penalty have been recommended and approved in lower proportions of cases involving Black or Hispanic

defendants than White defendants. There is nothing in these findings which suggests that the system involves racial or ethnic bias against minorities. As discussed above, the review process is designed to shield the review committee members and the Attorney General as far as possible from information concerning race and ethnicity in the submitted cases. What decisionmakers do not know about cannot influence their decisions.

Analysis of the actions of the U.S. Attorneys' offices is somewhat more complex, because they make a larger number of decisions which may affect the capital or non-capital treatment of their cases. However, the conclusion is the same. The U.S. Attorney offices have charged capital offenses and submitted cases to the review procedure in lower proportions of potential capital cases involving Black or Hispanic defendants than White defendants. They have also recommended seeking the death penalty in the submitted cases in lower proportions of cases involving Black or Hispanic defendants than White defendants. The racial and ethnic proportions in their recommendations have been similar to the racial and ethnic proportions in the recommendations and decisions by the review committee and the Attorney General. (Sept. 12 report at 7, 38-39.)

Following a decision by the Attorney General to seek the death penalty, a capital sentence may nevertheless not be sought because the U.S. Attorney office subsequently reaches a plea agreement to a non-capital charge with the defendant.[16] This has occurred for 48% of the White defendants, 25% of the Black defendants, and 28% of the Hispanic defendants in cases where the Attorney General approved the death penalty. (Sept. 12 report at 31-32).[17] While White defendants superficially fared better at this stage, inferring that these disparities resulted from racial or ethnic bias on the part of the U.S. Attorney offices would be unwarranted for a number of reasons:

First, in contrast to a recommendation for or against seeking the death penalty, the decision about pleas is not under the control of the U.S. Attorney's office. It takes two to make a plea agreement. Inferring bias from disparities in such agreements would not be justified unless non-invidious causes could be excluded, including possible differences in the inclination of defendants from different groups to seek or accept plea agreements. Indeed, since the actions of U.S. Attorney offices at all earlier stages of the process carry no suggestion of bias against racial or ethnic minorities - but rather involve seeking the death penalty with less frequency in cases involving Black or Hispanic defendants - it would be an odd assumption that such bias suddenly springs into existence at the end of the process, and becomes an operative factor at that point in decisions about non-capital pleas.

Second, the findings of the Department's study would not be suggestive of bias by the U.S. Attorneys' offices, even if one were to impute to those offices complete responsibility for the occurrence or nonoccurrence of pleas at the final stage of the process. Consider the class of potential capital cases in which a U.S. Attorney office concludes, either initially or at some point in the process, that a capital sentence should not be sought. The means the office potentially has at its disposal to achieve the desired non-capital treatment of the case include: (1) refraining from a capital charge and review procedure submission in the first place, (2) submitting the case to the review procedure with a recommendation against the death penalty and persuading the Attorney General to accept this recommendation, (3) reaching a non-capital plea agreement with the defendant following the review procedure submission of the case but prior to a decision by the Attorney General whether to seek the death penalty, or (4) reaching a non-capital plea agreement with the defendant subsequent to a decision by the Attorney General to seek the death penalty.

These methods will not necessarily be successful to the same degree at all stages of the process in achieving the desired result (i.e., non-capital treatment of the case) in relation to defendants from different population groups. To the extent that the desired result is not achieved at earlier stages in the process, there may be more motivation to use the methods available at later stages to secure a non-capital disposition. Given the possibility of such trade-offs between actions at different stages, the racial and ethnic proportions at the final plea stage are uninformative as possible indications of bias by the U.S. Attorney offices. Rather, one must look at what happens in the process as a whole.

This point can be assessed in quantitative terms by aggregating the effects of the various actions noted above that the U.S. Attorney offices can take to secure non-capital treatment of a case - refraining at the start from a capital charge and review procedure submission, submitting the case and successfully recommending against the death penalty, reaching a non-capital plea after submission but before an Attorney General decision, or reaching a non-capital plea after an Attorney General decision to seek the death penalty. When the figures are toted up, one finds that these actions of the U.S. Attorney offices secured non-capital treatment for 74% of the White defendants, 81% of the Black defendants, and 86% of the Hispanic defendants, in potential capital cases.[18] As with the other findings of the Department's study, there is nothing in these figures which suggests possible bias against minority defendants. Rather, the U.S. Attorney offices have exercised their powers with greater frequency to avoid death penalty prosecutions of minority defendants.[19]

A final point of some potential relevance is the outcome in capital cases that went to trial. Suppose the Department in its decisions about seeking capital punishment were favoring White defendants over minority defendants in comparable cases. One would expect such favoritism to result in a larger proportion of relatively weak cases for capital punishment involving minority defendants in which the Department sought the death penalty. This would in turn make it less likely that capital punishment would actually be imposed in cases involving minority defendants that went to trial. However, the outcome of tried cases provides no support for such a hypothesis. Rather, the jury returned a verdict for the death penalty in about half of the cases in which the Department sought it, and this proportion was about the same for White, Black, and Hispanic defendants.[20]

PART IV: PROTOCOL REVISION

While the Department's study of its death penalty decision-making processes has found no evidence of bias against racial or ethnic minorities, the study has indicated that certain modifications of the capital case review procedure are warranted to promote public confidence in the fairness of the process and to improve its efficiency. Some of these changes effectively broaden the scope of the process, including submission of information concerning a larger class of cases by the U.S. Attorney offices. Other changes would simplify and abbreviate the process in cases where the decision is against seeking a capital sentence.

A. BROADENING THE SCOPE OF THE PROCESS

Under the existing protocol, U.S. Attorneys submit to the capital case review procedure only cases in

which an offense is being charged for which the death penalty is a legally authorized sanction. This limited the information that was available for the Sept. 12 report. Information was subsequently obtained from the U.S. Attorneys' offices concerning a broader class of potential capital cases, but a special, ad hoc effort was necessary to do so.

The Department has concluded that information of this type should regularly be available. This should help to maintain public confidence in the system by making more complete racial and ethnic data available for both actual and potential federal capital cases. The amendment to the protocol will specifically require that, where a United States Attorney has obtained an indictment charging a capital offense or conduct that could be charged as a capital offense, the United States Attorney must fill out and submit a death penalty evaluation form, even if the United States Attorney does not intend to request authorization to seek the death penalty. These forms will include (among other information) gender, race, and ethnicity information for defendants and victims, the charges against the defendant, and the reasons the United States Attorney decided not to seek the death penalty or charge a capital offense.

The amendments to the protocol will also include two other changes in the direction of increased centralization:

First, in cases where the Attorney General approves seeking a capital sentence, the United States Attorney office will be required to submit the notice of intention to seek the death penalty it proposes to file in the case to the Criminal Division's Capital Case Unit. As discussed in Part I of this report, the notice includes a specification of the aggravating factors that the government intends to prove as the basis for imposing a capital sentence. Review by the Criminal Division will ensure consistent application of the statutory and nonstatutory aggravating factors in federal death penalty proceedings.

Second, where the Attorney General approves seeking a capital sentence, Attorney General approval will also be required for subsequent decisions to refrain from pursuing a capital sentence in the case. Under the current protocol, a United States Attorney can effectively negate a decision by the Attorney General to seek a capital sentence by subsequently reaching a plea agreement with the defendant to a noncapital offense. As in other areas, however, if subsequent developments show grounds for reconsidering a decision by the Attorney General, the proper recourse is to advise the Attorney General of the changed circumstances. The revised protocol will require this approach.

B. SIMPLIFICATION OF DECISIONS AGAINST SEEKING THE DEATH PENALTY

The revised protocol will maintain a uniform requirement that the approval of the Attorney General be obtained both for decisions to seek a capital sentence and for decisions not to seek a capital sentence. The United States Attorneys will be required to submit information concerning cases involving capital charges, regardless of their recommendations concerning the sentence. However, an expedited and simplified decisional process - not requiring the participation of defense counsel - will be authorized in cases in which the U.S. Attorney does not wish to seek a capital sentence. The full-dress review process will be reserved for cases in which: (1) the United States Attorney does wish to seek the death penalty, or (2) the reviewers decline to accept the United States Attorney's recommendation against seeking the death penalty on the basis of the abbreviated review process.

This modification of the protocol will produce a more efficient process with no loss of fairness. The data

of the Sept. 12 report showed that the United States Attorneys recommended against seeking the death penalty for 494 out of 682 defendants in submitted cases. (Sept. 12 report at 12.) In such cases, notwithstanding the negative recommendation, the full process must be run through under the current system. This includes submission of information concerning the case and supporting materials by the U.S. Attorney; preparation of an initial analysis and recommendation by the Criminal Division's Capital Case Unit; consideration by the capital case review committee, including hearing argument from defense counsel and U.S. Attorney personnel; and further review and a final decision by the Attorney General. In the vast majority of these cases - 94% - the Attorney General concurs in the U.S. Attorney's recommendation not to seek the death penalty. (Sept. 12 report at 40-41.) Hence, the normal result is no change from what the U.S. Attorney recommended.

The revised protocol will make it possible to focus the review procedure's resources more fully on cases in which the U.S. Attorney does propose to seek the death penalty, while providing a quicker and less burdensome process for reaching a final decision against seeking a capital sentence where the U.S. Attorney recommends against the death penalty. Defense resources will be conserved by not regularly requiring a presentation to the review committee by defense counsel where the U.S. Attorney office is not seeking a capital sentence. In addition, the costs of appointing a second lawyer for the defendant - as required by 18 U.S.C. 3005 for death penalty cases - will more frequently be avoided because the abbreviated process will produce quicker final decisions by the Department not to seek a capital sentence.

The Attorney General will, of course, retain legal authority as head of the Justice Department to determine in an exceptional case that the death penalty is an appropriate punishment, notwithstanding the United States Attorney's view that it should not be pursued. However, if the Attorney General declines to accept the United States Attorney's recommendation against a capital sentence on the basis of the abbreviated review process, the full review procedure will then be employed, including providing defense counsel an opportunity to be heard by the review committee. Hence, the protocol revision will increase the general efficiency of the process, while sacrificing no safeguard of fairness for defendants in cases where the Department may ultimately decide to seek the death penalty.

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1. The capital sentencing procedures for most federal crimes appear in 18 U.S.C. 3591ff. Separate procedures of a similar character for certain drug-related capital offenses are set forth in 21 U.S.C. 848(e)-(r). Back

2. See McCleskey v. Kemp, 481 U.S. 279, 309 & n.30 (1987). Back

3. See id.; Batson v. Kentucky, 476 U.S. 79 (1986); Georgia v. McCollum, 505 U.S. 42 (1992). Back

4. Defense counsel, however, choose in some cases to provide participants in the review process with information concerning a defendant's race or ethnicity. Back

5. Except where otherwise indicated, the figures in this report relate to the operation of the Department's current capital case review procedure from its establishment in January 1995 until July 2000, which was the cutoff date for data considered in the Sept. 12 report. Defendants are classified for purposes of discussion and analysis as White, Black, or Hispanic. "Hispanic" includes Hispanic individuals regardless of race. It can be estimated that about 90% of the defendants in the "Hispanic" category would be characterized as White in racial terms. See Sept. 12 report at T-xvi & n.2. The Department's data also places some defendants in an "Other" category. This category is generally not discussed separately in this report because it combines

individuals from several different groups - Asian, Pacific Islander, Native American, Aleut, Indian, or unknown - and the numbers involved are small. The "Other" defendants were 29 out of the 682 defendants considered under the review procedure, comprising 4% of the total. Back

6. The figures in the accompanying textual discussion relate to the period 1995-2000, during which the current statutes and capital case review procedure were in effect. In the period 1988-1994, the federal death penalty was only available for certain drug-related killings under 21 U.S.C. 848(e), and U.S. Attorneys submitted for the Attorney General's review only cases in which they recommended seeking the death penalty. See Sept. 12 report at 1-2. The cases so submitted involved 52 defendants, who were 13% (7) White, 75% (39) Black, 10% (5) Hispanic, and 2% (1) "Other." The Attorney General approved seeking the death penalty for 100% of the White defendants (7 out of 7), 87% of the Black defendants (34 out of 39), and 100% of the Hispanic defendants (5 out of 5). See Sept. 12 report at 6-7, 23-24. Back

7. Attorney General's Remarks Regarding the Federal Death Penalty Study (Dept. of Justice Sept. 12, 2000); Press Conference with Attorney General Reno and Deputy Attorney General Holder, Topic: The Death Penalty (Sept. 12, 2000). Back

8. See id. Back

9. Statement by the President: Staying the Execution of Juan Raul Garcia (The White House Dec. 7, 2000). Back

10. The supplementary data submitted by the U.S. Attorney offices included "A" data and "C" data. The "A" data was data on 231 cases (beyond the 682 submitted to the review procedure) that the offices provided in response to a directive to submit information concerning: (1) any cases that should have been, but were not, submitted to the capital case review procedure, (2) cases exempted from submission because the defendant pled to a noncapital offense, and (3) cases that could have been brought as death eligible cases but were not. When added to the 682 defendants in submitted cases, the "A" data produced a broader class of 913 defendants who were 17% (158) White, 42% (387) Black, 37% (334) Hispanic, and 4% (34) "Other." The "C" data was data on additional cases which, according to the districts, had gone or were going through the review process, or involved fugitives. Adding the "C" cases as well as the "A" cases produces a universe of 973 defendants in potential capital cases, as indicated in the accompanying text. Back

11. The remaining 5% of defendants (49) in the augmented class were in the "Other" category. Back

12. The numbers of defendants whose cases were submitted to the review procedure were 134 out of 166 White defendants, 324 out of 408 Black defendants, and 195 out of 350 Hispanic defendants. See Sept. 12 report at 6. If only "A" cases are included in defining the universe of potential capital cases, the corresponding proportions of defendants in potential capital cases who were capitally charged and submitted to the review procedure are as follows: 85% of White defendants (134 out of 158), 84% of Black defendants (324 out of 387), and 58% of Hispanic defendants (195 out of 334). Back

13. The corresponding figures if "A" cases but not "C" are included in defining the universe of potential capital cases are as follows: 28% of White defendants (44 out of 158), 18% of Black defendants (71 out of 387), and 10% of Hispanic defendants (32 out of 334). Back

14. See, e.g., Bureau of Justice Statistics, Homicide Trends in the United States - Trends by Race, www.ojp.usdoj.gov/bjs/homicide/race.htm; Bureau of Justice Statistics, Violent Victimization and Race, 1993-98, at 2, 4, 6, 10 (Mar. 2001); Bureau of Justice Statistics, Correctional Populations in the United

States, 1997, at iii, 4-5 (Nov. 2000). Back

15. The figures for submissions and recommendations by these districts, and the national average of 25% for recommendations to seek the death penalty in submitted cases involving Black defendants (81 out of 324 defendants), are documented in the Sept. 12 report, Table 5A, at T-14 to T-17. Back

16. The U.S. Attorneys currently have discretion to make such plea agreements. Under the revised protocol discussed in Part IV of this report, the Attorney General's approval will be required for a non-capital plea agreement subsequent to a decision by the Attorney General to seek a capital sentence. Back

17. The U.S. Attorney offices reached subsequent non-capital plea agreements with 51 out of the 159 defendants for whom the Attorney General authorized seeking the death penalty. See Sept. 12 report at 31. There were also 11 cases, almost all involving minority defendants, in which the Attorney General subsequently reversed her decision to seek the death penalty. See Sept. 12 report at 33, Table 3A at T-6 (reconsideration of decision to seek the death penalty for 1 White defendant, 3 Black defendants, 5 Hispanic defendants, and 2 "Other" defendants). In addition, in relation to 4 defendants (1 Black and 3 Hispanic), the death penalty was not pursued through trial because of dismissals or other judicial action. See id. Back

18. For example, the supplementary data submitted by the U.S. Attorney offices showed 166 White defendants in potential capital cases. Figures documented in the Sept. 12 report at 6, 41, 31-32 show the following: In relation to 32 of these defendants, the U.S. Attorney offices refrained from a capital charge and review procedure submission. In relation to 62 of these defendants, the U.S. Attorney offices submitted their cases to the review procedure with a recommendation against the death penalty, and the Attorney General concurred. In relation to 8 of these defendants, U.S. Attorney offices reached a non-capital plea agreement with the defendant following submission to the review procedure but before an Attorney General decision about the death penalty. In relation to 21 of these defendants, U.S. Attorney offices reached a non-capital plea agreement with the defendant after an Attorney General decision to seek the death penalty. Summing 32, 62, 8, and 21 gives 123 White defendants for whom the U.S. Attorney office successfully sought and secured non-capital treatment of their cases. This is 74% of the 166 White defendants in potential capital cases. Carrying out the same computation process for Black and Hispanic defendants yields the figures of 81% and 86% appearing in the text.

These figures include both "A" and "C" cases in defining the universe of potential capital cases. If the starting point is the somewhat smaller universe of potential capital cases which includes "A" cases but not "C" cases, the corresponding figures (by the same process of computation) are that the U.S. Attorney offices successfully avoided capital treatment for 73% of White defendants, 80% of Black defendants, and 85% of Hispanic defendants. Back

19. The Sept. 12 report (at pp. 30-31) noted that focusing on plea agreements which occur after the Attorney General authorizes seeking the death penalty is potentially misleading, because plea agreements that foreclose a capital sentence can also occur at earlier stages of the process, including prior to indictment and review procedure submission, and during the pendency of cases in the review process. Statistical information was not available at the time concerning cases which were not submitted to the review procedure for such reasons as pre-indictment plea agreements to non-capital charges. The supplementary data submitted by the U.S. Attorney offices following the Sept. 12 report provided information on the broader universe of potential capital cases in the U.S. Attorney offices, making possible the accompanying textual discussion's more complete assessment of the treatment of defendants from different population groups. Back

20. Specifically, between the initial revival of the federal death penalty in 1988 and the July 2000 endpoint for data considered in the Sept. 12 report, juries convicted defendants of capital offenses in 57 out of 62 cases in which the government sought the death penalty. Where the defendant was convicted of a capital offense, the jury returned a death penalty verdict for 6 out of 14 White defendants, 16 out of 33 Black defendants, and 3 out of 6 Hispanic defendants. (Sept. 12 report at 32-34.) Back

[The 2000 report follows:]

THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000)

United States Department of Justice
Washington, D.C.
September 12, 2000

INTRODUCTION

This Survey provides information regarding the federal death penalty system since the enactment of the first modern capital punishment statute in 1988. The Survey explains the Department of Justice's internal decision-making process for deciding whether to seek the death penalty in individual cases, and presents statistical information focusing on the racial/ethnic and geographic distribution of defendants and their victims at particular stages of that decision-making process.

The Supreme Court issued a ruling in 1972 that had the effect of invalidating capital punishment throughout the United States – both in the federal criminal justice system and in all of the states that then provided for the death penalty. While many state legislatures revised their procedures relatively quickly to withstand constitutional scrutiny, the federal government did not do so until November 18, 1988, when the President signed the Anti-Drug Abuse Act of 1988. A part of this law, known as the Drug Kingpin Act (DKA), made the death penalty available as a possible punishment for certain drug-related offenses. The availability of capital punishment in federal criminal cases expanded significantly further on September 13, 1994, when the President signed into law the Violent Crime Control and Law Enforcement Act. A part of this law, known as the Federal Death Penalty Act (FDPA), provided that over 40 federal offenses could be punished as capital crimes. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which went into effect on April 24, 1996, added another four federal offenses to the list of capital crimes.[1]

As the law governing the federal death penalty has changed, the Department of Justice has modified its internal decision-making processes in capital cases. With the enactment of the DKA in 1988, the Department instituted a policy that required United States Attorneys in the 94

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[1] The FDPA promulgated capital sentencing procedures and made them applicable to over 40 separately numbered sections of the United States Code. However, because many of these sections define multiple offenses (either in separately designated subsections or by listing different types of prohibited conduct in a single provision), the precise number of "offenses" to which the FDPA applies depends on the definition of "offense." A list of the 59 separate sections of the United States Code that define offenses currently subject to the death penalty (including the offenses added by the AEDPA) is set forth in Table 6 (page T-23).

federal districts across the country[2] to submit to the Attorney General for review and approval any case in which the United States Attorney affirmatively wished to seek the death penalty. Under this policy, the decision not to seek the death penalty was left to the United States Attorneys' discretion. From 1988 until the end of 1994, United States Attorneys sought approval from Attorneys General to seek the death penalty 52 times and received it 47 times.

On January 27, 1995, the Department adopted the policy still in effect today – commonly known as the death penalty "protocol" – under which United States Attorneys are required to submit for review all cases in which a defendant is charged with a capital-eligible offense, regardless whether the United States Attorney actually desires to seek the death penalty in that case. The United States Attorneys' submissions are initially considered by a committee of senior Department attorneys in Washington, D.C. known as the Attorney General's Review Committee on Capital Cases (Review Committee), which makes an independent recommendation to the Attorney General. From January 27, 1995 to July 20, 2000 – the close of the reporting period for this Survey – United States Attorneys submitted a total of 682 cases for review and the Attorney General ultimately authorized seeking the death penalty for 159 of those defendants.

While a case progresses through the Department's review process, it simultaneously continues in the United States Attorney's Office and in the court system. Some cases submitted by United States Attorney for review are subsequently withdrawn due to events outside the review process. For example, the defendant and the United States Attorney may enter into a plea agreement that disposes of the case and results in the imposition of a prison term. In other cases, a judicial decision may result in the dismissal of either the entire case or the specific charges that are punishable by death. As a result, the total number of cases considered by the Review Committee is smaller than the total number submitted by the United States Attorneys, and the total number of defendants considered by the Attorney General is smaller still. Furthermore, not all defendants who proceed to trial receive the death penalty. As discussed below, since 1988, federal juries returned death verdicts against fewer than half of the defendants they found guilty of capital crimes. As of the date of this Survey, five defendants who were authorized for the death penalty during the "pre-protocol" period (1988-1994) were subject to a pending sentence of death; fourteen defendants authorized during the "post-protocol" period (1995-2000) were also subject to a pending sentence of death.

Current Department policy provides that bias based on characteristics such as an individual's race/ethnicity must play no role in a United States Attorney's decision to recommend

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[2] There are 94 separate federal judicial districts in the United States. Twenty-six states, as well as the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands, each comprise a single federal district, while each of the remaining 24 states is divided into two or more federal districts. Each district has a United States Attorney who is appointed by the President with the advice and consent of the Senate, with the exception that the District of Guam and the District of the Northern Mariana Islands share a single United States Attorney. Accordingly, there are total of 93 United States Attorneys. A list of the United States Attorneys' Offices showing the locations of the principal offices in each district is provided in Table 4 (page T-10).

the death penalty. Also, in some districts, the United States Attorney (as opposed to the particular prosecutors handling a case) is likewise not informed of the defendant's race/ethnicity. Moreover, the United States Attorney's Office may not provide information about the race/ethnicity of the defendant to Review Committee members, to attorneys from the Criminal Division's Capital Case Unit (CCU) who assist the Review Committee, or to the Attorney General. As explained below, the only individuals in Washington, D.C. who are ordinarily privy to race/ethnicity information are paralegal assistants in the CCU who collect these statistics under separate cover from the United States Attorneys.[3] This information forms the pool from which most of the federal data on race/ethnicity reported below are drawn.

This Survey presents a series of statistics regarding the federal death penalty process that are broken down by time period (pre-protocol and post-protocol),[4] by participants in the decision-making process (the United States Attorneys, the Review Committee, and the Attorney General), and by the racial/ethnic groups of defendants and victims.[5] Part I presents highlights of a statistical overview of the Department's decision-making process. Parts II to V each presents highlights of data regarding particular stages of the process. In particular, Part II presents highlights regarding recommendations made by United States Attorneys; Part III presents highlights regarding recommendations made by the Review Committee; Part IV presents highlights regarding decisions made by Attorneys General; and Part V presents highlights regarding post-authorization activity (*e.g.*, plea agreements, jury trials) in all cases in which Attorneys General made decisions to seek the death penalty, with additional case-specific information about the 19 defendants now under a federal death sentence. Finally, Part VI presents highlights of data regarding the degree of consensus among United States Attorneys, the Review Committee, and the Attorney General.

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[3]In presenting reasons why the death penalty should not be sought, defense counsel on occasion explicitly provide information about the race/ethnicity of defendants or victims to the United States Attorneys, the Review Committee, and the Attorney General.

[4]As noted above, on January 27, 1995, the Attorney General revised the Department of Justice procedures for deciding whether to seek the death penalty against defendants charged with capital offenses. This change in policy was made by means of a formal amendment to the United States Attorneys' Manual. For ease of reference, the "pre-protocol" period, when United States Attorneys submitted for review only recommendations to seek the death penalty against defendants charged with violations of the DKA, is discussed as having lasted from 1988 to 1994, despite the fact that the first 26 days of 1995 were also, strictly speaking within that period. Likewise, the "post-protocol" period is described, during which United States Attorneys submitted recommendations both for and against seeking the death penalty against defendants charged with a variety of capital offenses, is often described in this Survey as encompassing the years 1995 to 2000.

[5]This Survey refers to defendants and victims as "White," "Black," "Hispanic," or "Other," due in large part to the way in which data regarding the federal death penalty has been collected. The last category – "Other" – includes any person whose race is Asian, Pacific Islander, Native American, Aleut, Indian, or unknown. The Survey uses "Hispanic" as a separate category to refer to persons of Hispanic ethnicity, regardless of race. As a result, the terms "White," "Black," and "Other" as used in this Survey refer only to non-Hispanic members of those racial groups.

The statistical information presented in the narrative of the Survey is based on the data contained in the tables set forth at pages T-1 to T-355. For the reader's convenience, those tables have been grouped together at the end of the Survey rather than interspersed within it. There are a number of important notes accompanying those tables that explain the methods and terms used in compiling the data, as well as the way in which anomalous cases have been treated in presenting overall characterizations of the statistics. Those notes are set out at the beginning of the tables (pages T-xi to T-xvii).

In evaluating the data presented in this Survey, the reader should bear in mind that the vast majority of homicides in the Untied States, like most violent crimes, are investigated exclusively by local police officers working hand-in-hand with local prosecutors, who file charges against defendants in state courts, either as a capital case or non-capital case.[6] When a homicide is prosecuted federally – either as a capital or non-capital case – it is often because of the availability of certain federal laws or because of a federal initiative to address a particular crime problem. Criminal organizations often operate in multiple jurisdictions, making it difficult for any single local prosecutor to investigate or prosecute a case. Additionally, many states lack the equivalent of the federal witness protection program and the ability to conduct complex long-term investigations using resource intensive investigative techniques such as court-ordered wiretaps and undercover operations.

Apart from these differences in laws and resources, which often affect whether a particular homicide is prosecuted in state or federal court – either as a capital or non-capital case – state and federal law enforcement officials often work cooperatively to maximize their overall ability to prevent and prosecute violent criminal activity in their respective communities. Such cooperation is a central feature of current federal law enforcement policy. In some areas, these cooperative efforts lead to agreements that certain kinds of offenses, particularly violent crimes, will be handled by federal authorities. In Puerto Rico, for example, the United States Attorney has agreed with his local counterpart that the federal government will prosecute carjackings involving death, which has led to a large number of homicides being handled by that particular United States Attorney's Office. In some cities, a large number of cases involving multiple murders by drug and other criminal organizations are investigated by joint federal and local task forces and prosecuted federally due to some of the factors cited above, such as the geographic reach of the organization and the availability of a witness protection program. In other areas, by contrast, these cooperative efforts lead to a federal emphasis on crimes other than homicides. These decisions are not, however, static ones. A given homicide that appears to be of purely local interest may, upon further investigation months or years after the offense, prove to be

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[6]Prior to 1972, capital punishment was available and carried out in both the federal and state systems for acts of murder and a variety of other crimes, such as rape, kidnaping, and treason. Today, while the vast majority of crimes subject to the death penalty under federal law involve homicides, a few do not. *See* 18 U.S.C. §§ 794 (espionage); 2381 (treason); 3591(b)(1) (certain aggravated narcotics trafficking offenses). Nonetheless, the federal government has not sought the death penalty in any such case since 1988 and all defendants now under a sentence of death in the states were convicted of crimes specifically related to homicides.

related to organized multi-jurisdictional criminal activity that is being investigated by federal law enforcement officials, who may seek to transfer the case from state prosecutors to federal prosecutors. For these and other reasons, the factors that determine whether a particular homicide will enter the state or federal criminal justice systems are complex and difficult to quantify.

Overall, however, the federal government continues to play a relatively small role in administering the death penalty in this country. From 1930 to 1999, state governments executed over 4,400 defendants.[7] During the same time period, the federal government executed 33 defendants and has not carried out any executions since 1963.[8] Furthermore, the Department of Justice's Bureau of Justice Statistics (BJS) reports that by the end of 1998 (the most recent year for which this statistic is available), there were 3,433 defendants with pending death sentences in the States, compared to 19 defendants with currently pending death sentences in the federal system. Thus, despite the expansion of the availability of the federal death penalty since 1988, federal defendants account for approximately one-half of one percent of all the defendants on death row in the United States.

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[7] *See* Bureau of Justice Statistics, U.S. Department of Justice, Number of Persons Executed in the United States, 1930 – 99, <http://www.ojp.usdoj.gov/bjs/glance/exe.txt>.

[8] *See* Federal Death Penalty Information Center, Executions of Federal Prisoners 1927-1999, <http://www.deathpenaltyinfo.org/fedexec.html>.

PART I: STATISTICAL OVERVIEW

Table Set I (pages T-1 to T-7) provides statistical summaries of the decision-making process at the Department of Justice by its primary participants – the United States Attorneys, the Review Committee, and the Attorney General – and how the decisions of those participants affect members of four different racial/ethnic groups. Highlights of these summary tables are presented below.

A. RACIAL/ETHNIC DISTRIBUTION OF DEFENDANTS SUBMITTED BY THE UNITED STATES ATTORNEYS

- From 1988 to 1994, a total of 52 defendants were submitted by the United States Attorneys under the Department's former decision-making procedures.

	Total	White	Black	Hispanic	Other
Number	52	7	39	5	1
Percent	100%	13%	75%	10%	2%

- From 1995 to 2000, a total of 682 defendants were reviewed under the Department's current death penalty decision-making procedures.

	Total	White	Black	Hispanic	Other
Number	682	134	324	195	29
Percent	100%	20%	48%	29%	4%

B. RATES AT WHICH EACH PARTICIPANT RECOMMENDED/AUTHORIZED THE DEATH PENALTY WITH RESPECT TO EACH RACIAL/ETHNIC GROUP

Because cases cc litigated while the death-penalty decision-making process is proceeding at the Department of Justice, not all of the defendants who are the subject of a recommendation by a United States Attorney are considered by the Review Committee and the Attorney General. The following highlights – which serve to allow a comparison of the rate at which each participant in the decision-making process recommends or authorizes seeking the death penalty – take that attrition into account by showing, for each racial/ethnic group, the rate at which *each* participant recommended or authorized seeking the death penalty as a percentage of the total number of defendants considered by *that* participant. Thus, the percentages below

reflect the number of defendants in a particular racial/ethnic group for which each participant in the death penalty process recommended/authorized the death penalty, divided by the total number of defendants of that racial/ethnic group that were considered by that participant.

- From 1988 to 1994, the Attorney General agreed with the United States Attorneys in most cases. (The Review Committee was not yet in existence).

RATES AT WHICH EACH PARTICIPANT RECOMMENDED/ AUTHORIZED SEEKING THE DEATH PENALTY (1988-1994)					
	Overall	**White**	**Black**	**Hispanic**	**Other**
U.S. Attorneys	**100%**	100%	100%	100%	100%
Attorney General	**90%**	100%	87%	100%	100%

- From 1995 to 2000, when United States Attorneys submitted defendants with recommendations both for and against seeking the death penalty, each participant in the decision-making process (including the Review Committee) recommended/authorized the death penalty against slightly less than one third of the defendants that each participant considered.

RATES AT WHICH EACH PARTICIPANT RECOMMENDED/ AUTHORIZED SEEKING THE DEATH PENALTY (1995-2000)					
	Overall	**White**	**Black**	**Hispanic**	**Other**
U.S. Attorneys	**27%**	36%	25%	20%	52%
Review Comm.	**30%**	40%	27%	25%	50%
Attorney General	**27%**	38%	25%	20%	46%

C. RATES AT WHICH THE DEPARTMENT OF JUSTICE SOUGHT THE DEATH PENALTY WITH RESPECT TO EACH RACIAL/ETHNIC GROUP

The percentages below reflect the number of defendants in each racial/ethnic group that the Attorney General authorized the death penalty, divided by the total number of defendants in that particular racial/ethnic group that initially entered the Department's review process.

- From 1988 to 1994, the Department of Justice sought the death penalty against 90 percent of the defendants submitted for review by United States Attorneys with recommendations exclusively in favor of seeking the death penalty.

	Total	White	Black	Hispanic	Other
Total submitted	52	7	39	5	1
Decision to seek DP	47	7	34	5	1
Percent	90%	100%	87%	100%	100%

- From 1995 to 2000, the Department of Justice sought the death penalty against 23 percent of the defendants charged with crimes punishable by death and submitted for review by United States Attorneys with recommendations for or against seeking the death penalty.

	Total	White	Black	Hispanic	Other
Total submitted	682	134	324	195	29
Decision to seek DP	159	44	71	32	12
Percent	23%	33%	22%	16%	41%

PART II: THE UNITED STATES ATTORNEYS

A. BACKGROUND

As discussed above, with the enactment of the DKA in 1988, the United States Attorneys were required to submit to the Attorney General for review and approval only those cases in which the United States Attorney affirmatively wished to seek the death penalty. With the enactment of the new death penalty protocol on January 27, 1995, United States Attorneys were required to submit to the Attorney General for review "all Federal cases in which a defendant is charged with an offense subject to the death penalty, regardless of whether the United States Attorney intends to request authorization to seek the death penalty." For the reasons set forth below, this protocol does not require United States Attorneys to submit to the Attorney General *all* potentially capital-eligible defendants in the federal system.

First, United States Attorneys are not required to submit to the Attorney General for review cases in which the United States Attorney initially considered the case for federal prosecution, but ultimately decided to defer prosecution to state authorities. For example, a federal agent might arrest a defendant for committing a street robbery in which a homicide occurred, but the prosecution might be turned over to the local district attorney because of the lack of a substantial federal interest.[9]

Second, United States Attorneys retain the discretion not to charge defendants facing federal prosecution for a homicide with a capital-eligible offenses if they do not believe such a charge could be sustained. For example, a United States Attorney might decide at the outset of a particular case (*e.g.*, a vehicular homicide on federal land) that he or she simply could not prove to a jury beyond a reasonable doubt that the defendant had the requisite level of intent to be charged with a capital-eligible offense.

Third, at any time, either before or after indictment, United States Attorneys have the discretion to conclude a plea agreement with a defendant, which has the effect of foreclosing the death penalty. For example, either before or after indicting several defendants for capital-eligible offenses, a United States Attorney may decide to enter into a cooperation agreement with one of the defendants, under which that defendant agrees to plead guilty to certain crimes and testify against his co-defendants in exchange for consideration – including the dismissal of

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[9]Under general Department policy, United States Attorneys must determine, in deciding whether to accept a capital or non-capital case for federal prosecution, if there is a "substantial federal interest" in doing so. In making this determination, United States Attorneys weigh a number of factors, including federal law enforcement priorities, the seriousness of the particular offense, and issues specific to the individual defendant, such as his or her willingness to cooperate in the investigation or prosecution of others.

certain charges and a promise to inform the sentencing judge about the cooperation – that has the effect of rendering the defendant ineligible for the death penalty. Likewise, United States Attorneys have the discretion to enter plea agreements with a defendant before or after he has been charged with capital-eligible offenses that do not require the defendants' cooperation. Such decisions may be made for a variety of reasons, including eliminating the risk of an acquittal in a difficult case, the unavailability of one or more key witnesses, or an unfavorable evidentiary ruling by the court that significantly weakens the case. If any such plea agreement is reached before a case has been submitted for review, the United States Attorney need not submit it thereafter [10]

There has been no centralized data collection process in place regarding these three categories of potential capital-eligible cases. As a result, the data regarding submissions by United States Attorneys that are reported in this Survey do not include information regarding the entire pool of potential capital-eligible defendants in the federal system since 1988.

There are, nonetheless, a significant number of cases that United States Attorneys have submitted to the Attorney General for review under the current protocol, namely, all cases in which a United States Attorney charges a capital-eligible offense and does not enter into a plea with the defendant before making a submission to the Attorney General. In submitting these cases, the United States Attorney must recommend to the Attorney General whether he or she believes that the death penalty should be authorized in that case. Prior to doing so, however, the United States Attorney or his or her designee will meet with the defendant's attorneys and allow them to make written and oral presentation as to why the death penalty should not be sought in the case.[11] In addition, many United States Attorneys employ additional decision-making procedures within their own offices; several have standing committees of senior prosecutors to

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[10]Even when an offender commits an offense punishable by death, there are statutory limits on the categories of persons who can be executed. Specifically, in expanding the scope of offenses for which the death penalty is available, the FDPA added a provision prohibiting the execution of a pregnant woman or any person who is mentally retarded. The same statute also prohibits the execution of any person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person, and further prohibits the imposition of the death sentence on any person who was less than 18 years of age at the time of the offense. *See* 18 U.S.C. §§ 3591, 3596.

[11]Since 1988, federal law has expressly required that, upon the request of an indigent capital defendant, a federal judge shall appoint two attorneys to represent the defendant and make available sufficient funds for reasonable investigative and expert services. The attorneys appointed to represent an indigent defendant must have the "background, knowledge, or experience [that] would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." *See* 21 U.S.C. § 848(q). Furthermore, a separate provision in effect since 1994 requires that at least one defense attorney be "learned in the law of capital cases" (a prior version of that statute, in effect from 1948 to 1994, provided for all capital defendants to be represented by "learned counsel"). *See* 18 U.S.C. § 3005.

review all potential capital cases, and others appoint such internal review committees on an ad hoc basis.[12]

Once a United States Attorney decides whether to seek authorization from the Attorney General to pursue the death penalty, he or she is required to submit detailed information about the case to the Criminal Division's CCU. In particular, the United States Attorney must submit a comprehensive discussion of the theory of liability; the facts and evidence relating to the issue of guilt or innocence; the facts and evidence relating to any aggravating factors (including victim impact) or mitigating factors; the defendant's background and criminal history; the basis for federal prosecution; and any other relevant information. The United States Attorney is also required to submit any material received from defense counsel in opposition to the death penalty, and other significant documents such as confessions, key witness statements, and autopsy and crime scene reports.

B. STATISTICAL HIGHLIGHTS

The United States Attorneys submitted 52 cases for review during the pre-protocol period and 682 cases during the post-protocol period. Detailed information about these submissions are set forth in Table Set II (pages T-8 to T-126). This section provides highlights of the statistical data regarding these submissions and is divided into three parts. First, drawing on the statistics in Table Set II.A (pages T-9 to T-21), the cases are analyzed in terms of the defendants who were charged by the United States Attorneys and submitted for review. Second, using statistics from Table Set II.B (pages T-22 to T-56), the cases are analyzed in terms of the types of offenses charged. Third, the cases are examined with an emphasis on the race/ethnicity of the victims of the crimes charged against defendants, using the statistical compilations from Table Set II.C (pages T-57 to T-126).

1. Defendants

a. Recommendations in favor of seeking the death penalty

- From 1995 to 2000, United States Attorneys recommended seeking the death penalty for 183 defendants, out of a total of 682 submitted for review by the Attorney General (27 percent).

[12]In some United States Attorneys' Offices, the United States Attorney, as well as members of the Office's internal committee that advises the United States Attorney on whether to recommend seeking the death penalty, are not informed by the prosecutors handling the case of the defendants' race/ethnicity.

	Total	White	Black	Hispanic	Other
Number	183	48	81	39	15
Percent	100%	26%	44%	21%	8%

- The 183 recommendations to seek the death penalty were made by the United States Attorneys in 49 of the Nation's 94 districts.

- 10 of these 49 districts submitted only recommendations in favor of seeking the death penalty. These 10 districts accounted for 31 of the 183 recommendations against the death penalty in the post-protocol period (17 percent).

b. Recommendations against seeking the death penalty

- From 1995 to 2000, United States Attorneys recommended against seeking the death penalty with respect to 494 defendants, out of 682 submitted for review by the Attorney General (72 percent).

	Total	White	Black	Hispanic	Other
Number	494	85	242	153	14
Percent	100%	17%	49%	31%	3%

- The 494 recommendations not to seek the death penalty were submitted by the United States Attorneys in 62 of the Nation's 94 districts.

- 23 of the 62 districts submitted only recommendations against seeking the death penalty.[13] These districts accounted for 87 of the 494 recommendations against the death penalty in the post-protocol period (18 percent).

- Including the 21 districts that have never submitted a case for review by the Attorney General, with a recommendation for or against the death penalty, there are a total of 40 districts out of 94 that have never recommended seeking the death penalty for any defendant.

[13]Of these 23 districts that submitted only recommendations against seeking the death penalty during the post-protocol period, four submitted at least one recommendation in favor of seeking the death penalty during the pre-protocol period.

2. Offenses

During the pre-protocol period, defendants were charged exclusively under the DKA. With the enactment of the FDPA in late 1994, many other federal criminal offenses were punishable by death. The following highlights therefore refer exclusively to the post-protocol period. In considering statistics about the most frequently charged offenses, the reader should bear in mind that a single defendant may be charged with more than one statutory offense punishable by death.

The most frequently charged capital offenses were different for different racial/ethnic groups, although there were some constants. In particular, the use of a gun to commit homicide during and in relation to a crime of violence or drug trafficking crime, 18 U.S.C. § 924(j) ("firearms murder"), was always among the three most frequently charged capital offenses against each group, and both murder in aid of racketeering activity, 18 U.S.C. § 1959(a) ("racketeering murder") and murder in furtherance of a continuing criminal narcotics enterprise, 21 U.S.C. § 848(e)(1)(A) ("CCE murder"), were generally among the most frequently charged. Each of these crimes, and particularly firearms murder, can be charged in a wide array of circumstances, and is therefore more likely to be available as a charging option in a given case than more narrowly defined offenses such as kidnaping-related murder.

- Among the 134 White defendants submitted for review from 1995 to 2000 the three offenses most frequently charged were:
  - Murder within federal jurisdiction, 18 U.S.C. § 1111, which was charged against 28 of the 134 submitted White defendants (21 percent);
  - Firearms murder, which was charged against 22 of the 134 submitted White defendants (16 percent); and
  - Racketeering murder, which was charged against 20 of the 134 submitted White defendants (15 percent).
- Among the 324 Black defendants submitted for review from 1995 to 2000 the three offenses most frequently charged were:
  - Firearms murder, which was charged against 105 of the 324 submitted Black defendants (32 percent);
  - CCE murder, which was charged against 85 of the 324 submitted Black defendants (26 percent); and
  - Racketeering murder, which was charged against 70 of the 324 submitted Black defendants (22 percent).

- Among the 195 Hispanic defendants submitted for review from 1995 to 2000 the three offenses most frequently charged were:
  - Racketeering murder, which was charged against 60 of the 195 submitted Hispanic defendants (31 percent);
  - Firearms murder, which was charged against 53 of the 195 submitted Hispanic defendants (27 percent); and
  - Carjacking murder, 18 U.S.C. § 2119(3), which was charged against 34 of the 195 submitted Hispanic defendants (17 percent).
- Among the 29 Other defendants submitted for review from 1995 to 2000 the three offenses most frequently charged were:
  - Firearms murder, which was charged against 6 of the 29 submitted Other defendants (21 percent);
  - Murder within federal jurisdiction, 18 U.S.C. § 1111, which was charged against 5 of the 29 submitted Other defendants (17 percent); and
  - Kidnaping murder, 18 U.S.C. § 1203(a), which was charged against 5 of the 29 submitted Other defendants (17 percent).
- As a general matter, the offenses most frequently charged against a given racial/ethnic group were also the most frequently charged against the members of that racial/ethnic group for whom United States Attorneys recommended seeking the death penalty.

3. Victims

a. Victims' race/ethnicity

- From 1988 to 1994, there were a total of 65 identified victims of the capital offenses charged against defendants submitted for review by United States Attorneys (as to whom the recommendation was to seek the death penalty).

	Total	White	Black	Hispanic	Other
Number	65	6	49	9	1
Percent	100%	9%	75%	14%	2%

- From 1995 to 2000, there were a total of 894 identified victims of the capital offenses charged against defendants submitted for review by United States Attorneys.[14]

	Total	White	Black	Hispanic	Other
Number	894	278	474	118	24
Percent	100%	31%	53%	13%	3%

- Of these 894 victims, 590 (66 percent) were victims of defendants for whom United States Attorneys recommended seeking the death penalty.

	Total	White	Black	Hispanic	Other
Number	590	202	345	29	14
Percent	100%	34%	58%	5%	2%

- Of the 894 victims, 302 (34 percent) were victims of defendants as to whom United States Attorneys recommended against seeking the death penalty.

	Total	White	Black	Hispanic	Other
Number	302	75	129	88	10
Percent	100%	25%	43%	29%	3%

b. Intraracial and interracial homicides

- Of the 677 homicide defendants submitted for review from 1995 to 2000,[15] 500 (74 percent) were charged with intraracial homicides (*i.e.*, each was of the same race/ethnicity as all victims).

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[14]All of the victim-related statistics in this Survey are skewed to some degree by the large number of victims involved in the bombing of the American embassies in Tanzania and Kenya, which resulted in the indictment of several defendants in the Southern District of New York, and the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, which resulted in the indictment of two defendants in the Western District of Oklahoma. A discussion of how the statistics are affected is set forth in the general explanatory notes to the statistical tables (*see* page T-57)

[15]Five defendants (all of them White) submitted for review during the post-protocol period were charged with espionage offenses that did not involve any homicide.

	Total	White	Black	Hispanic	Other
Number	500	109	227	150	14
Percent	100%	22%	45%	30%	3%

- United States Attorneys recommended seeking the death penalty for 24 percent of the defendants charged with intraracial homicides (121 out of 500 defendants). The rates at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 38 percent of White defendants (41 out of 109 defendants);
  - 20 percent of Black defendants (46 out of 227 defendants);
  - 17 percent of Hispanic defendants (26 out of 150 defendants); and
  - 57 percent of Other defendants (8 out of 14 defendants).

- Of the 677 homicide defendants submitted for review from 1995 to 2000, 177 (26 percent) were charged with interracial homicides (*i.e.*, each was of a different race/ethnicity than at least one victim).[16]

	Total	White	Black	Hispanic	Other
Number	177	20	97	45	15
Percent	100%	11%	55%	25%	8%

- United States Attorneys recommended seeking the death penalty for 35 percent of the defendants charged with interracial homicides (62 out of 177 defendants). The rats at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 35 percent of White defendants (7 out of 20 defendants);
  - 36 percent of Black defendants (35 out of 97 defendants);
  - 29 percent of Hispanic defendants (13 out of 45 defendants); and
  - 47 percent of Other defendants (7 out of 15 defendants).

c. Single- and multiple-victim cases

[16]Of the 177 defendants charged in interracial homicide cases, 33 (19 percent) were charged with killing more than one victim. In each of those cases, at least one victim was of the same race/ethnicity as the defendant. Accordingly, if the definition of "intraracial" homicides included those in which at least one victim was of the same race/ethnicity as the defendant, 33 defendants would be reported in the intraracial rather than interracial category.

- Of the 677 homicide defendants submitted for review from 1995 to 2000, 520 (77 percent) faced capital charges involving only one victim.

	Total	White	Black	Hispanic	Other
Number	520	103	240	153	24
Percent	100%	20%	46%	29%	5%

- United States Attorneys recommended seeking the death penalty for 23 percent of the defendants charged in single-victim cases (117 out of 520 defendants). The rates at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 31 percent of White defendants (32 out of 103 defendants);
  - 20 percent of Black defendants (49 out of 240 defendants);
  - 16 percent of Hispanic defendants (25 out of 153 defendants); and
  - 46 percent of Other defendants (11 out of 24 defendants).

- Of the 677 homicide defendants submitted for review from 1995 to 2000, 157 (23 percent) faced capital charges involving more than one victim.

	Total	White	Black	Hispanic	Other
Number	157	26	84	42	5
Percent	100%	17%	54%	27%	3%

- United States Attorneys recommended seeking the death penalty for 43 percent of the defendants charged in multiple-victim cases (66 out of 157 defendants). The rates at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 62 percent of White defendants (16 out of 26 defendants);
  - 38 percent of Black defendants (32 out of 84 defendants);
  - 33 percent of Hispanic defendants (14 out of 42 defendants); and
  - 80 percent of Other defendants (4 out of 5 defendants).

PART III: THE REVIEW COMMITTEE

A. BACKGROUND

With the issuance of the new death penalty protocol on January 27, 1995, the Attorney General created a permanent advisory panel, the Review Committee, to assist her in determining whether to seek capital punishment in cases submitted for review by United States Attorneys. The Review Committee currently has five members appointed by the Attorney General (with three members required for a quorum), and includes, as a matter of practice, at least one designee of the Deputy Attorney General and at least one designee of the Assistant Attorney General for the Criminal Division.

For each case submitted by a United States Attorney, the Review Committee receives all of the underlying materials that have been submitted by the United States Attorney, including the materials from defense counsel. The Review Committee then meets with defense counsel either in person or on video conference, along with attorneys from the United States Attorney's Office and the CCU. During this meeting, defense counsel are invited to make an oral presentation to the Review Committee as to why the Attorney General should not authorize the United States Attorney to seek the death penalty. Thereafter, the Review Committee makes its recommendation to the Attorney General (noting any dissenting views) as to why the death penalty should, or should not, be sought in that case.

B. STATISTICAL HIGHLIGHTS

From the time of its establishment in 1995 until the close of the reporting period, the Review Committee considered a total of 618 defendants. Detailed information about the results of this consideration is set forth in Table Set III (pages T-127 to T-197). This section provides highlights of the statistical data regarding these cases and is organized in the same manner as the preceding Section concerning the United States Attorneys. The analysis of the pool of defendants is based on the statistics in Table Set III.A (pages T-128 to T-132). The analysis of offense data is set forth in Table Set III.B (pages T-133 to T-162). Victim-related statistics are set forth in Table Set III.C (pages T-163 to T-197).

1. Defendants

- Of the 682 defendants submitted for review by United States Attorneys from 1995 to 2000, 15 were still under review as of July 20, 2000, and 49 others had been withdrawn. The Review Committee considered the remaining 618.

	Total	White	Black	Hispanic	Other
Number	618	120	300	172	26
Percent	100%	19%	49%	28%	4%

- From 1995 to 2000, the Review Committee recommended seeking the death penalty for 183 defendants, out of a total of 618 it reviewed (30 percent).[17]

	Total	White	Black	Hispanic	Other
Number	183	47	80	43	13
Percent	100%	26%	44%	23%	7%

2. Offenses

The Review Committee's practices with respect to charging practices were virtually identical to the trends reported above with respect to the recommendations of the United States Attorneys. Accordingly, highlights of the statistical tables presenting information on this topic are not discussed further here.

3. Victims

a. Victims' race/ethnicity

- From 1995 to 2000, there were a total of 853 identified victims of the capital offenses charged against defendants considered by the Review Committee.

	Total	White	Black	Hispanic	Other
Number	853	258	468	104	23
Percent	100%	30%	55%	12%	3%

- Of these 853 victims, 600 (70 percent) were victims of defendants for whom the Review Committee recommended seeking the death penalty.

[17] There were also 15 defendants as to whom the Review Committee completed its review but did not recommend either for or against seeking the death penalty. In some of these cases, the Review Committee recommended that the Attorney General defer a decision (either because of the pendency of a state prosecution of the same defendant or because the defendant was a fugitive), and in others the Review Committee was evenly divided as to a recommendation.

	Total	White	Black	Hispanic	Other
Number	600	193	346	46	15
Percent	100%	32%	58%	8%	3%

- Of the 853 victims, 246 (29 percent) were victims of defendants as to whom the Review Committee recommended against seeking the death penalty.

	Total	White	Black	Hispanic	Other
Number	246	61	120	57	8
Percent	100%	25%	49%	23%	3%

b. Intraracial and interracial homicides

- Of the 613 homicide defendants the Review Committee considered from 1995 to 2000, 449 (73 percent) were charged with intraracial homicides (*i.e.*, each was of the same race/ethnicity as all victims).

	Total	White	Black	Hispanic	Other
Number	449	94	211	131	13
Percent	100%	21%	47%	29%	3%

- The Review Committee recommended seeking the death penalty for 29 percent of the defendants charged with intraracial homicides (129 out of 449 defendants). The rates at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 43 percent of White defendants (40 out of 94 defendants);
  - 23 percent of Black defendants (48 out of 211 defendants);
  - 25 percent of Hispanic defendants (33 out of 131 defendants); and
  - 63 percent of Other defendants (8 out of 13 defendants).

- Of the 613 homicide defendants the Review Committee considered from 1995 to 2000, 164 (27 percent) were charged with interracial homicides (*i.e.*, each was of a different race/ethnicity than at least one victim).

	Total	White	Black	Hispanic	Other
Number	164	20	90	41	13
Percent	100%	12%	55%	25%	8%

- The Review Committee recommended seeking the death penalty for 33 percent of the defendants charged with interracial homicides (54 out of 164 defendants). The rates at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 35 percent of White defendants (7 out of 20 defendants);
  - 36 percent of Black defendants (32 out of 90 defendants);
  - 24 percent of Hispanic defendants (10 out of 41 defendants); and
  - 38 percent of Other defendants (5 out of 13 defendants).

c. Single- and multiple-victim cases

- From 1995 to 2000, 468 of the 613 homicide defendants considered by the Review Committee (76 percent) faced capital charges involving only one victim.

	Total	White	Black	Hispanic	Other
Number	468	90	221	136	21
Percent	100%	19%	47%	29%	4%

- The Review Committee recommended seeking the death penalty for 25 percent of the defendants charged in single-victim cases (115 out of 468 defendants). The rates at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 36 percent of White defendants (32 out of 90 defendants);
  - 20 percent of Black defendants (45 out of 221 defendants);
  - 21 percent of Hispanic defendants (28 out of 136 defendants); and
  - 48 percent of Other defendants (10 out of 21 defendants).

- From 1995 to 2000, 145 of the 613 homicide defendants considered by the Review Committee (24 percent) faced capital charges involving more than one victim.

	Total	White	Black	Hispanic	Other
Number	145	24	80	36	5
Percent	100%	17%	55%	25%	3%

- The Review Committee recommended seeking the death penalty for 47 percent of the defendants charged in multiple-victim cases (68 out of 145 defendants). The rates at which they recommended seeking the death penalty for specific racial/ethnic groups were as follows:

  - 63 percent of White defendants (15 out of 24 defendants);
  - 44 percent of Black defendants (35 out of 80 defendants);
  - 42 percent of Hispanic defendants (15 out of 36 defendants); and
  - 60 percent of Other defendants (3 out of 5 defendants).

PART IV: THE ATTORNEY GENERAL

A. BACKGROUND

Before considering a particular case, the Attorney General receives the recommendation of the United States Attorney, the recommendation of the Review Committee, and all of the underlying materials that have been submitted by the United States Attorney, including the materials from defense counsel. After discussing the case with the Review Committee and the CCU attorneys (and with the United States Attorney for the case when he or she disagrees with the recommendation of the Review Committee), and after careful review of all of the relevant material (including, at times, additional information gathered at the Attorney General's request), the Attorney General signs a letter to the United States Attorney either authorizing the filing of a notice of intent to seek the death penalty or authorizing the United States Attorney not to file such a notice.[18]

B. STATISTICAL HIGHLIGHTS

The Attorney General completed the review of 52 defendants submitted during the pre-protocol period and 588 defendants submitted during the post-protocol period. Detailed information about the results of the consideration of those defendants is set forth in Table Set IV (pages T-198 to T-304). This section provides highlights of the statistical data regarding these cases and is organized in the same manner as the preceding sections concerning the United States Attorneys and the Review Committee. The analysis of the pool of defendants is based on the statistics in Table Set IV.A (pages T-199 to T107). The analysis of offense data is set forth in Table Set IV.B (pages T-108 to T-235). Victim-related statistics are set forth in Table Set IV.C (pages T-236 to T-304).

1. Defendants

- In the pre-protocol period from 1988 to 1994, the United States Attorneys submitted 52 defendants for review. Attorneys General decided to seek the death penalty for 47 of these defendants (90 percent).

[18]In some instances, the Attorney General does not make a decision on a case submitted for review by a United States Attorney. For example, the United States Attorney may enter into a plea agreement with a defendant while the case is under consideration by the Attorney General (or the Review Committee). In other cases, consideration of a given defendant may be indefinitely suspended if the defendant is a fugitive.

	Total	White	Black	Hispanic	Other
Number	47	7	34	5	1
Percent	100%	15%	72%	11%	2%

- In the post-protocol period from 1995 to 2000, the United States Attorneys submitted 682 defendants for review. Of these, 31 were still pending review at the close of the reporting period, and 63 had been withdrawn by the United States Attorney. The Attorney General considered the remaining 588 defendants (86 percent).

	Total	White	Black	Hispanic	Other
Number	588	115	287	160	26
Percent	100%	20%	49%	27%	4%

- From 1995 to 2000, the Attorney General decided to seek the death penalty for 159 defendants, out of a total of 588 considered (27 percent).

	Total	White	Black	Hispanic	Other
Number	159	44	71	32	12
Percent	100%	28%	45%	20%	8%

2. Offenses

The Attorney General's practices with respect to charging practices were virtually identical to the trends reported above with respect to the recommendations of the United States Attorneys. Accordingly, highlights of the statistical tables presenting information on this topic are not discussed further here.

3. Victims

a. Victims' race/ethnicity

- From 1995 to 2000, there were a total of 833 identified victims of the capital offenses charged against defendants who were considered by the Attorney General.

	Total	White	Black	Hispanic	Other
Number	833	254	462	95	22
Percent	100%	30%	55%	11%	3%

- Of these 833 victims, 578 (69 percent) were victims of defendants for whom the Attorney General decided to seek the death penalty.

	Total	White	Black	Hispanic	Other
Number	578	190	340	35	13
Percent	100%	33%	59%	6%	2%

- Of the 833 victims, 252 (30 percent) were victims of defendants as to whom the Attorney General decided not to seek the death penalty.

	Total	White	Black	Hispanic	Other
Number	252	62	122	59	9
Percent	100%	25%	48%	23%	4%

b. Intraracial and interracial homicides

- Of the 583 homicide defendants whom the Attorney General considered from 1995 to 2000, 424 (73 percent) were charged with intraracial homicides (*i.e.*, each was of the same race/ethnicity as all victims).

	Total	White	Black	Hispanic	Other
Number	424	90	200	121	13
Percent	100%	21%	47%	29%	3%

- The Attorney General decided to seek the death penalty for 25 percent of the defendants charged with intraracial homicides (108 out of 424 defendants). The rates at which the Attorney General decided to seek the death penalty for specific racial/ethnic groups were as follows:

- 41 percent of White defendants (37 out of 90 defendants);
- 21 percent of Black defendants (41 out of 200 defendants);
- 19 percent of Hispanic defendants (23 out of 121 defendants); and
- 54 percent of Other defendants (7 out of 13 defendants).

- Of the 583 homicide defendants whom the Attorney General considered from 1995 to 2000, 159 (28 percent) were charged with interracial homicides (*i.e.*, each was of a different race/ethnicity than at least one victim).[19]

	Total	White	Black	Hispanic	Other
Number	159	20	87	39	13
Percent	100%	13%	55%	25%	8%

- The Attorney General decided to seek the death penalty for 32 percent of the defendants charged with interracial homicides (51 out of 159 defendants). The rates at which the Attorney General decided to seek the death penalty for specific racial/ethnic groups were as follows:

  - 35 percent of White defendants (7 out of 20 defendants);
  - 34 percent of Black defendants (30 out of 87 defendants);
  - 23 percent of Hispanic defendants (9 out of 39 defendants); and
  - 38 percent of Other defendants (5 out of 13 defendants).

c. Single- and multiple-victim cases

- From 1995 to 2000, 448 out of the 583 homicide defendants considered by the Attorney General (77 percent) faced capital charges involving only one victim.

	Total	White	Black	Hispanic	Other
Number	448	86	210	131	21
Percent	100%	19%	47%	29%	5%

- The Attorney General decided to seek the death penalty for 22 percent of the defendants charged in single-victim cases (97 out of 448 defendants). The rates

[19]Of the 159 defendants charged in interracial homicide cases, 33 (21 percent) were charged with killing more than one victim. In each of those cases, at least one victim was of the same race/ethnicity as the defendant. Accordingly, if the definition of "intraracial" homicides included those in which at least one victim was of the same race/ethnicity as the defendant, 33 defendants would be reported in the intraracial rather than interracial category.

at which the Attorney General decided to seek the death penalty for specific racial/ethnic groups were as follows:

- 34 percent of White defendants (29 out of 86 defendants);
- 19 percent of Black defendants (40 out of 210 defendants);
- 14 percent of Hispanic defendants (18 out of 131 defendants); and
- 48 percent of Other defendants (10 out of 21 defendants).

- From 1995 to 2000, 135 out of the 583 homicide defendants considered by the Attorney General (23 percent) faced capital charges involving more than one victim.

	Total	White	Black	Hispanic	Other
Number	135	24	77	29	5
Percent	100%	18%	57%	21%	4%

- The Attorney General decided to seek the death penalty for 46 percent of the defendants charged in multiple-victim cases (62 out of 135 defendants). The rates at which the Attorney General decided to seek the death penalty for specific racial/ethnic groups were as follows:

- 63 percent of White defendants (15 out of 24 defendants);
- 40 percent of Black defendants (31 out of 77 defendants);
- 48 percent of Hispanic defendants (14 out of 29 defendants); and
- 40 percent of Other defendants (2 out of 5 defendants).

PART V: POST-AUTHORIZATION ACTIVITY

A. BACKGROUND

A decision by the Attorney General to seek the death penalty is always subject to reconsideration until the jury has returned a sentencing verdict. Thus, even after such a decision to seek the death penalty has been made, additional facts or arguments may always be brought to the Attorney General's attention in support of a request to withdraw a notice of intent to seek the death penalty. Such reconsideration can be sought by defense counsel, the United States Attorney, the Review Committee, or the Attorney General herself. As explained above, the Attorney General's decision to authorize the seeking of the death penalty can also be changed by means of a cooperation or non-cooperation plea agreement between the United States Attorney and the defendant that forecloses the possibility of capital punishment. Under Department policy, such agreements do not require the Attorney General's prior authorization.

For those defendants who proceed to trial, there are two phases to the case. In the "guilt phase," the jury must decide unanimously whether the prosecution proved beyond a reasonable doubt that the defendant has committed the underlying death-eligible offense. If the jury finds the defendant guilty, the case proceeds to the "sentencing phase." At the sentencing phase, in order to meet legal requirements for the imposition of the death penalty, the prosecution must prove beyond a reasonable doubt that the defendant committed the capital offense with a certain level of intent. In addition, the prosecution must prove any aggravating factors beyond a reasonable doubt, and must prove at least one from a list of specific factors set out in the applicable statute.[20] In recommending a sentence, the jury may only consider aggravating factors that it unanimously finds to have been proven beyond a reasonable doubt. Mitigating factors can include any of several specific factors listed in the statute, as well as anything else "in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence."[21] Mitigating factors need only be proven by a preponderance of the evidence, and each juror can make an individual decision as to which factors have been proven to his or her satisfaction. Both the prosecution and defense may, in the

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[20] Although the exact list of aggravating factors varies depending on the nature of the offense, the statutory list of factors generally includes: killing multiple victims; committing the capital offense against particularly vulnerable victims or high-level public officials; paying someone else to commit the murder; committing the murder for pecuniary gain; committing the murder while committing other serious crimes; causing a grave risk of death to persons other than the actual victims; committing the offense in a particularly heinous manner; engaging in substantial planning or premeditation in committing the murder; or having previous convictions for other serious offenses. *See* 18 U.S.C. § 3592(b)-(d); 21 U.S.C. § 848(n).

[21] The specific mitigating factors listed in the FDPA are impaired capacity, duress, minor participation, equally culpable defendants who will not be punished by death, lack of a prior criminal record, mental or emotional disturbance, and consent by the victim. 18 U.S.C. § 3592(a); *see also* 21 U.S.C. § 848(m) (similar list of mitigating factors under DKA).

judge's discretion, present information that might not be admissible as evidence in the guilt phase of the trial (such as hearsay, for example); and may also rely on all of the evidence submitted during the guilt phase without having to present it anew during the penalty phase.

At the end of the sentencing phase, the federal judge instructs the jurors that they must each weigh the aggravating and mitigating factors and decide upon a sentence. The judge also instructs the jury that they may not in any way consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching a verdict. Jurors are then given at least two sentencing options: death or life in prison without any possibility of release. With respect to certain offenses, jurors are also given a third option – to have the judge impose a lesser sentence authorized by statute. Jurors are never required to return a verdict of death. In reaching a verdict, which must be unanimous, each juror must certify that he or she did not, in fact, consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching his or her determination and that his or her determination would have been the same regardless of those factors. In all cases, the jury's decision is binding upon the judge.[22]

After sentencing, a defendant subject to the death penalty is entitled to several forms of review. As with all federal criminal defendants, a defendant subject to a sentence of death may seek direct review of his or her conviction and sentence in the United States Court of Appeals for the circuit in which he or she was convicted. In capital cases, however, federal law explicitly requires the appellate court, in reviewing the case, to review the entire record and to address certain specific issues, including whether the sentence of death "was imposed under the influence of passion, prejudice, or any other arbitrary factor and whether the evidence supports the finding of the existence of an aggravating factor . . . ." 18 U.S.C. § 3595(c)(1). If the Court of Appeals affirms the conviction and sentence, the defendant may seek review in the United States Supreme Court by filing a petition for a writ of certiorari (and the government may likewise petition for a writ of certiorari if the conviction or sentence is reversed or vacated on appeal). Although the defendant is entitled to review in the Court of Appeals, the Supreme Court has discretion to decide whether to grant the petition for certiorari and review the case.

If the defendant fails to obtain relief on direct appeal, he or she may also seek collateral review by filing a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255 (which is sometimes described as a petition for a writ of habeas corpus). As with the proceedings in the underlying criminal case, such collateral review goes through three levels of the federal judiciary: the motion is made in the district court in which the defendant was convicted. Regardless of whether the conviction is upheld or vacated, the district court's resolution of the § 2255 motion is subject to direct appeal by the losing party. And, as with direct review, the judgment by the Court of Appeals concerning the § 2255 motion is subject to discretionary review by the Supreme Court.

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[22]Although federal law requires a judge to impose a sentence recommended by the jury in a capital case, the relevant statutes refer to the jury's sentencing decision as a recommendation. For ease of reference, this Survey refers to the determination made by a jury after a sentencing hearing as a "verdict."

If the defendant's sentence of death is upheld on both direct and collateral review, an execution date is set.[23] Under current policy, the Department will provide the defendant at least 120 days' notice of the scheduled execution date. *See* 65 Fed. Reg. 48379, 48380 (Aug. 8, 2000). Once judicial proceedings have ended and the defendant has received notification of the scheduled execution date, he or she may petition the President for a grant of executive clemency. *See* 28 C.F.R. § 1.10 (advisory regulations concerning clemency in capital cases). The Department reviews the case and makes a recommendation as to how it should be decided, but pursuant to the Constitution, the decision to grant or deny clemency or to stay the execution while a petition is under review is committed entirely to the discretion of the President.[24]

B. STATISTICAL HIGHLIGHTS

This Survey does not include separate tables for specific decision-making stages that occur after the Attorney General has authorized seeking the death penalty. However, information about those stages is set forth in Table Set I (pages T-1 to T-7).

1. Plea Agreements

The statistical highlights regarding plea agreements reported in this Part reflect only those cases in which defendants actually entered into an agreement resulting in a guilty plea after the Attorney General authorized seeking the death penalty. They do not reflect the number of times that United States Attorneys offered to enter into such agreements but were refused or, conversely, the number of times that United States Attorneys declined to enter into agreements offered by defendants and their counsel.

Moreover, because the decision to offer and accept a plea agreement may be affected by many factors other than the Attorney General's decision about authorizing capital prosecution, United States Attorneys and defendants can also decide to enter into plea agreements *before* the Attorney General makes a decision, either before the case is indicted, or after indictment but before the Department's decision-making process has been completed. Statistics that focus only on plea agreements after the Attorney General authorizes seeking the death penalty thus may not

[23] While there are additional avenues of potential relief available under federal law, direct appeal and § 2255 review are the two most commonly used, and current Department policy is to await the completion of these two forms of review, but not others, to set an execution date in a case in which a defendant has been sentenced to death. A defendant seeking other forms of judicial relief once an execution date has been scheduled may also seek a judicial order staying the execution to allow consideration of the merits of the pending claim.

[24] Federal law provides that indigent defendants are entitled to appointed counsel throughout the appeal, collateral review, and clemency processes.

accurately reflect the degree to which defendants charged with offenses punishable by death avoid such punishment as the result of guilty pleas.[25]

a. Pre-protocol cases

- From 1988 to 1994, the Attorney General authorized United States Attorneys to seek the death penalty for a total of 47 defendants. Of these, 14 defendants (30 percent) entered into plea agreements as a result of which the government withdrew the notice of intent to seek the death penalty.

	Total	White	Black	Hispanic	Other
Number	14	3	10	1	0
Percent	100%	21%	71%	7%	0%

- The rate at which defendants authorized for the death penalty entered plea agreements was 30 percent. The rates for individual racial ethnic groups were as follows:

  - 43 percent for White defendants (3 out of 7 authorized);
  - 29 percent for Black defendants (10 out of 34 authorized);
  - 20 percent for Hispanic defendants (1 out of 5 authorized); and
  - 100 percent for Other defendants (1 out of 1 authorized).

b. Post-protocol cases

- From 1995 to 2000, the Attorney General authorized United States Attorneys to seek the death penalty for a total of 159 defendants. Of these, 51 defendants (32 percent) entered into plea agreements as a result of which the government withdrew the notice of intent to seek the death penalty.[26]

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[25] The statistics compiled for this Survey do not include the number of plea agreements that occurred in cases after the Attorney General decided *not* to seek the death penalty. Further, as noted above in Part II, this Survey does not account for plea agreements reached before submission by United States Attorneys.

[26] Of the 682 defendants submitted by United States Attorneys for review from 1995 to 2000, a total of 58 entered into plea agreements before the Attorney General made a decision, including 8 (14 percent) who were White, 27 (47 percent) who were Black, 20 (34 percent) who were Hispanic, and 3 (5 percent) who were Other. None of the defendants submitted for review during the pre-protocol period entered into plea-agreements before the Attorney General decided whether to seek the death penalty.

	Total	White	Black	Hispanic	Other
Number	51	21	18	9	3
Percent	100%	41%	35%	18%	6%

- The rate at which defendants authorized for the death penalty entered plea agreements was 32 percent. The rates for individual racial ethnic groups were as follows:

  - 48 percent for White defendants (21 out of 44 authorized);
  - 25 percent for Black defendants (18 out of 71 authorized);
  - 28 percent for Hispanic defendants (9 out of 32 authorized); and
  - 25 percent for Other defendants (3 out of 12 authorized).

2. Trial Results

   a. Pre-protocol cases

- Of the 47 defendants as to whom the Attorney General authorized capital prosecution from 1988 to 1994, 20 (43 percent) proceeded to trial. The notice of intent to seek the death penalty was withdrawn as to 25 defendants, as the result of either a plea agreement (14 defendants) or reconsideration by the Attorney General (11 defendants). There were 2 defendants as to whom the notice to seek the death penalty was dismissed or the prosecution otherwise terminated by judicial action.

- Of the 20 defendants whose cases were tried, 16 (80 percent) were found guilty beyond a reasonable doubt of at least one offense subject to the death penalty.

	Total	White	Black	Hispanic	Other
Number	20	3	8	4	1
Percent	100%	19%	50%	25%	6%

- Of the 16 defendants convicted of capital offenses, juries returned non-death penalty verdicts (or no verdicts) for 10 (65 percent).

	Total	White	Black	Hispanic	Other
Number	10	1	5	3	1
Percent	100%	10%	50%	30%	10%

- Of the 16 defendants convicted of capital offenses, juries returned death penalty verdicts for 6 (35 percent).

	Total	White	Black	Hispanic	Other
Number	6	2	3	1	0
Percent	100%	33%	50%	17%	0%

- The rate at which juries returned death penalty verdicts was 35 percent for all defendants. The rates for individual racial/ethnic groups were as follows:

  - 67 percent for White defendants (2 out of 3 decided);
  - 38 percent for Black defendants (3 out of 8 decided);
  - 25 percent for Hispanic defendants (1 out of 4 decided); and
  - 0 percent for Other defendants (0 out of 1 decided).

- At the close of the reporting period, one of the six defendants for whom juries returned death penalty verdicts had his sentence vacated and was subsequently re-sentenced to life in prison.

b. Post-protocol cases

- Of the 159 defendants as to whom the Attorney General authorized capital prosecution from 1995 to 2000, 42 (26 percent) had been tried at the close of the reporting period. The notice of intent to seek the death penalty was withdrawn as to 62 defendants, as the result of either a plea agreement (51 defendants) or reconsideration by the Attorney General (11 defendants). There were 4 defendants as to whom the notice to seek the death penalty was dismissed or the prosecution otherwise terminated by judicial action. The remaining 51 defendants were awaiting trial as of July 20, 2000.

- Of the 42 defendants whose trials had been completed at the end of the reporting period, 41 (98 percent) were found guilty beyond a reasonable doubt of at least one offense subject to the death penalty.

	Total	White	Black	Hispanic	Other
Number	41	11	25	2	3
Percent	100%	27%	61%	5%	7%

- Of the 41 defendants convicted of capital offenses, juries returned non-death penalty verdicts (or no verdicts) for 21 (51 percent).

	Total	White	Black	Hispanic	Other
Number	21	7	12	0	2
Percent	100%	33%	57%	0%	10%

- Of the 41 defendants convicted of capital offenses, juries returned death penalty verdicts for 20 (49 percent).

	Total	White	Black	Hispanic	Other
Number	20	4	13	2	1
Percent	100%	20%	65%	10%	5%

- The rate at which juries returned death penalty verdicts was 49 percent for all defendants. The rates for individual racial/ethnic groups were as follows:

  - 44 percent for White defendants (4 out of 11 decided);
  - 52 percent for Black defendants (13 out of 25 decided);
  - 100 percent for Hispanic defendants (2 out of 2 decided); and
  - 33 percent for Other defendants (1 out of 3 decided).

- At the close of the reporting period, four of the 20 defendants for whom juries returned death verdicts had their sentences vacated and were awaiting further judicial proceedings (which may or may not result in the reinstatement of the death sentence in each case); and two were awaiting the formal imposition of sentence by the trial court.

3. Federal Defendants Sentenced to Death

Since 1988, federal juries have recommended the death sentence for a total of 26 defendants, of whom six were initially indicted before the protocol took effect on January 27,

1995. The sentences of four of these 26 defendants (one of whom is White, three of whom are Black, and all of whom were indicted under the Department's current protocol) were vacated in subsequent judicial proceedings; they are awaiting further proceedings in which their death sentences may or may not be reinstated. The sentence of one additional White defendant indicted in the pre-protocol period was vacated; this defendant was subsequently re-sentenced to life in prison. In addition, two Hispanic defendants are currently awaiting formal sentencing following the jury's recommendation of death. Thus, as of July 20, 2000, there were 19 defendants with pending federal death sentences, including eight who were litigating direct appeals, ten who were litigating collateral claims pursuant to 28 U.S.C. § 2255, and one who had completed both forms of post-verdict litigation and had been scheduled for execution.[27]

[27]In the case of the one defendant who had completed litigation of both direct appeal and the initial collateral review (Juan Raul Garza), the President granted a reprieve and set a new execution date after the close of the reporting period. Also, after the close of the reporting period, one defendant whose case had pending on direct appeal as on July 20, 2000 (David Paul Hammer), successfully petitioned the appellate court to dismiss the appeal and remand the case to the district court for the setting of an execution date.

Information about the federal defendants who have been sentenced to death is set forth in Table Set V (pages T-305 to T-309). This section provides highlights of the statistical data regarding these defendants.[28]

- As of July 20, 2000, 19 defendants were under a federal sentence of death.

	Total	White	Black	Hispanic	Other
Number	19	4	13	1	1
Percent	100%	21%	68%	5%	5%

- These 19 defendants were prosecuted in 14 separate cases – 10 cases had one defendant convicted of capital charges and sentenced to death, while 4 cases had two or more capital defendants sentenced to death. The 14 cases were prosecuted in 12 different judicial districts in 10 different states. Only two United States Attorneys' Offices have prosecuted more than one capital case resulting in a death sentence, and none has prosecuted more than two such cases.

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[28]This Survey generally does not attempt to document comparable state statistics regarding the death penalty decision-making process. Nevertheless, to allow a very general comparison of the relative size of the state and federal populations of death row, the following information compiled elsewhere by BJS is provided. As of December 31, 1998, BJS reports that there were 3,433 state defendants awaiting execution after being sentenced to death.

	Total	White	Black	Other
Number	3,433	1,900	1,473	60
Percent	100%	55%	43%	2%

Significantly, these state statistics do *not* distinguish between persons of Hispanic ethnicity and non-Hispanic defendants in counting the total number of White, Black, and Other defendants. However, BJS also reports that 314 defendants of all races (9 percent of the total population of 3,433) were of Hispanics ethnicity.

Furthermore, BJS reports that the states executed a total of 505 defendants from 1988 to 1999.

	Total	White	Black	Other
Number	505	317	177	11
Percent	100%	63%	35%	2%

BJS reports that 27 executed defendants of all races (7 percent of the total population of 505) were of Hispanic ethnicity.

- 10 of these 19 defendants (53 percent) had capital convictions related to only one victim. 9 of the 19 defendants (47 percent) had capital convictions related to two or more victims.

- 18 of these 19 defendants were sentenced to death for crimes involving a total of 27 victims.

	Total	White	Black	Hispanic	Other
Number	27	7	16	3	1
Percent	100%	26%	59%	11%	4%

- The remaining defendant, Timothy McVeigh, was found responsible for the deaths of 160 individuals of various races/ethnicities in connection with the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.[29]

- 13 of these 19 defendants (68 percent) were sentenced to death for crimes against victims exclusively of the same race/ethnicity.

	Total	White	Black	Hispanic	Other
Number	13	3	8	1	1
Percent	100%	23%	62%	8%	8%

- 6 of these 19 defendants (32 percent) were sentenced to death for crimes against at least one victim of a different race/ethnicity. One of these 6 defendants was White and five were Black.[30]

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[29]The victim-related data in this Survey is based exclusively on the number of victims set forth in the indictment against each defendant, which in some cases understates the actual number of victims who died as a result of a defendant's crimes. Thus, for example, although there were a total of 168 victims who died as a result of the bombing in Oklahoma City, the victim statistics in this survey include only 160 victims of that offense who at the time of the indictment were known to have died inside the building.

[30]This Survey reports statistics only relating to implementation of the federal death penalty since its re-introduction in 1988. Prior to that year, the federal government had not executed any person since 1963. Information about federal executions before 1963 has been published by the Death Penalty Information Center (DPIC). Specifically, DPIC reports that there 34 federal defendants were executed between 1927 and 1963. Of these, 28 (82 percent) were White, 3 (9 percent) were Black, 2 (6 percent) were Other, 1 (3 percent) was of unknown race. DPIC does not separately report the number of executed federal defendants who were Hispanic. DPIC further reports that 19 (56 percent) of these defendants were executed for murder, 6 (18 percent) for sabotage, 4 (12 percent) for kidnapping, 2 (6 percent) for espionage, 2 (6 percent) for bank robbery, and 2 (6 percent) for rape. The total

PART VI: AGREEMENTS AND DISAGREEMENTS IN THE FEDERAL DECISION-MAKING PROCESS

A. BACKGROUND

As suggested by the general similarity of the statistics reported about the recommendations and decisions made by each participant in the Department's death penalty review process, the United States Attorneys, the Review Committee, and the Attorney General often come to the same conclusion about whether or not the government should seek the death penalty for a given defendant. This Section provides information about the extent to which such agreement has and has not occurred under the Department's review procedures.

B. STATISTICAL HIGHLIGHTS

Detailed information about the degree to which different participants in the federal decision-making process agreed and disagreed with one another is set forth in Table Set VI (pages T-310 to T-355). The tables first analyze agreements and disagreements among all three participants in the decision-making process, *i.e.*, the United States Attorneys, the Review Committee, and the Attorney General (pages T-311 to T-327); and then focus on the extent to which specific pairs of those participants agreed and disagreed with one another (pages T-328 to T-355).

1. Three-party comparisons

- From 1995 to 2000, there were a total of 571 defendants who were considered by all three participants in the decision-making process. The Attorney General, the Review Committee and the United States Attorney all agreed with respect to 501 of these defendants (88 percent),

	Total	White	Black	Hispanic	Other
Number	497	95	250	130	22
Percent	100%	19%	50%	26%	4%

- The rate of agreement was 88 percent (501 of 571 defendants as to whom the Attorney General made a decision upon recommendations from both of the other

exceeds 34 because some defendants were convicted of multiple capital offenses. *See* Federal Death Penalty Information Center, Executions of Federal Prisoners 1927-1999, <http://www.deathpenaltyinfo.org/fedexec.html>.

participants), including both decisions to seek the death penalty and decisions not to seek it. With respect to specific racial/ethnic groups, the rates of agreement were:

- 86 percent for White defendants (95 of 110 defendants);
- 89 percent for Black defendants (250 of 280 defendants);
- 83 percent for Hispanic defendants (130 of 156 defendants); and
- 88 percent for Other defendants (22 of 25 defendants).

- The rate of agreement specifically for decisions to seek the death penalty was 84 percent (133 of 159 defendants for whom the Attorney General decided to seek the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:
  - 82 percent for White defendants (36 of 44 defendants);
  - 89 percent for Black defendants (63 of 71 defendants);
  - 69 percent for Hispanic defendants (22 of 32 defendants); and
  - 100 percent for Other defendants (12 of 12 defendants).

- The rate of agreement specifically for decisions against seeking the death penalty was 88 percent (368 of 417 defendants for whom the Attorney General decided not to seek the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:
  - 87 percent for White defendants (59 of 68 defendants);
  - 90 percent for Black defendants (191 of 212 defendants);
  - 87 percent for Hispanic defendants (108 of 124 defendants); and
  - 77 percent for Other defendants (10 of 13 defendants).

- In the 70 instances in which there was not overall agreement, the dissenting view was most often held by the United States Attorney and least often by the Attorney General.

- The United States Attorney held the dissenting view as to 50 defendants out of 70 as to whom there was a lack of consensus (71 percent), including 25 recommendations by United States Attorneys in favor of seeking the death penalty and 25 recommendations against doing so. Of these 50 defendants:

	Total	White	Black	Hispanic	Other
Number	50	13	17	18	2
Percent	100%	26%	34%	36%	4%

- The Review Committee held the dissenting view as to 18 defendants out of 70 as to whom there was a lack of consensus (26 percent), all of which were recommendations by the Review Committee in favor of seeking the death penalty.

	Total	White	Black	Hispanic	Other
Number	18	2	7	8	1
Percent	100%	11%	39%	44%	6%

- The Attorney General held the dissenting view as to 2 defendants out of 70 as to whom there was a lack of consensus (3 percent), and decided in both cases against seeking the death penalty. Both of these defendants were Black.

2. Two-party comparisons

a. The United States Attorneys and the Attorney General

- From 1995 to 2000, a total of 575 defendants facing capital-eligible charges were the subjects of both a recommendation either for or against seeking the death penalty by a United States Attorney and a decision by the Attorney General. With respect to 522 of these defendants (91 percent), the United States Attorney and the Attorney General agreed as to whether or not the death penalty should be sought.

	Total	White	Black	Hispanic	Other
Number	522	98	263	138	23
Percent	100%	19%	50%	26%	4%

- The overall rate of agreement was 87 percent (522 of 575 defendants), including both decision to seek the death penalty and decisions not to seek it. With respect to specific racial/ethnic groups, the overall rates of agreement were:
  - 88 percent for White defendants (98 of 111 defendants);
  - 93 percent for Black defendants (263 of 283 defendants);
  - 88 percent for Hispanic defendants (138 of 156 defendants); and
  - 92 percent for Other defendants (23 of 25 defendants).

- The rate of agreement specifically for decisions to seek the death penalty was 83 percent (133 of 160 defendants for whom the United States Attorney

recommended seeking the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:
- 88 percent for White defendants (36 of 41 defendants);
- 84 percent for Black defendants (63 of 75 defendants);
- 73 percent for Hispanic defendants (22 of 30 defendants); and
- 86 percent for Other defendants (12 of 14 defendants).

- The rate of agreement specifically for decisions against seeking the death penalty was 94 percent (389 of 415 defendants for whom the United States Attorney recommended against seeking the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:
  - 89 percent for White defendants (62 of 70 defendants);
  - 96 percent for Black defendants (200 of 208 defendants);
  - 92 percent for Hispanic defendants (116 of 126 defendants); and
  - 100 percent for Other defendants (11 of 11 defendants).

- The rate of agreement between the Attorney General and the United States Attorneys as to cases in which the latter recommended seeking the death penalty did not substantially change as a result of the adoption of the review protocol in 1995. In the pre-protocol period (when the United States Attorneys submitted only recommendations in favor of seeking the death penalty), the cases of 51 defendants facing capital-eligible charges were submitted by the United States Attorneys and decided by the Attorney General.[31] With respect to 47 of these defendants (92 percent), the Attorney General and the United States Attorney agreed that the death penalty should be sought.

	Total	White	Black	Hispanic	Other
Number	47	7	34	5	1
Percent	100%	15%	72%	11%	2%

b. The United States Attorneys and the Review Committee

- From 1995 to 2000, a total of 602 defendants facing capital-eligible charges were the subjects of recommendations either for or against seeking the death penalty by both a United States Attorney and the Review Committee. With respect to 529 of these defendants (88 percent), the United States Attorney and the Review Committee agreed as to whether or not the death penalty should be sought.

[31]The Attorney General deferred decision on one defendant, a fugitive who subsequently died.

	Total	White	Black	Hispanic	Other
Number	529	98	268	141	22
Percent	100%	19%	51%	27%	4%

- The overall rate of agreement was 88 percent (529 of 602 defendants), including both decision to seek the death penalty and decisions not to seek it. With respect to specific racial/ethnic groups, the overall rates of agreement were:

  - 86 percent for White defendants (98 of 114 defendants);
  - 91 percent for Black defendants (268 of 295 defendants);
  - 84 percent for Hispanic defendants (141 of 168 defendants); and
  - 88 percent for Other defendants (22 of 25 defendants).

- The rate of agreement specifically for decisions to seek the death penalty was 84 percent (137 of 164 defendants for whom the United States Attorney recommended seeking the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:

  - 88 percent for White defendants (36 of 41 defendants);
  - 84 percent for Black defendants (65 of 77 defendants);
  - 75 percent for Hispanic defendants (24 of 32 defendants); and
  - 86 percent for Other defendants (12 of 14 defendants).

- The rate of agreement specifically for decisions against seeking the death penalty was 89 percent (392 of 438 defendants for whom the United States Attorney recommended against seeking the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:

  - 85 percent for White defendants (63 of 73 defendants);
  - 93 percent for Black defendants (203 of 218 defendants);
  - 86 percent for Hispanic defendants (117 of 136 defendants); and
  - 91 percent for Other defendants (10 of 11 defendants).

c. The Review Committee and the Attorney General

- From 1995 to 2000, a total of 572 defendants facing capital-eligible charges were the subjects of recommendations either for or against seeking the death penalty by the Review Committee as well as a decision by the Attorney General. With respect to 552 of these defendants (97 percent), the Attorney General and the Review Committee agreed as to whether or not the death penalty should be sought.

	Total	White	Black	Hispanic	Other
Number	552	109	271	148	24
Percent	100%	20%	49%	27%	4%

- The overall rate of agreement was 97 percent (552 of 572 defendants), including both decision to seek the death penalty and decisions not to seek it. With respect to specific racial/ethnic groups, the overall rates of agreement were:

  - 98 percent for White defendants (109 of 111 defendants);
  - 97 percent for Black defendants (271 of 280 defendants);
  - 95 percent for Hispanic defendants (148 of 156 defendants); and
  - 96 percent for Other defendants (24 of 25 defendants).

- The rate of agreement specifically for decisions to seek the death penalty was 89 percent (158 of 178 defendants for whom the Review Committee recommended seeking the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:

  - 96 percent for White defendants (44 of 46 defendants);
  - 89 percent for Black defendants (70 of 79 defendants);
  - 80 percent for Hispanic defendants (32 of 40 defendants); and
  - 92 percent for Other defendants (12 of 13 defendants).

- The rate of agreement specifically for decisions against seeking the death penalty was 100 percent (394 of 394 defendants for whom the Review Committee recommended against seeking the death penalty). With respect to specific racial/ethnic groups, the rates of agreement were:

  - 100 percent for White defendants (65 of 65 defendants);
  - 100 percent for Black defendants (201 of 201 defendants);
  - 100 percent for Hispanic defendants (116 of 116 defendants); and
  - 100 percent for Other defendants (12 of 12 defendants).

- The Attorney General has never disagreed with a recommendation by the Review Committee that the death penalty should not be sought in a given case.

Ms. JACKSON LEE. Mr. Chairman, I would like to strike the last word.

Chairman SENSENBRENNER. The gentlewoman from Texas.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I believe that an open record allows the distinguished gentleman to submit any materials into the record, but I would like to ask the Chairman to allow me to do additional research and to be able to counter the distinguished gentleman's one statement by the former Attorney General with overwhelming evidence, and I will be proud to cite, when I say proud with qualification, the State of Texas as a prime example that there is disparate treatment not only in the State of Texas but around the nation, and we should counter that, and I would welcome the opportunity to hold full hearings on that very question about the disparity of treatment of minorities in the death sentencing but more importantly——

Chairman SENSENBRENNER. If the gentlewoman would yield.

Ms. JACKSON LEE. If I just may finish the sentence; more importantly, also, in the sentencing process, and I'll be happy to yield to the distinguished gentleman.

Chairman SENSENBRENNER. The problem of the gentlewoman's request is that in two calendar days, we have to file the Committee report, so the Committee report has got to be complete.

Ms. JACKSON LEE. Yes, sir.

Chairman SENSENBRENNER. I am certain that the gentlewoman will have further opportunities to spread whatever she wants to spread on the record. But if this bill is favorably reported, I do not think that the rules will allow us more than 2 days. She can utilize her prerogatives to file dissenting views to include this in the record.

Ms. JACKSON LEE. Within the 2 days, sir.

Chairman SENSENBRENNER. Yes, and this may be the way to do that without bending the rules.

Ms. JACKSON LEE. I thank the Chairman. If I am able to find some additional materials within that time frame to get into this record, I would be able to submit it within the 2-day period?

Chairman SENSENBRENNER. Yes, as dissenting views.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Chairman SENSENBRENNER. Okay; are there further amendments?

If there are no further amendments, without objection, the Subcommittee amendment in the nature of a substitute laid down as the base text as amended is adopted. A reporting quorum is present.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. Yes.

Mr. NADLER. I move to postpone consideration of this bill until July 7.

Chairman SENSENBRENNER. The question is on postponing the bill until July 7.

Those in favor will say aye.

Opposed no.

The noes appear to have it. The noes have it, and the motion to postpone is not agreed to.

The question now occurs on the motion to report the bill H.R. 2934 favorably as amended.

All in favor will say aye.

Opposed, no.

The ayes appear to have it, the ayes have it, the motion to report favorably is agreed to.

Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today.

Without objection, the Chairman is moved—is authorized to move to go to conference pursuant to House rules.

Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days as provided by the rules in which to submit additional dissenting supplemental or minority views.

The measures that have been noticed having been completed, the Committee stands adjourned.

[Whereupon, at 11:29 a.m., the Committee was adjourned.]

DISSENTING VIEWS

These views dissent to the Committee Report on H.R. 2934, the "Terrorist Penalty Enhancement Act." This bill provides for a massive expansion of the federal death penalty, both for crimes that supporters of the death penalty might think warrant the death penalty, as well as crimes many may not expect to be associated with this most severe of penalties. The bill creates 23 new death penalties by making all 43 "federal crimes of terrorism" under 18 U.S.C. 2332b(g)(5) death penalty eligible, if a death results in the commission of any one of them. Currently, 20 of the 43 crimes are death penalty eligible, if death results.

And this bill does not limit crimes for death penalty eligibility to heinous offenses or those severe enough to require either a death penalty or life without parole. In addition to deaths that occur as a result of a direct intent to murder, maim, kidnap, destroy a nuclear facility or other such heinous crimes, crimes such as financial or other material support to terrorists or terrorist organizations, and protection of computers, are also included. And they are included whether these crimes occur in the context of an effort to violently overthrow the government or terrorize people, or in a context of protest against government policies considered despicable. If a death results, even if it was not a specifically intended result, anyone who was involved in committing, or who attempted or conspired to commit one of the covered offenses, would be death penalty eligible.

Several of the added crimes of terrorism are so broad that they could cover civil disobedience activities by a diverse group of protest organizations, such as Operation Rescue, Greenpeace, and the anti-globalization movement, should a death result from illegal protest activities, particularly since attempts and conspiracies to commit these crimes are also death penalty eligible. Bombarding an abortion clinic or government computer with spam to shut a particular activity down as a protest to affect changes in abortion or war policies and practices is illegal and should be punished, but should not carry a potential death sentence to those who participated in the act, or planned or attempted it, should an unintentional death result in conjunction with such crimes.

Some recognition of these concerns was accorded by the Committee through its passage of two amendments. One amendment eliminated the "catch-all" expansion of the death penalty to be applicable to virtually any felony if a death results and it could be placed under the broad definitions of international or domestic terrorism. The other amendment removed from death penalty eligibility under the bill the provision under 2332(b)(g)(5) which makes it a crime to cause "injury to buildings or property" under federal control. While this is some recognition and some improvement, the bill still allows what are relatively minor crimes to result in a

death penalty prosecution should a death occur, albeit it unintentional. The provisions of this bill create a death penalty liability tantamount to a federal "felony murder" rule. This presents constitutional issues as to the appropriateness of the death penalty under these circumstances.

The bill provides too much latitude for abusive prosecutions. The Attorney General, who ultimately approves death penalty cases, has issued a broad directive to federal prosecutors to pursue the most severe penalties, including more death penalties. With the broad expansion of death penalty eligible offenses in this bill, he could pick and chose death penalty cases not necessarily on what someone did, but on who they are or how they are labeled, using nationality, citizen status, or other subjective factors.

There are any number of reasons to charge a death penalty offense under a provision such as this bill—to scare the defendant into pleading guilty even though the evidence is shaky, to get tough-on-crime points, or simply to get a more prosecutor favorable jury. On a death penalty qualified jury, anyone opposed to capital punishment would be stricken, if not for cause, by peremptory strike.

And the provisions of this bill will be duplicative of State jurisdiction in many instances and conflicting in some. One such conflict would be where the residents of a particular State have chosen not to authorize capital punishment and, as a consequence of the State requesting or acceding to federal involvement, the federal government pursues a death penalty against the State's wishes.

Another concern with this significant expansion of the death penalty is our frequent error rate in applying it in this country. A 23-year study conducted by Professor James Liebman of Columbia University, involving over 4,500 capital cases in 34 States revealed that the courts found serious, reversible error in 68 percent of the capital cases. In the last 10 years, more than 100 people on death row have been found innocent of the crime for which they received the death penalty. With this kind of record of administering existing death penalty laws, we should await the passage of the Innocence Protection Act before we add anymore death penalties.

Several studies have reflected that racial, ethnic and economic biases permeate administration of the death penalty in this country, including the federal death penalty. While Attorney General Ashcroft found no bias in federal death penalty administration from a 6-month review of the issue (Representative Feeney mistakenly referred to this report at the markup of this bill as a report by former Attorney General Reno), Attorney General Reno, in a more extensive analysis, did find that the federal death penalty was applied disproportionately against minorities and called for a more in-depth study and analysis by the National Institute of Justice (NIJ). As a result of this finding, President Clinton stayed the execution of Juan Garza to allow for the more in-depth analysis. NIJ has not been directed to do the study and the questions raised by the Reno analysis have not been addressed through an empirical study of "possible racial and regional bias" in the federal system. Without a thorough analysis of the issue, there is every reason for concern that bias remains in the administration of the federal death penalty.

Yet, another area of conflict or difficulty will arise in our efforts to further international cooperation in pursuing suspected terrorists. We are already experiencing difficulties in securing the cooperation of the rest of the civilized world in bringing terrorists to justice due to our existing proliferation of death penalty offenses. When these difficulties are over controversial issues such as whether someone who supports an organization's social or humanitarian programs knows it has been designated a terrorist organization, it can only exacerbate such difficulties and further undermine US efforts.

Finally, other than the uses we have expressed concerns about above, it is not clear what this expansion of the death penalty will add that will be of any significant use. We note that Timothy McVeigh was not sentenced to death for a crime of terrorism, but under other provisions for murder. And, at the recent hearing on this bill, no witness was able to conclude that the provisions under the bill would apply to the 9/11 hijackers, had any lived. For all of these reasons, this bill is unnecessary and unjustified at this time, and should be defeated.

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ADDITIONAL VIEWS

These views have been submitted in response to a statement made by a Majority Member during the Full Judiciary Committee Markup of H.R. 2934 on June 23, 2004:

> Mr. Chairman, during the Subcommittee meeting on April 24, the record includes a suggestion that there may be, in quotes, disparate treatment of African-Americans in the judicial system and the large numbers of those on death row. Contrary to the suggestion in the record, empirical evidence shows that there is no disparate treatment, *and according to a June 6, 2001, report by Attorney General Janet Reno, after an extensive review of all Federal death penalty procedures, there was, according to the report in quotes, no evidence that the minority defendants are subjected to bias or otherwise disfavored in decisions concerning capital punishment.* To the contrary, the report reflects that at each stage of the process, white defendants and not minorities were disproportionately recommended for the death penalty.
>
> Mr. Chairman, I would ask that the Attorney General's June 6, 2001, report, as well as a September 12, 2000, report concerning the same matter be inserted into the record at this time.

Markup transcript, Business Meeting, May 5, 2004 at 56 (emphasis added).

The Member erroneously cited a report issued by the Department of Justice initiated by Attorney General John Ashcroft entitled "The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review (2001 Report)." Attorney General John Ashcroft gave testimony before the House Judiciary Committee on June 6, 2001[1] that gives the impression that there is no racially disparate application of the death penalty in the federal criminal justice system. Mr. Ashcroft's statement was based on the 2001 Report. The 2001 Report followed up a study initiated by the previous Attorney General Janet Reno and was released in December of 2000 (2000 Report), the same month in which Juan Raul Garza, a Mexican-American from Texas was scheduled for execution.[2] This report initiated by Ms. Reno, contrary to the Member's suggestion, revealed that both Hispanics and

[1] On June 6, 2001 before the House Judiciary, Attorney General Ashcroft stated that there is "substantial basis for confidence" that there is an "absence of any evidence of bias or racial discrimination in the federal death penalty."

[2] After given a 6-month stay of execution until June 19, 2001 by the Clinton administration because "the examination of possible racial and regional bias should [have been] completed before the United States [went] forward with an execution in a case that may [have] implicate[d] the very questions raised by the Justice Department's continued study," Garza was executed by lethal injection in Terre Haute, Indiana after a clemency plea to President Bush failed. During the year of Mr. Garza's execution, U.S. Attorneys in Texas had only brought federal capital cases against Hispanics. "Second federal inmate executed in Indiana (CNN.com, June 20, 2001)."

persons in Texas were disproportionately subjected to the federal death penalty as compared to Whites and people living in other parts of the country.

Relying on incomplete data, the 2001 Report makes sweeping conclusions about the lack of racial bias in the federal system. Mr. Garza was executed despite the fact that the 2001 Report had not responded to the questions posed by President Clinton Administration when he granted a 6-month stay of execution.

The 2001 report has the following flaws: [3]

- It does not include any data explaining why U.S. Attorneys prosecute cases in the federal system or defer to the states;
- The data are not reflective of all potentially eligible federal capital defendants;
- Missing information about each case makes it impossible to determine whether charging and plea decisions were fair; and
- Because the 2001 Report does not provide the detailed underlying data it used to draw its conclusions, there is no way to understand if there are any national patterns requiring further analysis.

Furthermore, it is important to note that, subsequent to the issuance of the 2000 Report and prior to the issuance of the 2001 Report, Attorney General Janet Reno requested the collection of additional data and a more in-depth study to be conducted by the National Institute of Justice (NIJ). In fact, President Clinton stayed the execution of Juan Raul Garza, in large part, to allow the Department of Justice and NIJ time to complete their review and study. The data that would be yielded from the NIJ study, according to Ms. Reno, is critical to the proper analysis of whether and to what extent there exists discrimination in the administration of capital punishment in the federal system.[4] During his Senate confirmation hearing, Attorney General Ashcroft stated that he would "support the effort of the National Institute of Justice already under way to undertake the study of racial and regional disparities in the federal death penalty system that President Clinton had deemed necessary." Three years later, this study still has not been completed. Because the current Administration has not facilitated the completion of the NIJ study, the important data that it would yield will not be made a part of the DOJ review.[5]

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[3] "Analysis of June 6 Justice Department Report of Federal Death Penalty, ACLU (June 14, 2001, *http://www.aclu.org/DeathPenalty/DeathPenalty.cfm?ID=10905&c=62)*.

[4] Senator Russell Feingold (D-WI), Statement on the Federal Death Penalty Study (June 7, 2001).

[5] *Id.* Rather, the Attorney General now believes apparently it would take much too long to conduct this in-depth analysis of disparities and that it would provide indefinite answers."

The 2001 Report, as erroneously cited and relied upon by the Member in making his statement, is an incomplete analysis of the issue and the report fails to refute or rebut the 2000 Report. Since no efforts have been made to institute changes to the death penalty system, it is fair to assume that the problems identified in 2000 still exist.

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