UNITED STATES SENTENCING COMMISSION

WRITTEN STATEMENTS

PUBLIC HEARING

FEBRUARY 17, 1987

AGENDA

United States Sentencing Commission
Hearing on the Commission's responsibility regarding promulgation of sentencing guidelines for federal capital offenses

Ceremonial Courtroom, U.S. Courthouse, Washington, D.C.
February 17, 1987

9:30 a.m.	Department of Justice DP 00005 William F. Weld, Asst. Attorney General, Criminal Division Charles J. Cooper, Asst. Attorney General, Office of Legal Counsel
9:45 a.m.	Bureau of Prisons DP 00007 Mike Quinlan, deputy director
10 a.m.	NAACP Legal Defense Fund former former Wiley Branton, Dean, Howard Law School; v.p. Legal Defense Fund Hon. Marvin Frankel, former U.S. District Court Judge
10:15 a.m.	Institute for Government and Politics DP 00038 Patrick McGuigan, director → testified in the afternoon Jeffery Troutt, research director
10:30 a.m.	Heritage Foundation Bruce Fein, Visiting Fellow for Constitutional Studies DP 00002
10:45 a.m.	Amnesty International DP 00010 John Shattuck Jane Rocamora
11 a.m.	National Coalition Against the Death Penalty Jonathan Gradess, executive director, NY State Defenders Assoc.
11:15 a.m.	Washington Legal Foundation Paul Kamenar, executive legal director
11:30 a.m.	Moral Majority DP 00008 Roy C. Jones, senior vice president for political affairs
11:45 a.m.	NISBICO & National Interreligious Task Force on Criminal Justice DP 00001 Rev. L. William Yolton, executive director, NISBICO
noon	Police Executive Research Forum DP 00006 Darell Stephens, executive director National Law Enforcement Council DP Ordway P. Burden, chairman Douglas Baldwin, executive director
12:20 p.m.	Professor David C. Baldus DP 00003 University of Iowa College of Law

LUNCH

2 p.m.	American Civil Liberties Union DP 00009 Norman Dorsen, president William Allen, Covington & Burling DP 00044 Elizabeth Danello, Covington & Burling
2:15 p.m.	Professor Albert W. Alschuler DP 00038 University of Chicago Law School
2:30 p.m.	Dr. Ernest van den Haag Fordham University Law School
2:45 p.m.	CURE (Citizens United for Rehabilitation of Errants) DP 00041 Charlie Sullivan
3 p.m.	International Association of Chiefs of Police DP 00004 Jerald R. Vaughn, executive director National Sheriff's Association DP 00046 M. Wayne Huggins, sheriff, Fairfax County, VA Fraternal Order of Police DP 00042 Donald L. Cahill, legislative committee
3:30 p.m.	National Association of Criminal Defense Lawyers DP 00011 ~~Dr.~~ Prof. Charles Ogletree, Harvard Law School
3:45 p.m.	Federal Criminal Investigators Association DP 00040 Mickey Veich, congressional affairs officer International Union of Police Associations - AFL-CIO DP 00041 Robert Kliesmet, president
4:05 p.m.	Robert L. Weinberg Williams & Connolly

9/10

THE UNITED STATES SENTENCING COMMISSION
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TO: ALL COMMISSIONERS
STAFF

FROM: Cary Walters

DATE: February 19, 1987

Re: February 17th Hearing

For your review, I have attached additional hearing testimonies, in addition to the hearing agenda. If you are missing any testimonies, or with to receive additional copies, please let me know. All testimonies received have been assigned central file numbers which are indicated beside each testimony.

Department of Justice

STATEMENT OF

WILLIAM F. WELD
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

THE DESIRABILITY OF THE SENTENCING COMMISSION
PROMULGATING CAPITAL SENTENCING GUIDELINES

ON

FEBRUARY 17, 1987

Mr. Chairman and Members of the Commission:

I am pleased to be here today to present the views of the Department of Justice on issues relating to capital sentencing guidelines. The Department's Office of Legal Counsel has already provided an opinion explaining why, in the Department's view, the Sentencing Commission is authorized to promulgate capital sentencing guidelines. I will focus my testimony this morning on the issue of the desirability of such guidelines.

The Department is firmly of the view that capital sentencing guidelines for essentially all of the federal statutes that authorize that penalty would be desirable.[1] We believe this because capital sentences will serve the three purposes of sentencing that Congress has required federal sanctions to achieve: just punishment, deterrence, and incapacitation.[2] Consequently, we strongly support the promulgation of capital sentencing guidelines that will allow the consideration and imposition of the sentence of death under constitutionally permissible procedures and criteria. The Department views such

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[1] Constitutional questions have been raised about the status of the death penalty provisions in 18 U.S.C. §1992 and 18 U.S.C. §2113 in light of United States v. Jackson, 390 U.S. 570 (1968). The Department is analyzing these statutes to determine whether the Commission might be able to remedy the possible defects in these statutes through guidelines.

It is also not clear whether the Commission should promulgate guidelines for the aircraft hijacking statute, 49 U.S.C. §§1472 & 1473, or rely on the provisions already contained in that statute. The Department is also analyzing this issue.

[2] Congress has determined that a fourth purpose of sentencing -- rehabilitation -- is essentially irrelevant in the context of the serious offenders. See 28 U.S.C. §994(k).

guidelines as one of the most substantial contributions the Commission might make to the administration of justice in this country. We also believe it would be an important step towards effecting the will of Congress, which through the passage of statutory capital sentencing provisions has resolved all of the questions surrounding the death penalty in favor of protecting society and against lenient treatment for convicted murderers, traitors, and spies.

Only a death sentence can constitute "just punishment" for certain aggravated federal offenses. At the top of the list is the capital provision concerning assassination of the President, one of the gravest offenses imaginable. As the most powerful and visible of the nation's leaders, the President maintains a unique position within the Federal Government. As Commander-in-Chief of the armed forces, he discharges unique responsibilities for the security of the country. As head of the Executive Branch, he is entrusted with the authority of coordinating and executing all laws of the United States. Incredibly, however, in the absence of capital sentencing guidelines from the Commission, the maximum penalty that could be imposed by a federal court for the murder of the President might be less than could be imposed by most state courts if they had jurisdiction or were free to exercise it.[3] In addition to the President, members of Congress, Supreme

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[3] While in theory, a state could prosecute a person for assassinating the President or a Member of Congress, the assertion of federal jurisdiction over these uniquely federal

(continued...)

Court Justices, and the heads of important executive departments are also protected against political assassination by capital sentencing provisions. Other important federal statutes provide capital sanctions for treason and espionage. The importance of these statutes to the security of the nation can not be overemphasized. During the last several years we have seen appalling incidents of espionage in which it has been alleged -- and in a number of case already proven -- that military officers and others who enjoyed positions of special trust and responsibility have sold our country's secrets to foreign powers. The incalculable harm caused by these offenses -- crimes that may have impaired our country's ability to defend itself against a nuclear attack -- should underscore the necessity of having an enforceable death penalty available for espionage cases resulting in particularly serious breaches of national security.

Federal statutes also proscribe various types of murder that might be expected to result in multiple deaths and therefore are particularly heinous. Into this category fall statutes concerning willful wrecking of a train resulting in death as well as intentional destruction of aircraft and motor vehicles carrying passengers.

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[3](...continued)
crimes ousts the states of jurisdiction. See 18 U.S.C. §351(f) and §1751(h). Certain federal properties, like a number of military bases and prisons, are areas of exclusive federal jurisdiction on which the laws of the states do not apply.

Finally, a number of federal provisions attach capital sanctions to murder within the reach of federal jurisdiction. These provisions are important because they recognize the sanctity of human life. As one scholar has recognized, "Murder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought also to differ in kind. It must acknowledge the inviolability and dignity of innocent human life."

The overwhelming majority of Americans support capital punishment for serious crimes. The most recent national poll, published last month by the Media General and the Associated Press, reveals that 85% of Americans favor, and only 11% oppose, the death penalty for some murders. The survey reveals that support for the death penalty crossed all religious, educational, economic, and regional differences. This is compelling testimony to the fact that capital punishment is accepted to be just punishment in the eyes of the people.

Capital punishment also serves the purpose of deterring serious crimes. We know this for several reasons. First, common sense tells us that the death penalty operates as an effective deterrent for crimes involving planning and calculation. The federal crimes before the Commission -- treason, espionage, Presidential assassination, train wrecking, and the like -- are generally "contemplated" crimes where, as the Supreme Court has recognized, "the possible penalty of death may well enter into the cold calculus that precedes the decision to act." Second, we

know from examples that the death penalty has entered into the calculation of some criminals. For instance, some years ago the Attorney General of Kansas testified that one of the contributing factors leading to the reenactment in the 1930's of the death penalty in Kansas was numerous deliberate murders committed in Kansas by criminals who had previously committed murders in states surrounding Kansas. In these adjacent states, their punishment, if captured, could have been the death penalty. A more recent example comes from a robbery in Landover, Maryland, where one of the robbers boasted, while shooting helpless hostages, that the worst that would happen to him was that he would "be taken care of the rest of his life" in prison. Third, we know from econometric studies that punishment deters crime. These sophisticated studies provide clear evidence of a deterrent effect to the criminal law in general as well as considerable evidence of deterrence specifically from capital punishment.

A death penalty is also the best means of incapacitating habitual murderers who, if placed in prison and eventually released, may well commit their kind of crime yet again. For example, one Eddie Wein was sentenced to death in Los Angeles Superior Court in 1957. Instead of being executed, he was released from prison in 1975 to live in West Los Angeles, without warning to his neighbors. Within months, he began to attack or kill women in the area. He was convicted in 1976 of first degree murder of one woman, attempted murder of another, and numerous

sexual offenses. Here the death penalty would have spared an innocent life.

Even a "real life" sentence can not always effectively incapacitate such persons. If incarcerated, they will continue to pose a threat to prison guards and other prisoners. Indeed, without a death penalty, some federal prisoners already serving a life sentence can essentially murder "for free" -- that is, commit a murder and receive no additional punishment.

The small minority in our society opposed to capital punishment occasionally argues that the death penalty system is not properly administered. They contend, among other things, that some persons who deserve a death penalty escape it and that therefore a penalty of death should never be imposed. While we respect these sincerely-held views, the logic of such an argument is fatally flawed. I need not remind this body that every effort should be made to insure that similarly situated offenders receive similar punishment. But the mere fact that some persons escape appropriate punishment does not provide a justification for letting all escape.

It is also sometimes argued that minorities and other disadvantaged persons fare the worst under a capital sentencing system. At the federal level, this argument is not statistically supported. The past statistics reveal that of the 33 federal prisoners executed since 1930 -- the date to which Bureau of Justice Statistics extend -- only five were minority group members. More important than past history, however, is what

steps can be taken today to eliminate any trace of racial discrimination from our justice system, in a capital sentencing system and elsewhere. The Sentencing Commission has a unique opportunity in this regard. It can promulgate capital sentencing guidelines that minimize the risk of discrimination entering the system. In doing so, the Commission could establish model procedures to which all states could turn. The Commission might thereby improve the capital sentencing systems not only at the federal level, but at the state level, where a for greater number of capital cases are handled every year.

The federal system also has in place a vast array of safeguards designed to minimize to the greatest extent possible the risk of an erroneous execution. No credible assertions have been made that the federal system has executed an innocent person in recent memory. In these circumstances, it is not brutal or unfeeling to conclude that the remote chance of error inherent in any punishment scheme must be weighed against the substantial benefits in terms of protection of society, and innocent lives, that reinstitution of the death penalty would bring about.

The Commission has also asked for views as to what mitigating and aggravating circumstances should be included in capital sentencing guidelines. We believe the Commission need not "reinvent the wheel." In recent years, both Houses of Congress have passed capital punishment bills that set forth the relevant aggravating and mitigating factors in this area. It would be a simple matter for the Commission to adopt these

provisions to the guidelines context. I have attached a report that treats these issues, and the other issues discussed here, at greater length.

In passing capital punishment statutes, Congress recognized that death penalties allow society to exact just punishment from the most dangerous and vicious criminals and to avoid countless crimes. In establishing the Sentencing Commission, Congress created a vehicle for the constitutional and effective implementation of these penalties. The Commission should undertake this task and promptly begin drafting capital sentencing guidelines. The protection of this nation's citizens requires nothing less.

STATEMENT OF

CHARLES J. COOPER
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

THE STATUTORY AUTHORITY OF THE SENTENCING COMMISSION TO PROMULGATE CAPITAL SENTENCING GUIDELINES

ON

FEBRUARY 17, 1987

Mr. Chairman and Members of the Commission:

The Sentencing Reform Act establishes a comprehensive scheme. Subsection (a) of 18 U.S.C. 3551 provides that, "[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this [Act] . . . ." Subsection (b) specifically addresses the sentencing of individuals, authorizing the imposition of probation, fine, or imprisonment, as well as providing for forfeiture, notice to victims, and restitution. Absent from this list is capital punishment, although numerous provisions of the United States Code authorize judicial imposition of this sanction. Thus, the threshold question is whether the death penalty is still an authorized sanction for certain crimes under federal law. We believe that this question must be answered in the affirmative, as our January 8, 1987 opinion on this question reflects. I will not here undertake to restate that analysis in detail, but simply draw your attention to several salient points.

The history of congressional efforts to enact sentencing reform legislation establishes that capital punishment is an authorized sanction under the Sentencing Reform Act of 1984. The provisions of the Act expressly apply to all federal offenses "except as otherwise specifically provided." Prior congressional attempts at sentencing reform reveal that this exception in section 3551(a) was intended to mean just what it says: an offense is within the scope of the Sentencing Reform Act unless the statute defining the offense specifically states

that the provisions of the Act are inapplicable. Because existing federal death penalty provisions, save one (air piracy when death results, 49 U.S.C. 1472), do not specifically provide that the provisions of the Sentencing Reform Act are inapplicable, the Act requires that defendants convicted of capital offenses be sentenced in accordance with the Act. And, while section 3551(b)'s omission of the death penalty from its list of authorized sanctions raises the inference that the Act was intended to effect an implied repeal of existing federal death penalty provisions, this inference is overcome by positive and indisputable evidence in the Act's legislative history that existing death penalty statutes were intended not to be affected in any way, let alone repealed, by the Act.

The omission of the death penalty from section 3551(b) can be traced to a proposed bill -- S. 1437 -- that indeed would have expressly repealed existing death penalty provisions (save two, which S. 1437 would have amended to render sentencing provisions of the bill specifically inapplicable). After similar measures had been attempted unsuccessfully, Senators Thurmond and Laxalt introduced S. 829, which incorporated without significant change the sentencing provisions of S. 1437, including the omission from section 3551(b) of the death penalty, and which also supplied post-Furman procedures to implement existing, but inoperative, federal death penalty provisions. Had S. 829 been enacted, therefore, it could not have been reasonably maintained that the Sentencing Reform Act had implicitly repealed existing death penalty provisions because another part of the same bill explic-

itly relied on their continued existence and enacted procedures designed to ensure their implementation.

These two aspects of S. 829 were subsequently reported separately out of the Senate Judiciary Committee as S. 1762 and S. 1765, respectively. The Senate passed both bills in 1983, thus precluding the contention that existing death penalty provisions were intended to be repealed by virtue of the omission of the death penalty from the list of authorized sanctions in S. 1762, the bill that contained the Sentencing Reform Act as enacted. When the sentencing provisions of the earlier bill, S. 1437, were carried over into what was to become the 1984 Act, they simply were not revised, evidently through oversight, to conform to the congressional intention to leave the federal death penalty where it was -- an authorized sentence.

An additional argument may be made, however, that in leaving the federal death penalty where it was, Congress intended it to be authorized but inoperative. The difficulty with this position is that Congress failed to take any steps to ensure this result. Because existing death penalty provisions were not amended explicitly to exempt them from the Act, the Act applies. Thus, defendants convicted of capital offenses must be sentenced according to section 3551(b) and that provision must be interpreted either to permit imposition of, or to repeal, the death penalty. As we have seen, the latter construction is at war with the conclusive evidence that Congress did not intend to repeal the death penalty. Moreover, it is more accurate to say that Congress assumed, rather than intended, the federal death

penalty to be inoperative. The legislative history shows that this assumption was due solely to the Supreme Court's 1973 decision in Furman v. Georgia. Given this understanding, Congress must also have known that if Furman were subsequently overruled, the constitutional impediment to the enforcement of federal death penalty provisions would be removed. Similarly, should the Supreme Court hold that imposition of the death penalty for narrowly drawn offenses such as treason or espionage is constitutional, then current statutes would be adequate to the task. Thus, any argument that the death penalty statutes were not repealed by the Act, but rather were suspended in their operation until (and unless) Congress provided statutory procedures is in truth tantamount to an argument that the death penalty statutes were repealed.

Having concluded that the death penalty is a permissible sanction under the Sentencing Reform Act, section 994 of the Act appears to authorize the Commission to promulgate capital sentencing guidelines. The Commission's mandate under section 994(a) -- to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case" -- is plainly broad enough to encompass capital sentencing guidelines. Subsections (c) and (d) of section 994 provide additional support for the Commission's authority to promulgate capital sentencing guidelines. Both provisions refer to Commission "guidelines . . . governing the imposition of sentences of probation, a fine, or imprisonment, [and] governing the imposition of other authorized sanctions." 28 U.S.C. 994(c),

(d) (emphasis added). Numerous provisions of title 18 authorize sanctions other than probation, fine, or imprisonment. For example, the Sentencing Reform Act itself authorizes the imposition of orders of criminal forfeiture, notice to victims, and restitution, see 18 U.S.C. 3554, 3555, 3556, and, as already discussed, several federal statutes authorize the death penalty.

This conclusion is not altered by the fact that the Act does not make express reference to capital sentencing guidelines. As the Supreme Court's opinion in United States v. Southwestern Cable Co. (392 U.S. 157 (1968)) illustrates, an administrative agency may exercise a power within the terms of its delegated authority even if Congress did not expressly mention -- or, indeed, contemplate -- a specific exercise of delegated power or if Congress subsequently contemplated and failed to confer such power. This principle applies to the Sentencing Commission's statutory authority to issue capital sentencing guidelines.

This leaves only the question of the binding quality of any capital sentencing guidelines promulgated by the Commission. Section 3553(b) of the Sentencing Reform Act provides that sentencing courts are required to "impose a sentence of the kind, and within the range," established by the guidelines promulgated pursuant to 28 U.S.C. 994, absent mitigating or aggravating circumstances not taken into account by the Commission. 18 U.S.C. 3553(b). Thus, it seems clear that sentencing courts would be obligated generally to abide by capital sentencing guidelines promulgated by the Commission.

U.S. Department of Justice

Federal Bureau of Prisons

Office of the Director

February 13, 1987

Honorable William Wilkins, Jr.
Chairman
U.S. Sentencing Commission

Judge Wilkins:

Attached are 12 copies of my testimony for the hearing on the Death Penalty scheduled for Tuesday, February 17th.

J. Michael Quinlan
Deputy Director

Attachments

TESTIMONY BEFORE THE SENTENCING COMMISSION

FEBRUARY 17, 1987

I APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY.

AT THE START, I WOULD LIKE TO COMMEND THE COMMISSION FOR ITS WORK. THE DRAFT GUIDELINES PRESENT A LONG-AWAITED MECHANISM THROUGH WHICH THE MANY AND COMPLEX FACTORS INVOLVED IN A CRIME CAN BE CONSIDERED AT SENTENCING AND THROUGH WHICH DISPARITY CAN BE REDUCED. WE APPRECIATE THE INCLUSION OF A SEPARATE SECTION FOR PRISON OFFENSES IN THE OFFENSE CONDUCT CHAPTER IN YOUR MOST RECENT DRAFT OF THE GUIDELINES. THIS SECTION EMPHASIZES THE UNIQUE NATURE OF CRIMES COMMITTED IN OUR INSTITUTIONS.

MY TESTIMONY TODAY FOCUSES ON THE NEED FOR AN APPROPRIATE SANCTION FOR A SMALL NUMBER OF EXTREMELY VIOLENT INMATES WHO CONTINUE TO PREY ON OTHERS WHILE THEY ARE INCARCERATED. I BELIEVE THAT THE DEATH PENALTY IS A NECESSARY SANCTION IN THOSE CASES OF MURDER COMMITTED BY AN INMATE WHILE SERVING A LIFE SENTENCE.

A KEY FEATURE OF PUNISHMENT FOR CRIME IS THAT PERSONS ARE GENERALLY IMPRISONED LONGER FOR MORE VIOLENT AND DANGEROUS BEHAVIOR. CURRENTLY, INMATES INVOLVED IN SUCH BEHAVIOR ARE DISCIPLINED BY RECEIVING ADDITIONAL PRISON TIME OR BY A TRANSFER TO A MORE SECURE FACILITY. THESE ARE ADEQUATE

DETERRENTS TO CRIMINAL BEHAVIOR FOR MOST INMATES IN PRISON.

INMATES SERVING LIFE SENTENCES ARE UNDETERRED BY THE PROSPECT OF ANY FURTHER TERM OF INCARCERATION, HOWEVER. INMATES SERVING LIFE SENTENCES HAVE NO REALISTIC EXPECTATION OF EVENTUAL RELEASE. THIS SITUATION WILL BE FURTHER EXACERBATED WITH ABOLITION OF PAROLE IN 1993. FOR SOME OF THESE PERSONS, EXTREMELY ASSAULTIVE BEHAVIOR AND MURDER BECOME ROUTINE, AND STAFF AND OTHER INMATES ARE CONSTANTLY ENDANGERED. EVEN TRANSFER TO OUR MOST SECURE FACILITY, THE U.S. PENTITENTIARY AT MARION, ILLINOIS, OR PLACEMENT IN ITS MAXIMUM SECURITY CONTROL UNIT DOES NOT PREVENT FURTHER KILLINGS.

THE MOST RECENT EXAMPLES OF THIS SITUATION ARE THE TRAGIC MURDERS OF TWO EXPERIENCED CORRECTIONAL OFFICERS IN THE CONTROL UNIT AT MARION ON OCTOBER 22, 1983. ANOTHER OFFICER WAS KILLED SOON AFTER THAT ON JANUARY 29, 1984, AT THE FEDERAL CORRECTIONAL INSTITUTION, OXFORD, WISCONSIN. ALL THREE STAFF WERE KILLED BY PERSONS SERVING LIFE SENTENCES.

THE FIRST OFFICER DIED WHEN STABBED APPROXIMATELY 40 TIMES WITH A HOMEMADE KNIFE. THE INMATE RESPONSIBLE FOR THIS VICIOUS, UNPROVOKED ASSAULT HAD ALREADY MURDERED THREE INMATES WHILE IN FEDERAL CUSTODY. THIS SENSELESS MURDER OCCURRED IN FULL VIEW OF OTHER STAFF AND INMATES. THE INMATE PERPETRATOR WAS INITIALLY SERVING A 15-YEAR SENTENCE FOR BANK ROBBERY. HE RECEIVED THREE LIFE SENTENCES FOR THE MURDERS OF THE THREE

INMATES. SOME OF THESE MURDERS, AS WELL AS OTHER ASSAULTIVE BEHAVIOR, WERE RELATED TO THE INMATE'S INVOLVEMENT IN A PRISON GANG.

THE SECOND OFFICER WAS MURDERED AT MARION ON THE SAME DAY BY AN INMATE WHO WAS SENT TO THE BUREAU OF PRISONS FROM THE UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS. FOLLOWING THE AGAIN UNPROVOKED, BRUTAL STABBING OF THIS OFFICER, THE INMATE WAVED HIS ARMS IN A VICTORY EXPRESSION AS HE WALKED DOWN THE CELL RANGE IN FRONT OF OTHER INMATES. THIS INMATE WAS SERVING A LIFE SENTENCE FOR THE MURDER OF A STAFF SERGEANT WHILE IN THE UNITED STATES MARINES. HE HAD BEEN TRANSFERRED TO THE BUREAU OF PRISONS BECAUSE OF ASSAULTIVE BEHAVIOR WHILE IN MILITARY CUSTODY. HE HAS REPEATEDLY ENGAGED IN EXTREMELY VIOLENT ACTS, INCLUDING THE MURDERS OF INMATES IN 1979, 1981, AND 1982. BY KILLING THE OFFICER, IT APPEARS THE INMATE ATTEMPTED TO ENHANCE HIS PRESTIGE AND POSITION IN THE PRISON GANG.

STATUS IN A PRISON GANG WAS APPARENTLY A FACTOR IN THE MURDER OF THE OFFICER AT OXFORD, WISCONSIN. ONE OF THE INMATES WAS SERVING A LIFE SENTENCE AND WANTED TO BE ACCEPTED AS A MEMBER OF A PRISON GANG. THE INMATE WAS A FLORIDA PRISONER IN FEDERAL CUSTODY UNDER CONTRACT WITH THE BUREAU OF PRISONS. THIS MURDER ILLUSTRATES THE RISK ALWAYS PRESENT IN CONFINING AN INMATE SERVING A LIFE SENTENCE.

THE TRAGIC DEATHS OF THESE FINE, RESPECTED CORRECTIONAL OFFICERS AND OF THE INMATE MURDER VICTIMS ARE CONVINCING PROOF OF THE NEED FOR A FEDERAL DEATH PENALTY FOR MURDER COMMITTED BY A PERSON SERVING A LIFE SENTENCE. WITHOUT AN ULTIMATE SANCTION, THERE IS NO ADEQUATE DETERRENT. THE INMATES ARE IN EFFECT IMMUNE FROM ANY FURTHER SANCTION FOR THEIR ACTS--ANOTHER LIFE SENTENCE IS A MEANINGLESS GESTURE. THEY CAN CHOOSE TO KILL AND WE ARE FRUSTRATED BY OUR LACK OF MEANS TO PROTECT INNOCENT VICTIMS. NOTHING SHORT OF TOTAL AND COMPLETE ISOLATION COULD PREVENT THEM FROM STRIKING OUT AGAIN AT STAFF OR INMATES. IT IS IMPOSSIBLE, HOWEVER, TO INCARCERATE EVEN THE MOST DANGEROUS INMATE WITHOUT SOME HUMAN CONTACT. GIVEN THAT, THERE IS NO WAY TO INCAPACITATE THESE INMATES AND TO PROTECT THEIR POTENTIAL VICTIMS SHORT OF THE DEATH PENALTY. THE TRAGIC MURDERS I HAVE DISCUSSED DRAMATICALLY ILLUSTRATE THE NEED FOR THIS SANCTION.

LET ME CONCLUDE, MR. CHAIRMAN, BY THANKING THE COMMISSION FOR LETTING ME TESTIFY ON THIS VERY SENSITIVE ISSUE. WE LOOK FORWARD TO CONTINUING OUR CLOSE WORKING RELATIONSHIP WITH THE COMMISSION AND TO IMPLEMENTATION OF THE SENTENCING GUIDELINES.

: P 00049

BEFORE THE

UNITED STATES SENTENCING COMMISSION

In Re:

Capital Sentencing Guidelines

TESTIMONY BY THE
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.

February 17, 1987

Submitted by:

WILEY A. BRANTON
Vice-President

JULIUS L. CHAMBERS
Director-Counsel

MARVIN E. FRANKEL
Member
Board of Directors

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The NAACP Legal Defense and Educational Fund comes before you to urge that you end any further consideration of capital sentencing guidelines. For nearly three decades we have identified and sought to eliminate racial discrimination in capital sentencing. We began this effort at a time when two out of every three people on death row in our nation were black. Over the years this pattern of grossly disproportionate imposition of death sentences against black people has changed to some extent: now only one out of every two people on death row is black. Although such a change represents the elimination of some racial discrimination from our capital sentencing system, it is only a small step toward eliminating the still massive bias that haunts a system dedicated in principle to the fair and even-handed treatment of all citizens.

Overshadowing this extremely modest progress in eliminating discrimination against black defendants is the confirmation in recent years that racial discrimination is still operating entirely unchecked in relation to the race of the victim in capital crimes. History has taught that racial animus has taken two forms in relation to capital punishment -- disproportionate imposition of the death sentence against black defendants and against those defendants whose victims are white. But not until recently have there been tools of empirical research capable of revealing the overwhelming degree of such discrimination. In the course of today's hearing, you will be presented with the findings of this research, and we believe that you will agree

that they are profoundly disturbing.

The inability of contemporary capital sentencing schemes to make more than modest gains in eliminating defendant-based race discrimination and to make any appreciable gains in eliminating victim-based race discrimination -- despite good faith efforts to do so -- has led us to conclude that racial discrimination cannot be eliminated, even in substantial part, from the process of imposing death sentences. The legacy of racial animus and devaluation of black people's lives is still, at this point in our history, a powerful force in our criminal justice system.

This should be a sufficient reason standing alone for the Commission to terminate any further consideration of capital sentencing guidelines. Given what is at best, from the perspective of those urging the Commission to promulgate capital sentencing guidelines, implied Congressional permission to consider such guidelines, the specter of race discrimination should cause the Commission to demur. Nothing short of an explicit and unequivocal Congressional directive should cause the Commission to proceed in the face of such evidence.

There are, however, additional reasons -- powerful reasons of constitutional law, quite apart from race -- for the Commission not to proceed. Some of these reasons -- for example, the lack of statutory authority for the Commission to promulgate capital sentencing guidelines -- will be addressed by others. While endorsing these reasons, we will not address them ourselves. There are other reasons, however, based upon the

requirements of Article I of the Constitution and the Eighth Amendment to the Constitution, that we will address. The Commission must carefully evaluate its ability to promulgate capital sentencing guidelines in relation to these requirements.

The Eighth Amendment Requires That The Elected Representatives Of The People Determine The Criteria And The Procedures Under Which The Death Sentence May Be Imposed

In 1972, the Supreme Court held that capital sentencing procedures which allow the sentencer unlimited discretion to impose the death sentence inflict "cruel and unusual punishment" under the Eighth Amendment. Furman v. Georiga, 408 U.S. 238 (1972). While each Justice wrote a separate opinion, "[a] fair statement of the consensus expressed by the Court in Furman is that 'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" Zant v. Stephens, 462 U.S. 862, 874 (1983) (emphasis supplied).

In the fifteen years since Furman, the Supreme Court has consistently held that the capital sentencer's discretion can be "suitably directed and limited" if the legislature specifies certain limited criteria under which capital defendants become eligible for the death penalty and provides a procedure through which these criteria are evaluated in the determination of the sentence. As the Court explained in Gregg v. Georgia,

> [T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. 153, 195 (1976). Through the years the Court has reiterated that under the Eighth Amendment these two safeguards against arbitrary and capricious sentencing -- the specification of criteria for death-eligibility and the provision of procedures for consideration of these criteria -- must be provided by any capital sentencing scheme. See, e.g., Godfrey v. Georgia, 446 U.S. 420, 428 (1980); Zant v. Stephens, 462 U.S. at 873-80; Pulley v. Harris, 465 U.S. 37, 44-51 (1984); id. at 55 (Stevens, J., concurring).

In its capital punishment decisions, the Court has been equally emphatic in declaring that capital sentencing criteria and procedures must be adopted by the legislative body of the jurisdiction which seeks to punish by death. "[I]n reaching [the] conclusion [as to which limited class of persons and offenses should be eligible for the death penalty] we have stated that this is a judgment peculiarly within the competence of legislatures and not the judiciary." Spaziano v. Florida, 468 U.S. 447, 478 & n.21 (1984) (Stevens, joined by Marshall and Brennan, J.J., dissenting) (citing Gregg v. Georgia, 428 U.S. at 185-86, and noting the concurrence of the majority in this principle, at 468 U.S. at 461).

This is so because "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people," Furman v. Georgia, 408 U.S. at 383 (Burger, C.J., dissenting), and the moral values of the people must be reflected in the specification of death-eligible persons and offenses. Under the Eighth Amendment, the infliction of death must be in accord with "contemporary values," Gregg v. Georgia, 428 U.S. at 173, and "'the evolving stndards of decency that mark the progrss of a maturing society.'" Id. (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). It is only through the elected representatives of the people that these moral standards find expression, for in setting for the criteria and procedures for imposition of the death penalty, the legislature "express[es] . . . the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 428 U.S. at 184.

For this reason, the Eighth Amendment requires that the legislature rather than non-elected government officials promulgate the criteria and procedures through which a capital sentencing scheme is brought into compliance with the Constitution. Thus, the Court of Appeals for the Ninth Circuit was correct when it held in United States v. Harper, 729 F.2d 1216, 1225 (9th Cir. 1984), that the federal courts cannot promulgate capital sentencing guidelines in federal capital prosecutions, because "[t]he conclusion that the Constitution

requires legislative guidelines in death penalty cases is . . . inescapable".[1]

Article I Similarly Requires That Congress Determine Capital Sentencing Criteria And Procedures In The Exercise Of Its Lawmaking Powers

Article I, Section 1 of the Constitution provides that all lawmaking powers shall be vested in the Congress. Nevertheless, Section 8 of Article I -- the "necessary and proper" clause-- allows Congress to delegate to executive agencies, like the Sentencing Commission,[2] such of its lawmaking responsibilities as is "necessary and proper." See Lichter v. United States, 334 U.S.

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[1]The Department of Justice has cited Jordan v. Watkins, 681 F.2d 1067, 1077-80 (5th Cir. 1982); Knapp v. Cardwell, 667 F.2d 1253, 1260-61 (9th Cir. 1982); and United States v. Matthews, 16 M.J. 354 (1983), for the proposition that the legislature need not be the body which specifies capital sentencing criteria and procedures. The citation to Knapp is inapposite, for in that case no body other than the legislature had specified these matters. While Jordan appears to approve a state court's limited, temporary specification of one additional aggravating circumstance, the Fifth Circuit did not address the constitutional propriety of a state court's specification of capital sentencing criteria and procedures, addressing instead and only, the state court's ability to construe -- not create-- existing legislative provisions. Finally, Matthews was decided in the unique context of the military justice system which, because of the President's constitutionally-designated role as the commander-in-chief of the military forces, allows the President to exercise the legislative prerogative as he cannot in any other situation. Thus, the reliance on Matthews is also misplaced.

[2]In its memorandum of January 8, 1987, the Department of Justice analyzed the function of the Commission and determined that, despite Congressional designation of the Commission as "an independent Commission within the judical branch" of government, the Commission was in fact an agency within the executive branch. See pp. 1-3 of that memorandum.

742, 757 (1948). Even though a particular delegation might be deemed "necessary," however, the delegation must also be "proper" in order to comport with the Constitution. As far back as McCulloch v. Maryland, 17 U.S. (4 Wh.) 316, 421 (1819), the Supreme Court gave the "necessary" aspect of the clause a wide reading, but in doing so noted that "the end [also must] be legitimate" for the delegation to be valid. The question, therefore, is whether a Congressional delegation (assuming that Congress intended such a delegation) to the Sentencing Commission, of responsibility to specify criteria and procedures for capital sentencing, would be "proper."

The answer is, quite plainly, that it would not be. There can be no dispute that Congress has the exclusive power and responsibility to define crimes and "to fix criminal penalties." United States v. Batchelder, 442 U.S. 114, 125-26 (1979). See also United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812); Liparota v. United States, __U.S. __, 85 L.Ed.2d 434, 439 (1985). While the power to define crimes can be properly delegated so long as Congress has provided the general principles of liability applicable to the crime, see United States v. Grimaud, 220 U.S. 506, 516-17 (1911), the power to "affix penalties" cannot be delegated. See United States v. Evans, 333 U.S. 483 (1948). However, once Congress has "affixed penalties," by "demarcat[ing] the range of penalties that prosecutors and judges may seek and impose," its exclusive, non-delegable responsibilities have been carried out. United States v. Batchelder, 442 U.S. at 125-26.

Critically, Congress' responsibility to "affix penalties" cannot be concluded until it "[h]a[s] informed the courts, prosecutors, and defendants of the permissible punishment alternatives available . . . ." Id. at 126 (emphasis supplied). It is in this respect that a Congressional delegation to the Sentencing Commission of the responsibility to specify capital sentencing criteria and procedures would be defective. As we have demonstrated, the Eighth Amendment requires that the legislature specify these criteria and procedures before the death sentence can become a constitutionally permissible punishment. Accordingly, the death sentence is not a "permissible punishment alternative[]," United States v. Batchelder, 442 U.S. at 126, in the absence of Congress' specification of these matters. Until Congress enacts capital sentencing criteria and procedures, therefore, its non-delegable lawmaking responsibilities have not been completed.

Thus, the Commission is without the power to fill the void left by a Congressional determination not to enact capital sentencing criteria and procedures, from the perspective of both Article I and the Eighth Amendment.

Congress Did Not and Could Not Perform Its Grave Task of Re-Enacting Capital Sentencing By Casual Implication or Inaction

Given the requirements of Article I and the Eighth Amendment, it is inconceivable that Congress could have intended that the Sentencing Commission promulgate capital sentencing

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Congress Did Not and Could Not Perform Its Grave Task of Re-Enacting Capital Sentencing By Casual Implication or Inaction

Given the requirements of Article I and the Eighth Amendment, it is inconceivable that Congress could have intended that the Sentencing Commission promulgate capital sentencing

guidelines. Congress plainly did not address capital sentencing criteria and procedures in the Sentencing Reform Act. Moreover, Congress cannot have intended to fulfill its legislative duties by mere inaction -- through a process in which capital sentencing criteria and procedures are promulgated by an executive agency and thereafter allowed to become law by the very inability of both houses of Congress to agree to modify or reject those criteria and procedures. Congress plainly understands that it cannot fulfill its legislative function -- as prescribed by the Eighth Amendment or by Article I of the Constitution -- by such casual implication or inaction. Only the Department of Justice, out of its frustration with Congressional refusal to re-enact capital sentencing criteria and procedures, has suggested otherwise.

In no provision of the Sentencing Reform Act has Congress set forth or defined the criteria or procedures specifically applicable to capital sentencing. No procedures are addressed, and the only mention of criteria generally is the direction to the Commission to consider, and to take into account if relevant, "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense," 28 U.S.C. § 994(c)(2). However, the Act specifies no particular circumstances that must be taken into account in all sentencing proceedings. The specification of certain aggravating circumstances was not entirely overlooked by Congress, for certain of these circumstances are enumerated for sentences of

imprisonment. See 28 U.S.C. §§ 994(h),(i)(taking into account various present and prior convictions of the defendant). But these aggravating circumstances are to be used exclusively in determining terms of imprisonment. Id. Thus, the Sentencing Reform Act omits altogether any reference to the criteria or procedures applicable to capital sentencing.[3]

Notwithstanding Congress' silence, the Department of Justice nevertheless contends that Congress intended for the Sentencing Commission to promulgate capital sentencing guidelines. Such a position is wholly unreasoned when it is examined closely, for its premise is that Congress decided to perform its grave -- and constitutionally mandated -- responsibility of re-vitalizing capital sentencing by a process of inaction. This assumption is not only unwarranted -- it is a creature of political arrogance and lack of respect for the Constitution.

If Congress' intent was as the Department of Justice says, Congress established a process by which it could perform its legislative responsibilities by doing nothing. As the members of

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[3]Similarly, with the exception of 49 U.S.C. §§ 1472 and 1473 (aircraft piracy in which a death occurs), Congress has not specified the criteria or the procedures for the imposition of the death penalty in the definition of any of the federal crimes for which death is an available sentence. See, e.g., 18 U.S.C. §§ 32, 33, 34 (destruction of aircraft, motor vehicle, or related facilities resulting in death), § 351 (murder of a Member of Congress, important executive official, or Supreme Court justice), § 794 (espionage), § 844(f) (destruction of government property resulting in death), § 1111 (first degree murder), § 1716 (mailing of injurious article resulting in death), 1751 (assassination or kidnapping resulting in death of the President or Vice-President), § 1992 (willful wrecking of train resulting in death), § 2113 (bank-robbery-related murder or kidnapping), § 2381 (treason).

this Commission know, the Sentencing Reform Act has established a process by which the sentencing guidelines promulgated by the Commission become law, unless, within six months after the guidelines are submitted to Congress, both houses of Congress agree to modify or reject the guidelines. See Sections 235 (a)(1)(B)(i), (ii) of Pub. L. 98-473, as amended, set out as a note under 18 U.S.C. § 3351.[4] Thus, if Congress does nothing--because an insufficient consensus exists in either house for that house to reject or modify the guidelines, or because the two houses cannot agree to reject or modify the guidelines -- the Commission's guidelines become law. While such a process may not raise constitutional questions with respect to non-capital sentencing guidelines, it plainly does with respect to capital sentencing guidelines.

Since Congress' non-delegable responsibility with respect to sentencing is to "demarcate the range of penalties ... [that provides the] permissible punishment alternatives available" for each crime, United States v. Batchelder, 442 U.S. at 126, one can argue with some force that Congress has already fulfilled this

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[4]While these provisions of Pub. L. 98-473 do not specify the form of Congressional action needed to modify or reject the initial guidelines, after the initial guidelines have become law, any amendments proposed by the Commission to these guidelines will become law "one hundred and eighty days after the Commission reports them [to Congress], except to the extent ... the guidelines are disapproved or modified by Act of Congress." 28 U.S.C. § 994(o)(emphasis supplied). Since an "Act of Congress" (requiring the agreement of both houses) is necessary for Congress to prevent amendments from becoming law, obviously the same is necessary to prevent the initial guidelines from becoming law.

responsibility with respect to non-capital sentences by its specification of sentencing ranges for various classes of crimes. See 18 U.S.C. §§ 3561, 3571, 3581. If this is so, Congress could thus properly leave to the Sentencing Commission the essentially executive function of providing guidelines for the application of these sentencing ranges. The only substantial question about the validity of this argument is whether the Sentencing Commission's further and more detailed "demarcation" of the range of sentences within the ranges specified by Congress constitutes the exercise of Congress' non-delegable responsibility to "demarcate the range of ... permissible punishment alternatives." See generally, Morrison, "A Fatal Flaw," The National Law Journal, pp. 15, 28-29 (January 26, 1987).

However, as we have already demonstrated, such a process raises grave constitutional questions with respect to capital sentencing guidelines. The Eighth Amendment contemplates Congress' exercise of its own unique judgment, as the elected representatives of the people, in determining the criteria and procedures for imposition of the death sentence. And because the Eighth Amendment requires that these criteria and procedures be specified before the death sentence can become a "permissible punishment" -- a requirement not applicable to non-capital sentences -- under Article I Congress cannot fulfill its non-delegable responsibility to establish the death sentence as a "permissible punishment alternative" until it has specified capital sentencing criteria and procedures.

To suggest, as the Department of Justice has, that Congress meant to fulfill its manifest responsibility to enact these criteria and procedures by inaction is patently absurd. The Eighth Amendment and Article I call for the kind of deliberate and attentive focus by Congress on these matters that is provided only when Congress enacts positive legislation. If there is an insufficient consensus in Congress to enact explicit, positive capital sentencing criteria and procedures, the result -- the continual relegation of the death sentence to the status of a non-available punishment -- is the result the Constitution requires. It is inconceivable that Congress would intend to subvert the constitutional process, by permitting a matter to become law because of an insufficient consensus to prevent its becoming law, when there was an insufficient consensus to enact that law in the first place. Thus, "[w]e cannot take [Congress' silence as to capital sentencing criteria and procedures] as importing clear direction to the [Commission] to do what Congress itself either refused or failed on notice to do upon so many occasions and opportunities." United States v. Evans, 333 U.S. at 492.

Conclusion

Accordingly, if the Commission decides to promulgate capital sentencing guidelines, its decision will be made in disregard of the Constitution. While political pressures could force the Commission into making such a decision, that decision would be

accompanied by a storm of litigation and a public outcry that would likely bring the Commission's entire effort at sentencing reform into disrepute. Congress could not have intended these consequences by its mere silence. Congress' omission of any reference to capital sentencing criteria or procedures in the Sentencing Reform Act plainly meant that capital sentencing was outside the scope of the Act. The Commission should, therefore, leave to Congress the resolution of the knotty constitutional, moral, and policy questions that it is uniquely suited -- and required under the Constitution -- to resolve, by refusing to promulgate capital sentencing guidelines.

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TESTIMONY OF PATRICK B. MCGUIGAN, DIRECTOR, THE INSTITUTE FOR GOVERNMENT AND POLITICS, A DIVISION OF THE FREE CONGRESS FOUNDATION.

before

THE UNITED STATES SENTENCING COMMISSION

on

February 17, 1987

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TESTIMONY OF PATRICK B. MCGUIGAN, DIRECTOR OF THE INSITUTUTE FOR GOVERNMENT AND POLITICS, A DIVISION OF THE FREE CONGRESS FOUNDATION.

Introduction

The Sentencing Commission is considering whether or not to promulgate guidelines to provide for the constitutionally sound imposition of capital punishment. Naturally, I applaud this sensible effort to have national law reflect the will of the American people, who have, time and again -- in opinion polls, and at the voting booth -- expressed their support for capital punishment.

I would caution those who attack this action that citizens in our most heavily populated state, California, recently had an opportunity to render their judgment on three judges who had repeatedly -- frequently on absurd technical grounds -- thwarted justice in many areas, particularly in the imposition of the death penalty.

At its roots, the California election was a repudiation of judicial activism. But the catalyst for the ouster of the three justices was their unreasonable, and I believe, unconstitutional belief that the death penalty should not be imposed under any circumstances whatsoever. The American people support the death penalty; it is a key weapon in the war against crime. One of government's chief responsibilities is to protect the lives of innocent citizens. The death penalty is a vital tool to help government effectuate that purpose.

Lest anyone misinterpret the results of the recent elections, recall that the same electorate which narrowly

returned Alan Cranston to the U.S. Senate overwhelmingly rejected three justices who rejected the death penalty on the most tenuous of grounds. This is a clear reflection of the fact that the vast majority of the American people support the death penalty. According to a recent poll conducted by Media General and the Associated Press, 85% of the American people support the death penalty.

The Sentencing Commission has the statutory authority to promulgate guidelines for the imposition of the death penalty.

The Sentencing Reform Act of 1984 established the Sentencing Commission, which, under 28 U.S.C. Section 994, has the responsiblity to "promulgate and distribute to all courts of the United States . . . guidelines . . . for use of a sentencing court in deteriming the sentence to be imposed in a criminal case." The Act makes it clear that the Commission's authority includes the entire range of federal criminal statutes. Subsection (a) of section 3551 provides that, "[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this [Act] . . . ." 18 U.S.C. Section 3551(a).

It is important to remember that the Supreme Court, in its decisions in this area, did not say that all the existing death penalty statutes were constitutionally infirm. Rather, the Court has said that past imposition of the death penalty has been unconstitutional, and indicated that certain procedural guidelines were necessary for the constitutional imposition of capital punishment. The contemplated action is a first step toward reasserting the right of Americans to impose the supreme

penalty upon the most evil perpetrators of crime.

Most federal death penalty statutes were enacted prior to Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court decision that invalidated Georgia's death penalty statutes because of what the Court considered constitutionally unacceptable procedures. The Supreme Court has never held that the current federal death penalty statutes are unconstitutional. Neither has the Congress repealed death penalty statutes.

The fact that the Sentencing Reform Act does not specifically mention the death penalty, but does mention other sanctions, does not mean that it was not the intent of the Congress to charge the Commission with promulgating guidelines for the imposition of the death penalty. Such a construction is erroneous because the Commission was charged with promulgating guidelines for the entire range of criminal statutes -- many of which provide for the death penalty.

To argue that under the Sentencing Reform Act the Commission was precluded from considering guidelines imposing the death penalty is essentially to argue that the Act impliedly repealed the death penalty, because judges will be bound by the final guidelines. That is an obvious error. Courts have a strong presumption against implied repeal. Further, had Congress wished to exclude the death penalty, it would have limited the Commission's authority to consider penalties to those statutes which do not carry the death penalty, or it would

have affirmatively repealed them.

The Commission should promulgate guidelines for the imposition of the death penalty for each crime for which federal law carries the penalty of death.

Among the questions the Commission asked was for what crimes should it promulgate guidelines for the imposition of the death penalty. Federal statutes call for the death penalty for several crimes, including murder, espionage, treason, and hijacking. I suggest that you promulgate guidelines to impose the death penalty for every federal crime for which the death penalty is prescribed.

This is completely consistent with the Commission's implementing legislation, and with the principles of congressional delegation of rulemaking authority. The Congress has prescribed the death penalty for certain crimes. It is not this Commission's function to second guess the Congress. It is the responsibility of the Congress to determine for what crimes the death penalty is merited; it is the responsibility of this Commission to promulgate guidelines to implement that penalty in a manner which is consistent with the will of the Congress.

To put it another way, the judgment as to which crimes merit the death penalty rests properly with our elected representatives, and not with the Sentencing Commission. The Congress has already made that choice. If the Congress finds that it wishes to reconsider whether or not to impose the death

penalty for any of these crimes, it can always do so.

Conclusion.

The Congress, in passing the Comprehensive Crime Control Act of 1984, clearly intended that the Sentencing Commission promulgate guidelines for the imposition of the entire range of penalties contemplated by federal criminal law. Among them is the death penalty. There is no language in the statute upon which one could reasonably find a basis for the argument that the Congress intended to exclude the death penalty.

The death penalty is an essential element in the war against crime. Lest anyone doubt its efficacy as a deterrent, I would like to read portions of a letter from Mr. and Mrs. Thomas Horner, written in 1975 to Keith Sanborn, the district attorney of Sedgwick County in Kansas:

> "Last September 17th at four in the morning, three people held us captive at gun-point for three hours during an attempt to rob our bank. During that time they discussed their sentences if they were caught. They decided to kill us, rather than leave witnesses. There wouldn't be that much difference in the 'time' they would serve. They mocked the law, for we have become more concerned with the criminals' rights than those of the law-abiding citizen.
>
> "Capital punishment is not excessive, unnecessary punishment for those who willfully, with premeditation, set out to take the lives of others. Even though it may be used infrequently, it does impose a threat to the criminal.
>
> "Rosie escaped, but they shot me twice in the head and left me for dead in the bank vault. Thank God that we lived so

that we can tell you that capital punishment will save the lives of the innocent. Our first 'moral' obligations should be to the law-abiding citizens."

In cemeteries all over our country lay the bones of men, women and children who were not as fortunate as Mr. and Mrs. Horner. If we could bring them back, many of them would tell us that the death penalty, does, indeed, deter murder. If their families were before this Commission, they would tell us the same. On their behalf, I urge you to promulgate guidelines facilitating the imposition of the death penalty. My question is: if it is constitutional, and 85% of the American people want it, why isn't it happening?

Respectfully submitted, this thirteenth day of February, 1987.

Patrick B. McGuigan

Director

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TESTIMONY OF JEFFERY D. TROUTT, RESEARCH DIRECTOR,

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THE UNITED STATES SENTENCING COMMISSION

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TESTIMONY OF JEFFERY D. TROUTT, RESEARCH DIRECTOR, INSTITUTE FOR GOVERNMENT AND POLITICS, A DIVISION OF THE FREE CONGRESS FOUNDATION.

Introduction.

Today, the Commission has before it one of the greatest issues of our day: the death penalty. Few issues are more controversial, or evoke more emotion. Yet, in my view, few issues are more vital to the safety and security of our nation and its citizens. The courts, legislatures, and common sense have indicated that the death penalty has a deterrent effect upon crime. Thus, your decision whether or not to promulgate death penalty guidelines will have an impact that can be measured in human lives.

The Sentencing Reform Act of 1984, which established this Commission, charged it with the responsiblity to "promulgate and distribute to all courts of the United States . . . guidelines . . . for use of a sentencing court in deteriming the sentence to be imposed in a criminal case." 28 U.S.C. Section 994. Under the Act, the Commission has the authority to promulgate guidelines for the entire range of federal criminal statutes. 18 U.S.C. section 3551(a) provides that, "[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this [Act]. . . ."

<u>The Commission has the authority to promulgate guidelines for the imposition of the death penalty.</u>

Most federal death penalty statutes were enacted prior to

Furman v. Georgia, 408 U.S. 238 (1972). The Supreme Court has never held that the existing federal death penalty statutes are constitutionally infirm. Rather, the Court has said that it has been imposed in an unconstitutional manner in the past, and indicated that certain procedural guidelines were necessary for its constitutional imposition. Promulgation of guidelines for the imposition of the death penalty would not only be Constitutional, it would fulfill the intent of the Congress -- as expressed in the several statutes which provide for the death penalty for crimes such as murder and the assassination of the President. The Congress has never repealed these statutes which call for the death penalty.

28 U.S.C. Section 994(a) instructs the Commission to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." This language is extremely broad -- broad enough to infer that death penalty guidelines are within the scope of the Commission's authority.

Section 994(a) also enumerates several specific sentences such as imprisonment and fines which the Commission is to consider. It does not mention the death penalty specifically. However, that does not mean that the Congress excluded the death penalty from the Commission's consideration. The statute says that the Commission is to promulgate sentencing guidelines, "for use of a sentencing court in determining the sentence to be imposed in a criminal case, including," fines, imprisonment, etc. 28 U.S.C. Section 994(a). The word "including" clearly indicates that the list of sentences provided in Section 994 was

not inclusive. Thus, the language of the statute in no way indicates an intent by the Congress either to exclude the death penalty from the scope of the Commission's authority, or to repeal existing death penalty statutes by implication.

There is further evidence of Congress' intent to include the death penalty within the ambit of the Commission's authority. 28 U.S.C. Section 994(b) provides that "[t]he Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." The word, "shall" in Section 994(b) indicates that the Commission must promulgate guidelines consistent with Title 18, which prescibes the death penalty for several crimes. As the death penalty is part of the sentencing scheme, the Commission is charged by the statute to promulgate guidelines for its implementation.

The fact that the Sentencing Reform Act does not specifically mention the death penalty, but does mention other sanctions, does not indicate that it was not the intent of the Congress to charge the Commission with promulgating guidelines for the imposition of the death penalty. Such a construction is erroneous because the Commission was charged with promulgating guidelines for the entire range of criminal statutes -- many of which provide for the death penalty. It is impossible for the Commission to consider the entire sentencing range of Title 18 without considering the death penalty.

An alternative construction of the Act is that the

Commission was precluded from considering guidelines imposing the death penalty because the Congress repealed the death penalty by implication. That is an erroneous construction of the Act. Courts have a strong presumption against implied repeal. Further, had Congress wished to exclude the death penalty, it would have limited the Commission's authority to consider penalties to those statutes which do not carry the death penalty, or it would have affirmatively repealed them.

The recent AP poll found that the death penalty has support from about 85% of the American people. Given such strong public support, and the sound reasons that the death penalty is sound public pollicy, it is practically inconceivable that the Congress would attempt to repeal the death penalty, either directly or by inference.

The intent of Congress can also be inferred by the fact that the death penalty meets three of the four purposes of sentencing outlined in the Commission's implementing legislation and in it's proposed guidelines. 28 U.S. C. Section 991(b) provides that the senctencing guidelines should meet the purposes of sentencing set forth in Title 18 of the United States Code. Those purposes are just punishment, deterrence, incapacitation, and rehabilitation. Other have eloquently testified as to how the death sentence fulfills the functions of deterrence, just punishment, and incapacitation. I will not repeat their arguments here. I will merely mention that I believe it is likely that the Congress would approve of a sentence that meets these requirements, assuming it is proportional to the crime committed. While this does not itself establish congressional intent, I believe that it is further

indicium that the Congress intended for the Commission to consider the death penalty.

If the Commission is in doubt at to its authority to promulgate guidelines for the imposition of the death penalty, it should assume it has such authority, and submit them separately, leaving the final decision to the Congress and the courts.

I am certain that the Commission has the statutory authority to promulgate guidelines for the imposition of the death penalty. At the very least, there is a reasonable basis for this belief. Perhaps the Commission is not the appropriate forum to decide the matter. If some Commissioners are in doubt as to whether or not they have such authority, it seems to me that a compromse approach would be for the Commission to assume that it has such authority, and let the Congress and the courts decide the matter finally. In any event, given that it is a close question, the Congress and the courts are the most appropriate entities to decide the matter of legislative intent.

The Commission could bifrucate the guidelines, promulgating guidelines for the imposition of the death penalty and submitting them to Congress separately. Thus, if the Congress disagrees with the Commission, or decides that the Commission has acted ultra vires, it can vote against them.

When the Commission does promulgate death penalty guidelines, it is probable that someone will challenge them in court. The challenge will likely turn upon the issue of legislative intent.

Thus, this Commission will not be the final forum to decide this issue. The opponents of the death penalty will have the

opportunity to challenge the guidelines in other, more appropriate, forums.

However, if the Commission refuses to take action on the death penalty, it will have failed in its duty to discharge the intent of the Congress. I am sure that no one on the Commission would want to fail in that regard. I urge you, therefore to follow most logical path: to promulgate guidelines for the imposition of the death penalty, and leave the issue of legislative intent to the bodies most competent to discern it -- the Congress and the courts.

<u>The Commission should promulgate death penalty guidelines for every crime for which the Congress has provided the death penalty.</u>

Addressing the Commission request for comment regarding for what specific crimes the should the death penalty be imposed, it is my contention that the Commission should promulgate guidelines for the imposition of the death penalty for every crime for which the Congress has provided the penalty of death. The only way the Commission can completly fulfill its statutory mandate is to promulgate guidelines to impose the death penalty for every federal crime for which the death penalty has been prescribed by the Congress.

The Congress has prescribed the death penalty for certain crimes; it has already spoken as to which crimes merit the death penalty. This Commission must work with what the Congess has given it, and promulgate guidelines to impose the death penalty, as is consistent with the will of the Congress.

Conclusion.

The Commission has the authority to promulgate guidelines for the imposition of the death penalty. In fact, it has more than the authority to promulgate them -- it has the duty to promulgate them. If it fails to do so, it fails to follow the intent of the Congress.

There are powerful special interest groups opposed to the death penalty. I am not here to argue with them over whether or not the death penalty is sound public policy. I believe it is, but I do not believe that the Commission is a compentent body to decide this issue. The Congress is the competent body, and it has already spoken. The Commission should not make public policy on this matter, but should obediently discharge the responsibility entrusted to it by the Congress. The battle over the death penalty is too important to be waged in this Commission. It should be waged in the Congress, and in the courts.

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January 29, 1987

The Honorable William W. Wilkins, Jr.
Chairman
United States Sentencing Commission
1331 Pennsylvania Ave., N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

For your attention, I am enclosing a copy of Judicial Notice, which includes an article on the Commission, a copy of an op-ed written by Pat McGuigan and I, which will appear in the February 2, 1987 issue of Legal Times, and a copy of a Media General/Associated Press poll showing that 83% of the American people support the imposition of the death penalty.

I look forward to testifying before the Commission this February.

Sincerely yours,

Jeffery D. Troutt

Jeffery D. Troutt
Research Director

Methodology

This Media General/Associated Press public opinion poll was conducted by Media General Research among a representative sample of 1,251 adults across the nation living in telephone households.

Interviews were conducted between November 7 and November 14, 1986, during the hours when men and working women could also be reached. Up to three call-backs were made to reach the appropriate respondent.

The telephone sample was drawn using a random method by Survey Sampling, Inc., of Westport, Connecticut. It included listed and non-listed telephone households.

The data projects to an estimated 161 million adults in telephone households.

Sampling Tolerances for Random Samples

Plus or Minus Percentage Points

(95% Confidence Limit)

Sample Size	Response Percentage					
	5% or 95%	10% or 90%	20% or 80%	30% or 70%	40% or 60%	50%
100	4	6	8	9	10	10
200	3	4	6	6	7	7
300	2	3	5	5	6	6
400	2	3	4	4	5	5
500	2	3	4	4	4	4
600	2	2	3	4	4	4
700	2	2	3	3	4	4
800	2	2	3	3	3	3
900	1	2	3	3	3	3
1,000	1	2	2	3	3	3
1,100	1	2	2	3	3	3
1,200	1	2	2	3	3	3
1,400	1	2	2	2	3	3
1,500	1	2	2	2	3	3

How to Read Table: If 68% of a sample of 860 adults said they are in favor of a certain issue, read across "Response Percentage" column heading to nearest response level. In this case 68% comes closest to 70%. Follow down that column to the row which comes closest to 860 sample. In this case it is 900. At that point--70%, 900 sample--the tolerance is plus or minus 3 percentage points which means that if a census were taken, you could expect the response to the same question to fall between 65% and 71% 95 out of 100 times.

Differences Between Two Percentages: When comparing two percentages from the same survey and you wish to determine with some assurance that the difference between them is significant, a good rule of thumb is to simply look up the sampling tolerance of each percentage. If the difference between the two percentages is greater than the sum of the two sampling tolerances, then the difference is significant. If the difference between the two percentages is less than the sum of the two sampling tolerances, then the difference between the two percentages is not significant. For example, if 50% of a random sample of 570 women and 40% of a random sample of 530 men agreed on an issue, is the difference significant? The sampling tolerance for women is 4 percentage points according to the chart. The sampling tolerance for men, as it turns out, is also 4 percentage points. The sum of the two tolerances is 8 percentage points. The difference between the percentages of men and women is 10 percentage points. Therefore, the difference between men and women on this issue is significant.

And lastly, I'd like to ask you some questions about the death penalty.

1. First, is the death penalty an issue you have thought about often, sometimes, or hardly ever?

48-1 (42) Often
2 (41) Sometimes
3 (16) Hardly ever
4 (1) DK/NA
Base 1251

2. Is the death penalty an issue you feel very strongly or not very strongly about?

49-1 (65) Very strongly
2 (28) Not very strongly
3 (7) DK/NA
Base 1251

3. In general, do you feel the death penalty should be allowed in all murder cases, only in certain murder cases, or should there be no death penalty at all?

50-1 (29) All murder cases (go to Q. 5)
2 (56) Only in certain murder cases (go to Q. 4)
3 (11) No death penalty at all (go to Q. 9)
4 (4) DK/NA (go to Q. 9)
Base 1251

4. Which of the following murder cases, if any, would you consider justification for the death penalty?

51-1 (84) If murder is especially brutal
52-2 (74) If murder is for hire
53-3 (79) If victim was a child
54-4 (62) If victim was a police officer
55-5 (56) If victim was a prison guard
56-6 (83) If convicted of killing more than one person
57-7 (1) None of these
58-8 (4) DK/NA
Base 702

5. What if convicted murderers were sent to jail for life without any chance of being let out. Would you still support the death penalty?

59-1 (75) Yes
2 (19) No
3 (6) DK/NA
Base 1063

6. Do you think the death penalty should be imposed for crimes other than murder, or is murder the only crime that should be punished by death?

60-1 (47) Death penalty only for murder (go to Q. 8)
2 (47) Death penalty for other crimes also (go to Q. 7)
3 (6) DK/NA (go to Q. 8)
Base 1063

7. For what crimes besides murder should the death penalty be imposed?
(DO NOT READ LIST)

61-1 (54) Rape
62-2 (20) Treason against the U.S. (traitors, espionage, etc.)
63-3 (14) Drug dealing
64-4 (35) Child molestation or abuse
65-5 (21) Other_____
66-6 (5) DK/NA

Base 501

8. Which of the following, if any, would you say is the main justification for the death penalty? (ROTATE)
(ONE ANSWER ONLY)

67-1 (33) To deter others from committing serious crimes
2 (43) To protect society from future crimes that person might commit
3 (19) To punish that particular person
4 (1) None of these
5 (4) DK/NA

Base 1063

9. Some people say executions in the U.S. have become routine and Americans don't pay much attention to them anymore. But others say the death penalty is still unusual and Americans do pay attention. How about you personally? Would you say you pay as much attention to executions in the U.S. as you used to, or not?

68-1 (68) Pay as much attention to executions as I used to
2 (27) Don't pay as much attention as I used to
3 (5) DK/NA

Base 1251

10. Some people say the death penalty is not carried out fairly from case to case. Others say it is. Do you think the death penalty is carried out fairly from case to case, or not?

69-1 (32) Is carried out fairly
2 (50) Is not carried out fairly
3 (18) DK/NA

Base 1251

MG/AP POLL NO. 14

November 7-14, 1986

Death Penalty

Q. 1

First, is the death penalty an issue you have thought about often, sometimes, or hardly ever?

	Base	Often	Sometimes	Hardly Ever	DK/NA
All Adults.....	1251	42%	41%	16%	1%
White Collar.....	549	42	43	14	1
Blue Collar.....	230	42	42	16	-
Other Occupations.....	99	39	39	21	1
Not in Work Force.....	371	44	37	16	3
18-34 Years.....	479	38	45	16	1
35-54 "	450	42	43	14	1
55-64 "	157	53	31	14	2
65+ "	164	45	30	20	5
Not H.S. Graduate.....	163	43	30	23	4
H.S. Graduate.....	447	42	41	16	1
Part College.....	295	42	44	14	-
College Grad. +.....	342	42	44	12	2
Black.....	97	42	28	25	5
White.....	1111	42	42	15	1
Hispanic.....	16	25	69	6	-
Other.....	23	48	26	26	-
Protestant.....	658	42	38	18	2
Catholic.....	323	40	45	13	2
Jew.....	21	33	62	5	-
Other Faith.....	80	39	43	14	4
No Preference.....	158	43	39	17	1
Democrat.....	419	46	37	16	1
Republican.....	336	42	42	15	1
Independent.....	443	41	43	14	2
Ind. Lean Dem.	151	36	48	15	1
Ind. Lean Repub.	130	42	46	12	-
Ind./Ind.	162	44	38	14	4
Democrat + Lean.....	570	43	40	16	1
Republican + Lean.....	466	42	43	14	1

Q. 1
CONTINUED

	Base	Often	Sometimes	Hardly Ever	DK/NA
All Adults.....	1251	42%	41%	16%	1%
Conservative.....	682	45	40	14	1
Liberal.....	355	40	43	16	1
Neither.....	140	43	41	13	3
Registered Voter.....	1068	44	41	14	1
Not Registered Voter.....	178	33	40	25	2
Under $20,000.....	345	41	35	22	2
$20,000-$34,999.....	430	42	43	15	-
$35,000+.....	394	44	45	10	1
Labor Union.....	141	40	44	15	1
No Labor Union.....	1104	42	40	16	2
Male.....	612	44	39	16	1
Female.....	639	40	42	16	2
Top 10 MSAs.....	198	43	40	15	2
Balance MSAs.....	766	42	41	16	1
No MSA.....	287	42	41	15	2
Northeast.....	253	40	44	15	1
North Central.....	348	37	46	16	1
South.....	411	45	37	16	2
West.....	239	46	37	15	2

Q. 2

Is the death penalty an issue you feel very strongly or not very strongly about?

	Base	Very Strongly	Not Very Strongly	DK/NA
All Adults.....	1251	65%	28%	7%
White Collar.....	549	65	29	6
Blue Collar.....	230	67	24	9
Other Occupations.....	99	68	29	3
Not in Work Force.....	371	65	27	8
18-34 Years.....	479	62	32	6
35-54 "	450	68	25	7
55-64 "	157	72	20	8
65+ "	164	61	30	9
Not H.S. Graduate.....	163	60	31	9
H.S. Graduate.....	447	68	25	7
Part College.....	295	66	30	4
College Grad. +.....	342	64	28	8
Black.....	97	54	39	7
White.....	1111	67	26	7
Hispanic.....	16	69	31	-
Other.....	23	65	35	-
Protestant.....	658	64	30	6
Catholic.....	323	68	25	7
Jew.....	21	66	29	5
Other Faith.....	80	65	24	11
No Preference.....	158	65	29	6
Democrat.....	419	64	29	7
Republican.....	336	70	24	6
Independent.....	443	65	29	6
Ind. Lean Dem.	151	61	34	5
Ind. Lean Repub.	130	64	31	5
Ind./Ind.	162	71	22	7
Democrat + Lean.....	570	62	31	7
Republican + Lean.....	466	68	26	6

Q. 2

CONTINUED

	Base	Very Strongly	Not Very Strongly	DK/NA
All Adults.....	1251	65%	28%	7%
Conservative.....	682	69	26	5
Liberal.....	355	63	30	7
Neither.....	140	63	26	11
Registered Voter.....	1068	66	27	7
Not Registered Voter.....	178	61	32	7
Under $20,000.....	345	61	32	7
$20,000-$34,999.....	430	66	27	7
$35,000+.....	394	69	25	6
Labor Union.....	141	66	25	9
No Labor Union.....	1104	66	28	6
Male.....	612	68	27	5
Female.....	639	63	29	8
Top 10 MSAs.....	198	65	27	8
Balance MSAs.....	766	66	27	7
No MSA.....	287	63	30	7
Northeast.....	253	65	28	7
North Central.....	348	61	28	11
South.....	411	66	29	5
West.....	239	73	23	4

Q. 3

In general, do you feel the death penalty should be allowed in all murder cases, only in certain murder cases, or should there be no death penalty at all?

	Base	All Murder Cases	Certain Murder Cases	No Death Penalty At All	DK/NA
All Adults	1251	29%	56%	11%	4%
White Collar	549	26	58	12	4
Blue Collar	230	31	58	10	1
Other Occupations	99	32	51	13	4
Not in Work Force	371	32	51	11	6
18-34 Years	479	27	60	10	3
35-54 "	450	29	55	13	3
55-64 "	157	32	54	9	5
65+ "	164	32	50	11	7
Not H.S. Graduate	163	36	43	14	7
H.S. Graduate	447	33	55	9	3
Part College	295	28	59	11	2
College Grad. +	342	21	61	13	5
Black	97	20	38	33	9
White	1111	30	58	9	3
Hispanic	16	19	50	31	-
Other	23	39	48	13	-
Protestant	658	29	56	11	4
Catholic	323	30	56	11	3
Jew	21	33	52	10	5
Other Faith	80	28	53	11	8
No Preference	158	26	56	13	5
Democrat	419	24	53	19	4
Republican	336	35	58	5	2
Independent	443	28	59	9	4
Ind. Lean Dem.	151	25	60	14	1
Ind. Lean Repub.	130	30	65	3	2
Ind./Ind.	162	29	55	9	7
Democrat + Lean	570	25	53	18	4
Republican + Lean	466	34	59	5	2

Q. 3

CONTINUED

	Base	All Murder Cases	Certain Murder Cases	No Death Penalty At All	DK/NA
All Adults.....	1251	29%	56%	11%	4%
Conservative.....	682	31	57	8	4
Liberal.....	355	26	54	18	2
Neither.....	140	23	61	11	5
Registered Voter.....	1068	29	56	11	4
Not Registered Voter.....	178	30	53	11	6
Under $20,000.....	345	33	49	13	5
$20,000-$34,999.....	430	29	57	11	3
$35,000+.....	394	27	62	8	3
Labor Union.....	141	28	56	14	2
No Labor Union.....	1104	29	56	11	4
Male.....	612	32	56	10	2
Female.....	639	26	55	13	6
Top 10 MSAs.....	198	28	55	11	6
Balance MSAs.....	766	30	54	12	4
No MSA.....	287	26	60	11	3
Northeast.....	253	26	59	13	2
North Central.....	348	30	56	9	5
South.....	411	32	52	12	4
West.....	239	24	62	11	3

Q. 4

Which of the following murder cases, if any, would you consider justification for the death penalty?

(respondents who said - only in certain circumstances)

	Base	Murder Especially Brutal	Murder For Hire	Victim Was Child	Victim Was Police Officer
All Adults.....	702	84%	74%	79%	62%
White Collar.....	326	86	76	77	61
Blue Collar.....	133	84	74	84	65
Other Occupations.....	50	82	62	84	58
Not in Work Force.....	192	80	75	80	63
18-34 Years.....	283	83	69	75	55
35-54 "	252	85	77	81	65
55-64 "	85	85	81	87	74
65+ "	82	82	73	79	68
Not H.S. Graduate.....	71	82	75	87	66
H.S. Graduate.....	242	84	72	84	66
Part College.....	176	84	75	76	57
College Grad.+.....	210	84	76	76	61
Black.....	37	76	81	81	57
White.....	643	84	75	80	64
Hispanic.....	8	75	13	63	25
Other.....	11	91	46	82	46
Protestant.....	375	84	77	82	64
Catholic.....	180	82	69	75	63
Jew.....	11	100	55	82	64
Other Faith.....	43	79	67	79	54
No Preference.....	89	87	78	80	60
Democrat.....	219	81	71	79	61
Republican.....	194	87	76	83	63
Independent.....	263	84	75	78	62
Ind. Lean Dem.....	90	84	70	70	57
Ind. Lean Repub.....	84	81	77	74	66
Ind./Ind.....	89	85	76	90	64
Democrat + Lean.....	309	82	71	76	60
Republican + Lean.....	278	85	77	80	64

Q. 4 - page 2

CONTINUED

	Base	Victim Was Prison Guard	Convicted Of Killing More Than 1 Person	None Of These	DK/NA
All Adults.....	702	56%	83%	1%	4%
White Collar.....	326	56	83	-	3
Blue Collar.....	133	56	87	-	2
Other Occupations.....	50	52	86	4	-
Not in Work Force.....	192	59	80	1	6
18-34 Years.....	283	48	85	1	3
35-54 "	252	60	84	1	3
55-64 "	85	67	86	-	1
65+ "	82	62	73	-	9
Not H.S. Graduate.....	71	59	86	-	3
H.S. Graduate.....	242	59	86	1	4
Part College.....	176	53	83	1	2
College Grad.+.....	210	56	80	1	4
Black.....	37	46	84	-	-
White.....	643	58	83	1	4
Hispanic.....	8	13	88	-	-
Other.....	11	36	91	-	9
Protestant.....	375	59	86	-	3
Catholic.....	180	55	77	1	6
Jew.....	11	55	64	-	-
Other Faith.....	43	54	88	2	-
No Preference.....	89	53	87	1	3
Democrat.....	219	58	82	-	5
Republican.....	194	58	87	1	4
Independent.....	263	54	81	1	2
Ind. Lean Dem.....	90	42	79	1	2
Ind. Lean Repub.....	84	61	82	2	-
Ind./Ind.....	89	60	83	-	3
Democrat + Lean.....	309	53	81	-	-
Republican + Lean.....	278	59	85	1	3

Q. 4

CONTINUED

	Base	Murder Especially Brutal	Murder For Hire	Victim Was Child	Victim Was Police Officer
All Adults.....	702	84%	74%	79%	62%
Conservative.....	391	84	72	81	65
Liberal.....	192	84	76	76	58
Neither.....	86	83	80	84	63
Registered Voter.....	602	84	74	80	63
Not Registered Voter.....	96	81	76	75	57
Under $20,000.....	169	83	72	83	61
$20,000-$34,999.....	245	85	74	78	61
$35,000+.....	244	83	78	78	64
Labor Union.....	79	82	70	77	68
No Labor Union.....	620	84	75	80	62
Male.....	348	84	77	78	66
Female.....	354	83	71	81	59
Top 10 MSAs.....	111	79	66	71	65
Balance MSAs.....	419	85	76	81	62
No MSA.....	172	83	74	80	62
Northeast.....	150	81	67	76	65
North Central.....	194	83	72	79	61
South.....	211	84	77	81	61
West.....	147	86	79	81	62

Q. 4 - page 3
CONTINUED

	Base	Victim Was Prison Guard	Convicted Of Killing More Than 1 Person	None Of These	DK/NA
All Adults.....	702	56%	83%	1%	4%
Conservative.....	391	60	83	1	4
Liberal.....	192	49	84	1	2
Neither.....	86	57	85	1	1
Registered Voter.....	602	58	83	1	4
Not Registered Voter.....	96	51	87	1	3
Under $20,000.....	169	54	83	1	5
$20,000-$34,999.....	245	54	83	-	2
$35,000+.....	244	60	83	-	3
Labor Union.....	79	61	85	1	4
No Labor Union.....	620	56	83	1	3
Male.....	348	59	82	-	2
Female.....	354	54	84	1	5
Top 10 MSAs.....	111	59	81	1	4
Balance MSAs.....	419	55	84	1	3
No MSA.....	172	58	82	1	5
Northeast.....	150	55	79	2	3
North Central.....	194	55	83	1	3
South.....	211	59	84	-	4
West.....	147	56	86	-	4

Q. 5

What if convicted murderers were sent to jail for life without any chance of being let out. Would you still support the death penalty?
(respondents who believe in death penalty)

	Base	Yes	No	DK/NA
All Adults.....	1063	75%	19%	6%
White Collar.....	466	75	20	5
Blue Collar.....	203	76	18	6
Other Occupations.....	82	77	18	5
Not in Work Force.....	310	74	17	9
18-34 Years.....	413	78	18	4
35-54 "	380	75	19	6
55-64 "	135	73	21	6
65+ "	135	69	17	14
Not H.S. Graduate.....	130	72	18	10
H.S. Graduate.....	390	77	18	5
Part College.....	258	77	19	4
College Grad.+.....	282	73	20	7
Black.....	56	57	39	4
White.....	973	76	18	6
Hispanic.....	11	82	18	-
Other.....	20	70	25	5
Protestant.....	565	74	19	7
Catholic.....	278	72	21	7
Jew.....	18	89	11	-
Other Faith.....	65	82	15	3
No Preference.....	129	81	16	3
Democrat.....	322	68	25	7
Republican.....	311	79	15	6
Independent.....	387	79	16	5
Ind. Lean Dem.....	128	74	20	6
Ind. Lean Repub.....	123	84	14	2
Ind./Ind.....	136	79	13	8
Democrat + Lean.....	450	70	24	6
Republican + Lean.....	434	80	15	5

Q. 5

CONTINUED

	Base	Yes	No	DK/NA
All Adults.....	1063	75%	19%	6%
Conservative.....	604	76	18	6
Liberal.....	284	77	19	4
Neither.....	118	73	20	7
Registered Voter.....	910	74	19	7
Not Registered Voter.....	149	77	20	3
Under $20,000.....	281	72	20	8
$20,000-$34,999.....	370	74	20	6
$35,000+.....	351	78	17	5
Labor Union.....	119	76	19	5
No Labor Union.....	939	75	19	6
Male.....	540	79	16	5
Female.....	523	71	22	7
Top 10 MSAs.....	166	77	18	5
Balance MSAs.....	650	74	19	7
No MSA.....	247	76	19	5
Northeast.....	215	71	20	9
North Central.....	300	79	16	5
South.....	343	72	22	6
West.....	205	77	17	6

Q. 6

Do you think the death penalty should be imposed for crimes other than murder, or is murder the only crime that should be punished by death?
(respondents who believe in death penalty)

	Base	Only For Murder	For Other Crimes Also	DK/NA
All Adults.....	1063	47%	47%	6%
White Collar.....	466	48	47	5
Blue Collar.....	203	46	50	4
Other Occupations.....	82	48	50	2
Not in Work Force.....	310	47	46	7
18-34 Years.....	413	52	44	4
35-54 "	380	44	50	6
55-64 "	135	43	53	4
65+ "	135	47	42	11
Not H.S. Graduate.....	130	43	48	9
H.S. Graduate.....	390	47	47	6
Part College.....	258	49	49	2
College Grad.+.....	282	49	45	6
Black.....	56	53	43	4
White.....	973	47	47	6
Hispanic.....	11	46	54	-
Other.....	20	45	55	-
Protestant.....	565	47	47	6
Catholic.....	278	48	48	4
Jew.....	18	33	61	6
Other Faith.....	65	52	43	5
No Preference.....	129	48	47	5
Democrat.....	322	47	47	6
Republican.....	311	47	49	4
Independent.....	387	48	46	6
Ind. Lean Dem.....	128	52	42	6
Ind. Lean Repub.....	123	47	50	3
Ind./Ind.....	136	46	46	8
Democrat + Lean.....	450	48	46	6
Republican + Lean.....	434	47	49	4

Q. 6

CONTINUED

	Base	Only For Murder	For Other Crimes Also	DK/NA
All Adults.....	1063	47%	47%	6%
Conservative.....	604	48	48	4
Liberal.....	284	47	49	4
Neither.....	118	52	39	9
Registered Voter.....	910	46	48	6
Not Registered Voter.....	149	56	41	3
Under $20,000.....	281	46	47	7
$20,000-$34,999.....	370	49	45	6
$35,000+.....	351	48	49	3
Labor Union.....	119	56	40	4
No Labor Union.....	939	46	48	6
Male.....	540	45	51	4
Female.....	523	49	44	7
Top 10 MSAs.....	166	51	47	2
Balance MSAs.....	650	48	48	4
No MSA.....	247	45	45	10
Northeast.....	215	56	39	5
North Central.....	300	50	44	6
South.....	343	41	53	6
West.....	205	44	51	5

Q. 7

For what crimes besides murder should the death penalty be imposed?
(respondents who want death penalty for crimes besides murder)

	Base	Rape	Treason	Drug Dealing	Child Molestation Or Abuse	Other	DK/NA
All Adults.....	501	54%	20%	14%	35%	21%	5%
White Collar.....	218	53	22	16	33	22	5
Blue Collar.....	101	58	19	15	40	14	3
Other Occupations.....	41	66	20	12	34	24	2
Not in Work Force.....	141	48	18	13	36	24	8
18-34 Years.....	182	57	19	12	37	18	3
35-54 "	191	57	19	14	35	25	6
55-64 "	72	43	26	24	28	14	3
65+ "	56	43	20	13	38	25	11
Not H.S. Graduate.....	62	66	13	18	31	21	5
H.S. Graduate.....	185	51	16	11	43	18	6
Part College.....	126	56	21	13	36	19	3
College Grad.+.....	127	49	28	19	25	28	6
Black.....	24	63	-	17	42	21	4
White.....	457	52	22	14	35	21	5
Hispanic.....	6	67	-	17	33	17	-
Other.....	11	64	9	18	27	36	-
Protestant.....	264	51	21	13	36	22	5
Catholic.....	132	56	21	12	35	17	4
Jew.....	11	55	18	36	18	27	-
Other Faith.....	28	54	4	18	36	21	18
No Preference.....	60	57	22	20	37	27	3
Democrat.....	152	55	15	16	38	19	3
Republican.....	153	52	23	11	31	25	5
Independent.....	178	53	24	15	36	19	7
Ind. Lean Dem.....	54	54	20	19	35	11	7
Ind. Lean Repub.....	61	49	28	15	36	28	5
Ind./Ind.....	63	57	24	13	37	16	8
Democrat + Lean.....	206	54	16	17	37	17	4
Republican + Lean.....	214	51	24	12	32	26	5

Q. 7

CONTINUED

	Base	Rape	Treason	Drug Dealing	Child Molestation Or Abuse	Other	DK/NA
All Adults.....	501	54%	20%	14%	35%	21%	5%
Conservative.....	287	52	23	14	33	22	5
Liberal.....	139	55	17	15	34	19	6
Neither.....	46	59	15	20	50	17	2
Registered Voter.....	439	53	21	15	34	21	5
Not Registered Voter.....	61	56	15	10	43	21	7
Under $20,000.....	133	63	9	14	42	19	5
$20,000-$34,999.....	166	48	21	12	31	21	5
$35,000+.....	172	52	27	17	31	24	5
Labor Union.....	47	53	23	9	26	26	2
No Labor Union.....	450	53	20	15	36	20	5
Male.....	273	54	26	18	28	20	3
Female.....	228	53	13	11	43	22	7
Top 10 MSAs.....	78	50	30	19	28	21	3
Balance MSAs.....	311	55	20	12	36	22	5
No MSA.....	112	51	14	18	38	20	7
Northeast.....	83	47	24	21	33	19	5
North Central.....	132	55	19	17	37	17	2
South.....	182	59	18	8	32	21	8
West.....	104	47	21	17	39	26	4

Q. 8

Which of the following, if any, would you say is the main justification for the death penalty?

(respondents who believe in death penalty)

	Base	Deter Others	Protect Society	Punish Particular Person	None Of These	DK/NA
All Adults	1063	33%	43%	19%	1%	4%
White Collar	466	36	42	18	1	3
Blue Collar	203	37	35	20	2	6
Other Occupations	82	26	45	23	1	5
Not in Work Force	310	29	45	20	1	5
18-34 Years	413	36	41	19	1	3
35-54 "	380	33	43	18	1	5
55-64 "	135	31	42	23	2	2
65+ "	135	25	43	20	3	9
Not H.S. Graduate	130	32	31	28	3	6
H.S. Graduate	390	31	44	18	2	5
Part College	258	36	40	19	-	5
College Grad.+	282	34	46	17	1	2
Black	56	29	37	25	2	7
White	973	33	43	19	1	4
Hispanic	11	36	36	28	-	-
Other	20	50	30	15	-	5
Protestant	565	33	40	20	2	5
Catholic	278	30	46	20	-	4
Jew	18	22	55	11	6	6
Other Faith	65	35	40	20	2	3
No Preference	129	42	40	15	1	2
Democrat	322	30	41	24	2	3
Republican	311	37	42	15	1	5
Independent	387	33	43	18	2	4
Ind. Lean Dem	128	31	46	18	1	4
Ind. Lean Repub	123	36	47	14	1	2
Ind./Ind	136	31	39	21	3	6
Democrat + Lean	450	30	42	22	2	4
Republican + Lean	434	36	44	15	1	4

Q. 8

CONTINUED

	Base	Deter Others	Protect Society	Punish Particular Person	None Of These	DK/NA
All Adults.....	1063	33%	43%	19%	1%	4%
Conservative.....	604	36	41	18	1	4
Liberal.....	284	31	43	22	1	3
Neither.....	118	27	47	19	2	5
Registered Voter.....	910	34	42	19	1	4
Not Registered Voter.....	149	30	42	20	2	6
Under $20,000.....	281	30	42	21	2	5
$20,000-$34,999.....	370	35	44	17	1	3
$35,000+.....	351	36	41	18	1	4
Labor Union.....	119	31	39	24	3	3
No Labor Union.....	939	33	43	18	1	5
Male.....	540	37	37	20	1	5
Female.....	523	29	48	18	1	4
Top 10 MSAs.....	166	36	38	20	2	4
Balance MSAs.....	650	32	45	18	1	4
No MSA.....	247	34	38	22	1	5
Northeast.....	215	30	43	22	2	3
North Central.....	300	34	41	20	-	5
South.....	343	35	40	19	2	4
West.....	205	33	45	15	2	5

Q. 9

Some people say executions in th U.S. have become routine and Americans don't pay much attention to them anymore. But others say the death penalty is still unusual and Americans do pay attention. How about you personally? Would you say you pay as much attention to executions in the U.S. as you used to, or not?

	Base	Pay As Much Attention As Used To	Not Pay As Much Attention As Used To	DK/NA
All Adults.....	1251	68%	27%	5%
White Collar.....	549	68	28	4
Blue Collar.....	230	71	24	5
Other Occupations.....	99	68	28	4
Not in Work Force.....	371	64	29	7
18-34 Years.....	479	65	31	4
35-54 "	450	73	22	5
55-64 "	157	66	26	8
65+ "	164	60	33	7
Not H.S. Graduate.....	163	62	28	10
H.S. Graduate.....	447	68	27	5
Part College.....	295	66	29	5
College Grad.+.....	342	70	26	4
Black.....	97	61	33	6
White.....	1111	68	27	5
Hispanic.....	16	75	19	6
Other.....	23	78	22	-
Protestant.....	658	69	25	6
Catholic.....	323	66	29	5
Jew.....	21	48	48	4
Other Faith.....	80	61	33	6
No Preference.....	158	68	28	4
Democrat.....	419	65	29	6
Republican.....	336	69	26	5
Independent.....	443	69	26	5
Ind. Lean Dem.....	151	71	25	4
Ind. Lean Repub.....	130	68	30	2
Ind. /Ind.....	162	69	23	8
Democrat + Lean.....	570	67	28	5
Republican + Lean.....	466	69	27	4

Q. 9

CONTINUED

	Base	Pay As Much Attention As Used To	Not Pay As Much Attention As Used To	DK/NA
All Adults	1251	68%	27%	5%
Conservative	682	70	26	4
Liberal	355	66	29	5
Neither	140	64	29	7
Registered Voter	1068	69	26	5
Not Registered Voter	178	60	35	5
Under $20,000	345	60	32	8
$20,000-$34,999	430	71	26	3
$35,000+	394	72	24	4
Labor Union	141	63	33	4
No Labor Union	1104	68	27	5
Male	612	68	28	4
Female	639	67	26	7
Top 10 MSAs	198	62	32	6
Balance MSAs	766	67	27	6
No MSA	287	70	25	5
Northeast	253	66	30	4
North Central	348	67	27	6
South	411	69	26	5
West	239	68	26	6

Q. 10

Some people say the death penalty is not carried out fairly from case to case. Others say it is. Do you think the death penalty is carried out fairly from case to case, or not?

	Base	Carried Out Fairly	Not Carried Out Fairly	DK/NA
All Adults.....	1251	32%	50%	18%
White Collar.....	549	31	51	18
Blue Collar.....	230	31	56	13
Other Occupations.....	99	40	38	22
Not in Work Force.....	371	34	46	20
18-34 Years.....	479	35	48	17
35-54 "	450	30	54	16
55-64 "	157	31	50	19
65+ "	164	33	43	24
Not H.S. Graduate.....	163	29	47	24
H.S. Graduate.....	447	31	51	18
Part College.....	295	31	53	16
College Grad. +.....	342	37	47	16
Black.....	97	21	59	20
White.....	1111	33	49	18
Hispanic.....	16	25	62	13
Other.....	23	57	26	17
Protestant.....	658	32	51	17
Catholic.....	323	32	49	19
Jew.....	21	24	62	14
Other Faith.....	80	40	36	24
No Preference.....	158	34	48	18
Democrat.....	419	28	51	21
Republican.....	336	35	50	15
Independent.....	443	37	46	17
Ind. Lean Dem.	151	33	50	17
Ind. Lean Repub.	130	45	49	6
Ind./Ind.	162	33	43	24
Democrat + Lean.....	570	29	51	20
Republican + Lean.....	466	38	49	13

Q. 10

CONTINUED

	Base	Carried Out Fairly	Not Carried Out Fairly	DK/NA
All Adults.....	1251	32%	50%	18%
Conservative.....	682	37	48	15
Liberal.....	355	28	53	19
Neither.....	140	30	49	21
Registered Voter.....	1068	33	50	17
Not Registered Voter.....	178	27	52	21
Under $20,000.....	345	31	49	20
$20,000-$34,999.....	430	33	50	17
$35,000+.....	394	36	50	14
Labor Union.....	141	28	54	18
No Labor Union.....	1104	33	49	18
Male.....	612	35	50	15
Female.....	639	30	49	21
Top 10 MSAs.....	198	29	48	23
Balance MSAs.....	766	33	50	17
No MSA.....	287	33	49	18
Northeast.....	253	31	45	24
North Central.....	348	34	47	19
South.....	411	36	49	15
West.....	239	26	59	15

relatively small reduction in sentence, it is unlikely that defendants with meritorious cases will enter guilty pleas.

Kastenmeier also criticized the "modified real offense" sentencing scheme because criminals who committed the same acts, but were charged with different crimes, would receive virtually the same sentence. The "modified real offense" scheme dampens, but does not eliminate, one of the most unfair aspects of criminal procedure -- plea bargaining. These are certainly valid grounds for criticizing plea bargaining, as noted in Wisconsin state judge Ralph Adam Fine's Escape of the Guilty (Dodd, Mead, 1986).

What strikes us as unfair is the ability of criminals to commit serious, violent crimes, and then be able to plea bargain down to a lesser one. By focusing upon the criminal's behavior, the system quite properly forces the state and the defendant to come to grips with that behavior. It is hard to understand why Kastenmeier thinks this is unfair. Instead, this makes it much more likely that the prosecution will bring the charge which best speaks to the defendants behavior. The result of this is that the law will treat criminals with similar behavior in a similar manner. We fail to see how that results in disparity.

Another source of alleged disparity is the forty percent reduction in sentence for cooperating with the government. For some, the typical case of cooperation could be viewed a sign of rehabilitation. Where that cooperation consists of fingering one's comrades in crime or crime bosses, a more realistic way of looking at it is a criminal saving his own neck by putting the other people's necks in the noose. In such a situation, a

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"where courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action, and fearless comment on it."

Chief Justice Harlan Fiske Stone (1872-1946)

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BIDEN'S TERM AT JUDICIARY HELM BEGINS AS ABA CRITICISM MOUNTS AND LIBERAL "REHNQUIST WATCH" GROUP FORMS

-- by Kristin R. Blair

As the 100th Congress begins, judicial reformers are advocating quick movement on conservative judicial nominees. Judiciary Committee conservatives have encouraged the administration to flood the Committee with names for the 55 vacancies in the federal courts. However, the administration has not responded with the expected speed, and JN has learned, planned to submit only 20 names by mid-January. There are several reasons for this: the first is footdragging by the ABA standing committee on the federal judiciary; the second is slow senatorial response to the administration's requests for help; and the third is that names recommended through Senators move slowly through the bureaucracy of the Department of Justice.

Sources say that roughly another dozen names are far enough along in the process that they should soon go to the Senate. By the end of January, Judiciary Committee Chairman Joseph Biden should have 30-40 names pending for the approval of the Committee. Among those names will be Professor Bernard Siegan, the widely respected libertarian/conservative scholar from San Diego University, an apparent nominee for the Ninth U.S. Circuit Court of Appeals.

Four Man Nominations Panel Not So Bad?

After the change in Senate leadership, Democrats threatened to create a special "nominations subcommittee" to screen President

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Reagan's judicial nominees. The idea was discarded after filibuster threats by the Republican leadership. One key GOP Senator told a well known conservative political activist, "We'll filibuster it if we have to. I'm not going to put up with that c--p." Republican Senators well understood that such a subcommittee could have only one purpose: to kill conservative nominees before they ever reached the full Committee.

After realizing that creating a nominations subcommittee would spark partisan warfare in the Senate, Democrats instead opted to create a four man panel to "screen" the nominees. The all-Democrat panel is chaired by Vermont Senator Patrick Leahy, and includes Sens. Paul Simon of Illinois, Howard Metzenbaum of Ohio and Howell Heflin of Alabama. One judicial reformer was heard by JN to refer to the panel pejoratively as "the Four Horsemen of the Apocalypse." However, this term does not reflect the respect most reformers have for Heflin. The screening unit will investigate the credentials and backgrounds of nominees and will schedule and conduct hearings for the full Judiciary Committee, which now consists of eight Democrats and six Republicans.

Mark Goodin, an aide to ranking Republican Senator Strom Thurmond said, "At first blush, the new structure appears to be little more than a formalization of the way the committee has been working informally all along. . . The final barometer will be whether it is for partisan political purposes." (Washington Times, 12/24/86)

"It smacks of hypocrisy," said Dan Popeo of Washington Legal Foundation, "The message they're sending is that unless you meet liberal Democratic standards, you're not qualified to be a federal judge. The bottom line is that the Democrats are shutting down the judicial selection process." (Washington Times 12/24/86)

Podesta Denies Existence of Panel

Regarding the panel, John Podesta, formerly a Democrat staffer on the Judiciary Committee, and currently a staffer on the Agriculture Committee, said,

> The nominations subcommittee was an idea whose time never came. The subcommittee would have done one of two things: either it would have been a very small number of people who would vote up or down on nominees or it wouldn't have functioned as a subcommittee at all. What would that get you? The subcommittee offered more problems than solutions. It was staffed out and it didn't work out. If I'm against it, who is for it? The panel will get into the nominations in greater depth. Now I'm not the Senate historian, but my understanding is that Eastland did things this way.

Podesta, who is the brother of Anthony Podesta of People for the American Way, continued, "I don't like to think of it as a panel. The Senators have agreed to spend more time on nominations and more

time on investigation. Those members have said they'll devote the extra time to do that."

When asked if this is fair to opponents, Podesta responded,

> It's not a panel. It's an ad hoc group. Howie Kurtz [of the Washington Post] wrote a story that's inaccurate. There's no story here. It's an arrangement of Democrats in the full committee to make sure there are thorough and complete investigations of the nominees. There is a committment of greater staff resources. If the responsibility is spread among everyone it get dispersed and everyone looks the other way. [The four Senators] will devote more staff resources to investigation. The intention is that we would look harder and not just wait for problems to walk in the door. We will find the problems before they are brought up by the outside groups. If the nominee has problems in any area from ethical questions to experience to competence, we'll find out early. This administration has approved someone who most members thought was incompetent. You know, Manion. We'll be looking for those kinds of things.

(After a long struggle, last summer, South Bend Attorney Daniel Manion was confirmed by the Senate.)

Screening Panel Possible Screen for Biden

In the view of some analysts, the screening panel may serve to help insulate Judiciary Committee Chairman Joseph Biden, a potential presidential candidate for 1988, from controversy. Senator Kennedy held seniority over Biden and was expected to take the chairmanship, but rejected it to be Chairman of the Labor and Human Resources Committee. Biden's assumption of the chairmanship was suprising to observers, because of the contentiousness of the position. A seat on the Judiciary Committee, let alone the Chairmanship, leaves Biden in an uncomfortable position because he will be forced frequently to choose between the conflicting demands of special interests and the broader sentiment of his national constituency.

If a seat opens on the Supreme Court, Biden will be under pressure from all sides. Democrats will look to Biden to oppose a conservative nominee for the Supreme Court because such a nominee would change the balance of the court to the conservative side. Seeming to recognize these pressures, Biden says he would be inclined to vote for a qualified conservative nominee. In an interview with the Philadelphia Inquirer (11/16//86), Biden said, "Say the administration sends up [former Solicitor General Robert H.] Bork and, after our investigation, he looks a lot like another [Associate Justice Antonin] Scalia. I'd have to vote for him, and if the groups tear me apart, that's the medicine I'll have to take. I'm not Ted Kennedy."

[In the same interview Biden also said that his top priority as chairman of the committee will be to create a "drug czar" who would hold a cabinet level position and be responsible for leading the ongoing war against drugs in the U.S. However, such a proposal has recently been excluded twice from major crime legislation because of requests from the White House.]

Liberal Activist Attorneys Join Forces for "Rehnquist Watch"

A group of liberals, opposed to the Chief Justice on ideological grounds, are starting a "Rehnquist Watch" group designed to undermine the impact of Chief Justice Rehnquist's future rulings. The first meeting of the group was sponsored by Public Advocates, Inc. of San Francisco, with the initial meeting held November 20, in the offices of the Washington based law firm of Wilmer, Cutler & Pickering on November 20. (Washington Post, 12/4/86) (JN notes that although not in attendance at the meeting, a partner in the firm, Lloyd Cutler, was former counsel to President Jimmy Carter.)

Wilmer, Cutler & Pickering partner John Payton told the Washington Post, "The first thing everybody said," was that the group could not be called "Rehnquist Watch." JN interviewed Payton about the meeting, and he said of the group, "We just let them use the conference room. . . Yes, I was present at part of the meeting. . . No, I didn't know the people there; I don't know their names -- I just know two of the people from Public Advocates, Robert Gnaizda and Angela Blackwell. They're friends of mine."

A copy of the invitation to the meeting was provided to JN by a source unsympathetic to the goals of the group. The invitation said that possible objectives of the group would be to: "1. Weaken the moral authority of the Chief Justice when he issues opinions, particularly involving civil rights and economic issues affecting low-income groups; 2. Give pause to other Supreme Court justices about being closely associated with Rehnquist opinions; 3. Deny to the Chief Justice the special trappings of his office, such as the ability to speak in lofty, moral terms at ABA conventions on the dignity and impartiality of the law; 4. Diminish the ability of the Chief Justice to effectuate anti-civil rights court reforms that depend upon the approval of the Bar, the rest of the judiciary, and/or Congress; 5. Embolden liberal and neutral federal and state judges to narrowly construe Rehnquist opinions; 6. Encourage state courts to develop independent state grounds for constitutional decisions; 7. Diminish the impact and enforcement power of Rehnquist decisions; and 8. Encourage the public-at-large to criticize and seek legislative solutions to particularly anti-civil rights decisions."

Among those present at the meeting were John Payton of Wilmer, Cutler & Pickering, San Francisco attorney Robert Gnaizda, civil rights lobbyist Ralph Neas, (Washington Post). Robert Gnaizda, the organizer of the meeting told JN that attorneys present at the meeting were representing themselves, and not their respective groups. Gnaizda told JN that Tony Califa of the ACLU, and Estelle H. Rogers of the Federation of Women Lawyers also attended. Other

people not individually named who attended the meeting, according to Gnaizda, are employed by the National Alliance for Justice, the League of Latin American Citizens, Center for Constitutional Rights, the Mexican American Legal Defense Fund and The Nation's Supreme Court Watch Project. The invitation to the event listed Mario Obledo, former head of League of Latin American Citizens, as another participant.

Gnaizda said the purpose of such a group is to "Objectively analyze specific opinions and integrate them with past decisions . . . The group is not intended to be against Rehnquist personally. I used the name 'Rehnquist Watch' because it was catchy. It also aptly describes that this is the Chief Justice's Court. He is the worst enemy of the court and will weaken it the most. The public should be involved with the Supreme Court. The public should try to influence the court." He added, "I'm optimistic we'll have something in place by June. It will be done without deep involvement by major legal institutions. The group will be funded by individual contributions from lawyers and private citizens. It's still a little premature now. Many people want to have the group come into being a little more before getting involved."

U.S. District Judge Graham Lambasts ABA Rating System

U.S. District Judge James Graham of the Southern District of Ohio sent a letter to Chairman Robert Fiske Jr. of the ABA Standing Committee on the Federal Judiciary, which said that there are "serious flaws" in the secretive process used by the ABA to evaluate nominees for federal judgeships. Further, Graham said "there is significant potential for the distortion of the constitutional appointment process," because of these flaws. Graham wondered why he was asked about his religious beliefs during the ABA screening process, and called into question whether committee members, who serve part time, are too busy to spend enough time investigating nominees. He also challenged the ABA's four-category rating system. (Legal Times 12/15/86)

Graham recalled in the letter the questioning he received about his Christianity. "[ABA Committee member John Elam] said he heard that I considered myself a born again Christian and that he was curious about the nature of my religious beliefs. . . This raises a question as to whether the committee considers the religious convictions of nominees in passing upon their qualifications to sit as federal judges and the propriety of doing so."

Chairman Fiske admitted that the topic of Graham's religious beliefs may indeed have come up, but in a response to Graham, said, "the committee does not consider religion to be a relevant factor in making its judgments. The committee does not take religion into account." Fiske declined to discuss the ABA's consideration process of Graham. In his response, Fiske said, "While I cannot divulge the contents of the report, it was, and remains, my judgment that there were sufficiently widespread problems of temperament, by lawyers who had litigated with and against you, to dictate the result reached by the committee."

SENTENCING COMMISSION GUIDELINES EMERGE, DEATH PENALTY CONTROVERSY LOOMS

The United States Sentencing Commission recently held hearings in Washington, D.C. on its proposed preliminary sentencing guidelines. A final version of the guidelines will be released in April. They become law after six months, unless the Congress votes to the contrary.

The preliminary guidelines are intended to eliminiate disparity in sentencing. They follow a "modified real offense approach", under which the judge considers various acts relevant to the occurence of the crime -- including the harm inflicted upon the victim. The scheme works as follows:

1. The offense is assigned a certain point value as listed in the guidelines;

2. The judge then adds or subtracts points based upon the circumstances under which the crime was committed and the effects of the crime.

Opponents complain that the system will lead to increased federal prison overcrowding. At the hearings in Washington, several witnesses concentrated upon prison capacity, including Judge Abner Mikva of the D.C. Circuit. The American Bar Association criticized the guidelines because they called for mandatory prison sentences. ABA President Eugene C. Thomas stated in the ABA Journal of January 1, 1987 that about 40% of prisoners did not pose a threat to society.

Supporters of the Commission's preliminary guidelines countered that nothing in the Commission's statutory framework authorized it to take prison capacity into consideration in adopting its guidelines. JN Associate Editor Jeffery Troutt, who testified at the Washington hearings, urged the Commission not to take prison capacity into account. Troutt argued that the Congress should have the option to respond to the problem by appropriating money. The decision as to whether to spend more money on new prisons or to release prisoners before their sentences are served is a legislative one that is best left with the elected representatives.

Commission Considers Death Penalty Procedures

Soon before JN went to press, news broke that the Sentencing Commission is considering promulgating guidelines for the imposition of the death penalty by federal courts. The Commission requested the Department of Justice to give its opinion as to whether its statutory mandate, the Sentencing Reform Act of 1984, gave it authority to promulgate guidelines regarding the imposition of the death penalty. After studying the matter, the Justice Department came to the preliminary conclusion that such authority exists.

Conservatives have been urging the Commission take to up the death penalty issue. Washington Legal Foundation's Paul Kamenar testified before the Commission in Washington, urging them at that time to include the death penalty in their final guidelines.

Many observers noted that a new federal death penalty which would meet Supreme Court-mandated procedural requirements has been defeated by some liberals in Congress. But, it has the overwhelming support of the American people. JN Editor Patrick B. McGuigan, noting that polls show that around 80% of the American people support the death penalty, stated that in the recent election involving the California Supreme Court -- the only race in 1986 in which the death penalty was the most salient issue -- "the same electorate which narrowly returned Alan Cranston to the U.S. Senate overwhelmingly rejected three [anti-death penalty] judges."

Johnny L. Hughes, of the National Trooper Coalition, noted that the Commission's legislative mandate allowed for the promulgation of death penalty guidelines. In a letter obtained by JN, Hughes said,

> Congress itself in enacting the new sentencing law directed the Commission to insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. If the war against crime is to be won, the Commission must adopt strong measures and promulgate guidelines designed to permit the implementation of the death penalties included in present federal statutes.

Opponents of the death penalty complained that the Commission was circumventing the will of the Congress. Apparently, only two of the Commissioners took that position initially. Some considered this an effort to restore the death penalty.

However, conservatives have noted that death penalty provisions exist in federal statutes for several crimes, including espionage, murder, and hijacking. They have not been enforced. Therefore, they argue, the promulgation of the guidelines is not an attempt to circumvent the will of the Congress. Rather, it is designed to facilitate congressional will as clearly expressed in existing statutes, and stymied by activist courts.

As JN went to press, rumors began to circulate that the Commission might not include the death penalty guidelines in the revised draft of the guidelines which will be released at the end of this month. Commission spokesman Paul Martin stated that he did not think that the guidelines would be in the revised draft, raising serious questions whether the Commission will include the death penalty in the April guidelines. Also, it is uncertain whether the death penalty provisions would survive the hearings process.

Nevertheless, conservatives are optimistic. Given unprecedented public support for the death penalty, even a defeat on the merits of the issue could become a political victory.

IRAN/CONTRA CONTROVERSY: FIFTH AMENDMENT IGNORANCE AND CONGRESSIONAL STONEWALLING.

-- by Jeffery D. Troutt

The Iran/Contra scandal has occupied most of the attention of the Washington press, and is expected to be the number one issue in the Congress this year (except, of course, the congressional pay hike). Critics of the Administration are having a field day with the issue, and hoping to protract the investigations and speculations for as long as possible -- even into the next presidential election.

Soon after Attorney General Edwin Meese announced that funds from the sale of arms to Iran had been diverted to the Contras, congressional committees began investigating the matter, soliciting testimony from, among others, former National Security Advisor John Poindexter, and Lieutenant Colonel Oliver North.

Both North and Poindexter sought the advice of counsel prior to testifying, and, pursuant to that advice, refused to testify, invoking the Fifth Amendment. This came as no suprise, but was nevertheless grist for a multitude of politicians and commentators.

Not widely reported was a confrontation between a member of a congressional committee and Poindexter's attorney. After Poindexter refused to answer the committee on Fifth Amendment grounds, Congressman Michael Barnes (D-MD) urged him to testify anyway, stating that the most that Poindexter would probably receive was "a very short, probably suspended sentence." Poindexter's attorney shot back that with a sharp reminder to the Congressman that under the law of the United States, a person is presumed to be innocent until proven guilty. The entire hearing room burst into applause.

In refusing to testify before congressional committees on Fifth Amendment grounds, North was an ideal object of commiseration. The uniformed North addressed the Committee with sad eyes and a quivering voice. North, justifying his refusal to testify on the basis of "the very Constitution I have sworn to uphold." North grabbed the sympathy of the audience stating, "I don't think there's another person in America that wants to tell this story as much as I do." All this led to speculation that North would be effective on the witness stand, should charges be brought against him.

President Reagan received a substantial amount of criticism when his former aides refused to testify. Many commentators, and one of the major networks, in a remarkable, but enlightening, display of constitutional ignorance, suggested that Reagan force them to testify. National Public Radio was one of the few media sources that pointed out that under the Constitution, even the president cannot compel a person to testify against himself.

Many judicial reformers found themselves amused by the left's sudden conversion to a hard-line law and order stance. They rubbed their eyes and pinched themselves when they saw liberal legislators complaining that these "criminals" were hiding behind their rights under the Constitution. Perhaps, if more government officials

diverted money to the Contras, liberals would start begin to call for the overruling of Miranda.

The Report of the Intelligence Committee

As the new year began, the evidence was beginning to appear that the President did not know of the diversion of funds to the Contras. The administration's supporters pointed out that it was Reagan and Meese who first disclosed that the diversion occurred. In late December, Meese stated that he had been told by North that President Reagan was unaware of the diversion.

A report of the Senate Select Intelligence Committee was reported to have said that it was unlikely that President Reagan knew of the diversion of funds to the contras. The Committee voted 7 to 6 not to release an unclassified version of the report. The vote was largely along partisan lines, but Senator William Cohen (R-ME) cast the tie-breaking vote by proxy. Senate minority leader Robert Dole (R-KA) urged that the report be released. Majority leader Robert Byrd (D-WV), not suprisingly, did not want the report released, stating that it was incomplete and possibly misleading. Further, said Byrd, release might interfere with the work of special prosecutor Lawrence Walsh.

The decision not to release the report was a highly partisan one, calling into question the credibility of many Senators, and the congressional investigations process. Many observers indicated their belief that the investigating committees are more interested in undercutting the President than it was in telling the truth to the American people. Even the liberal Washington Post seemed to agree with this analysis, taking the Senators to task in a January 7th editorial:

> At this moment the most important thing to do is establish the credibility of congressional inquiry. This cannot be done if the Democrats act in a way to convey the idea that only information damaging to President Reagan will be allowed to flow freely into the public domain. Let's see the report.

Observers worried that some members of Congress were determined to exploit and protract the crisis atmosphere at the expense of the Republic. The Iran/Contra controversy has already shaken many people's faith in their government and its leaders. Now, their faith in the process of congressional investigations threatens to be undermined.

Further, the current crisis has weakened the president, and emboldened his adversaries. As long as he remains under the shadow of this crisis, he will be preoccupied with it, and less able to seize the initiative on important issues.

Judicial reformers are now pondering how the whole affair might affect the Reaganization of the judiciary. The answer appears to be

uncertain. On the one hand, the president has been weakened by the crisis. Thus, problems are likely to be compounded for "controversial" judges in the Rehnquist/Manion mold. Further, the scandal has emboldened the President's adversaries. The mood in Congress, despite rhetoric to the contrary, is confrontational. To the extent that the President has a problem with a Democrat-contolled Senate, and Judiciary Committee, his problems are aggravated by the shroud of controversy over the Iran/Contra affair.

However, some observers felt that continual congressional duplicity on the Iran/Contra affair might undercut public confidence in the ability of the congress to conduct an impartial investigation. If the trend continues, it is likely that the public will grow weary of the circus-like atmosphere. This weariness may carry over to Joseph Biden's (D-DE) Judiciary Committee, making it more difficult to oppose conservative nominees on thinly disguised ideological grounds. If events follow that course, it is possible that Biden may chart a more cautious approach than he has so far.

JUSTICE O'CONNOR ENTERS "TULANE DEBATE"

Supreme Court Associate Justice Sandra Day O'Connor recently told an audience in Wyoming that the Supreme Court is not the final word on constitutional questions. Rather, the citizens of the country, through their elected representatives, public opinion, and lawsuits are in fact the final arbitrators of constitutional construction.

O'Connor noted in a Scipps-Howard article carried by the Washington Times that "[T]he Constitution is interpreted first and last by people other than judges." She cited President Franklin Roosevelt's ability to essentially reverse Court decisions striking much of the New Deal by replacing retired justices. This, she said, was evidence of the role that other branches of government play in the process of interpreting the Constitution.

The Associate Justice also contrasted the Court's decisions on segregation and abortion to point out the role of public opinion. Public opinion generally supports the Court's cases on segregation, and no one seriously calls for its return. That issue is essentially settled. However, the issue of abortion remains unsettled. Many people do not accept the Supreme Court's holdings on this issue as final, and are working to change them.

Judicial reformers considered O'Connor's speech as supporting the position taken by Attorney General Edwin Meese III in his now-famous speech at Tulane University. In that speech, Meese remarked that the Supreme Court was not the final or only source of interpretation of the Constitution.

O'Connor seemed to agree with that analysis, noting that legislators engage in constitutional analysis when deciding whether or not proposed legislation is constitutional. In regards to the process of questioning Supreme Court decisions, O'Connor said, "This is as it should be. A nation that docilely and unthinkingly approved every Supreme Court decision as unfallible and immutable, would have, I believe, severely disappointed our founders."

JUDICIAL NOTICE

JN BICENTENNIAL ESSAY

HEAT AND LIGHT: Reflections of an Outsider Looking In

--by Patrick B. McGuigan

After seven years, I still feel like an outsider looking in. The Establishment in the nation's capital consists of individuals whose ultimate motivations still elude me. Nowhere is this truer than in an examination of the individuals and organizations who argue, with apparent sincerity, that judges really ought to solve our tough problems (i.e. they should be law makers and not interpreters of the law). While I believe the vast majority of conservative judicial reformers hope and work for an era of principled jurisprudence in American law, our liberal opponents really ought to ponder the implications of a mere conservative inversion of liberal judicial activism. As Raoul Berger has so aptly said, "More than another, a liberal fears all power, whether abused by Nixon or by Earl Warren."

It is so easy, in the midst of particular engagements in what I call "The Judges War of the 1980s", to look at the debate on the proper role of the judiciary as a confrontation between, on the one hand, iniquity, self-seeking power and special interest factions and, on the other hand, righteousness, selfless morality and justice for all. In truth, however, this confrontation is between two intellectually legitimate -- but fundamentally opposed -- views of how a non-totalitarian polity is best organized.

On the one side (our side) are individuals with diverse political agendas who, nonetheless, share a commitment to the essential value of democratic governance. We are not moral relativists, nor do we believe judges should be neutered automatons mechanically applying pre-determined outcomes in every legal controversy. Supporters of judicial restraint, or interpretivism, recognize a very substantial role for the judiciary as the referees of the American polity -- but there is a rule book those referees are supposed to follow. That rule book is the Constitution and the tradition that judges enter the political thicket reluctantly, in rare instances. When necessity dictates judicial intervention, legal remedies ought to be fashioned in the least coercive and least politically disruptive manner, so that most political controversies remain in the province of the elected representatives of free men and women.

On the non-interpretivist side are individuals who regard the Constitution as both more and less than it really is. Justice William Brennan, in his controversial speech last year, said, "Our amended Constitution is the lodestar for our aspirations... Its majestic generalities and ennobling pronouncements are both luminous and obscure." In truth, as my colleague Jeffery Troutt has observed, ". . . the Constitution is not a limited enumeration of individual rights, but a limited enumeration of government powers." True, there are certainly elevating aspirations expressed in the Constitution and its amendments. The most elevating of all is the simple proposition that free men and women can govern themselves.

When Joe Sobran recently wrote that the Constitution was essentially "a deal" struck between the big states and little states of the American Confederation, he raised the eyebrows and ire of some conservative analysts, although it is impossible for me to fault the correctness of his conclusion. In truth, it is no denigration of the Constitution to observe that it is for the most part a pragmatic description of, a sound prescription for, limited government. The brilliance of the document is its division of national governmental power among competing branches with, significantly, most issues left to state/local governments and the people themselves.

Brennan and his colleagues read more than is proper into the Constitution when they pretend the document embodies the more interventionist elements of the liberal agenda, but they undermine its central legitimacy when they read out of the document its clear, practical and successful limits on, and separations of, government power. In such hands, however well intentioned, America's central document of governance becomes both as little and as much as the individual interpreter wishes it to be.

The competing views of how best to organize a non-totalitarian polity are both, in this writer's opinion, legitimate intellectual propositions. But only one, the interpretivist, is constitutional. Advocates of non-interpretivism, the Brennan view of "constitutional" law, had best drop the pretense and admit what they are about: They honestly believe well-educated and non-accountable judges should grapple with society's most difficult issues, creating solutions which represent the best in contemporary "enlightened" thought. In the absence of honesty among non-interpretivists, there should be no surprise when both serious analysts and average citizens grow cynical while watching defenders of non-interpretivism pretend their judicial results flow from sound constitutional analysis.

If the challenge for non-interpretivists is to be honest about their position, the challenge for judicial reformers is not to miss the forest for the trees. It is so easy, in the midst of heart-breaking defeats or exhilirating victories, to lose sight of the principles and objectives that brought us to this cause and to the city by the Potomac.

September 26, 1986 was a memorable day, perhaps the most memorable I've had since coming to Washington in 1980. Unexpectedly, I found myself invited to both the swearing-in and investiture ceremonies for Chief Justice Rehnquist and Justice Scalia. For the first time in years, it was difficult to concentrate on work, there was so much sheer joy in the day.

At a White House ceremony in the morning, President Reagan delivered the finest brief exposition I have ever heard of the rationale for the interpretivist "doctrine of original intent", the straightforward proposition that judicial construction of statutes and constitutional provisions ought to be in accord with the general intention of those who wrote the document which is being interpreted. The new Chief Justice struck me as both remarkably

brilliant and somewhat ill-at-ease. (He reminded me of one of my best friends, a tall fellow who, when standing in the open without a podium, doesn't quite know what to do with his hands.) His remarks at the White House were gracious and appropriate, as were those of outgoing Chief Justice Burger. Next to Reagan, the best presentation undoubtedly came from Scalia, who called his wife "the most remarkable woman I know" who "sure has made it a lot of fun along the way." Like everyone else there, I had the opportunity to chat with Scalia, Rehnquist and Burger as well as their spouses. The entire morning at the White House had a warm, intimate feeling, despite the television cameras and reporters present for the actual swearing-in ceremony.

In contrast, the afternoon investiture in the Supreme Court Chambers was formal and less intimate, with several hundred in attendance. The Court ceremony was not televised, and the Court oath was different than the constitutional oath, with the justices promising to stand firm for the rights of both rich and poor.

Every member of the Court (except one) seemed genuinely pleased and happy for Rehnquist. Brennan in particular was beaming, which confirmed for me the reports of his anger toward those who attacked Rehnquist's personal integrity, and Marshall seemed curiously pleased with the whole thing. The one exception to the general spirit of collegiality was none other than Harry Blackmun, who looked like a porcupine through the whole thing.

At the following reception, it was nice to savor the moment with many good friends, and I had the good fortune when I was leaving to find, and thank, the attorney friend who had thoughtfully arranged for my attendance.

It was enough to turn the head of even the most determined anti-establishment player. All in all, though, I figure this is what we came here to do: not the receptions and the ceremonies (although they are a nice reward for hard work) but the substantive shift in American law which has begun with the Rehnquist/Scalia elevations.

The years ahead will bring countless challenges which will undoubtedly equal the Manion, and then the Rehnquist, battles. But there won't be many rites of passage more significant than the Rehnquist/Scalia installation. Of course, there is one waiting out there: Now press and other calls come regularly asking how "those on the outside" would view a decision to go with Senator Orrin Hatch of Utah for the next opening on the High Court rather than Judge Robert Bork. It is no secret that judicial reformers are Hatch's biggest fans. Without his ability and leadership, several individuals now on the federal bench -- and Rehnquist in the center chair at the High Court -- would have been defeated.

Having said that, if the Administration gets only one more choice in the next 18-24 months, it ought to send up its best, and

the majority view among conservatives is that Robert Bork should be the nominee. If a second nomination becomes possible, Hatch is probably the best choice both because of his substantive merits as a constitutional analyst and because of the "confirmability" factor, i.e. the virtual certainty his colleagues would confirm him. This much is clear: Only Bork and Hatch bring to the battle a ready-made national constituency prepared to "go to the mat" for their confirmations. Any other judicial nominee will enter the fray without this source of strength for a confirmation battle. An effort to be "clever" and pick a dark horse will most likely lead to this result: The Democrats will be as determined as ever to thwart Reagan's abilities to reshape the High Court, and a nominee without a national constituency will be defeated.

For those of us engaged in both heat and light -- the particular battles and the larger struggle to reaffirm principled jurisprudence -- only two events yet to come give greater satisfaction, even in advance, than the activities of September 26. The first will be if Judge Bork is confirmed and sworn into the Court. The second will be when Rehnquist, Bork or Scalia (perhaps joined by Justices Hatch, White and O'Connor), begin the renaissance of American law by writing majority opinions reversing the most egregious judicial excesses of the last twenty years.

Once -- if -- those things happen, perhaps it will be time for one outsider looking in to go back to Oklahoma and teach kids about our Constitution, why a system of separated powers works best even when it means smart folks don't get to solve all our tough problems, and finally, how too many Americans have forgotten, in this stirring bicentennial year of the Republic's framing document, that the Author of our liberties is remarkably patient with His children.

(This is the first in a series of Constitution Bicentennial essays which will be printed in Judicial Notice.)

Inter Alia

• Academic freedom was tested recently at Yale University in the case of sophmore Wayne Dick. Last spring, Dick satirized Gay/Lesbian Awareness Days (GLAD) by putting up posters proclaiming Bestiality Awareness Days (BAD). He was brought up before the school's disiplinary board and placed on probation for the remainder of his time at Yale.

Yale's president Benno Schmidt reconvened the board and Wayne Dick's right to free speech was defended by Yale Law School Dean Guido Calabresi. Calabresi won for his client, who was taken off probation.

A few months ago, JN criticized Calabresi during the Manion confirmation. Here, however, we praise him. Guido Calabresi stood up for academic freedom at a time when it was being tested, and defended a student whose views were unpopular on campus, perhaps even with the Dean himself. This reflects the most noble principles of the legal profession. Calabresi deserves recognition and praise.

• Doug Bandow, a senior fellow at the CATO institute, recently suggested in a Washington Times op-ed that President Reagan should broaden the scope of his judicial nominees by including non-lawyers. Bandow especially recommends them for Appellate and Supreme Court positions, where they might bring a bit of common sense (he says, "provide an important leavening influence") to the higher courts, which are often muddled by legal obfuscation. Bandow notes that the Constitution, in Article III, is silent as to whether or not judges should also be lawyers.

While a prospective judge should have some kind of legal aptitude or experience, in certain instances this would be a good idea. After all, Benjamin Cardozo, while he was a lawyer, never finished law school, and King Solomon was not an attorney. Perhaps there are potential Cardozos and Solomons out there who should be considered for judgeships.

• Some people in New Jersey are talking about urging Governor Tom Kean (pronounced "Cain") to run for President in 1988. While Kean is attempting to portray himself as a moderate, his critics argue that the appellation "liberal" is more appropriate. JN will only note that Kean recently reappointed leftist Chief Justice Robert Wilentz to the New Jersey Supreme Court. Wilentz can now remain on the court for the next 11 years. To quote Annette Funicello, "beauty is as beauty does."

• The Federalist Society will be holding two events this year which will be of interest to judicial reformers. On January 30 and 31, it will hold a Lawyers Convention on "Changing the Law: The Role of Lawyers, Judges and Legislators." Speakers will include Associate Justice Antonin Scalia, Attorney General Edwin Meese III, Senator Orrin Hatch, Judges Robert Bork and Frank Easterbrook, and professor Larry Tribe, among others. Cost of the convention is $40 for non-members, $20 for members. Cost of the banquet is $35. For more information, call Eugene Meyer, Executive Director, The Federalist Society, 1625 Eye Street, N.W., Washington, D.C. 20006, (202)822-8138.

On April third and fourth of this year, the Federalist Society will be holding its annual symposium at the University of Chicago Law School. The subject of the symposium is "Crisis in Legal Theory: Revival of Jurisprudence." JN will provide more information on speakers as it becomes available.

• Landmark Legal Foundation, formerly known as Gulf & Great Plains Legal Foundation, has entered its second decade of public interest litigation directed at promoting the free enterprise system and limiting government regulation. Its diverse activities include representation of a company in a sexual discrimination suit, and a challenge to the Kansas Mail Ballot Election Act, among others. Landmark does not charge for its services and relies upon contributions to fund its activities. Readers interested in more information can contact Mr. Jerald L. Hill, President, Landmark Legal Foundation, 1000 Brookfield Building, 101 West 11th Street, Kansas City, Missouri 64105.

The following is a sampling of quotes from artiles about Crime and Punishment in Modern America, eds., Patrick B. McGuigan and Jon S. Pascale. The book is available for $9.95 in soft cover and $15.95 hardcover from: Publications Department, The Institute for Government and Politics, 721 Second St., N.E., Washington, D.C. 20002, (202)546-3004.

"Crime and Punishment in Modern America is a valuable resource for anyone interested in criminial justice issues. Indeed it would make a splendid colege and post-graduate text.. It is a worthy sequel to the Institute's earlier volume, Criminal Justice Reform: A Blueprint, which had a substantial influence on Congress' shaping of the Comprehensive Crime Control Act of 1984. This latest effort will, similarly, significantly add to the debate over how to win the fight against crime."

-- Judge Ralph Adam Fine, author of Escape of the Guilty.
Wisconsin state district judge
Washington Times, Dec. 29, 1986

"Confronted with spiraling costs and crowding in U.S. prisons, a group of conservative scholars and politicians is advocating alternatives such as restitution, community service and even beatings. Several of the 29 contributors to a book published last week in Washington that departs from conservative dogma on incarceration are eyeing the Republican presidential nomination in 1988. There was a wide agreement on reserving expensive prison space for violent criminals and putting those who commit non-violent property crimes to work, often outside prison, to repay their victims."

-- Michael Sniffen,
Associated Press story
November 12, 1986

"Whatever his or her political philosophy, every policy maker in America's many criminal justice systems should have Crime and Punishment in Modern America and be informed as to its point of view. Particularly for those concerned with criminal justice reform, this collection is invaluable. . . I look forward to reading the McGuigan-headed Judicial Reform Project's next scheduled major book, said to focus on tort reform, excessive litigiousness, and other civil justice issues. . . It will be hard pressed, however, to match the contribution to the conservative reform movement made now by this book."

-- David Wilkinson
Attorney General of Utah
review forthcoming

"A remarkable new document has recently been published. Entitled Crime and Punishment in Modern America, the book is a collection of expert conservative analysis and opinion on a wide range of criminal justice subjects. . . [This book] can be considered the most authoritative representative of contemporary conservative thought on these pressing issues."

-- Newsmaker Interviews
January, 1987

STATEMENT OF

BRUCE FEIN, PRESIDENT
BRUCE FEIN & ASSOCIATES

BEFORE

THE UNITED STATES SENTENCING
COMMISSION

IN SUPPORT OF THE COMMISSION'S STATUTORY
AUTHORITY TO PROMULGATE GUIDELINES
FOR FEDERAL CAPITAL OFFENSES

FEBRUARY 17, 1987
UNITED STATES COURTHOUSE
WASHINGTON, D.C.

Mr. Chairman and Members of the Commission, I am indebted for this opportunity to submit a statement amplifying on the Commission's statutory authority to promulgate sentencing guidelines for federal capital offenses. Several canons of statutory construction and case law developed by the United States Supreme Court compel an affirmative conclusion.

The Commission's duties are elaborated in section 994 of Title 18. Subsection (a) instructs the Commission to promulgate sentencing guidelines for use in criminal cases. It explicitly identifies sentences of probation, fine, or imprisonment for use of the guidelines, but nowhere suggests that the Commission should desist from promulgating guidelines for other sentences, such as forfeiture, capital punishment, restitution, or notice to victims. These latter penalties are authorized in Title 18, although not explicitly enumerated in subsection (a). See e.g., 18 U.S. Code 3554 (forfeiture); 3555 (notice); 3556 (restitution); death penalty authorized under 18 U.S. Code 32, 33, 34 (destruction of aircraft, motor vehicle, or related facilities resulting in death), 351 (murder of a Member of Congress, important executive official, or Supreme Court Justice), 794 espionage, 844 (f) (destruction of government property resulting in death), 1111 (first degree murder), 1716 (mailing of injurious article resulting in death), 1751 (assassination or kidnapping resulting in death of the President or Vice-President), 1992 (wilful wrecking of

train resulting in death), 2113 (bank robbery-related murder or kidnapping), 2381 (treason).

Subsection (b) fortifies the conclusion manifest in subsection (a) that the Commission should promulgate guidelines for the imposition of capital punishment. It directs the Commission, in the guidelines issued under subsection (a), to stay witnin a sentencing range consistent with all pertinent provisions of Title 18, United States Code. It is wholly consistent with the capital penalty provisions of Title 18 to issue guidelines, especially since a failure to act would raise constitutional doubts regarding their implementation. The Supreme Court has decreed that due process and Eighth Amendment considerations require death sentencing procedures to channel the discretion of the sentencing authority by enumerating aggravating or mitigating factors that should be considered in determining whether a death sentence is apropriate. See e.g., Gregg v. Georgia, 428 U.S. 153 (1976)). (A mandatory death penalty might be permissible for a limited category of offenses exceptionally dangerous to the public weal, such as the assassination of a President, treason, or espionage). Death sentencing guidelines are completely compatible with the death penalty provisions of Title 18.

A comparable statutory issue regarding procedural requisites for implementing substantive policy arose in United

States v. Thirty-seven Photographs, 402, U.S. 363 (1971). There the Court confronted a customs statute that authorized the seizure of obscene materials, 19 U.S. Code 1305 (a). The statute failed explicitly to create a mechanism for expedited judicial review of initial administrative determinations of obscenity resulting in seizures. The Supreme Court had announced in Freedman v. Maryland, 380 U.S. 51 (1965), however, that government schemes for suppressing obscenity pass constitutional muster only if expedited judicial review and final decisions addressing the obscenity issue are mandated.

Justice White, writing for the Court, maintained that Congress intended section 1305 (a) to incorporate strict time limits regarding judicial review. This interpretation was necessary, he reasoned, to save the statute from any arguable constitutional infirmity. The interpretation was also responsive to the congressional disapprobation voiced in legislative history against delayed judicial resolution of obscenity disputes. Setting time limits, moreover, did not require the Court to decide issues of policy appropriately left to Congress because a policy of promptness had already been declared. Thus, the Court held that section 1305 (a) required the initation of judicial forfeiture proceedings against obscene materials within 14 days of their seizure, and no longer than 60 days from the filing of the action to a

final decision of the district court.

As in Thirty-seven Photographs, the Commission should presume that Congress intended its death penalty statutes to be interpreted to avoid constitutional difficulties. Sentencing guidelines would achieve this objective.

Furthermore, in creating the United States Sentencing Commission, Congress worried over the absence of guidelines to constrain the discretion of the sentencing authority for any federal crime. In U.S. Code 991 (b) (1) (B), Congress proclaimed that a paramount purpose of the Commission's guidelines is to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by aggravating or mitigating factors..." The Commission's promulgation of guidelines for the imposition of capital punishment vindicates the congressional purpose of circumscribing the discretion of the sentencing authority in determining whether death is an appropriate sentence.

As with the Court's articulation of time limits in Thirty-seven Photographs, the Commission would be following congressional policy in prescribing mitigating or aggravating circumstances regarding capital offenses. Congress has

instructed the Commission to consider particular aspects both of the crime and the character of the offender. In 18 U.S. Code 994 (b), Congress identified as pertinent criteria the circumstances of the offense, the nature and degree of harm caused, the community view of its gravity, public concern aroused by the offense, deterrence, and the incidence of the offense. In 18 U.S. Code 994 (c), Congress has directed the Commission to consider the offender's age, education, vocational skills, mental, emotional and physical condition, employment record, family and community ties, role in the offense, criminal history, and dependency on crime for a livelihood in its sentencing guidelines.

The Commission would not be fashioning new policy in promulgating guidelines for capital punishment, but simply amplifying on criteria already voiced by Congress in section 994. The Commission might additionally consider the particular aggravating and mitigating factors selected by Congress in the Antihijacking Act of 1974.

For the capital crimes of aircraft piracy provided in 49 U.S. Code 1472 (i) (n), Congress determined in Section 1473 (c) (i) (6) that the following are mitigating circumstances: the youth of the offender; the offender's mental capacity or state of duress; an insubstantial role in the crime; and, a lack of any foreseeable risk that the crime would cause death. Congress specified in section 1473 (c) (i)

(7) the following aggravating factors: previous convictions for serious crimes; intentional creation of a grave risk of death to persons other than the victim; and, commission of the offense in an especially heinous, cruel, or depraved manner.

The Commission's death penalty guidelines should also respect the congressional directive in 18 U.S. Code 3553 that a sentence promote respect for the law, provide just punishment, and adequately protect the public from further crimes of the defendant.

Fidelity to congressional policy regarding the death penalty dictates the following guidelines:

Mitigating Factors

(1) age under 18;

(2) no prior criminal history;

(3) low incidence of the crime;

(4) lack of foreseeability that death would occur;

(5) community perception that the crime was unthreatening to the social fabric;

(6) insubstantial role in the crime;

(7) lack of education;

(8) mental, emotional or physical infirmity;

(9) no likelihood of recidivism;

(10) no danger created to persons other than the victim;

(11) crime committed under duress;

(12) any other evidence that the defendant desires to introduce, see Lockett v. Ohio, 438 U.S. 586 (1978).

Aggravating Factors

(1) commission of previous serious crimes;

(2) substantial likelihood of recidivism;

(3) high incidence of crime committed;

(4) dependency on crime for livelihood;

(5) creation of substantial community fear by the crime;

(6) prominent role in the commission of the crime;

(7) creation of physical danger to persons other than the crime victim;

(8) commission of the offense in an especially heinous, cruel, or depraved manner; and

(9) public harm caused by the offense.

If, by a preponderance of the evidence, the government proves an aggravating factor and the defendant fails to prove a mitigating factor, the death sentence shall be imposed. If no aggravating factor exists, or if a mitigating factor is established, there should be no death sentence. The sentencing procedures in capital cases should mirror those established for air piracy in 49 U.S. Code 1473.

The statutory omission of an explicit directive to the Commission to promulgate guidelines for death sentences

is unpersuasive evidence of an intent to withhold such authority. That Congress contemplated guidelines for death sentences is evident in the references to "other authorized sanctions" in 28 U.S. Code 994 (c) and (d) where particular aspects of a crime and an offender are suggested as aggravating or mitigating circumstances. Furthermore, section 3559 of Title 18 expressly includes the death penalty in classifying offenses for sentencing; and, the purposes of a sentence identified in Section 3553 of Title 18 -- including deterrence, just punishment, and respect for law -- would be subverted if the Commission refused to issue guidelines for the administration of capital punishment. In these circumstances, the teaching of Justice Holmes is instructive:

> "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.....[I]t is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it, and therefore we shall go in as before.'" Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908).

Finally, to conclude that Congress had empowered the Commission to promulgate death sentence guidelines without using explicit statutory language would be no legal novelty.

Recognition of comparable implicit statutory authority was upheld in United States v. New York Telephone Co., 434 U.S. 159 (1974), and Dalia v. United States, 441 U.S. 238 (1979).

In the former case, the Court held that Rule 41 of the Federal Rules of Criminal Procedure empowered district courts to authorize federal agents to install and use pen registers, and that the All Writs Act, 28 U.S. Code 1641 (a), authorized district courts to order private parties to assist in the installations. Rule 41 omitted explicit authorization of warrants for pen registers, but a failure to issue such warrants would have defied a congressional judgment that pen registers "be permissible"," 434 U.S. at 170. The Court in New York Telephone also interpreted the All Writs Act broadly to embrace orders to private parties to avoid frustrating the congressional tacit endorsement of pen registers as law enforcement tools. Similarly, rejection of a crabbed interpretation of the Commission's sentencing authority is necessary to prevent contradiction of the congressional judgment that death sentences be permissible.

In Dalia, the Court held that Title III of the Omnibus Crime Control and Safe Streets Act authorized district courts to approve covert entry to install electronic surveillance equipment. Although Title III omitted explicit reference to covert entry, its language, structure, and

purpose bolstered the conclusion that covert entries could be authorized. Title III did not disavow such power, and its authorization of electronic surveillance would have been largely thwarted in the absence of covert entries. They are needed for successful operation of electronic surveillance. Likewise, in establishing the Sentencing Commission, Congress nowhere disavowed the death penalty, and the promulgation of guidelines by the Commission is generally necessary for the administration of capital punishment.

An arguable foundation for holding that the Commission lacks authority to promulgate death sentence guidelines is the omission of the death penalty among the authorized sentences for individuals in 18 U.S. Code 3551 (b). But subsection (b) penalties are not exclusive, according to subsection (a), if Congress has "otherwise specifically provided...." And, Congress has specifically provided for the death penalty in several sections of Title 18.

* * * * * * *

In summary, time-honored canons of statutory interpretation, fortified by decisions of the Supreme Court, clearly establish the Commission's duty to promulgate guidelines for determining the propriety of a death sentence. Debate over the wisdom of capital punishment frequently arouses strong emotions because human life is at stake. Such

passions are fitting in a legislative or public arena where public policy is forged.

The duty of the Commission, however, is to implement public policy declared by Congress unswayed by emotions or idiosyncratic policy preferences. In discharging this duty as regards capital punishment, the Commission should heed the reminder of Justice Holmes in Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904) (dissenting opinion):

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reasons of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

PREPARED STATEMENT OF AMNESTY INTERNATIONAL USA
CONCERNING
GUIDELINES FOR THE IMPOSITION OF A FEDERAL DEATH PENALTY
BY THE UNITED STATES SENTENCING COMMISSION

Before the
United States Sentencing Commission
February 17, 1987

The United States Section of Amnesty International, in consultation with the International Secretariat of Amnesty International in London, welcomes this opportunity to present testimony before the United States Sentencing Commission concerning the drafting of guidelines for the imposition of a federal death penalty.

Amnesty International is a worldwide human rights movement. It is independent of all governments, political factions, ideologies, economic interests and religious creeds. Amnesty has formal consultative status with the United Nations, UNESCO and the Council of Europe; has cooperative relations with the Inter-American Commission on Human Rights of the Organization of American States; and has observer status with the Organization of African Unity. In 1977, Amnesty International received the Nobel Prize for Peace.

Amnesty International works for the release of prisoners of conscience--men and women detained anywhere for their beliefs, color, sex, ethnic origin, religion or language, provided they have not used or advocated violence. With over 500,000 members throughout the world, Amnesty also advocates fair and prompt trials for all political prisoners, and it opposes unconditionally the imposition of torture and the death penalty on any prisoner.

In 1985, Amnesty conducted a fact-finding project in the United States for the purpose of studying the death penalty and, in particular, the manner in which it is imposed. As a result of the project and its research, Amnesty issued a report which we would like to submit to the Commission for use in its deliberations. The report concludes that the imposition of the death penalty in the United States, despite serious and repeated attempts to ensure its fairness and consistency, continues to result in arbitrary and discriminatory executions.

The Commission has requested that Amnesty respond to two questions: (1) whether the Commission has jurisdiction to propose guidelines governing judicial imposition of the death penalty and (2) if it does, what are Amnesty's suggestions for the substantive content of those guidelines.

As an international organization Amnesty has no special competence to address the issue of whether this Commission has jurisdiction to propose guidelines for imposition of the death penalty. However, Amnesty considers the death penalty to be fundamentally different from any other penalty because it is irreversible. As the Amnesty report indicates, at least 23 wrongly convicted people have been executed in the United States in this century. This is the price of irreversibility.

The non-inclusion of the penalty of death with the other penalties for which the Commission is expressly authorized to propose sentencing guidelines is a recognition by the Congress of the fundamental difference between the death penalty and other penalties. Because the Commission's jurisdiction in this matter is at best uncertain, Amnesty believes that it would be wise for the Commission to leave to Congress the debate on whether application of the death penalty should be reintroduced at the federal level in the United States.

The Commission has also asked that Amnesty International comment on the protections that should be included in death penalty guidelines in the event that jurisdiction is assumed. As an initial matter, Amnesty urges the Commission to respect the internationally accepted minimum standards concerning the death penalty. Amnesty's investigation determined that current practices in the United States conflict with them. While the Amnesty Report describes the inadequacies of the current system at length and in detail, below is a discussion of the more serious problems we think are most relevant to these proceedings. These problems further support the position of Amnesty International that the death penalty is fundamentally different from all other penalties. Because it is not included within the mandate of the Commission, it should not be addressed in the proposed guidelines.

1. Execution of Juvenile Offenders Should be Prohibited

The imposition of the death penalty upon minors is in clear contravention of international law. Studies show that children and adolescents are less responsible than adults for their actions and more susceptible to rehabilitation. Imposing a death penalty on children for actions committed at an age younger than 18, however heinous the crime, violates "contemporary standards of justice and humane treatment" and violates U.S. obligations under international law.

Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR) and Article 4(5) of the American Convention on Human Rights (ACHR), both signed by the United States Government in 1977, unequivocably state that capital punishment shall not be imposed upon persons who are under 18 years of age at the time of the crime. The 1949 Geneva Convention concerning the protection of civilians in time of war, signed and ratified by the United States, also forbids the execution of persons who were under age 18 at the time of the

crime. Although this provision of the Geneva Convention is applicable only during time of war, it demonstrates the generally accepted nature of the international standard prohibiting juvenile executions.

In May, 1984, the United Nations Economic and Social Council (ECOSOC) adopted a series of safeguards guaranteeing protection of the rights of those facing the death penalty ("Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," ECOSOC Resolution 1984/50 reprinted at pp. 222-223 of Amnesty Report). At paragraph 3, these guidelines reiterate the prohibition against juvenile executions contained in the ICCPR, the ACHR and the Geneva Convention.

Although the United States is a signatory, not a party, to the ICCPR and the ACHR, it still has obligations relative to their provisions. Article 18 of the Vienna Convention on the Laws of Treaties requires that a signatory nation refrain from doing that which would "defeat the object and purpose" of a signed treaty. Therefore, permitting the death penalty to be imposed on persons who were younger than 18 at the time of the crime would constitute a violation of the treaties which the United States has signed.

Information available worldwide indicates that there is almost universal adherence to the international norm prohibiting executions of juveniles. More than 40 countries that retain the death penalty have statutes which specifically prohibit the imposition of that sentence on people who were juveniles at the time of the crime. Of the thousands of executions recorded by Amnesty International between January, 1980 and May, 1986, only eight were juvenile executions: Three of them occurred in the United States; two in Pakistan; and one each in Bangladesh, Barbados and Rwanda.

In May, 1986, at least 32 juvenile offenders (ranging in age from 15-17) were already under sentance of death in this country, even though the U.S. Supreme Court has yet to determine the constitutionality of juvenile executions. See Eddings v. Oklahoma, 455 UA 104 (1982).] Amnesty International recommends that a prohibition on juvenile executions be adopted to conform with minimum international standards.

2. Execution of the Mentally Insane Should be Effectively Prohibited

Paragraph 3 of the ECOSOC guidelines states that the death penalty shall not be carried out on people who have become insane. Not until June, 1986, did the United States Supreme Court rule that the Eighth Amendment prohibits execution of an insane prisoner. Tragically, this decision was too late to stop the execution of Arthur Goode about whose competence even the the Eleventh Circuit Court of Appeals had "serious doubts." [See Goode v. Wainwright, 704 F.2d 593, 601 (1984).] Amnesty's investigation of states' practices revealed that Mr. Goode was

not the only prisoner who suffered a violation of the ECOSOC guidelines; several other US prisoners who appeared to suffer from serious mental illness have also been executed or have come close to it. (See AI Report at pp. 76-87.)

Although the United States now prohibits the execution of the insane, Amnesty found deficiencies in U.S. practice with regard to the mentally incompetent. There currently are serious absences of procedural safeguards and clear standards which can effectively assess competence and thereby conform to the minimum standards of the ECOSOC guidelines. For example, seventeen states currently permit insanity determinations only if the prisoner awaiting execution appears to the warden or the sheriff in charge of custody to be insane. In other states only "reasonable" insanity claims must be examined by a state judge, and in some states a hearing into the matter is not even required.

Amnesty International recommends that an effective prohibition on the execution of the mentally ill be adopted to conform with minimum international standards.

3. Elimination of Racial Discrimination in the Application of the Death Penalty

In its investigation of the death penalty in the United States, Amnesty found that, as practiced by the states, there is evidence of race discrimination. Amnesty considers this evidence to be a matter for serious and urgent action. In its memorandum of December 15, 1986 (at Attachment 2 pp. 9-10), the Justice Department, recognizing the discrimination issue, proposes that the Commission adopt guidelines requiring a jury to certify that its decision was free of discrimination. Such a procedure is seriously deficient in light of the detailed studies and statistics (relating to executed prisoners as well as those currently on death row in the United States) which demonstrate that racial disparities in death sentencing result from actions taken from the moment a person is arrested through the time of actual execution. (See AI Report at pp. 54-64.)

While the Justice Department proposes an oversight commission to monitor, inter alia, issues of race discrimination, Amnesty International believes these measures are insufficient where an improperly sentenced human being could suffer death in the interim.

Amnesty is also aware of the McCleskey case currently pending before the US Supreme Court which may refine the law in this regard. However, Amnesty International was disturbed to find that the Eleventh Circuit Court of Appeals, in considering the evidence presented on race discrimination, appeared willing to tolerate a discernible level of racial unfairness in a system of capital punishment.

Amnesty International recommends that a moratorium on execution be adopted pending the outcome of a study which would use impartial specialists to evaluate all relevant data and which would be commissioned to make a serious inquiry into the issue of race disparities in sentencing and executions. (See AI Recommendation 6, AI Report at p. 190.)

4. Provision of Adequate Legal Assistance for Condemned Prisoners at all Stages of the Proceedings

Paragraph 5 of the ECOSOC guidelines requires that a person charged with a capital crime have adequate legal assistance "at all stages of the proceedings." During its mission to the United States, Amnesty found substantial evidence that many defendants are assigned inexperienced counsel, ill-equipped to handle capital cases and working with severely limited resources.

Justice Thurgood Marshall, at a conference in 1985, strongly criticized well-intentioned, but ill-prepared, trial lawyers in capital cases whose clients never had "a fair opportunity to defend their lives in the courtroom." Recognizing the need for better representation of capital defendants, in 1985, the ABA House of Delegates passed a resolution recommending that no fewer than two attorneys be appointed in capital cases, at least one of whom should have substantial criminal trial experience.

In addition to the absence of counsel with adequate experience in capital cases, Amnesty found that the resources necessary to provide indigent capital defendants in the United States with adequate representation were lacking. For example, in Louisiana, a maximum fee for assigned counsel in capital cases was only $1,000; in Virginia, the fees paid to assigned counsel in capital cases averaged only $687. These amounts were far short of the average $50,000 minimum fee paid to qualified, privately-retained counsel in capital cases. The disparity, Amnesty found, has decided effect on the outcome of a trial. A recent study conducted in Texas found that capital defendants in Texas with court-appointed lawyers were more than twice as likely to receive a death sentence than those with retained counsel.

Amnesty also found that public funding for the representation of indigent defendants ceased in most states after a death sentence has been affirmed on direct appeal. Effectively, habes corpus appeals in capital cases are handled by a small number of lawyers who are prepared to take on capital appeals for little or no pay. When the number of people sentenced to death increased during the early 1980s, a serious shortage of the volunteers available for habeas corpus appeals was created. The shortage of lawyers at this stage, Amnesty found, affects not only a prisoner's opportunity for pursuing his or her appeal, but also adversely affects preparation of material for review in clemency proceedings.

Amnesty International recommends that adequate legal representation be provided each capital defendant at all stages of his or her case.

5. Reintroduction of a Federal Death Penalty Is a Violation of International Standards

Amnesty International respectfully submits that the reinstatement of the death penalty under federal law is in clear conflict with international standards.

Article 4(2) of the ACHR states that the "application of [capital punishment] shall not be extended to crimes to which it does not presently apply." The United States is obliged, having signed this Convention, to refrain from acting contrary to this provision. To reinstate a federal death penalty at this time would, in Amnesty's view, violate this country's international obligations.

Additionally, the growing international consensus that the death penalty is a violation of the right to life and the right not to be subject to cruel, inhuman or degrading treatment or punishment is incompatible with any movement to reintroduce it and expand the crimes for which it would be imposed.

In December, 1971, the United Nations General Assembly adopted Resolution 2857 (XXVI) stating that

> ...in order fully to guarantee the right to life, as provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed with a view to the desirability of abolishing this punishment in all countries.

This resolution was reaffirmed by the General Assembly in Resolution 32/61 of 8 December 1977. In 1984, The Inter-American Commission on Human Rights decided to call on all countries in the Americas to abolish the death penalty. And by May, 1986, fifteen of the twenty-one member states of the Council of Europe had signed the Sixth Optional Protocol to the European Convention on Human Rights, abolishing the death penalty for peacetime offences and preventing its reinstatement in countries which had already abolished it.

Since 1975, at least one country a year has ended its use of the death penalty in law, or having done so for ordinary offences, has gone on to abolish it for all offences. Even attempts to reinstate capital sentencing in several countries during these same years have been unsuccessful.

As of May, 1986, Amnesty found that twenty-eight countries did not have a death penalty for any crime. Eighteen countries imposed the death penalty only for exceptional crimes,

meaning under military law or crimes committed in exceptional circumstances such as wartime. Turkey was the only Western European country found to have carried out executions in recent years. Many of the other 129 countries which Amnesty determined retained death penalty laws have not carried out executions in recent years. (See Appendix 12 of AI Report at pp. 228-231 for a list of abolitionist and retentionist countries.)

Despite this international trend, in May, 1986, Amnesty found that the United States already had a total of 1,720 prisoners on death row. This total represents the highest number of death row inmates ever recorded in this country.

Amnesty International calls upon the federal government to recognize and conform to the international trend toward abolition of the death penalty and to refrain from its reintroduction at the federal level in the United States.

6. Conclusion

There are other factors discovered by Amnesty during its mission to the United States that contributed to its finding that imposing the death penalty under this system of "guided discretion" has failed to ensure fairness, consistency, and compliance with internationally recognized minimum standards. For example, failure to require that courts conduct a true comparative review of death sentences may mean that general inconsistencies and arbitrariness remain unchecked. For another example, allowing habeas proceedings to be expedited has led to the execution or near-execution of several prisoners under circumstances which would appear to violate the minimum standards set out in the ECOSOC guidelines. (See, for example, paragraph 8 of ECOSOC guidelines.)

This Commission should consider the current arbitrariness of state death penalty practice and the dangers of incorporating it into federal law. However, Amnesty International, which has monitored the use of the penalty on a regular and worldwide basis, is convinced that no system of capital punishment can ensure fairness and consistency.

Amnesty International urges the United States to comply with the U.N. Resolution of 1977 that called on all nations to restrict progressively the offenses for which capital punishment can be imposed with a view to its eventual abolition.

DP 0053

TESTIMONY

BEFORE THE

UNITED STATES SENTENCING COMMISSION

Jonathan E. Gradess
for the
National Coalition Against the Death Penalty

February 17, 1987
United States Court House
Washington, D.C.

My name is Jonathan Gradess, and I appear before you today on behalf of the National Coalition Against the Death Penalty. I am here to urge you to withdraw capital guidelines from this Commission's agenda.

The circle of nations that maintains the death penalty is growing smaller as we speak. Eventually the death penalty is going to be abolished in the world and in this country because it is wrong. Thirteen of our states - the exact number of jurisdictions that built America - today reject the death penalty. Studies reveal that when the American people are provided with accurate information concerning the death penalty, they change their minds and come to oppose it.

(See, Sarat, A. and N. Vidmar (1976) "Public Opinion, The Death Penalty and the Eighth Amendment: Testing the Marshall Hypothesis," Wisconsin Law Review 171-206; Vidmar and Dittenhoffer (1981) "Informed Public Opinion and Death Penalty Attitudes, 23 Can. J. of Criminology 43.)

The data cited in my testimony to you today support our Coalition's conclusion that Americans can and will be gently turned away from the death penalty because it is unjust. Because it is barbaric. Because it is more costly than life imprisonment. Because it kills innocent people. Because it provides no remedy to homicide victims' families for their grief, their pain, or their loss. Because it discriminates against the poor. Because it masks lethal patterns of institutional racism. Because

it flies in the face of the scriptural traditions of Christianity and Judaism and Islam. Because by its weight and cost and image it transforms our criminal justice system into something malignant.

When the American people reflect upon these known facts, they change their own minds. Most Americans of our experience do not bear such hatred for people that they find it difficult to change their minds. Most do so with ease, greatly relieved by their decision. The data reveal that some people do not change their minds and are not so relieved, but that percentage represents a minority of the American people, and standing alone - in a plebiscite - that minority, without commissions like yours, could not make the death penalty American policy. And when I say "commissions like yours," I give some evidence of how invasive the death penalty really has become. The United States Sentencing Guidelines Commission sits before me today contemplating whether it should "legislate" death penalty guidelines.

Our Coalition is now in every state. We are dividing those states by county and by town and by village, by neighborhood, by block and by church. The process may seem invisible to you, but I want you to know that it is happening, and that we are going to close down the death penalty in the United States. We will lead our national community back to decency and compassion. We ask of you today only one small contribution

to our effort, and that is to abandon your unwise work in capital sentencing guidelines.

* * * * *

Let me share with you a perspective which may be somewhat more palatable to you than our abolitionist position.

Sentencing guidelines, as you all know, began not as a vehicle to drive sentencing policy. Guidelines grew - in a sense as you have - from early experiments with parole decisionmaking and the federal parole guidelines. Those experiments and subsequent guidelines efforts were premised on the belief that judges by looking at current sentencing practices could create a management tool for the exercise of discretion. The thought was to pool current information, look at it and apply it, create a "feedback loop" to evaluate it, and then fine tune it.

The pure guidelines theorists, if they were testifying before you today, would say, "Since the death penalty is not current federal practice, and since guidelines are but a management tool, not a policymaking vehicle, don't include capital punishment in your guidelines system."

But pure guidelines theory gave up the ghost some years ago. More than any other group, you Commissioners know that today even

non-capital sentencing guidelines have become politicized. And we are here thinking about adding the death penalty to your already hard, unpopular and complicated work. You must know that whatever credibility your sentencing guidelines project may have for non-capital sentences, adding death penalty guidelines will surely destroy that credibility. We urge you then, if only in your own self interest, to abandon your inquiry into death penalty guidelines.

Those who understand sentencing guidelines theory as you do must know that sentencing guidelines are designed to help in three particular ways uniquely unrelated to the death penalty. First, guidelines seem to be best suited when they are applied <u>after</u> the in/out decision has been made. At that point less weight needs to be given to individualized factors.

Second, guidelines are most helpful when the only question is the length of time to be served.

Third, guidelines are ordinarily designed for aggregating people within decisionmaking systems - meaning consensually chosen lengths of time associate themselves with "so-called" principled criteria to pinpoint where most individuals with particular characteristics are presumptively to be placed.

The historic intent of guidelines sentencing was to allow outlyers - exceptions to the guidelines rule - to be treated differently.

The problem with applying sentencing guidelines to death penalty cases in part may be seen as a result of these three issues, particularly as they converge. Death penalty decision-making is uniquely related to the characteristics of an offender. Mandatory death sentences are impermissible. Mitigation hearings are designed to explore the characteristics of human beings, and we want juries to decide in part on an intuitive basis as the conscience of the community what sanction to impose in a particular case. Our constitutional jurisprudence leans in favor of jury intuition in death cases based on jury feelings about mitigating circumstances and jurors' feelings about sparing a life. Any effort to rigidly codify this decisionmaking process will fail.

Second, except in the broadest theological sense, execution does not involve a length of time.

Third, all death penalty cases are unique. Each must be treated as an exception to guidelines rules, and at the legislative stage none may carry a presumptively "correct" sentence.

It follows that even if the Sentencing Guidelines Commission has been delegated the power from Congress which it today considers asserting, it should not in the interest of justice or intellectual integrity fashion guidelines for capital cases. Without conceding that power, we think it would be foolishly irresponsible for you to try to do so in the 60 days that you have. I know that you have been urged to extend your schedule. I do not think you can extend

it far enough into the future to incorporate capital sentencing guidelines.

In any review of the death penalty, there is an imperative need for quiet and deliberative discussion. There is a need for increased citizen understanding. We are obliged to conduct a true and in-depth penological inquiry into the effacacy of the death penalty as compared with lesser penalties. We must examine alternatives to violence in this country, and in doing so we must examine alternative sentences which are by no means as costly or invasive as the death penalty. These tasks cannot be performed by this Commission unless you are to perform them poorly.

In my remaining minutes with you, I wish to sketch for you some of the even broader public policy issues which require resolution before any entity should even contemplate the reintroduction of a federal death penalty.

1. The majority of credible scientific research on deterrence, including that cited for the opposite proposition by the Department of Justice, concedes sufficient flaws in deterrence methodology that one cannot rely on deterrence as a basis for the death penalty. How will you fashion the guidelines for a capital sanction until you resolve the deterrence debate?

2. The death penalty functions like a lottery, executing disproportionately poor and minority people. This issue, crucial to any inquiry designed to produce capital guidelines, requires

a fundamental examination of capital practices. Sentencing guidelines designed to address capricious decisionmaking would require extensive data collection from the states and a model for cross-jurisdictional analysis to the federal system. We do not think you are prepared to perform this task nor do we think you should perform it.

3. Calling the risk of erroneous convictions remote does not make it remote. Every day in the United States the death penalty places innocent people at risk. Most Americans vividly fear the risk of error. They have good reason to. Researchers Michael Radelet and Hugo Bedau have documented 349 cases in which innocent people have been, in this century, convicted of homicide or sentenced to death for rape. How will you factor in the risk of erroneous convictions in your capital guidelines? Will you deliberate on the question? Whether you ignore it or deliberate upon it, you will not resolve it.

4. There is a 4.3 times greater chance of being executed if your victim is white than if your victim is non-white, according to evidence from the most monumental social science inquiry into sentencing deliberations ever performed in this country.

Racial disparity in the death penalty cannot be removed by sentencing guidelines. Try and you will fail. Fail and you will not perform your duty to remove sentencing disparity.

5. It is now crystal clear that capital cases cost inordinately more than non-capital cases to prosecute and conduct, and that criminal justice systems with death penalties cost inordinately more than criminal justice systems without them. The cost of the death penalty far exceeds the cost of life imprisonment.

Significantly, your death penalty guidelines will add to these costs. Particularly due to the unusual method by which your guidelines would be promulgated, they will generate litigation in every federal district in every death penalty case concerning your authority, Congress's administrative veto, and the odd course by which guidelines would resurrect constitutionally defective federal death penalty statutes. Guidelines would thus foster an even greater consumption of judicial resources within the federal circuits than is already under way. In some jurisdictions within the death belt, as much as 30 percent of the judiciary's time is currently being expended on death penalty litigation. Consider cost as you will, but recognize that your entry into this question, if it results in capital guidelines, will generate new and extensive death penalty costs for the American taxpayer.

6. Your Commission must, before proposing capital sentencing guidelines, determine whether or not defects in the nation's public defense system create a routine risk of

unreliability in guilt-phase verdicts. If you conclude that there is such a risk of error in guilt-phase verdicts, you must conclude that capital sentencing guidelines cannot be fashioned to remedy the problem. The evidence is overwhelming that the risk of guilt-phase error exists.

In sum, the National Coalition Against the Death Penalty does not believe that this Commission should promulgate capital sentencing guidelines. Your Commission is uniquely unsuited to perform the task you are contemplating, and we urge you to abandon it.

Thank you.

NCADP

National Coalition Against the Death Penalty

FOR MORE INFORMATION:
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February 11, 1987
F O R I M M E D I A T E R E L E A S E

DEATH PENALTY FOES CHALLENGE SENTENCING COMMISSION'S AUTHORITY

Representatives of the National Coalition Against the Death Penalty (NCADP) today challenged whether the U.S. Sentencing Commission has the authority to include death penalty procedures in its revision of federal sentencing guidelines.

NCADP Director Leigh Dingerson cited both the history of the Commission as well as the intensely emotional nature of the death penalty debate. "Clearly, Congress did not intend for the Commission to address the explosive and divisive question of capital punishment. Elected officials, not presidential appointees, should decide whether or not the federal government belongs in the business of killing its own citizens." Attempts at reinstating procedures for a federal death penalty have failed in Congress in recent years

Dingerson added that the possible inclusion of death penalty procedures in the guidelines has already sparked significant opposition from a vocal array of organizations and individuals across the country. "Groups that otherwise might support the new guidelines will vigorously fight against them if they include the death penalty," she warned.

Dingerson went on to announce that Jonathan Gradess,

---more---

Executive Director of the New York State Defenders Association, will testify on behalf of the NCADP at the Sentencing Commission's public hearing on the death penalty February 17. Gradess authored a 1986 study showing that a return to the death penalty would cost New York government roughly $1.8 million per execution, or three times the price of life imprisonment.

Dingerson concluded that the death penalty "has never proven itself a deterrent -- in fact, it actually sanctions and fosters the brutality we all oppose. It is costly, it is discriminatory, it is undeniably barbaric. In short, the death penalty is dead wrong."

According to Dingerson, the National Coalition Against the Death Penalty, formed in 1976, has over 100 national, regional, and local affiliates in 33 states. The only national single-issue group working to abolish capital punishment, the Coalition supports research, educational, and advocacy endeavors. Members include the major Protestant denominations, the U.S. Conference of Catholic Bishops, several national Jewish organizations, the American Civil Liberties Union, the American Friends Service Committee, Amnesty International, and the NAACP.

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Summary

Authority of the U.S. Sentencing Commission to Include Capital Punishment in its Sentencing Guidelines

The U.S. Sentencing Commission lacks authority to include capital punishment in its sentencing guidelines, for the following three reasons:

1) The Congress could not have delegated the death penalty issue to the Commission even if it wanted to: The establishment of aggravating and mitigating circumstances for the death penalty is fundamentally different from the Commission's task of identifying aggravating and mitigating factors to be balanced in non-capital cases. The Supreme Court has said that in capital cases, there are three levels of inquiry: first, whether the defendant committed the crime; second, whether at least one aggravating factor, as "established by statutory definitions," exists, so that the defendant is death-eligible; and third, a balancing of all the circumstances of the case--whether in extenuation, aggravation or mitigation--against each other. Zant v. Stephens, 33 Cr.L. 3195, 3198 (1983). It is the second level which is unique to capital cases. The process of prescribing aggravating circumstances to be applied in this second level is a process of prescribing the elements of the crime itself, entailing a system-wide, policy judgment (as opposed to a factfinding determination) of who shall live and who shall die. And the Supreme Court has held that such determinations regarding "the proper apportionment of punishment . . . are peculiarly questions of legislative policy." Gore v. United States, 357 U.S. 386 (1958).

2) Inclusion of capital punishment is statutorily precluded: Section 3551 of title 18, United States Code, enacted as part of the Sentencing Reform Act of 1984, under which the Sentencing Commission was established, provides an exclusive list of "authorized sentences" for federal offenses--limited to probation, fine, imprisonment, forfeiture, notice to victims, and restitution. The death penalty is not specified.

The Justice Department argues that section 3551 can be read as excluding the death penalty as an authorized sentence only if there has been a repeal, whether express or implied, of the various federal death penalty provisions which remain in the criminal code (e.g., for murder, treason, and presidential assasination) even though they may not meet the constitutional requirements set forth by the Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972). This is a "straw man" argument, a non-issue; it ignores the legal effect of Furman--that is, to void all state and federal death penalty provisions which fail to provide for consideration of aggravating and mitigating circumstances. The death penalty is no longer an "authorized sentence" under such provisions of federal law; its imposition would be unconstitutional. On this point, there is unanimous agreement

among the House and Senate Judiciary Committees, the Justice Department, and the federal courts. (See H.R. Rept. no. 96-1396, at 434 (1980), citing appellate decisions in the Fourth, Fifth, Eighth, and Eleventh Circuits, and in various Federal District Courts; S. Rept. no. 99-282, at 2 (1986); Testimony of Assistant Attorney General Stephen S. Trott before House Judiciary Subcommittee on Criminal Justice, November 7, 1985, at 7, n.4). In enacting the 1984 Sentencing Reform Act, the Congress did not change this situation; by providing no specific new authority for a federal death penalty, it simply left intact the status quo ante--that is, death penalty provisions which are constitutionally void and unenforceable.

This limitation and section 3551 delimit the Sentencing Commission's authority promulgate guidelines for a federal death penalty, no matter how non-exclusively the Commission's authorizing legislation, in section 994(a)(1) of title 28, may be phrased.

3) The legislative intent emphatically and unambiguously excludes the death penalty: Even if it is assumed for the sake of argument that the statute does not directly preclude consideration of the death penalty by the Commission, there can be no dispute that it does not expressly permit it. The result is an ambiguity in construing the statute, so that, under settled rules of statutory construction, guidance must be sought from the legislative history.

The Sentencing Reform Act originated and was developed exclusively in the Senate, and on the day that it first passed the Senate in 1984, there were statements from leaders of both parties, including the Chairman and Ranking Minority Member of the Judiciary Committee, to the effect that capital punishment was so controversial that it had been removed from the crime package in the interests of obtaining consensus. Indeed, the Senate report on the Sentencing Reform Act states that: "To enhance the potential for ultimate enactment of a comprehensive crime bill, the Committee decided to deal with a number of the more controversial pending issues in separate legislation . . . including capital punishment (S. 1765)." S. Rept. no. 98-225 (1983). Although the Senate did pass S. 1765, the House did not act on it.

Moreover, the Congress has continued since 1984 to wrestle with death penalty legislation--with the Justice Department taking the lead, in fact, in urging that legislation to authorize a death penalty remains necessary. The continuing controversy of the issue is demonstrated by the Senate's intense debate and rejection of death penalty legislation in the context of last Fall's omnibus drug legislation; supporters of the death penalty were unable to muster the 60 votes necessary to break a filibuster (the vote was 58-38)--a result difficult to reconcile with the argument that the 1984 legislation, which passed the Senate by a vote of 98-1, was designed to establish a federal death penalty.

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February 18, 1987

The Honorable William W. Wilkins, Jr.
Chairman, U.S. Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Mr. Chairman:

Enclosed is a copy of my testimony that I summarized yesterday at the hearing, including a copy of our brief in United States v. John Anthony Walker, Crim. No. H-85-0309.

Thank you for the opportunity to present our views to the Commission on this important topic.

Sincerely yours,

Paul D. Kamenar
Executive Legal Director

PDK/cme
enc.
cc (w/ enc.): Michael K. Block
Stephen G. Breyer
Helen G. Corrothers
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TESTIMONY OF THE WASHINGTON LEGAL FOUNDATION

PRESENTED BY PAUL D. KAMENAR

EXECUTIVE LEGAL DIRECTOR

BEFORE THE

UNITED STATES SENTENCING COMMISSION

WASHINGTON, D.C.

FEBRUARY 17, 1987

Mr. Chairman and Members of the Commission:

On behalf of the Washington Legal Foundation (WLF), I appreciate the opportunity to testify once again before the Commission on its formulation of sentencing guidelines to be used by federal courts. I refer you to our earlier testimony of December 3, 1986 relating to our views on the proposed sentencing guidelines, particularly our request -- which apparently was one of the first -- that the Commission should issue, and indeed had the authority to issue, capital punishment sentencing guidelines.

WLF is a national non-profit public interest law and policy center with over 200,000 members and supporters nationwide. We are the only major public interest law organization that consistently has appeared in the courts supporting capital punishment. We have also debated the issue on numerous occasions against the ACLU, NAACP Legal Defense Fund, and other opponents of capital punishment.

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I. Current State of Federal Capital Punishment.

As you know, federal law currently provides for the death penalty for certain federal crimes such as homicide, espionage, and aircraft hijacking. For example, on page 21 of your report, Section A211 expressly and properly refers to the availability of the death penalty for "Homicide--Level One." However, the Commission has developed no guidelines on when this sentence should be imposed. There are those who argue that the federal

death penalty is unconstitutional in light of the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), because there are no sentencing guidelines or procedures to implement the penalty. However, the Supreme Court has never addressed the constitutionality of the death penalty for federal crimes imposed under federal procedures. If it did, we maintain (as did the federal district judge who first addressed this issue in 1984 in an espionage case, United States v. Harper, No. CR-83-0770-SC (N.D. Calif. Jan. 13, 1984)) that the Court would find the federal capital punishment laws to be clearly constitutional. Our position is described in detail in legal briefs which we filed in all of the John Walker spy ring cases. (See Exhibit attached hereto). In the Jerry Whitworth espionage case, federal judge John Vukasin heard oral argument from us on the issue. Unfortunately, no federal prosecutor or U.S. Attorney has sought the death penalty for these kind of federal capital cases since 1972 because, I believe, of their serious misinterpretation of the law, or their unwillingness to request the punishment.

In brief, our argument is the following: First, unlike the state sentencing procedure found unconstitutional in Furman v. Georgia, the federal system provides for a bifurcated trial, i.e., a guilt and innocence stage and a separate sentencing stage or hearing. Secondly, under Rule 32 of the Federal Rules of Criminal Procedure, a pre-sentence report is prepared focusing on the particular defendant and his crime, and that

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aggravating and mitigating circumstances can be presented and considered by the judge before imposing the sentence. Indeed, Rule 32 was cited with approval by the Supreme Court approval in Gregg v. Georgia, 428 U.S. 153, 190, n. 37 (1976), a case which reinstituted the death penalty in the States, as an example of the kind of procedure that focuses and channels the sentencing discretion of the Court. These two procedures are all that is constitutionally required to reduce the risk of arbitrary sentences. Thirdly, the sentencing authority in federal cases, unlike the state systems, is an unelected federal judge with life tenure with experience in sentencing matters. Thus, there is little likelihood for political pressure or bias to infect the sentencing process. Thus, there is no constitutional requirement that guidelines be promulgated, either by the Congress or this Commission in order to impose capital punishment. See also Zant v. Stephens, 103 S.Ct. 2733, 2744 (1983) (court looks to "legislative or court-imposed standards"). There is no constitutional requirement that a jury impose the death penalty. Spazians v. Florida, 104 S.Ct. 3154 (1984).

For example, if John Walker were given capital punishment which many believe he so richly deserved, not even the ACLU could make the novel argument that capital punishment is being used discriminatorily, unless they want to argue that it is discrimination to execute white middle-class males.

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Thus, in our view, regardless of whether this Commission issues sentencing guidelines for capital punishment, federal judges will continue to possess the legal authority to impose a capital sentence regardless of whether federal prosecutors continue to shy away from seeking it. However, by drafting appropriate guidelines, we believe both prosecutors and judges will begin to realize that capital punishment can be imposed.

II. Legal Authority to Draft Guidelines

The authority for the Commission to draft capital punishment guidelines may be found in 28 U.S.C. §§ 944(a)(1)(2), (b). In § 944(a)(1), for example, Congress mandated that the commission promulgate "guidelines...in determining the sentence to be imposed in a criminal case, including" probation, a fine, or term of imprisonment. The term "including" is not exclusive of all other punishments that can be imposed. In § 944(b), Congress stated that the "Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall,...establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code." Clearly, the capital punishment provisions in title 18 are pertinent sentencing provisions. Finally, in § 994(a)(2), the Commission may issue "general policy statements regarding the application of the guidelines or any other aspect of sentencing [that]...would further the purposes set forth in section 3553(a)(2)...." (Emphasis added).

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If, however, the Commission decides not to issue any guidelines on capital punishment, we suggest that the Commission make clear in the preface to its other guidelines why it decided not to do so, and to indicate that the Commission's failure to issue such guidelines should in no way indicate that capital punishment is not an available or proper form of punishment for those federal crimes where Congress has expressly provided for it.

III. Purpose of Capital Punishment

We submit that capital punishment has both a deterrent effect as well as serves the valid principle of retribution. These value judgments were already made by the Congress that enacted those federal laws which contain the death penalty. By not having capital punishment as an available punishment, society demeans the value of innocent human life by saying, in effect, to the murderer, terrorist, or traitor "no matter how many innocent lives you slaughter, or how much you have jeopardized the safety of an entire nation, we will not impose the ultimate punishment on you but will incarcerate you at best, taking care of basic needs. It should be noted, for example, that the multiple "life sentences" given to John Walker are phony since he is eligible for parole in 10 short years.

The deterrent function of capital punishment was recently demonstrated by Professor Stephen K. Layson in his 1985 study showing that for every execution of a convicted murderer on the

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average prevents about 18 murders from occurring. As Professor Layson concluded "The evidence is clear: By taking the life of a murderer, we can save innocent lives." Layson's study basically confirms an earlier study by Isaac Ehrlich and shows that if anything, Ehrlich underestimated the deterrent aspect of capital punishment. We submit that for federal capital crimes, the deterrent function would be even greater since some of the federal capital crimes like espionage are crimes which involve a high degree of thought and planning.

There are those who criticize the death penalty claiming that it is imposed disproportionately on minorities. However, the statistics show otherwise. In fact, according to a Department of Justice study issued August 25, 1985, whites are 36 percent more likely to receive the death penalty than blacks. Death penalty foes, having failed to prove discrimination against the murderers, have desperately and heretofore unsuccessfully argued that capital punishment discriminates on the basis of the race of the victim. The support for this novel argument is a highly criticized study by Professor Baldus which is the basis for the discrimination argument in McCleskey v. Kemp, No. 84-6811, a case currently before the Supreme Court.

CONCLUSION

WLF submits that the Commission has the authority and duty to issue sentencing guidelines for capital crimes. The

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guidelines or offender and offense characteristics should focus on the nature of the crime as well as the prior criminal history of the defendant. The Commission could promulgate such guidelines along the lines of those contained in capital punishment statutes of the various states. However, certain crimes, by their own definition, are aggravated such as espionage. It should be noted that when the State of Georgia revised their capital punishment laws following Furman v. Georgia, 408 U.S. 238 (1972), they made no change to Georgia's espionage law which also provides for capital punishment. The Commission should refrain from promulgating extensive guidelines and should indicate that the finding of at least one aggravating circumstance is sufficient for imposing capital punishment.

We oppose the Department of Justice's suggestion that the Commission adopt the guidelines offered by Congress in recent death penalty proposals on the grounds that such guidelines are too extensive and confusing. Our views on the federal legislation are contained in our testimony before the Senate Judiciary Committee on S.239 on September 24, 1985, a copy of which is attached hereto.

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S. HRG. 99-497

DEATH PENALTY LEGISLATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 239

A BILL TO ESTABLISH CONSTITUTIONAL PROCEDURES FOR THE IMPOSITION OF THE SENTENCE OF DEATH, AND FOR OTHER PURPOSES

SEPTEMBER 24, 1985

Serial No. J-99-53

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The CHAIRMAN. Mr. Kamenar, you may proceed.

STATEMENT OF PAUL D. KAMENAR

Mr. KAMENAR. Thank you very much, Mr. Chairman.

My name is Paul Kamenar, executive legal director of the Washington Legal Foundation and I am also an adjunct professor of law at the Georgetown University Law Center.

We support the death penalty, as serving both the principled values of deterrence and retribution and in that regard, I differ with the rest of the people on the panel here, sitting with me.

We support and have been involved in many cases before the Supreme Court and indeed, in the current Walker spy cases. We have filed a brief with the courts in those cases that argues that the death penalty provision which is currently on the books for espionage, can indeed be applied.

I would like to submit for the record, Mr. Chairman, if I may, a copy of our brief which makes that point.[1] Indeed, the Justice Department after receiving that brief, and when ordered by the court to give its position, the Justice Department did not oppose it and in fact, said that our arguments are not without force.

What I am getting at, Mr. Chairman, is that it seems like everyone has been saying here that the Emperor has no clothes; that the current death penalty laws do not exist; they have no force.

I am here to say that the Emperor does have clothes and that the additional wardrobe offered by the proposed statute, S. 239, although well-intentioned, may very well, by its own weight, smother the Emperor with too many procedural safeguards and provide fertile ground for legal challenges. I would predict right now that if this law would be passed, you would not see one death penalty conviction under the statute, because all of the nooks and crannies that will allow crafty defense lawyers to argue for.

Briefly my argument is this. In the *Furman* v. *Georgia*, Supreme Court was considering only State crimes of your garden variety murders and rapes and was concerned about the thousands and thousands of murders and the few that were given the death penalty; and the problem that the death penalty may be imposed for arbitrary reasons such as minority status or whether they are poor.

Now, the Federal crimes that we are talking about are espionage, hijacking, kidnapping, assassination of the President, and so forth. There are not thousands and thousands of those kinds of crimes. Rather, you already have a very small class to begin with.

Second, those arrested for espionage are white middle class males and there can be no argument that the death penalty would be imposed on them because they are poor and minority. The court never required sentencing guidelines in those kinds of situations and did not rule at all on the Federal death penalty whatsoever.

So we argue that there is a difference between the kind of crimes that the Supreme Court has examined in the State cases, compared with the Federal capital crimes that we are talking about how and where you already have a narrow class by the very definition of the crime. The crime itself has its seeds of its own aggravating cir-

[1] Brief was placed in Committee file

cumstances. You do not have to say how more aggravating an attempted assassination of the President is. You do not have hundreds of attempted assassinations.

There is no risk that the death penalty would be imposed because of the minority status of the defendant in these Federal cases, and *Furman* dealt solely with juries imposing sentences and not in light of experienced trial judge who is the sentencing authority in the Federal system.

Now, we next argue that if *Furman* is indeed applicable, and we do not think that it is, rule 32 of the Federal Rules of Criminal Procedure more than satisfies the eighth and fifth amendment of procedural safeguards. All the Supreme Court has said is that the sentencing authority must focus on the defendant and must focus on the nature of the crime. If you read rule 32, it already says that. The defendant can also bring any mitigating circumstance he wants before the court.

And in that respect, I agree with one of the speakers *Lockett* v. *Ohio*, saying you cannot limit mitigating factors. Let the defendant bring in everything he wants. Keep rule 32. I think that the committee was unwise to delete rule 32 in the provision of the bill.

What I am suggesting is what *Gregg* v. *Georgia* did. The Supreme Court in *Gregg* v. *Georgia*, even cited rule 32 as an example of the kind of rule that guides the sentencing authority. In other words, what we are only looking for is to minimize the risk that the death penalty would be applied for arbitrary reasons. You do not have to eliminate it altogether with hundreds of different procedural devices.

States are free to do that, of course, and it seems that they have gotten into trouble by providing so many procedural safeguards that it allows for defendants to escape from them.

Basically, I would conclude by stating that: (1) Considering the nature of the capital crimes charged in Federal cases: espionage, hijacking, and so forth, with no history of the death penalty being imposed because of race, and so forth; (2) coupled with the presentence requirements of rule 32, which was cited by the Supreme Court favorably in *Gregg* v. *Georgia*, by the way, the State of Georgia, when they rewrote their death penalty law after *Furman* did not touch their espionage or treason statute; they left it intact without providing all of these aggravating and mitigating circumstances; and (3) considering the fact that under Federal law, a Federal judge imposes the sentence who is appointed for life and insulated from outside pressures and prejudices, the compelling conclusion is that the death penalty can be imposed today, upon those found guilty of Federal capital crimes without violating the eighth or fifth amendments.

Just briefly, some of the points that we find in the bill that we object to. The death penalty is limited to only one statutory aggravating circumstance. There is no need to limit that. Let the aggravating circumstance be any one that the jury can find. Even though the bill says that the jury can consider nonstatutory aggravating circumstances, specifically it says that in order for the death penalty to be imposed, it has to find one statutory circumstance.

In other words, if there were only some nonstatutory aggravating circumstances that the jury found, they cannot impose the death

penalty. We think that this bill needlessly restricts the discretion of the jury.

There is no need for unanimity by the whole jury on the death penalty. Again, the Supreme Court does not require that. You do not even need a jury. The judge can simply do it.

We do not think that it is necessary to have the reasonable doubt provision for each aggreating circumstance.

Again, the Supreme Court does not require that.

The other thing that we object to is the mitigating circumstances which you allow, where it says, "if the defendant has a mental capacity that is significantly impaired," we object to that. But if you leave that in, we would like a qualifying phrase that that it cannot be used if the impairment is due to the voluntary ingestion of drugs or alcohol by the defendant.

You mentioned the *Roper* case, Mr. Chairman. That is a good case, because in the *Roper* case, the defendants were claiming that they were high on PCP and drugs when they butchered Stephanie Roper's daughter.

They used that as a mitigating circumstance. We think, that if anything, that is an aggravating circumstance, and should be so specified.

Our conclusion is that this law is too restrictive in terms of the room that the criminal justice needs to work here, and we think that the current laws with rule 32 are more than sufficient.

Thank you, Mr. Chairman.

[The prepared statement follows:]

PREPARED STATEMENT OF PAUL D. KAMENAR

My name is Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation, a non profit public interest legal center, with 200,000 members and supporters nationwide. We appreciate the opportunity to present our views on the death penalty and S.239.

Our Foundation supports the death penalty in appropriate cases as both a deterrent and as retribution. We have filed many briefs in the Supreme Court and lower federal courts supporting the death penalty and opposing groups such as the ACLU and NAACP Legal Defense Fund. In fact, we are the only nationally recognized public interest group that supports the death penalty.

We have submitted for the record our recent brief filed in the current Walker spy cases arguing that the current death penalty provision for espionage is constitutional, and the first federal district judge to address this issue so held in January 1984 in United States v. Harper. That decision was overturned by the Ninth Circuit at the insistence of both the traitor and the Justice Department. Consequently, no one appealed the decision to the Supreme Court. However, in the Jerry Whitworth spy case in California, Judge J.P. Vukasin, Jr. accepted our brief for filing and I argued the case before him on September 13, 1985. This time, however, the Justice Department did not agree with the defendant but took a more favorable view of our argument stating that it is "not without force." Unfortunately, the Court ruled against us, principally because of the Ninth Circuit opinion.

I will not detail at length our position, but I will summarize our argument as to why S.239 may be unnecessary. If legislation is deemed to be necessary, we believe that S.239 contains so many restrictions and unnecessary provisions such that the death penalty would be almost impossible to impose, or if it is, that it

would likely be reversed by arguments from smart defense lawyers. In short, S.239 is legislative overkill and we strongly oppose the Justice Department's suggestion in its June 27, 1985 letter to you suggesting yet further unnecessary restrictions to add to this bill.

S.239 IS UNNECESSARY

Contrary to popular belief, Furman v. Georgia, 408 U.S. 238 (1972) did not strike down federal death penalty statutes. The Supreme Court has not considered a single federal death penalty case. The only capital cases considered by the Supreme Court were state cases dealing with murder and rape. The issues in those cases were whether state sentencing procedures violated the due process clause of the 14th Amendment and the 8th Amendment. The concerns by some Justices was the risk that the death penalty might be imposed for arbitrary reasons such as race or economic status. The lesson from Furman and its progeny is simply that the state sentencing schemes should focus the attention of the sentencing authority on the crime and the defendant.

In the federal context, federal crimes for espionage, assassination, and the like are not comparable to garden variety murders where there are thousands of murders and the concern that only a few get the death penalty. In other words, espionage by its very definition in 18 U.S.C. §794 is narrowly defined and thus contains its own aggravating circumstances. Congress does not need to add more aggravating circumstances to espionage, assassination, hijacking, etc. to make them eligible for the death penalty. In short, the nature of the federal crime and its frequency already delimit the class of potential death penalty cases. For example, since 1954, there have only been about 40 arrests for espionage, too many in our view, but a very small number in relation to the number of murders. Further, those arrested for espionage are typically white middle-class males. In

short, no one can claim, not even the ACLU or NAACP, that the death penalty for espionage has come to be imposed in such a way for arbitrary reasons such as race or economic status.

Secondly, assuming arguendo that Furman v. Georgia does apply, the federal sentencing procedures under current law already satisfy the constitutional concerns. Under Rule 32 of the Federal Rule of Criminal Procedure, there is a separate sentencing hearing; a pre-sentence report is prepared; and aggravating and mitigating circumstances are presented to the federal judge who is experienced in sentencing unlike state juries. None of these procedures were present in the Georgia system in Furman. Indeed, in Gregg v. Georgia, the Supreme Court referred to Rule 32 suggesting that those procedures are sufficient. 428 U.S. at 190, n.37 (1976).

Thirdly, if those procedures are deemed insufficient to protect the constitutional rights of a defendant, (and we do not think they are), a federal court can, and indeed has the duty to, fashion procedural safeguards to uphold an Act of Congress. U.S. v. 37 Photographs, 402 U.S. 363, 372-73 (1971) (judicially imposed procedural safeguards are "fully consistent with congressional purpose and that will obviate the constitutional objections raised by claimant"). It is never, ever, considered "judicial activism" to uphold an Act of Congress. The opposite is true.

CRITIQUE OF S.239

If the Committee is committed to "restoring" the federal death penalty (or, in our view "refurbishing" a current valid law) the present bill, S.239, will be self-defeating. It is a over-reaction to Supreme Court decisions that examined state laws on the subject. In other words, if a state (or federal) death penalty law provides more rights than are constitutionally required, then the state judicial system must uphold those statutory rights viewed in a constitutional context. Thus, as

more statutory rights are provided, one runs the risk that those procedures may be as successfully challenged as they are applied (or misapplied) in each individual case. There is more grist for the mill of defense lawyers. Thus, any bill should be kept very simple and merely provide the constitutionally minimum standards. Thus, all that is necessary is a re-codification of Rule 32 in some manner. Federal courts and lawyers are familiar with it. Why re-invent the wheel? Certainly, do not eliminate Rule 32 as proposed section 3593(b) does by eliminating a pre-sentence report. Our other objections are:

1. Do not limit the death penalty to only a finding of a specified statutory aggravating circumstance. Any aggravating circumstance will do under the constitution.

2. There is no need to require a finding of aggravating circumstances beyond a "reasonable doubt." While many states do, this is the federal system and the federal government need not copy state laws.

3. There is no constitutional requirement for unanimity by the jury, or even to have a jury at the sentencing phase. The following sentence in proposed §3593(d) states:

> The jury must find the existence of a mitigating or aggravating factor by a unanimous vote, although it is unnecessary that there be a unanimous vote on any specific mitigating or aggravating factor if a majority of the jury finds the existence of such a specific factor.

This makes no sense and is just fertile material for defense lawyers.

4. S.239 would allow under §3592(a)(2) a mitigating circumstance where the "mental capacity is significantly impaired." While we do not oppose any presentation of any mitigating factor the defendant chooses to make, we do not think

it should be a mitigating factor if the impairment is due to the voluntary ingestion of alcohol or drugs. If anything, that should be an aggravating circumstance.

There are many other problems with this bill, but just to ensure its proper interpretation by the courts, a provision should be added stating to the effect that "nothing herein shall prevent any federal court from adding additional procedural safeguards deemed constitutionally required by Supreme Court decisions." In that way, Congress will be assured that as 8th Amendment jurisprudence develops, further Congresses will not have to "restore" the death penalty again.

The CHAIRMAN. Thank you very much.

Senator Metzenbaum did not appear. I guess that he had conflicts but we will leave the record open until 6 p.m. Friday afternoon, if any Senator wants to put in a statement.

Senator DeConcini has sent a statement approving this bill.

I have asked that this statement be in the record.

I have asked that my statement be the first statement and that all of these other Senators' statements follow that, in order, put them all in order.

That would be the best way to arrange it, rather than to spread them throughout.

We now stand adjourned.

Thank you, people for coming and testifying, all of you.

[Whereupon at 3:25 p.m., the committee was adjourned.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. H-85-0309
	:	
JOHN ANTHONY WALKER, JR. a/k/a JAWS	:	

MOTION OF THE WASHINGTON LEGAL FOUNDATION AND CONGRESSMEN ELDON RUDD, FRED ECKERT, PHILIP CRANE, BOB WALKER, JOSEPH DIO GUARDI, HENRY HYDE, JOE BARTON, AND ROBERT DORNAN TO FILE THE ATTACHED MEMORANDUM AS AMICI CURIAE SUGGESTING THAT THE COURT RULE THAT THE DEATH PENALTY IS APPLICABLE IN THE INSTANT CASE

The Washington Legal Foundation and Congressmen Eldon Rudd, et al., for reasons stated below, hereby move this Court pursuant to Local Rule 6 for leave to appear as amici curiae and to file the attached Memorandum Suggesting The Applicability Of The Death Penalty In The Instant Case And In Response To Defendant's Motion For Twenty Peremptory Challenges.

Respectfully submitted,

Daniel J. Popeo
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Date: July 9, 1985
Washington, D.C.

Statement of the Case

The defendant, John Anthony Walker, Jr., was indicted on or about May 28, 1985 for committing espionage, viz., conspiracy to deliver national defense information to a foreign government, i.e., the Soviet Union, [18 U.S.C. Sec. 794(c)], attempted delivery of national defense information to a foreign government [18 U.S.C. Sec. 794(a)] and other serious charges of unlawfully obtaining, receiving, and transmitting information relating to the national defense of the United States [18 U.S.C. Secs. 793(b), (c), and (e)]. The statutory penalty for a violation of either 18 U.S.C. Sec. 794(a) or (c) of the Espionage Act is punishment "by death or by imprisonment for any term of years or for life."

On June 18, 1985, the defendant filed several motions, including a MOTION TO ALLOW DEFENDANTS (sic) TO HAVE TWENTY PEREMPTORY CHALLENGES PURSUANT TO RULE 24(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (attached hereto as Exhibit A). In that motion, the defendant correctly notes that under Rule 24(b) "if the offense charged is punishable by death, each side is entitled to twenty (20) peremptory challenges" of prospective jurors. Defendant's Motion at 2, para. 4. The defendant also correctly admits that "[v]iolations of the Espionage Act are still a 'capital crime'...." Id. at 1, para. 2. However, the defendant incorrectly states that "in light of Furman v. Georgia, 408 U.S. 238 (1972), the death penalty in this case could not constitutionally be imposed." Id. The thrust of the defendant's motion is that even though he believes that the death penalty

could not be constitutionally applied, he claims that he is nevertheless "entitled to the procedural benefits" of being charged with a "capital crime". Id. at 2, para. 5.

As of July 8, 1985, the Government has not responded to that motion. A hearing on that and other motions is scheduled for August 15, 1985.

Amici submit that the defendant is entitled to the procedural benefits of being charged with a capital crime not in spite of his assertion that the death penalty cannot be applied, but precisely because of the opposite. In short, Furman v. Georgia did not rule that the death penalty could not be imposed under the federal Espionage Act, 18 U.S.C. Section 794, as the defendant would have this Court believe. A careful reading of the various opinions in the 5-4 decision in Furman v. Georgia and its progeny do not compel the conclusion that the death penalty could not be applicable in an espionage case. There is simply no history of the federal death penalty being applied or a risk that it may be applied to those convicted of espionage for reasons of race, poverty, or other arbitrary reasons which some members of the Supreme court felt were present in sentencing those convicted of the capital crimes of murder and rape under state law. In any event, the procedural benefits of Rule 34(c) of the Federal Rules of Criminal Procedure, and others that may be imposed by this Court are more than ample to satisfy the Eighth and Fourteenth Amendments.

Indeed, the first federal court to address this issue squarely in another espionage case has agreed with amici's position. United States v. Harper, No. CR-83-0770-SC ("Order Re Penalty Provision of 18 U.S.C. Sec. 794") (N.D. Calif., Jan. 12, 1984) rev'd in part, 729 F.2d 1216 (9th Cir. 1984) (Exhibit B). In addition, as will be demonstrated, the opinions of other federal and state judges lend ample support to the legal position taken by amici.

At worst, the constitutional issue is unresolved and this Court has an independent duty to resolve this issue. Amici suggest that this Court should construe the Espionage Act, being an Act of Congress, as constitutionally valid until a definitive ruling by the Supreme Court holds otherwise. Such a decision in our view would be upheld by the appellate courts as well as be in the public interest.

ARGUMENT

There are only two grounds upon which the defendant could challenge the constitutionality of the death penalty provision of the Espionage Act, 18 U.S.C. Sec. 794: (1) that the Eighth Amendment per se prohibits the Congress from providing for the death penalty as an available method of punishment for espionage,

or (2) assuming that Congress can so legislate, that the lack of statutory sentencing guidelines in the current law would necessarily create a risk of an arbitrary and capricious imposition of the death penalty violative of the Eighth or Fifth Amendment. While the defendant in this case, John Walker, Jr., did not clearly specify which of these two arguments he relies on in his motion for 20 peremptory challenges, amici will address both of them and show that neither one is valid.

I. THE EIGHTH AMENDMENT DOES NOT PER SE BAR THE IMPOSITION OF THE DEATH PENALTY AS A PUNISHMENT FOR ESPIONAGE.

The initial question is whether the Eighth Amendment's proscription against cruel and unusual punishment bars the availability of the death penalty for espionage. Based upon the reasoning of the Supreme Court and lower court decisions on capital punishment, the answer is clearly no.

In 1952, Julius and Ethel Rosenberg were convicted for espionage during World War II. United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952). The statute at that time, 18 U.S.C. Sec. 794(b), provided that those so convicted for espionage "in times of war shall be punished by death or by imprisonment for not more than thirty years." (Emphasis added). The trial judge, rather than a jury, imposed the death sentence and such sentence was upheld.

The espionage law was amended in 1954 by Congress to prohibit peacetime espionage and to provide for the punishment "by death or by imprisonment for any term of years or for life." 18 U.S.C. Sec. 794(a). Since 1954, there have been several convictions of

standards necessary to reduce the risk of an arbitrary and capricious imposition of the death penalty. United States v. Harper, 729 F.2d 1216 (9th Cir. 1984). Thus, the Ninth Circuit left undisturbed that part of the lower court's decision ruling that the death penalty is not per se unconstitutional. However, since both the Government and the spy argued that the death penalty could not be imposed, no appeal was taken to the Supreme Court on the procedural issue.

The defendant in the instant case might nevertheless try to argue that Congress cannot constitutionally provide for the death penalty for peacetime espionage where it cannot be shown that any life was taken, citing Coker v. Georgia, 433 U.S. 584 (1977). In Coker, the Supreme Court ruled that the death sentence for rape of an adult woman when death did not result was disproportionate to the crime. While amici believe Coker was wrongly decided, that decision does not stand for the proposition, as some may believe, that the death penalty is unconstitutional for any crime where death does not result. Indeed, the Court left open the possibility that the death penalty could be available as a punishment for the rape of a child where death does not result.

Admittedly, Chief Justice Burger, in his dissent in Coker, critically opined that the plurality decision "casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, e.g., treason, airplane hijacking, and kidnapping." 433 U.S. 584, 621 (1977) (Burger,

those who committed peacetime espionage, but no one has been sentenced to death. Consequently, no court has had occasion to rule on the constitutionality of the death penalty for peacetime espionage until 1984. For the last 13 years, the apparent reason for this lack of applying the death penalty in espionage cases was the mistaken belief that the penalty may have been foreclosed by the 1972 decision in Furman v. Georgia, 408 U.S. 238 (1972).

In 1983, James Durward Harper was accused of violating 18 U.S.C. Sec. 794 by obtaining secret national defense information and transmitting it to the Polish Intelligence Service for use by that country and the Soviet Union. In return for this information, he received $250,000. On January 12, 1984, the United States District Court for the Northern District of California issued a pre-trial order ruling that the availability of the death penalty for peacetime espionage was not per se violative of the Eighth Amendment and that the imposition of such a penalty in that case, should Harper be found guilty, would also not violate the Eighth Amendment or Furman v. Georgia, 408 U.S. 238 (1972). United States v. Harper, No. CR-83-0770-SC (Order Re Penalty Provision of 18 U.S.C. Sec. 794) (N.D. Calif., Jan. 12, 1984).

The Ninth Circuit, at the urging of both the accused spy and the Government, reversed the lower court but only with respect to the second aspect of his decision, i.e., whether sentencing guidelines must come from the legislature or whether the trial judge can provide suitable guidelines to meet the miminum

C.J., dissenting). However, the standards articulated by Justice White, speaking for the plurality in Coker, do not foreclose the death penalty for peacetime espionage. In determining whether the death penalty may be imposed where no death results, the Coker standards are (1) whether the sentence makes a measurable contribution to acceptable goals of punishment, and (2) whether the sentence is grossly out of proportion to the crime. 433 U.S. at 592. Stated otherwise by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976):

> "...in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."

Gregg, 428 U.S. at 175.

Amici submit that the availability of the death penalty clearly satisfies the criteria specified by the Supreme Court. The following excerpt from the cogent opinion of the district court by Judge Samuel Conti in United States v. Harper, supra, is quoted at length to further demonstrate that the death penalty for espionage is not unconstitutional per se:

> Whether the punishment of death for espionage is cruel and unusual punishment per se under the Eighth Amendment requires a two-part inquiry. The court must ascertain whether the punishment both accords with the 'evolving standards of decency of a maturing society', and comports with the 'dignity of man' which is the 'basic concept underlying the Eighth Amendment.' [Gregg v. Georgia, 428 U.S.] at 173.

In assessing whether the death penalty for espionage accords with contemporary societal standards of decency, a court looks to 'objective indicia that reflect the public attitude toward the penalty.' Id. Capital punishment for crimes which threaten our national security has been approved since the outset of our national existence. The First Congress of the United States enacted legislation providing the death penalty for treason. C 9, 1 Stat 112 (1790). And, as the majority in Gregg noted, '[t]he Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases ....' Id. at 177.

The present statute has its origins in the Espionage Act of 1917, C 30, 40 Stat 217 et seq. (1917), enacted during the onset of American involvement in World War I. Although the statute originally provided the punishment of death for acts of wartime espionage, Congress, in 1954, adopted capital punishment as an appropriate penalty for peacetime espionage as well. C 1261, Title II, Sec. 201, 68 Stat 1219 (1954). This judgment of our elected representatives remains unaltered.... Finally, the legislatures of several states have also enacted statutes providing the death penalty for treason. The court concludes from these mandates of our elected representatives that the punishment of death for espionage conforms to contemporary societal standards of decency.

To be constitutionally permissible per se, the punishment of death for espionage must additionally comport with the 'basic concept of human dignity at the core of the [Eighth] Amendment', Gregg, 428 U.S. at 182. To fulfill this requirement, a punishment must neither involve the unnecessary or wanton infliction of pain nor be disproportionate to the severity of the crime for which it is imposed. Id. at 173.

Absent conclusive proof that the generally cited penological justifications for capital punishment -- retribution and deterrence -- are invalid, a court should decline to nullify legislative determinations that the penalty is justified for a particular crime. See, id. at 182-87. The court is not aware of any conclusive evidence, statistical or otherwise, which demonstrates that capital punishment fails to deter acts of espionage. Nor does the court find tht the imposition of capital punishment for espionage is an

impermissible expression of the nation's abhorrence for such acts. Consequently, the court defers to the judgment of Congress that imposition of the penalty of death for espionage fulfills valid penological goals and does not involve the unnecessary and wanton infliction of pain.

The court must also consider whether imposition of the death penalty for espionage is disproportionate to the severity of the crime. We acknowledge that death 'is an extreme sanction, suitable to the most extreme of crimes.' Id. at 187. Acts of espionage, however, may irreparably damage our nation's ability to defend itself. The court cannot dispute the legislative judgment that this crime is extreme in character. Given the potential consequences of a serious breach of our national security through espionage, which may threaten the lives of all citizens of the United States, this court finds that capital punishment for espionage is not uniformly disproportionate to the severity of the offense. Accordingly, the punishment of death for espionage is not unconstitutional per se under the Eighth Amendment."

United States v. Harper, supra, slip op. at 5-7 (emphasis added).

As previously noted, the Ninth Circuit did not overrule Judge Conti's decision that the death penalty is not per se unconstitutional. Nor would the Supreme Court so rule. Accordingly, it is clear that the availability of the death penalty for espionage is not per se unconstitutional.

II. THE DEATH PENALTY CAN BE CONSTITUTIONALLY APPLIED IN ESPIONAGE CASES.

The only remaining argument that the defendant could make is that the death penalty cannot be applied to him in this case. Amici submit that the death penalty provision of the Espionage Act, 18 U.S.C. Sec. 794, can be constitutionally applied in this case should be defendant be found guilty. Neither the Supreme

Court decision in Furman v. Georgia, 408 U.S. 238 (1972) nor the decision in Gregg v. Georgia, 428 U.S. 153 (1976) compels the conclusion that the death penalty cannot be constitutionally applied in espionage cases. The Ninth Circuit opinion in United States v. Harper, 729 F.2d 1216 (9th Cir. 1984), holding the contrary, is not binding on this Court and, in any event, was erroneously decided. This was not surprising given the absence of an adversarial proceeding. Any constitutional deficiencies with the death penalty can be easily cured by judicially imposed sentencing guidelines that comport with the Eighth and Fifth Amendments.

A. Furman v. Georgia Did Not Strike Down All Death Penalty Statutes Lacking Statutory Sentencing Guidelines .

The Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, did not rule that all death penalty statutes are unconstitutional that lack statutory sentencing guidelines. The Court only ruled that the imposition of the penalty in the three cases before it were unconstitutional. The entire per curiam opinion of the Court in Furman v. Georgia reads as follows:

> PER CURIAM.
>
> Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. Sec. 26-1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S.E. 2d 628 (1969). Petitioner in No. 69--5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. Sec. 26-1302 (Supp. 1971) (effective prior to July 1, 1969) 225 Ga. 790, 171 S.E. 2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Tex. Penal Code, Art. 1189 (1961). 447 S.W. 2d 932 (Ct. Crim. App. 1969). Certiorari was granted limited to the following question: "Does the imposition and

> carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" 403 U.S. 952 (1971). The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.
>
> So ordered.

408 U.S. at 239-40 (emphasis added).

The 5-4 per curiam opinion makes it clear that only those cases before the Court were being addressed. There simply was no majority opinion as to the reasons for the decision.

While the per curiam opinion itself was short, the mixed bag of concurring and dissenting opinions extended over 225 pages. The following is a brief descriptive listing of each of the Justice's position in Furman v. Georgia:

1. Justice Brennan concluded in his concurring opinion that the Eighth Amendment prohibits capital punishment in all cases.

2. Justice Marshall agreed with Justice Brennan's position. Only Justices Brennan and Marshall were and are of the view that the death penalty is per se unconstitutional.

3. Justice Douglas (who has been replaced by Justice Stevens) focused in his concurring opinion on the sentencing procedures which allow for impermissible reasons such as "race, religion, wealth, social position, or class" to cause the jury to impose a death sentence. 408 U.S. at 240, 242 (Douglas, J. concurring).

4. Justice Stewart (who has been replaced by Justice O'Connor) concluded in a short concurring opinion that the infliction of the death penalty is unconstitutional "under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed". 408 U.S. at 306, 310 (Stewart, J. concurring) (emphasis added).

5. Justice White concurred in the opinion and was struck by the fact that the penalty is imposed very infrequently out of the "hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty". 408 U.S. at 310, 313 (White, J. concurring).

6. Chief Justice Burger wrote a lengthy dissent stating, inter alia, that the "very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases". 403 U.S. 375, 402 (Burger, C.J. dissenting). He further noted that just a year earlier, the Court upheld the standardless sentencing procedures in death penalty cases under the Fourteenth Amendment in McGautha v. California, 402 U.S. 183, 207 (1971) and properly criticized the plurality for grafting a procedural due process clause onto the Eighth Amendment which simply prohibits "cruel and unusual punishment". 403 U.S. at 399.

7. Justice Blackmun joined in Chief Justice Burger's dissent and wrote separately adding only what he called his "somewhat personal, comments". 408 U.S. at 405 (Blackmun, J. dissenting). He criticized the plurality for imposing their "personal

preferences" over the wisdom of legislative branch. He opined that he thought the federal death penalty statutes are "apparently" voided by the decision, id. at 411, although his view was obviously a critical over-reaction to the concurring opinions which had not addressed the federal statutes.

8. Justice Powell joined in Chief Justice Burger's dissent and wrote a separate dissent joined by Chief Justice Burger and Justices Blackmun and Rehnquist. The thrust of his lengthy dissent was his criticism of the Court's departure from clear precedent and the judicial intrusion into the legislative sphere. 408 U.S. 238, 414 (Powell, J. dissenting). He also suggested that federal death penalty laws may be invalidated; however, as noted, that issue was never squarely presented.

9. Justice Rehnquist joined in Chief Justice Burger's dissent and wrote a separate dissent joined by the Chief Justice, Blackmun, and Powell. Justice Rehnquist was the only Justice who correctly noted that only three Justices -- Douglas, Brennan, and Marshall -- would "consign to the limbo of unconstitutionality" the death penalty laws of the states and Congress.. 408 U.S. 238, 465 (Rehnquist, J. dissenting). The thrust of his dissent was his criticism of the Court's judicial activism declaring that the Court's decision was "not an act of judgment, but rather an act of will". Id. at 468.

As can be seen from the Court's per curiam opinion and the variety of concurring opinions, it cannot be said that the court clearly struck down the imposition of the death penalty in this or

other espionage cases. The per curiam opinion only struck down the actual imposition of the death penalty in the three state cases before the Court. As for the opinions of Justices Brennan, Marshall, Douglas, Stewart, and White, "concurring opinions have no legal effect, and thus, are in no way binding on any court". Bronson v. Board of Education of Cincinnati, 510 F.Supp. 1251, 1265 (S.D. Ohio, 1980) (emphasis added).

Thus, amici submit that the imposition of the death penalty provision would not be unconstitutional and can be imposed in this case as previously ordered last year by the United States District Court in United States v. Harper.

Should this issue reach the Supreme Court, amici believe that the current Court would uphold the imposition of the death penalty in this case. No doubt, the four dissenters in Furman would agree with such a decision. In addition, since Justices Stewart and Douglas have been replaced by Justices Stevens and O'Connor, there is a great likelihood that one or both of them would rule to uphold the death penalty. Justice White's opinion would also likely change based on the different facts of espionage cases and the procedural safeguards that could be fashioned as the district court did in United States v. Harper. Only Justices Brennan and Marshall appear to remain committed to their views that the death penalty is per se unconstitutional. But even there, one could argue that the factual predicate for their decision does not obtain in this circumstance. Amici's position is that a decision upholding the death penalty would not be in violation of Furman v.

Georgia, and indeed, would be consistent with that decision. The Supreme Court need not overrule Furman v. Georgia to uphold the imposition of the death penalty in espionage cases.

The chief factual predicate running throughout the concurring opinions in Furman was the "sweeping factual assertions, unsupported by empirical data concerning the manner of imposition and effectiveness of capital punishment in this country". 408 U.S. at 405 (Blackmun, J. dissenting). A major objection to the death penalty was that juries could selectively impose the death sentence against those who are "poor and despised ... or if [they are] a member of a suspect or unpopular minority...." 408 U.S. at 255 (Douglas, J. concurring). A second objection noted in Furman was the difficulty in discerning why the sentence was imposed in a few cases compared to the thousands of cases where the death penalty was available as a punishment but not imposed. These two primary concerns, however invalid as they are on their own merits, are totally inapposite in the context of ruling on the death penalty in espionage cases.

In the first place, no one could demonstrate that persons who have been convicted of espionage are poor, lack political clout,

or are members of a racial minority. Indeed, almost all of those arrested and convicted are white, middle to upper class individuals. Indeed, the defendant in the instant case, John Walker, is a white middle-class male. Thus, if Walker is convicted and the death sentence imposed, there is no risk that the death sentence would be imposed for such irrelevant reasons as race or poverty. Rather, the likely articulable reason would be that his crime and the circumstances surrounding it were so reprehensible that the death penalty is an appropriate punishment. If that were to happen, the penalty would be imposed precisely for the very reasons Congress enacted the law -- to punish severely those who would betray their country.

The second possible argument, i.e., the infrequency of the imposition of the sentence referred to in Furman, is also inapplicable here. As previously noted, the most recent execution of spies were a white male and female, Julius and Ethel Rosenberg in 1952, United States v. Rosenberg, 195 F.2d 583 (2nd Cir. 1952). Since then, there have been a few dozen other convictions for peacetime espionage but no death penalty has been imposed. However, because of the small statistical pool, the infrequency of capital punishment in espionage cases can hardly be compared to the literally thousands of murders and rapes alluded to in Furman where the death penalty was available but not imposed. It should also be noted that many of these espionage convictions were obtained after Furman when it was erroneously assumed that the death penalty was foreclosed in espionage cases. In any event,

the "infrequency of imposition" argument is invalid as a self-fulfilling one because it could apply to situations where Congress enacts recent death penalty laws to deal with peacetime espionage and newer crimes such as airline hijacking.

In short, no one can be heard to say that the death penalty had come to be imposed so arbitrarily and capriciously in espionage cases so as to constitute cruel and unusual punishment in violation of the Eighth or Fifth Amendment. Consequently, neither the Supreme Court's decision in Furman v. Georgia nor the concurring opinions, except perhaps those of Justices Brennan and Marshall, foreclose the imposition of the death penalty in this case.

B. The Supreme Court Decision in Gregg v. Georgia Does Not Foreclose the Imposition of the Death Penalty in this Case.

After the 1972 decision in Furman v. Georgia, many states rewrote their death penalty statutes in order to diminish the risk that such sentences would be imposed by juries for arbitrary and capricious reasons such as the race or social position of the defendant. One of the salient features of most of those laws was a bifurcated trial, i.e., one to determine guilt or innocence and another to determine whether the death penalty should be imposed. Another feature was the opportunity for the defendant to present mitigating factors and the prosecutor to present aggravating factors which must be weighed by the sentencing authority.

In Gregg v. Georgia, the Supreme Court had the opportunity to review the constitutionality of a death sentence imposed under the revised Georgia statute which required the bifurcated trial and the consideration of mitigating and aggravating circumstance before the death sentence could be imposed. The Supreme Court ruled 7 to 2 that the death penalty was not unconstitutional per se and that its imposition under the Georgia system did not violate the Eighth or Fourteenth Amendments. The Gregg Court, however, did not rule that certain procedures were required in each capital case no matter what the crime, nor did the Gregg Court specify that procedural safeguards must be imposed by the legislature as opposed to the court. Indeed, even after the 1972 Furman decision, Georgia did not deem it necessary to rewrite its law to require the finding of aggravating circumstances in aircraft piracy or treason. Ga. Code Ann. Sec. 27-2534.1(a) (Supp. 1975). Georgia law provides "(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case." Id. (Emphasis added) reprinted in Gregg v. Georgia, 428 U.S. 165, at n. 9.

As previously noted, amici submit that the risk that the death penalty would be imposed for arbitrary reasons in cases of treason or espionage is nil. Furthermore, that already miniscule risk is further reduced by the fact that in federal courts, a federal judge rather than a jury makes the sentencing decision. Indeed, in reviewing the sufficiency of Georgia's procedural safeguards,

the Gregg court noted the difference between an experienced judge and an inexperienced jury as the sentencing authority:

> The cited studies assumed that the trial judge would be the sentencing authority. If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

428 U.S. at 190.

The Gregg Court further cited with approval Rule 32(c) of the Federal Rules of Criminal Procedure that requires that a presentence report be prepared containing information about the defendant's background. 428 U.S. at 190, n. 37. The clear implication is that the Court viewed Rule 32(c) as a sufficient guideline for sentencing procedures by state juries.

Thus, amici submit that (1) considering the nature of the capital crime charged in this case -- espionage -- with no history of the death penalty being imposed because of race, and so forth, (2) coupled with the pre-sentence requirements of Rule 32(c) of the Federal Rules of Criminal Procedure and (3) the fact that the sentencing authority is not a jury but a federal judge with life tenure who is insulated from outside pressures and prejudices, the compelling conclusion is that the death penalty can be imposed upon those found guilty of espionage without violating the Eighth or Fourteenth Amendments.

C. The Authority Cited by the Ninth Circuit in United States v. Harper does not Compel the Conclusion that Statutory Guidelines are Required in Espionage Cases.

For reasons already stated, infra, neither Furman v. Georgia nor Gregg v. Georgia would foreclose the imposition of the death penalty in espionage cases. The first federal district court to address this issue squarely, United States v. Harper, supra, held that the death penalty could be constitutionally imposed in espionage cases. While admitting that the Harper case presented "a question of first impression," 729 F.2d at 1222, the Ninth Circuit reversed the district court at the insistence of both the Justice Department and the traitor. Unfortunately, the Ninth Circuit did not have the benefit of an adversarial proceeding. In such cases, a court is more prone to err as that one did. While amici submit for reasons already mentioned why the Ninth Circuit's decision is erroneous, amici will nevertheless examine that Court's stated rationale to show that it lacks merit.

The Ninth Circuit in Harper held that sentencing procedures must be statutory rather than judicially guided because:

> If the "will and ... moral values of the people," [Gregg v. Georgia] at 175, 96 S.Ct. at 2926, are particularly important in sentencing decisions, and if specification of punishments is therefore peculiarly a legislative function, then specifying the circumstances under which someone may be put to death must also be a function of the elected representatives of the people.

The court's ispe dixit conclusion is faulty and without any authority. The key issue ignored by the court is whether the defendant's Fifth and Eighth Amendment rights would be violated by the imposition of the death penalty for espionage under the lower

court's ruling. What difference does it make to the defendant as to the source of his procedural protections as long as they satisfy due process and the Eighth Amendment. Courts routinely limit the reach of the law by providing for judicially imposed safeguards to protect a person's constitutional rights such as the First Amendment (limiting the reach of laws that impinge on freedom of speech), the Fourth Amendment (the judge-made "exclusionary rule"), the Fifth Amendment (due process requirements of notice, hearing, etc.), and in many other circumstances. Courts routinely instruct juries on a variety of issues in a criminal case that protect the rights of the defendant, but which are not legislatively mandated.

Furthermore, the Ninth Circuit's conclusion is not supported by any compelling authority. The Court cited to an out-of-context excerpt from the Gregg decision (the "will and ... moral values of the people") where Gregg was actually quoting from Chief Justice Burger's dissent in Furman v. Georgia for the broad proposition that deference is due the legislative branch's decision in selecting punishments for a particular crime.

Having thus reached the unsupported conclusions that (a) procedural guidelines are necessary in federal espionage cases, and (b) those guidelines must be statutory, the Harper Court then proceeded to justify its conclusion that statutory guidelines are required by relying on two distorted excerpts from Gregg:

> It is for that reason that, in finding Georgia's revised procedures constitutional, the Court [in Gregg] emphasized that the guidelines were statutory: "[Under the revised Georgia procedures, the jury] must

> find a statutory aggravating circumstance before recommending a sentence of death." Gregg, 428 U.S. at 197, 96 S.Ct. at 2936 (emphasis in original). The Court has thus plainly required that guidelines be expressly articulated by the legislature in the statute authorizing the death penalty.

United States v. Harper, 729 F.2d at 1225.

In the first place, the references by the Ninth Circuit to the "Court" in Gregg in this excerpt, as well as in the second one which will be later discussed, are not entirely accurate since the quotes are from the opinions of only Justices Powell, Stewart, and Stevens. The Chief Justice and Justices White, Rehnquist and Blackmun concurred in the judgment only. In any event, the Gregg "Court" did not emphasize that the guidelines are required to be statutory as the Harper court states. The Harper court quoted Gregg out of context. The full quote from Gregg reads thusly:

> In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. Sec. 27-2534.1(b) (Supp. 1975). The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, see Sec. 27-2302 (Supp. 1975), but it must find a statutory aggravating circumstance before recommending a sentence of death.

428 U.S. at 197, 96 S.Ct. at 2936 (emphasis in original).

The Gregg court emphasized the word "statutory" not for the reasons that the Harper court suggests, but merely to emphasize in a descriptive manner the differences in the Georgia scheme between unspecified non-statutory aggravating and mitigating circumstances which the jury may consider and the requirement that the jury find at least one statutory aggravating circumstance before recommending a death sentence. The Gregg Court then went on to

emphasize how the Georgia procedure as a whole gives some "guidance or direction" to the jury. Id. There was no language requiring that such jury guidance be formulated by a statute rather than given by the judge. Nor does Gregg require any guidance at all where an experienced judge rather than a jury imposes the sentence and where Rule 32 of the Federal Rules of Criminal Procedure is applicable which requires pre-sentence reports and allocution for informed sentencing decisions.

The second and final reference by the Harper Court to the Gregg decision is similarly quoted out of context and lends no support for the requirement that there be statutory guidelines:

> See also id. [Gregg] at 192, 96 S.Ct. at 2934 ("It seems clear ... that the problem [of unfettered jury discretion to impose the death penalty] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." (emphasis added)).

U.S. v. Harper, 729 F.2d at 1225.

The full statement by the Gregg court (i.e., Justices Stewart, Powell and Stevens) is as follows:

> Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State representing organized society, deems particularly relevant to the sentencing decision.

> The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit.

Gregg v. Georgia, 428 U.S. at 197 (emphasis added).

In the first place, the "problem" referred to by Gregg is not "unfettered jury discretion" as the Harper court states, but the inexperience of a jury to weigh the information given to them. In any event, amici agree that the "problem", however defined, can certainly be "alleviated" although not "totally correctible" by guidance from the State. But it can also be "alleviated" as the Gregg court suggests by jury instructions from the judge. This was the conclusion reached by the district court in Harper. This reference to the Gregg decision hardly supports the proposition that statutory guidance is required. In any event, the Gregg Court was focusing on the problems of jury sentencing which presumably would not exist where a judge imposes a sentence under the current federal espionage law.

Thus, the two meager references to the Gregg decision cited by the Harper court is a slim reed to support the sweeping conclusion that the death penalty cannot be constitutionally imposed in federal espionage cases. As the Gregg court admonished, "each distinct [sentencing] system must be examined on an individual basis". 428 U.S. at 195, 96 S.Ct. 2935. Even the Gregg court was careful to note that McGautha v. California was not overruled by Furman but stated that the "standardless jury sentencing procedures were not employed in the cases there before the Court

[in McGautha] so as to violate the Due Process Clause." 428 U.S. at 197, n.47; 96 S.Ct. at 2936, n.47 (emphasis added).

The remaining authority for the Ninth Circuit's opinion in Harper is non-judicial and is of no moment. The Harper court cited the ill-conceived concession by the prosecutor that the death penalty is inapplicable*/, various Congressional testimony by current and former Justice Department officials**/, and proposed legislation providing for statutory guidelines which, although may be preferable by some, is not constitutionally required. 729 F.2d at 1225-26. Amici submit that none of this authority is compelling, and that the Ninth Circuit's opinion is erroneous which should not be duplicated by this Court.

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*/ Cf. Young v. United States, 315 U.S. 257, 259 (1942) ("the proper administration of the criminal law cannot be left merely to the stipulation of the parties").

**/ Amici were unable, however, to find any official Opinion of the Attorney General or formal legal opinions of the Justice Department's Office of Legal Counsel on the question of whether Furman v. Georgia struck down all federal death penalty statutes.

CONCLUSION

For all the foregoing reasons, amici curiae request that the Court rule that the death penalty can be constitutionally applied in this case.

Respectfully submitted,

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Date: July 9, 1985
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA :

v. : Criminal No. H-85-0309

JOHN ANTHONY WALKER, JR. :

: : : : :

MOTION TO ALLOW DEFENDANTS TO HAVE TWENTY PEREMPTORY CHALLENGES PURSUANT TO RULE 24(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Comes now the defendant, John Anthony Walker, Jr., by and through his attorneys, Fred Warren Bennett, Federal Public Defender for the District of Maryland, and Thomas B. Mason, Assistant Federal Public Defender, and moves this Honorable Court, pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure, Rule 24(b) of the Federal Rules of Criminal Procedure, and United States v. Watson, 496 F.2d 1125 (4th Cir. 1973), to allow the defendants to have twenty (20) peremptory challenges at the trial of this case, to be exercised jointly, and for reasons therefor says as follows:

1. The defendant and the co-defendant, Michael Lance Walker, are charged in a six-count Indictment with conspiracy to deliver national defense information to a foreign government [18 U.S.C. §792(c)], attempted delivery of national defense information to a foreign government [18 U.S.C. §794(a)] and other lesser offenses. The statutory penalty for a violation of either 18 U.S.C. §794(a) or (c) is punishment "by death or by imprisonment for any term of years or for life."

2. Violations of the Espionage Act are still a "capital crime" notwithstanding the fact that in light of Furman v. Georgia, 408 U.S. 238 (1972), the death penalty in this case could not constitutionally be imposed.

3. The decision by the United States Supreme Court in Furman did not repeal those federal statutes which contain death penalty provisions that cannot be constitutionally applied, nor did Furman repeal procedural statutes which depend for their opera-

EXHIBIT A

tion on a defendant being charged with a "capital crime".

4. Under Rule 24(b) of the Federal Rules of Criminal Procedure, if the offense charged is punishable by death, each side is entitled to twenty (20) peremptory challenges.

5. Based on United States v. Watson, 496 F.2d 1125 (4th Cir. 1973), Rule 24(b) of the Federal Rules of Criminal Procedure is a procedural statute which depends for its operation on the defendant being charged with a "capital crime" and since the defendant is charged herein with a "capital crime", he is entitled to the procedural benefits of Rule 24(b) of the Federal Rules of Criminal Procedure.

Respectfully submitted,

FRED WARREN BENNETT (#00318)
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REQUEST FOR HEARING

Pursuant to Rule 6 of the Local Rules of the United States District Court for the District of Maryland, a hearing is requested on the defendant's Motion.

FRED WARREN BENNETT
Federal Public Defender

MEMORANDUM OF POINTS AND AUTHORITIES

1. Rule 24(b) of the Federal Rules of Criminal Procedure.

2. United States v. Watson, 496 F.2d 1125 (4th Cir. 1973).

FRED WARREN BENNETT
Federal Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June, 1985, a copy of the foregoing Motion was delivered to Michael Schatzow, Assistant United States Attorney, 820 United States Courthouse, 101 West Lombard Street, Baltimore, Maryland 21201-2692; Charles G. Bernstein, Esquire, 2233 World Trade Center, Baltimore, Maryland 21202, and Ellen M. Hollander, Esquire, Frank, Bernstein, Conaway and Goldman, 300 East Lombard Street, Baltimore, Maryland 21202, attorneys for co-defendant Michael Lance Walker.

FRED WARREN BENNETT
Federal Public Defender

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, -vs- JAMES DURWARD HARPER, JR., Defendant.	No. CR-83-0770-SC ORDER RE PENALTY PROVISION OF 18 U.S.C. §794

Defendant James Durward Harper, Jr., is currently under indictment for alleged multiple violations of the espionage laws of the United States.[1/] Four counts of the nine-count indictment charge capital crimes, conviction of which "...shall be punished by death or by imprisonment for any term of years or for life." 18 U.S.C. §794(a). Both the government and the defendant contend that the death penalty provision of section 794 has been rendered unconstitutional, and hence inapplicable, by the Supreme Court's landmark ruling in Furman v. Georgia, 408 U.S. 238 (1972). To fulfill its duty to independently determine the constitutional status

EXHIBIT B

of this death penalty provision, duly enacted by the Congress, the court must review the arguments of counsel in light of the applicable precedents. See, United States v. Woodley, __ F.2d __, No. 82-1028, slip op. at 5730, 5738 (9th Cir. Dec. 8, 1983)("But while the members of both the legislative and executive branches are sworn to uphold the Constitution, the courts alone are the final arbiters of its meaning.")

The court undertakes to resolve the issue of the constitutionality of the death penalty provision of section 794 at this stage of the proceedings for two reasons: (1) to provide the defendant with certain knowledge of the penalties which may be imposed upon conviction; and (2) to determine whether the additional procedural safeguards afforded defendants in capital cases are warranted in the case at hand. 2/

We strongly emphasize that in addressing the issue of the constitutionality of the death penalty provision in section 794 we seek only to clarify the status of that statute. We intend no comment on the guilt or innocence of the accused; nor do we intimate any opinion as to the appropriate penalties for the crimes alleged in the indictment. The court's sole task, and, indeed, its obligation, is to determine whether the death penalty provision of section 794, as written and adopted by Congress, is constitutional and thereby entitled to our consideration in determining what procedures to adopt at trial and what sentence to impose if and when the penalty phase of the trial is reached.

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court reversed death sentences imposed under the Georgia and Texas death penalty statutes following defendants' convictions for rape and murder. The court issued a short per curiam opinion stating that the sentences imposed constituted cruel and unusual punishments in violation of the eighth amendment,[3] supplemented by five concurring and four dissenting opinions. The plurality opinions did not clearly establish the constitutional requirements for imposition of the death penalty in the cases before the court; at least three of the opinions, however, appeared to adopt the general theme that sentencing authorities exercising unbridled discretion in capital cases involving murder and rape were acting arbitrarily and capriciously in selecting defendants for execution and were prone to discriminate against minority defendants.[4]

In response to Furman, at least thirty-five states redrafted death penalty statutes.[5] Subsequent Supreme Court decisions have developed and refined the constitutional requirements for imposition of the death penalty under these statutes with respect to the crimes of murder, felony murder and rape.[6]

The issue for the court, however, is whether Furman rendered unconstitutional the death penalty for espionage as articulated in section 794. No federal court has squarely confronted this issue.[7] In Furman and its progeny the Supreme Court addressed the constitutionality of the death penalty as applied under state statutes solely with respect to

convictions for crimes of violence against individual citizens. The crime of espionage, however, poses far different and potentially greater dangers to our society; for example, the intentional disclosure of vital national defense information to foreign agents places the safety of every United States citizen in jeopardy.[8/] Consequently, the calculus employed by a legislature in determining the punishments for crimes which threaten our national security may be fundamentally different from that utilized for crimes of individual violence. More importantly, the constitutional implications of the eighth amendment proscription against cruel and unusual punishments with respect to the crime of espionage may be qualitatively different from those articulated in Furman concerning the crimes of murder and rape. Indeed, in upholding the revised Georgia death penalty statute in Gregg v. Georgia, 428 U.S. 153 (1976), the Court declined to examine the provision of the statute concerning aircraft piracy and treason, which provides for imposition of the death penalty in any case without consideration of statutory aggravating or mitigating circumstances.[9/] Hence, the limited holdings of Furman and its progeny do not invalidate the death penalty provision in section 794.

The court must determine, however, whether the eighth amendment prohibits imposition of the death penalty for espionage per se and as applied under section 794. We note that absent repeal of the statute, the legislative judgment as to the appropriateness of the death penalty is entitled to great deference. Indeed,

> "...in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."

Gregg, 428 U.S. at 175. Moreover, greater judicial deference to legislative judgment is required where specification of punishment is concerned "for these are peculiarly questions of legislative policy." Id. at 176.

Whether the punishment of death for espionage is cruel and unusual punishment per se under the eighth amendment requires a two-part inquiry. The court must ascertain whether the punishment both accords with the "evolving standards of decency of a maturing society", and comports with the "dignity of man" which is the "basic concept underlying the Eighth Amendment." Id. at 173.

In assessing whether the death penalty for espionage accords with contemporary societal standards of decency, a court looks to "objective indicia that reflect the public attitude toward the penalty." Id. Capital punishment for crimes which threaten our national security has been approved since the outset of our national existence. The First Congress of the United States enacted legislation providing the death penalty for treason.[10/] C 9, 1 Stat 112 (1790). And, as the majority in Gregg noted, "[t]he Fifth Amendment, adopted at the same time as the Eighth, contemplated the continued existence of the capital sanction by imposing certain limits on the prosecution of capital cases ...." Id.

at 177.

The present statute has its origins in the Espionage Act of 1917, C 30, 40 Stat 217 et seq. (1917), enacted during the onset of American involvement in World War I.[11/] Although the statute originally provided the punishment of death for acts of wartime espionage, Congress, in 1954, adopted capital punishment as an appropriate penalty for peacetime espionage as well. C 1261, Title II, §201, 68 Stat 1219 (1954). This judgment of our elected representatives remains unaltered. Further, Congress has reaffirmed its general acceptance of capital punishment for certain crimes by providing the death penalty for aircraft piracy that results in death. Antihijacking Act of 1974, 49 U.S.C. §1472(i) (1983 Supp). Finally, the legislatures of several states have also enacted statutes providing the death penalty for treason.[12/] The court concludes from these mandates of our elected representatives that the punishment of death for espionage conforms to contemporary societal standards of decency.

To be constitutionally permissible per se, the punishment of death for espionage must additionally comport with the "basic concept of human dignity at the core of the [Eighth] Amendment", Gregg, 428 U.S. at 182. To fulfill this requirement, a punishment must neither involve the unnecessary or wanton infliction of pain nor be disproportionate to the severity of the crime for which it is imposed. Id. at 173.

Absent conclusive proof that the generally cited penological justifications for capital punishment --

retribution and deterrence -- are invalid, a court should decline to nullify legislative determinations that the penalty is justified for a particular crime. See, id. at 182-87. The court is not aware of any conclusive evidence, statistical or otherwise, which demonstrates that capital punishment fails to deter acts of espionage. Nor does the court find that the imposition of capital punishment for espionage is an impermissible expression of the nation's abhorrence for such acts. Consequently, the court defers to the judgment of Congress that imposition of the penalty of death for espionage fulfills valid penological goals and does not involve the unnecessary and wanton infliction of pain.

The court must also consider whether imposition of the death penalty for espionage is disproportionate to the severity of the crime. We acknowledge that death "is an extreme sanction, suitable to the most extreme of crimes." Id. at 187. Acts of espionage, however, may irreparably damage our nation's ability to defend itself. The court cannot dispute the legislative judgment that this crime is extreme in character. Given the potential consequences of a serious breach of our national security through espionage, which may threaten the lives of all citizens of the United States, this court finds that capital punishment for espionage is not uniformly disproportionate to the severity of the offense.[13/] Accordingly, the punishment of death for espionage is not unconstitutional per se under the eighth amendment.

The sole question remaining for the court is whether the

penalty of death for espionage may be imposed under section 794. The court is cognizant that "...because there is a qualitative difference between death and any other permissible punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'". Zant v. Stephens, __U.S.__, 77 L.Ed.2d 235, 255 (1983), citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Indeed, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Zant, supra at 255, citing Gardner v. Florida, 430 U.S. 349, 358 (1977). Where discretion is afforded the sentencing authority to choose death as a penalty with respect to crimes of violence against individuals, the need for reliability requires such discretion to "...be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189.

Section 794 confers upon the court discretion to impose death or a lesser penalty. Hence, a legislative judgment has been made which recognizes degrees of culpability for various acts of espionage; for example, a court would be expected to impose a more severe penalty for a particularly egregious breach of national security. Although espionage differs greatly from the crimes of individual violence against the person discussed in Furman, the court acknowledges that the sentencing discretion afforded it by section 794 necessitates the formulation of sentencing guidelines which will ensure

the reliable imposition of punishment. Accordingly, if the penalty stage of this proceeding is reached, the court will apply sentencing guidelines designed to comply with both the legislative mandate requiring that the death penalty be considered when sentencing a defendant upon conviction for espionage, and the eighth amendment requirement that the sentencing authority be suitably guided in determining whether the death penalty, or a lesser penalty, is the appropriate punishment in a given case. The court believes that the articulation of such guidelines, if necessary, will render the penalty provision of section 794 constitutional as applied in its present form.

The court reiterates that in finding the death penalty provision of section 794 to be constitutional, it makes no comment on the merits of this case. It voices no opinion as to the guilt or innocence of the defendant. The court seeks only to advise the parties of the proper scope of the statute.

Accordingly, the defendant and the Government are hereby notified that the crimes charged in the indictment under 18 U.S.C. §§ 794(a) and (c) are capital crimes punishable by death or imprisonment for any term of years or for life. In addition, it is hereby ordered that the defendant is entitled to the statutory safeguards reserved for capital cases, as follows:

(1) the defendant, through his attorney, Jerrold M. Ladar, will file within ten days the name of an additional attorney who will represent him in this proceeding;

(2) the Government shall disclose to the defendant its

list of witnesses and the list of veniremen at least three days prior to trial;

(3) the defendant may not waive the indictment charged against him; and

(4) the defendant shall be afforded 20 peremptory challenges during voir dire.

Dated: January 12, 1983.

Samuel Conti
United States District Judge

FOOTNOTES

1/ The indictment charges defendant as follows:
Count One: 18 U.S.C. § 794(c) - Conspiring to Deliver National Defense Information to Aid a Foreign Government;
Count Two: 18 U.S.C § 793(b) - Unlawfully Obtaining National Defense Information;
Counts Three, Four and Five: 18 U.S.C. § 794(a) - Delivery of National Defense Information to Aid a Foreign Government;
Count Six: 18 U.S.C § 793(e) - Unlawful Retention of National Defense Information;
Count Seven: 26 U.S.C. § 7201 - Income Tax Evasion;
Counts Eight and Nine: 26 U.S.C. § 7206(1) - Making a False Income Tax Return.

2/ These statutory procedural safeguards include: 18 U.S.C. § 3005 (authorizing appointment of two attorneys for defense); 18 U.S.C. § 3432 (requiring disclosure of government witness list and veniremen at least three days prior to trial); Rule 7(a), F.R.Cr.P. (prohibiting waiver of indictment; and Rule 24(b), F.R.Cr.P. (increased peremptory challenges.)

Federal courts are divided over whether the additional safeguards provided defendants in capital cases are available where the applicable death penalty provision has been declared unconstitutional. Compare United States v. Watson, 496 F.2d 1125 (4th Cir. 1973) (absolute right to two appointed attorneys on request); United States v. Dufur, 648 F.2d 512 (9th Cir. 1980), cert. denied 450 U.S. 925 (1981) (no right to second court-appointed attorney); United States v. Shepherd, 576 F.2d 719 (7th Cir. 1978), cert. denied, 439 U.S.852 (1978) (no right to two attorneys); United States v. Weddell, 567 F.2d 767 (8th Cir. 1977), cert. denied, 436 U.S. 919 (1978) (no right to appointment of second attorney); United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977)(federal murder statute non-capital for all purposes given unconstitutionality of death penalty provision); United States v.Martinez, 536 F.2d 886 (9th Cir. 1976), cert. denied, 429 U.S. 907 (1976)(no right to extra peremptory challenges); United States v. Maestas, 523 F.2d 316 (10th Cir. 1975) (same); United States v. McNally, 485 F.2d 398 (8th Cir. 1973) (same).

The Ninth Circuit, however, has expressly held that defendants are not entitled to two attorneys or extra peremptory challenges where the death penalty sanction is inapplicable. See, Dufur, Martinez, supra. Further, with respect to statutory procedural safeguards in general, the Ninth Circuit has adopted the view that such safeguards remain available only "[i]f the statute's purpose derives from the nature of the offense

v. Georgia, 446 U.S. 420 (1980). The Court has also held that death is a disproportionate penalty for some crimes. Coker v. Georgia, 433 U.S. 584 (1977)(rape); Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982) (defendant in armed robbery case who drove getaway car and did not participate in murder, was not present at murder, and neither intended nor anticipated murder). Finally, the invalidation of one statutory aggravating circumstance where more than one aggravating circumstance has been identified by the jury does not invariably require reversal of a death sentence. Zant v. Stephens, __ U.S. __, 77 L. Ed. 2d 235 (1983).

7/ The federal courts have confronted the issue of the validity of federal death penalties post-Furman generally with respect to the crime of murder expressly discussed in Furman. See, e.g. United States v. Dufur, 648 F.2d 512 (9th Cir. 1980), cert. denied, 450 U.S. 925 (1981); United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977). One district court which has considered section 794 ruled that Furman has "apparently" rendered the death penalty provision unconstitutional. United States v. Helmich, 521 F.Supp. 1246, 1248 (M.D. Fla 1981).

8/ See, United States v. Rosenberg, 109 F.Supp. 108, 110 (S.D.N.Y. 1953).

9/ Ga. Code Ann. § 27-2534.1(a). Thus, the Georgia legislature essentially interpreted Furman to be inapplicable to the crimes of treason and aircraft piracy. Indeed, under the Georgia "pyramid" sentencing scheme, the sentencing authority apparently has absolute discretion whether to impose the death penalty for these crimes. For a discussion of Georgia's "pyramid" scheme, see, Zant v. Stephens, __ U.S. __, 77 L. Ed. 2d at 245-47. See also, Cal. Penal Code § 37 (1983 Supp.); Wash. Rev. Code § 9.82.010 (1983 Supp.)

10/ Treason can be characterized as a cousin of espionage: both crimes involve activity, whether violent or non-violent, directed toward the penetration of national security for the benefit of a foreign nation. See, Cramer v. United States, 325 U.S. 1, 45 (1945)(". . . the treason offense is not the only nor can it well serve as the principal legal weapon to vindicate our national cohesion and security.") Thus, although the elements of the crimes are distinct, and the problems of proof different, public attitudes towards treason and espionage are assumed to be similar.

11/ See, Edgar and Schmidt, The Espionage Statutes and Publication of National Defense Information, 73 Colum. L. Rev. 929, 940 (1973).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To File Memorandum As Amici Curiae, Points and Authorities, Memorandum Suggesting The Applicability of the Death Penalty, and Exhibits thereto, was hand-delivered this 9th day of July, 1985 to:

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Paul D. Kamenar

TESTIMONY OF ROY C. JONES SENIOR VICE-PRESIDENT OF POLITICAL AFFAIRS, MORAL MAJORITY, INC. BEFORE THE UNITED STATES SENTENCING COMMISSION, FEBRUARY 17, 1987

It is an honor to come before such a distinguished body charged with determining what penalties should be recommended for those who violate the laws of our land.

The Moral Majority was founded in 1979 in part because many Americans felt that the moral and ethical components of public issues were ignored--when not being actually attacked in our nation's legislatures and courtrooms. Thus, I come before you as a representative of over 7 million concerned Americans who have contributed to our cause and who will be ultimately affected by the recommendations of this Commission.

I am proud to stand behind the exhaustive study undertaken by the United States Department of Justice's Office of Legal Counsel with regard to this Commission's statutory authority to promulgate sentencing guidelines for federal capital offenses.

The Supreme Court holding in United States v. Southwestern Cable Company 392 U.S. 157 (1968), as the Office of Legal Counsel notes, clearly indicates that an administrative agency may exercise a power within the terms of its delegated authority even if Congress did not expressly mention -- or indeed did not contemplate -- a specific exercise of delegated power.

Clearly, some of the finest attorneys in America have agreed that this Commission has the requisite legal authority to address the question of capital crimes. It is the belief of Moral Majority, Inc. that this Commission has the moral responsibility to structure guidelines for certain and swift capital punishment for specific offenses.

Some people think capital punishment has no deterrent effect. I respectfully disagree with both their data and their conclusion. True, the deterrent effect of capital punishment is mitigated when criminals are not certain that is their fate. The obstacle course

erected by the Warren Court has ensured that years and even decades may elapse before a man found guilty of the most heinous crime by a jury of his peers is allowed to be executed. Is it any wonder that so many armed robberies now include the murder of any and all potential witnesses? The criminal class of our population have come to believe that murder is a free crime if committed as part of another felony. And, in many jurisdictions, their belief is correct.

Clearly, this Commission should say, enough. Enough cold blooded executions of innocent cash register attendants. Enough serial killings by people unafraid of "consecutive" life terms since they have only one life anyway. Enough revolving door jail terms for contract killers and child murderers.

When the average time served of a "life sentence" is considerably short of the average lifetime-7 1/2 years according to one investigator--it is no wonder that our nation's elderly tremble at the thought of walking their neighborhood streets after dark in most of our cities.

Capital punishment has a general deterrent effect for even the most hardened criminal. It is a rare human being who volunteers to have his stay on this earth terminated.

While the deterrent nature of capital punishment commends it as a sentencing tool, the interest of the community, the government establishment and the clear boundaries of civilized behavior command it.

The community has the right to say this far and no farther. The community has the right to declare certain conduct not only reprehensible, but anathema. The community's voice speaks through its legislatures and those voices have been thwarted by arbitrary and sometimes capricious behavior of unelected judges. The Bird court in California virtually never upheld a death sentence--just 3 of 58. In that case the voters were able to remove part of the problem, but only after nine long years had passed. This commission's guidelines can prevent such a war of wills in the federal system and the 49 other states that comprise our Republic.

This Commission has heard and will hear from those who are on the front lines of the fight against violent crime. There are others far more experienced than I as to the precise crimes that deserve a death sentence. As a layman, I can only suggest certain general categories of crime that the Commission should give consideration to as capital offenses:

(1) Murder of potential witnesses on the course of committing another felony.

(2) Serial or multiple killings.

(3) Murder for hire.

(4) Kidnapping which results in the death or disfigurement of an individual.

(5) Arson which results in the death of an individual or individuals.

(6) Murder of a president, elected official, officer of the court, or law enforcement officer.

(7) Sexual assault of a child which results in the child's death or disfigurement.

(8) Acts of terrorism which result in the death of innocent civilians.

While this list is not intended to be exhaustive, it is meant to assure the Commission that a citizen consensus exists that some criminals have harmed society to such a degree that they no longer deserve to live. Reestablishment of a just legal system and our civilized nation rests in the hands of this Commission. I urge you to do your duty.

Formed 1940

NISBCO

National Interreligious Service Board for Conscientious Objectors

TESTIMONY ON WHETHER CAPITAL PUNISHMENT MAY BE INCLUDED AMONG THE SANCTIONS TO BE CONSIDERED IN THE GUIDELINES FOR SENTENCING

before the

U. S. SENTENCING COMMISSION

on behalf of the

National Interreligious Task Force
on Criminal Justice
of the
Joint Strategy and Action Commission

and the

National Interreligious Service Board
For Conscientious Objectors

by Rev. L. William Yolton
Executive Director, NISBCO

February 17, 1987

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HERMAN WILL, JR., ESQ., Northwest Representative
GERALD SHENK, Southwest Representative

The National Interreligious Service Board for Conscientious Objectors, formed in 1940, is committed to helping and supporting all those who conscientiously question participation in war.

NISBCO is a nonprofit service agency sponsored by a broad coalition of religious bodies who join to protect, defend, and extend the rights of conscientious objectors. NISBCO is governed by an eleven-member Board which is elected from members of its Consultative Council.

The Board employs a staff which serves the national CO constituency out of offices in Washington, DC. The staff works as a cooperative team within the policies set by the Board. Their services are provided at no charge.

NISBCO cares for the Conscientious Objector by:

- Providing information on how to document one's convictions as a conscientious objector.
- Providing draft counselor training.
- Providing help and support for COs in the armed forces, or in the Delayed Entry Program, who seek discharge or transfer to noncombatant service.
- Providing nondirective advice for those who conscientiously object to the payment of war taxes.
- Advocating the rights of conscientious objectors before the Selective Service System, the White House, the Courts and Congress.
- Alerting concerned persons to changes that take place or are under consideration regarding military conscription, and coercive national service proposals.
- Alerting persons to changes in regulations regarding conscientious objection within the military.
- Maintaining an extensive referral service to local counseling agencies in all areas of country and attorneys who can aid those in need of legal counsel.
- Acting as a national resource center for documents relating to the draft and conscientious objection, as well as the religious response to those issues.
- Advising religious and other agencies with regard to educational curricula as they touch on issues of war, peace and conscience.
- Educating citizens through articles, speaking engagements, and publications to conscientiously decide for themselves what they believe about participation in war.

NISBCO DEPENDS ON TAX DEDUCTIBLE CONTRIBUTIONS FOR ITS SUPPORT

BOARD OF DIRECTORS

CONSULTATIVE COUNCIL

This testimony is presented on behalf of the National Interreligious Task Force on Criminal Justice and on behalf of the National Interreligious Service Board for Conscientious Objectors. Both organizations share many of the same member religious constituencies and on the question before the Commission with respect to including capital punishment among the criminal sanctions available to sentencing judges both organizations are in agreement.

The task force is a coalition of national and judicatory church officials and secular groups with a special concern for some aspect of criminal justice. These groups work together to broaden citizen and church participation in altering the criminal justice system so that more equal justice may emerge. The Task Force tries to stay in touch with ethical issues and special needs within the whole system--community safety, police practices, law, courts, prisons, probation, rehabilitation, etc. The Task Force is administratively related to the interdenominational and inter-faith cooperative instrumentality, the Joint Strategy and Action Commission, Inc. (JSAC). It is programmatically related to and staffed by JSAC and the Division of Church and Society of the National Council of Churches.

For twenty years JSAC has brought together working groups of religious organizations who share common purposes for service, what most American religious traditions call urban and national mission. For over a decade the task force on criminal justice has been bringing together religious efforts in the field of

criminal justice for coordination of efforts, skills building and participation in policy planning.

It is part of a long history of religious participation in the criminal justice system. At times the religious authorities were the criminal justice system. Times have changed, and religious interest has focused on amelioration of the system. We are about to observe the bicentennial of the development of the penitentiary, which was a Quaker initiative to diminish the harshness of criminal sanctions, including capital punishment, and to substitute a more human and rehabilitative system. The religious organizations of our country have extensive efforts to conduct conciliation services as alternatives or supplements to the court system, chaplaincy services in jails and prisons, victim assistance programs, and programs for prisoners and ex-prisoners. Most of the religious bodies have developed carefully considered policies on criminal justice issues, using their own expert members who are involved in the system and using outside consultants to develop critical distance. The Task Force has compiled the policy positions on capital punishment of more than twenty religious bodies, and I submit that compilation with my testimony.

The National Interreligious Service Board for Conscientious Objectors [NISBCO] represents thirty-four Catholic, Protestant, and Jewish religious organizations, as well as religious organizations based on primarily ethical concerns. In addition, NISBCO interprets the concerns of several conservative religious bodies

who on principle do not participate in coalitions. Since 1940 NISBCO has supported those who for reasons of conscience oppose conscription for military service. More recently it has taken an interest in the problems of those who for reasons of conscience oppose payment of taxes for war or preparation for war. On behalf of all persons affected by conscription laws, NISBCO has sought to improve the fairness of those laws, their administration, and the treatment of those persons involved. On the issue of capital punishment, most conscientious objectors to participation war also oppose capital punishment. For that extraordinary reason as Executive Director of NISBCO, I have undertaken this testimony as consistent with the concerns of the organization. I am sensitive to the fact that war objectors have themselves been killed, either as the direct result of the conditions of their imprisonment, or from the association of their positions against war as treason.

* * * * *

The U.S. Sentencing Commission is to consider whether it has a mandate to include capital punishment among the criminal sanctions in the sentencing guidelines. Should the Commission determine that it has such a mandate, then it must determine whether capital punishment can administered with rules that guarantee its fairness and avoid unwarranted disparity. Capital punishment by definition excludes the fourth goal of sentencing, rehabilitation.

When the Sentencing Commission came into existence no one

suggested that capital punishment would be considered as one of the criminal sanctions to be included in the guidelines. The insertion of this agenda after preliminary guidelines, and now, revised guidelines were published is a surprise for which we were not prepared. Our organizations are unalterably opposed to this new development, which is an irregular and morally questionable proposal.

I address the question of fairness and disparity first. So long as the possibility exists that one person could be executed who is innocent of the capital crime of which he or she was convicted, the test cannot be met. One of the members of our task force is a convicted murderer who was mistakenly convicted.

Rehabilitation remains a fundamental consideration. In the over ten years of debate about the effectiveness or fruitlessness of efforts at rehabilitation, the committees have consistently rejected the extreme view, and the congressional instructions to you retain that objective of rehabilitation. "The Committee in no way means to suggest that we should abandon our efforts to rehabilitate prisoners. . . Also, as noted previously, the purpose of rehabilitation is still important in determining whether a sanction other than a term of imprisonment is appropriate in a particular case." (p. 942, Report of the Senate Committee on the Judiciary, to accompany S. 1722, 96th Congress, Report No. 96-553) Surely, had the Congress considered inclusion of capital punishment in your options, it would have noted that this goal of sentencing could not be achieved.

Despite the unpredictability of rehabilitative measures, especially of imprisonment, rehabilitation of murderers does take place. A good friend of mine, the late William Goudas, served twenty years for murder and emerged self-educated and despite prison conditions rehabilitated himself. [My personal view is that God has a lot to do with rehabilitation.] He served as co-director of the Prison Education Program of Massachusetts, of which I was the president. Rehabilitation is possible; his work after imprisonment was a significant contribution to society. He became a field supervisor for the ministerial studies program at Harvard Divinity School when I was on the faculty, and thereby an adjunct faculty member.

The Commission must satisfy itself that the Congress actually intended that the Sentencing Commission include within its available sanctions the use of capital punishment. The religious organizations supported the separation of the capital punishment issue from the general question of reform of the Federal Criminal Code. The inclusion of that issue in S. 1 was one of the factors that united religious groups in opposition to that omnibus recodification. That experience of over a decade was a factor in the separate submission of death penalty bills in the last several congresses, and was certainly a condition of the passage of the Sentencing Act of 1984.

So long as there is considerable doubt that the Congress intended inclusion of capital punishment as a sentencing option, political prudence should dictate that the death penalty be

excluded in order that Congress not send the entire effort of the Commission to the scrap heap. Were I the manipulative sort, I might urge you to include the death penalty, so that the rest of the guidelines, which are contrary to my earlier testimony, might be defeated as a whole. Instead, I am willing to accept the democratic process with respect to the Congressional approval of the guidelines, and to facilitate that consideration urge you to exclude the controversial capital punishment sanction.

Religious groups that are opposed to capital punishment include the American Jewish Committee, the U.S. Catholic Conference, the American Baptist Church in the U.S.A., the Episcopal Church, the Lutheran Church of America, the United Methodist Church, the Presbyterian Church (U.S.A.), the United Church of Christ, the Christian Church (Disciples of Christ), Mennonites, Brethren, Friends, and many others. Liberal religious groups such as the Unitarian Universalist Association and the American Ethical Union have long led the opposition to capital punishment. Even those conservative religious bodies with traditions of support for capital punishment such as the American Lutheran Church and the Christian Church have withdrawn their univocal support, and have asked their members to study the question.

This virtual unanimity of denominational policy statements does not mean that the teaching of the religious groups is accepted by the adherents. I presume that many of you continue your religious affiliation and yet are probably not even aware that your religious group has a position, and perhaps don't

care. The reality of our religious constituencies is that the position of the religious leaders, which is reflected in the teaching of the religious bodies is not based on polling the members. Several national religious bodies have encouraged special study of the issue among their members in an effort to develop a more responsible participation in moral questions.

The nearly universal teaching of contemporary religious ethicists is in opposition to capital punishment. As a member of the Society of Christian Ethics, the association of teachers and scholars in colleges, universities, and theological schools, I can recall no support for capital punishment in the papers presented nor in the books reviewed.

Although the matter is outside my technical competence, I cannot refrain from asking the Commission to consider whether appearing to accept the argument of the Justice Department that the Commission is a branch of the executive, and not an independent commission of the judiciary, would establish the basis for a test of the constitutionality of the guidelines themselves. Since the issue is already raised in terms of the power of the President to appoint and to remove the members of the Commission, and the compensation of the federal judges who are members of the Commission during the time they are district judges is affected by the supplementary compensation there are constitutional problems with the composition of the Commission. To take on capital punishment as a sentencing option without completely repudiating the justice department memorandum would further cloud

the authority of the Commission. If the Justice Department's initiative is repudiated, then why are we here in this hearing?

Finally, I appeal to you as moral agents, to reject the futile, and contradictory effort to suppose that by killing people you show others that killing people is wrong. After state killings there is a rash of private killings, for the moral threshold has been breached. Capital punishment tends to brutalize the society that condones it. The international consensus has moved toward a complete bar to capital punishment. Our European allies have universally abandoned it. Surely we can do without the ultimate sanction: "Vengeance is mine, saith the Lord."

Respectfully submitted,

L. William Yolton
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POLICE EXECUTIVE
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DARREL W. STEPHENS
EXECUTIVE DIRECTOR

TESTIMONY BEFORE THE U.S. SENTENCING COMMISSION:

REMARKS ON DEATH PENALTY SENTENCING GUIDELINES

Submitted by Darrel Stephens
Executive Director
Police Executive Research Forum
February 17, 1987

Mr. Chairman, Commissioners, Ladies and Gentlemen: I appreciate the opportunity to appear before you today. I see that a number of other law enforcement organizations are present. I believe that the Commission's efforts to bring together representatives from policing and other fields directly impacted by sentencing procedures, reflects a dedication to formulating fair and responsive guidelines when they are deemed necessary.

I speak to you today on behalf of the members of the Police Executive Research Forum. Our organization is comprised primarily of law enforcement executives from the nation's largest jurisdictions. We have joined together to promote common goals; among them a mandate to debate issues of concern to police and the communities they are sworn to protect. This Commission also has a responsibility to protect the public, through sentencing guidelines that reflect society's views of a proper response to unlawful behavior.

I have spent 20 years in local law enforcement, including chief of police in Newport News, VA and Largo, FL. I also served as an Assistant Chief in Lawrence, KS and in several other capacities in Kansas City, MO including patrol officer. My perspective, therefore, is that of a local police practitioner. In each community there lies a common concern - protection from violence and other forms of criminal behavior. The police, prosecutors, and community rely on a system of criminal justice that promises to keep identified violent offenders from committing further offenses against society. Unfortunately, there are flaws in this system. The absense of sentencing guidelines for those convicted of the most heinous crimes is just one example of how our system of justice fails to meet its intended purpose of prosecuting to the full extent of the law those offenders who present an

overwhelming threat to the community. Due in large part to the Furman case interpretations, the death penalty is not sought even when federal statutes allow for it, because guidelines do not exist to ensure that the sentencing is fair and reasonable.

As I understand it, there are two questions being considered before this Commission today. The first issue concerns whether or not this Commission should have the statutory authority to promulgate guidelines for federal capital offenses. The second question addresses the issue of what safeguards these guidelines could possess should the Commission be given that authority. In addition, there is a need to determine what types of offenses and circumstances should dictate consideration of the death penalty. I believe the first question may be best answered by other legal experts. We do not feel our testimony regarding the history of the legislation, court decisions, and constitutional interpretations would be of benefit to this Commission. There are legal authorities with a great deal more expertise in these areas. I will speak instead to the issues raised by the second question.

Our criminal justice system is built on the premise that legislation reflects the priorities and standards by which a majority of our society would like to live. If federal statutes continue to provide for a death penalty, there must be appropriate guidelines to ensure fair and uniform imposition.

Local law enforcement is concerned with federal capital offenses. It is often local law enforcement that is called to investigate incidents later prosecuted under federal statutes. As our President Chief Behan mentioned in his earlier testimony to this Commission, our officers often participate with

Federal authorities in joint arrests, particularly in the area of drug offenses. The felons we arrest pose a threat to the community at large as well as to police and correctional officers.

In order to properly represent the views of our members, we conducted a short phone survey to over 20 member police chiefs. They were asked, "Do you support efforts of the U.S. Sentencing Commission to develop guidelines for seeking the death penalty on Federal cases where the law provides for its use? Of those responding, eighteen answered affirmatively, two had no applicable answer and only one responded in the negative, though one other said that he agreed conditionally. More telling than the numbers are the remarks they provided. Of particular concern were premeditated murders, particularly those committed by cop-killers, serial murderers, and those who carry out their crimes across state lines.

In addition, local authorities are growing more concerned with domestic terrorism. Terrorists pose an unprecedented threat to the nation--a threat that law enforcement on all levels must combat. In keeping with the application of the death penalty for acts of treason, severe penalties must be imposed on those that undermine the safety and security of the country. There was consensus among the chiefs surveyed that these categories of offenders are among those that should receive the death penalty, and that guidelines should be formulated to allow for imposition of the maximum penalty.

Our responding members suggested that deference be given to mitigating circumstances for each of these categories. One chief suggested that there must be some evaluation of whether the offender is a public menace. For

example, in a street gang, initiation for membership involves a prospective member robbing and beating an individual. There is a "bonus" if the inductee happens to kill the person. While this is a local crime that would be prosecuted under state statutes, the premise is easily applied to federal cases. The chief of police who cited this example felt that in premeditated situations in which there is loss of life or a significant threat to society, capital punishment guidelines would be helpful to remove the menace from society. Conversely, in other "heat of passion" situations, the death penalty may not be warranted because the individual does not present an ongoing threat to society, and other forms of punishment may be more appropriate.

There was also a sense that the death penalty should be imposed in situations in which an offense reflects an attack not only on an individual, but on our system of government. Killings involving the President, Congressmen, and other government agents represent a blatant disregard for the order and standards that society has set forth, and should be dealt with severely. Similarly, we believe that offenders responsible for law enforcement fatalities should receive the maximum penalty for attacking the agents designated to protect the law-abiding community. This would include local law enforcement officers working with federal agents on special cases and assignments.

I would like to take just a moment to talk about those law enforcement officers who have made the ultimate sacrifice in the course of performing their duty. We are currently involved in an effort to build a national memorial commemorating those officers who have given their lives in the line of duty. I believe we can send a message to the officers on the street that

we will do more than honor our dead, we will do everything in our power to see that these incidents are minimized and that offenders will be held to task for their actions. This signal may best be communicated through the imposition of dramatic penalties for those offenders who take the lives of law enforcement officers or their loved ones. In 1985, 78 police officers were feloniously killed in the line of duty. Nine of those offenders had previously been arrested for murder. In just this past fiscal year, 2 more federal agents were killed by individuals who were convicted of federal felonies.

As you know, recent research suggests that a large proportion of serious crime is committed by a small percentage of repeat offenders. The Bureau of Justice Statistics states, "Among those for whom legal status at the time of the capital offense was reported, about 40% had been in an active status. Half of these were on parole, while the rest had charges pending (7%), were on probation (5%), or were prison inmates (3%) or escapees (3%)." In addition, a significant percentage of prisoners under sentence of death at the time of the study had a previous conviction for homicide. (Bureau of Justice Statistics, Capital Punishment, 1985, U.S. Department of Justice.) We in local law enforcement are too familiar with murderers who are paroled only to kill again. They may claim many victims across numerous states before detected. Guidelines must be established to assist those with sentencing authority to remove these serial murderers from society, without jeopardizing other inmates, correctional officers or the community.

The imposition of the death penalty is like no other form of punishment, and should be instituted only in circumstances in which the crime is so heinous as to dictate an extreme response. We have mentioned some of the crimes that might be covered in new guidelines. However, in all cases, there must be consideration of the specific circumstances surrounding the commission of the crime. Sentencing must be flexible enough to ensure that the offense is considered in the context of other factors, such as premeditation, the mental and emotional stability of the offender and cognizance of what he/she was doing, and any causes for such an action. Yet, the court must also impose some standards to ensure fair and consistent treatment of offenders, free from discrimination and bias. I will list brief examples of some of the characteristics of the offender that may be considered in guidelines for federal capital crimes. (It must also be decided if the presence of one special trait is enough to preclude further consideration of the death penalty for this individual.)

O Age and level of understanding (It is important to assess whether a child, for example, or mentally impaired person understands his/her actions and the implications...)

O Context of the commission of an offense (It should be determined if the offender acted in response to repeated abuse, coersion, manipulation....)

O Physical health (Physical impairments, such as an offender who is deaf and mute, must be taken into consideration to determine if such disabilities affect their ability to comprehend the law...)

O Criminal record (If the individual depends on criminal activity for his/her livelihood and shows little prospect for rehabilitation based on past experiences, these factors should be considered in the sentencing process...)

O Potential threat v. potential contribution to community (It may be helpful to determine the offender's potential to the community through support of family, job, or self as opposed to the potential for increased harm...)

O Crime against individual or government (There should be a distinction between an offender who murders an officer on a military base in the heat of the moment of a domestic dispute and an offender who murders an officer because he is an enforcing agent of the United States...)

O Dependency on drugs or other substances (Physical addictions may be considered when determining whether the death penalty is appropriate, or if treatment and incapacitation is a better response...)

O Participation in offense (The level of participation in a crime is important to sentencing; accomplice, "master-mind", unknowing participant...)

As mentioned earlier, the death penalty is the ultimate form of punishment. Because an error in sentencing is irreversable, there must

be stringent safeguards and precise guidelines put in place. It is critical that decisions to invoke capital punishment are in no way related to discrimination based on age, sex, race, religion, socioeconomic status, physical characteristics, sexual orientation, and others. We also support automatic appellate review of death penalty sentences. While this might create additional work for the courts, it would ensure greater protection against a capricious or discriminatory sentence. Also, if the law does not already provide for a separate sentencing hearing for death penalty offenses, this may be considered. First, the guilt or innocence of the offender would be determined. Then a second court could determine the appropriate sentence based on evidence more relevant to assessing punishment than guilt or innocence, and on the provided guidelines.

In closing, I would like to state that the Police Executive Research Forum applauds the Commission's decision to provide public hearings on this issue. The death penalty is an emotionally charged issue with implications that affect our most basic human rights. Should it be determined that the Commission has the authority to formulate sentencing guidelines for federal capital offenses, the Forum membership stands ready to assist in this effort. Again, thank you for this opportunity to share our concerns with the Commission.

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Testimony before

THE UNITED STATES SENTENCING COMMISSION

February 17, 1987

Ordway P. Burden, Chairman

Ceremonial Courtroom
U.S. Courthouse
Washington, D.C.

Chairman Wilkins and members of the United States Sentencing Commission, we welcome this opportunity to share our views on the question of whether or not this commission has the authority to write guidelines for certain capital offenses. The fact that we do agree is the reason we are here.

The National Law Enforcement Council is an umbrella group of fifteen national law enforcement organizations, representing through the executive heads of these organizations, over 300,000 law enforcement officers. The Council does not represent the views of its individual members; that they will do for themselves. We are here today to express our views, as a general philosophy of law enforcement, which are in agreement with the Department of Justice's Office of Legal Counsel's opinion. We believe that capital punishment, for certain crimes, may be imposed under the Sentencing Reform Act of 1984, and that this Commission has the authority to promulgate such guidelines.

You will hear individually from other law enforcement national organizations, representing specific law enforcement officers, who will speak to this question from their organization's point of view. We do not and will not suggest that we can speak for them. But, in a general philosophical nature we do believe that these comments are endorsed by the vast majority of law enforcement officers throughout our country.

The Sentencing Commission has the authority to promulgate guidelines for the imposition of the death penalty.

We agree with the opinion of the Department of Justice's Office of Legal Counsel that this Commission has the statutory authority to promulgate guidelines for the imposition of the death penalty. The Commission's implementing legislation gives the Commission the responsibility to promulgate sentencing guidelines for the entire range of crimes found in Title 18 of the United States Code. Title 18 provides for the death penalty for several crimes, including espionage, treason, hijacking, murder, and assassination of the President.

Congress did not intend to exclude the death penalty from the ambit of sentences for which the Commission is empowered to promulgate guidelines. The mere fact that the implementing legislation does not specifically mention the death penalty does not indicate to the contrary.

The death penalty has existed in the federal statutes since the foundations of our Republic, despite the fact that it has not been implemented by federal courts for about 20 years. Congress was aware of the fact that these statutes existed when it passed the implementing legislation. Thus, if the Congress had intended to exclude the death penalty from the scope of the Commission's work, it would have said so explicitly.

The death penalty serves the purposes of deterrence, incapacitation, and retribution.

The Commission's implementing legislation provides that sentencing should serve certain purposes -- deterrence, incapacitation, retribution, and rehabilitation. The fact that

the death penalty serves three of these purposes infers that the Congress intended for that sentence to be within the scope of the Commission's authority.

There can be no better reason for the imposition of the death penalty than its deterrent effect. One study by Stephen K. Layson of the University of North Carolina at Greensboro indicates that for every one execution, fifteen lives are saved through general deterrent effects.

Even if some dispute the statistical evidence, common sense indicates that the death penalty has a deterrent effect. Those who labor daily in the vineyards of criminal justice -- law enforcement officials -- generally agree that the death penalty deters crime. This view has been noted by the Supreme Court in Gregg v. Georgia, 428 U.S. 153, 185-86 (1976):

> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical supporting or refuting this view. We may nevertheless assume safely that there are murders, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

Retribution is also a valid reason for imposing the death penalty. When criminals go unpunished, or are underpunished, it causes people to believe that their lives and safety are of no concern to their government. By making the price for taking a human life the life of the criminal, government asserts that it values the lives of its citizens enough to impose the ultimate punishment. This will reaffirm the public's faith in their government.

The death penalty also serves the important purpose of incapacitation. The value of incapacitation is obvious: dead people do not commit crimes. In the case of some violent criminals, the death sentence is the only means of incapacitation. This is especially true where a person is serving a life sentence and commits violent crimes in prison. In the absence of a death penalty, such a person cannot be stopped from committing violent crimes, short of absolute solitary confinement. But even then, the prisoner would have occasional contact with other people, and would thus pose a continual threat. The death sentence is the only viable way to completely incapacitate these violent offenders.

The same holds true for a person who has committed many violent crimes outside of prison. A person who is has committed violent crimes outside of prison will certainly commit them inside of prison. Thus, we should not shrink from applying the death penalty in cases where a person would otherwise merit its imposition merely because he or she would not be a threat to the society at large if incarcerated for life. We should consider the safety of our prison population along with the safety of the

rest of society.

Because of its finality, the death sentence does not serve the purpose of rehabilitation. Nevertheless, that is not a reason for the Commission to decline to consider it. A life sentence, or a 60 year sentence (which, for most people, is the equivalent of a life sentence) does not serve the purpose of rehabilitation. But such sentences are contemplated by the current federal sentencing structure, and by the Commission. The reasoning behind this is clear: there are some criminals for whom rehabilitation is too risky. To attempt to rehabilitate someone who has committed a crime so heinous as to merit the death penalty is irresponsible. It is playing Russian Roulette with the lives of innocent people.

<u>The Commission should promulgate guidelines for the imposition of the death penalty for every crime for which the Congress has prescibed it as a punishment, but especially for murder, espionage, treason, and assassination of the President.</u>

The Commission should no more forgo considering the death penalty for this reason than it should forgo considering any other sentence contemplated by the federal statutes.

While there are several crimes which merit the Commission's immediate attention, I would first urge that you promulgate guidelines for every crime which carries the death penalty. The fact that the Congress prescribed a penalty of death for certain acts clearly indicates that it desired that it should be implemented. Thus, to exclude any crimes from consideration would not be in keeping with the intentions of the Congress. If the Congress decides that the death penalty should not be given

for one or another crime, it can repeal those provisions prescribing the death penalty.

Among the crimes which the Commission should immediately promulgate guidelines for the implementation of the death penalty are murder, espionage, treason, and assassination of the President.

Practically every civilization in the history of Man has punished first degree murder with death. This is not evidence of a low regard for human life; rather, it is evidence of a high regard for human life. In fact, civilizations which did not hold human life in high regard tended to allow persons convicted of first degree murder to evade the death penalty, often through paying a fine, or by paying a family to have one of its members accept the penalty vicariously.

Our society prides itself in being one of the most, if not the most, civilized societies in history. Yet more often than not we do not evidence this by requiring the ultimate price for the ultimate crime.

The opponents of the death penalty often point out that blacks are generally executed more often than whites. Many court cases in recent years have focused upon the alleged disproportionate amount of executions of blacks over whites. Where this occurs, and results from conscious racism, it is reprehensible. However, the solution to this problem is not to eliminate the death penalty altogether -- the problems of crime and racism are two different problems. Disproportionate execution of blacks merely points out the need for a more even implementation of the death penalty, not its abandonment.

The problem of disproportionate execution of blacks has never been a problem at the federal level. The Bureau of Justice Statistics has pointed out that 33 persons have been executed by the federal government since 1930. Of those, only 5 were members of minority groups. Thus, there is no problem of disproportionate imposition of the death penalty in federal cases. In fact, the federal government has executed a smaller proportion of minorities than the population at large.

What is disturbing about the emphasis upon the number of blacks executed is that it overlooks the fact that the proportion of blacks murdered far exceeds that of whites. Opponents of the death penalty may consider their compassion for convicted murderers noble. I assert that it is ignoble to be concerned with the guilty at the expense of the innocent.

Nowhere are the effects of misplaced compassion more evident than here in the District of Columbia, where murder is the most frequent cause of death of young black males. What the District needs is not more compassion for guilty people, but more concern about the innocent. It needs a strong deterrent, so that some of these young lives can be saved. The death penalty will provide this deterrent.

Nevertheless, if the Commission feels that it is necessary to take up the problem, which has generally been confined to a few states, it is possible to construct procedures which ensure that the decision of whether or not to execute a defendant is made in a way that the defendant's race is not at issue. For example, after a jury has rendered a guilty verdict, another jury, which has no idea what is the race of the criminal or his

victim, could decide whether or not the death penalty should be imposed.

Another area where the death penalty should be applied is espionage and treason. Those who betray our country's vital secrets place the entire nation at risk. In a war, victory or defeat -- and the lives of thousands of soldiers -- could turn upon information obtained from a traitor.

The imposition of the death penalty would have a deterrent effect upon potential traitors. The average mole betrays his country for simple financial greed. It is less likely that such a person would do so if faced with death.

Further, once these moles are caught, the threat of death would make it more likely that they would be willing to let intelligence services "turn" them, that is, feed false information to the adversary.

The Commission should also promulgate guidelines for the imposition of the death penalty for the assassination of the President. In the nuclear age, the President of the United States, as Commander-in-Chief of our armed forces, is at the apex of the chain of command upon which the security and survival of the nation, and the entire world, hangs. The assassination of the President would severely disrupt that chain. If such an assassination were coupled with a severe international crisis, the resulting confusion could lead to disastrous results.

World War I began when Austria-Hungary attacked Serbia in retaliation for the assassination of Archduke Franz Ferdinand. This was the catylist for a conflagration which engulfed the

entire world. Should our President be assassinated by a terrorist, our leaders might feel compelled to retaliate in a similar manner. Thus, history might repeat itself, with similar results. However, the trial and execution of the assassin could prove to be sufficient catharsis that our leaders would not feel compelled to retaliate in as Draconian manner as they might otherwise.

Thus, the survival of the nation, and even the human species, would be more completely secured by the deterrent and retributive effects of providing for a death penalty for the assassination of the President of the United States.

Conclusion

We believe that the Sentencing Commission has the authority to promulgate guidelines for the imposition of the death penalty. The intent of the Congress was to give the Commission such authority. The Commission should promulgate guidelines for its imposition for all crimes for which the Congress has prescribed it.

STATEMENT

OF

DAVID C. BALDUS
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BEFORE

THE

UNITED STATES SENTENCING COMMISSION

CONCERNING

DEATH PENALITY LEGISLATION

ON

FEBRUARY 17, 1987

ABSTRACT

During the past decade, two colleagues and I have studied the administration of state capital sentencing systems operating under the post-Furman sentencing reforms approved by the Supreme Court. My purpose today is to discuss what light the recent experience of these states sheds on the issues of inconsistency and lack of evenhandedness that will confront the Commission if it assumes jurisdiction over the capital punishment issue.

The federal proposals currently pending in Congress authorize the death sentence for a number of high visibility but quite infrequent crimes, such as treason, for which no significant counterpart exists under state laws. However, the great bulk of the death eligible homicides which would be processed under the federal proposals are first degree murders or similar homicides which are very much like the normally low-visibility homicides that warrant capital punishment under the laws of many states. The federal criminal justice system currently produces 30 to 40 first degree murder convictions each year, a large proportion of which arise from homicides committed on Indian reservations. Because of the similarity between the capital crimes presently processed by the states and those that are likely to arise under the proposals, what we have learned about the state systems may assist this Commission in its assessment of some of the issues raised by the capital punishment question.

Four features of state systems are relevant to the question of consistency and evenhandedness under the federal proposals. First, death sentences are imposed in only a small proportion of the death eligible cases. Of the 2,000 to 4,000 death eligible cases prosecuted annually, the nation only imposes 250 to 300 death sentences, a rate of from only 6% to 15%.

Second, the relatively few death sentences that are imposed are not limited to the most aggravated cases. Many defendants who commit extremely aggravated murders do not receive death sentences, and many death sentences are imposed in cases that cannot be meaningfully distinguished from cases that routinely receive lesser sentences.

Third, although racial discrimination against minority group defendants does not appear to be a substantial problem, there is strong evidence that defendants whose victims are white face a substantially greater risk of receiving death sentences.

Fourth, statutory provisions providing for the comparative proportionality review of death sentences by state supreme courts have had limited effectiveness in eliminating excessive death sentences from the state systems.

We expect that inconsistent and excessive death sentencing will be a significant problem under the federal death sentencing proposals. First, the proposals authorize far more death sentences than federal prosecutors and juries are likely to believe should be imposed; we anticipate only a handful of death sentences each year. Second, because of broad prosecutorial discretion and the highly decentralized nature of the federal system, we can expect substantial geographic disparity in the results. Third, unique features of federal criminal jurisdiction over Indian reservations enhance the likelihood of inconsistent or excessive death sentences in cases involving Native Americans.

We propose that if the Commission assumes jurisdiction over this issue, it consider the adoption of safeguards against inconsistency and a lack of evenhandedness that go beyond those required by the United States Supreme Court. Specifically, we recommend that any death penalty proposals should (a) limit the death penalty for homicide to the most aggravated forms of intentional murder, and (b) should include detailed provisions requiring a comprehensive comparative proportionality review by the Courts of Appeals.

LIKELY ISSUES OF CONSISTENCY AND EVENHANDEDNESS IN FEDERAL DEATH SENTENCING UNDER PROPOSED LEGISLATION.

By

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February 17, 1987

I. Introduction

My name is David Baldus. I am the Joseph B. Tye professor of law at the University of Iowa College of Law, where I teach courses on criminal law and capital punishment. I am presenting these remarks on behalf of myself, Charles Pulaski, a law professor and criminal procedure specialist at Arizona State University, and George Woodworth, a professor of statistics at the University of Iowa. Professors Pulaski and Woodworth have collaborated with me for the past six years in the study of capital sentencing in the post-Furman period.

Shortly after the United States Supreme Court's 1976 decisions approving the principal state death sentencing systems, we undertook a series of studies to determine how consistently and evenhandedly the post-Furman v. Georgia (1972) death sentencing systems operate in practice. This work was supported by grants from the National Institute of Justice, the National Science Foundation, and private foundations.

By "consistently and evenhandedly" I refer to the extent to which the death sentence imposed upon any particular defendant appears to be consistent with the sentences imposed on other defendants charged with or convicted of similar capital crimes.

Our most detailed investigations have been empirical studies of the death sentencing systems now operating in Georgia and Colorado. I am also familiar with the extensive literature on the operation of the post-Furman systems.[1] Professor

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1. See Baldus, Pulaski & Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts", 15 Stetson L. Rev. 133, 146-65 (1986) [hereinafter cited as Baldus, Pulaski & Woodworth].

Woodworth and I presented the results of our Georgia research in a post-conviction proceeding challenging the constitutionality of the Georgia capital punishment system. That case, known as McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), was argued before the United States Supreme Court last October and is now awaiting decision.

In addition, I have served as a consultant to the Supreme Courts of South Dakota and Delaware on comparative proportionality review in death sentence cases. And during the period 1982-84, I served as a consultant to the National Center for State Courts' project on Comparative Proportionality Review of Death Sentences by State Supreme Courts.

As I understand it, the Commission is considering a proposal that the Commission address the question of whether it should recommend the reenactment of a federal death penalty. To assist the Commission in its deliberations, I would like to outline the issues concerning consistency and evenhandedness that are likely to arise in the administration of the death penalty under the pending federal proposals, and to propose changes which may reduce the risk that a federal death sentence law would produce inconsistent or discriminatory results. My judgments on this subject are based principally on the striking similarity between the federal death penalty system that is likely to emerge under the pending federal legislation and the state systems that have emerged over the last 10 years under the guided discretion statutes approved by the United States Supreme Court in 1976.

Last May, I presented a similar analysis to the House Subcommittee on Criminal Justice, which has jurisdiction over the proposed death penalty legislation in the House of Representatives. In that presentation, I outlined the problems of consistency and evenhandedness that I foresaw if those proposals were enacted into law. I also recommended that the Subcommittee adopt specific safeguards against inconsistency and a lack of evenhandedness, safeguards that would go beyond those required by the United States Supreme Court. Specifically, I recommended that any proposed death penalty legislation be limited to the most aggravated forms of intentional murder and that such legislation should also include detailed provisions requiring the relevant Court of Appeals to perform a comprehensive comparative proportionality review of any federal death sentences. A copy of the more detailed and more thoroughly documented statement which I submitted to the House Committee is attached to this statement as Appendix A.

II. The Projected Federal Death Row if the Current Federal Proposals Become Law

The application of the current federal proposals for the reinstitution of the death penalty is likely to produce very few death sentences and these cases are most likely to arise from low-visibility cases involving first degree murder, bank robbery homicides, and prison homicides. Moreover, these death sentence cases are disproportionately likely to involve minority group defendants, particularly Native Americans.

The types of federal crimes that would make a convicted offender eligible to receive the death sentence (death-eligible) under the current proposals fall into two general categories. The first category involves distinctly federal concerns for which no significant counterpart under state laws now exists. In this category are the crimes of treason, espionage, assassination of the President and other important officials, and homicides involving the use of interstate or foreign commerce -- aircraft piracy, train wrecking, mailing lethal objects, even kidnapping for ransom.

Under normal circumstances, very few of these death-eligible crimes will be committed each year, but when they do occur, they are likely to attract substantial public attention.

In the second category, we find three types of proposed death-eligible crimes that are very much like the crimes that may warrant capital punishment under the laws of many states, i.e.,

* premeditated or first degree murder,

* homicide committed in the course of a bank robbery,

* homicide committed by a federal prisoner subject to a life sentence or while attempting to escape.[2/]

When compared to the more exotic sort of potentially capital federal crimes in the first category -- espionage, treason, assassination of the President -- these three federal homicide offenses, in individual instances, are normally of relatively low visibility. In this respect as well, they resemble the typical capital homicide prosecuted in state courts.

Furthermore, based on current statistics, it appears that the vast majority of federal death-eligible homicides would fall within this second category of low-visibility crimes. Also, the number of cases in this category is not likely to be large. Currently, the federal government prosecutes between 180 and 210 homicide cases each year, which produce from 30 to 40 first degree murder convictions per year; and fewer than 20 of these cases a year are currently considered serious enough to warrant a sentence of five years or more. We consider it quite unlikely that federal prosecutors and juries will consider more than a handful of these cases to be sufficiently death-worthy to justify a death sentence.

Finally, a large proportion of the cases that result in first degree murder convictions -- for which the pending proposals would authorize the death penalty -- appear to involve murders committed (a) on Indian reservations under federal jurisdiction, and (b) in U.S. territories (Virgin Islands, Guam, and the Northern Marianas).

III. Anticipated Results and Issues Arising from the Processing of Routine Low-Visibility Cases Under the Federal Proposals.

The experience of the states in processing death-eligible cases which are comparable to the low-visibility, potentially capital federal cases (murder, bank robbery, and prison homicides) provides the basis for anticipating a lack of consistency and evenhandedness under the federal proposals. A principal source of excessiveness in the state systems is that death sentences are imposed in a very small proportion of all death-eligible cases -- only 250 to 300 sentences are

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2. The similarity of the federal and state crimes in this category becomes even more striking when one also considers the sorts of aggravating circumstances which, under the pending bills, would elevate these three state law-type homicides to the status of capital crimes. In many respects, they too resemble the statutorily designated aggravating circumstances employed by many state statutes.

imposed annually, accounting for what we estimate to be just 10-15% of the death-eligible cases prosecuted under state law.[3/] This low death sentencing rate occurs because the state capital sentencing systems operate in substantially the same way as the systems used for processing other serious felonies. Specifically, the state systems are dominated by the exercise of prosecutorial discretion which results in plea bargaining and waiver of the death penalty in the vast majority of cases. The result is that very few death-eligible cases ever reach a sentencing jury, and even when they do, juries impose death sentences only about 50% of the time. The principal reason for this low death sentencing rate, we believe, is that the scope of the state death sentencing statutes embraces far more cases than prosecutors and juries believe should receive a death sentence.

Further, because of this overbreadth of the state death sentencing statutes and broad exercise of prosecutorial discretion, the few death sentences that are actually imposed are not limited to the most aggravated murder cases. It is true that a large proportion of the death sentences imposed do occur in the most aggravated cases, e.g., those involving serious contemporaneous offenses such as rape and armed robbery, especially when combined with multiple victims, torture, and extreme brutality. But it is also clear that many of the defendants who commit extremely aggravated murders do not receive death sentences. Moreover, we find that a significant number of defendants have received death sentences in cases that are generally no more aggravated than the large majority of cases that result in lesser sentences. These results also reflect the tremendous variations between counties and judicial districts in prosecutorial and jury judgments as to what constitutes a death-eligible offense. Under the pending federal proposals, the same problems would exist. The category of low-visibility crimes for which capital punishment would be authorized is nearly as broad as it is in most states. In addition, not only do federal prosecutors exercise as much discretion as state prosecutors, but because the federal system is so highly decentralized, we can also expect to see even more geographic disparity in the exercise of federal prosecutorial discretion than we do within any given state jurisdictions.

The experience of the states also suggests that the proposals to reintroduce federal death sentencing will raise important issues of racial discrimination. Although the data from the states suggest that racial discrimination against minority group defendants is not a substantial problem, there is strong evidence that defendants whose victims are white face a substantially greater risk of receiving death sentences. Community pressure and psychological identification with the victim is considerably more likely to affect our predominantly white prosecutors and juries. Not only would these same forces and influences affect federal prosecutors and juries, but three complications unique to federal Indian reservations, where most of the death-eligible cases would probably arise, further enhance the likelihood of racially discriminatory effects. The first is that Native American defendants tried for homicides committed on their reservations are not tried by their Native American peers but by federal juries, who are predominantly white citizens. The second complication is the division of criminal jurisdiction over Indian reservations between state and federal authority. In some states, this criminal jurisdiction is exclusively federal, and in others it is exclusively state, while in other states some of the reservations are under federal authority and some are under state control. We estimate that approximately 60% of the 352,000 people residing on Indian reservations are under federal criminal jurisdiction.

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3. See Baldus, Pulaski & Woodworth, supra note 1, at 154.

Bifurcation of authority over homicides occurring on Indian reservations further complicates the consistency issue.

A third complication on the Indian reservations under federal jurisdiction is an exception to federal jurisdiction on the basis of the defendant-victim racial combination of the case. Under current law, a homicide case occurring on an Indian reservation which involves both a non-Indian defendant and a non-Indian victim falls outside of federal jurisdiction. As a result, under the federal proposals, capital crimes committed on an Indian reservation that involved either an Indian defendant or an Indian victim would be subject to a possible death sentence, while identical crimes between two non-Indians would fall under the jurisdiction of the host states, whose laws may or may not include capital punishment.

The fourth feature of the state experience with death sentencing that is relevant to the federal proposals concerns the efficacy of comparative proportionality review. This concept refers to the requirement in most death sentencing states, either by statute or court decision, that an appellate court must review each death penalty case and determine whether the death sentence in the case is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The Supreme Court has held, however, that proportionality review of this type is not constitutionally required. Moreover, we have found that even in the states that do use comparative proportionality review, that it is not particularly effective. The reason, in large part, for this lack of effectiveness is that the review process actually employed is not sufficiently systematic and comprehensive to accomplish the intended results. Because of the high risk that the federal proposals will produce comparatively excessive sentences, the question of an effective system of comparative proportionality review under the federal proposals should be a high priority if the Commission assumes jurisdiction over this question.[4/]

IV. Recommendations to Limit the Risk of Inconsistency and a Lack of Evenhandedness in Federal Death Sentencing

First, we recommend that if the Commission assumes jurisdiction over this issue, it should consider narrowing the definition of the death-eligible crimes, for example by limiting the definition of a potentially death-eligible murder to one intentionally committed by the defendant. We also recommend that the "heinous, cruel, or depraved" statutory aggravating factor be limited to circumstances in which "the defendant subjected the victim to torture or a similar gratuitous infliction of pain in a heinous, cruel, or depraved manner." These limitations would avoid potential constitutional issues concerning overbreadth, harmonize federal law with comparable state laws, and limit death eligibility to only the most aggravated intentional murders.

Second, and, in our opinion most important, we recommend that the Commission consider recommending detailed provisions for the conduct of comparative proportionality review. Specifically, we suggest that the legislation should require the United States Courts of Appeals to conduct such a review on the direct

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4. A detailed discussion of the issues involved in the development of an effective system of proportionality review is presented in Van Duizend, "Comparative Proportionality Review in Death Sentence Cases: What? How? Why?" 8 State Ct. J. 9 (Summer 1984).

appeal of every death sentence case. Such legislation should also require the reviewing court to (a) consider all cases of similar culpability that resulted in a homicide conviction by plea or at trial; (b) to identify the specific cases deemed to be similar for comparative purposes; and (c) to explain the basis of its decision with reference to those similar cases.

An effective system of proportionality review should also include a requirement that the Justice Department, through its local prosecutors, collect and maintain machine readable and narrative descriptions of all death eligible cases processed in the federal courts. These data should be available to the Courts of Appeals and the parties in all death penalty cases. With information of this type available, the Courts of Appeals reviewing death cases would be in a position to determine the relative frequency with which death sentences are imposed in classes of similar cases, decided for example over the last five years, and to determine whether the death sentence case before it can be meaningfully distinguished from the death-eligible cases that routinely result in life sentences or less. The proportionality review experiences of the state supreme courts clearly demonstrates that without such a data base of information available to the reviewing court an effective system of judicial oversight is not possible.

In summary, by more narrowly defining the categories of federal capital crimes and by ensuring an effective proportionality review system, the Commission can maximize the prospects of limiting the death penalty to only the most serious and aggravated federal crimes and of avoiding the kinds of excessiveness and discrimination that still occur under contemporary state death sentencing procedures.

STATEMENT

OF

DAVID C. BALDUS
COLLEGE OF LAW
UNIVERSITY OF IOWA

BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

DEATH PENALTY LEGISLATION

ON

MAY 7, 1986

Appendix A

Summary of Remarks by David C. Baldus, before the House Subcommittee on Criminal Justice, Committee on the Judiciary, May 7, 1986

CONSISTENCY AND EVENHANDEDNESS IN FEDERAL DEATH SENTENCING UNDER PROPOSED LEGISLATION: LESSONS FROM THE STATES

During the past decade, two colleagues and I have studied the administration of state capital sentencing systems operating under the post-Furman sentencing reforms approved by the Supreme Court. My purpose today is to discuss what light the recent experience of these states sheds on the problems of inconsistency and lack of evenhandedness that are likely to arise if the death sentencing bills currently pending before this Subcommittee become law.

The federal proposals authorize the death sentence for a number of high visibility but quite infrequent crimes, such as treason, for which no significant counterpart exists under state laws. However, the great bulk of the death eligible homicides which would be processed under the federal proposals are first degree murders which are very much like the normally low visibility homicides that warrant capital punishment under the laws of many states. The federal system currently produces 30 to 40 first degree murder convictions each year, a large proportion of which arise from homicides committed on Indian reservations. Because of the similarity between the capital crimes presently processed by the states and those that are likely to arise under the proposals, what we have learned about the state systems may assist this Subcommittee in its deliberations.

Four features of state systems are relevant to the federal proposals. First, death sentences are imposed in only a small proportion of the death eligible cases. In from 2,000 to 4,000 death eligible cases prosecuted annually, the nation only imposes 250 to 300 death sentences, a rate of only 6% to 15%. The reasons for the low death sentencing rates are an unwillingness of prosecutors to pursue a death sentence in a large proportion of death eligible cases and a frequent reluctance on the part of juries to impose a death sentence. These low death sentencing rates reveal a substantial gap between strong public support for capital punishment in theory, expressed in public opinion polls and broad state death penalty laws, and support for capital punishment in practice.

Second, the relatively few death sentences that are imposed are not limited to the most aggravated cases. Many defendants who commit extremely aggravated murders do not receive death sentences.

Third, although racial discrimination against minority group defendants does not appear to be a substantial problem, there is strong evidence that defendants whose victims are white face a substantially greater risk of receiving death sentences.

Fourth, statutory provisions providing for the comparative proportionality review of death sentences by state supreme courts have had limited effectiveness in eliminating excessive death sentences from the state systems.

We expect that inconsistent and excessive death sentencing will be a significant problem under the federal death sentencing proposals. First, the proposals authorize far more death sentences than federal prosecutors and juries are likely to believe should be imposed; we anticipate only a handful of death sentences each year. Second, because of broad prosecutorial discretion and the highly decentralized nature of the federal system, we can expect substantial geographic disparity in the results. Third, unique features of federal criminal jurisdiction over Indian reservations enhance the likelihood of inconsistent or excessive death sentences in cases involving native Americans.

We recommend that the Committee adopt safeguards against inconsistency and a lack of evenhandedness that go beyond those required by the United States Supreme Court. Specifically, we recommend that any proposed death penalty legislation (a) be limited to the most aggravated forms of intentional murder, and (b) should include detailed provisions requiring a comprehensive comparative proportionality review by the Court of Appeals.

CONSISTENCY AND EVENHANDEDNESS IN FEDERAL DEATH SENTENCING UNDER PROPOSED LEGISLATION: LESSONS FROM THE STATES

By

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May 7, 1986

My name is David Baldus. I am Joseph B. Tye professor of law at the University of Iowa College of Law, where I teach courses on criminal law and capital punishment. I am presenting these remarks on behalf of myself, Charles Pulaski, a law professor and criminal procedure specialist at Arizona State University, and George Woodworth, a professor of statistics at the University of Iowa.

Shortly after the United States Supreme Court's 1976 decisions approving the principal state death sentencing systems, we undertook a series of studies to determine how consistently and evenhandedly the post-Furman v. Georgia (1972) death sentencing systems operate in practice.1/ By "consistently and evenhandedly" I refer to the extent to which the sentence imposed upon any particular defendant appears to

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1/ Baldus, Pulaski & Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts," ___ Stetson L.Rev. ____ (1986)(in press); Baldus, Woodworth & Pulaski, "Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia," 18 U.C.Davis L.Rev. 1375 (1985); Baldus, Pulaski & Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," 74 J.Crim.L.& Criminology 661 (1983); Baldus, Pulaski & Kyle, "Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach," 33 Stan.L.Rev. 1 (1980).

be consistent with the sentences imposed on other defendants charged with or convicted of capital crimes.

Our most detailed investigations have been empirical studies of the death sentencing systems now operating in Georgia and Colorado. Our work has been supported by grants from the National Institute of Justice, the National Science Foundation, and private foundations.

In addition, I have served as a consultant to the Supreme Courts of South Dakota and Delaware on comparative proportionality review in death sentence cases. And during the period 1982-84, I served as a consultant to the National Center for State Courts project on Comparative Proportionality Review of Death Sentences by State Supreme Courts.

My purpose today is to discuss what light the recent experience of the states that use capital punishment sheds on the problems of inconsistency and lack of evenhandedness that are likely to arise if the federal death sentencing bills currently pending before this Subcommittee become law. To be sure, the bills before you are different from the death penalty laws of the various states; but they also resemble those state laws in many important respects. Certainly, with respect to the observations I would like to make today, the similarities between existing state laws and the proposed federal legislation are more important than the differences, as I shall try to explain.

II. Federal Homicides and the Proposals to Make Certain Federal Crimes Capital Offenses

Most of the proposals now before you suggest a two-step determination of whether any particular federal defendant should receive a death sentence.2/ The first step is determine whether the defendant has committed a federal crime, e.g. treason, for which capital punishment is authorized under the appropriate circumstances. If so, the second step involves a determination, based upon the aggravating and mitigating factors present in the individual case, whether that particular defendant should receive a death sentence.

The sorts of federal crimes that would make a convicted offender "death-eligible" under the current proposals represent an interesting mix.3/ Most of them involve distinctly federal concerns for which no

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2/ See, e.g., H.R. 343, 99th Cong. 2d Sess. § 3562A (1985); S. 239, 99th Cong. 1st Sess. § 3593 (1985).

3/ A defendant becomes "death eligible" if the circumstances of the crime would support both (a) a conviction for an offense for which death is an authorized sanction, and (b) a finding that a statutory aggravating circumstance is present in the case, whether or not the defendant is actually charged and convicted of the capital crime committed, and if a capital conviction does result, whether the defendant is sentenced to life imprisonment or death.

significant counterpart under state laws now exists. I include in this category treason, espionage, assassination of the President and other important officials, and homicides involving the use of interstate or foreign commerce—aircraft piracy, train wrecking, mailing lethal objects, even kidnapping for ransom.4/ On the other hand, there are also three aggravated homicides for which the death penalty is suggested that are very much like the kinds of crimes that may warrant capital punishment under the laws of many states, i.e.,

* premeditated or first degree murder,5/
* homicide committed in the course of a bank robbery,6/
* homicide committed by a federal prisoner subject to a life sentence or while attempting to escape.7/

These three potentially capital federal crimes are of interest for several reasons. First, as I just mentioned, they resemble in their legal elements crimes that many states classify as potentially capital offenses. This similarity becomes even more striking when one also considers the sorts of aggravating circumstances which, under the bills before you, would elevate these three state-law type homicides to the status of capital crimes. In many respects they, too, resemble the statutorily designated aggravating circumstances employed by many state statutes.8/

4/ The following laws either currently authorize a death sentence or define circumstances, the presence of which, under the federal proposals, would elevate first degree murder to capital murder: 18 U.S.C. § 34 (1982) (aircraft destruction with death resulting); 18 U.S.C. § 794 (1982) (espionage); 18 U.S.C. § 844(d),(f) (Supp. II 1984) (dealing with explosives if death results); 18 U.S.C. § 1716 (1982) (mailing dangerous items resulting in death); 18 U.S.C. § 1751 (1982) (kidnapping, assault, assassination of President, staff members, or attempt thereto); 18 U.S.C. § 1992 (1982) (train wrecking with death result); 18 U.S.C. § 2113 (Supp. II 1984) (bank robbery with death result); 18 U.S.C. § 2381 (1982) (treason); 49 U.S.C.A. § 1472 (West 1986) (air piracy with death).

5/ 18 U.S.C. § 1111 (Supp. II 1984).

6/ 18 U.S.C. § 2113 (Supp. II 1984).

7/ E.g., S. 239, 99th Cong. 1st Sess., § 3592(c)(1) (1985) proposes capital punishment for murder committed by a prisoner escaping from federal custody or by a prisoner serving a life term in a federal institution.

8/ The statutory aggravating circumstances in the federal proposals most comparable to those in the typical state law that elevate a first degree murder to capital murder include: kidnapping for ransom;

The one exception to this observation that deserves mention is the statutory aggravating circumstance included in several of the proposals--"murder after substantial planning and premeditation."9/ This proposed aggravating circumstance, which is found in no state law, would expand federal death eligibility far beyond that contemplated by any state. It would appear to apply to a wide variety of intentional murders such as those committed between spouses, family, and friends that, in the absence of other aggravating circumstances, would not seem to justify society's ultimate penal sanction. Certainly, that no state currently makes this factor a basis for capital punishment argues for its reconsideration.10/

The second reason that we think the three state-law type homicides are important concerns the extent to which they will attract sustained public attention. Compared to the more exotic sort of potentially capital federal crimes--espionage, treason, assassination of the President--these three federal offenses, in individual instances, are normally of relatively low visibility. In this respect as well, they resemble the typical capital homicide prosecuted in state courts.

There is a third reason as well to be interested in this group of three state-law type crimes. Based on current statistics, it appears the vast majority of homicides presently prosecuted in the federal courts fall within this group. This suggests that we can expect to see relatively few instances of the more unusual federal crimes--treason, espionage, or assassination of a high public official--which will become capital offenses under the proposed legislation. If such crimes occur, of course, they will receive substantial public attention, and properly so, since they constitute extremely serious criminal conduct,

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defendant has a prior conviction for a state or federal crime for which death or life was authorized; prior conviction for two or more federal or state offenses involving substantial violence; defendant created grave risk to one or more persons in addition to the victim; contract killing; offense committed in an especially heinous, cruel, or depraved manner; killing for pecuniary gain; defendant seeking to escape from federal custody; and defendant serving a life term. See, e.g., S. 239, 99th Cong. 1st Sess., § 3592(c) (1985).

9/ E.g., S. 239, 99th Cong. 1st Sess., § 3592(c)(9) (1985) establishes a defendant as death eligible if he "committed the offense after substantial planning and premeditation to cause the death of a person . . ."

10/ Another difference between the proposed federal and current state laws is that the federal law does not define as death eligible first degree murder committed in the course of a rape, or a kidnapping not for ransom, unless it is committed in an "especially heinous, cruel, or depraved" manner. Most state laws include these two contemporaneous offenses in their list of statutory aggravating circumstances.

jeopardizing the national interest. However, both their high visibility and relative infrequency distinguish them from the nationally less significant and normally low visibility intentional murders that make up the bulk of first degree murder convictions obtained today in both the federal and state courts.

Of course, when we speak of the state-law type murders that currently constitute the bulk of federally prosecuted homicides, we are not talking about a large number of cases. Currently, the federal government prosecutes between 180 and 210 homicide cases each year. Roughly three-fourths of these cases result in a homicide conviction. Of these convictions, generally about one-third are for first degree murder. The number of federal first degree murder convictions, therefore, ranges from 30 to 40 per year.11/ Interestingly, a large proportion of the cases that result in first degree murder convictions--for which the current proposals would authorize the death penalty--appear to involve murders committed (a) on Indian reservations under Federal jurisdiction, and (b) in U.S. territories (Virgin Islands, Guam and the Northern Marianas).12/

11/ The reported number of federal defendants prosecuted for homicide (first and second degree murder and manslaughter) during the twelve-month period ended June 30, 1981 through 1985 were: 216, 185, 190, 207, and 188. Director, Administrative Office of the United States Courts, Annual Report 355 (1985).

12/ There are no hard statistics available on the distribution of federal homicides by subject matter and circumstances, but officials at the Administrative Office of the United States Courts estimate the assertion in the text is correct. The statistics about federal homicides that are available also appear to support this estimate. Table 1, which is appended to this report, compares the population distribution on Indian reservations according to the 1980 census with the distribution of federal homicide charges and convictions during the period 1982-83. It indicates that for the one year period ending June 30, 1983, 68% (80/117) of federal homicide convictions were reported from offshore territories and states with exclusive or concurrent federal jurisdiction over Indian reservations. Also, Patti Tin Bin Boo, Computer Analyst, Bureau of Indian Affairs, reports that 68 murders were committed in 1984 on reservations under Federal jurisdiction, although the final disposition of these cases is unknown.

Table 1 also indicates that the U.S. territories of the Virgin Islands, Guam and the northern Marianas account for 11% of the federal homicide convictions.

There are also a number of homicides committed in federal prisons. In 1983, 12 federal inmate slayings were reported and 9 were reported in the six months of 1984, the latest data available. 9 Corrections Compendium (No. 10), Contact Center Inc., Lincoln, Nebraska, p. 7 (April 1985). It is unknown how many of these prison homicides would be capital under the federal proposals. Federal jurisdiction also

Another important similarity between present state death-sentencing systems and the current federal proposals concerns the role of the prosecutor. In both systems, the prosecutor exercises a very large degree of discretion. Under the death penalty laws of every state, the prosecutor initially decides whether to charge a defendant with capital murder. Moreover, in most states prosecutors are free to accept guilty pleas tendered by capital defendants in exchange for waiving the death penalty. Some states also permit the prosecutor to waive the death penalty unilaterally even after a jury has convicted the defendant at trial of capital murder. Federal prosecutors traditionally enjoy a similar degree of discretion in homicide cases, and none of the pending proposals would in any way restrict that discretion in capital cases.13/

In summary, under the federal proposals capital punishment would become a potential sanction for a variety of crimes, one of which--intentional or first degree murder--is quite similar to the sort of murder that constitutes a capital offense in many states. Furthermore, the sorts of statutory aggravating circumstances that might justify a federal death sentence under the proposals before you for the most part resemble those employed by many states. Since the most frequently prosecuted federal crime that would become a capital offense under the current proposals is intentional, aggravated murder, what we have learned about the disposition of comparable capital crimes in the state systems may assist this Subcommittee in its deliberations.

III. Consistency and Evenhandedness in the Administration of State Post-Furman Death Sentencing Laws

The available data from our studies of Georgia and Colorado and the results of studies conducted by others in several states reveal four features of contemporary state death-sentencing systems that are particularly relevant to the federal proposals. First, death sentences in the states are imposed in only a small proportion of all death eligible cases. As a nation, we prosecute each year between 2,000 and 4,000 cases, the circumstances of which potentially implicate the death penalty. But we only impose the death penalty in 250 to 300 of those cases, i.e., in from only 10 to 15% of the death eligible cases. Table 2, which is appended to this statement, presents an overview of the death sentencing rates recently observed in the post-Furman period. Even among the cases resulting in conviction for capital murder, the

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reaches homicides committed in national parks and by civilians on military reservations.

13/ In the twelve-month period ending June 30, 1984, 33 first degree murder convictions were obtained in the federal system. Sixteen, or 48% of these were obtained by guilty plea, presumably in most instances through a plea bargain. Director, Administrative Office of the United States Courts, Annual Report 348 (1984).

rate is quite low; only a handful show rates over .50. At a time when opinion polls and prosecutors express great support for capital punishment, these results are surprising. In addition, these low rates remain quite stable from year to year and from state to state, and they show relatively little regional variation.

We have also explored the reasons for these low death sentencing rates. Figure 1, which is appended to this statement, helps to explain the low death sentencing rates in one state, Colorado. The figure presents the flow of potentially capital cases through Colorado's death sentencing system over a four-year period. It reveals a tremendous rate of attrition of cases at the plea-bargaining stage. It also indicates that prosecutors pursue death sentences in only a very small fraction of the death eligible cases that result in capital murder convictions at trial. Moreover, the jury death sentencing rate among the handful of cases that reach a penalty trial is only .33 (4/12).

The flow of cases through Colorado's capital charging and sentencing system is typical of the systems found in the states for which we have data.14/ What we find is that death sentencing rates in the United States are low, but not because of the intercession of state appellate courts or the federal judiciary. Rather these low death-sentencing rates result from the actions of prosecutors and ordinary citizens who, as jurors, process these cases on a daily basis.

These low death sentencing rates reveal a substantial gap between support for capital punishment in theory, as expressed in public opinion polls and broad state death eligibility legislation, and support for it in practice. One possible reason for this gap is the enormous expenditure of time and money associated with the conduct of capital litigation, which no doubt deters some prosecutors from seeking the death penalty in every death-eligible case. A more important explanation, we believe, is that these low death sentencing rates reflect society's effort to resolve the profound value conflicts implicated in capital punishment. The de facto national quota of 250-300 death sentences imposed annually symbolizes the nation's commitment to the protection of the lives of the public, while the exercise of leniency by prosecutors and juries in the vast majority of death eligible cases--approximately 2,000 to 4,000 each year--reflects the nation's unwillingness to take the lives of even our most culpable criminals on a wholesale basis.

Curiously enough, however, the relatively few death sentences that we do impose are not necessarily limited to the most aggravated murder cases. This is the second feature of the death-sentencing experience

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14/ The numbers of death sentences imposed in states with large numbers of homicides are, of course, larger. For example, the average number imposed annually in Florida is about 35, in Georgia 15, in California 35, and in Texas 30.

of the states that is relevant to the federal proposals. To be sure, a large portion of the death sentences that the states impose occur in the most aggravated cases, e.g., those involving serious contemporaneous offenses such as rape, multiple victims, torture, and extreme brutality. But it is also clear that many of the defendants who commit these most extremely aggravated murders do not receive death sentences. This sometimes happen because the sentencing judge or jury chooses to be lenient. More often, however, this happens because the prosecutor chooses to reduce the charges or to waive the death penalty in exchange for a guilty plea. Perhaps more importantly, we find that a significant number of defendants have received death sentences in cases that are really no more aggravated than the large majority of cases that only result in lesser sentences.15/ We regard these death sentences as excessive in the sense that we use that term because these defendants have received death sentences under circumstances that usually result only in a term of imprisonment. A principal explanation for these excessive death sentences is that, especially when they are from different parts of a state, different prosecutors employ different standards when deciding how to process comparable death eligible offenses.

A third feature of the experience of the states that is relevant to the proposals to reinstate federal death-sentencing concerns the impact of race. Although the data from the states suggest that racial discrimination against minority group defendants is not a substantial problem, there is strong evidence that defendants whose victims are white face a substantially greater risk of receiving death sentences. Community pressure and psychological identification with the victim is considerably more likely to affect our predominantly white prosecutors and juries when the victim is also white. Table 3, which is appended to this statement, depicts the nationwide pattern of race of victim discrimination for murder cases involving contemporaneous felonies. The disparities in death-sentencing rates that it indicates are strong and widespread throughout most geographic regions.

Our findings in Georgia suggest that race of victim discrimination occurs most frequently in murder cases that are only moderately aggravated.16/ This is not surprising, because within this "mid-range" of cases, for which either a life or death sentence would be plausible, juries and prosecutors can exercise the greatest discretion. In contrast, among both the least aggravated and the most aggravated cases, where the facts cry out for either a life or a death sentence, we find no evidence of discrimination based on the race of either the victim or the defendant.

15/ See, e.g., Baldus, Woodworth & Pulaski, "Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia," 18 U.C.Davis L.Rev. 1375, 1396-98 (1985).

16/ Id. at 1400-01.

The fourth feature of the state experience with death-sentencing that is relevant concerns the efficacy of comparative proportionality review. This term refers to the requirement in most death sentencing states, either by statute or court decision, that an appellate court must review each death penalty case and determine that the sentence imposed is both warranted by the facts and consistent with the sentences imposed in other, similar cases. In Pulley v. Harris, the United States Supreme Court ruled that proportionality review was not constitutionally required.17/ However, in various death penalty decisions, including Pulley v. Harris, the Court has described comparative proportionality review as an important additional safeguard against the imposition of irrational or excessive death sentences. Moreover, in practice, state legislation in 26 of the death-sentencing states requires that the state supreme court conduct a comparative proportionality review of every death sentence imposed.18/

What we have found, particularly in Georgia, is that, even in those states that do use comparative proportionality review, it is not particularly effective.19/ By and large, the reason is that the review process actually employed is not sufficiently systematic to accomplish the intended results. This failure is especially disappointing, since we are convinced that, properly conducted, comparative proportionality review can be extremely effective and that

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17/ 465 U.S. 37 (1984).

18/ Van Duizend, "Comparative Proportionality Review in Death Sentence Cases: What? How? Why?" 8 State Ct.J., Summer 1984, at p. 22, n. 2. Moreover, four state supreme courts conduct a proportionality review in the absence of legislation requiring them to do so (Arizona, Arkansas, Florida, Illinois).

19/ See Baldus, Pulaski & Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," 74 J.Crim.L. & Criminology 661 (1983); Liebman, "Appellate Review of Death Sentences: A Critique of Proportionality Review," 18 U.C. Davis L. Rev. 1433 (1985); Bowers, "The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Statutes," 74 J. Crim. L. & Criminology 1067 (1983); Goodpaster, "Judicial Review of Death Sentences," 74 J. Crim. L. & Criminology 786 (1983); Dix, "Appellate Review of the Decision to Impose Death," 68 Georgetown L. Rev. 97 (1979); Radelet & Vandiver, "The Florida Supreme Court and Death Penalty Appeals," 74 J. Crim. L. & Criminology 913 (1983); Bentele, "The Death Penalty in Georgia: Still Arbitrary," 62 Wash. U. L. Q. 573 (1985); Rodrequez, Perlin & Apicella, "Proportionality Review in New Jersey: An Indispensible Safeguard in the Capital Sentencing Process," 15 Rutgers L. R. 399 (1984).

appellate courts possess the necessary expertise to do the job properly.20/

IV. Anticipated Results in the Processing of Routine Low Visibility Cases Under Federal Proposals

There are six reasons why we expect that the problem of inconsistent or excessive death sentences that we find in the state systems will be as bad or worse among the kinds of crimes most likely to be processed under the federal death sentence proposals. First, a principal source of inconsistent sentencing among the states is that their laws authorize far more death sentences than the state prosecutors and juries believe should be imposed. Under the federal proposals, the category of crimes for which capital punishment is an authorized penalty is nearly as broad as in most states. For example, under the bank robbery statute, a defendant could receive a death sentence even if he neither killed, nor participated in the killing, nor intended a killing to occur.21/

Second, we anticipate the system would produce only a handful of death sentences. During the one-year period ending June 30, 1985, the federal system sentenced 43 defendants convicted of first degree murder and only 19 of these homicides were considered sufficiently aggravated to warrant a prison sentence of five years or more.22/

Third, a major source of the variation in the sentences imposed in death eligible cases is the exercise of prosecutorial discretion. Under the federal proposals, prosecutors will continue to exercise as much discretion in capital cases, both before and after trial, as they do in any state.

Fourth, because the federal system is so highly decentralized, we can expect to see even more geographic disparity in the exercise of federal prosecutorial discretion than we do within any given state jurisdictions.

Fifth, there are three complications unique to federal Indian reservations which further enhance the likelihood of inconsistent or excessive death sentences under the current proposals. First is the

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20/ Baldus, Pulaski & Woodworth, "Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts," ___ Stetson L.Rev. ___ (1986) (in press).

21/ Indeed, some potential applications of the federal proposals may violate the Eighth Amendment. See Enmund v. Florida, 458 U.S. 782 (1982). See also note 27 infra.

22/ Director, Administrative Office of the United States Courts, Annual Report 378 (1985).

potential for arbitrariness and discrimination resulting from the trial of native American defendants before federal juries of predominantly or all white citizens. Our concern is that in such cases, we may encounter discrepancies in death sentencing rates that reflect the ethnic characteristics of the defendant or the victim. The second complication is the division of criminal jurisdiction over Indian reservations between state and federal authority.23/ In some states criminal jurisdiction is exclusively federal, in others it is exclusively state, while in others some of the reservations are under federal authority but others are under state control. We estimate that approximately 60% of the 352,000 people residing on Indian reservations are under federal criminal jurisdiction.24/

A third complication on the Indian reservations under federal jurisdiction is an exception to federal jurisdiction on the basis of the defendant-victim racial combination of the case. Under current law, a homicide case occurring on an Indian reservation which involves both a non-Indian defendant and a non-Indian victim falls outside of federal jurisdiction.25/ As a result, under the federal proposals, capital crimes committed on an Indian reservation that involved either an Indian defendant or an Indian victim would be subject to a possible death sentence, while identical crimes between two non-Indians would fall under the jurisdiction of the host states, whose laws may or may not include capital punishment.26/

Sixth and finally, we anticipate that many of the death eligible cases processed under the federal proposals, especially those arising on Indian reservations, will fall into the mid-aggravation range, in which we have observed the strongest evidence of race of victim discrimination in the state data.

V. Recommendations

The experience of the states in administering their death-sentencing systems since 1973 leads us to believe that the current federal proposals for authorizing the death penalty for certain federal crimes will result in very few death sentences and that those death

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23/ Clinton, "Criminal Jurisdiction over Indian Land: A Journey Through a Jurisdictional Maze," 18 Ariz.L.Rev. 503, 577-83 (1976).

24/ A distribution of the reservations is shown in Table 1, which is appended to this report. Roughly one-third of the Indian population in the states listed in Part I of Table 1 are under state criminal jurisdiction.

25/ United States v. McBratney, 104 U.S. 621 (1882).

26/ Several jurisdictions hosting Indian reservations under federal jurisdiction do not authorize capital punishment, e.g., Alaska, Iowa, Maine, Michigan, Minnesota, North Dakota, and Wisconsin.

sentences that are imposed in cases involving relatively low visibility homicides may very likely reflect the same sort of inconsistency and excessiveness that we have found in the states.27/ What also gives us pause is the high probability, based on current statistics, that the death-sentencing procedures that the current proposals advocate would be applied disproportionately to native American defendants for crimes committed on reservations.

We are not suggesting that the federal proposals are unconstitutional, since in the main they appear to satisfy the requirements established by the Supreme Court since 1976. However, if such a federal death-sentencing law is to be enacted, we urge the Committee to go beyond those safeguards that are constitutionally required in order to address the problems of discrimination and excessiveness that appear to persist in the states.

First, we recommend that the proposed legislation should limit the definition of a potentially death eligible murder to one intentionally committed by the defendant. We also recommend that the "heinous, cruel or depraved" statutory aggravating factor be limited to circumstances in which "the defendant subjected the victim to torture or a similar gratuitous infliction of pain in a heinous, cruel or depraved manner." These limitations would avoid potential constitutional issues concerning overbreadth, harmonize federal law with comparable state laws, and limit death eligibility to only the most aggravated intentional murders.

Second and, in our opinion, most important, we recommend that any federal death-sentencing legislation should include detailed provisions regarding comparative proportionality review.28/ Specifically, we suggest that the legislation should require a United States Court of Appeals to conduct such a review on direct appeal of every death sentence case. Such legislation should also include detailed standards

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27/ As for the high visibility crimes like treason and espionage, because they involve no taking of life, we would also expect the use of capital punishment to be quite infrequent, with a real risk of arbitrariness on the few occasions when it is used. Also, since the United States Supreme Court has thus far only approved the use of capital punishment against defendants who killed, intended to kill, or participated in the killing, the use of the death penalty in cases that involve no loss of life will be subject to constitutional challenge. Enmund v. Florida, 458 U.S. 782 (1982).

28/ See Van Duizend, "Comparative Proportionality Review in Death Sentence Cases: What? How? Why?" 8 State Ct. J. 9 (Summer 1985) for a description of the recommendations of the National Center for States Courts Project on Proportionality Review in Death Sentencing Cases. The project's recommendations were produced by a task force consisting of state supreme court administrative officials, prosecutors, defense attorneys, and academics.

governing the review process. It should require the reviewing court to consider all factually or otherwise similar cases that resulted in a homicide conviction by plea or at trial.29/ It should also specify with what frequency death sentences must have occurred in those cases deemed to be similar in order to classify the death sentence under review as either evenhanded or excessive.

To ensure a fully effective comparative proportionality review process, we also suggest that such legislation would (a) require the Justice Department, through the F.B.I. or the Bureau of Criminal Justice Statistics, to maintain machine readable and narrative descriptions of all homicide cases processed in either state or federal courts; (b) provide that these data would be made available to litigants in capital cases; and (c) require the reviewing court to identify the specific cases deemed to be similar for comparative purposes and explain the basis of its decision with reference to those cases.30/

Requiring the Justice Department to collect data on homicide cases in both state and federal courts would serve several important purposes. First, it would allow the federal appellate courts to consider the sentencing patterns in state courts when assessing the evenhandedness of a federal death sentence. This would help to ensure that no death sentences were imposed for crimes on federal properties that were not considered to be appropriate for a death sentence in the courts of the state in which the property is located.31/ Second, a homicide data file of this sort would considerably assist state supreme

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29/ The most important recommendation of the National Center for State Courts Project on Proportionality Review was that in its comparative proportionality review, the appellate court should consider all cases "in which the indictment included a death eligible charge, and a homicide conviction was obtained." Id. at 11. This recommendation was made in recognition of the fact that prosecutors regularly plead out cases indicted for capital offenses to lesser included offenses or waive the penalty trial after obtaining a capital murder conviction by plea or at trial. An expansion of proportionality review oversight in this manner will permit the reviewing court to account for the effects of prosecutorial decisions and will help to ensure consistency in the federal system, even if there are substantial disparities in prosecutorial plea bargaining practices. We believe a comprehensive system of proportionality review is a more feasible means of controlling the effects of prosecutorial discretion than a prohibition against plea bargaining in capital cases or a requirement that a penalty trial be held in every case that results in a conviction of a capital crime.

30/ See Van Duizend, supra note 28 at 19-22.

31/ All the major reservations under federal jurisdiction are located in states with death sentencing laws.

courts conducting proportionality reviews under their own death sentencing laws. Third, a national bank of homicide data would enable Congress, social scientists, and the public to identify patterns of both homicide sentencing behavior and possibly assist the modification or improvement of capital sentencing laws.32/

By narrowly defining the categories of federal capital crimes, by restricting the scope of prosecutorial discretion, and by ensuring an effective proportionality review system, Congress can maximize the prospects for reserving the death penalty for only the most serious and aggravated crimes and for avoiding the kinds of excessiveness and discrimination that still occur under contemporary state death sentencing procedures.33/

32/ A national bank of homicide data would also enable public officials to identify patterns of homicide (e.g., to establish the modus operandi of suspects) or to warn the public of areas with high homicide rates.

33/ The Subcommittee might also consider amending the provisions in several proposals which are intended to minimize racial discrimination in the capital sentencing context by requiring a jury instruction on the defendant's right to justice without discrimination and by requiring the jurors to certify in writing that the race, color, national origin, creed or sex of the defendant was not a factor in their decision, by also including in the jury instruction and certification a reference to the race, color, national origin, creed or sex of the victim. See, e.g., H.R. 343, 99th Cong. 2d Sess., § 3562A(j) (1985).

Table 1: Listing of Territories and States by type of criminal jurisdiction over Indian Reservations and by percentage of total Indian Reservation population in each state with homicide statistics.

Sorted by type of homicide jurisdiction and by % of total U.S. Indian reservation population.

A	B	C	D	E	F	G
State	% of total US Ind. reserv. popul.	Total pop. of state's Ind. res.1/	% of total fed. homic. charges	No. of fed. hom. charged in state2/	% of total fed. homic. convict.	No. of fed. hom. conv.2/
I. Primarily federal homicide jurisdiction over Indian reservations with state jurisdiction limited to crimes between non-Indians.3/						
Arizona	32.3624%	114028	18.95%	29	23.93%	28
N. Mexico	17.8046%	62734	2.61%	4	1.71%	2
S. Dakota	8.2453%	29052	9.15%	14	7.69%	9
Montana	7.5261%	26518	1.31%	2	.85%	1
Washington	5.2820%	18611	1.96%	3	1.71%	2
N. Dakota	3.2664%	11509	2.61%	4	3.42%	4
Minnesota	2.9891%	10532	0.00%	0	0.00%	0
Wisconsin	2.8515%	10047	1.96%	3	1.71%	2
Utah	2.0460%	7209	1.96%	3	2.56%	3
Oklahoma	1.8206%	6415	.65%	1	.85%	1
N. Carolina	1.4943%	5265	1.31%	2	.85%	1
Idaho	1.4733%	5191	1.31%	2	1.71%	2
Nevada	1.2928%	4555	1.96%	3	1.71%	2
Wyoming	1.2919%	4552	1.31%	2	1.71%	2
Oregon	.9281%	3270	0.00%	0	0.00%	0
Nebraska	.8228%	2899	.65%	1	.85%	1
Miss.	.7864%	2771	.65%	1	.85%	1
Colorado	.5963%	2101	0.00%	0	0.00%	0
Michigan	.5327%	1877	0.00%	0	0.00%	0
Texas	.2727%	961	3.92%	6	5.13%	6
Iowa	.1425%	502	0.00%	0	0.00%	0
La.	.0761%	268	0.00%	0	0.00%	0
--(subtotals)	**93.9037%**	**330867**	**52.29%**	**80**	**57.26%**	**67**
II. No federal jurisdiction over Indian lands or no Ind. lands in state.						
California	2.8268%	9960	3.92%	6	1.71%	2
New York	1.6228%	5718	.65%	1	0.00%	0
Florida	.4030%	1420	.65%	1	0.00%	0
Maine	.3871%	1364	0.00%	0	0.00%	0
Alaska	.2926%	1031	.65%	1	.85%	1
S. Carolina	.2818%	993	0.00%	0	0.00%	0
Kansas	.2251%	793	6.54%	10	7.69%	9
Virginia	.0341%	120	5.23%	8	5.13%	6
Conn.	.0142%	50	0.00%	0	0.00%	0

A	B	C	D	E	F	G
State	% of total US Ind. reserv. popul.	Total pop. of state's Ind. res.1/	% of total fed. homic. charges	No. of fed. hom. charged in state2/	% of total fed. homic. convict.	No. of fed. hom. conv.2/
(II. No federal jurisdiction over Indian lands or no Ind. lands in state.)						
Georgia	.0085%	30	1.96%	3	2.56%	3
Mass.	.0003%	1	0.00%	0	0.00%	0
N.H.	0.0000%	0	0.00%	0	0.00%	0
R.I.	0.0000%	0	0.00%	0	0.00%	0
Vermont	0.0000%	0	0.00%	0	0.00%	0
Delaware	0.0000%	0	0.00%	0	0.00%	0
New Jersey	0.0000%	0	0.00%	0	0.00%	0
Pa.	0.0000%	0	0.00%	0	0.00%	0
Maryland	0.0000%	0	1.96%	3	2.56%	3
W. Virginia	0.0000%	0	0.00%	0	0.00%	0
Kentucky	0.0000%	0	.65%	1	.85%	1
Ohio	0.0000%	0	0.00%	0	0.00%	0
Tenn.	0.0000%	0	2.61%	4	.85%	1
Illinois	0.0000%	0	5.88%	9	5.98%	7
Indiana	0.0000%	0	1.96%	3	1.71%	2
Arkansas	0.0000%	0	.65%	1	.85%	1
Missouri	0.0000%	0	0.00%	0	0.00%	0
Hawaii	0.0000%	0	0.00%	0	0.00%	0
Alabama	0.0000%	0	.65%	1	.85%	1
--(subtotal)	**6.0963%**	**21480**	**33.99%**	**52**	**31.62%**	**37**
III. Federal jurisdiction because of U.S. territorial status.						
Virgin Is.	0.0000%	0	9.15%	14	8.55%	10
Guam	0.0000%	0	3.92%	6	1.71%	2
No. Marianas	0.0000%	0	.65%	1	.85%	1
--(subtotals)	**0.0000%**	**0**	**13.73%**	**21**	**11.11%**	**13**
Total	**100.0000%**	**352347**	**100.00%**	**153**	**100.00%**	**117**

1/ U.S. Department of Commerce Bureau of the Census, 2 1980 Census of Population Subject Reports, Part 2: American Indians, Eskimos, and Aleuts on Identified Reservations and in the Historic Areas of Oklahoma (Excluding Urbanized Areas) 10 (Jan. 1986).

2/ Administrative Office of the United States Courts, Federal Offenders in the United States Courts 1983 pp. X-1-2 to X-1-33 (1984).

3/ If a state did not assume P.L. 280 jurisdiction over every reservation in the state, it is included in Category I. States in Category II exercise jurisdiction over every reservation in the state.

Figure 1. Disposition of Colorado's Death Eligible Cases
1980 - 1984

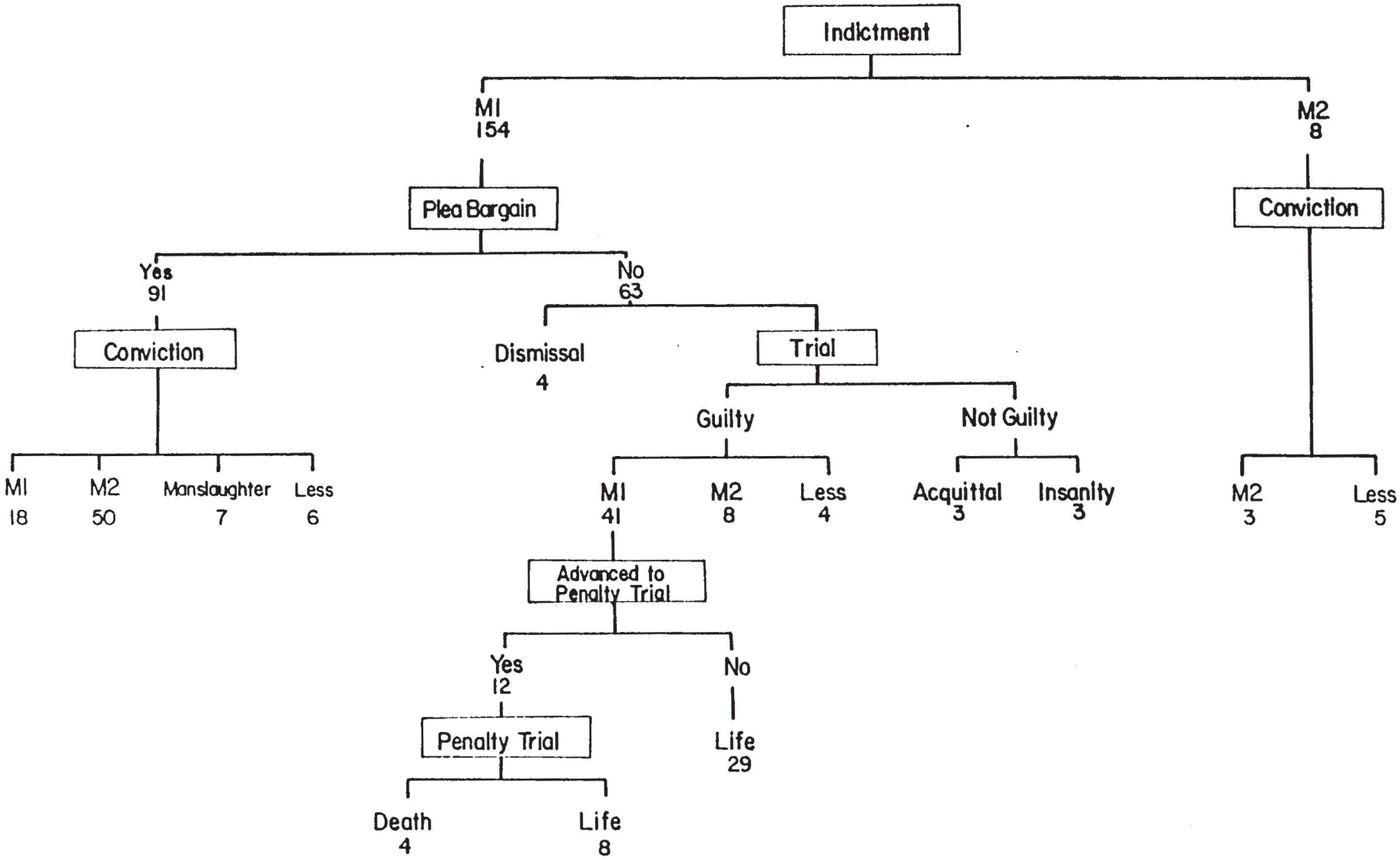

Table 2

Estimated United States Death Sentencing Rates Among
Death Eligible Defendants, 1982-84

A	B	C	D	E	F	G
			Death Sentencing Rates 1/ (# of death eligibles in parenthesis)			
			Broad Death Eligibility Statutes		Narrow Death Eligibility Statutes	
Region/State 2/	Average Number of Death Sentences a/ Imposed, 1982-84	Number of Murder Non-Negligent Manslaughter Offenses Reported to FBI, 1983 b/	Rates Among All Death Eligible Defendants: Convicted of Homicide3/	Convicted of Murder4/	Rates Among All Death Eligible Defendants: Convicted of Homicide3/	Convicted of Murder4/
North East						
New Jersey (1)	3.33	399	.03 (117)	.06 (58)	.09 (36)	.13 (26)
Pennsylvania(1)	22.33	583	.13 (171)	.26 (85)	.43 (52)	.59 (38)
E. North Central						
Illinois(2)	14.67	1112	.05 (325)	.09 (163)	.15 (100)	.20 (72)
Indiana(2)	6.0	286	.07 (84)	.14 (42)	.23 (26)	.33 (18)
Ohio(2)	11.67	600	.07 (176)	.13 (88)	.22 (54)	.30 (39)
W. North Central						
Missouri(1)	7.00	403	.06 (118)	.12 (59)	.19 (36)	.27 (26)
Nebraska(3)	.67	42	.06 (12)	.11 (6)	.17 (4)	.22 (3)
South Atlantic						
Delaware(1)	.67	25	.09 (7)	.17 (4)	.34 (2)	.34 (2)
Florida(1)	37.33	1199	.11 (351)	.21 (175)	.35 (108)	.48 (77)
Georgia(1)	11.00	483	.08 (141)	.15 (71)	.26 (43)	.35 (31)

A	B	C	D	E	F	G
Maryland(2)	4.33	367	.04 (107)	.08 (54)	.13 (33)	.18 (24)
North Carolina(1)	11.00	490	.08 (143)	.15 (72)	.25 (44)	.34 (32)
South Carolina(1)	6.67	321	.07 (94)	.14 (47)	.23 (29)	.32 (21)
Virginia(2)	5.33	387	.05 (113)	.09 (57)	.15 (35)	.21 (25)
E. South Central						
Alabama(1)	11.67	364	.11 (106)	.22 (53)	.35 (33)	.49 (24)
Kentucky(2)	4.33	364	.04 (106)	.08 (53)	.13 (33)	.18 (24)
Mississippi(1)	8.67	290	.10 (85)	.21 (42)	.33 (26)	.46 (19)
Tennessee(1)	6.67	410	.06 (120)	.11 (60)	.18 (37)	.26 (26)
W. South Central						
Arkansas(2)	2.00	178	.04 (52)	.08 (26)	.13 (16)	.17 (12)
Louisiana(1)	7.67	629	.04 (184)	.08 (92)	.13 (57)	.19 (41)
Oklahoma(3)	9.67	249	.13 (73)	.27 (36)	.44 (22)	.60 (16)
Texas(2)	27.00	2239	.04 (655)	.08 (327)	.13 (202)	.19(145)
Mountain						
Arizona(3)	12.67	213	.20 (62)	.41 (31)	.66 (19)	.91 (14)
Colorado(1)	1.00	202	.02 (59)	.03 (30)	.06 (18)	.08 (13)
Idaho(3)	3.67	35	.37 (10)	.73 (5)	1.0 (3)	1.0 (2)
Montana(3)	.33	30	.04 (9)	.08 (4)	.11 (3)	.17 (2)
Nevada(1)	5.33	114	.16 (33)	.31 (17)	.53 (10)	.76 (7)
New Mexico(2)	1.00	124	.03 (36)	.06 (18)	.09 (11)	.13 (8)
Utah(1)	.67	56	.04 (16)	.08 (8)	.13 (5)	.17 (4)
Pacific						
California(1)	33.67	2639	.04 (772)	.09 (386)	.14 (238)	.20(170)
Washington(2)	1.33	212	.02 (62)	.04 (31)	.07 (19)	.10 (14)
Total Estimated Death Eligible Cases			4998	2498	1538	1104

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1. The population of death eligible offenders underlying each estimate is based on Georgia arrest and conviction rates during the period 1974-79. Of the murders and non negligent manslaughters reported to the FBI during this period, 17% (767/4472) resulted in murder convictions, by trial or by plea; 86% of these offenders were death eligible under Georgia's broad death sentencing statute. However, if one considers all convictions for either murder or voluntary manslaughter during the same period, one finds

that 45% (1999/4472) of the reported crimes resulted in a conviction and that 65% of those defendants were death eligible under Georgia law. We applied these conviction and death eligibility rates to the F.B.I. date for each state to produce the estimated pools of death eligible offenders that underlie the estimates in Columns D and E of Table 1.

The estimates in Columns F and G assume that only cases with felony circumstances are death eligible. In Georgia, felony circumstances were present in the cases of 38% of the defendants convicted of murder (by plea or at trial); for those convicted of either murder or voluntary manslaughter the rate was 20%. We applied these death eligibility rates to produce the estimated pools of death eligible offenders that underlie the estimates shown in Columns F and G. Accordingly, the relevance of these estimates to a given state will depend on the extent to which its conviction rates and its frequency of death eligible cases in each category of crimes differ from Georgia's.

Because various factors, such as the strength of the evidence in a case, or a prosecutorial grant of immunity in exchange for testimony, may legitimately remove cases from the death eligible category, we made two alternative estimates to take such factors into account. For the first estimate, we reduced the final pool of death eligible cases by 25%. For the second estimate we reduced the final pool by 50%. The 25% reduction caused a 38% increase in the estimated death sentence rates in Table 1; the 50% reduction in the pool of eligibles increased the estimated death sentence rates on the order by 100%. For example, the .14 estimated death sentencing rate for South Carolina when based only on murder convictions rises to .19 when 25% of the death eligible murder convictions are excluded from the pool of death eligible defendants for strength of evidence reasons and to .28 when 50% of the cases are excluded.

The most appropriate estimate for a given state depends, first, upon the scope of its statutory aggravating circumstances, whether broad or narrow, (see note 2 below) and second whether the pool of offenders deemed death eligible is (a) limited to those convicted of capital murder or (b) also embraces defendants who were death eligible under the statute, but were convicted of a lesser offense than capital murder. The "broad" statute estimates (shown in Columns D & E of Table 1) are most appropriate for states like Georgia and Colorado whose statutes include both the "contemporaneous felony" and "vile killing" statutory aggravating circumstances. For states in this category, the estimate in Column D embraces death eligible defendants convicted of either murder or manslaughter while the estimate in Column E limits the death eligible population to those found guilty of capital murder. The "narrow" statute estimates in Columns F and G have the most relevance for states like Texas whose statutes do not include a "vile" killing in the capital murder category.

Because no death sentences were imposed in Connecticut, New Hampshire, Oregon, South Dakota and Vermont and only one was imposed in New York, which has very narrow statutory aggravating circumstance, these states were omitted from the tabulation.

2. The notation in parenthesis for each state indicates which of the main statutory aggravating circumstance(s) are in its law and whether the "Broad" or "Narrow" death eligibility estimates for a given state are most appropriate:

   1 = statute includes both vile murder and felony circumstance factors (broad eligibility estimates are most appropriate);

   2 = statute includes felony circumstance factor but not vile murder factor (narrow eligibility estimates are most appropriate, but biased upward to the extent the minor statutory aggravating circumstances, such as police officer victim, enlarge the pool of death eligibles).

   3 = statute includes vile murder or torture factor but not felony circumstance factor (narrow eligiblity estimates are a rough approximation).

a. The average number of all death sentences imposed in the years 1982, 1983 and 1984, including the 20-30% of the sentences that were ultimately vacated on appeal to the state supreme court. Letter from Richard Brody, NAACP Legal Defenese Fund to David Baldus, October 11, 1985 (on file with Stetson Law Review). All of the estimated death sentencing rates would be lower if the calculations were based only on cases affirmed by the state supreme court.

b. The number of murder and nonnegligent manslaughters reported to the FBI for 1983. FBI, Dept. of Justice Uniform Crime Reports 52-63 (1984).

3. "Homicide" conviction includes murder (capital and noncapital) and voluntary manslaughter.

4. "Murder" convictions are by plea or by trial conviction.

TESTIMONY

OF

NORMAN DORSEN
PRESIDENT

AND

DIANN RUST-TIERNEY
LEGISLATIVE COUNSEL

AMERICAN CIVIL LIBERTIES UNION

BEFORE

THE UNITED STATES SENTENCING COMMISSION

FEBRUARY 17, 1987

I. Introduction

Members of the the Unites States Sentencing Commission, my name is Norman Dorsen. I am a lawyer, admitted to practice in New York state, the District of Columbia, and other federal courts, including the Supreme Court of the United States. Before entering the private practice of law, I served as a law clerk to Chief Judge Calvert Magruder of the U.S. Court of Appeals for the First Circuit and for Justice John Marshall Harlan of the U.S. Supreme Court. Beginning in 1962 I have appeared as counsel in numerous constitutional cases in the Supreme Court and other federal and state courts. Since 1961 I have been a member of the faculty of New York University Law School, where I am now Stokes Professor of Law. I have been a visiting professor and have lectured at many other law schools, including Harvard, Texas, Michigan and the University of California at Berkeley. I was president of the Society of American Law Teachers from 1973-75.

Finally, I am and have been since 1976 the President of the American Civil Liberties Union. I am testifying today on behalf of the American Civil Liberties Union. The American Civil Liberties Union is a nationwide, nonpartisan organization of approximately 250,000 members devoted solely to defending and enforcing rights and liberties guaranteed by the Constitution.

I am joined today by Ms. Diann Rust-Tierney, Legislative Counsel for the American Civil Liberties Union and Mr. William Allen a partner in the law firm of Covington and Burling and his associate Ms. Elizabeth Danello. At the request of the ACLU the law firm of Covington and Burling has prepared a detailed

memorandum on the Commission's authority. It is included with my testimony as an appendix.

I appreciate the opportunity to present the results of our investigation into the Commission's authority today. Our position is that the Commission does not have the authority to reinstate the federal death penalty.

The American Civil Liberties Union maintains that the death penalty inherently violates the Eighth Amendment prohibition against cruel and unusual punishment and deprivations of due process of the law. For more than a decade the American Civil Liberties Union has been involved at every level of the death penalty debate, before the Congress, the courts and state legislatures. In response to a crisis of inadequate legal representation for individuals on death row, the American Civil Liberties Union has recently established two offices to find and train lawyers to represent the vast numbers of death row inmates who are without representation to raise legitimate constitutional claims. Whatever one's views on capital punishment, I hope all would agree that no individual should be put to death without an opportunity to raise every valid constitutional claim.

Today there are over 1800 people on death row in our country. Almost half of the people on death row are Black, Hispanic, Native American or Asian. Most are indigent, many are mentally disabled. As of January 1, 1987, thirty-seven people are on death row for crimes committed while under the age of 18. Whether a particular defendant is sentenced to death and executed has little to do with the nature of the crime, the viciousness

with which it was committed, or even the likelihood that the defendant would commit the crime again. Recent research demonstrates that whether a particular defendant is sentenced to death and executed has more to do with his or her race, the race of the victim, and the quality of legal representation.

Finally, some have testified that the death penalty is a deterrent. That point is hotly contested. This is not the occasion to review the evidence in detail, but we assert that no persuasive case can be made that the death penalty is, in fact, a deterrent to crime.

I raise these concerns today to illustrate the enormous complexity of the capital punishment question--not solely the legal questions-- but the ethical, moral, religious and practical questions as well. Fortunately, this Commission does not have to resolve these questions because the issue before the Commission today is simple: Does a congressional statute that specifically authorizes six punishments, and directs this Commission to promulgate guidelines for each, grant authority to promulgate guidelines for a seventh unmentioned punishment that is different in kind from the enumerated punishments and raises the fundamental questions I have aluded to? The answer is surely no.

II. The Comprehensive Crime Control Act of 1984

A. The Provisions

The Comprehensive Crime Control Act of 1984 amends two Titles of the U.S. Code, Titles 28 and 18. The Title 28 Amendment, new Chapter 58, creates the U.S. Sentencing Commission as an independent agency within the judicial branch of the government.[1] Chapter 58 describes the duties and powers of the Commission and directs it to promulgate "guidelines. . . for [the] use of the sentencing court in sentencing determinations."[2] The guidelines, which must be submitted to Congress by April 13, 1987, will bind all federal judges in their sentencing determinations unless within six months Congress amends, rejects or extends the effective date of the guidelines.[3]

The amendment to Title 18 creates a new Chapter 227 with Subchapters A through D. Subchapter A sets out general provisions. Section 3551 of Subchapter A describes the sentences which may be imposed under the guidelines established by the Commission. The sentences listed include a term of probation, a fine, and a term of imprisonment.[4] Subchapter A also provides that the additional sanctions of criminal forfeiture, notice to victims and restitution are available.[5] The death penalty is not included among the authorized punishments specifically enumerated in Subchapter A.

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1 See 28 U.S.C. 991.

2 See 28 U.S.C. Section 994 (a)(1).

3 See Pub. L. 99-217, 99 Stat. 1728 (1985); 28 U.S.C. Section 994(o); 18 U.S.C. Section 3553(a)(4).

4 See 18 U.S.C. Section 3551(b).

5 See, 18 U.S.C. Sections 3554, 3555 and 3556.

Subchapters B, C and D of Chapter 227 describe the procedures that govern probation, fines, and imprisonment, respectively.

Section 3551 of Subchapter A requires that defendants "found guilty of an offense described in any federal statute"[6] be sentenced in accordance with the procedures of Chapter 227. Chapter 227 directs the sentencing court to consider a series of factors in setting sentences, including the type of sentence and the sentencing ranges set out in the guidelines promulgated by the Commission.[7]

The Act directs the Commission to promulgate guidelines to assist courts in determining which of the authorized sentences--probation, fines, or imprisonment--may be imposed. Section 994(a)(1)(A) states:

> The Commission. . . shall promulgate and distribute. . . guidelines. . . for use of a sentencing court in determining the sentence to be imposed in a criminal case, including
>
> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment. [8]

The Commission is also directed to issue general policy statements on, among other things, the appropriate use of criminal forfeiture, notice to victims and restitution.[9]

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6 Defendants found guilty of federal offenses exclusive to the District of Columbia and offenses under the UCMJ are not subject to Chapter 227, 18 U.S.C. section 3551).

7 See 18 U.S.C. Section 3553(a)(4).

8 See 28 U.S.C. Section 994(a)(1)(A).

9 See 28 U.S.C. Section 994(a)(2)(A).

B. The Constitutional Context In Which The Comprehensive Crime Control Act Was Enacted.

The Supreme Court invalidated virtually every state and federal death penalty statute in Furman v. Georgia, 408 U.S. 238 (1972), when it held that two death penalty statutes before it which failed to provide adequate guidance to the sentencing body were unconstitutional.[10] The Court held that the absence of standards in the statutes themselves to assist the judge or jury in distinguishing on a rational basis those who should live from those who should die created a substantial risk that the punishment would be imposed in an unconstitutionally arbitrary, capricious and discriminatory manner.

Since the Furman decision, almost 40 states have enacted new legislation designed to guide the discretion of the sentencer. When death penalty statutes have provided sufficient guidance and procedural safeguards, they have withstood constitutional

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10 Following Furman, the Ninth Circuit ruled in United States v. Harper, 729 F.2d 1216 (9th Cir. 1976) that the federal death penalty provisions of the Espionage Act are unconstitutional and unenforceable. See also Report of the Senate Judiciary Committee on S.239, Establishing Procedures for the Imposition of Capital Punishment, 99th Cong. 2d Sess., Rep. No.99-282 2; ("Furman v. Georgia, in effect, made the death penalty provisions of State and Federal law inoperative") Covington and Burling Memorandum [hereinafter Covington Memo] n.1 at 13 (citing the dissenting opinions of Justices Blackmun and Powell in Furman). Significantly, the Justice Department agreed with the defendant in Harper that the death penalty provision of the Espionage Act was unenforceable. Harper at 1217, 1226 ("The Justice Department has long been of the view that Furman rendered section 794's death penalty provision unconstitutional").

challenge.[11]

Proposals to reinstate the federal death penalty have been introduced in every Congress since since 1972.[12] Although Congress amended the Anti-Hijacking Act in 1974 and in 1978 in an attempt to bring the statute in line with recent death penalty decisions by the Supreme Court, and the 99th Congress amended the Uniform Code of Military Justice (UCMJ) to provide the death penalty for peacetime espionage by military personnel, Congress has not reinstated the federal death penalty for the broad range of offenses which appear in the U.S. Code.[13]

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11 See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976) (upholding Georgia statute providing for bifurcated trial where jury must consider aggravating and mitigating circumstances at the sentencing stage of trial); Proffit v. Florida, 428 U.S. 242 (1976) (upholding Florida statute); Jurek v. Texas, 428 U.S. 262 (1976) (upholding Texas statute limiting death penalty to certain offenses).

12 See Report of the Senate Judiciary Committee on S.239, Establishing Constitutional Procedures for the Imposition of Capital Punishment, Rep. 99-282, 99th Cong., 2d Sess. 2 (1986) (outlining history of death penalty proposals).

13 See 49 U.S.C. Sections 1472-73; 10 U.S.C. Section 906(a) (1986).

III. The Comprehensive Crime Control Act of 1984 Did Not Give The Commission the Authority to Reinstate the Federal Death Penalty.

A. The Language of the Sentencing Reform Act and Its Legislative History Clearly Denote This Limitation.

Neither Chapter 227, governing sentences, nor Chapter 58, governing the authority and duties of the Commission, remotely suggests that the Sentencing Reform Act is intended to provide the Commission with the authority to promulgate guidelines for punishments, such as the death penalty, that are not specifically enumerated. The Supreme Court has repeatedly ruled that where, as here, a statute is clear on its face, its plain meaning must be given effect. See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Aaron v. Securities and Exchange Comm'n, 446 U.S. 680, 700 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200-01 (1976). In Consumer Products Safety Comm'n, then Associate Justice Rehnquist, writing for the Court, stated:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. 14

The language of the Sentencing Reform Act could not be plainer. There is no reference to the death penalty in the sections authorizing the Commission to promulgate guidelines for specific punishments. In practical effect, the Justice Department is asking the Commission to amend the Sentencing Reform Act.

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14 447 U.S. at 108.

Although there should be no need to go beyond the clear language of the statute the legislative history strongly supports the conclusion that the Commission does not have the authority to reinstate the federal death penalty. The Comprehensive Crime Control Act was originally introduced by Senator Strom Thurmond as S.829, a bill designed to revamp federal criminal law. In addition to the Sentencing Reform Act, S.829 contained a Title X, a proposal to reinstate the federal death penalty. The inclusion of Title X in the Comprehensive Crime Control Act reflected the general understanding of members of Congress and the Justice Department that the sentencing provisions of the Comprehensive Crime Control Act would not revive the federal death penalty but that the death penalty would be reinstated by separate legislation passed as part of the overall package.

In testimony before the Subcommittee on Criminal Law of the Senate Judiciary Committee, Assistant Attorney General Jensen testified that "[T]he establishment of constitutional procedures for the imposition of capital punishment is the purpose of Title X of the Administration's crime bill. . . For more than a decade Federal statutes authorizing the death penalty. . . have been unenforceable because they fail to provide a set of legislated guidelines to narrow the sentencer's discretion."[15] Had the sponsors of the Comprehensive Crime Control Act intended to authorize the Sentencing Commission to reinstate the federal death penalty they would not, at the same time, have

15 See Comprehensive Crime Control Act of 1983: Hearings on S.829 Before the Subcomm. on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess. 22 (1983) (emphasis added).

included a separate title in the bill to reinstate the federal death penalty.

Soon after the legislation was introduced it became clear that "one controversial provision could slow or halt the process on the entire package."[16] Consequently, Title X was removed from the Comprehensive Crime Control Act.

Senator Thurmond, one of the bill's key sponsors, made this statement on the Senate floor: "Capital punishment is controversial so we took it out of the package."[17] Thurmond stated later that issues such as capital punishment "are so controversial that we felt it would jeopardize the whole bill to include them."[18] Senator Biden, the ranking minority member of the Senate Judiciary Committee stated: "[the Committee members agreed] to move those bills which are controversial as separate legislation because they recognize that passage of a comprehensive crime package is the most important goal".[19]

Moreover, the debates surrounding the Sentencing Reform Act and Congress' focus on imprisonment as the maximum penalty further illustrate that the Commission was not given the authority to reinstate the death penalty. The Act's supporters praised it for its potential for "stricter, saner and more uniform sentencing

16 Remarks ~f Senator Biden; 130 Cong. Rec. S338 (daily ed. Jan. 27, 1984)

17 130 Cong. Rec. S63839 (daily ed. Aug. 4, 1983).

18 129 Cong. Rec. S.11679.

19 See 130 Cong. Rec. S338 (daily ed. Jan. 27, 1984). See also 130 Cong. Rec. S243 (daily ed. Feb. 2, 1984) (death penalty and other contentious matters stripped out) (remarks of Sen. Baker). 130 Cong. Rec. S754 (daily ed. Feb. 2, 1984) (remarks of Sen. Kennedy) (bill excludes death penalty).

guidelines."[20] Notably, the floor debates mention imprisonment as the maximum sentence available.[21]

The actions of key sponsors of the Comprehensive Crime Control Act and of the Administration during the 99th and 100th Congresses are consistent with the conclusion that the United States Sentencing Commission does not possess the authority to reinstate the federal death penalty. On January 21, 1985 Senator Thurmond introduced S.239 "A Bill To Establish Procedures for the Imposition of the Death Penalty and for other Purposes." Senator Thurmond's opening statement at the of hearings on his most recent proposal demonstrated that he viewed S.239 as the sole mechanism for reviving capital punishment on the federal level. He characterized S.239 as the unfinished business that would restore people's respect for the criminal justice system. "No one maintains that this legislation [S.239] alone will cure the epidemic of violent crime that plagues our nation. . . . Capital punishment, together with recently enacted reforms of our federal bail and sentencing laws. . . will go a long way toward restoring. . . the peoples' respect for that system."[22]

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20 130 Cong. Rec. S13088 (daily ed. Oct. 4, 1984) (remarks of Sen. D'Amato).

21 See e.g. 130 Cong. Rec. S527 (daily ed. Jan. 31, 1984) (remarks of Sen. Thurmond); 130 Cong. Rec. S757-58 (daily ed. Feb. 2, 1984) (remarks of Sen. Laxalt) (bill requires Commission to specify stiff prison terms for those who commit violent crimes, drug offenses and other serious crimes); 130 Cong. Rec. S429 (daily ed. Jan. 30, 1984) (remarks of Sen. Biden) (emphasizing that guidelines put "emphasis on imprisonment for violent offenders").

22 Hearings Before the Senate Judiciary Committee, 99th Cong. 1st. Sess. 1 (September 24, 1985)

Assistant Attorney General Stephen Trott testified that same day before the Committee that "the Administration ardently regards the passage of this bill [S.239] as one of its highest priorities in the criminal justice area." Mr. Trott added that "The reinstitution is long overdue as a possible punishment for certain especially serious federal offenses....[t]hese offenses [incidents of espionage] underscore the necessity of having an enforceable federal death penalty. . ." Assistant Attorney General Trott did not mention in his testimony what, if any, role the Commission had in reinstating the federal death penalty.[23] His statements, well after the Sentencing Reform Act had been enacted, are inconsistent with the position the Justice Department now asserts.

B. The Justice Department's Arguments in Favor of the Commission's Authority to Reinstate the Federal Death Penalty Are Invalid.

The Justice Department argues that a statute that specifically enumerates all authorized punishments and directs the Commission to promulgate guidelines for each enumerated punishment silently confers authority to reinstate the most severe and controversial punishment even though it is not mentioned in the relevant portion of the statute.

Finally, the Department claims that the language of the statute is broad enough, to reach any punishment prescribed in the federal code. Because death appears at least nominally on

23 See Statement of Stephen Trott, Assistant Attorney General, Department of Justice Hearings before the Senate Judiciary on S.239, 99th Cong., 1st Sess. 45 (September 24, 1985).

the books, the Department concludes that death is an authorized punishment under the Sentencing Reform Act of 1984.[24]

The essential flaw in the Justice Department's position is that specifying the circumstances under which someone may be put to death is a peculiarly legislative function and that Congress knew it to be such when it passed the Comprehensive Crime Control Act.

The death penalty involves fundamental judgments about the moral values of the people that must be made by their elected representatives. See Gore v. United States 357 U.S. 386, 393 (1958) "[specification of punishments] [is] peculiarly [a] question of legislative policy"); United States v. Harper, 729 F.2d 1216, 1225 (1984).

> [T]he Court's opinions compel the conclusion that, whether the sentencing authority is the judge or the jury, the guidelines must come from Congress. . . Gregg is replete with references to the peculiarly legislative character of sentencing determinations. . . 25

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24 See Justice memo at 8 n.8.

25 Zant v. Stephens, 462 U.S. 862, 878 (1984). See also Harper at 1225; see United States v. Mathews, 16 Military L. Rep. 354. The Court of Appeals in dicta stated that constitutional procedures for imposing death sentences under the UCMJ could be promulgated either by Congress or the President.

The Court's statements are not applicable to this Commission. The President's authority for imposing death sentences under the UMCJ is grounded in his/her broad authority under the UMCJ to promulgate procedures for courts-martial, including the authority to prescribe maximum punishments. This broad power stems from the President's authority as Commander-in-Chief under Art. II, Section 2. Unlike the President, the Commission's authority is limited.

The Justice Department would have the Commission usurp the power of Congress to define the circumstances under which an individual may be put to death for a federal offense. A similar attempt was rejected by the Ninth Circuit in Harper when it held that guidelines necessary to reinstate the federal death penalty for peacetime espionage could not be promulgated by "the judge at the time of sentencing or at any other time." See Harper at 1226. The Ninth Circuit's reasons for rejecting guidelines originating with the court in Harper apply to the Commission. Of particular significance to the court in Harper was the fact that decisions regarding what offenses shall be punishable by death and under what circumstances the punishment must be imposed are inextricably intertwined with assessments of contemporary standards of decency. These standards are best defined by the Congress, representing the general community.

The Commission is being asked by the Justice Department to reinstate the federal death penalty across the board for a wide variety of offenses. Because the Sentencing Reform Act is silent on the death penalty, all we know about Congress' views is that the punishment appears for some offenses in the U.S. Code. But the fact that Congress once thought death an appropriate punishment for a particular crime is not persuasive evidence that when faced now with the choice of a penalty for the crime it would choose death. To the contrary, the record shows that congressional action to reinstate the death penalty has been exceedingly selective. Congress has acted but twice since Furman to reinstate the death penalty. In each instance Congress

reinstated the punishment for narrowly defined offenses.[26] Such discriminating care by the Congress strongly suggests that judgments about which crimes should be punishable by death and who among those convicted of a particular offense should be executed are not judgments that this Commission was intended to make or should make.

Moreover, the Justice Department's arguments ignore Supreme Court decisions in capital cases since Furman. The Court has repeatedly held that the death penalty is "different in kind from any other punishment imposed under our system of criminal justice"[27]; Death "differs more from life imprisonment than a 100-year prison term differs from only one year or two."[28] This qualitative difference requires a greater degree of reliability when a death sentence is imposed. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gregg v. Georgia, 428 U.S. 153, 189 (1976); Proffitt v. Florida, 428 U.S. 242, 247-253 (1976).

The Supreme Court has said, "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). See also Roberts v. Louisiana, 428

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26 See, e.g., 49 U.S.C. Sections 1472-73 (death penalty for air piracy); 10 U.S.C. Section 906(a) (death penalty for espionage by military personnel).

27 Gregg. v. Georgia, 428 U.S. 153 (1976)

28 Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280(1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976).

In every death penalty decision upholding state capital sentencing schemes since Furman, the Supreme Court has relied on the presence of specific guidance in the death penalty statute. See, e.g., Gregg v. Georgia, 428 U.S. at 197 ("[u]nder the revised Georgia procedures, the jury must find a statutory aggravating circumstance before recommending a sentence of death") (emphasis in original); Jurek v. Texas, 428 U.S. 262 (1976) (death penalty limited to narrow class of offenses set out in the statute); Proffit v. Florida, 428 U.S. 242 (1976) (upholding Florida statute where at least one statutory aggravating factor must be found before the death penalty can be considered). More recently, the Court has said:

> Our cases indicate that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. 29

Finally, the Justice Department's argument ignores the fact some death penalty provisions which remain on the books could never be constitutionally imposed. It would require Congress to have given the Commission the authority to reinstate the death penalty regardless of whether the punishment is desirable or constitutional for a particular offense. For example, 18 U.S.C. Section 2113(e) prescribes death as punishment for kidnapping

29 Zant v. Stephens, 462 U.S. 862, 878 (1984).

during a bank robbery, regardless of whether the victim is killed, a result that is contrary to the Supreme Court decision in Coker v. Georgia, 433 U.S. 584 (1977), which held that the death penalty for nonhomicidal crimes is unconstitutional.[30]

30 Pending legislation to reinstate the federal death penalty would limit the death penalty to those circumstances where the victim is killed during the kidnapping. See, Report of the Senate Judiciary Committee on S.239, Establishing Constitutional Procedures for the Imposition of Capital Punishment, Report 99-282, 99 Cong. 2d Sess. 2 (1986).

IV. Conclusion

The language of the Sentencing Reform Act of 1984 and its legislative history clearly indicate that the Sentencing Commission does not have the authority to reinstate the federal death penalty.

If the Commission reinstated capital punishment it would be usurping Congress' power to reinstate the federal death penalty. Such a decision would not only embroil the Commission in unnecessary controversy but would undermine the effectiveness of its other work. Congress clearly did not intend this result. In fact, given the controversial nature of the issue, had the Sentencing Reform Act purported to give the Commission the authority the Justice Department now claims for it, the statute would not have been enacted.

Finally, although we do not believe this to be a close question in light of the statutory language, legislative history and the political context, any doubt should lead the Commission to defer to Congress. Reinstating the federal death penalty goes to the core of our values as a society and as a nation. In principle, and under governing Supreme Court cases, that decision can properly be made only by the elected representatives of the people.

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February 12, 1987

MEMORANDUM

Re: Statutory Authority of the United States Sentencing Commission to Include Capital Punishment in its Sentencing Guidelines

The American Civil Liberties Union has asked Covington & Burling to examine the question whether the United States Sentencing Commission has statutory authority to issue guidelines establishing criteria for the imposition of the death penalty. This memorandum responds to the ACLU's request.

Section I of the memorandum describes the legislative background of the Sentencing Commission and of the statute under which it operates. Section II sets out the statutory provisions that define the Commission's authority. Section III states the arguments of the Department of Justice, which has recently advised the Commission that it may legally establish criteria for the imposition of capital punishment. Finally, in Section IV, the memorandum analyzes the issue of the Commission's authority with respect to the death penalty in the light of the legislative background, the terms of the governing statute, and the Justice Department's analysis. It concludes, contrary to the Justice Department, that the Commission is not authorized to include in its sentencing guidelines criteria governing the imposition of the death sentence.

I. Legislative Background

The Sentencing Commission was created by the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987, Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976. The Comprehensive Crime Control Act capped more than a decade of legislative efforts to reform the federal criminal justice system. This omnibus statute evolved from S. 1, introduced first in the 93d Congress as the Criminal Justice Codification, Revision and Reform Act of 1973 and then in the 94th Congress as the Criminal Justice Reform Act of 1975. S. 1 would have revised and recodified all substantive offense provisions in Title 18 of the United States Code. In addition, S. 1 would have modified the sentencing provisions of that title.

Both versions of S. 1 listed "authorized sentences," which included punishment by death, and both would have established special death sentence procedures and substantive criteria to guide the sentencer in deciding whether to impose such punishment.

These procedures and criteria reflected a general understanding that the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), striking down as unconstitutional state death penalty statutes that gave judges and juries unfettered discretion in their decisions whether to sentence to death, applied to the federal death penalty

statutes then on the books.[1/] None of the federal statutes provided in terms for procedural or substantive means of channeling the sentencer's discretion. In the aftermath of Furman, nearly forty states have adopted capital punishment guidelines of the general kinds that the Court was to hold constitutionally acceptable in the second round of death penalty cases, Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). There is one federal statute comparable to these new statutes, the Antihijacking Act of 1974, which authorizes the death penalty for air piracy if death results and includes sentencing procedures and substantive sentencing criteria designed to satisfy the constitutional requirements of Furman. 49 U.S.C. §§ 1472-73.[2/] None of the pre-existing federal death penalty statutes, however, has been amended to respond to Furman.

1/ Justice Blackmun, dissenting in Furman, said that federal death penalty provisions, along with those of the states, were apparently voided. 408 U.S. at 411-12 (Blackmun, J., dissenting); see also 408 U.S. at 417 (Powell, J., dissenting). Contemporaneous commentators agreed. See, e.g., Note, The Furman Case: What Life Is Left in the Death Penalty?, 22 Cath. L. Rev. 651 (1973); Polsby, The Death of Capital Punishment?; Furman v. Georgia, 1972 S. Ct. Rev. 1 (1972).

2/ In 1985, Congress also amended the Uniform Code of Military Justice to authorize the death penalty for members of the armed forces found guilty of espionage in a court-martial proceeding. Pub. L. 99-145, § 535, 99 Stat. 635. Although also designed to meet the Furman requirements, this statute does not apply to the general civilian public.

After S. 1 had failed twice, similar legislation was introduced in the 95th Congress as S. 1437, the Criminal Code Reform Act of 1978. S. 1437 generally adopted the sentencing changes of S. 1, and it added provision for a sentencing commission. S. 1437 would have repealed all but two federal death penalty provisions, and it deleted capital punishment from the list of authorized sentences. S. 1437 was not enacted, and similar bills in the 96th and 97th Congress also failed.

Finally, in the 98th Congress, Senator Thurmond introduced S. 829, an Administration bill that incorporated the earlier bills on criminal justice reform, including the sentencing provisions of S. 1437, and added several other, controversial measures. Title X of S. 829 would have established procedures and provided criteria for the imposition of the death penalty under those federal offenses for which existing statutes nominally authorized the death penalty. The bill was referred to the Senate Judiciary Committee, which split off the controversial measures into separate bills. The committee reported the general criminal reform legislation as S. 1762 and the bill to restore the federal death penalty as S. 1765. The Senate approved both bills -- S. 1762 by a vote of 91 to 1, 130 Cong. Rec. S759 (daily ed. Feb. 2, 1984) and S. 1765 later and by the much closer margin of 63 to 32, 130 Cong. Rec. S1491 (daily ed. Feb. 22, 1984). S. 1762 was enacted as the Comprehensive Crime Control Act of 1984.

S. 1765 died in the House of Representatives.

Chapter II of the omnibus Crime Control Act is the Sentencing Reform Act, which broadly revises the law governing the imposition of sentences for federal offenses. In section 217(a) of the statute, Congress created the United States Sentencing Commission, an independent, bipartisan commission comprised of seven voting members and one nonvoting member.[3/] The Commission's duties include the promulgation of guidelines establishing criteria for the imposition of the several types of authorized sentences and setting a sentencing range for each category of federal offense. 18 U.S.C. §§ 994(a) and (b). Unless Congress acts within six months of their issuance, these guidelines will control the sentencing decisions of all federal judges, save in unusual cases. 28 U.S.C. § 994(o); 18 U.S.C. § 3553(a)(4). The Commission must issue its first guidelines by April 13, 1987.[4/]

3/ In a later section of the statute, Congress provided that the Chairman of the United State Parole Commission would serve as as an ex officio member of the Commission for the first five years of the Commission's life. Pub. L. 98-473, § 235(b)(5). The Commission today therefore includes seven voting and two nonvoting members.

4/ Pub. L. 99-217, 99 Stat. 1728 (1985), extended the Commission's original 1986 deadline by one year.

II. Relevant Statutory Provisions

The Sentencing Reform Act is in two major parts. First, by Section 212(a) it enacts two new chapters of Title 18 of the United States Code: Chapter 227, entitled "Sentences," supplanting the old Chapter 227, "Sentence, Judgment, and Execution"; and Chapter 229, entitled "Postsentence Administration," supplanting the old Chapter 229, "Fines, Penalties and Forfeitures." Second, Section 217(a) enacts a new Chapter 58 of Title 28 of the United States Code, "United States Sentencing Commission"; the provisions of Chapter 58 create and empower the Sentencing Commission.

The heart of the Title 18 provisions is Section 3551, entitled "Authorized sentences." Section 3551(a) requires that, "[e]xcept as otherwise specifically provided," a defendant who has been found guilty of a federal offense

> "shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case."

The "purposes" set forth in Section 3553(a)(2) are the need for the sentence imposed (A) to reflect the seriousness of the crime, to promote respect for the law, and to provide just punishment, (B) to afford adequate deterrence of criminal conduct, (C) to protect the public from further crimes by the defendant, and (D) to provide rehabilitation for the defendant. Under Section 3551(b),

> "An individual found guilty of an offense

> shall be sentenced, in accordance with the provisions of section 3553, to --
>
> (1) a term of probation as authorized by subchapter B;
>
> (2) a fine as authorized by subchapter C; or
>
> (3) a term of imprisonment as authorized by subchapter D."

Section 3551(b) goes on to provide that a fine may be imposed in addition to either probation or imprisonment. It also says that certain sanctions -- criminal forfeiture authorized by Section 3554, notice by the defendant to the victims of a crime involving fraud or deceit, authorized by Section 3555, and restitution authorized by Section 3556 -- may be imposed "in addition to the sentence required" by Section 3551(b). (Section 3551(c) deals with the sentencing of organizations, following the pattern of Section 3551(b) but omitting the sentence of imprisonment.) Section 3559, the final section of subchapter A of Chapter 227 containing the general sentencing provisions including Section 3551, classifies offenses for sentencing purposes by letter grades, A (the most serious) through E felonies, A through C misdemeanors, and (least serious of all) infractions. The seriousness of an offense is inferred from the gravity of the sentence provided for in the substantive statute defining and denouncing the offense.

Subchapter B of Chapter 227, Sections 3561-66, states the circumstances in which the sentence of probation can be imposed, the factors to be considered in determining

what the conditions of probation must and may be, and the sanctions for probation violations. Subchapter C, Sections 3571-74, similarly deals with the size of authorized fines, factors to be considered in imposing fines, and the modification or remission of fines. Subchapter D, Sections 3581-86, specifies authorized terms of imprisonment for various classes of offenses, factors to be considered in sentencing an individual to prison, factors relating to whether sentences should be concurrent or consecutive, and other matters relating to imprisonment.

Turning to the Title 28 provisions of the Sentencing Reform Act, Section 994, a long and detailed section, is the principal provision dealing with the Sentencing Commission and its duties and powers. Section 994(a)(1) directs the Commission to promulgate and distribute to the federal courts

> "guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including --
>
> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
>
> (C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

> (D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively."

Section 994(a)(2) also requires the Commission to issue "general policy statements" on certain matters, including the appropriate use of the sanctions of criminal forfeiture, notice to victims and restitution.

Section 994(b) further refines the Commission's duties:

> " (1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of Title 18, United States Code.
>
> (2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by the greater of 25 percent or 6 months, except that, if the maximum term of the range is 30 years or more, the maximum may be life imprisonment." As amended by Pub. L. 99-363, 99 Stat. 770 (1986).

Subsections (c) and (d) require the Commission to consider various factors relating to offense and offender characteristics in establishing categories of offenses and defendants for use in its guidelines and policy statements.

Section 3553(a)(4) of Title 18 directs that a federal court, "in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and the sentencing range" established by the Sentencing Commission for the relevant category of offense and offender.

Section 3553(b) goes further, directing that a court "shall impose a sentence of the kind and within the range, referred to in subsection (a)(4)," unless it finds that an aggravating or mitigating circumstance exists not adequately treated by the Sentencing Commission that indicates a sentence different from that prescribed by the Commission's guidelines.

III. Summary of the Justice Department's Analysis

The Office of Legal Counsel of the Department of Justice takes the position that the Sentencing Commission has the statutory authority to prescribe criteria for the imposition of the death penalty. Its view is stated in a memorandum dated January 8, 1987, addressed to the chairman of the Sentencing Commission. We have also been supplied with memoranda on the same subject and reaching the same conclusion prepared by lawyers in the Criminal Division. We have taken the OLC memorandum as stating the Justice Department position authoritatively. This section of our memorandum briefly summarizes the Justice Department's position as so stated.

The Justice Department's chief argument is that, if the statute were read as excluding capital punishment from the Commission's authority to promulgate sentencing guidelines, the result would be the implied repeal of all but one of the existing federal provisions for the death penalty, and repeals by implication are disfavored. The Department notes that a number of federal criminal statutes now provide for imposition of capital punishment. See, e.g., 18 U.S.C. §§ 1111 (first-

degree murder), 1751 (assassination or kidnapping resulting in the death of the President), 2381 (treason). The Department says that the phrase "[e]xcept as otherwise specifically provided" as used in 18 U.S.C. § 3551(a) to qualify the general rule that a federal criminal defendant "shall be sentenced in accordance with the provisions" of the new Chapter 227 requires a specific reference in the substantive statute defining and denouncing an offense denying the applicability of the new sentencing provisions. There is no such reference in any of the death penalty provisions of Title 18, though there is at least an attempted such reference in the Antihijacking Act (pp. 24-25, infra). Therefore, unless the death penalty is somehow within Chapter 227 though not there mentioned (save for a recognition in Section 3559(a) that some statutes in fact provide for the death penalty), the death penalty for all Title 18 crimes has effectively been repealed. Such a repeal, the Department contends, would run counter to "positive and indisputable evidence in the Act's legislative history that existing death penalty statutes were not intended to be affected in any way, let alone repealed." (OLC Mem. 26.) Therefore the Department concludes "that capital punishment is an authorized sanction under the Sentencing Reform Act of 1984." (Id. at 24.)

The Department finds no textual support for this conclusion in the substantive sentencing provisions of Title 18. It does profess to find support in the provisions

of Title 28 dealing with the Sentencing Commission. Indeed, it goes so far as to say that, "[o]n its face, section 994 of the Act appears to authorize the Commission to promulgate capital sentencing guidelines." (Id. at 26.) The Department refers for such authorization to the Commission's mandate under Section 994(a) to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." (Id.) It refers further to Section 994(b) and the requirement that the Commission establish a sentencing range for each offense "consistent with all pertinent provisions" of Title 18. (Id.) And it notes that Section 994(a)(1), in defining the kind of sentencing guidelines the Commission is to promulgate and seemingly restricting sentences to probation, fine, and imprisonment, is introduced by the nonrestrictive term "including," which to the Department is a recognition "that it may be necessary for the Commission to promulgate additional, unspecified guidelines." (Id.) Finally, the Department points to references in Sections 994(c) and (d), which prescribe factors for the Commission to consider in formulating its guidelines, to "other authorized sanctions," which it believes may include the death penalty. (Id.)

IV. Analysis

A. Overview

Before we undertake the detailed textual, contextual and historical analysis that leads us to a conclusion diametrically opposite to that of the Department of Justice, it is well to stand back and look at what it is that is being contested.

It has been assumed since 1972 by supporters and opponents of the death penalty alike that Furman v. Georgia invalidated the death penalty provisions of all federal laws then in effect.5/ Right or wrong, that assumption has underlain subsequent legislative action concerning the death penalty. In 1974, Congress reacted to public concern over aerial hijackings and enacted a death penalty statute with procedural and substantive safeguards intended to satisfy the

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5/ See, e.g., S. Rep. No. 282, 99th Cong., 2d Sess. 2 (1986); S. Rep. No. 251, 98th Cong., 1st Sess. 2-4 (1983); 130 Cong. Rec. S1470 (daily ed. Feb. 22, 1984) (remarks of Sen. Thurmond); S1472 (remarks of Sen. Mathias); S1477 (remarks of Sen. Dole); Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess. 22 (1983) (statement of Assistant Attorney General Jensen) ("For more than a decade, Federal statutes authorizing the death penalty for offenses of homicide, espionage, and treason have been unenforceable because they fail to provide, as required under the Supreme Court's landmark decision in Furman v. Georgia, a set of legislated guidelines to narrow the sentencer's discretion in determining whether the death penalty is justified in a particular case").

Supreme Court's constitutional concerns.[6/] Supporters of the death penalty have attempted to secure the enactment of legislation that would revitalize the pre-existing federal death penalty statutes. But significant opposition in Congress to capital punishment has prevented the enactment of the procedural and substantive safeguards for those statutes that the Constitution requires as a prerequisite to the imposition of a sentence of death.

The death penalty has been one of the most sharply debated of public policy issues. In debate on the bill that was enacted as the Sentencing Reform Act, Senator Thurmond, a strong supporter of the death penalty, stated both the underlying assumption that positive congressional action would be necessary to resuscitate the federal death penalty and his own frustration at the lack of such action. He said that "we do not seem to be able to enact a death penalty statute" with the result, he noted, that life imprisonment is the most severe sanction available even for prisoners, already serving life sentences, who kill prison guards. 130 Cong. Rec. S428 (daily

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6/ Antihijacking Act of 1974, Pub. L. 93-366, §§ 104-05, 88 Stat. 410-11 (1974), codified at 49 U.S.C. §§ 1472-73. In view of the plurality opinion of Lockett v. Ohio, 438 U.S. 586 (1978), which held that the Ohio death penalty statute was unconstitutional because it limited the range of mitigating circumstances that the sentencer may consider, it is not clear that even the Antihijacking Act on its face would survive constitutional scrutiny since 49 U.S.C. § 1473 does not provide for consideration of mitigating factors other than those listed in subsection (c)(6).

ed. Jan. 30, 1984).

It is clear that in finding common ground for dealing with a wholly separate matter of public concern -- the existence of discrepancies in sentencing within the federal court system -- legislators agreed to set aside their differences on the death penalty. The Justice Department concurs and indeed asserts that proposition as a major premise of its argument. As a reflection of that agreement, the Sentencing Reform Act is silent on the death penalty. In both its substantive sections on sentencing, enacted as provisions of Title 18, and in its creation and empowerment of a new commission that would establish sentencing guidelines, the Sentencing Reform Act treats as the only "authorized sentences" imprisonment, fines, and probation. It provides specifically for certain additional "sanctions" -- notice to victims, restitution, and forfeiture. Not one express term of the statute mentions the death penalty as an authorized sentence or an authorized sanction. Congress so legislated on the assumption that the death penalty (except for skyjacking) was unenforceable. The silence of the statute can only mean that Congress intended to leave the federal death penalty in that unenforceable state of suspension.

If the Sentencing Reform Act had attempted to deal with the death penalty as an authorized sentence or authorized sanction, it very likely would not have been enacted. We know that because the House of Representatives failed to pass a

bill, S. 1765, that would have resuscitated the federal death penalty by establishing constitutional procedures and criteria for its imposition. That same House passed the Sentencing Reform Act without difficulty. It is inconceivable that the House meant by the Sentencing Reform Act to authorize a commission to do exactly what it had declined to do in respect of the death penalty. It is similarly inconceivable that the Senate intended this effect. The Senate had separated the controversial death penalty provisions from the noncontroversial sentencing reform provisions of a single bill, divided them into separate bills, and passed both, the non-controversial one with a single dissent, the controversial death penalty bill over a substantial negative vote.

B. Text

The text of the statute demonstrates that Congress did not intend to authorize the Sentencing Commission to establish criteria reviving the death penalty. The author of the OLC memorandum of January 8 surely had his tongue more firmly embedded in his cheek than is usual, even for a lawyer advocating a client's position, when he wrote that Section 994 of Title 28, added by the Sentencing Reform Act, "[o]n its face . . . appears to authorize the [Sentencing] Commission to promulgate capital sentencing guidelines." (OLC Mem. 26.) It is impossible to find on the face of Section 994 (or any other provision added to either title of the Code by the Sentencing Reform Act) a suggestion that Congress was conferring

authority on the Commission to promulgate capital sentencing guidelines. Every indication on the face of the statute is to the contrary.

The striking thing about the text of the statute is that with one exception any mention of the death penalty is, as the Justice Department itself puts it, "[c]onspicuously absent." (OLC Mem. 7.) The key substantive provision of the statute lists three kinds of "authorized sentences," 18 U.S.C. § 3551(b). Under Section 3551(b), an individual found guilty of a federal offense must be sentenced to a term of probation, a fine, or a term of imprisonment. The defendant may be fined on top of being sentenced to probation or imprisonment, and he may also be subjected to an order of forfeiture, an order to give notice to the victim or victims of his crime, or an order to make restitution.

Following Section 3551 come provisions concerning presentence reports, § 3552, and detailing the factors to be considered in imposing sentence, § 3553. Section 3554 states the circumstances in which a forfeiture order must be entered in addition to the sentence. Section 3555 explains the notice sanction -- the option of the court's ordering the defendant to give notice of his conviction to his victims in the case of a crime involving fraud or deception. Section 3556 similarly explains when restitution can be exacted of a defendant. And three following subchapters, each consisting of several separate Code sections, set forth details of the authorized

sentences of probation, fine, and imprisonment. There is nothing remotely comparable about the death penalty in these provisions of Title 18. In fact, there is next to nothing at all.

Similarly, Congress' mandate to the Sentencing Commission in Title 28 omits any mention of capital punishment. The provisions dealing with the Commission list the same three types of sentences as are listed in Section 3551 and treated in the following subchapters of Title 18. By citation to the relevant sections of Title 18, the Commission is empowered to recommend appropriate uses for the other authorized sanctions of forfeiture, notice, and restitution. Specifically, under Section 994(a)(1), the Commission is directed to issue

> "guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including --
>
> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
>
> . . . . "

Section 994(a)(2) directs the Commission to issue general policy statements regarding other aspects of sentencing, "including the appropriate use" of the forfeiture, notice, and restitution sanctions. 28 U.S.C. § 994(a)(2)(A).

Under the quoted provisions of Section 994(a)(1) the Commission has the duty to prescribe guidelines first for a sentencing court's determination "whether to impose a sentence to probation, a fine, or a term of imprisonment" and second for the court's determination of the amount of a fine or length of a term of probation or imprisonment. It is hard to understand how Congress could have stated more clearly that these three sentences -- referred to elsewhere as "authorized sentences" -- are the only kinds of sentences with respect to which the Commission is empowered to issue guidelines.

The Department of Justice makes four textual points in arguing against the conclusion that the words of the statute seem to dictate. It points first to the breadth of the Sentencing Commission's mandate to prescribe guidelines for use of a court in determining the sentence in a criminal case. In doing so, it omits from the statutory mandate, as quoted above, the phrase "as described in this section." (P. 8, supra.) The sentencing guidelines that the Commission is directed to promulgate are the guidelines "described in this section." And neither the Department of Justice nor anyone else can point to any description of a guideline in Section 994 that encompasses capital punishment.

But, says the Department, even if Congress did not describe any such guideline, it left room for one by using the non-limiting term "including" in Section 994(a)(1). As can be seen from the quotation of Section 994(a)(1) just above,

however, the word "including" is in the wrong place to avail the Department in this argument. The statute does not say in Section 994(a)(1)(A) that the Commission is to prescribe guidelines for use of a sentencing court in determining "what kind of sentence to impose, including a sentence to probation, a fine, or imprisonment." Instead, the Commission is directed to prescribe guidelines for the use of the sentencing court in making certain determinations including (A) the determination which of the three authorized sentences to impose, (B) the determination how severe any such sentence should be, (C) the determination whether a term of imprisonment should be followed by supervised release, and (D) the determination whether multiple terms of imprisonment should run concurrently or consecutively.7/ Because paragraphs (A) through (D) are introduced by the word "including," the Commission may be empowered to prescribe guidelines for other, related determinations by sentencing courts. It does not follow that it can issue guidelines for determining that some other type of sentence, not specifically authorized anywhere in the statute, can be imposed.

The Department also emphasizes that Section 994(b) requires that the Commission's guidelines establish a sentencing range "that is consistent with all pertinent

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7/ Paragraphs (C) and (D) of § 994(a)(1) are quoted at page 8 supra.

provisions of title 18, United States Code." Noting that Title 18 includes provisions authorizing imposition of the death penalty, the Department concludes that consistency with Title 18 necessitates inclusion of capital punishment in the guidelines. Yet this argument assumes that the death penalty provisions in Title 18 are still enforceable -- the opposite of the assumption that legislators have proceeded on since Furman v. Georgia. If these death penalty provisions are indeed unconstitutional, the most severe punishment in Title 18 that can be imposed is imprisonment. Section 994(b) does not require the Commission to reach beyond the current constitutional limits of Title 18 -- or, at any rate, Congress' understanding of those limits.

The Department's final textual argument rests on the use of the phrase "other authorized sanctions" in identical subordinate clauses of Sections 994(c) and (d) describing the guidelines and policy statements the Commission has a duty to issue. Leave to one side the oddity of Congress' empowering the Commission to act on so important a matter as the death penalty by the use of a nonspecific phrase in a subordinate clause. Leave to one side the oddity of its using the word "sanctions" to describe capital punishment in a statute in which the word "sentence" is used to describe the primary and most serious sanctions or penalties. It is plain in any event that "other authorized sanctions" refers to the sanctions (so denominated in Section 3551 of Title 18 and in Section

994(a)(2) of Title 28) of forfeiture, notice, and restitution, which are mentioned at several points in the Act.

The only places in the Act where punishment by death is even acknowledged are in new 18 U.S.C. § 3559, which provides for classification of offenses according to the sentence prescribed in the original statute, and amended Rule 38 of the Federal Rules of Criminal Procedure, which outlines the procedures for appeal from a conviction or sentence. Subsection (a)(1) of Section 3559 classifies an offense as a Class A felony "if the maximum term of imprisonment authorized is -- (A) life imprisonment, or if the maximum penalty is death . . . ." This classification of offenses for the purpose of sentencing does not affect the Commission's choice of sentences. Similarly, the restructuring of Rule 38 to provide for appeals from sentences, which continues a reference in the rule to a sentence of death, does not create authority to establish criteria for the imposition of capital punishment. These references to a death penalty merely represent a recognition that in fact death penalty statutes are on the books.8/

8/ The Commission similarly recognized the existence of a death penalty statute that is nominally on the books in its commentary on the offense of first-degree murder. In commentary on its proposed sentencing guideline for first-degree murder, it wrote, descriptively: "First degree murder is subject to a mandatory sentence of life imprisonment unless the death penalty is imposed, as set forth in 18 U.S.C.

(Footnote Continued)

The Act not only fails to mention capital punishment as a sentencing option but requires the imposition of sentences that would preclude capital punishment. Under 18 U.S.C. § 3551(b), an individual "shall" be sentenced to either probation or a fine or imprisonment. As the legislative history notes, this subsection thus "requires the imposition of at least one of such sentences." S. Rep. No. 225, 98th Cong., 1st Sess. 69 (1983), reprinted in 1983 U.S. Code Cong. & Ad. News 3182, 3151. The Justice Department tries to explain away the inconsistency of this requirement and any provision for capital punishment by claiming that "convicted offenders sentenced to death will invariably be imprisoned and often fined prior to the execution of the death sentence." (OLC Mem. 22 n.26.) But surely it is straining statutory language beyond its resiliency to equate temporary incarceration before execution with the "term of imprisonment" required by the Act. Similarly, fining a defendant already sentenced to death just to satisfy Section 3551(b) does not reflect a reasonable interpretation of the statute. The requirement of probation, fine or imprisonment -- prominently placed in the first section on sentencing in Title 18 -- suggests that one of these three options is designed to be the heart of the

(Footnote Continued)
§ 1111 for premeditated murder and some felony murders." "Proposed Sentencing Guidelines for United States Courts," Commentary on § A211, 52 Fed. Reg. 3920, 3928 (Feb. 6, 1987).

sentence, not the appendix.

Where a statute is clear on its face, its "plain meaning" must be given effect. See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Aaron v. SEC, 446 U.S. 680, 700 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200-01 (1976). The plain meaning rule is sometimes seen as old-fashioned, but it is the only rule consonant with our lawmaking system. The words of a bill are what Senators, Representatives, and the President see and act upon. Here, the words of the Sentencing Reform Act, enacted in the constitutionally prescribed manner by the concurrence of the two legislative chambers and the President, are clear on their face. The exclusion of capital punishment from the statutory statement of what sentences are permissible compels the conclusion that Congress intended to withhold from the Commission authority to include capital punishment in its guidelines.

C. Context of Statutory Provisions

The context of the principal provisions of the Sentencing Reform Act negates any suggestion that Congress meant to confer capital punishment authority on the Sentencing Commission. The most significant piece of contextual evidence is that Congress in the Sentencing Reform Act apparently acted to preserve the death penalty of the Antihijacking Act -- the one federal death penalty statute thought to be accompanied by constitutionally adequate safeguards. See Pub. L. 98-473,

§ 232(a), amending 49 U.S.C. § 1472. In doing so, it kept the Antihijacking Act death penalty outside the purview of the Sentencing Commission.9/ On Senator Laxalt's motion, the Senate amended S. 1762 to insert in the Antihijacking Act the words "notwithstanding the provisions of 18 U.S.C. § 3559(b)" before the provisions of the statute that authorize the death penalty. The purpose of this amendment was "to make clear that the new 18 U.S.C. § 3559(b) is not intended to repeal the current death penalty and related procedures applicable to aircraft hijacking, where death results." 129 Cong. Rec. S14702 (daily ed. Oct. 26, 1983) (remarks of Sen. Laxalt).

The amendment should probably refer, and presumably was intended to refer, to 18 U.S.C. § 3551(b), and not 3359(b). Section 3559(b) merely describes the effect of the classification of offenses in Section 3559(a) and does not appear to limit the choice of sentences so as to require a "notwithstanding." Section 3551(b), on the other hand, limits "authorized sentences" to probation, fines and imprisonment and thus on its face excludes the capital punishment that the Antihijacking Act would otherwise authorize.

9/ The Commission's proposed guidelines properly reflect the amendment. See "Proposed Sentencing Guidelines for United States Courts," Commentary on § A251, 52 Fed. Reg. 3920, 3931 (Feb 6, 1987) (stating that, "[i]f death occurs during the commission of aircraft piracy, either a mandatory minimum term of life imprisonment or the death penalty should be imposed," but without attempting to guide the sentencer's choice of one or the other sentence).

Assuming the garbled reference to Section 3559(b) is taken as a reference to Section 3551(b), the effect of the amendment may be to authorize capital punishment under the Antihijacking Act, notwithstanding the general rule restricting sentences to probation, fines, and imprisonment. In other words, in the Antihijacking Act, it is "otherwise specifically provided," 18 U.S.C. § 3551(a) (see p. 11, supra), and the death penalty can be imposed even though it is not an authorized sentence named in Section 3551. The fact that Senator Laxalt described his amendment as a clarifying one (see OLC Mem. 25 n.22) does not compel the conclusion that it was truly unnecessary or justify the further conclusion that somehow the death penalty, though unmentioned, was in the Sentencing Reform Act all along.

Moreover, the context of the major provisions of the Sentencing Reform Act demonstrates that Congress was at best indifferent to the death penalty in enacting that statute. One of the provisions of the former Chapter 227 of Title 18 that were repealed by Section 212(a)(2) of the Act is old 18 U.S.C. § 3566, which provided that the punishment of death should be inflicted by the means provided in the laws of the place where the federal sentence of death was imposed. In the absence of old Section 3566 there is no prescription of how a federal death penalty shall be executed.

Finally, if the Sentencing Commission were meant to have power to deal with the death sentence, its power would be

incomplete, insufficient to bring the death penalty provisions of Title 18 into conformity with the Constitution. The Sentencing Commission's charter pertains to the substance of sentences: what considerations should enter into the prescription of one or another kind of sentence and into how severe that sentence should be. See 18 U.S.C. §§ 994(a) (Commission to promulgate guidelines "for use of a sentencing court in determining the sentence to be imposed . . . .") (emphasis added); 994(b) (Commission shall "establish a sentencing range . . . .") (emphasis added). The reason for the creation of the Commission was what some perceived to be a scandalous disparity in sentences meted out by different federal courts for the same offense and to similarly-situated defendants. See S. Rep. No. 225 at 38-46. There had been no public outcry about sentencing procedures, and the Commission is not, on any reading of its charter, empowered or directed to prescribe sentencing procedures.

Yet, in the Antihijacking Act and in the generally applicable federal death sentence bills that have been modeled on it,[10/] there are provisions dealing both with the aggravating and mitigating factors that must be considered by a court in deciding whether to impose the death penalty and the procedures to be followed in weighing the factors. In

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10/ See, e.g., S. 829, Title X, 98th Cong., 1st Sess (1983); S. 1765, 98th Cong., 2d Sess. (1984).

general, the procedures are those familiar to students of the post-Furman state death penalty statutes -- a rather formal sentencing hearing, practically a second trial following the trial of guilt or innocence. The Commission clearly could not promulgate guidelines requiring that there be such a sentencing trial.

D. Legislative History

Contrary to what the Justice Department asserts, the legislative history confirms the plain meaning of the statute. As the Department notes, the Senate decided not to use the sentencing reform bill as a vehicle for reinstating capital punishment because it did not want to shake the consensus behind the legislation. When Senator Thurmond introduced S. 829, it was soon apparent that "one controversial provision could slow or halt progress on the entire package." 130 Cong. Rec. S338 (daily ed. Jan. 27, 1984) (remarks of Sen. Biden). The leaders of the Senate Judiciary Committee therefore decided "to agree what we agreed on and agree on what we disagreed on and move forward with the parts on which we agreed." 130 Cong. Rec. S404 (daily ed. Jan. 30, 1984) (remarks of Sen. Biden).

The committee leaders decided to remove capital punishment from the bill in order to deflect the controversy that the death penalty provisions were sure to incite. See S. Rep. No. 225 at 2 n.10. The chairman, Senator Thurmond, explained more than once to his colleagues on the Senate floor

that "capital punishment is controversial, so we took it out of the package." 130 Cong. Rec. S638-39 (daily ed. Feb. 1, 1984) (remarks of Sen. Thurmond); see also 129 Cong. Rec. S11679 (daily ed. Aug. 4, 1983) (remarks of Sen. Thurmond) (committee deleted from predecessor bill S. 2572 those issues, such as capital punishment, that "are so controversial that we felt it would jeopardize the whole bill to include them"); 128 Cong. Rec. S3882 (daily ed. April 22, 1982) (same). Senator Biden, the ranking minority member of the committee, agreed with Chairman's version. See 130 Cong. Rec. S338 (daily ed. Jan. 27, 1984) (committee members agreed to "move those bills which are controversial as separate legislation because they recognized that passage of a comprehensive crime package is the most important goal"). Thus, the comprehensive crime control bill that reached the floor of the Senate "had stripped out of it the major controversies, that is, the death penalty," the exclusionary rule, habeas corpus, and other highly contentious matters. 130 Cong. Rec. S743 (daily ed. Feb. 2, 1984) (remarks of Sen. Baker); see also 130 Cong. Rec. S754 (daily ed. Feb. 2, 1984) (remarks of Sen. Kennedy) (bill "excludes controversial proposals to limit the exclusionary rule and habeas corpus, and to reinstate the death penalty").

Congress' decision to isolate the sentencing reform bill from controversial matters, such as capital punishment, negates any inference that it sanctioned the death penalty as an appropriate subject of the Commission's guidelines. The

Commission's authority derives entirely from the Sentencing Reform Act. Its power "is no greater than that delegated to it by Congress." Lyng v. Payne, 106 S. Ct. 2333, 2341 (1986); see Dixon v. United States, 381 U.S. 68, 74 (1965); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936). Where Congress has built a wall between its sentencing reform legislation and the death penalty, the Commission has no authority to climb over it.

Congress' focus on imprisonment as the maximum penalty further demonstrates the Commission's lack of authority to establish criteria for imposing the death penalty. Proponents of the Act hailed its promise of "stricter, saner and more uniform sentencing guidelines." 130 Cong. Rec. S13088 (daily ed. Oct. 4, 1984) (remarks of Sen. D'Amato). Yet the floor debates mention only imprisonment as the maximum sentence available for the maximum offenses. See 130 Cong. Rec. S527 (daily ed. Jan. 31, 1984) (remarks of Sen. Thurmond); 130 Cong. Rec. S757-58 (daily ed. Feb. 2, 1984) (remarks of Sen. Laxalt) (bill requires Commission to specify stiff prison terms for those who commit violent crimes, drug offenses and other serious crimes); 130 Cong. Rec. S429 (daily Ed. Jan. 30, 1984) (remarks of Sen. Biden) (emphasizing that guidelines put "emphasis on imprisonment for violent offenders").

Relying on this same legislative history, the Justice Department nonetheless concludes that the Commission

may issue guidelines that effectively reinstate the death penalty. The Department argues that, since Congress evidently did not intend to affect the current death penalty statutes, the guidelines must recognize their existence and include capital punishment. The Department is correct in asserting both that repeals by implication are disfavored and that Congress probably did not consciously intend to repeal the death penalty statutes. But to state the issue as one of repeal is to misstate it. In the wake of Furman v. Georgia, the death penalty statutes in Title 18 have been thought to be unenforceable. That assumption may be debatable, as the Justice Department contends (OLC Mem. 8 n.8), but it clearly was the assumption in fact. The assumption (see p. 13 n.5, supra) was grounded not only in the tenor of the prevailing opinions in Furman and the contemporaneous views of Justices and commentators (p. 3 n.1, supra) but also in a later decision of a United States court of appeals that a death penalty imposed for murder under 18 U.S.C. § 1111 must be set aside because the statute "is absolutely barren of sentencing standards, an open invitation to capricious and arbitrary execution," United States v. Kaiser, 545 F.2d 467, 469 (5th Cir. 1977), and the statement of another that the death penalty provisions of Section 1111 "probably cannot be constitutionally applied," United States v. Watson, 496 F.2d 1125, 1127 (4th Cir. 1973); see also United States v. Johnson, 425 F. Supp. 986 (E.D. La. 1976) (death penalty provision of

federal rape statute, 18 U.S.C. § 2031, unconstitutional); United States v. Weddell, 567 F.2d 767, 770 (8th Cir. 1977) (government counsel agreed that Furman precluded impositon of the death penalty under 18 U.S.C. § 1111).

The status quo on which Congress acted, therefore, in considering and passing the Sentencing Reform Act, was a status quo in which the death penalty -- save for that contained in the Antihijacking Act, which Congress acted to preserve -- hung in suspension. Congress believed, and probably quite correctly, that it would require a political decision on the part of its members, the people's elected representatives, to remove from its state of suspension the death penalty for most federal offenses for which it is nominally provided.

The decision is quintessentially one for the Congress. Congress has simply not been able to decide (save in the case of aerial hijacking) that the death penalty sufficiently serves the sentencing goals of just punishment, deterrence, and incapacitation to warrant the awesome finality of its imposition and execution. The "implied repeal" of the death sentence by the Sentencing Reform Act, to use the Justice Department's phrase, leaves the issue just as it was before the Act was passed, an issue that Congress alone can properly resolve.

It trivializes and distorts the nature of the policy decision that Congress has reserved to itself to argue, as the

Justice Department does, by reference to cases such as United States v. Southwestern Cable Co., 392 U.S. 157 (1968), in which an agency authorized to deal in the public interest with a range of economic issues affecting an industry or a technology has been held empowered to act in respect of some issue unforeseen when its broad congressional charter was written. That is far from the death penalty situation. The decision whether, and if so in what circumstances, the supreme penalty should be exacted for federal offenses is a decision of a very different order of magnitude from the decision whether cable television should be regulated by the FCC. Moreover, Congress was well aware of the death penalty issue and chose not to try to resolve it in the legislation that otherwise empowered the Sentencing Commission to fill in the details of the sentencing policy it was enacting.

Conclusion

The Sentencing Reform Act does not authorize the Sentencing Commission to include the death penalty in its guidelines. Any provision authorizing judicial imposition of capital punishment thus would exceed the Commission's statutory authority.

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Norman Dorsen
PRESIDENT

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Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

February 13, 1987

The Honorable William Wilkins
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Please find enclosed a copy of the Covington and Burling memorandum which forms the basis of our testimony.

Norman Dorsen's written testimony will be submitted to the Committee on February 17, 1987.

Sincerely,

Diann Rust-Tierney

Diann Rust-Tierney
Legislative Counsel

February 12, 1987

MEMORANDUM

Re: Statutory Authority of the United States Sentencing Commission to Include Capital Punishment in its Sentencing Guidelines

The American Civil Liberties Union has asked Covington & Burling to examine the question whether the United States Sentencing Commission has statutory authority to issue guidelines establishing criteria for the imposition of the death penalty. This memorandum responds to the ACLU's request.

Section I of the memorandum describes the legislative background of the Sentencing Commission and of the statute under which it operates. Section II sets out the statutory provisions that define the Commission's authority. Section III states the arguments of the Department of Justice, which has recently advised the Commission that it may legally establish criteria for the imposition of capital punishment. Finally, in Section IV, the memorandum analyzes the issue of the Commission's authority with respect to the death penalty in the light of the legislative background, the terms of the governing statute, and the Justice Department's analysis. It concludes, contrary to the Justice Department, that the Commission is not authorized to include in its sentencing guidelines criteria governing the imposition of the death sentence.

I. Legislative Background

The Sentencing Commission was created by the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987, Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1976. The Comprehensive Crime Control Act capped more than a decade of legislative efforts to reform the federal criminal justice system. This omnibus statute evolved from S. 1, introduced first in the 93d Congress as the Criminal Justice Codification, Revision and Reform Act of 1973 and then in the 94th Congress as the Criminal Justice Reform Act of 1975. S. 1 would have revised and recodified all substantive offense provisions in Title 18 of the United States Code. In addition, S. 1 would have modified the sentencing provisions of that title.

Both versions of S. 1 listed "authorized sentences," which included punishment by death, and both would have established special death sentence procedures and substantive criteria to guide the sentencer in deciding whether to impose such punishment.

These procedures and criteria reflected a general understanding that the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), striking down as unconstitutional state death penalty statutes that gave judges and juries unfettered discretion in their decisions whether to sentence to death, applied to the federal death penalty

statutes then on the books.[1/] None of the federal statutes provided in terms for procedural or substantive means of channeling the sentencer's discretion. In the aftermath of Furman, nearly forty states have adopted capital punishment guidelines of the general kinds that the Court was to hold constitutionally acceptable in the second round of death penalty cases, Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976). There is one federal statute comparable to these new statutes, the Antihijacking Act of 1974, which authorizes the death penalty for air piracy if death results and includes sentencing procedures and substantive sentencing criteria designed to satisfy the constitutional requirements of Furman. 49 U.S.C. §§ 1472-73.[2/] None of the pre-existing federal death penalty statutes, however, has been amended to respond to Furman.

1/ Justice Blackmun, dissenting in Furman, said that federal death penalty provisions, along with those of the states, were apparently voided. 408 U.S. at 411-12 (Blackmun, J., dissenting); see also 408 U.S. at 417 (Powell, J., dissenting). Contemporaneous commentators agreed. See, e.g., Note, The Furman Case: What Life Is Left in the Death Penalty?, 22 Cath. L. Rev. 651 (1973); Polsby, The Death of Capital Punishment?; Furman v. Georgia, 1972 S. Ct. Rev. 1 (1972).

2/ In 1985, Congress also amended the Uniform Code of Military Justice to authorize the death penalty for members of the armed forces found guilty of espionage in a court-martial proceeding. Pub. L. 99-145, § 535, 99 Stat. 635. Although also designed to meet the Furman requirements, this statute does not apply to the general civilian public.

After S. 1 had failed twice, similar legislation was introduced in the 95th Congress as S. 1437, the Criminal Code Reform Act of 1978. S. 1437 generally adopted the sentencing changes of S. 1, and it added provision for a sentencing commission. S. 1437 would have repealed all but two federal death penalty provisions, and it deleted capital punishment from the list of authorized sentences. S. 1437 was not enacted, and similar bills in the 96th and 97th Congress also failed.

Finally, in the 98th Congress, Senator Thurmond introduced S. 829, an Administration bill that incorporated the earlier bills on criminal justice reform, including the sentencing provisions of S. 1437, and added several other, controversial measures. Title X of S. 829 would have established procedures and provided criteria for the imposition of the death penalty under those federal offenses for which existing statutes nominally authorized the death penalty. The bill was referred to the Senate Judiciary Committee, which split off the controversial measures into separate bills. The committee reported the general criminal reform legislation as S. 1762 and the bill to restore the federal death penalty as S. 1765. The Senate approved both bills -- S. 1762 by a vote of 91 to 1, 130 Cong. Rec. S759 (daily ed. Feb. 2, 1984) and S. 1765 later and by the much closer margin of 63 to 32, 130 Cong. Rec. S1491 (daily ed. Feb. 22, 1984). S. 1762 was enacted as the Comprehensive Crime Control Act of 1984.

S. 1765 died in the House of Representatives.

Chapter II of the omnibus Crime Control Act is the Sentencing Reform Act, which broadly revises the law governing the imposition of sentences for federal offenses. In section 217(a) of the statute, Congress created the United States Sentencing Commission, an independent, bipartisan commission comprised of seven voting members and one nonvoting member.3/ The Commission's duties include the promulgation of guidelines establishing criteria for the imposition of the several types of authorized sentences and setting a sentencing range for each category of federal offense. 18 U.S.C. §§ 994(a) and (b). Unless Congress acts within six months of their issuance, these guidelines will control the sentencing decisions of all federal judges, save in unusual cases. 28 U.S.C. § 994(o); 18 U.S.C. § 3553(a)(4). The Commission must issue its first guidelines by April 13, 1987.4/

3/ In a later section of the statute, Congress provided that the Chairman of the United State Parole Commission would serve as as an ex officio member of the Commission for the first five years of the Commission's life. Pub. L. 98-473, § 235(b)(5). The Commission today therefore includes seven voting and two nonvoting members.

4/ Pub. L. 99-217, 99 Stat. 1728 (1985), extended the Commission's original 1986 deadline by one year.

II. Relevant Statutory Provisions

The Sentencing Reform Act is in two major parts. First, by Section 212(a) it enacts two new chapters of Title 18 of the United States Code: Chapter 227, entitled "Sentences," supplanting the old Chapter 227, "Sentence, Judgment, and Execution"; and Chapter 229, entitled "Postsentence Administration," supplanting the old Chapter 229, "Fines, Penalties and Forfeitures." Second, Section 217(a) enacts a new Chapter 58 of Title 28 of the United States Code, "United States Sentencing Commission"; the provisions of Chapter 58 create and empower the Sentencing Commission.

The heart of the Title 18 provisions is Section 3551, entitled "Authorized sentences." Section 3551(a) requires that, "[e]xcept as otherwise specifically provided," a defendant who has been found guilty of a federal offense

> "shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case."

The "purposes" set forth in Section 3553(a)(2) are the need for the sentence imposed (A) to reflect the seriousness of the crime, to promote respect for the law, and to provide just punishment, (B) to afford adequate deterrence of criminal conduct, (C) to protect the public from further crimes by the defendant, and (D) to provide rehabilitation for the defendant. Under Section 3551(b),

> "An individual found guilty of an offense

> shall be sentenced, in accordance with the provisions of section 3553, to --
>
> (1) a term of probation as authorized by subchapter B;
>
> (2) a fine as authorized by subchapter C; or
>
> (3) a term of imprisonment as authorized by subchapter D."

Section 3551(b) goes on to provide that a fine may be imposed in addition to either probation or imprisonment. It also says that certain sanctions -- criminal forfeiture authorized by Section 3554, notice by the defendant to the victims of a crime involving fraud or deceit, authorized by Section 3555, and restitution authorized by Section 3556 -- may be imposed "in addition to the sentence required" by Section 3551(b). (Section 3551(c) deals with the sentencing of organizations, following the pattern of Section 3551(b) but omitting the sentence of imprisonment.) Section 3559, the final section of subchapter A of Chapter 227 containing the general sentencing provisions including Section 3551, classifies offenses for sentencing purposes by letter grades, A (the most serious) through E felonies, A through C misdemeanors, and (least serious of all) infractions. The seriousness of an offense is inferred from the gravity of the sentence provided for in the substantive statute defining and denouncing the offense.

Subchapter B of Chapter 227, Sections 3561-66, states the circumstances in which the sentence of probation can be imposed, the factors to be considered in determining

what the conditions of probation must and may be, and the sanctions for probation violations. Subchapter C, Sections 3571-74, similarly deals with the size of authorized fines, factors to be considered in imposing fines, and the modification or remission of fines. Subchapter D, Sections 3581-86, specifies authorized terms of imprisonment for various classes of offenses, factors to be considered in sentencing an individual to prison, factors relating to whether sentences should be concurrent or consecutive, and other matters relating to imprisonment.

Turning to the Title 28 provisions of the Sentencing Reform Act, Section 994, a long and detailed section, is the principal provision dealing with the Sentencing Commission and its duties and powers. Section 994(a)(1) directs the Commission to promulgate and distribute to the federal courts

> "guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including --
>
> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
>
> (C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

> (D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively."

Section 994(a)(2) also requires the Commission to issue "general policy statements" on certain matters, including the appropriate use of the sanctions of criminal forfeiture, notice to victims and restitution.

Section 994(b) further refines the Commission's duties:

> " (1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of Title 18, United States Code.
>
> (2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by the greater of 25 percent or 6 months, except that, if the maximum term of the range is 30 years or more, the maximum may be life imprisonment." As amended by Pub. L. 99-363, 99 Stat. 770 (1986).

Subsections (c) and (d) require the Commission to consider various factors relating to offense and offender characteristics in establishing categories of offenses and defendants for use in its guidelines and policy statements.

Section 3553(a)(4) of Title 18 directs that a federal court, "in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and the sentencing range" established by the Sentencing Commission for the relevant category of offense and offender.

Section 3553(b) goes further, directing that a court "shall impose a sentence of the kind and within the range, referred to in subsection (a)(4)," unless it finds that an aggravating or mitigating circumstance exists not adequately treated by the Sentencing Commission that indicates a sentence different from that prescribed by the Commission's guidelines.

III. Summary of the Justice Department's Analysis

The Office of Legal Counsel of the Department of Justice takes the position that the Sentencing Commission has the statutory authority to prescribe criteria for the imposition of the death penalty. Its view is stated in a memorandum dated January 8, 1987, addressed to the chairman of the Sentencing Commission. We have also been supplied with memoranda on the same subject and reaching the same conclusion prepared by lawyers in the Criminal Division. We have taken the OLC memorandum as stating the Justice Department position authoritatively. This section of our memorandum briefly summarizes the Justice Department's position as so stated.

The Justice Department's chief argument is that, if the statute were read as excluding capital punishment from the Commission's authority to promulgate sentencing guidelines, the result would be the implied repeal of all but one of the existing federal provisions for the death penalty, and repeals by implication are disfavored. The Department notes that a number of federal criminal statutes now provide for imposition of capital punishment. See, e.g., 18 U.S.C. §§ 1111 (first-

degree murder), 1751 (assassination or kidnapping resulting in the death of the President), 2381 (treason). The Department says that the phrase "[e]xcept as otherwise specifically provided" as used in 18 U.S.C. § 3551(a) to qualify the general rule that a federal criminal defendant "shall be sentenced in accordance with the provisions" of the new Chapter 227 requires a specific reference in the substantive statute defining and denouncing an offense denying the applicability of the new sentencing provisions. There is no such reference in any of the death penalty provisions of Title 18, though there is at least an attempted such reference in the Antihijacking Act (pp. 24-25, infra). Therefore, unless the death penalty is somehow within Chapter 227 though not there mentioned (save for a recognition in Section 3559(a) that some statutes in fact provide for the death penalty), the death penalty for all Title 18 crimes has effectively been repealed. Such a repeal, the Department contends, would run counter to "positive and indisputable evidence in the Act's legislative history that existing death penalty statutes were not intended to be affected in any way, let alone repealed." (OLC Mem. 26.) Therefore the Department concludes "that capital punishment is an authorized sanction under the Sentencing Reform Act of 1984." (Id. at 24.)

The Department finds no textual support for this conclusion in the substantive sentencing provisions of Title 18. It does profess to find support in the provisions

of Title 28 dealing with the Sentencing Commission. Indeed, it goes so far as to say that, "[o]n its face, section 994 of the Act appears to authorize the Commission to promulgate capital sentencing guidelines." (Id. at 26.) The Department refers for such authorization to the Commission's mandate under Section 994(a) to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case." (Id.) It refers further to Section 994(b) and the requirement that the Commission establish a sentencing range for each offense "consistent with all pertinent provisions" of Title 18. (Id.) And it notes that Section 994(a)(1), in defining the kind of sentencing guidelines the Commission is to promulgate and seemingly restricting sentences to probation, fine, and imprisonment, is introduced by the nonrestrictive term "including," which to the Department is a recognition "that it may be necessary for the Commission to promulgate additional, unspecified guidelines." (Id.) Finally, the Department points to references in Sections 994(c) and (d), which prescribe factors for the Commission to consider in formulating its guidelines, to "other authorized sanctions," which it believes may include the death penalty. (Id.)

IV. Analysis

A. Overview

Before we undertake the detailed textual, contextual and historical analysis that leads us to a conclusion diametrically opposite to that of the Department of Justice, it is well to stand back and look at what it is that is being contested.

It has been assumed since 1972 by supporters and opponents of the death penalty alike that Furman v. Georgia invalidated the death penalty provisions of all federal laws then in effect.[5/] Right or wrong, that assumption has underlain subsequent legislative action concerning the death penalty. In 1974, Congress reacted to public concern over aerial hijackings and enacted a death penalty statute with procedural and substantive safeguards intended to satisfy the

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5/ See, e.g., S. Rep. No. 282, 99th Cong., 2d Sess. 2 (1986); S. Rep. No. 251, 98th Cong., 1st Sess. 2-4 (1983); 130 Cong. Rec. S1470 (daily ed. Feb. 22, 1984) (remarks of Sen. Thurmond); S1472 (remarks of Sen. Mathias); S1477 (remarks of Sen. Dole); Comprehensive Crime Control Act of 1983: Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Committee on the Judiciary, 98th Cong., 1st Sess. 22 (1983) (statement of Assistant Attorney General Jensen) ("For more than a decade, Federal statutes authorizing the death penalty for offenses of homicide, espionage, and treason have been unenforceable because they fail to provide, as required under the Supreme Court's landmark decision in Furman v. Georgia, a set of legislated guidelines to narrow the sentencer's discretion in determining whether the death penalty is justified in a particular case").

Supreme Court's constitutional concerns.[6/] Supporters of the death penalty have attempted to secure the enactment of legislation that would revitalize the pre-existing federal death penalty statutes. But significant opposition in Congress to capital punishment has prevented the enactment of the procedural and substantive safeguards for those statutes that the Constitution requires as a prerequisite to the imposition of a sentence of death.

The death penalty has been one of the most sharply debated of public policy issues. In debate on the bill that was enacted as the Sentencing Reform Act, Senator Thurmond, a strong supporter of the death penalty, stated both the underlying assumption that positive congressional action would be necessary to resuscitate the federal death penalty and his own frustration at the lack of such action. He said that "we do not seem to be able to enact a death penalty statute" with the result, he noted, that life imprisonment is the most severe sanction available even for prisoners, already serving life sentences, who kill prison guards. 130 Cong. Rec. S428 (daily

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6/ Antihijacking Act of 1974, Pub. L. 93-366, §§ 104-05, 88 Stat. 410-11 (1974), codified at 49 U.S.C. §§ 1472-73. In view of the plurality opinion of Lockett v. Ohio, 438 U.S. 586 (1978), which held that the Ohio death penalty statute was unconstitutional because it limited the range of mitigating circumstances that the sentencer may consider, it is not clear that even the Antihijacking Act on its face would survive constitutional scrutiny since 49 U.S.C. § 1473 does not provide for consideration of mitigating factors other than those listed in subsection (c)(6).

ed. Jan. 30, 1984).

It is clear that in finding common ground for dealing with a wholly separate matter of public concern -- the existence of discrepancies in sentencing within the federal court system -- legislators agreed to set aside their differences on the death penalty. The Justice Department concurs and indeed asserts that proposition as a major premise of its argument. As a reflection of that agreement, the Sentencing Reform Act is silent on the death penalty. In both its substantive sections on sentencing, enacted as provisions of Title 18, and in its creation and empowerment of a new commission that would establish sentencing guidelines, the Sentencing Reform Act treats as the only "authorized sentences" imprisonment, fines, and probation. It provides specifically for certain additional "sanctions" -- notice to victims, restitution, and forfeiture. Not one express term of the statute mentions the death penalty as an authorized sentence or an authorized sanction. Congress so legislated on the assumption that the death penalty (except for skyjacking) was unenforceable. The silence of the statute can only mean that Congress intended to leave the federal death penalty in that unenforceable state of suspension.

If the Sentencing Reform Act had attempted to deal with the death penalty as an authorized sentence or authorized sanction, it very likely would not have been enacted. We know that because the House of Representatives failed to pass a

bill, S. 1765, that would have resuscitated the federal death penalty by establishing constitutional procedures and criteria for its imposition. That same House passed the Sentencing Reform Act without difficulty. It is inconceivable that the House meant by the Sentencing Reform Act to authorize a commission to do exactly what it had declined to do in respect of the death penalty. It is similarly inconceivable that the Senate intended this effect. The Senate had separated the controversial death penalty provisions from the noncontroversial sentencing reform provisions of a single bill, divided them into separate bills, and passed both, the non-controversial one with a single dissent, the controversial death penalty bill over a substantial negative vote.

B. Text

The text of the statute demonstrates that Congress did not intend to authorize the Sentencing Commission to establish criteria reviving the death penalty. The author of the OLC memorandum of January 8 surely had his tongue more firmly embedded in his cheek than is usual, even for a lawyer advocating a client's position, when he wrote that Section 994 of Title 28, added by the Sentencing Reform Act, "[o]n its face . . . appears to authorize the [Sentencing] Commission to promulgate capital sentencing guidelines." (OLC Mem. 26.) It is impossible to find on the face of Section 994 (or any other provision added to either title of the Code by the Sentencing Reform Act) a suggestion that Congress was conferring

authority on the Commission to promulgate capital sentencing guidelines. Every indication on the face of the statute is to the contrary.

The striking thing about the text of the statute is that with one exception any mention of the death penalty is, as the Justice Department itself puts it, "[c]onspicuously absent." (OLC Mem. 7.) The key substantive provision of the statute lists three kinds of "authorized sentences," 18 U.S.C. § 3551(b). Under Section 3551(b), an individual found guilty of a federal offense must be sentenced to a term of probation, a fine, or a term of imprisonment. The defendant may be fined on top of being sentenced to probation or imprisonment, and he may also be subjected to an order of forfeiture, an order to give notice to the victim or victims of his crime, or an order to make restitution.

Following Section 3551 come provisions concerning presentence reports, § 3552, and detailing the factors to be considered in imposing sentence, § 3553. Section 3554 states the circumstances in which a forfeiture order must be entered in addition to the sentence. Section 3555 explains the notice sanction -- the option of the court's ordering the defendant to give notice of his conviction to his victims in the case of a crime involving fraud or deception. Section 3556 similarly explains when restitution can be exacted of a defendant. And three following subchapters, each consisting of several separate Code sections, set forth details of the authorized

sentences of probation, fine, and imprisonment. There is nothing remotely comparable about the death penalty in these provisions of Title 18. In fact, there is next to nothing at all.

Similarly, Congress' mandate to the Sentencing Commission in Title 28 omits any mention of capital punishment. The provisions dealing with the Commission list the same three types of sentences as are listed in Section 3551 and treated in the following subchapters of Title 18. By citation to the relevant sections of Title 18, the Commission is empowered to recommend appropriate uses for the other authorized sanctions of forfeiture, notice, and restitution. Specifically, under Section 994(a)(1), the Commission is directed to issue

> "guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including --
>
> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;
>
> . . . . "

Section 994(a)(2) directs the Commission to issue general policy statements regarding other aspects of sentencing, "including the appropriate use" of the forfeiture, notice, and restitution sanctions. 28 U.S.C. § 994(a)(2)(A).

Under the quoted provisions of Section 994(a)(1) the Commission has the duty to prescribe guidelines first for a sentencing court's determination "whether to impose a sentence to probation, a fine, or a term of imprisonment" and second for the court's determination of the amount of a fine or length of a term of probation or imprisonment. It is hard to understand how Congress could have stated more clearly that these three sentences -- referred to elsewhere as "authorized sentences" -- are the only kinds of sentences with respect to which the Commission is empowered to issue guidelines.

The Department of Justice makes four textual points in arguing against the conclusion that the words of the statute seem to dictate. It points first to the breadth of the Sentencing Commission's mandate to prescribe guidelines for use of a court in determining the sentence in a criminal case. In doing so, it omits from the statutory mandate, as quoted above, the phrase "as described in this section." (P. 8, supra.) The sentencing guidelines that the Commission is directed to promulgate are the guidelines "described in this section." And neither the Department of Justice nor anyone else can point to any description of a guideline in Section 994 that encompasses capital punishment.

But, says the Department, even if Congress did not describe any such guideline, it left room for one by using the non-limiting term "including" in Section 994(a)(1). As can be seen from the quotation of Section 994(a)(1) just above,

however, the word "including" is in the wrong place to avail the Department in this argument. The statute does not say in Section 994(a)(1)(A) that the Commission is to prescribe guidelines for use of a sentencing court in determining "what kind of sentence to impose, including a sentence to probation, a fine, or imprisonment." Instead, the Commission is directed to prescribe guidelines for the use of the sentencing court in making certain determinations including (A) the determination which of the three authorized sentences to impose, (B) the determination how severe any such sentence should be, (C) the determination whether a term of imprisonment should be followed by supervised release, and (D) the determination whether multiple terms of imprisonment should run concurrently or consecutively.7/ Because paragraphs (A) through (D) are introduced by the word "including," the Commission may be empowered to prescribe guidelines for other, related determinations by sentencing courts. It does not follow that it can issue guidelines for determining that some other type of sentence, not specifically authorized anywhere in the statute, can be imposed.

The Department also emphasizes that Section 994(b) requires that the Commission's guidelines establish a sentencing range "that is consistent with all pertinent

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7/ Paragraphs (C) and (D) of § 994(a)(1) are quoted at page 8 supra.

provisions of title 18, United States Code." Noting that Title 18 includes provisions authorizing imposition of the death penalty, the Department concludes that consistency with Title 18 necessitates inclusion of capital punishment in the guidelines. Yet this argument assumes that the death penalty provisions in Title 18 are still enforceable -- the opposite of the assumption that legislators have proceeded on since Furman v. Georgia. If these death penalty provisions are indeed unconstitutional, the most severe punishment in Title 18 that can be imposed is imprisonment. Section 994(b) does not require the Commission to reach beyond the current constitutional limits of Title 18 -- or, at any rate, Congress' understanding of those limits.

The Department's final textual argument rests on the use of the phrase "other authorized sanctions" in identical subordinate clauses of Sections 994(c) and (d) describing the guidelines and policy statements the Commission has a duty to issue. Leave to one side the oddity of Congress' empowering the Commission to act on so important a matter as the death penalty by the use of a nonspecific phrase in a subordinate clause. Leave to one side the oddity of its using the word "sanctions" to describe capital punishment in a statute in which the word "sentence" is used to describe the primary and most serious sanctions or penalties. It is plain in any event that "other authorized sanctions" refers to the sanctions (so denominated in Section 3551 of Title 18 and in Section

The Act not only fails to mention capital punishment as a sentencing option but requires the imposition of sentences that would preclude capital punishment. Under 18 U.S.C. § 3551(b), an individual "shall" be sentenced to either probation or a fine or imprisonment. As the legislative history notes, this subsection thus "requires the imposition of at least one of such sentences." S. Rep. No. 225, 98th Cong., 1st Sess. 69 (1983), reprinted in 1983 U.S. Code Cong. & Ad. News 3182, 3151. The Justice Department tries to explain away the inconsistency of this requirement and any provision for capital punishment by claiming that "convicted offenders sentenced to death will invariably be imprisoned and often fined prior to the execution of the death sentence." (OLC Mem. 22 n.26.) But surely it is straining statutory language beyond its resiliency to equate temporary incarceration before execution with the "term of imprisonment" required by the Act. Similarly, fining a defendant already sentenced to death just to satisfy Section 3551(b) does not reflect a reasonable interpretation of the statute. The requirement of probation, fine or imprisonment -- prominently placed in the first section on sentencing in Title 18 -- suggests that one of these three options is designed to be the heart of the

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(Footnote Continued)
§ 1111 for premeditated murder and some felony murders." "Proposed Sentencing Guidelines for United States Courts," Commentary on § A211, 52 Fed. Reg. 3920, 3928 (Feb. 6, 1987).

sentence, not the appendix.

Where a statute is clear on its face, its "plain meaning" must be given effect. See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); Aaron v. SEC, 446 U.S. 680, 700 (1980); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200-01 (1976). The plain meaning rule is sometimes seen as old-fashioned, but it is the only rule consonant with our lawmaking system. The words of a bill are what Senators, Representatives, and the President see and act upon. Here, the words of the Sentencing Reform Act, enacted in the constitutionally prescribed manner by the concurrence of the two legislative chambers and the President, are clear on their face. The exclusion of capital punishment from the statutory statement of what sentences are permissible compels the conclusion that Congress intended to withhold from the Commission authority to include capital punishment in its guidelines.

C. Context of Statutory Provisions

The context of the principal provisions of the Sentencing Reform Act negates any suggestion that Congress meant to confer capital punishment authority on the Sentencing Commission. The most significant piece of contextual evidence is that Congress in the Sentencing Reform Act apparently acted to preserve the death penalty of the Antihijacking Act -- the one federal death penalty statute thought to be accompanied by constitutionally adequate safeguards. See Pub. L. 98-473,

Assuming the garbled reference to Section 3559(b) is taken as a reference to Section 3551(b), the effect of the amendment may be to authorize capital punishment under the Antihijacking Act, notwithstanding the general rule restricting sentences to probation, fines, and imprisonment. In other words, in the Antihijacking Act, it is "otherwise specifically provided," 18 U.S.C. § 3551(a) (see p. 11, supra), and the death penalty can be imposed even though it is not an authorized sentence named in Section 3551. The fact that Senator Laxalt described his amendment as a clarifying one (see OLC Mem. 25 n.22) does not compel the conclusion that it was truly unnecessary or justify the further conclusion that somehow the death penalty, though unmentioned, was in the Sentencing Reform Act all along.

Moreover, the context of the major provisions of the Sentencing Reform Act demonstrates that Congress was at best indifferent to the death penalty in enacting that statute. One of the provisions of the former Chapter 227 of Title 18 that were repealed by Section 212(a)(2) of the Act is old 18 U.S.C. § 3566, which provided that the punishment of death should be inflicted by the means provided in the laws of the place where the federal sentence of death was imposed. In the absence of old Section 3566 there is no prescription of how a federal death penalty shall be executed.

Finally, if the Sentencing Commission were meant to have power to deal with the death sentence, its power would be

general, the procedures are those familiar to students of the post-Furman state death penalty statutes -- a rather formal sentencing hearing, practically a second trial following the trial of guilt or innocence. The Commission clearly could not promulgate guidelines requiring that there be such a sentencing trial.

D. Legislative History

Contrary to what the Justice Department asserts, the legislative history confirms the plain meaning of the statute. As the Department notes, the Senate decided not to use the sentencing reform bill as a vehicle for reinstating capital punishment because it did not want to shake the consensus behind the legislation. When Senator Thurmond introduced S. 829, it was soon apparent that "one controversial provision could slow or halt progress on the entire package." 130 Cong. Rec. S338 (daily ed. Jan. 27, 1984) (remarks of Sen. Biden). The leaders of the Senate Judiciary Committee therefore decided "to agree what we agreed on and agree on what we disagreed on and move forward with the parts on which we agreed." 130 Cong. Rec. S404 (daily ed. Jan. 30, 1984) (remarks of Sen. Biden).

The committee leaders decided to remove capital punishment from the bill in order to deflect the controversy that the death penalty provisions were sure to incite. See S. Rep. No. 225 at 2 n.10. The chairman, Senator Thurmond, explained more than once to his colleagues on the Senate floor

that "capital punishment is controversial, so we took it out of the package." 130 Cong. Rec. S638-39 (daily ed. Feb. 1, 1984) (remarks of Sen. Thurmond); see also 129 Cong. Rec. S11679 (daily ed. Aug. 4, 1983) (remarks of Sen. Thurmond) (committee deleted from predecessor bill S. 2572 those issues, such as capital punishment, that "are so controversial that we felt it would jeopardize the whole bill to include them"); 128 Cong. Rec. S3882 (daily ed. April 22, 1982) (same). Senator Biden, the ranking minority member of the committee, agreed with Chairman's version. See 130 Cong. Rec. S338 (daily ed. Jan. 27, 1984) (committee members agreed to "move those bills which are controversial as separate legislation because they recognized that passage of a comprehensive crime package is the most important goal"). Thus, the comprehensive crime control bill that reached the floor of the Senate "had stripped out of it the major controversies, that is, the death penalty," the exclusionary rule, habeas corpus, and other highly contentious matters. 130 Cong. Rec. S743 (daily ed. Feb. 2, 1984) (remarks of Sen. Baker); see also 130 Cong. Rec. S754 (daily ed. Feb. 2, 1984) (remarks of Sen. Kennedy) (bill "excludes controversial proposals to limit the exclusionary rule and habeas corpus, and to reinstate the death penalty").

Congress' decision to isolate the sentencing reform bill from controversial matters, such as capital punishment, negates any inference that it sanctioned the death penalty as an appropriate subject of the Commission's guidelines. The

Commission's authority derives entirely from the Sentencing Reform Act. Its power "is no greater than that delegated to it by Congress." Lyng v. Payne, 106 S. Ct. 2333, 2341 (1986); see Dixon v. United States, 381 U.S. 68, 74 (1965); Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936). Where Congress has built a wall between its sentencing reform legislation and the death penalty, the Commission has no authority to climb over it.

Congress' focus on imprisonment as the maximum penalty further demonstrates the Commission's lack of authority to establish criteria for imposing the death penalty. Proponents of the Act hailed its promise of "stricter, saner and more uniform sentencing guidelines." 130 Cong. Rec. S13088 (daily ed. Oct. 4, 1984) (remarks of Sen. D'Amato). Yet the floor debates mention only imprisonment as the maximum sentence available for the maximum offenses. See 130 Cong. Rec. S527 (daily ed. Jan. 31, 1984) (remarks of Sen. Thurmond); 130 Cong. Rec. S757-58 (daily ed. Feb. 2, 1984) (remarks of Sen. Laxalt) (bill requires Commission to specify stiff prison terms for those who commit violent crimes, drug offenses and other serious crimes); 130 Cong. Rec. S429 (daily Ed. Jan. 30, 1984) (remarks of Sen. Biden) (emphasizing that guidelines put "emphasis on imprisonment for violent offenders").

Relying on this same legislative history, the Justice Department nonetheless concludes that the Commission

may issue guidelines that effectively reinstate the death penalty. The Department argues that, since Congress evidently did not intend to affect the current death penalty statutes, the guidelines must recognize their existence and include capital punishment. The Department is correct in asserting both that repeals by implication are disfavored and that Congress probably did not consciously intend to repeal the death penalty statutes. But to state the issue as one of repeal is to misstate it. In the wake of Furman v. Georgia, the death penalty statutes in Title 18 have been thought to be unenforceable. That assumption may be debatable, as the Justice Department contends (OLC Mem. 8 n.8), but it clearly was the assumption in fact. The assumption (see p. 13 n.5, supra) was grounded not only in the tenor of the prevailing opinions in Furman and the contemporaneous views of Justices and commentators (p. 3 n.1, supra) but also in a later decision of a United States court of appeals that a death penalty imposed for murder under 18 U.S.C. § 1111 must be set aside because the statute "is absolutely barren of sentencing standards, an open invitation to capricious and arbitrary execution," United States v. Kaiser, 545 F.2d 467, 469 (5th Cir. 1977), and the statement of another that the death penalty provisions of Section 1111 "probably cannot be constitutionally applied," United States v. Watson, 496 F.2d 1125, 1127 (4th Cir. 1973); see also United States v. Johnson, 425 F. Supp. 986 (E.D. La. 1976) (death penalty provision of

federal rape statute, 18 U.S.C. § 2031, unconstitutional); United States v. Weddell, 567 F.2d 767, 770 (8th Cir. 1977) (government counsel agreed that Furman precluded impositon of the death penalty under 18 U.S.C. § 1111).

The status quo on which Congress acted, therefore, in considering and passing the Sentencing Reform Act, was a status quo in which the death penalty -- save for that contained in the Antihijacking Act, which Congress acted to preserve -- hung in suspension. Congress believed, and probably quite correctly, that it would require a political decision on the part of its members, the people's elected representatives, to remove from its state of suspension the death penalty for most federal offenses for which it is nominally provided.

The decision is quintessentially one for the Congress. Congress has simply not been able to decide (save in the case of aerial hijacking) that the death penalty sufficiently serves the sentencing goals of just punishment, deterrence, and incapacitation to warrant the awesome finality of its imposition and execution. The "implied repeal" of the death sentence by the Sentencing Reform Act, to use the Justice Department's phrase, leaves the issue just as it was before the Act was passed, an issue that Congress alone can properly resolve.

It trivializes and distorts the nature of the policy decision that Congress has reserved to itself to argue, as the

Justice Department does, by reference to cases such as United States v. Southwestern Cable Co., 392 U.S. 157 (1968), in which an agency authorized to deal in the public interest with a range of economic issues affecting an industry or a technology has been held empowered to act in respect of some issue unforeseen when its broad congressional charter was written. That is far from the death penalty situation. The decision whether, and if so in what circumstances, the supreme penalty should be exacted for federal offenses is a decision of a very different order of magnitude from the decision whether cable television should be regulated by the FCC. Moreover, Congress was well aware of the death penalty issue and chose not to try to resolve it in the legislation that otherwise empowered the Sentencing Commission to fill in the details of the sentencing policy it was enacting.

Conclusion

The Sentencing Reform Act does not authorize the Sentencing Commission to include the death penalty in its guidelines. Any provision authorizing judicial imposition of capital punishment thus would exceed the Commission's statutory authority.

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THE AMERICAN CIVIL LIBERTIES UNION TESTIFIES BEFORE THE UNITED STATES SENTENCING COMMISSION

THE COMMISSION LACKS THE AUTHORITY TO TO REINSTATE THE FEDERAL DEATH PENALTY SAYS ACLU

The ACLU today called upon the Sentencing Commission to recognize the fact that it does not have the authority to impose a federal death penalty. The ACLU characterized the Justice Department memorandum asserting that it had such authority as an effort to "usurp the power of Congress."

In testimony before the United States Sentencing Commission today, Norman Dorsen the President of the American Civil Liberties Union, stated: "the United States Sentencing Commission simply does not have the authority to reinstate the federal death penalty."

"The statute lists all of the punishments that the Commission has the authority to address and the death penalty is not among them". "The only reasonable reading of the statute under those circumstances is that the Commission has limited authority to promulgate guidelines for those punishments that are specifically enumerated in the statute." "The Justice Department is urging the Commission to go beyond its mandate to, in effect, amend the the Sentencing Reform Act" said Dorsen.

The United States Sentencing Commission was created as a bipartisan commission by the Sentencing Reform Act of 1984. The

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Commission has the responsibility of devising guideline for sentencing for a term of probation, a fine, or a term of imprisonment. The death penalty is listed among the authorized punishments under the Act. The Commission is expected to submit a final draft of their sentencing guidelines to Congress by April 13, 1987. These guidelines will bind all federal judges in their sentencing determinations unless, within six months, Congress amends, rejects or extends the effective date of the guidelines.

The Justice Department has urged the Commission to develop procedures which would permit the federal government to begin imposing death sentences for over a dozen death penalty provisions in the U.S. Code. These measures were rendered unenforceable by the Supreme Court decision in Furman v. Georgia which held that the death penalty could only be imposed for narrowly defined crimes and then only in accordance with tightly drawn procedures designed to curb arbitrariness and discrimination.

"The federal death penalty is a very divisive and controversial issue for Congress" said Diann Rust-Tierney, Legislative Counsel for the American Civil Liberties Union. "Had the Sentencing Reform Act purported to give the Commission the authority the Justice Department now claims for it, it would, in all likelihood, not have been enacted" She added.

"It is inconceivable that Congress would silently give the Commission the authority to reinstate the federal death penalty when it has been so specific for every other punishment" Rust-Tierney concluded.

"Deciding the circumstances under which an individual will be sentenced to death and executed is a determination that goes to the core of our values as a society and as a nation. Such decisions must be made by the elected representatives of the people." Dorsen ended.

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STATEMENT OF ALBERT W. ALSCHULER, PROFESSOR OF LAW AT THE UNIVERSITY OF CHICAGO, BEFORE THE UNITED STATES SENTENCING COMMMISSION, FEBRUARY 17, 1987

My name is Albert Alschuler. I teach law at the University of Chicago. We have met before.

The Office of Legal Counsel has concluded that this Commission can breathe life into some currently dormant federal death penalty statutes -- and in that way empower the federal courts to sentence some offenders to death. My remarks will address four questions. First, does the Commission have constitutional authority to resurrect these dormant death penalty statutes? Second, does the Commission have statutory authority to revive these statutes? Third, could any regime of sentencing guidelines cure the defects of the old statutes and yield an appropriate system of capital sentencing? And fourth, as a prudential matter, should the Commission undertake the task that it is currently considering?

I. CONSTITUTIONAL AUTHORITY

Article I, Section 1 of the Constitution declares, "All legislative powers . . . shall be vested in a Congress of the United States." The Supreme Court has held that Congress may not delegate its legislative powers.[1] Although the "nondelegation doctrine" has substantially less force today than it did fifty years ago,[2] it surely precludes Congress from delegating to an

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[1] See, e.g., United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932).

[2] See, e.g., Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 352-53 (1974).

administrative agency, not simply the power to promulgate capital sentencing guidelines, but the power to decide what crimes, if any, shall be punishable by death. In realistic terms, this larger power is the one that the Office of Legal Counsel has invited the Commission to exercise.

Congress determined that some federal offenders merited capital punishment when it enacted its pre-Furman[3] death penalty statutes; and although Congress has not reasserted this judgment in the post-Furman period, it also has not, as a matter of juridicial theory, retreated from its earlier position.[4] No one, however, has suggested that this Commission must issue guidelines governing the imposition of capital punishment. The only claim is that the Commission is empowered to do so. The Sentencing Reform Act of 1984 requires the issuance of guidelines on several subjects, but the imposition of capital punishment is not among them. The conclusion of the Office of Legal Counsel is that the statutory list is not exclusive and that the Commission may issue guidelines on other sentencing issues as well.

If the Commission does not exercise its asserted power, no operative federal death penalty (apart from that provided by Congress in the post-Furman Anti-Hijacking Act[5]) will exist. If the Commission does promulgate capital sentencing guidelines, however, other federal death penalties may exist. The

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[3] See Furman v. Georgia, 408 U.S. 238 (1972).

[4] Unless, that is, the Sentencing Reform Act of 1984 itself repeals pre-Furman death penalty provisions. See pp. 5-6 infra.

[5] 49 U.S.C. §§ 1472(i), 1742(n), 1473(c).

Commission, in other words, will effectively determine whether the United States will have capital punishment for various offenses -- a decision that only Congress can make. The Commission will decide much more than what form capital sentencing guidelines should take in a system in which guidelines have been mandated.

Especially in light of Congress's failure over an extended period to resurrect its pre-Furman statutes, one should not assume that courts will press to the limit the juridicial theory that the pre-Furman statutes never faded. The courts are likely to view the Commission's action more realistically. For an administrative agency to determine whether America will have a death penalty is incompatible with our scheme of democratic government. If the federal government is to punish offenders with death, Congress must (if you will pardon the metaphor) bite the bullet.

Congress, in short, cannot resurrect capital offenses through indirection, surprise, and delegation. A statute that told an administrative agency, "You may issue capital sentencing guidelines if you feel like it," would be unconstitutional. If the Sentencing Reform Act of 1984 conferred a similar power, it would be unconstitutional as well.

II. STATUTORY AUTHORITY

I will not linger over the question of constitutional authority, for no court is likely to reach it. At most, the constitutional issue might prompt a court to construe the Commission's statutory powers narrowly. One need not, however,

invoke the principle that statutes are to be construed to avoid constitutional issues to conclude that the Sentencing Reform Act does not authorize the action that the Commission is considering. The promulgation of capital sentencing guidelines was plainly beyond the contemplation of Congress when it enacted this statute.

The Act requires the Commission to "promulgate . . . guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case, including --

> (A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment [Notice what's not there];
>
> (B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment [Notice what's not there];
>
> (C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term [Notice what's not there]; and
>
> (D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively [Notice what's not there]."[6]

Before listing the mandatory subjects of sentencing guidelines, the statute uses the word "including." This word indicates that the list of enumerated subjects is not exclusive and that the Commission may issue guidelines on other subjects as well. If Congress had expected the Commission to promulgate

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[6] 28 U.S.C. § 994(a)(1).

capital sentencing guidelines, however, it surely would not have left this responsibility off its list. Congress would not have conferred a power to control use of the government's most coercive sanction by indirection when it conferred power over lesser sanctions explicitly.

A similar conclusion flows from the list of authorized sentences: "Except as otherwise specifically provided, . . . an individual found guilty of an offense shall be sentenced . . . to (1) a term of probation . . ., (2) a fine . . .; or (3) a term of imprisonment."[7] The statute authorizes sanctions of forfeiture, notice to victims, and restitution as well.[8] Again, however, notice what's not there.

The memorandum of the Office of Legal Counsel considers whether the Sentencing Reform Act's limitation of authorized sentences has repealed the pre-Furman death penalty provisions. Although repeals by implication are not favored, the memorandum, before it veers to a different conclusion,[9] offers a substantial argument that the Sentencing Reform Act has indeed repealed these provisions. The memorandum concludes that at least in predecessor bills with identical language the phrase "except as otherwise specificially provided" did not save these pre-Furman enactments. The memorandum declares, "[I]n our view, Congress

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[7] 18 U.S.C. § 3551.

[8] Id.

[9] The memorandum's final conclusion is based on legislative history that in fact points in the opposite direction. See pp. 6-7 infra.

intended the exception to be limited to contemporanously or subsequently enacted provisions specifically referencing the relevant provisions of the Sentencing Reform Act."[10] This interpretation gains force from the fact that Congress, when it enacted the Sentencing Reform Act of 1984 also amended the Anti-Skyjacking Act (its sole post-Furman death penalty provision) to ensure that this provision would remain unaffected by the 1984 Act. Congress did not insert similar "saving" language in the earlier, long-dormant, pre-Furman death-penalty provisions.

Whether the 1984 Act repealed these pre-Furman provisions may be debatable, but Congress plainly did not intend the Sentencing Commission to bring them back from limbo. Both the insertion of saving language into one death penalty provision and the limitation of authorized penalties reveal Congress's assumption that the pre-Furman provisions were dormant and would remain so until Congress acted.

The legislative history recited by the OLC memorandum reveals, moreover, that Congress enacted the Sentencing Reform Act on the explicit assumption that this Act would not resurrect the pre-Furman statutes. For example, the memorandum quotes Senator Thurmond's analysis of a bill with language identical to that later enacted in the Sentencing Reform Act:

> We were not able to consider some things, including a number of things I would like to see enacted. For example, there are four matters which I strongly feel deserve attention, but they are so controversial that we felt it would jeopardize the whole bill to

[10] OLC Memorandum at 16 n.15.

> include them. These issues are habeas corpus reform, the exclusionary rule, the insanity question, and the death penalty. All of those need to be addressed, but there is no use running the risk of not being able pass the important provisions in S. 2572.[11]

Senator Kennedy declared:

> This legislation embodies a unique consensus that has been developing in the Senate to achieve reforms needed to wage a successful war on crime. It excludes controversial proposals to limit the exclusionary rule and habeas corpus, and to reinstate the death penalty. Judiciary Committee Senators in both parties know that we cannot enact effective anticrime legislation unless we separate these divisive issues from the major effort.[12]

If the Members of Congress had suspected that the Sentencing Reform Act would effectively reinstate federal death penalties by empowering this Commission to promulgate capital sentencing guidelines, it seems very doubtful that the measure would have passed. That, at least, is the testimony of the legislators most influential in bringing about the Act's passage. The 1984 Act grew out of a clear understanding that its passage would not reinstate the death penalty, and the Office of Legal Counsel has invited this Commission to treat the understanding as a nullity.

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[11] OLC Memorandum at 19. Senator Thurmond said much the same thing of the proposal ultimately enacted:

> The members of the Judiciary Committee, the minority and the majority, worked out this crime package in a way that we hoped no amendments would be offered. We deleted from it several provisions that were recommended by the administration. For instance, capital punishment is controversial, so we took it out of the package.

[12] Id. at 23 n.20.

The Supreme Court confronted a somewhat analogous situation last year.[13] Federal statutes empower the Department of Health and Human Services to promulgate regulations to prevent discrimination against the handicapped, and the Department concluded that a hospital's failure to provide medical care to an infant with Down's Syndrome discriminated against this infant on the basis of handicap. The Supreme Court held the HHS determination invalid on procedural grounds. The plurality opinion emphasized Congress's failure "to indicate, either in the statute or in the legislative history, that it envisioned federal superintentence of treatment decisions traditionally entrusted to state governance."[14] The opinion added:

> Agency deference has not come so far that we will uphold regulations whenever it is possible to "conceive a basis" for administrative action. . . . [T]he mere fact that there is "some rational basis within the knowledge and experience of the [regulators]," . . . under which they "might have concluded" that the regulations was necessary to discharge their statutorily-authorized mission . . . will not suffice to validate agency decision-making.[15]

A year earlier, in Heckler v. Chaney,[16] a group of death-row inmates had argued that they could not lawfully be put to death because the Food and Drug Administration had not approved the use of lethal drugs for that purpose. The Supreme Court decided the

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[13] See Bowen v. American Hospital Ass'n, 106 S. Ct. 2101 (1986).

[14] Id. at 2121.

[15] Id. at 2112-13.

[16] 470 U.S. 821 (1985).

case on grounds that do not bear on the Sentencing Commission's authority to promulgate capital sentencing guidelines. The Court, however, briefly indicated its impatience with literalistic statutory constructions that would afford administrative agencies authority in areas that Congress never intended. It said, "We granted certiorari to review the implausible result that the FDA is required to exercise its enforcement power to ensure that States only use drugs that are 'safe and effective' for human execution."[17] As in the "Baby Doe case," the Court indicated that a statute intended for one purpose could not be used to accomplish another.[18]

III. PRE-FURMAN STATUTES AND SENTENCING GUIDELINES: AN IMPOSSIBLE OVERLAY

If one were to accept the OLC's conclusion that the Sentencing Commission has authority to promulgate capital sentencing guidelines, an important issue would remain: What good would the guidelines do? The OLC memorandum maintains that these guidelines would be an all-purpose elixir for moribund death penalties. It declares, "[A]ny constitutional defect in existing federal statutes authorizing imposition of the death penalty can be cured by the congressional or administrative promulgation of regulations specifying appropriate sentencing procedures."[19] This conclusion, however, seems erroneous. The

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[17] Id. at 827.

[18] The claim that the Sentencing Commission has the power to restore the death penalty may be more plausible than the claim that the FDA had the power to stop it. Both claims, however, press Congress's language beyond Congress's meaning.

[19] OLC Memorandum at 8.

Office of Legal Counsel apparently assumed that only one Supreme Court decision, Furman v. Georgia, imposes any limit on the government's infliction of the death penalty.

In Coker v. Georgia,[20] however, the Court held that the eighth amendment forbids capital punishment for rape. Coker apparently precludes capital punishment for all nonhomicidal offenses with the possible exceptions of treason and espionage. After Coker, the principal focus of capital sentencing guidelines must be on murder and other federal homicide offenses. Federal sentencing guidelines, however, could not restore the death penalty for most of these crimes.

Analysis can begin with United States v. Jackson,[21] a case that the Supreme Court decided four years before Furman. The Federal Kidnapping Act authorized the death penalty for some kidnappers "if the verdict of the jury shall so recommend." Although the Kidnapping Act might have been read differently, the Supreme Court held that it authorized the death penalty only when a defendant had been convicted at a jury trial. Defendants convicted at nonjury trials and defendants who had pleaded guilty could be sentenced to no more than life imprisonment. This circumstance, the Court said, rendered the Kidnapping Act's death penalty provision unconstitutional. The provision needlessly encouraged guilty pleas and waivers of the right to jury trial in violation of the fifth and sixth amendments. The Jackson defect

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[20] 433 U.S. 584 (1977).

[21] 390 U.S. 570 (1968).

cannot be cured by the promulgation of sentencing guidelines.

The pre-Furman federal murder statute declares, "Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment', in which event he shall be sentenced to imprisonment for life."[22] The federal statutes concerning assassination of the President, Vice-President, and Members of Congress authorize punishment "as provided by [the federal murder statute]."[23] All of these statutes apparently suffer from the Jackson defect. All appear to authorize the death penalty only for defendants convicted at jury trials. The assumption of the authors of the murder and assassination statutes was apparently that the question of capital punishment always would be resolved by a jury. Accordingly, these provisions seem beyond this Commission's powers of redemption.[23A]

One might avoid this conclusion, however, by construing the statutes in a technical way. The Kidnapping Act required the death penalty whenever the verdict of the jury recommended it; the murder statute requires the death penalty unless the jury adds to its verdict the words "without capital punishment." Perhaps the federal murder statute, unlike the Kidnapping Act,

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[22] 18 U.S.C. § 1111.

[23] 18 U.S.C. §§ 351, 1751.

[23A] A court apparently could not construe the murder statute to authorize the empaneling of a jury following a guilty plea or conviction at a nonjury trial. The murder statute seems no more subject to this "saving" construction than the statute invalidated in Jackson.

mandates the death penalty for defendants who plead guilty or who waive the right to jury trial.[24] This doubtful construction would cure the Jackson defect but would impail the statute on the opposite horn of a dilemma.

If the federal murder statute were construed to establish a mandatory death penalty for some federal defendants, it might contravene the requirements of Woodson v. North Carolina[25] and Roberts v. Louisiana,[26] which held mandatory capital punishment statutes unconstitutional. The fact that a murder defendant always could exercise the right to a jury trial, however, probably would obviate this objection. Forcing a murder defendant to demand a jury trial whenever he or she sought to avoid the death penalty would be strange, but this action would not violate the Constitution. The requirement would merely illustrate the Sentencing Commission's inability to establish a sensible regime of capital sentencing.

A more serious difficulty lies in the fact that the murder statute does not bifurcate the guilt and penalty phases of a capital murder trial. The jury must return a verdict on punishment at the same time that it returns a verdict on guilt. The Sentencing Commission has no authority to alter this unfortunate and probably unconstitutional procedure.

Prior to Furman, the Supreme Court had held that the eighth

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[24] See Santos v. United States, 311 F. Supp. 293, 294-95 (D. Puerto Rico 1970).

[25] 428 U.S. 280 (1976).

[26] 428 U.S. 325 (1976).

amendment does not require the bifurcation of the guilt and penalty phases of a capital trial,[27] but that decision probably cannot survive Furman and the Supreme Court's subsequent death penalty decisions. The plurality in Gregg v. Georgia[28] declared that concerns about the arbitrary infliction of the death penalty "are best met by a system that provides for a bifurcated proceeding." Justice White, dissenting in Roberts v. Louisiana,[29] read the majority's decision as requiring bifurcation despite the absence of an express declaration to that effect. Like Congress's one post-Furman death penalty statute, every current state death penalty statute apparently requires bifurcated proceedings.[30]

In the absence of a bifurcated proceeding, guidelines for capital sentencing presumably would be read to the jury along with the court's instructions on issues of substantive homicide law.[30A] Moreover, the Supreme Court has held that "[t]he Eighth and Fourteenth Amendments require that the sentencer, in all but

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[27] McGautha v. California, 402 U.S. 183, 220-22 (1971).

[28] 428 U.S. 153, 195 (1976).

[29] 428 U.S. 325, 356 (1976) (White, J., dissenting).

[30] See Gillers, Deciding Who Dies, 129 U. PA. L. REV. 1, 3 n.4 (1980).

[30A] Indeed, the Sentencing Reform Act apparently does not empower the Commission to issue guidelines for sentencing by a jury. It authorizes the Commission to promulgate guidelines "for use of a sentencing court." 28 U.S.C. § 994. The Act requires the court to impose a sentence within the guidelines range unless it makes certain findings, and it requires the court to "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553 (b) & (c). These functions are not ones that a jury could perform.

the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[31] A defendant cannot effectively exercise the right to present mitigating evidence at a unitary guilt-and-penalty trial. For example, a defendant cannot testify about the circumstances that prompted a murder without admitting that he or she committed the murder. In the absence of a bifurcated proceeding, a defendant often must choose between exercising his or her privilege against self-incrimination and exercising his or her right to present mitigating evidence. The defendant may have the benefit of the fifth amendment or the eighth amendment but not both. A bifurcated proceeding would avoid this incongruity and also would increase the likelihood that the sentencing authority would hear relevant mitigating evidence.

A non-bifurcated proceeding almost certainly could not pass constitutional muster; and even if it could, this procedure would be cumbersome and unjust. For this reason as well as others, the Sentencing Commission lacks the power to provide a fair and constitutional capital sentencing procedure for murder and for the assassination of federal officials.

Some pre-Furman federal death penalty statutes -- including the treason and espionage statutes[32] -- give the jury no role in

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[31] Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[32] 18 U.S.C. §§ 794, 2381.

capital sentencing. The sentencing judge may impose the death penalty just as he or she may impose any other punishment. The Constitution does not require the participation of a jury in the capital sentencing decision,[33] and capital sentencing guidelines might render these pre-Furman statutes constitutional.

In the Anti-Skyjacking Act, however, Congress required jury participation in the capital sentencing decision even when a defendant pleaded guilty or waived the right to jury trial on the issue of guilt. Only 4 of the 37 states with capital punishment statutes fail to provide for jury participation in the determination of sentence.[34] The responsibility of deciding whether to sentence someone to death without any input from a jury is not one that a federal judge is likely to value; and the Supreme Court, even as it upheld the constitutionality of capital sentencing by the judge alone, declared, "We do not denigrate the significance of the jury's role as a link between the community and the penal system and as a bulwark between the accused and the State."[35]

Although capital sentencing guidelines might save the several pre-Furman death penalty statutes that require sentencing by the judge alone, almost everyone currently favors jury sentencing in capital cases. Moreover, every pre-Furman federal death penalty statute apparently requires either sentencing by

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[33] See Spaziano v. Florida, 468 U.S. 447 (1984).

[34] Id. at 463-64 n.9.

[35] Id. at 462.

the judge alone (which is unfortunate) or sentencing at a unitary, non-bifurcated jury trial (which is unfortunate and probably unconstitutional). The Sentencing Commission cannot provide a safeguarded capital sentencing scheme of the sort that Congress almost certainly would provide were it to address the issue and determine that capital punishment is appropriate. The Commission's inability to provide a capital sentencing scheme that fits the safeguarded pattern of post-Furman enactments not only indicates why the promulgation of capital sentencing guidelines would be unfortunate; this limitation also bears on whether Congress intended the Commission to undertake the task.

IV. PRUDENTIAL CONCERNS

As a criminal lawyer, I claim no powers of political punditry. Nevertheless, I cannot resist a closing comment on the dangers of the course that the Office of Legal Counsel has invited the Commission to follow. The OLC memorandum traces the legislative history of the Sentencing Reform Act of 1984 to its origins almost 20 years ago in proposals for a new federal criminal code. This new code was needed 20 years ago, and it is needed today. I know of no one who disputes this proposition. Nevertheless, every effort to enact a federal criminal code has foundered on controversy concerning a few issues, prominent among them the death penalty. Opponents of the death penalty have resisted a criminal code that authorizes this penalty; proponents of the death penalty have resisted a code without it. For nearly 20 years, although most provisions of the proposed federal code have been noncontroversial, the tail has wagged the dog.

Obviously the death penalty remains divisive in the halls of Congress. The 99th Congress was probably more sympathetic to capital punishment than the 100th, yet opponents of capital punishment in the 99th Congress succeeded in blocking the death penalty provisions of the Comprehensive Drug Control Act of 1986 (and, indeed, for a time placed the entire measure in jeopardy).

This Commission's work holds promise of bringing order out of federal criminal sentencing; but even without an effort to resurrect the death penalty, its guidelines are likely to face opposition. One member of the Commission has dissented from its current proposals, objecting that these proposals are not only misguided but unlawful. Opposition to the guidelines from judges, defense attorneys and bar associations is likely to materialize as well. Insuring the opposition of Members of Congress who disapprove of capital punishment -- and, perhaps, of Members who support capital punishment but who oppose the wholesale resurrection of dormant statutes that seem ill-suited to current conditions -- would be unfortunate. The promulgation of capital sentencing guidelines would be unlikely to lead to the execution of federal criminal offenders, for Congress might reject the guidelines, the Sentencing Commission lacks authority to issue the guidelines, and the guidelines could not, in any event, cure the constitutional defects of the most important pre-Furman death penalty provisions, those for murder and assassination.[*] Despite its lack of authority to issue capital sentencing guidelines, however, the Commission does have the power to shoot itself in the foot.

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CITIZENS UNITED FOR REHABILITATION OF ERRANTS

"A NATIONAL EFFORT TO REDUCE CRIME
THROUGH CRIMINAL JUSTICE REFORM"

STATEMENT OF CHARLES SULLIVAN

Mr. Chairman, Commission Members, I have a relatively brief statement.

Judge Wilkins in his letter to the witnesses has asked that we concentrate on two issues. (1) Does the Commission have the statutory authority to promulgate sentencing guidelines for federal capital offenses? (2) If the Commission is found to have such authority, what specific statutory crimes, aggravating or mitigating circumstances, and procedural safeguards should be covered by any guidelines to ensure that capital punishment is imposed in a fundamentally fair and non-discriminatory manner?

As to the first issue, from what I have studied as a layman, I do not believe you have the statutory authority. However, this position will be ably covered by other witnesses.

As for the second issue, this seems to presume a positive response to the first issue. Thus, since I do not believe you have the statutory authority to impose the death penalty, then I can not outline critieria for the death penalty's imposition.

In summary, CURE's position is "no statutory authority" on the first issue, and because of this position, I will not address the second issue.

Before closing, however, I would like to make a different argument for not considerating the death penalty. This is a political argument, and, for the most part, a subjective view.

And yet, this subjectivity is based on experiential observations. I have been at most of the public meetings of the Commission here in Washington. This includes your confirmation hearings on the Hill to the entire meeting today.

Also, I was very involved in the blocking of the attachment of a death penalty amendment to the drug bill last Fall.

From these experiences--two observations. (1) I have been impressed with the progress of the guidelines. Although they are not yet in the shape where our organization could endorse them, the latest draft has moved much further in that direction. (2) I also was very impressed with the deep commitment of many of the Senators in their opposition to the death penalty last Fall.

Democratic Senators like Carl Levin, and Ted Kennedy and Republican Senators like Daniel Evans were willing to stop the entire drug bill "cold in its tracks" rather than accept a very narrowly drawn amendment on the death penalty. In fact, the House sent the Senate the drug bill three times with the death penalty amendment, and three times it was rejected.

I realize that a death penalty in the guidelines is in a much better position than a death penalty in the drug bill. Like the Congressional pay raise, the burden would be on the opponents to block the guidelines.

However, do not underestimate the opponents of the death penalty in the Senate! And, if you do, there is a good chance that the guidelines will "go down the drain". In other words, the death penalty, in my opinion, will poison the guidelines.

In conclusion, as many of you may know, CURE which organizes families of prisoners into a lobby is relatively new on the national level. Although we started in Texas in 1972, we only expanded to a national organization in August of 1985.

Next June, we will be having our first national convention. As part of our convention, we plan to visit Congressional offices on Capitol Hill and discuss our national agenda on prison reform.

I am hopeful that one of the top items on our agenda will be the urging of the acceptance by Congress of the sentencing guidelines.

At the same time, I must unequivocably and regrettably state that if the guidelines contain a death penalty, we will be in total opposition.

I can only speak for my organization, but I believe that other organizations might be in this same position.

Therefore, I urge you for the sake of the guidelines, and for many other reasons, not to consider a federal death penalty.

STATEMENT OF

THE

INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE

BEFORE THE

U.S. SENTENCING COMMISSION

FEBRUARY 17, 1987

GOOD AFTERNOON, I APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE YOU TO DISCUSS THE VIEWS OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE ON THE SENTENCING COMMISSION'S RESPONSIBILITY REGARDING THE PROMULGATION OF SENTENCING GUIDELINES FOR FEDERAL CAPITAL OFFENSES.

BY WAY OF INTRODUCTION LET ME FIRST TELL YOU A LITTLE ABOUT THE ORGANIZATION I REPRESENT. IACP IS A VOLUNTARY, PROFESSIONAL ORGANIZATION ESTABLISHED IN 1893. IT IS COMPRISED OF CHIEFS OF POLICE AND OTHER LAW ENFORCEMENT PERSONNEL FROM ALL SECTIONS OF THE UNITED STATES AND MORE THAN 67 NATIONS. COMMAND PERSONNEL WITHIN THE UNITED STATES CONSTITUTE MORE THAN 90 PERCENT OF THE MORE THAN 14,000 MEMBERS. THROUGHOUT ITS EXISTENCE, THE IACP HAS STRIVEN TO ACHIEVE PROPER, CONSCIENTIOUS AND RESOLUTE LAW ENFORCEMENT. THIS IT HAS DONE IN THE INTEREST OF COMMUNITY BETTERMENT, CONSERVATION OF THE PUBLIC PEACE AND MAINTENANCE OF GOOD ORDER. THE IACP HAS ALWAYS SOUGHT TO ACHIEVE THESE OBJECTIVES IN FULL ACCORD WITH THE CONSTITUTION, AND THE IACP HAS BEEN CONSTANTLY DEVOTED IN ALL ITS ACTIVITIES TO THE STEADY ADVANCEMENT OF THIS NATION'S BEST WELFARE AND WELL-BEING.

I WILL LEAVE TO THE LEGAL SCHOLARS THE INDEPTH DISCUSSION OF THIS COMMISSION'S AUTHORITY TO PROMULGATE SENTENCING GUIDELINES FOR FEDERAL CAPITAL CRIMES. I MUST COMMENT, HOWEVER, THAT THE IACP BELIEVES THAT THE STATUTE CREATING THE SENTENCING COMMISSION CLEARLY GIVES IT SUCH AUTHORITY.

ONE OF THE STATED PURPOSES OF THE COMMISSION IS TO ESTABLISH GUIDELINES TO ASSURE THAT THE PURPOSE OF SENTENCING AS SET FORTH IN SECTION 3553(A)(2) OF TITLE 18 OF THE UNITED STATES CODE IS MET. SPECIFICALLY THE GUIDELINES SHOULD ENSURE THAT FEDERAL SENTENCES ARE DESIGNED:

A. TO REFLECT THE SERIOUSNESS OF THE OFFENSE, TO PROMOTE RESPECT FOR THE LAW AND TO PROVIDE JUST PUNISHMENT FOR THE OFFENSE;

B. TO AFFORD ADEQUATE DETERRENCE TO CRIMINAL CONDUCT;

C. TO PROTECT THE PUBLIC FROM FURTHER CRIMES OF THE DEFENDANT; AND

D. TO PROVIDE THE DEFENDANT WITH NEEDED EDUCATIONAL OR VOCATIONAL TRAINING, MEDICAL CARE, OR OTHER CORRECTIONAL TREATMENT IN THE MOST EFFECTIVE MANNER,...

CLEARLY THERE ARE SOME OFFENSES WHICH ARE SO HEINOUS AND REPREHENSIBLE THAT ONLY A SENTENCE OF DEATH WILL SATISFY THESE REQUIREMENTS.

IN ANOTHER SECTION OF THE AUTHORIZING STATUTE, THE COMMISSION IS REQUIRED TO TAKE INTO ACCOUNT SEVERAL FACTORS:

> IN ESTABLISHING CATEGORIES OF OFFENSES FOR USE IN THE GUIDELINES AND POLICY STATEMENTS GOVERNING THE IMPOSITION OF SENTENCES OF PROBATION, A FINE OR IMPRISONMENT, GOVERNING THE IMPOSITION OF OTHER AUTHORIZED SANCTIONS, GOVERNING THE SIZE OF A FINE OR THE LENGTH OF A TERM OF IMPRISONMENT, OR SUPERVISED RELEASE, AND GOVERNING THE CONDITIONS OF PROBATION, SUPERVISED RELEASE, OR IMPRISONMENT... 28 U.S.C. § 994(c)

THIS SECTION APPEARS TO EXPRESS THE RECOGNITION BY CONGRESS THAT PENALTIES OTHER THAN FINES, PROBATION OR IMPRISONMENT WOULD ALSO BE ADDRESSED BY THE COMMISSION'S GUIDELINES. IN REFERRING TO "OTHER AUTHORIZED SANCTIONS" CONGRESS PRESUMABLY INTENDED TO ENCOMPASS THE DEATH PENALTY WHICH IS AUTHORIZED IN VARIOUS SECTIONS OF TITLE 18 OF THE UNITED STATES CODE FOR VARIOUS OFFENSES.

ALTHOUGH THESE SECTIONS HAVE NOT BEEN USED SINCE THE U.S. SUPREME COURT STRUCK DOWN THE DEATH PENALTY STATUTES OF GEORGIA AND TEXAS IN 1972, THAT CASE, FURMAN v. GEORGIA, DID NOT HAVE THE EFFECT OF REMOVING THE DEATH PENALTY FROM TITLE 18, NOR HAS CONGRESS EXPLICITLY REPEALED THESE PROVISIONS. ALL THAT IS NEEDED ARE GUIDELINES FOR THE FAIR, CONSTITUTIONAL APPLICATION OF THESE LAWS SO THAT THEY MAY BE REACTIVATED WITHOUT RUNNING AFOUL OF FURMAN, GUIDELINES WHICH THIS COMMISSION MUST PROVIDE.

I WOULD LIKE TO TURN NOW TO A DISCUSSION OF THE POSITION OF IACP'S MEMBERS ON CAPITAL PUNISHMENT. THE ASSOCIATION IS VERY MUCH IN FAVOR OF THE IMPOSITION OF THE DEATH PENALTY FOR CERTAIN CRIMES. WE STRONGLY BELIEVE THAT CAPITAL PUNISHMENT IS A DETERRENT TO THE COMMISSION OF CERTAIN CRIMES, PARTICULARLY PREMEDITATED MURDER, MURDER COMMITTED DURING THE PERPETRATION OF FELONIES AND THE KILLING OF LAW ENFORCEMENT OFFICERS AND PRISON GUARDS DURING THE EXECUTION OF THEIR DUTIES. THE NECESSITY OF THE DEATH PENALTY AS A DETERRENT CAN ALSO BE CLEARLY SEEN IN THE CASE OF A PRISON INMATE SERVING A LIFE SENTENCE WHO COMMITS A MURDER WHILE INCARCERATED. WHAT DOES

SUCH A PERSON HAVE TO LOSE BY HIS BARBAROUS BEHAVIOR IF NOT HIS LIFE.

THE SERIOUSNESS OF THE COMMISSION'S TASK AND THE GREAT DIFFICULTY IT POSES FOR YOU IS EMPHASIZED BY THE FACT THAT PERSONS OF DIFFERING OPINIONS CAN LOOK AT THE SAME FACTS AND COME TO ENTIRELY CONTRARY CONCLUSIONS. OPPONENTS OF CAPITAL PUNISHMENT BELIEVE THEY ARE EXPRESSING A CONCERN FOR HUMAN LIFE. CONCERN FOR HUMAN LIFE IS PRECISELY THE REASON WE RECOMMEND THE USE OF THIS FORM OF CRIME PREVENTION. WE ARE CONVINCED THAT ULTIMATELY ABOLITION OF CAPITAL PUNISHMENT WILL RESULT IN A MUCH GREATER LOSS OF HUMAN LIFE THAN WOULD ITS RETENTION.

IT IS ADMITTEDLY TRAGIC WHENEVER THE GOVERNMENT IN ITS MOST AWESOME EXERCISE OF AUTHORITY DECIDES THAT CAPITAL PUNISHMENT MUST BE INVOKED. ANY LOSS OF HUMAN LIFE IS A TRAGEDY. BUT EVEN IN THE TRAGEDY OF HUMAN DEATH THERE ARE DEGREES AND IT IS MUCH MORE TRAGIC FOR AN INNOCENT PERSON TO LOSE HIS OR HER LIFE THAN FOR THE GOVERNMENT TO TAKE THE LIFE OF A CRIMINAL CONVICTED OF A CAPITAL OFFENSE.

I CANNOT POINT TO ANY CONCLUSIVE STATISTICS THAT PROVE CAPITAL PUNISHMENT DOES INDEED DETER OTHER CAPITAL CRIMES. HOWEVER, A STUDY PUBLISHED SEVERAL YEARS AGO IN THE UNIVERSITY OF PENNSYLVANIA'S JOURNAL OF COMMUNICATIONS HAD SOME INTERESTING CONCLUSIONS REGARDING THIS TOPIC. TWO UNIVERSITY OF CALIFORNIA SOCIOLOGISTS CONDUCTED AN EXTENSIVE STUDY REGARDING THE IMPACT OF PUBLICIZED PUNISHMENTS AS A DETERRENT TO SIMILAR CRIMINAL ACTIVITY. THE FINDINGS OF THE STUDY ARE SIGNIFICANT IN THAT THEY FOUND THAT NEWS REPORTS OF SENTENCES IMPOSED ON CONVICTED MURDERERS LEAD TO SHORT-TERM DECREASES IN KILLINGS. USING HOMICIDE DATA FROM THE NATIONAL CENTER FOR HEALTH STATISTICS, THE RESEARCHERS EXAMINED THE TIMING OF MORE THAN 14,000 MURDERS. THEIR RESEARCH INDICATED THAT FOR A PERIOD OF FOUR DAYS AFTER A PERSON IS SENTENCED TO DIE OR IS EXECUTED FOR COMMITING MURDER, AND THERE IS CONSIDERABLE NEWS COVERAGE OF IT, A DECREASE OF 3.32 PERCENT IN HOMICIDES OCCURS. THE RESEARCHERS CALLED THEIR FINDING THE FIRST CLEAR EVIDENCE THAT PUBLICIZED PUNISHMENTS HAVE A SHORT-TERM DETERRENT EFFECT. CERTAINLY, MANY

QUESTIONS GO UNANSWERED IN THIS RESEARCH PROJECT, BUT AT LEAST THERE IS SOME DIRECTION PROVIDED IN THE QUEST FOR AN ANSWER TO THE DETERRENCE ISSUE.

AT ONE TIME IN THE HISTORY OF MAN, 168 VIOLATIONS WERE CAPITAL OFFENSES. IT IS TO THE CREDIT OF OUR FOREBEARERS THAT THEY REALIZED THAT THE DEATH PENALTY COULD NOT PROPERLY BE APPLIED IN MINOR CASES BUT MUST BE RESERVED TO THOSE CASES OF GREATEST MAGNITUDE. WE ARE CONVINCED THAT AN EQUAL EXERCISE OF GOOD JUDGMENT CALLS UPON US TO DECIDE THAT CONDITIONS CAN EXIST IN WHICH THIS ACT OF THE UTMOST GRAVITY IS NOT ONLY JUSTIFIED BUT IS DEMANDED, AND THAT VIOLATIONS CAN BE COMMITTED WHICH ARE SO REPREHENSIBLE THAT NO OTHER FORM OF PUNISHMENT IS SUITABLE. IF WE ARE TO APPLY THOSE METHODS WHICH SERVE AS THE GREATEST DETERRENT, WE ARE GOING TO HAVE TO CONTINUE TO SUIT THE PUNISHMENT TO THE OFFENSE.

I RECALL READING ABOUT A CASE WHILE I WAS THE POLICE CHIEF IN LARGO, FLORIDA. THE MURDERER HAD SO BADLY BRUTALIZED HIS 22 YEAR OLD VICTIM THAT THE POLICE WERE UNABLE TO DETERMINE WHETHER THE VICTIM HAD BEEN SEVERELY BEATEN OR RUN OVER BY A MOTOR

VEHICLE. THE MURDERER WAS FOUND NOT GUILTY BY REASON OF INSANITY AND COMMITTED TO A PSYCHIATRIC HOSPITAL. NINE YEARS LATER, HE WAS RELEASED FROM THE HOSPITAL AND SHORTLY THEREAFTER HE SHOT AND KILLED FOUR TEENAGERS. ONE CAN ONLY WONDER WHY AN INDIVIDUAL WHO HAS DEMONSTRATED THE CAPABILITY TO VICIOUSLY KILL PEOPLE CAN BE TURNED BACK INTO OUR SOCIETY AGAIN. IF NOTHING ELSE, PROPONENTS OF CAPITAL PUNISHMENT HAVE ONE COMPELLING ARGUMENT THAT CANNOT BE DISPUTED. IF THE DEATH PENALTY IS IMPOSED ON THOSE WHO CRIMINALLY TAKE THE LIVES OF OTHERS IN A VIOLENT, SENSELESS FASHION, THEN MENACES SUCH AS THE ONE I JUST DESCRIBED WOULD NOT BE ABLE TO PREY ON SOCIETY AGAIN.

OPPONENTS OF CAPITAL PUNISHMENT ARGUE THAT THERE IS A DANGER THAT WE WILL EXECUTE A PERSON CONVICTED OF A MURDER HE DID NOT COMMIT. I WILL NOT CLAIM THAT PEOPLE HAVE NEVER BEEN WRONGLY CONVICTED OF CRIMES BUT IN THIS DAY OF WELL-TRAINED, PROFESSIONAL POLICE OFFICERS, EXPERT CRIMINOLOGISTS AND SCIENTIFIC EQUIPMENT, THE DANGER IS VERY SLIM. PARTICULARLY WHEN A PERSON'S LIFE IS AT STAKE, POLICE OFFICERS WILL WORK ESPECIALLY HARD TO ENSURE

THAT THEY HAVE THE RIGHT PERSON IN CUSTODY. IF THERE IS ANY DOUBT AT ALL, DETECTIVES WILL CONTINUE THE INVESTIGATION UNTIL THAT DOUBT IS REMOVED OR THE RIGHT PERSON HAS BEEN ARRESTED.

THE NATION'S LAW ENFORCEMENT OFFICERS ARE PARTICULARLY CONCERNED WITH THIS ISSUE OF CAPITAL PUNISHMENT, NOT ONLY BECAUSE THEY ARE CALLED UPON FOR DIRECT INVOLVEMENT IN THE INCIDENTS WHICH MAY RESULT IN THE APPLICATION OF THE DEATH PENALTY, BUT BECAUSE THEY THEMSELVES ARE SO OFTEN THE VICTIMS OF OFFENSES FOR WHICH THE DEATH PENALTY SHOULD BE ASSESSED. THE LAW ENFORCEMENT OFFICER WILLINGLY SUBJECTS HIMSELF TO A GREATER ELEMENT OF DANGER THAN MOST PERSONS EVER EXPERIENCE WHILE PROTECTING THE CITIZENS HE SERVES. THE OFFICER IS NOT, HOWEVER, WILLING TO BE THE VICTIM OF THE CRIMINAL WHO USES VIOLENCE AS THE METHOD OF OBTAINING THAT WHICH HE SEEKS. NOR IS HE WILLING TO BE THE VICTIM OF FELONIOUS ASSAULT MERELY BECAUSE HIS ASSAILANT KNOWS THAT HE CAN MAIM AND KILL WITHOUT BEING SUBJECTED TO MEANINGFUL AND APPROPRIATE PUNISHMENT.

AS I HAVE ALREADY STATED, THERE CLEARLY IS NO CONSTITUTIONAL PROHIBITION AGAINST CAPITAL PUNISHMENT. THE SUPREME COURT, IN

GREGG v. GEORGIA, SPECIFICALLY UPHELD A STATE DEATH PENALTY STATUTE WHICH CONTAINED SUFFICIENT PROCEDURAL PROTECTIONS TO ENSURE THE FAIR, NONDISCRIMINATORY APPLICATION OF THE DEATH PENALTY.

SENTENCING PROCEDURES MUST FOCUS THE ATTENTION OF THE SENTENCING AUTHORITY, WHETHER IT BE A JUDGE OR JURY, ON THE PARTICULAR NATURE OF THE CRIME AND THE PARTICULAR CHARACTERISTICS OF THE INDIVIDUAL DEFENDANT. IN ORDER TO DO THIS, INFORMATION MUST BE PROVIDED THAT IS PERHAPS TOO PREJUDICIAL TO BE PRESENTED PRIOR TO A DETERMINATION OF GUILT. FOR THAT REASON WE WOULD SUPPORT A BIFURCATED PROCEEDING FOR CAPITAL CRIMES SUCH AS THAT UPHELD IN GREGG, THAT IS, ONE TRIAL TO DETERMINE GUILT AND A SEPARATE PROCEEDING TO DETERMINE WHETHER A SENTENCE OF DEATH SHOULD BE IMPOSED. DURING THE SECOND STAGE, EVIDENCE OF AGGRAVATING AND MITIGATING FACTORS SHOULD BE PRESENTED.

THE COMMISSION SHOULD DETERMINE HOW THE VARIOUS AGGRAVATING AND MITIGATING CIRCUMSTANCES ARE TO BE WEIGHED, FOR EXAMPLE, WHETHER ONE AGGRAVATING FACTOR WITHOUT ANY MITIGATING FACTORS IS SUFFICIENT TO IMPOSE THE DEATH PENALTY. THIS INFORMATION SHOULD BE EXPLAINED TO A JURY THAT WILL DETERMINE THE APPROPRIATE PENALTY.

ANOTHER STEP WOULD BE TO REQUIRE THE SENTENCING AUTHORITY TO SPECIFY THE FACTORS IT USED IN REACHING ITS DECISION. THIS INFORMATION WOULD BE IMPORTANT TO AN APPELLATE COURT SHOULD THE DEFENDANT SEEK APPELLATE REVIEW, IN DETERMINING WHETHER THE DECISION WAS MADE ARBITRARILY OR CAPRICIOUSLY.

AS TO THE QUESTION OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES THAT SHOULD PROPERLY BE CONSIDERED WE BELIEVE THAT THE MODEL PENAL CODE, AS CITED IN GREGG, PROVIDES GUIDANCE. WITH REGARD TO A PERSON CONVICTED OF MURDER, APPROPRIATE AGGRAVATING CIRCUMSTANCES TO CONSIDER ARE:

(A) THE MURDER WAS COMMITTED BY A CONVICT UNDER SENTENCE OF IMPRISONMENT.

(B) THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER MURDER OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

(c) AT THE TIME THE MURDER WAS COMMITTED THE DEFENDANT ALSO COMMITTED ANOTHER MURDER.

(D) THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

(E) THE MURDER WAS COMMITTED WHILE THE DEFENDENT WAS ENGAGED OR WAS AN ACCOMPLICE IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT ROBBERY, RAPE OR DEVIATE SEXUAL INTERCOURSE BY FORCE OR THREAT OF FORCE, ARSON, BURGLARY OR KIDNAPPING.

(F) THE MURDER WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM LAWFUL CUSTODY.

(G) THE MURDER WAS COMMITTED FOR PECUNIARY GAIN, AND

(H) THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL, MANIFESTING EXCEPTIONAL DEPRAVITY.

MITIGATING FACTORS SHOULD INCLUDE:

(A) THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

(B) THE DEFENDANT'S MENTAL OR EMOTIONAL INCAPACITY AT THE TIME OF THE MURDER.

(C) THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S HOMICIDAL CONDUCT OR CONSENTED TO THE HOMICIDAL ACT.

(D) THE MURDER WAS COMMITTED UNDER CIRCUMSTANCES WHICH THE DEFENDANT BELIEVED TO PROVIDE A MORAL JUSTIFICATION OR EXTENUATION FOR HIS CONDUCT.

(E) THE DEFENDANT WAS AN ACCOMPLICE IN A MURDER COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION IN THE HOMICIDAL ACT WAS RELATIVELY MINOR.

(F) THE DEFENDANT ACTED UNDER DURESS OR UNDER THE DOMINATION OF ANOTHER PERSON.

(G) THE YOUTH OF THE DEFENDANT AT THE TIME OF THE CRIME.

I HAVE FOCUSED MY DISCUSSION TODAY ON THE CRIME OF MURDER BECAUSE THAT IS THE ONLY OFFENSE FOR WHICH IACP'S MEMBERSHIP HAS EXPRESSLY STATED, BY RESOLUTION, ITS SUPPORT FOR THE DEATH PENALTY. MURDER IS SOMETHING WITH WHICH LAW ENFORCEMENT OFFICERS ARE FREQUENTLY CONFRONTED. WE MAKE NO JUDGMENT REGARDING OTHER CRIMES THAT THIS COMMISSION OR OTHERS IN THIS ROOM DEEM TO BE SO DANGEROUS TO SOCIETY AS TO JUSTIFY THE IMPOSITION OF THE SENTENCE OF DEATH.

OUR CONCERN IS THAT APPROPRIATE STANDARDS ARE QUICKLY ADOPTED TO PERMIT CAPITAL PUNISHMENT TO BE REINSTITUTED.

THANK YOU FOR YOUR CONSIDERATION OF THESE VIEWS. I WOULD BE HAPPY TO ENTERTAIN ANY OF YOUR QUESTIONS AT THIS TIME.

NATIONAL SHERIFFS' ASSOCIATION

1450 DUKE STREET • ALEXANDRIA, VIRGINIA 22314
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STATEMENT OF

SHERIFF M. WAYNE HUGGINS

FOR

THE NATIONAL SHERIFFS' ASSOCIATION

BEFORE

THE UNITED STATES SENTENCING COMMISSION

ON

FEBRUARY 17, 1987

The National Sheriffs' Association (NSA) thanks you for the invitation to address the U.S. Sentencing Commission on this most important issue--capital punishment.

Before concentrating on the specific issues to be covered today, I would like to provide you with some background information about the National Sheriffs' Association and why the sheriffs of this nation are so concerned about this issue.

The National Sheriffs' Association is a non-profit, professional organization founded in 1940 to promote the fair and efficient administration of justice in the United States. The National Sheriffs' Association is the national organization representing the country's 3,100 sheriffs. The National Sheriffs' Association has over 40,000 members, including, sheriffs, undersheriffs, deputies, and other criminal justice practitioners. Sheriffs, in most jurisdictions, are constitutional officers and are elected. Generally, sheriffs are responsible for enforcing state and local laws, administering the jails, providing security in the courtrooms, and for civil and criminal process.

You may ask why local law enforcement officials are concerned about federal capital offenses. There are several reasons why the sheriffs want to speak out on this issue:

- Sheriffs Believe in Capital Punishment: As the chief law enforcement officer in their jurisdiction, sheriffs see firsthand the results of heinous criminal acts that seriously jeopardize the security of our nation or its individual members, and they believe that certain offenses require an equally serious response. Sheriffs believe that in some cases, only death for the convicted offender can guarantee that the offense will not recur. In other cases, we would argue that the offense is so grievous that the only just sanction is death. As recently as 1985, the membership of NSA passed a Resolution in support of legislation that would have enacted guidelines allowing for imposition of the death penalty in federal cases. (See attachment.)

- The Federal Government Can Provide a Model for the States: As a result of the U.S. Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), certain state death penalty statutes, in addition to the federal statute, were deemed invalidated due to a lack of constitutionally adequate procedures governing their imposition. The National Sheriffs' Association recognizes this as an opportunity for the federal government to take a leadership role in formulating model guidelines that could be adopted by the states.

o Lack of Sanctions for Inmates Serving Life Sentences Provide a License to Kill: In the case of an inmate sentenced to life imprisonment, no additional sanctions are available if, for example, that inmate fails to comply with the law. If, for example, an inmate kills a correctional officer, the courts could not punish him for this new offense, as there are no sanctions available beyond the sentence that has previously been imposed. This atmosphere breeds a contempt for law and order within our penal institutions and jeopardizes the lives of the officers and inmates in those facilities.

We would now like to address the two issues posed by the U.S. Sentencing Commission today:

A. Does the Commission have authority to promulgate sentencing guidelines for federal capital offenses?

B. If the Commission does have authority, what specific statutory crimes should be covered by the guidelines?

A. U.S. Sentencing Commission Has Authority to Issue Guidelines

The National Sheriffs' Association believes that the

U.S. Sentencing Commission does have authority to promulgate sentencing guidelines for federal capital offenses. The National Sheriffs' Association concurs with the opinion issued by the U.S. Attorney General in support of the U.S. Sentencing Commission to promulgate guidelines in capital offenses.

The Sentencing Reform Act of 1984 established a comprehensive federal sentencing scheme for use by U.S. Courts in determining the sentence to be imposed in a criminal case. Section 3551, Subsection (a) of 18 U.S. Code indicates that "except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any federal statute ... shall be sentenced in accordance with the provisions of this Act." Subsection (b) goes on to outline the sentencing options. However, it does not specifically mention the death penalty or other non-standard sanctions, such as public treason or insurrection.

Does this failure to mention these other sanctions, including the death penalty, indicate Congressional intent to repeal these statutes? We think not; neither the legislation nor the legislative history lend any credence to the theory that Congress intended to repeal the numerous death penalty provisions or the other sanctions listed in the U.S. Code.

When Congress sought to supersede legislation through the Act, they did so in an explicit fashion. In fact, the Act contains two separate sections detailing "repealers" and "technical and confirming amendments," to conform all provisions of the U.S. Code to provisions of the Sentencing Act. In light of these steps taken by Congress to clarify all these issues, it is impossible to imagine that they merely overlooked the death penalty.

B. Statutory Crimes That Should Be Punishable by Death

The National Sheriffs' Association recommends that those offenses currently punishable by death under the federal statutes be retained. These would include, for example, the crimes of air hijacking involving a death, treason, and espionage. In addition, the National Sheriffs' Association urges Congress and the U.S. Sentencing Commission to expand this list to include the following offenses: the killing of a correcional officer or other person by an inmate, the killing of a federal law enforcement officer during the performance of his official duties, indiscriminate killing related to terrorist activities, the killing of witnesses, the murder of hostages, and murder-for-hire offenses.

1985-5

NATIONAL SHERIFFS' ASSOCIATION

1450 DUKE STREET • ALEXANDRIA, VIRGINIA 22314 • 703-836-7827

L. CARY BITTICK
EXECUTIVE DIRECTOR

RESOLUTION

Capital Punishment

WHEREAS, reinstitution of capital punishment has been called for by the nation's law enforcement officials; and

WHEREAS, legislation has been introduced in Congress that would provide for a constitutional procedure for the imposition of capital punishment for federal crimes; and

WHEREAS, the reinstitution of capital punishment will have a deterrent effect, especially in dealing with the serious problem of protecting prison officers and inmates from dangerous prisoners already serving life sentences for murder without any realistic possiblity of parole; and

WHEREAS, the President and the Attorney General have communicated to Congress their support for the reinstitution of capital punishment for certain federal crimes.

THEREFORE, BE IT RESOLVED, that the National Sheriffs' Association goes on record supporting the Administration's efforts to secure passage of legislation reinstituting capital punishment for certain federal crimes; and requests the Leadership of the Congress to bring this legislation to a vote before all members of Congress.

Adopted at a meeting of the Membership
This 19th day of June, 1985
Dallas/Ft. Worth, Texas

TESTIMONY OF

DONALD L. CAHILL
NATIONAL LEGISLATIVE COMMITTEE

THE FRATERNAL ORDER OF POLICE

before

THE UNITED STATES SENTENCING COMMISSION

February 17, 1987

WASHINGTON, D.C.

TESTIMONY OF DONALD L. CAHILL
NATIONAL LEGISLATIVE COMMITTEE
THE FRATERNAL ORDER OF POLICE

Mr. Chairman and members of The United States Sentencing Commission. I am Donald L. Cahill, I serve with The National Legislative Committee of The Fraternal Order of Police. The Fraternal Order of Police is the largest police organization in the United States with over 175,000 active members of all ranks, from beat patrolman to Chief of Police.

On behalf of the National President of The Fraternal Order of Police, Richard A. Boyd, I would like to take this opportunity to thank the Sentencing Commission for reaching out to the people their decisions eventually affect; the citizens of this great country; and getting their opinions. I also want to thank the commission for allowing The Fraternal Order of Police the opportunity to speak.

DOES THE COMMISSION HAVE THE STATUTORY AUTHORITY TO PROMULGATE SENTENCING GUIDELINES FOR FEDERAL CAPITAL OFFENSES?

We believe that the Congress of the United States could have made it clearer in 28 U.S.C. 994 (a) (1) when they said "that the Commission shal promulgate and distribute to all courts of the United States and to the United States probation system

1. Guidelines - including
    a. a determination on probation,fine or imprisonment
    b. a determination on how much time on probation, how much of a fine or how much time imprisoned
    c. a determination on whether probation should be imposed after incarceration and how much probation

d. a determination whether sentences should run concurrantly or consecutively

Certainly we see that Congress did not include wording on Capital Offenses, but this does not mean that it was their intent to repeal Capital Punishment.

Under the United States Code, the death penalty can be enacted after guilty findings for espionage, first degree murder, destruction of an aircraft, motor vehicle or other facility resulting in death, assassination or kidnapping resulting in the death of a President of Vice-President, Treason, mailing of injurious articles resulting in death, Murder related to bank robbery or kidnapping, willful wrecking of a train resulting in death and murder of a member of Congress, important executive official or Supreme Court Justice.

While most of these sections were enacted prior to the famous decision by the United States Supreme Court in FURMAN v Georgia 408 U.S. 238 (1972), no federal death penalty was invalidated prior to that decision.

With the determination that guidelines can be promulgated by the Sentencing Commission, we, the members of The Fraternal Order of Police, firmly believe that the commission should follow the statutory leads set forth by the Congress of the United States.

We believe that the Congress of The United States still dictates the will of the American people.

The Fraternal Order of Police strongly endorse Capital Punishment as it is set out in Federal and State statutes as long as it is applied in accordance with the rules decided by the United States Supreme Court.

It would be very simple for the Fraternal Order of Police to provide a string of witness after witness to testify favorably about Capital Punishment. We believe that would be counter productive. In a recent poll conducted by the associated press across the country it was found that most persons do support Capital Punishment in certain cases. Those cases involved murder during other violent crimes and murder during drug dealing. In addition to punishing the offender the respondants felt it would also protect society.

Mr. Chairman and members of the commission, I assure you that the citizens of this great country are in favor of seeing greater use of Capital Punishment in our Criminal Justice System, But they want to see it used in a fair and impartial way. Equal punishment for henious crimes, not considering race, color or creed but considering the crime and the seriousness of the whole offense, the lack of remorse of the perpetrator and the propensity of the offender to commit that or other crimes again.

I am an active duty Police Officer. I presently serve on a police department in Virginia and have for over fifteen years. During

This period of time I have investigated, testified, and sat through well over six hundred felony trials in our courts. Not only in my jurisdiction, but in other counties, states, Federal courts and other countries. As a police officer I have observed jury trials in at least Ten states in the United States, Canada, Hong Kong, Japan, Mexico, The Republic of the Philippines, England, Scotland, Northern Ireland, Germany and The Peoples Republic of China from where I have recently returned from.

In evaluating these courts, trials and systems, I believe ours to be by far, the finest in the world. But being the finest does not mean that we are without problems. Being the finest does not mean that the citizens are pleased with it.

Amoung the court systems in the world, we certainly have if not one of the fairest, we have the fairest. But we also have one of the most confusing and misleading.

Time and time again, while waiting in the halls of justice you hear the words " The court is re-conviening; the jury has a question." And time after time that question is "How much time will the defendant serve if we sentence him to ____ years."

Certainly this is not a concern for them legally and YES, the presiding judge always tells them that they cannot concern themselves with that question; but they are concerned. They are very concerned. And they have every right to be concerned. I know that I am.

When a jurer votes to give a defendant life in prison they want that person to go to prison for life and they usually believe that he will go to prison for life. They believe the defendant will do twenty years in prison when the jury gives him twenty years.

The citizenry are not happy with our system. This was certainly borne out in recent elections in the state of California where three state Supreme Court Justices were rejected by the voters in recent elections. Where the citizens can speak they will speak; DE PRAESENTI through the polls.

In previous hearings the United States Sentencing Commission was criticized for issuing guidelines thought by some judges as being too rigid and complex. These judges complained that sentences were too harsh. Some harsher than those imposed currantly. Maybe these judges are right in their protests. But then, maybe they are wrong. Maybe there is too much "PLEA BARGAINING" in criminal cases. Maybe we are to quick to "shop" for the sentence discount as a defense council. Maybe we are to quick to look for a plea for good numbers or a court load reduction at the expense of the victim.

It is time for us to take a better look at the Criminal Justice System as a whole. It is time for the Executive Branch and the Judicial Brach to follow up on what the Legislative Branch legislates at the will of the people. Perhaps it is time for the Judicial Branch to sentence the offender to serve the time set forth in the statute passed by the Legislative Branch and the Executive Branch to follow up by building the prison space to

allow the offenders to serve this time.

This would satisfy the need for a deterant and also serve as punishment for the crime committed. This would not only serve as a deterant to this offender to commit further criminal acts after his release, but to other criminals as well.

Does the Death Penalty serve as a deterant to criminals? We believe that it does. We have seen the number of criminal homicides increase tremendously in the last twenty years. This may or may not be as a result of the dormant time in death penalties but we believe it does have some bearing. It is still to soon for the figures to give us a trye picture since the death penalty has been re-instituted in most states but in most of the interviews that I have conducted with major offenders I have had a respose of "I did't want to burn or I would have taken them out".

All too often we tend to go overboard while looking after the rights of the accussed; while we treat the citizenry EX LEGARE--

The recidivism rate is very high in the United States and so is the crime rate. This tells me that the system is not really working very well. It needs to be changed.

SUMMARY

In summary I emphasis that the Fraternal Order of Police is strongly in favor of Capital Punishment in certain criminal offenses. In addition we do believe that the United States Sentencing Commission does have the authority and should promulgate guidelines for sentencing in Federal Capital Offences.

The Fraternal Order of Police believe that the difficulty shown in trying to pass death legislation shows that this is an area not taken lightly by anyone. We believe that the United States Sentencing Commission should be IN PROMPTU to promulgate guidelines for imposition of capital punishment wherever statute calls for it.

I thank the commission for affording us this forum.

National Association of Criminal Defense Lawyers

STATEMENT OF

CHARLES J. OGLETREE, PROFESSOR OF LAW
HARVARD LAW SCHOOL

ON BEHALF OF

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

BEFORE THE

UNITED STATES SENTENCING COMMISSION

COMMENTS ON

THE STATUTORY AUTHORITY TO PROMULGATE SENTENCING GUIDELINES FOR FEDERAL CAPITAL OFFENSES

FEBRUARY 17, 1987

SUITE 550 • 1815 H STREET NORTHWEST • WASHINGTON, DC 20006
(202) 872-8688

My name is Charles Ogletree. I am a visiting Professor of Law at the Harvard Law School, and I appear today on behalf of the National Association of Criminal Defense Lawyers.

The National Association of Criminal Defense Lawyers (NACDL) is a nationwide, voluntary bar association comprised of almost 5,000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecutions and individual rights. It was founded 26 years ago to promote study and research in the field of criminal defense law, and to encourage the integrity, independence and expertise of criminal defense lawyers. Throughout our history, we have worked to protect the rights and liberties of those accused of criminal offenses, and to promote the proper administration of justice.

I am pleased to present testimony on the two questions the Sentencing Commission has outlined:

1) Does the Commission have the statutory authority to promulgate sentencing guidelines for federal capital offenses?

2) If the Commission is found to have such authority, what specific crimes, aggravating or mitigating circumstances, and procedural safeguards should be covered by any guidelines to ensure that capital punishment is

imposed in a fundamentally fair and non-discriminatory manner?

Because I believe the answer to the first question is a resounding no, I will largely confine myself to that question and only address the second question briefly at the end of my testimony.

Introduction

In a memorandum to the Sentencing Commission, the Department of Justice maintains that the Commission has the authority to promulgate constitutional procedures to reinstate the death penalty to the United States Code. See Charles Cooper, Department of Justice Memorandum, January 8, 1987 (DOJ Memo). The Justice Department, however, points to no textual provision that authorizes the Commission to issue such procedures, nor does it rely on any explicit legislative history. Rather, in reaching its conclusion, the Department of Justice relies on silence, implication and strained readings of legislative history.

In my testimony, I will analyze the text and legislative history of the Comprehensive Crime Control Act of 1984 (the Act) and conclude that the Commission does not have the authority to issue procedures for reinstituting a federal death penalty. Moreover, it will be demonstrated that Congress has explicitly retained any

authority for issuing such procedures and has removed any question concerning the death penalty from the Commission's authority. Finally, and alternatively, if the Commission should decide that it does have the power to issue procedures for a federal death penalty, at most it can issue procedures for the limited statutes that currently carry a death penalty provision.

Question One: Does the Commission have the statutory authority to promulgate sentencing guidelines for federal capital offenses?

A. The Text Of The Comprehensive Crime Control Act Of 1984

In the statute creating and detailing the functions of the Sentencing Commission, there is no mention of the death penalty, nor is there any provision authorizing the Commission to provide constitutional procedures to revive federal death penalty. See 28 U.S.C. § § 991-98. Similarly, in the section setting forth an exclusive list of the sentences available for the federal criminal offenses, there is no mention of the death penalty as an available sanction. See 18 U.S.C. 3551. Instead, the statute only provides for probation, fines, imprisonment, forfeiture, restitution, and notice to victims, and certain combinations of those sanctions. See 18 U.S.C. 3551(B). Thus, nowhere on the face of the statute is

there authority for the Sentencing Commission to issue procedures for, or to reinstate a federal death penalty.

Importantly, this statute was designed to be comprehensive and exhaustive. As the Senate Report accompanying the bill explained: "It outlines in one place the purposes of sentencing, describes in detail the kinds of sentences that may be imposed to carry out those procedures..." S. Rep. 225, 98th Cong., 1st Sess. 50, reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3233.

In its analysis, the Justice Department suggests that within 28 U.S.C. § 994 of the Sentencing Reform Act there is support for authorizing the Commission to reinstate the death penalty. It finds support in § 994(a)(1) where the word "including" precedes the list of authorized sentences. It further contends that the phrase in § 994(c) allowing the Commission to provide "other authorized sanctions" includes the death penalty.

Such a reading trivializes the death penalty. It is simply inconceivable that Congress would include the death penalty by implication within "other authorized sanctions", as if it were the last item on a grocery list. The death penalty is one of the most unique and controversial issues in our society. As Justice Stewart observed in Furman: "The penalty of death differs from all other forms of criminal punishment, not in degree but

in kind." 408 U.S. at 306 (cited in Department of Justice Memo by Cassell, at 15). To suggest that Congress would relegate the death penalty to "other status" or contain it within the phrase "including" is to exceed any reasonable statutory interpretation.

In short, the text of the Comprehensive Crime Control Act provides no support whatsoever for the position that the Commission has the authority to promulgate constitutional procedures to reinstate the death penalty at the federal level. The Act is comprehensive and detailed, and with respect to reinstituting the death penalty, unambiguous in its intent not to do so.

Realizing the futility of looking to the statute for support, the Department of Justice suggests that since various federal death penalty provisions remain on the books from pre-Furman days, it remains an "authorized" punishment within the Commission's purview, unless those provisions have been impliedly repealed by the Act. The Department goes to great lengths to demonstrate that there has been no implied repeal.

But this is a "straw man" argument, a non-issue; it ignores the legal effect of Furman--that is, to void all state and federal death penalty provisions which fail to provide for consideration of aggravating and mitigating circumstances. The death penalty is no longer an "authorized sentence" under such provisions of federal

law; its imposition would be unconstitutional. On this point, there is unanimous agreement among the House and Senate Judiciary Committees, the Justice Department, and the federal courts. (See Furman v. Georgia, 408 U.S. At 411-12 [Blackmun, J. Dissenting; at 238-39, [Powell, J. dissenting] H.R. Rept. No. 96-1396, at 434 (1980), citing appellate decisions in the Fourth, Fifth, Eighth, and Eleventh Circuits, and in various Federal District Courts, S. Rept. No. 99-282, At 2 (1986); letter from Department of Justice, reprinted in, 130 Cong. Rec. S1204 [daily ed., Feb. 9, 1984]; Testimony of Assistant Attorney General Stephen S. Trott before House Judiciary Subcommittee on Criminal Justice, Nov. 7, 1985, At 7, n.4.)

In enacting the 1984 Sentencing Reform Act, the Congress did not change this situation; by providing no specific new authority for a federal death penalty, it simply left intact the status quo ante--that is, death penalty provisions which are constitutionally void and unenforceable.

In the fifteen years since Furman, bills to restore the federal death penalty have been introduced in each new session but have never passed. See S. Rep. 282, 99th Cong., 2d Sess. 3-4 (detailing history of the death penalty legislation). Moreover, as will be discussed below, the task of restoring the death penalty is Congress' and

outside the province of the Sentencing Commission.

Additionally, as pointed out in the DOJ Memo (p. 24 n.22), The Crime Control Act as passed explicitly retained the only post-Furman death penalty statute, the Anti-Hijacking Act. See 49 U.S.C. § § 1472-73. This provides further evidence that Congress intended to leave the federal death penalty statutes as they were -- those that were unenforceable remained that way, and the one statute they believed was enforceable was explicitly retained.

With this in mind, the question is not whether the Act "impliedly repealed" the death penalty, but whether through the Act Congress has chosen to restore it. The text plainly suggests the answer is no, and the legislative history affirms this result.

B. Legislative History of the Bill

In debating S. 1765, a bill to restore the federal death penalty, Senator Specter stated: "There is no more difficult question, either philosophically or from a practical point of view, than the issue of the death penalty" 130 cong. Rec. S 1148 (daily ed. Feb. 8, 1984). These sentiments were echoed frequently in the lengthy debate on S. 1765, A bill that failed to pass the house. The Commission must assess whether Congress would include such a critical issue in a bill by way of implication or through an ambiguous savings clause as the Department of

Justice maintains. Common sense, political realities, and clear legislative history suggests that the answer is no.

Although efforts to pass the Comprehensive Crime Control Act can be traced back to the early Seventies, the bill that was actually passed was introduced in the Senate on March 16, 1983, by Senators Thurmond and Laxalt. See 129 Cong. Rec. S 3076 (daily ed. Mar. 16, 1983). This bill was drafted by and introduced on behalf the Administration. See S. Rep. 225, 98th Cong., 1st Sess. 2, reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3184. Section II of the bill established the Sentencing Commission and delineated its powers. As originally introduced, section X of the bill provided procedures for reinstituting capital punishment. See 129 Cong. Rec. S3112 (daily ed. Mar 16, 1983).

It is important to note that even in the original bill the Sentencing Commission was not authorized to promulgate procedures for the death penalty. Those procedures were proposed to be created by Congress. There was never any proposal to give the Sentencing Commission independent authority to reinstate the death penalty.

Four months after the bill was introduced, the Senate Judiciary Committee ordered that the original bill be split into five separate bills, with the death penalty

provisions being treated as a separate bill. The main bill, which included the Sentencing Commission, was reported as S. 1762, while the bill containing the death penalty procedures was reported separately as S. 1765 See 129 Cong. Rec. S11679-11707 (daily ed. Aug., 4, 1983).

The purpose of splitting the bills was clearly explained in the Senate Report: "to enhance the potential for ultimate enactment of a comprehensive crime bill, the committee decided to deal with a number of the more controversial pending issues in separate legislation. Accordingly, bills on habeas corpus (S. 1763), exclusionary rule (S. 1764), capital punishment (S. 1765)...were introduced and reported to the Senate on August 4, 1983." S. Rep. 225, 98th Cong., 1st Sess. 2 n.10, reprinted in, 1984 U.S. Code Cong. & Admin. News 3182, 3185 n.10.

Likewise, when S.1762 reached the Senate floor, Senator Thurmond, chief sponsor of the Comprehensive Crime Control Act, explained:

> Senator Biden...And I have worked on this criminal package for several years. We removed from it provisions on the death penalty, habeas corpus, the exclusionary rule, and the Federal Tort Claims Act, because those matters were controversial. We tried to take out of this package what we thought might cause controversial questions... They will come up individually after this package has been completed. I am sure some of them will be opposed. But on this package we all agree

(emphasis added).

130 Cong. Rec. S742 (daily ed. Feb. 2, 1984). Senator Thurmond had also earlier prevented the introduction of a death penalty amendment to the crime act, calling it "inadvisable" and noting that there was "a separate bill on capital punishment." 129 Cong. Rec. S14603 (daily ed. Oct. 25, 1983).

Senator Kennedy, a long-time opponent of the death penalty, made clear the death penalty was not part of the Crime Control Act:

> the bill is equally notable for three provisions it does not contain -- it excludes the highly controversially proposals to limit the exclusionary rule and habeas corpus, and to reinstate the death penalty. Judiciary Committee Senators in both parties know that we cannot enact effective anticrime legislation unless we separate these controversial issues from the major effort.

129 Cong. Rec. S11709 (daily ed. Aug. 4, 1983). Senator Kennedy also sponsored a bill (S.668) That with a few technical exceptions was identical in language and spirit to the Sentencing Reform Act, and the death penalty was excluded from his bill see 130 cong. Rec. S813 (daily ed. Feb. 2, 1984). Another indication of the inherent conflict between the Crime Control Act and the death penalty is that Senator Kennedy, and thirty-one other Senators, voted for the crime bill but against the death penalty. See 130 Cong. Rec. S759 (daily ed. Feb. 12,

1984), and 130 Cong. Rec. S1491 (daily ed. Feb. 22, 1984). The vote on the crime bill was 91-1, whereas the vote on the death penalty legislation was 63-32. The death penalty bill died in the House without consideration.

Moreover, the Congress has continued since 1984 to wrestle with death penalty legislation--with the Justice Department taking the lead, in fact, in urging that legislation to authorize a death penalty remains unnecessary. The continuing controversy of the issue is demonstrated by the Senate's intense debate and rejection of death penalty legislation in the context of last Fall's omnibus drug legislation; supporters of the death penalty were unable to muster to 60 votes necessary to break a filibuster (the vote was 58-38).

C. Interpreting the Statute

What the Department of Justice is now trying to do is pass legislation through the Sentencing Commission that it was unable to push through Congress. As already mentioned, the Administration originally sent the crime control bill with the death penalty provision to Congress. It strongly supported the death penalty, and also supported the severed bill that would have reinstated the sanction. See 130 Cong. Rec. S1204 (daily ed. Feb. 9, 1984). But those efforts failed, and the

Administration should not be allowed to gain through the Commission what it could not gain through Congress.

Congressional intent could be no clearer: the Sentencing Commission was never intended to have the power to promulgate constitutional procedures for a federal death penalty. Nor was the Comprehensive Crime Control Act intended to reinstate the death penalty. Moreover, although the bill to reinstate the death penalty (s.1765) passed the Senate, it died in the House Judiciary Committee.

The Justice Department seems to recognize all this. But by focusing on the issue of whether the Crime Control Act was designed to repeal existing death penalty statutes, it overlooks the obvious import of severing the death penalty from the Act. As previously explained, the question is not whether the Act repealed the death penalty, but whether it reinstated those provisions. The answer to that is incontrovertibly no.

When construing a statute, it is important to try to effectuate and adhere to the legislature's purposes. See H. Hart & A. Sacks, The Legal Process (1958); Posner, Statutory Interpretation -- In The Classroom And In The Courtroom, 50 U. Chi. L. Rev. 800 (1983). In this way, the interpreter must try to decide how the legislators would have wanted the statute to be construed. In this case: would Congress have wanted the Sentencing

Commission to promulgate procedures to reinstate the death penalty at the federal level? The answer is clear: reinstating the death penalty was not part of the Comprehensive Crime Control Act. It was severed and became a different bill. Many Senators, including staunch supporters of the death penalty such as Senator Thurmond, stated that the Crime Control Act would not have passed unless the death penalty was omitted from it. See 130 cong. Rec. S.742 (daily ed. Feb. 2, 1984).

The Department cites United States v. Matthews, 16 M.J. 354, 380-81 (1983), A case with limited or no relevancy. In that case, the court was relying on the President's powers as Commander-In-Chief under Article II, Section 2, where the President admittedly has broad powers. No such powers or authority is implicated in the present situation.

Finally, even assuming arguendo that the statute and legislative history were in fact designed and intended to give the Commission authority over the death penalty, it is unlikely that such a delegation would have any effect. The establishment of aggravating and mitigating circumstances for the death penalty is fundamentally different from the Commission's task of identifying aggravating and mitigating factors to be balanced in non-capital cases. The Supreme Court has said that in capital cases, there are three levels of inquiry: first,

whether the defendant committed the crime; second, whether at least one aggravating factor, as "established by statutory definitions," exists, so that the defendant is death-eligible; and third, a balancing of all the circumstances of the case--whether in extenuation, aggravation or mitigation--against each other. Zant v. Stephens, 462 U.S. 862 (1983). It is the second level which is unique to capital cases. The process of prescribing aggravating circumstances to be applied in this second level is a process of prescribing the elements of the crime itself, entailing a system-wide, policy judgment of who shall live and who shall die. The Supreme Court has held that such determinations regarding "the proper apportionment of punishment...are peculiarly questions of legislative policy." Gore v. United States, 357 U.S. 386 (1958).

A keystone of the Department's argument is that the death penalty remains an authorized sanction for certain crimes under federal law, although such statutes "may be constitutionally incomplete," a defect which can be cured "by congressional or administrative promulgation of regulations specifying appropriate sentencing procedures." (DOJ Memo at 7-8, n.8). Inherent in this "incompleteness" argument is the notion that all the commission has to do is "fill in the blanks" with adequate constitutional procedures to restore vitality to

the statutes. The Department even suggests, by its reference to Jurek v. Texas, 428 U.S. 262 (1976) (cited at DOJ Memo, 7-8, n.8.), That the courts as well as Congress and the Executive Branch, would be able to fill in those blanks.

If this is so, it is curious indeed that the Department has never, to my knowledge, suggested it in any federal court--despite their outspoken and persistent advocacy of the death penalty in the legislative arena. Certainly, no federal court has ever approved such a notion. Nor would the courts be likely to, in light of the Gore case, supra.

Moreover, the Jurek cite is without merit: the court approved the Texas statute because it permitted consideration of any mitigating circumstance the defendant may offer, while current federal death penalties (other than the 1974 air piracy one) permit consideration of none. The court was saying that the Texas statute is saved because it is wide open; the various federal statutes are doomed because they are closed.

Indeed, the Department's own materials reveal the disingenuousness of their position. While talking in the DOJ Memo of mere "constitutional incompleteness," it is revealed in the internal Cassell memo, at page 18, that their goal is flatly to persuade the Commission to

"authorize" capital punishment in the guidelines. This is a term which describes a distinctively legislative function: it is to the Congress what "implement" is to the Executive Branch, and "adjudicate" is to the Judiciary.

This the Department plainly acknowledges, by premising its entire argument upon the theory that the death penalty is already authorized.

Nothing could be clearer: the Department knows that it is asking the Commission to perform a legislative function--in an area it has been trying, without success, to get the Congress to address for years. This is a shameless usurpation, and it must be rebuffed.

Question 2: Assuming the Sentencing Commission does have the authority to issue procedures to reinstate the death penalty, under what circumstances should it do so?

If the Sentencing Commission decides it does have the authority to promulgate procedures to reinstate the death penalty, we would caution that its authority would only extend to providing procedures for already existing death penalty statutes. Even under the Department of Justice's position, the most that could be done would be to revive currently moribund statutes and not to create any new provisions.

Providing new death penalty sanctions would also

plainly exceed the Commission's executive or judicial powers, moving it into the legislative arena in violation of the separation of powers. As the Supreme Court has recently explained, the constitutional procedures for passing legislation must be strictly followed. See Bowsher v. Synar, 106 s. Ct. 3181 (1986); INS v. Chadha, 462 U.S. 919 (1983). Were the Commission to take it upon itself to apply the death penalty to new provisions of the criminal code, it would certainly violate these constitutional procedures.

Conclusion

Before acting to reinstate the death penalty, the Sentencing Commission should ask itself a few questions. Why is Congress still actively considering death penalty legislation? Why did Congress split the death penalty from the bill that later became the Comprehensive Crime Control Act of 1984? Why was the death penalty not mentioned in such a lengthy and detailed statute, in subsequent comprehensive amendments to the statute, or in any of the thousands of pages of legislative history on the bill? Why is an Administration so aligned with close textual readings and original intent now resorting to reading between the statutory lines and grasping into irrelevant legislative history? And finally, in the face of the lack of any explicit reference to restoring the

death penalty, is it a reasonable assumption that Congress could have meant to include such a controversial proposal solely by way of implication?

After all, as the Department of Justice points out, previous versions of the criminal code reform bills include death penalty procedures, indicating that when Congress wanted to be explicit it was. In the bill that passed Congress, there is no indication whatsoever that Congress intended to restore the death penalty through the Sentencing Reform Act. To the contrary, all of the evidence, including statements by the bill's sponsor, conclusively suggests that the death penalty was to be excluded from the bill, and thus falls outside the scope of the Sentencing Commission's authority.

Mr. Chairman, I am sincerely grateful for the opportunity to appear before this body to present NACDL's views on the vitally important issue before you today. We applaud your conscientious efforts, but urge you in the strongest possible terms to vote down the Department of Justice's proposal.

My name is Micky Veich, Congressional Affairs Officer, Federal Criminal Investigators Association speaking on behalf of the National President, Mr. Robert Fuesel.

I thank the commission for providing this opportunity to listen to the federal criminal investigators.

The Federal Criminal Investigators Association is a professional association consisting of federal criminal investigators from some 50 or so federal agencies. These are the men and women charged with the enforcement responsibilities of our federal laws.

The FCIA favors the death penalty in certain instances, some of which include murder of a federal agent; air piracy which results in death; and, espionage. Title 18, U.S.C. Section 844(i) calls for the imposition of the death penalty if someone dies as a result of an arson, but that provision has never been applied.

Federal agents rarely work on criminals commonly engaged in what is referred to as a crime of opportunity. An occasional tax fraud by the amateur; a citizen who saws off the barrel of his shotgun because he has nothing better to do that day; or that foolish individual who is convinced that the odds are against his getting caught at his first drug smuggling attempt. Your federal agent is engaged in the identification of violent habitual offenders, the recidivist, the professional criminal, the guy who plans his big caper worth millions, the top gun of criminal activity.

Federal agencies have to be the responsible agencies for only they can afford the luxury of targeting the highest ranking criminal in the nation and the world, and have the time it takes to get their man.

In certain situations our members feel that leniency should be granted to convicted persons who assist the government in subsequent investigations. If these persons were sentenced to death, then a commutation to life in prisonment might be more appealing.

We feel that the criminal element should be put on notice that any time certain crimes are committed, they will have to pay the price.

We are not talking about people who are temporarily seized with some emotional problem. We are talking about well planned bank robbers who plan the murder of FBI agents in Florida; DEA agents raiding drug dealers who kill agents because of a well planned "rip-off"; we're talking about the murder of Secret Service agents on surveillance of counterfeiters; we're talking about drug smugglers who kill DEA agents because they're getting hot on the trail; we're talking about Agriculture agents about to close in on a major fraud against the government and unsuspecting public; we're talking about tax protestors who form major groups throughout our land, arm themselves and then shoot it out with us because they think taxing is unfair; international weapons smugglers who sell Kaddafi explosives and state of the art expertise to be used against us.

This Commission has the responsibility to respond to the

Congressional mandate directed by the Comprehensive Crime Control Act of 1984. You are the only hope for true justice for the families who are awaiting your action. You have been mandated by the public to act on its behalf. No other organization has that awesome responsibility no matter what they say or who they allegedly represent. You alone have a clear mandate.

It has been reported that judges by and large will not favor any guidelines system of any kind. However, it was further reported that many judges have come forward and welcome this structure. How many times have you heard Supreme Court speakers state that "the problem lies with the courts"? How many times have you had law enforcement officers say that the criminals are just being set free by judges to commit more crimes? How many educators have you heard state that the judicial system needs to be told who they should be sending to prisons, etc.? How many more professionals do you want to hear? How many more law enforcement officers have to lose their lives before the criminals know they will face the firing squad or be given an all too humanitarian fatal injection?

Your mandate is clear. This commission now has the opportunity to show Americans once and for all that they have spoken and criminals will listen. There will be listening guidelines for federal capital offenses.

Frequently, federal agents are asked to apprehend dangerous persons fleeing from having committed serious crimes under state law, e.g. drug trafficking. These crimes frequently carry heavy prison sentences but are not subject to a death penalty. That

fugitive has every reason to murder a federal agent in an attempt to secure his freedom because he knows it will not result in a more serious sentence than he is already subject to. The felon has every reason to kill the feds in a shootout - he will get caught and sentenced to perhaps forty (40) years if he kills the agent, he gets away. If he kills the agent and still gets caught - still only forty (40) years.

The persons we're dealing with can best be illustrated by the Columbia Drug Czar who boasted that he would have a federal judge murdered every day until he is released.

Thank You.

INTERNATIONAL UNION OF POLICE ASSOCIATIONS AFL-CIO

THE ONLY UNION FOR LAW ENFORCEMENT OFFICERS

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Robert B. Kliesmet
President

Al Angele
Secretary-Treasurer

Testimony of

ROBERT B. KLIESMET
PRESIDENT

of the

INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO

before the

U.S. Sentencing Commission

February 17, 1987

Thank you for the opportunity to address the Commission again on this important issue. I hope my comments will be of some value to you as you resolve this complex issue of capital punishment.

As before, I come to you with the perspective of the street cop. Most street cops approach their role and responsibilities as a segment of the Criminal Justice System with a pragmatic view. That view generally runs along these lines: police investigate and apprehend - prosecutors charge and present the facts - juries decide guilt or innocence and judges rule on courtroom order and set the punishment.

Street cops, in their pragmatic view, believe, as does 86% of the public[1], that the death penalty is a viable deterrent for persons convicted of certain crimes. A search of the literature shows there are a number of studies and articles that show a direct deterrent effect by imposing and carrying out the death penalty.[2] One study goes as far as to point out that for each execution for a homicide, up to 15 lives can be saved through the deterrent effect. Compromising the safety of society, which is the real goal of the Criminal Justice System, to save the life of a convicted offender is a needless sacrifice of a blameless victim's life.

Street cops by and large look to the U.S. Justice Department and the U.S. Congress to bring back realism to the sentencing process of the nation's Criminal Justice System. Congress, as the advocate of the will of the people, adopted and funded the creation of the U.S. Sentencing Commission. Now, this Commission finds itself distracted from its mission of establishing sentencing guidelines which includes capital punishment upon conviction for certain federal crimes. The U.S. Department of Justice rendered a legal opinion that the Sentencing Commission has the authority to reimpose the federal death penalty. The Congress acted, the Justice Department sanctioned, and the people demand the death penalty be imposed for certain federal criminal convictions. What more needs to be said?

Undaunted by this distraction from imposing the will of the people and accepting the fact that this Commission has the authority to proceed, let me suggest a list of the capital offenses in which the death sentence should be imposed.

Conviction of:

a) Premeditated murder.
b) Murder committed during the commission of a federal capital offense (felony).
c) Murder of a Law Enforcement Officer or Correction's Officer while they are acting in the line of duty.
d) Certain cases of espionage.
e) Sabotage.
f) Third offenders convicted as major drug dealers.

To further illustrate the will of the people and the intention of the street cops one only needs to look to the recent State

Supreme Court elections in the State of California. Clearly the death penalty issue, or the lack of it being carried out, was on the voters' minds when they resoundingly rejected California's Supreme Court Justice Rose Bird's re-election bid. Our members, the street cops of California, were actively involved in her rejection.

In summation, let me urge this Commission to establish guidelines for all the courts of the United States to follow that include imposing the death penalty when a defendant is found guilty of any of the federal offenses I mentioned.

Thank you. I would be happy to respond to any questions you may have.

[1] Media General Associated Press poll, November 1986.

[2] Homicide and Deterrence: A Reexamination of the United States Times-Series Evidence. Stephen K. Layson

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February 24, 1987

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Re: Hearing on the Commission's responsibility regarding promulgation of sentencing guidelines for federal capital offenses

Dear Chairman Wilkins:

Thank you very much for your letter of February 20, 1987, in regard to my testimony at the February 17 hearing on the above matter. The following is a written submission to summarize and in some respects supplement the points addressed in my testimony at the hearing. These points are presented largely as a response to points made in the January 1987 Memorandum submitted to the Commission by the United States Department of Justice, through its Office of Legal Counsel (hereinafter "DOJ Memo").

1. The Commission should not accept the DOJ's position that the Commission is part of the Executive Branch of the United States Government.

The threshold contention on which the DOJ Memo rests is that "The Sentencing Commission is within the Executive Branch." (DOJ Memo, part I, pp. 1-4.) This position of DOJ directly contradicts the opening sentence of this Commission's Revised Draft Sentencing Guidelines (January 1987):

> "The United States Sentencing Commission (`Commission') is an independent agency in the judicial branch. . . ." (Guidelines, p.1; emphasis supplied).

If the Commission, or the courts, were to agree with DOJ that the Commission is part of the executive branch, this would call into question the validity of any guidelines promulgated by the Commission for imposition of capital punishment under federal statutes. For it would mean that the very branch of the government responsible for prosecuting federal criminal offenses, and for seeking the death penalty if permitted to do so under the

sentencing guidelines, would itself be promulgating those guidelines, intended to have the effect of restoring capital punishment. This would at the least raise substantial issues of separation of powers between the branches. Moreover, a ruling that this Commission is part of the executive branch -- the branch that prosecutes federal offenses -- might call into question the validity of all of the sentencing guidelines, not merely those regarding capital punishment, on separation of powers grounds.

The DOJ Memo acknowledges that, if the Commission is part of the executive branch, "the question arises whether service by an active federal judge as an officer in the executive branch is consistent with the constitutional principle of separation of powers. . . . [T]wo circuits have split on this question. . . ." (DOJ Memo, p.4, n.4.) No doubt this issue would be litigated with respect to the validity of all of the guidelines, if the Commission is deemed to be within the executive branch. The examples given in the DOJ Memo, of individual judges such as John Jay performing specific assignments in the executive branch at the behest of the President, seem quite

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Thus there seems no basis for assuming, as the DOJ Memorandum evidently does, that the House shared the alleged intent (which the DOJ Memo attributes to the Senate) to make the Commission's sentencing guidelines applicable to capital punishment.

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However, under the federal statutory provisions governing homicide -- the area in which most potentially capital cases would presumably arise -- the applicable statute leaves no such discretion. The provisions of the federal statute on "Murder," 18 U.S.C. §1111 -- which are also incorporated in 18 U.S.C. §1114, "Protection of officers and employees of the United States" -- prescribe:

> Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its

> verdict by adding thereto 'without capital punishment', in which event he shall be sentenced to imprisonment for life;. . ." (18 U.S.C. §1111(b), emphasis supplied.)

The sentencing judge is thus bound by the decision of the jury as to whether or not to add to a verdict of guilty the words "without capital punishment". As construed by the United States Supreme Court in the leading case of Andres v. United States, 333 U.S. 740 (1948), the jury must be unanimous in deciding whether or not to include the provision "without capital punishment" in its guilty verdict. But if the jury does not include those words, the statute makes the imposition of the death sentence mandatory, while the inclusion of those words by the jury precludes the Court from imposing a sentence of death. There being no discretion left to the sentencing judge under §1111(b), the promulgation of Commission guidelines for the exercise of discretion by the "sentencing court" cannot have been intended by Congress for offenses under the Federal murder statute. And if

Congress did not intend such guidelines for the offense of murder, it is difficult to impute such an intent for other offenses which had been capitally punishable prior to Furman (even if one were to assume their death sentence procedural provisions were not unconstitutional under Furman).

4. In light of the constitutional requirement that any possible mitigating factor must be considered by the jury in a capital case, promulgation of Commission guidelines for capital cases is not feasible or congressionally mandated.

The DOJ Memo recognizes that the Sentencing Reform Act was not intended to authorize Commission guidelines for application of the one post-Furman Federal death penalty statute, the air piracy statute, 49 U.S.C. §§1472, 1473. (DOJ Memo, p.24 and n.22.) But since that statute's procedures appear to be unconstitutional -- despite Congress' express intent to provide a valid death penalty thereunder -- it would be paradoxical if the Commission could restore capital punishment under any of the pre-Furman federal death penalty statutes, such as 18 U.S.C. §1111, which Congress has not decided to amend to provide purportedly constitutional procedures.

The DOJ Memo appears to assume the constitutionality of this sole post-Furman Federal statute authorizing the death penalty, 49 U.S.C. §§1472, 1473. (DOJ Memo, p. 24, n.22.) However, that statute was adopted in 1974, prior to the Supreme Court's 1978 decision in Lockett v. Ohio, 438 U.S. 586 (1978), and appears patently unconstitutional in light of Lockett. For the air piracy statute limits the jury's consideration of mitigating factors to the five factors specified in 49 U.S.C. §1473(c)(6); and it requires a sentence of death if the jury by "special verdict" finds an aggravating factor specified in subparagraph (c)(7) but finds none of the five mitigating factors specified in subsection (c)(6). Lockett, however, imposed a constitutional requirement that any mitigating factor must be considered, even though not specified in the sentencing statute. This constitutional requirement was recently reiterated in Skipper v. South Carolina, 106 S.Ct. 1669 (1986).

The procedure for returning a "special verdict" by the jury on specified aggravating and mitigating factors, followed in the air piracy statute, thus does not appear to pass

constitutional muster. Therefore, in further response to the question posted by Judge MacKinnon at the hearing, as to the feasibility of the Commission promulgating guidelines to be implemented in a special verdict procedure, that question should be answered in the negative. It is not feasible to list in Commission guidelines all of the possible mitigating factors which would have to be considered under the constitutional requirements of Lockett. Thus a special verdict procedure, even with guidelines, would entail the same constitutional infirmity as the air piracy statute.

Moreover, the Sentencing Reform Act does not authorize the Commission to adopt the changes in the Federal Rules of Criminal Procedure that would be needed to institute a special verdict procedure in federal criminal cases. Such changes would entail either Congressional legislation or adoption through the Supreme Court's rule-making process. In addition, since the Supreme Court in Andres v. United States, supra, read the federal murder statute to require a single verdict as to both guilt and punishment, the Commission would not be empowered to promulgate a procedure conflicting with that prescribed in the murder statute, 18 U.S.C. §1111(b).

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It must be apparent that, if guidelines were promulgated by the Commission allowing capital punishment, and if these became effective through Congressional inaction, any prosecution in which capital punishment was potentially available would give rise to extended litigation as to the validity of the guidelines

and the manner of their adoption. Such questions would need to be raised pretrial in every such prosecution, even though there might be few that would actually result in a death sentence after trial. Rather than invite such litigation as to the validity of its actions, the Commission should reject the position of the Department of Justice, and should leave to the Congress the question of whether the legislative branch will or will not enact procedures and standards for the revival of capital punishment under federal statutes.

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Finally, to supplement the record of my oral testimony at the hearing, the following are the citations to the principal cases which I referred, by way of background, to having litigated under the District of Columbia and Florida death penalty statutes. Coleman v. United States, 357 F.2d 563 (D.C. Cir. 1965) and the predecessor appeals cited therein; and Morgan v. State,, 475 So.2d 681 (Fla. 1985), now pending following remand as No. 69,104 (Florida Supreme Court).

I very much appreciate the opportunity to appear and present my views as a practicing member of the bar at the Commission's hearing, and to supplement that presentation herein.

Respectfully yours,

Robert L. Weinberg

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copy to members of the
United States Sentencing Commission

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February 24, 1987

The Honorable William W. Wilkins, Jr.
Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Re: Hearing on the Commission's responsibility regarding promulgation of sentencing guidelines for federal capital offenses

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