
UNITED STATES SENTENCING COMMISSION



TRANSCRIPT

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
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
Mike Quinlan, deputy director
- 10 a.m. NAACP Legal Defense Fund
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
Patrick McGuigan, director
Jeffery Troutt, research director
- 10:30 a.m. Heritage Foundation
Bruce Fein, Visiting Fellow for Constitutional Studies
- 10:45 a.m. Amnesty International
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
Roy C. Jones, senior vice president for political affairs
- 11:45 a.m. NISBICO & National Interreligious Task Force on Criminal Justice
Rev. L. William Yolton, executive director, NISBICO
- noon Police Executive Research Forum
Darell Stephens, executive director
- National Law Enforcement Council
Ordway P. Burden, chairman
Douglas Baldwin, executive director
- 12:20 p.m. Professor David C. Baldus
University of Iowa College of Law

LUNCH

2 p.m.	American Civil Liberties Union Norman Dorsen, president William Allen, Covington & Burling Elizabeth Danello, Covington & Burling
2:15 p.m.	Professor Albert W. Alschuler 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) Charlie Sullivan
3 p.m.	International Association of Chiefs of Police Jerald R. Vaughn, executive director National Sheriff's Association M. Wayne Huggins, sheriff, Fairfax County, VA Fraternal Order of Police Donald L. Cahill, legislative committee
3:30 p.m.	National Association of Criminal Defense Lawyers Dr. Charles Ogletree, Harvard Law School
3:45 p.m.	Federal Criminal Investigators Association Mickey Veich, congressional affairs officer International Union of Police Associations - AFL-CIO Robert Kliesmet, president
4:05 p.m.	Robert L. Weinberg Williams & Connolly

ORIGINAL

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UNITED STATES SENTENCING COMMISSION

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Public Hearing

- - -

Washington, D.C.
February 17, 1987

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P R O C E E D I N G S

CHAIRMAN WILKINS: Let me call this public hearing to order. First of all, I welcome all of you here. We look forward to a very productive day.

Let me first introduce to you the Members of the United States Sentencing Commission. On my far right is Commissioner Ben Baer, then Commissioner Michael Block, Commissioner Helen Corrothers; to my immediate right is Commissioner Paul Robinson; to my immediate left is Commissioner Ilene Nagel, Commissioner Stephen Breyer, Commissioner George Mac Kinnon, Commissioner Ron Gainer and my name is Billy Wilkins.

The topic of our public hearing today will deal with capital punishment guidelines and, specifically along with other related issues, we will be addressing the issue of whether or not the United States Sentencing Commission has the statutory authority to issue guidelines dealing with capital punishment.

We are addressing this issue and we decided several months ago that we would address this issue in the same manner in which we have addressed all other important issues which the commission has had to resolve or yet to resolve in the

process of writing guidelines for the Federal Courts.

The issue dealing with capital punishment has not been resolved by this commission and no decision has been made, indeed, none will be made until the commission has had the benefit of a wide range of opinions--has had the benefit of everyone who wishes to participate in this process to submit to us a written opinion, legal briefs, or present other testimony either in writing or orally. And once all of this has been completed, the commission will have to come to grips with this issue as we have all other issues that we have addressed during the past few months leading up to meeting the statutory deadline imposed by the legislation which created us of submitting guidelines to the Congress on or before April the 13th.

Because we have a large number of witnesses who are on the program to testify as well as I'm sure there will be many others who wish to testify, at the conclusion of the prepared testimony given sometime this afternoon, I am going to limit testimony to 15 minutes per witness.

While we have tried to do that in the past, we have been somewhat lenient with giving more time to those who wish to testify longer than the allotted time, but because of the

large number of witnesses and the fact that we want to give everybody the opportunity to participate with us, I will sound the gong after 15 minutes have expired.

Of course, if a commissioner has questions that he or she wishes to ask of any witness, the time, of course, limitation would be waived for that.

So, please try to limit your testimony to about 10 minutes and thereby allowing time for questions from any of the commissioners.

We are very pleased to have with us this morning as our first witnesses, first of all, is the Assistant Attorney General for the Criminal Division, Mr. William F. Weld, who is representing the Criminal Division in the Department of Justice. With Mr. Weld is Assistant Attorney General, the Office of Legal Counsel, Mr. Charles J. Cooper, and also, from the Bureau of Prisons, Mr. Mike Quinlan.

I understand you gentlemen will testify as a group and thereby perhaps providing more time since your 15 minutes will be grouped together.

Please come forward.

Mr. Weld, Mr. Cooper, Mr. Quinlan, we are delighted to have you with us, and I will leave it up to you gentlemen

as to the order in which you will testify and respond to questions.

MR. COOPER: Thank you, Mr. Chairman.

I believe I have been elected by my colleagues to begin. I came in a little bit late; so, I'm not entirely clear that the 15 minutes that applies to me is 15 minutes that is to be split among us or is that 15 minutes apiece?

CHAIRMAN WILKINS: The schedule, because of the grouping, allots 30 minutes, total, for you three gentlemen's testimony.

MR. COOPER: All right. Well, I will summarize my statement then.

JUDGE MAC KINNON: You're Cooper?

MR. COOPER: Yes, sir, Judge MacKinnon.

The Sentencing Reform Act establishes a comprehensive scheme, Subsection (a) of Section 3551 provides that, quote, "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) 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. So, the threshold question--the threshold legal 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 8th, 1987 legal memorandum to you, Judge Wilkins, on this subject makes clear in--I think it's fair to say--painstaking detail.

I would, in the moments I have here simply draw the commission's attention to a few salient points rather than going through that analysis in detail.

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--the air piracy statute--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, we believe, is overcome by positive and very thoroughgoing evidence in the act's legislative history to the effect that existing death penalty statutes were intended not to be affected in any way, let alone to be repealed by enactment of the 1984 Act.

The omission of the death penalty from 3551 (b) can be traced to a proposed bill, S. 1437, that indeed would have expressly repealed existing death penalty provisions except for two, the espionage death penalty provision and the air piracy death penalty provision. And S. 1437 would have

amended those sanctions in order to make quite clear that the sentencing provisions of the 1984 Act were not to apply.

After similar measures had been attempted unsuccessfully to enact crime reform legislation, 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 for implementing 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 explicitly relied on their continued existence and, indeed, enacted statutory procedures designed to ensure their implementation and to perform the same kind of guideline's writing task that is now before this commission.

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, in our opinion, 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 ultimately contained the Sentencing Reform Act.

When the sentencing provisions of the earlier bill, which was S. 1437--and these numbers get hard to keep track of--were carried over into what was to become the 1984 Act, they simply were not revised. And we come to the conclusion that it was simply through oversight to conform to the Congressional intention to leave the federal death penalty where it was--an authorized sentence..

Now, if it is correct that the death penalty is a permissible sanction of the Sentencing Reform Act, as we believe it is, Section 994 of the Act appears to authorize this commission to promulgate capital sentencing guidelines.

The commission's mandate, under Section 994(a) is this--to "promulgate guidelines for use of a sentencing court in determining the sentence to be imposed in a criminal case." We believe this 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"--and this is quoting--" governing the imposition of sentences of probation, fine, imprisonment, and governing the imposition of other authorized sanctions."

Numerous provisions of title 18, of course, 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. And, as I have already mentioned, several federal statutes authorize the death penalty, which brings us to the final question, which is whether any capital sentencing guidelines that might be promulgated by this commission would be binding on sentencing authorities.

Section 3553 (b) of the Sentencing Reform Act provides that sentencing courts are required to impose a sentence--this is quoting--"impose a sentence of the kind and within the range," established by the guidelines promulgated pursuant to Section 994, absent mitigating or aggravating circumstances not taken into account by the commission. Thus, we believe that capital sentencing guidelines no less than sentencing guidelines of any other variety would, indeed, be binding with respect to the sentencing authorities--the Federal Courts.

CHAIRMAN WILKINS: Thank you very much, Mr. Cooper.

Mr. Weld?

MR. WELD: Thank you, Mr. Chairman. With your permission I will now make my very brief remarks and both Mr. Cooper and myself would be available at that time to attempt to answer questions that the Chairman and Members of the Commission might have.

My name for the record is William Weld, and I am the Chief of the Criminal Division of the Department of Justice.

I am here to speak in favor of the desirability of the commission's adopting death penalty guidelines, essentially for the reason that we believe that the act of doing so would be responsive to the charge of the commission under a number of headings. We think that the adoption of death penalty guidelines would serve several of the purposes of punishment under the statutory scheme setting up the commission as well as traditional notions of the purposes of punishment, those being just punishment, deterrents and incapacitation.

Under the heading of "just punishment," it's, of course, the case that death penalty would be reserved for the most aggravated of federal offenses--assassination of the President; wreckage of a public conveyance carrying many, many passengers, calculated to result in a great number of

deaths; treason; espionage, so that, in terms of society giving as good as it gets, those are the offenses to which the penalty would be applicable.

I think the notion here is something more though than the Old Testament idea of an "eye for an eye and a tooth for a tooth." I think that the purpose being served here goes beyond vengeance or retribution, if you will, and implicates our more general notions of justice and even of society, a too little appreciated concept, I sometimes think these degenerate days.

The formulation I keep coming back to is one stated by Sir James Fitzjames Steven, in his "History of the Criminal Law," in England, in which he said that if the crime of murder could be prevented by the fine of one shilling, we could not, without doing violence to the moral bonds of society--the moral bonds of society settle for a shilling fine for murder. And I submit that that is the testing case and that's really the one point that I would like to make in my remarks today.

It's stated a little bit differently by Judge Kaufman in his remarks on the Rosenberg Case, which are quoted at Page 5 of the appendix we have submitted to the commission

with my testimony. He says, "The murderer kills only his victim while the traitor violates all the members of his Society--all the members of the group to which he owes his allegiance."

It is stated again a little differently by Walter Burns, quoted at Page 7 of the appendix. He says, "In a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement and, thereby, hope to promote disrespect to be successful, which it says--and it makes this moral statement when it punishes--must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe, and the only way it can be made awful, or awe-inspiring is to entitle it to inflict the penalty of death."

As to deterrents, I would submit that, in general, the offenses to which the penalty would apply are so-called contemplated crimes. The Supreme Court has recognized that, quote, "The possible penalty of death may well enter into the cold, calculus that precedes the decision to act," close quote, in some cases. And I would suggest that the types of offenses

we are talking about here are those where that's likely to be the case.

There is anecdotal evidence in support of the common sense intuition that the death penalty, like other forms of punishment, can serve as a deterrent.

As to incapacitation, I would draw the attention of the commission to the study referred to at Page 27 of the appendix, the 810 two-time murderers who had killed 821 persons after their first murder.

As to the objection that the death penalty historically has been not well administered or that has been administered in a discriminatory fashion, I would urge only that, to the extent that these objections have force, the commission is presented with an opportunity to fashion guidelines including, of course, aggravating and mitigating factors which would go far to keep to a irreducible minimum the danger of such failures of administration.

Mr. Chairman, that concludes my remarks. I would perhaps turn the podium over to Mr. Quinlan, or I beg the commission's pleasure as to whether you wish us to proceed in that fashion.

CHAIRMAN WILKINS: Thank you, Mr. Weld.

Let's hear from Mr. Quinlan and then we will have questions I'm sure.

Mr. Weld, are you just going to trade seats? That's fine. I didn't want you to leave. We may want to call you back. Thank you.

Mr. Quinlan?

MR. QUINLAN: Thank you very much, Judge Wilkins, and Members of the Commission. It's a pleasure to be here. I appreciate the opportunity to present my views on this very important subject.

Mr. Carlson, the Director of the Bureau of Prisons, wishes he could be here. He had a long-standing commitment to be out-of-town this morning. My views do parallel very closely those of Mr. Carlson.

My testimony today focuses on the need--

JUDGE MAC KINNON: What is your position?

MR. QUINLAN: My position, Judge MacKinnon, is Deputy Director of the Bureau of Prisons.

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 a crime is accountability. Persons are generally in prison longer for more violent and dangerous behavior. Currently, inmates involved in such behavior are disciplined by receiving additional prison terms or by transfer to a more secure facility.

These are adequate deterrents to criminal behavior for most inmates in prison. However, inmates serving life sentences are undeterred by the prospect of any further term of incarceration. Inmates serving life sentences have no realistic expectation of eventual release. This situation will be further exacerbated with the abolition of parole in 1993.

For some of these persons, extremely assaultive behavior and murder become routine, and staff and other inmates are constantly in danger. Even transfer to our most secure facility, the U. S. Penitentiary at Marion, Illinois, for placement in its maximum security control unit does not prevent further killings.

It does not make sense to me to have a type of

behavior that has no meaningful consequence for this small group of vicious, violent inmates. Staff and inmates feel helpless when dealing with these inmates. They, in my view, present an unacceptable risk to those who must come in contact with them daily because they are, in effect, judgment-proof, immune from further sanctions for their acts.

This small group of violent offenders see the trip to court for prosecution as a break in the regular monotony of serving a life sentence.

The most recent examples of this situation are the tragic murders of two experienced correctional officers in the control unit at Marion, on October 22nd, 1983. Another officer was killed soon after that, on January 29th, 1984, at the Federal Correctional Institution in 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 inmates involvement in a prison gang, the Arian Brotherhood.

The second officer was murdered at Marion on the same day by an inmate who was sent to the Bureau of Prisons from the Military. Following the, again, unprovoked brutal stabbing of this officer at Marion, 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 the 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 the prison gang. The inmate was a Florida prisoner in federal custody under contract with the

Bureau of Prisons..

These murders illustrate the risk always present in confining inmates 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. For these inmates, another life sentence is a meaningful 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 stabbing, 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.

Thank you very much, Mr. Chairman.

CHAIRMAN WILKINS: The individuals who murdered the correctional officers, did they receive another life sentence?

MR. QUINLAN: Yes, they did, judge.

CHAIRMAN WILKINS: So, one is now serving four life sentences?

MR. QUINLAN: That's correct.

CHAIRMAN WILKINS: I see.

Let me ask you, Mr. Cooper, with regard to aggravating and mitigating circumstances, from your testimony it's clear that you believe the commission has statutory authority to write such vague and mitigating circumstances for various crimes where the death penalty is authorized by Congress, is that correct?

MR. COOPER: Yes.

CHAIRMAN WILKINS: How about procedural requirements, do we have that same authority to say, "Judge, bifurcate the trial. You must give notice, Mr. U. S. Attorney, to the defendant and the other procedural requirements that are required?"

MR. COOPER: Judge Wilkins, our legal examination of the question you pose didn't really get to that level of detail, though off the top of my head I can't think of a reason why that would not be true. I would suspect that the authority that you have with respect to non-capital sanctions

would be the same authority you have with respect to capital sanctions.

CHAIRMAN WILKINS: All right, sir.

Any questions from any other commissioner?

Mr. Block?

COMMISSIONER BLOCK: Mr. Quinlan, on this question of punishment for individuals serving life sentences, I heard a remark I think recently by Judge Easterbrook that, in fact, for an inmate murdering someone inside a prison--I forget whether it's a guard or a fellow prisoner--that the only sanction available in reality was the restriction of that person's canteen privileges.

Are there substantial punishments other than the symbolic and life sentence that the Bureau of Prisons can use?

MR. QUINLAN: I do not believe there are, Commissioner Block. I think that that is--there is no punishment at all to restricting canteen privileges. There are no punishments at all to restricting any privileges in prison. I think inmates would laugh at those kind of sanctions. I do not believe that they are appropriate sanctions.

COMMISSIONER BLOCK: So, it would be your opinion that

both for deterrents, to the extent those exist, and lastly for incapacitation that you need the death penalty to run federal prisons?

MR. QUINLAN: Yes, that is my view.

COMMISSIONER BLOCK: One additional question for Mr. Cooper, just following up you can help me out a minute because as I summarize the logic of your argument is that the statute establishing the Sentencing Commission did not repeal the death penalty, and the statute, in fact, requires us to set guidelines for all criminal sanctions; therefore, we are permitted, in fact, required to set guidelines for the death penalty. Is that a fair summary of your argument?

MR. COOPER: Actually, that goes one step beyond where our opinion leaves the matter, because we only answered the question that was put to us, and that was whether the commission had statutory authority to provide guidelines--sentencing guidelines for capital punishment. We didn't go the next step as to whether it would be required to do so. So, we don't have a legal judgment for you on that at this time.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Mr. Baer?

COMMISSIONER BAER: Mr. Quinlan, do you feel that the Sentencing Commission has the authority to provide for capital punishment for the type of cases you presented-- the murdering of staffers--or does Congress have to act also?

MR. QUINLAN: No. I think Congress has to act, too, Commissioner Baer.

COMMISSIONER BAER: Is the Bureau proposing such legislation?

MR. QUINLAN: Yes, and the department is also supporting that type of legislation.

COMMISSIONER BAER: Thank you.

COMMISSIONER CORROTHERS: Mr. Quinlan, in relation to Commissioner Block's question concerning sanctions within the institution, isn't it true that it is considered appropriate sanction or a rather punishment-type sanction to transfer an inmate from a lower-level custody facility to a higher-level one. However, in the instance when the incident occurs at Marion, then they are, in fact, at the highest-level custody, and that somewhat makes it a bigger problem than it would be otherwise. Is that not correct?

MR. QUINLAN: That's absolutely correct. As I

indicated, for most offenders, Ms. Carrothers, transfer to a high-level-security institution is a very appropriate sanction, but for many--or for actually a very small number of inmates, who are either at Marion or who have been transferred to other high-maximum-security facilities, a transfer after they have already murdered or have received life sentences is of no meaning.

COMMISSIONER CORROTHERS: One question, Mr. Quinlan, one is too many, but do you have an idea as to the total number of correctional officers or employees who were killed by inmates already serving life sentences during 1984? Do you have any idea about the total number? I think '84 was the big year, was it not?

MR. QUINLAN: In 1983, there were two, and, in 1984, there was one, but in the history of the Bureau of Prisons, there have been 12 since 1930. The history of the Bureau--when the history of the Bureau began, there have been 12 correctional staff killed in the line of duty. I do not know if all of the murders were committed by people serving life sentences.

COMMISSIONER CORROTHERS: Were most, in your opinion, motivated by the desire to have their status enhanced among

their fellow gang members?

MR. QUINLAN: To the best of my knowledge, that was one of the primary motives.

COMMISSIONER CORROTHERS: Thank you.

CHAIRMAN WILKINS: To my left, Commissioner Breyer?

COMMISSIONER BREYER: I would ask Mr. Weld--I won't quarrel with your legal analysis. I think it is a very intelligent legal analysis. And I have heard some very strong arguments that you three have made that capital punishment is a desirable thing to have. I suspect others will make arguments the other way.

I might as well say the two things that are bothering me and see if you would like to respond to them. You may not want to respond to them, but I think really the question is is it right for this commission--for this commission to do what maybe it's legally permitted to do? I mean, if everybody in the world exercises and does all the things he has a right to do, we wouldn't have civilization. And the question isn't really to me whether we have a legal right to do it; it's should we do it?

And the two things that specifically bother me are, number one, I'm a judge. I'm a federal judge. Is it appropriate

for me, a federal judge, to say whether I think the death penalty, one of the most controversial issues in this country, is good and, therefore, legal anymore than I would have a right to say, "I think it's bad and, therefore, illegal?" Is it appropriate for a judge and a judicial commission to go and decide this kind of question that's divided Congress for 15 years?

And my question is my recollection--and there are representatives here from the department who were more involved than I--was that in the history of the criminal code reform, the very controversial items of the death penalty, habeas corpus, the exclusionary rule were all by joint agreement stripped from the bill and dealt with in separate bills, so that this particular legislation, which became law, would not be mired down in highly emotional, highly partisan controversy.

Now, in light of that history, is it an appropriate thing? Not is it legally right, but is it appropriate for this commission to try to resolve the issue that Congress, itself, could not resolve and that, specifically stripped from the bill, it became law?

Those questions have nothing to do with the death

penalty as good or bad. In fact, the very fact that you make such strong arguments that it's good is one of the very reasons that the institutional problem concerns me.

MR. WELD: Well, Judge Breyer, I can't answer either question as an expert witness. I would say only with respect to the first question that, of course, judges have to make, by implication, statements as to sensitive issues, even death penalty issues in the context of specific cases all the time, when they are called upon whether to impose a certain penalty, for example, by way of sentence. So, I'm not sure that it strikes me as more out-of-line for a member of the judiciary wearing a commission hat to be called upon to make such a statement even if it is controversial and even if it does divide society.

With respect to the issue of the prudential question, if you will--the wisdom of the commission entering this thicket when there may have been those in Congress who thought that the thicket would not be entered, it seems to me that if the statute, as my brother, Mr. Cooper, maintains does give the commission the authority to enter here, then I would be tempted to come to the conclusion that they have a corresponding duty, unless the death penalty is on the books, unless

there is something in the statute that excerpts or excises the death penalty from the class of penalties that the commission is to address, then I would think, as a statutory matter, that the commission should get into the area.

I suppose one detail that may be not irrelevant here is that if the death penalty provisions are decoupled from the rest of the commission's work--guidelines--and I don't know whether that's finally going to happen or not, but if it did, that would give those in Congress who felt that, you know, the area should not be gotten into, an opportunity to make that known on a straight up or down vote so everything would be on top of the table. There needn't be any lingering recrimination that somehow the procedural avenue by which the guidelines were adopted was inappropriate, but as I say I can't claim to be an expert. Those are just my reactions to those questions.

CHAIRMAN WILKINS: Anyone else like to respond?

I think Mr. Cooper wants to respond, judge, and then I will get to you.

MR. COOPER: Just to endorse what Bill Weld has said and I want to add I do not think, Judge Breyer, that the work of this commission would in any way prejudice any of

its members in their judicial capacity with respect to deciding specific cases, even specific cases under the guidelines that this body ultimately will develop. And that includes any capital punishment guidelines that it may develop.

It seems to me that obviously the obligation of the members of the commission, sitting as judges, will be to apply their judgment as judges at such time as it is necessary for them to come to grips with any question on which the guidelines are relevant.

With respect to prudential concern, I think that one of the major reasons that we have commissions of various kinds throughout the Executive Branch primarily is because it so often happens that Congress finds itself, for one reason or another, unable to bring to bear specifically the kinds of expertise, perhaps, that it's called upon to deal with some kind of question, such as sentencing guidelines, or because for political reasons it is essentially paralyzed to act on with respect to some subject matter.

It does seem to me that the committee--

COMMISSIONER BREYER: Well, you don't think it's a technical question, the death penalty. I mean, it's not just a technical question, and I know that you are worried, as am I,

when an unelected group of people in a sense usurps or in a sense decides a matter of great political moment, and that's really--it's that institutional question that an unelected group of people including three judges, deciding this great question of political moment instead of the elective representatives of the people that calls into my mind the question of institutional propriety.

MR. COOPER: I think your point has merit. My concern would be exacerbated extremely if the decision before this commission was whether or not capital punishment should be imposed for certain crimes. I believe that Congress has made that judgment with respect to a host of federal crimes.

The only decision before this body would be under what restraints, procedural perhaps and otherwise, that penalty should be imposed for those crimes. My concern--or to the extent I am concerned along the lines you suggest is substantially ameliorated by the fact also, as Bill Weld mentioned, that the Congress will have its opportunity to review, examine, debate the wisdom of the idea of this body promulgating sentencing commissions as well as the wisdom of any death sentencing guidelines as well as the wisdom of any particular guideline or procedure that you promulgate.

So, I think it's actually a couple of steps removed from the problem of unelected officials dealing with so very important and emotional an issue.

CHAIRMAN WILKINS: Judge MacKinnon?

COMMISSIONER MAC KINNON: Well, I will just say offhand for myself that I don't see any difficulty. I think we are authorized to do what the statute says we are authorized to do. And the punishments are fixed by the statute and we are merely prescribing some standards for their imposition.

If my interpretation of the statute gives us the authority and the obligation to do this, or just the authority, why that's the end of my concern on it. I don't think the fact that we come from the bench here creates any additional problems.

About the three life sentences, were they consecutive?

MR. QUINLAN: I believe that they were consecutive.

COMMISSIONER MAC KINNON: Now, what is the average time within which that man will be released under those considerations?

MR. QUINLAN: The actual parole eligibility under those--

COMMISSIONER MAC KINNON: I know that there's a 10-year statute.

MR. QUINLAN: 10 years, yes, judge.

COMMISSIONER MAC KINNON: But I am talking about what was the average release time?

MR. QUINLAN: I cannot--I can provide that information to you, judge. I do not know what their--if they have-- I don't even believe that any release dates have been set for any of those individuals.

COMMISSIONER MAC KINNON: My next question is, do you have any statistics on federal discrimination? I know there's a lot of statistics on state discrimination. Do you have any on black-white federal discrimination?

MR. WELD: I believe, Judge MacKinnon, that of 33 federal prisoners executed since a year, which is supplied in my testimony, that five have been minority individuals. 28 were white. At the federal level, discrimination--

COMMISSIONER MAC KINNON: Now, wait a minute. This is state?

MR. WELD: No.

COMMISSIONER MAC KINNON: Federal?

MR. WELD: Federal, Your Honor. At the federal

level the discrimination complaint in the administration of the death penlty does not seem to be borne out.

COMMISSIONER MAC KINNON: And what period of time was this?

MR. WELD: I think it's since--I want to say since 1930, but that may be--since 1927, Your Honor.

COMMISSIONER MAC KINNON: And they haven't had any federal executions since Furman, have they, or have they?

MR. WELD: I am advised that 1963 was the last federal execution, Your Honor.

COMMISSIONER MAC KINNON: And I suppose you all agree that Furman is the controlling decision, except for air piracy?

MR. WELD: Yes, Your Honor.

COMMISSIONER MAC KINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much, gentlemen.

Chief Justice for the State of North Carolina, Jim Axton, was to testify. He has been unable to come today but he is submitting written testimony and I want the record to reflect that. Also, Commissioner Ron Gainer has an engagement of long-standing beginning somewhere around 10:30, as I recall, and he will have to leave, but he will return

shortly within the hour as soon as possible after meeting this obligation.

We are delighted to have with us the Dean of the Harvard Law School, Wiley Branton, and the Honorable Marvin Frankel, former United States District Court Judge.

Dean, judge, we are delighted to have you.

DEAN BRANTON: Thank you, Mr. Chairman, and Members of the Commission. I must first correct my title. I resigned as Dean of the Harvard Law School about three years ago but like my colleague to my left who still carries the title of judge, I suppose I still carry the title of "dean." I am a lawyer engaged in private practice here in Washington. I am appearing however in my capacity as vice president of the NAACP Legal Defense and Education Fund.

Without arguing the question as to whether or not this commission has the authority to set capital sentencing guidelines, I see nothing in the legislation which mandates you to do it, and I would like to urge that you cease and abandon all efforts at trying to set sentencing guidelines.

And I suppose that the strongest feeling that I have on that has to do with the fact that historically capital sentences in this country, particularly in the south, have been

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based, to a great extent, first, on the race of the defendant and also exacerbated by the race of the victim.

COMMISSIONER MAC KINNON: Counsel, or whatever your status is now, I am aware and I'm sure we are all aware about the state instances and you're mentioning those. We are concerned with the federal.

DEAN BRANTON: I am too, Judge MacKinnon--

COMMISSIONER MAC KINNON: I didn't want to interrupt you but--

DEAN BRANTON:--but I strongly believe that any guidelines that are set by this commission would be treated as precedent to some extent by many of the states, and it would simply cause them to escalate their own plans at reinstituting of the death penalty.

I am certainly aware of the fact that, as a general rule, particularly the part of the country that I hail from down south, that we don't normally pay much attention to federal guidelines. In fact, we generally argue against them, but I suspect that this is one area that would be embraced. Quite honestly, I look upon the imposition of the death penalty as it has been practiced over the years as almost an escape hatch for a lynch mob in the south.

I think it has had a deterrent against lynch mobs because there was always the feeling, particularly if the victim was white and the defendant was black, that the person was going to receive a death penalty anyhow.

In the 13 years that I practiced in my native State of Arkansas--and I've lost count of the number of felony cases that I handled--I knew without question that any time I represented a black defendant who was charged with rape or murder of a white person that the death penalty would be sought, and that I would have to work awfully hard to try and avoid the imposition of a death penalty.

I also knew--and this was in the days when the imposition of the death penalty was the rule rather than the exception--I never represented a single black defendant charged with a capital offense against a white victim that I was ever able to get out on bond prior to the trial. And I knew that that was a fact of life.

On the flip side of the coin, I never represented a single black defendant charged with a capital offense against a black victim that I could not get out on bond prior to the trial. It shows you the disparity with which people treat the value of human life based upon the race of the

defendant.

When we started out the NAACP Legal Defense and Education Fund several years ago undertaking to try and defend people who were charged with capital offenses, at that time, I believe two out of three persons on death row were black. We have made some progress in that regard over the past several years; so, it is now I believe one out of every two

In many of the early cases we did not have the empirical data to argue in lower courts. Now, that research has been extensively collected, and other persons who are experts in that field will be talking to the commission later today about the empirical studies that have been made, and I will not go into that.

I just don't see how you can adopt guidelines for capital sentencing without contributing in some way to the continuation of the serious race discrimination that exists in cases of this type.

My colleague, Judge Frankel, will expand on the remarks and the position of the NAACP Legal Defense and Education Fund. I would be happy either at this time or upon conclusion of Judge Frankel's remarks either of us

will be happy to try and respond to questions that the commissioners might have.

CHAIRMAN WILKINS: Thank you, Dean Branton.

Judge Frankel?

JUDGE FRANKEL: Thank you, Mr. Chairman and Members of the Commission.

I want to be somewhat more technically legal in my aspect of the Legal Defense Fund's submissions. I want to remind the commission very briefly that for 15 years since Furman, in Georgia, no federal prosecutor has asked for and no federal court has imposed the death penalty.

As you know, Furman said that statutes, like the federal statutes, providing for capital punishment then were unconstitutional because they failed to provide rational standards and adequate procedures for imposing the death penalty. That put it up, as history has shown, to the legislatures, to the elected representatives of the people to decide whether they wanted to reinstate the death penalty and to determine the criteria on which that penalty might be imposed, and the delicate procedures required for imposing it.

Some 40 state legislatures responded to that

challenge by enacting statutes that had the criteria and had the procedures that they thought could constitutionally warrant the imposition of the death penalty.

In Congress, over these 15 years, the same kind of effort has been attempted and debated but has never been completed. The issue has been put, over those years, in the Congress as to whether the death penalty should be revived or reinstated. When the act under which this commission is laboring was passed, people at both ends of the spectrum, for the death penalty and against it, Strom Thurmond on one side and Edward Kennedy on the other, said, "This is too controversial a subject as we have seen. We are leaving it out of the package." Senator Kennedy, using elocution that had become familiar over the years, said, "It's too controversial to treat now the proposal to reinstate the death penalty."

Now, this morning, the Department of Justice argues that because of five words in the statute, and because of implications that it finds from silence, this commission, in effect, can accomplish the revival and the reinstatement that Congress has not seen fit to achieve thus far.

The submission I want to stress is that that kind

of determination, the judgment as to standards, the decision as to whether and to what extent to revive or reinstate is one of the greatest and most serious, most controversial judgments possible, and one of the judgments, in our community, most uniquely for the Congress and not for any commission--not for this commission with all its other troubles and not a task to be found to be authorized, let alone required, by five words in a section where those five words clearly mean something else--"except as otherwise specifically provided." In those five words, the Department of Justice finds that a dozen death statutes that Congress debated inconclusively about for 15 years were revived and reinstated and, therefore, you should go ahead and create the criteria that Congress has not been able to evolve and enact since Furman.

I am suggesting, with all respect to the department, that if somebody had gotten up on the Floor of the House or the Senate and said those five words accomplish that and never mind what Thurmond and Kennedy said about leaving it out of the package, he would have been hooted off the Floor. It is an argument with deference that we think is absolutely indefensible.

If you look at the Department of Justice memo which

I have read and reread, and far from supporting its legal position, it helps to explode it.

I notice that the department begins with the careful demonstration that this commission, in its view, is an executive agency. Well, it seems outlandish, if the department is right, to require or expect or permit that an executive agency should go ahead and accomplish the kind of legislative action that 40 states and the Congress have seen as a legislative task in the days since Furman.

The department, at great length, points to the prior bills to which I have referred and by an analysis that is both ingenious and, in my view, indispensable, tries to use that legislative effort to bring about the death penalty under the 1984 statute that says not a single word about that important subject.

And my submission to this commission is that if you look at that legislative history and the analysis of it by the Department of Justice, it serves, if anything, to refute the department's argument rather than support it.

Then you go on and you read and you listen this morning and you hear the department say that the death penalty is embraced among your responsibilities because you are

supposed to be evolving sentencing ranges, and then, very quickly, it seems to be obvious to our friends from Justice, that a range can go from a number of years, through a continuum, on to death.

That argument, if it needed explosion, has been exploded by the Supreme Court in looking at this subject. We quote in our memorandum submitted to this commission what everybody knows that death is different. Death isn't part of a continuum or a range.

And the Court said, in Woodson against North Carolina, "death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." And, yet, you are invited--indeed, it's demanded, as I understand it, that you put that on as part of one of the ranges, part of the continuum that you will evolve in making guidelines for sentences.

The chairman asked about procedures. Procedures, as the chairman, observed, were part of the requirements that the Supreme Court imposed in Furman.

Our answer to your question, Judge Wilkins, is that there is no word, as we find it, in your act that authorizes you to go through the very careful, and difficult, and specific

task of evolving new, criminal procedures for the imposition of the death penalty.

I think it was Mr. Cooper who referred to this as a detail that he was not ready to speak about. It is not a detail. It's a vital part of what is necessary to try to create a valid capital punishment statute. It's a task for the legislature, not for this commission, which, as I guess, I keep saying, has troubles enough.

I emphasize that it is a legislative task and that this commission does not have legislative authority. Saying this, I recognize that the production--the product of your labors in the spring will be laid before the Congress and can be disapproved by the Congress, but that's a far cry from the deliberate, positive kind of judgment that's required of the Congress under Furman before the death penalty can be revived or reinstated in constitutional form.

I want to say, in a mildly personal sense, that I have watched the difficult labors of this commission with special interest and with very special support for your enterprise. I certainly hope you will succeed.

And I say that, first, I think you would be exceeding your power if you undertook to revive the death penalty through

the device of creating guidelines for it; and, secondly, if we're wrong in that and you have the power, it would be exceedingly unwise to attempt to use it.

It is my respectful judgment for the Legal Defense Fund and for myself, as a citizen, that if you were to follow the course proposed by the Department of Justice, you would expose this commission to the danger of such violent attacks, such severe disagreements about that, and such severe questions of your authority as to endanger the entire project of evolving suitable guidelines to make prison and other sentences more rational.

We respectfully hope that you will reject that advice as unsound and imprudent. Thank you.

CHAIRMAN WILKINS: Thank you, judge.

Any questions?

Commissioner Baer?

COMMISSIONER BAER: Judge Frankel, as a legal scholar, if you were asked to do so, would you have any difficulty writing the legal procedures for the death penalty for the types of cases that Deputy Director Mike Quinlan described?

JUDGE FRANKEL: Well, I hope I would have difficulty.

I have not tried to do it. I think it's a serious, difficult, and delicate job, but I think it can be done, and I'm not saying it is beyond your power to do it, if you were authorized and asked to do it.

I might say, by the way, that the first part of the Department of Justice's argument, as I listened to it this morning, is an argument exactly of the kind you would address to Congress, why the death penalty is a good idea; why it ought to be revived, and why it's needed. But that's not a question that this commission has ever had entrusted to it, so far as I understand it.

CHAIRMAN WILKINS: Mr. Block?

COMMISSIONER BLOCK: Judge Frankel, there was a suggestion made by Mr. Weld that possibly we would decouple the death penalty guidelines from the other parts of the guidelines, and that would provide a mechanism by which Congress could have an up-and-down vote on the death penalty and, in some sense, the provisions.

What's the problem with that from your point of view?

JUDGE FRANKEL: Well, the problem is--whether you couple or decouple, the problem is, first, were you called

upon to do that? Do you have the authority to do that? Should you allow yourselves to be used as the vehicle for a revival or reinstatement that Congress hasn't been able to work up? That's the first problem.

COMMISSIONER BLOCK: Congress would be then presented with the choice of whether to vote it down--

JUDGE FRANKEL: Pardon?

COMMISSIONER BLOCK: We would not be reestablishing anything. I mean, we would simply be proposing a set of guidelines for the death penalty, Congress having the ability then to throw that out.

JUDGE FRANKEL: Well, if you view it in that sense and you really mean that you are going to put it up as a proposal that won't become effective unless Congress affirmatively approves it, that's one thing, but if you are saying you are going to serve it up, and that those guidelines become effective and the death penalty becomes effective if Congress doesn't disapprove it, then everything I have said is against it. Whether you couple it or decouple it, I think you would be exceeding your statutory authority and I think, again with deference, you would be violating the constitution.

CHAIRMAN WILKINS: Commissioner Corrothers?

COMMISSIONER CORROTHERS: I have a question to Dean Branton and possibly Judge Frankel, as well.

First, I don't think that many people would argue and would tend to agree that this country has a history of unfairly implementing the capital punishment sanction. My question is, do you think that the development of guidelines could minimize the discriminatory practices?

DEAN BRANTON: Oh, I think if they are carefully constructed that they possibly could as a guideline, but I think that the overriding effect would be to help reinstitute the death penalty throughout the country. I think it has a greater detriment than a benefit.

COMMISSIONER CORROTHERS: So, the bad outweighs the good in that area?

DEAN BRANTON: In my opinion, it does. Judge Frankel may have a comment on that.

JUDGE FRANKEL: Well, I think the problem of racial and other discrimination and arbitrariness, in general, in the assignment of the discretion to put people to death are grave and terribly delicate problems that I am not prepared to say have been resolved with complete satisfactoriness in

any of the state statutes, even though they have been held constitutional. And I think that's why Congress has had so much trouble with this. Apart from the fact that people are for or against the death penalty, which is a big fact and a big threshold problem, the question of how you administer the death penalty and how you keep prosecutors in the end from having major power for deciding who gets exposed to the death penalty and who doesn't, just to name one, those are agonizing problems of the greatest difficulty. And that's entirely different, in my judgment, from the sufficiently difficult problems that you face in evolving prison guidelines.

COMMISSIONER CORROTHERS: Thank you.

CHAIRMAN WILKINS: Any other questions?

COMMISSIONER MAC KINNON: Just a minute. Judge Frankel, you are familiar with New York?

JUDGE FRANKEL: With New York?

COMMISSIONER MAC KINNON: Yes.

JUDGE FRANKEL: Well, I live there and as I grow older I get more familiar with it, yes.

COMMISSIONER MAC KINNON: That's what I thought. What have they done on the death penalty?

JUDGE FRANKEL: New York, so far as I know, has done

nothing about the death penalty, because it's been vetoed each time the legislature tried to enact it by governors who oppose it essentially I think on moral grounds.

COMMISSIONER MAC KINNON: Thank you.

CHAIRMAN WILKINS: Again, thank you, and we appreciate very much the very thoughtful written submissions that you submitted.

Our next witness is a director of Institute for Government and Politics, Mr. Patrick McGuigan, and research director, Mr. Jeffery Troutt.

Gentlemen, we are glad to have you.

MR. MC GUIGAN: Mr. Troutt is not here at the moment. I sent him back because I realized we got the copies in late on Friday. So, I sent him back to make some copies and bring them over. We both have written statements, which you will be able to pursue at length later.

I will present a summary of my testimony and if Jeffery gets back in time he can, too.

CHAIRMAN WILKINS: Thank you.

MR. MC GUIGAN: The Sentencing Commission is considering now whether or not to promulgate guidelines to provide for a constitutionally sound imposition of capital

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punishment.

Naturally, I applaud this sensible effort to have the national law reflect the will of the American people who have time again in opinion polls and at the voting booth expressed their support for capital punishment.

Lest anyone misinterpret the results of the recent elections, it is interesting to recall that the same California electorate which narrowly returned Alan Cranston to the U. S. Senate overwhelmingly rejected three justices who themselves rejected the death penalty on the most tenuous of grounds. This is a reflection of the continuing fact that the vast majority of the American people support the death penalty.

As you are all aware, a recent media general AP poll found that 85 percent backed the ultimate penalty.

Now, I maintain that the Sentencing Commission does have the authority to promulgate guidelines for the imposition of a death penalty. The Sentencing Reform Act of 1984 established the commission and, under 28 U.S.C., Section 994, gave the commission the responsibility to promulgate and distribute to all courts of the United States guidelines for use of a sentencing court in determining 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, "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."

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.

Your contemplated action is a first step towards reasserting the right of Americans to impose the supreme penalty upon the most evil perpetrators of crime.

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 the intent of Congress to charge the commission with promulgating guidelines for the

imposition of the death penalty. It does not preclude the use 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.

Now, 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, after all, 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.

As a second point, I maintain that the commission should promulgate guidelines for each crime for which federal law carries the penalty of death.

The commission specifically asked this question in a letter to individuals who were invited to testify. 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 allowed--created the death penalty for certain crimes. It is not the 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 the commission to promulgate guidelines to implement that penalty in a manner which is consistent with the will of the Congress.

The Congress, in conclusion, 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.

In cemeteries all over our country lay the bodies of men, and women, and children who suffered at the hands of the most heinous criminal predators. If we could bring them back, many of them would tell us that the death penalty can, indeed, deter murder. If their families were before this commission, many of them 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's constitutional and 85 percent of the American people want it, why isn't it happening?

- I will be glad to take your questions.

CHAIRMAN WILKINS: Thank you very much.

Any questions from the commissioners?

All right, Judge MacKinnon?

COMMISSIONER MAC KINNON: What is the Institute of Government and Politics?

MR. MC GUIGAN: It's an arm of the Free Congress Foundation, a public policy research group.

COMMISSIONER MAC KINNON: An arm of what?

MR. MC GUIGAN: The Free Congress Foundation.

COMMISSIONER MAC KINNON: What's that?

MR. MC GUIGAN: It's a public policy research group, a conservative organization here in the Nation's capitol. It's been in existence since 1977.

COMMISSIONER MAC KINNON: You interpreted the California election as being based on rejection of the death sentence?

MR. MC GUIGAN: I think that was the key factor; there were many others.

COMMISSIONER MAC KINNON: Would it be more accurate to say that it was based with respect to those judges on the specious grounds that they gave for their particular action?

MR. MC GUIGAN: Well, yes, and it's an interesting question because if you look at Justice Stanley Moss, who has on occasion struck down imposition of the death penalty and who personally opposes it and has said so repeatedly, but nonetheless much more frequently upheld the constitutionality of individual death penalty sentences, if you look at the example of him, he had virtually the identical rate of reconfirmation as the two more conservative justices that were reconfirmed.

COMMISSIONER MAC KINNON: So, the--

MR. MC GUIGAN: In other words, I think the voters were making a very interesting and discerning judgment.

COMMISSIONER MAC KINNON: They made a judgment that the judges weren't proper judges, rather than solely on the death sentence.

MR. MC GUIGAN: I think that's correct.

COMMISSIONER MAC KINNON: Did I understand you to say that you thought we ought to have different guidelines for each separate statute that calls for the death penalty?

MR. MC GUIGAN: I think that might be required.

COMMISSIONER MAC KINNON: Well, I mean, you would have to have something that covered everything, naturally, but do you think--

MR. MC GUIGAN: I think that's possibly precisely because of some of the concerns that have been raised earlier about the potential for abuse and the recognition that such abuse has occurred in the past. I think the greater the guidance to judges that emerges from the commission the less chance that there will be arbitrariness in future imposition of the death penalty.

COMMISSIONER MAC KINNON: What did you contemplate when you said "guidelines." Did you mean guidelines for the

particular offense?

MR. MC GUIGAN: Yes, I think quite a bit of specificity along the lines of what the commission has issued now twice in the two drafts of guidelines for other parts of the criminal code.

COMMISSIONER MAC KINNON: Thank you.

CHAIRMAN WILKINS: Any other questions?

(No response.)

CHAIRMAN WILKINS: Thank you very much, sir. And we will look forward to Mr. Troutt's submission.

MR. MC GUIGAN: I apologize immensely. It's my fault that Jeffery is not here.

CHAIRMAN WILKINS: That's all right. You well represented him and we will receive any written submission that he has as well as any additional information that you would like to give us, too. Thank you very much.

MR. MC GUIGAN: Yes, sir. Thank you.

CHAIRMAN WILKINS: Our next witness is Mr. Bruce Fein, a Visiting Fellow for Constitutional Studies at the Heritage Foundation.

Mr. Fein, we are glad to have you.

MR. FEIN: Thank you, Mr. Chairman.

My written statement was submitted last week and I will assume that members of the committee have read it previously. I only need to summarize the legal argument that is presented there as to the duty of this commission to promulgate guidelines for the imposition of the death penalty where Congress has previously determined that death is an appropriate sentence.

Let me begin, I think, by quoting from Justice Holmes in his famous dissent in Northern Securities vs The United States. "Great cases," he said, "like hard cases make bad law. For great cases are called great not by reason 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," he said, "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."

And I would submit that it is the hydraulic pressure created by the emotions roused in contemplating the death sentence that has caused some to question the duty of this commission to promulgate guidelines to govern the

imposition of the death penalty.

Basic standards of statutory construction leave no room for the argument that the Congress distinguished between death and other sentences authorized under law regarding the commission's duty to promulgate guidelines that will constrain the discretion of the sentencer--the sentencing authority. Indeed, the whole purpose of the creation of this commission was to provide such kinds of constraints upon the sentencing authority because of concern that absent constraints sentences would be imposed arbitrarily according to the whim or idiosyncrasy of particular judges.

Now, there's been grave concern--I think legitimate concern raised about the authority or the propriety of this commission to promulgate guidelines where Congress has not acted directly.

I think that worry is overstated. I think that from the factors that Congress has enumerated as being worthy of consideration as either a mitigating or aggravating circumstance, one should at least contemplate following those guidelines as well as those present in the Anti-Hijacking Act of 1974 in creating a scheme that will be faithful to which Congress has already expressed are the appropriate

mitigating and aggravating factors in determining the sentence whether of imprisonment, or death, or otherwise.

And let me sketch for you what I think can be reasonably deduced from Congressional statutes as to the appropriate mitigating and aggravating circumstances for a sentencing authority in imposing sentence under those statutes that authorize death.

Mitigating factors--if the age of the offender is less than 18, a mitigating factor; no prior criminal history, a mitigating factor; low incidence of the crime, mitigating; lack of foreseeability that death would occur; a community perception that the crime was not threatening the social fabric; the offender playing an insubstantial role in the commission of the crime; lack of education opportunity for the defendant; any mental, emotional or physical infirmity; the insubstantial likelihood of recidivism; the fact that the crime created no danger to persons other than the victim; the fact that the crime may have been committed under some kind of duress and any other evidence that the defendant desires to introduce as a mitigating factor, as the Supreme Court has required in any event in its decision in Lockett vs Ohio.

The aggravating factors that can be deduced from

Congressional statutes--the fact that the offender may have committed previous serious crimes; a substantial likelihood of recidivism; a high incidence of the crime committed; a dependency on crime for the defendant's livelihood; the fact the crime created substantial community fear; the prominent role the defendant played in the commission of the crime; the fact that the crime created a physical danger to persons other than the crime victim; the commission of the offense in an especially heinous, cruel, or depraved manner, and the substantial public harm caused by the offense.

I think it is clear from what Congress has said in its determination of how death should be imposed under the Anti-Hijacking Act that, if by preponderance of the evidence, the government proves an aggravating factor and the defendant fails to prove any mitigating factor, then death ought to be imposed. If no aggravating factor is proven or if a single mitigating factor is established, there should be no death sentence.

And I think it's reasonably clear that this commission should be following the procedures for establishing the death sentence that echo those drafted in the Air Piracy Act 49 U. S. Code, Section 1473.

The fact that this commission can and ought to rely on the factors that Congress has identified, the procedures that Congress has thought appropriate for administering the death penalty ought to remove those doubts or qualms about the commission undertaking a policy judgment that ought more properly to rest with those elected officials.

I submit those elected officials have already made those decisions and this commission would simply be filling in the interstices and not making any substantial policy judgment in doing so.

Thank you, Mr. Commissioner.

CHAIRMAN WILKINS: Thank you very much, Mr. Fein.

Any questions?

On my right, Mr. Block?

COMMISSIONER BLOCK: Mr. Fein, I would just like to follow up on one small point and that is under the list of mitigating factors you listed lack of educational opportunity. What do you interpret that to be?

MR. FEIN: Lack of education. If the defendant had had no education at all that may relate somewhat to his ability to conform to the law, if he was totally ignorant. I am saying that is a possible mitigating factor. It's one

that Congress has identified as possibly mitigating under the guidelines that this commission should be promulgating for other non-capital crimes.

COMMISSIONER BLOCK: You meant it as the ability to understand?

MR. FEIN: Yes, not something that would go necessarily to insanity but would show that the defendant perhaps had a lesser ability to understand the nature of his acts than others who had full education.

CHAIRMAN WILKINS:

Any other questions?

COMMISSIONER MAC KINNON: Where do you come from? The Visiting Fellow for Constitutional Studies, what is that?

MR. FEIN: At the Heritage Foundation, my primary duty at present is developing and implementing a schedule of lectures that examines the constitution during the bi-centennial celebration. I am not, however, speaking to represent the views of the Heritage Foundation as an institution. I am speaking individually.

COMMISSIONER MAC KINNON: What is the Heritage Foundation?

MR. FEIN: Well, it's popularly known, I suppose,

as a conservative think tank, but it undertakes a variety of public policy studies, examination of legislation, or otherwise, in order to encourage and heighten the intelligence of public discourse on matters of concern to the American people--foreign policy and domestic policy.

COMMISSIONER MAC KINNON: I was interested in your inclusion of low incidence of crime as a mitigating factor. Certainly, you wouldn't apply that to treason, which is an infrequent offense?

MR. FEIN: No. Treason may well be one of those crimes where the death penalty being mandatory--

COMMISSIONER MAC KINNON: It isn't mandatory.

MR. FEIN: --permissible under the constitution.

COMMISSIONER MAC KINNON: Mandatory?

MR. FEIN: Mandatory, yes. The Supreme Court has never ruled out the possibility that certain crimes very, very dangerous to the weal might pass muster even though the death sentence is mandatory.

COMMISSIONER MAC KINNON: I know, but it isn't. The statute doesn't make it mandatory, does it? There isn't anything that makes it mandatory.

MR. FEIN: The death sentence for treason?

COMMISSIONER MAC KINNON: Yes.

MR. FEIN: Well, but that could be an instance where this commission might wish to include a mandatory penalty if it's thought that the danger to the sovereignty is so great that nothing ought to excuse that type of offense.

COMMISSIONER MAC KINNON: Well, there's a difference between treason in war and treason in peace.

MR. FEIN: Yes, there is in terms of the danger to the country.

COMMISSIONER MAC KINNON: Thank you.

CHAIRMAN WILKINS: Thank you very much, Mr. Fein.

John Shattuck and Jane Rocamora, are you present? I understand Mr. Shattuck may have--is this Mr. Shattuck? Good; your airplane did make it.

MR. SHATTUCK: It did; thank you very much, sir.

CHAIRMAN WILKINS: We are delighted to have both of you with us.

These two witnesses are representing Amnesty International.

MR. SHATTUCK: Thank you very much, Mr. Chairman.

My name is John Shattuck and I am accompanied by Jane Rocamora. We both appear this morning on behalf of

Amnesty International, whose national board of directors I serve. I am also a vice president of Harvard University and a member of the Harvard Law School faculty, but I appear here in my capacity as an Amnesty board member.

Amnesty International is an independent, worldwide, human rights organization of more than 500,000 members. It has formal consultative status with the United Nations and other similar international and regional bodies. And in 1977, it was honored with the Nobel Peace Prize.

Last year, Amnesty conducted an extensive fact-finding project in the United States to study the death penalty and the manner in which it is imposed.

This month, a report has been published summarizing the findings of the project and I am submitting that report to the commission along with my prepared statement.

The report concludes that the imposition of the death penalty in the United States has resulted in arbitrary and discriminatory executions that violate a variety of international standards.

In my oral testimony this morning, I would like to offer a brief summary of our views on the two questions posed by the commission, first, whether the commission has

jurisdiction to propose judicial guidelines for reinstating the death penalty at the federal level; and, second, if so, what those guidelines should provide.

Our view on this matter starts from the premise that the penalty of death is fundamentally different from all other penalties because it is irreversible. And when Congress created the Sentencing Commission it reflected this view. First, it left the death penalty out of the commission's expressed statutory mandate; and, second, not only did Congress leave reference to the death penalty out, it appeared to have excluded it from consideration by expressly limiting the penalties for the commission to consider to three--fines, probation and imprisonment.

By doing this, Congress reserved to itself the task of determining whether and how the death penalty might be reinstated at the federal level following a series of Supreme Court rulings over the last 15 years calling into question procedural and substantive aspects of earlier death penalty statutes.

We know that Congress has reserved the death penalty decision to itself or at least we have quite good evidence to that effect, because in one instance, the Anti-Hijacking Act,

it specifically provided for a new death penalty during the period of time that I am speaking of.

But the issue of jurisdiction before the commission is far more than a question of statutory construction. It is also, we submit, a profound issue of national policy with far-reaching ramifications for both domestic and international law.

The Department of Justice has argued that federal death penalty statutes can simply be carried forward by this commission by the promulgation of certain procedural guidelines to limit the discretion of judges and juries in capital cases.

We respectfully submit that this position is untenable because it does not take into account a wide range of constitutional issues and international standards that have arisen or come into being since the federal death penalty statutes were originally enacted.

In our testimony and the report that we have submitted to the commission, Amnesty identifies a variety of internationally accepted minimum standards concerning the death penalty, all of which are applicable to the U. S. and many of which are fundamentally at odds with U. S. death penalty

practices.

The question of U. S. adherence to international standards is a major political issue which should not be resolved, with all due respect, by an administrative body however competent that body may be. It is clearly an issue for the Congress and for the President.

Let me very briefly review, Mr. Chairman and Members of the Commission, five of the areas covered in the Amnesty report in which international standards and U. S. obligations have a direct bearing on the issue of reinstating a federal death penalty.

First is the execution of juvenile offenders. Although there are at least 32 juvenile offenders now under sentences of death in the United States, their execution is expressly prohibited by the International Covenant on Civil and Political Rights and by the American Convention on Human Rights, both of which were signed by the U. S. in 1977 but have not yet been ratified by the Congress.

Of the thousands of executions worldwide that were recorded by Amnesty between 1980 and 1986, only eight were of juveniles. Three of those eight were in the United States.

Federal law is silent on the question of whether

juveniles can be sentenced to death. So, the issue is clearly presented.

A second area involves the execution of persons who have become mentally incompetent while they are in prison awaiting execution. Although a United Nations Resolution bars the execution of mentally incompetent prisoners, Amnesty's report details numerous deficiencies in U. S. practice at the state level in particular with regard to mental incompetency and the death penalty.

Most of these deficiencies relate to the varying state procedures that are used to determine the competency of prisoners on death row prior to their execution. In the absence of a procedurally acceptable, substantively acceptable federal death penalty at this point, federal law would appear to be simply unclear on this question of the possible execution of persons who are mentally incompetent, or at least the procedures for determining whether their competence should be an issue.

A third area involves racial discrimination in the application of the death penalty. The Amnesty report presents substantial evidence of such discrimination, again, at the state level, during recent history in the United States.

Recognizing the problem, the Department of Justice proposes to require a jury to certify that its decision in a death penalty case was free from racial discrimination. This proposal, with all due respect, misses the point although it underscores the problem, because many studies demonstrate that racial disparities that have occurred in death sentencing go far beyond the jury and result from actions that occur from the moment of arrest on and need to be taken into consideration in that regard.

A fourth area involves inadequate assistance of counsel. Here, again, international standards adopted by the United Nations require a person charged with a capital crime to have adequate assistance of counsel at all stages of the proceeding.

In its report, Amnesty documents substantial evidence that defendants in capital cases in the United States, often have had unprepared, inexperienced and under-compensated counsel, and that the inadequacy of counsel greatly increases the likelihood that a death sentence will be imposed and carried out.

One would hope that this would not be the result at the federal level, but, again, experience suggests otherwise.

The final area for concern is that the reintroduction of the death penalty in federal law would itself appear to violate international standards. Virtually every international body, starting with the United Nations in 1971, has adopted, within the last 15 years, a bar on the reintroduction or expansion of the death penalty by member nations.

To reinstate the death penalty now at the federal level in the United States would appear to violate these international standards and would be contrary to the clear international trend toward restriction and even abolition of the death penalty.

In conclusion, Mr. Chairman and Members of the Commission, let me simply repeat what I said at the outset, the premise that the death penalty is fundamentally different from all other criminal penalties must permeate these proceedings and the consideration by the commission of whether it has jurisdiction over this matter.

The Congress recognized this fact by not including the penalty in its charge to the commission. International bodies of which the United States is a member have recognized this fact by adopting standards restricting the use of the penalty. And an administrative body, like this commission,

should, in our view, leave the decision whether to reinstitute the federal death penalty where it belongs with the Congress which created the commission and reserved to itself the decision on this complex and profound matter that has far-reaching domestic and international ramifications.

Thank you very much, and I would be happy to respond to any questions that you might have.

COMMISSIONER NAGEL: Thank you very much, Professor Shattuck.

Any questions to my right?

COMMISSIONER BLOCK: Mr. Shattuck, I guess I am somewhat disturbed by the introduction of international standards. When you mention that, that's really not a question for us to take on, but let me follow that since you have introduced it. Let me follow that up in terms of these standards promulgated by the august body, The United Nations.

Are we signatories to these particular restrictions and standards that you have cited?

MR. SHATTUCK: We are signatories with respect to the treaties that I cited. We have not yet ratified them in the Congress.

And I should say, Commissioner Block, that the

reason this issue is presented--the reason we have raised it before the commission is not to urge the commission to construe or weigh, in any detailed way, the nature of the international standards but, rather, to recognize that another dimension of the issue before you involves international law and the ultimate question of whether international standards should have a bearing on the reinstitution of the death penalty at the federal level. And with all due respect we believe that is an issue of great political moment and, therefore, more appropriate for the body that created the commission, the Congress, rather than the commission itself.

COMMISSIONER BLOCK: I guess I still fail to understand the logic of introducing it, but let me follow that somewhat further.

Again, if you go back to Mr. Weld's suggestion possibly that the death penalty provisions be decoupled from the guidelines, in general, and those provisions be sent to Congress with the possibility there for an up-or-down vote, isn't that the appropriate forum for the international standards to be debated and not in this commission?

MR. SHATTUCK: Well, I think, Mr. Chairman, again, the issue of the direct and immediate applicability of the

standards to a particular case involving the death penalty that might be pending in a federal court and a challenge that might be made to an execution based on international standards is not an issue that we believe is properly before the commission and we are not presenting it in that way.

And it may be that the question of ratification and the nature of a particular standard is one that would have to ultimately be adjudicated, but we think that the over-arching question is one that is really appropriate for the Congress to address and does demonstrate the very fundamental difference between this penalty and the other penalties that are being considered by the commission.

COMMISSIONER BLOCK: There are, I understand, international standards on imprisonment also. I mean, the international nature doesn't differentiate it, does it--I mean, the non-reversibility? There's an inherent difference. The international conventions on this don't differentiate it. You are not trying to make the case that it's because of these international standards that the death penalty--

MR. SHATTUCK: No, but I think in the case of other penalties which the Congress has very directly identified in the statute creating the commission it is appropriate for the

commission to make determinations that relate to those penalties and their availability under U. S. law. With respect to a penalty which is not identified in the charge to the commission, which raises issues of international law in addition to the constitutional questions that are presented as well as issues of public policy, we would suggest that it is really appropriate for the commission not to make a determination with respect to that penalty.

COMMISSIONER BLOCK: Thank you.

CHAIRMAN WILKINS: Mr. Baer?

COMMISSIONER BAER: Does Amnesty International support the death penalty in any kind of cases or under any circumstances?

MR. SHATTUCK: No, it does not.

COMMISSIONER BAER: In other words, the current law which permits the death penalty for skyjacking when innocent people are killed, you oppose the death penalty on those cases?

MR. SHATTUCK: That's correct.

COMMISSIONER BAER: So, you would also oppose the death penalty for the kind of cases that were described earlier this morning, like persons serving life who committed a

murder, who killed a guard or an officer, you don't favor the death penalty for those people?

MR. SHATTUCK: That's correct.

COMMISSIONER BAER: What do you favor for those people?

MR. SHATTUCK: Well, we do not hold ourselves forward as experts on the appropriate nature of prison sentences but certainly a long prison term might well be appropriate in that circumstance.

But we are here presenting our view of the ultimate issue of the death penalty rather than any alternative view of the nature of the sentence that might be imposed by the court based on guidelines that this commission might promulgate within the area of the three categories that are appropriate for the commission's action.

CHAIRMAN WILKINS: Questions?

COMMISSIONER BREYER: Mr. Shattuck, let me ask you a question really not to do with Amnesty, but I know in your very long and distinguished career you have--

MR. SHATTUCK: Long but I'm not sure distinguished.

COMMISSIONER BREYER: Oh, yes, very distinguished. In fact, you had a lot of practical experience with the bill

that became the law that authorized this commission. And I think you have lived through, indeed, were intimately familiar in the lobbying capacity and as a student of the subject with all the stages at which this bill became a law and, indeed, with its parents, the previous bills in 1980.

COMMISSIONER MAC KINNON: Grandparents.

MR. SHATTUCK: It's grandparents were in 1976.

COMMISSIONER MAC KINNON: Great-grandparents. Now, I think I am right that in each of those instances the bills that became law they began with a provision included in the bill that would restore the death penalty. And then that provision was stripped out of the bill each time and made a subject of a separate bill.

Now, you were there and you were familiar with it, I believe. In any of those instances including this one, once the death penalty was stripped out of it, can you recall any Senator, any Congressman, any staff member who thought that the stripped-down version of the bill would lead to the restoration of the death penalty through the action of this commission?

MR. SHATTUCK: No.

COMMISSIONER BREYER: Did you ever hear anyone

suggest that?

MR. SHATTUCK: I think not at all. In fact, it was the commission--the creation of the commission was quite clearly a very broad consensus within the Congress and was something that was regarded as one of the, if you will, jewels of the ultimate enactment of the legislation regarding sentencing. However, the question of the death penalty was, as you suggest, Mr. Breyer, repeatedly removed from consideration within the context of the commission as a result of separate legislation, separate bills that were moved through the judiciary committees with--

COMMISSIONER BREYER: You never heard anybody say-- never heard any of that that--

MR. SHATTUCK: --respect to the death penalty.

COMMISSIONER BREYER: And we were at odds on some of these things, as you recall, but you worked for an organization that was against the stripped-down bill. You were against it. And I recall at one point you submitted a memorandum of 18 objections to it, and you had a number of objections.

Now, I don't recall when you objected to the stripped-down bill. I am thinking of that memorandum with 18 points.

Nowhere did you mention that you were against this bill because you are against the death penalty. Why didn't you mention it?

MR. SHATTUCK: There was--I mean, clearly, there was no reference to the death penalty in the legislation in that context nor in the particular language regarding the commission.

It was, I think, quite clear--and we have cited in the report that we have submitted to the commission a number of comments by proponents of the death penalty that they felt the only way to secure the enactment of the legislation creating the commission and other aspects of criminal code reform was to remove the death penalty in agreement with co-sponsors of the legislation and put it on a separate track and as a result, of course, it did not get enacted.

CHAIRMAN WILKINS: Judge MacKinnon?

COMMISSIONER MAC KINNON: Mr. Shattuck, I read a lot about Amnesty International but I don't know much about it. Where is its principal office?

MR. SHATTUCK: It's principal office, Judge MacKinnon, is in London, England. It's the international secretariat for Amnesty.

COMMISSIONER MAC KINNON: And how long has it been in existence and who runs it?

MR. SHATTUCK: Well, it was founded in 1961, and it is run by an international secretariat and a general secretary. And then there are--

COMMISSIONER MAC KINNON: How chosen? How elected?

MR. SHATTUCK: Sorry?

COMMISSIONER MAC KINNON: How chosen?

MR. SHATTUCK: Well, the international secretariat and the international executive committee are elected, or, at least, the executive committee are elected by the members of the organization who constitute various sections and individual countries. The United States section, whose board of directors I serve on, is made up of an elected body of people such as myself, who are elected by the membership. We then, in turn, would elect representatives to the international secretariat. It is quite an internally democratic organization.

COMMISSIONER MAC KINNON: "Our board of directors" includes how many people and where do they come from?

MR. SHATTUCK: Well, the board of directors of the American section is, I believe, 23 or 24 members, and they

come from all parts of the country.

COMMISSIONER MAC KINNON: Name some of them.

MR. SHATTUCK: Name some of them?

COMMISSIONER MAC KINNON: And their backgrounds.

Who do they represent?

MR. SHATTUCK: Well, perhaps--

COMMISSIONER MAC KINNON: Or what do they represent?

MR. SHATTUCK: Would it be helpful, Judge MacKinnon, if I provided you a list of--I'm not--of--I mean, it's certainly a public--

COMMISSIONER MAC KINNON: I would like to have it very much.

MR. SHATTUCK: --a public board of directors and we would be happy to provide you with their identity.

COMMISSIONER MAC KINNON: Because I think that these views that come up and speak for various groups are good or bad depending on the group they represent. Just like Congress speaking for the United States, a group speaks for its own-- or an individual speaks for its own group.

You made one statement that "inadequate assistance of counsel," you had made a study and your experience suggests that those in federal death sentence cases were not adequately

represented by counsel. Now, tell me a little more about that.

MR. SHATTUCK: Judge MacKinnon, I believe the references in the study that we have submitted to the commission are predominately to state practices which, of course, are all we really know about over the last 15 years, considering that the federal death penalty has lain dormant during that period.

COMMISSIONER MAC KINNON: Well, we are somewhat aware of those, but you wouldn't say that you have experience that extends to the federal level at this time?

MR. SHATTUCK: We do--of course, during the period, I believe, 1933 to when the last federal death penalty was--last federal execution occurred, which I believe was about 1963, I think there were only 33 federal executions. That, happily, from our point of view, is a small statistical sample. We have not done the kind of detailed study of federal executions that occurred during that period that we have done with respect to the state executions that have occurred during the last 15 years, as to which there are tables and data appended to our report.

COMMISSIONER MAC KINNON: I just probably have one

last question. You don't think that the death penalty was justified in the Greenlease kidnapping where they kidnapped that young boy, killed him, buried him in the back yard, and then went out and collected the money and sat in the bars drinking--a man and a woman? You do not think that the death sentence was an adequate sentence in that particular case?

MR. SHATTUCK: Well, Judge MacKinnon, these issues are obviously profound and difficult. I would have great difficulty answering if I was not honest with you to say that the position of Amnesty International, and my own personal position, is that the death penalty under all circumstances is inappropriate, cruel and inhuman. Obviously, there are many people who would disagree with that position, but it is a position that the organization has weighed with great care.

And I might add that, just in further response to your last question, the position--the policy position with respect to this issue really comes from the entire international organization of Amnesty and is presented by the international secretariat. It is not a position that is developed exclusively by the United States section.

COMMISSIONER MAC KINNON: Well, you are expressing

then an independent, international position rather than your own viewpoint?

MR. SHATTUCK: No, no. I am expressing my own viewpoint, as well, but I am trying to underscore the gravity of the--

COMMISSIONER MAC KINNON: It is also supported internationally.

MR. SHATTUCK: By the organization of Amnesty and by its members in the United States, as well.

COMMISSIONER MAC KINNON: And against any death sentence under any circumstances in any crime.

MR. SHATTUCK: That's correct.

COMMISSIONER MAC KINNON: Including, as Commissioner Baer said, in the first instance that he cited to you. Thank you.

CHAIRMAN WILKINS: Thank you very much. We appreciate not only your testimony but your written submissions.

MR. SHATTUCK: Thank you very much.

CHAIRMAN WILKINS: Our next witness is Executive Director of the New York State Defenders Association, Mr. Jonathan Gradess. He is also representing the National Coalition Against the Death Penalty.

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MR. GRADESS: The record, Mr. Chairman, should reflect precisely that I am here for 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.

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; and 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 revealed 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 has truly 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's happening

and that we are going to close down the death penalty in the United States. We are going to lead our national community back to decency and to compassion.

And we ask from you today only one small contribution 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 abolitionish 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 decision-making 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 to fine-tune it.

The pure guideline 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 guideline 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 creditability your sentencing guidelines project may have for non-capital sentences, adding death penalty guidelines will surely destroy that creditability.

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 after 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 guideline sentencing was to allow out-lyers--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 decisionmaking 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. With 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 efficacy 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.

One, 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?

Two, 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.

Three, calling the risk of erroneous convictions remote does not make it remote. Everyday 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 in this century been 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.

Four, 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.

Five, 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 would 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' 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 underway. 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.

Six, 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.

CHAIRMAN WILKINS: Thank you very much, Mr. Gradess.

Any questions from the commissioners?

Commissioner Baer?

COMMISSIONER BAER: Your earlier statements today indicated you don't believe the national polls which say 85 percent of the American people favor the death penalty in certain aggravated cases, is that right?

MR. GRADESS: No, I didn't mean to indicate that. I think that the Gallup Polls and the one-type, bullet-type questions that are asked, like, "Do you support the death penalty for child torture murderers?" and that kind of question which politicians ask and newspapers ask, those seem to be generating accurate statistics I suspect. When asking that question, 86 or 87 percent of the American people answer, "Yes, I want a death penalty."

COMMISSIONER BAER: But you were saying--

MR. GRADESS: No. The data cited in my testimony indicates that when you provide to people--and I would include in this the U. S. Sentencing Commission, most probably--information on the humanitarian and utilitarian aspects of the death penalty with control for placebo information, the people, given the humanitarian information and utilitarian information, change their minds, even though their predisposition is for the death penalty. That's what it is, and the citation is on the first page--very interesting studies.

COMMISSIONER BAER: My real question then is why do you think the Congress doesn't want to vote on this issue?

MR. GRADESS: Why do I think the Congress doesn't want to vote?

COMMISSIONER BAER: Do you think Congress should vote--

MR. GRADESS: I would think that the Congress is struggling much in the way that the American people struggle.

COMMISSIONER BAER: Would you like to see a vote today?

MR. GRADESS: In the United States Congress?

COMMISSIONER BAER: Yes.

MR. GARDESS: No, I would like never to see a vote.

COMMISSIONER BAER: You are afraid to see a vote, right?

MR. GRADESS: I hope it stays for a very long time in this limbo debate.

COMMISSIONER BAER: You're afraid to see a vote from your position? You don't want to see a vote?

MR. GRADESS: Well, fortunately for us, I don't control the vote. I am not afraid to see it. My hope would be that the kind of pressure that you, yourself, are being placed under would not come to the Congress. I suspect, given the time and resources the Department of Justice has demonstrated here this morning--the eight or ten people in the task force back home, if I had them at my disposal, I

could turn Congress and turn this commission, given the time and energy to do it. That's my true answer to you.

If I saw a vote today, we might have a death penalty, but you wouldn't have an execution for a decade, and that's part of the problem. So, either way, my point remains the same.

CHAIRMAN WILKINS: Commissioner Corrothers?

COMMISSIONER CORROTHERS: Did you state which organization conducted the study involving innocent persons being sentenced to death?

MR. GRADESS: It's been done by two researchers, one is Michael Radelet, at the University of Florida; the other is Hugo Bedau, at Tufts University. The results have been preliminarily published, I believe, last fall and are going to be out, if I'm not mistaken, in a Law Review article or an article very shortly. And I would be happy to get to you full citations and copies of the report.

COMMISSIONER CORROTHERS: Would you please do that?

MR. GRADESS: Sure.

COMMISSIONER CORROTHERS: Did you provide us a copy of your written testimony?

MR. GRADESS: Yes, I did.

COMMISSIONER CORROTHERS: Thank you.

CHAIRMAN WILKINS: Any other questions?

(No response.)

CHAIRMAN WILKINS: Well, thank you very much. We appreciate your appearance today.

MR. GRADESS: Thank you.

CHAIRMAN WILKINS: Our next witness is the executive legal director of the Washington Legal Foundation, Mr. Paul Kamenar.

Mr. Kamenar, I'm delighted to see you again today.

MR. KAMENAR: Thank you very much, Mr. Chairman, and Commissioners. I am sorry I didn't have a copy of my testimony available beforehand. I will leave copies today when the testimony is completed.

I appreciate the opportunity to be here again. I would like to point out to you--I refer you to our earlier testimony of December 3rd, 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.

Our foundation is a non-profit, public interest

law firm, and we have filed numerous briefs in the Supreme Court supporting the death penalty, and we have debated on numerous occasions opponents against the death penalty, such as the ACLU and the NAACP Legal Defense Fund.

As you know, federal law currently provides for the death penalty for certain federal crimes, such as hijacking, espionage, homicide on federal facilities, and so forth. There is a misconception, however, a fallacy that the federal death penalty law is unconstitutional in light of the Supreme Court's decision in Furman vs. Georgia, because there are no sentencing guidelines or procedures to implement the penalty; thus, we have talk about reinstituting or reintroducing the death penalty. I think that is erroneous.

The Supreme Court has never addressed the constitutionality of the death penalty for federal crimes and under current federal procedures. If it did, we maintain, as did the first federal judge who addressed this issue squarely in 1984, in the case of the United States vs. Harper, an espionage case, we think the Supreme Court would rule, as did that federal judge, Judge Conti, that the Court would find the current federal capital punishment laws to be clearly constitutional.

Our position is described in detail in briefs we filed in all the John Walker spy cases, a copy which I gave at the last hearing. I will give a copy again at this hearing. In the Jerry Whitworth case, I argued that issue before Federal Judge Vukasin, out in California. Unfortunately, no federal prosecutor or U. S. attorney has sought the federal death penalty for these federal capital crimes since 1972 because of their serious misinterpretation of the current state of the law or their unwillingness to request the punishment.

In brief, our argument is simply the following: Unlike the state sentencing procedures found arbitrary and unconstitutional in Furman vs. Georgia, where there was a risk of creating arbitrary and capricious sentencing, the federal system has provided and continues to provide a bifurcated trial. You do have a guilt and innocent phase in the federal trial, whether it's for bank robbery, or kidnapping, or espionage, and you have a sentencing hearing. These procedures are embodied in the rules--the Federal Rules of Criminal Procedure 32, and so forth, that provides for this bifurcated system, which the state did not have in Furman vs. Georgia.

Secondly, Rule 32 of the Federal Rules of Criminal Procedure provides for a presentence report which is prepared focusing on the particular defendant and the particular crime and allowing the prosecutor to articulate any aggravating circumstances and allowing the defendant to present any mitigating circumstances that he or she wishes. Indeed, Rule 32 was cited with approval by the Supreme Court in Gregg vs. Georgia, a 1976 case, which reinstituted the death penalty at the state level, specifically on Page 190 of the opinion at Footnote 37, and the Supreme Court cited Rule 32 as an example of the kind of procedure that focus in channels of sentencing discretion of the Court.

Thirdly, what we have in the federal system--I think, first of all, those two procedures we already have is more than sufficient to make the death penalty constitutional, but, 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.

We reject any recommendation either by this commission or by Congress to have a requirement of jury

sentencing in federal cases. That is not constitutionally required. The Supreme Court has so held in Spaziano vs. Florida, a 1984 case, in a six-to-three decision. The three dissents, first of all, of course, you always have Brennan and Marshall, who are against the death penalty in all cases, but Stephens joined the dissent there. And the Court also ruled in Spaziano that, indeed, the judge can even overrule a jury which wanted a life sentence, and said, "No, no. The aggravating circumstances are so serious, I am going to overrule the jury and I, as a judge, am going to impose the death sentence." And the Court held that to be constitutional.

There is no requirement under the Sixth Amendment that a defendant be given a jury sentence.

In terms of--well, thus, in our view, regardless of whether this commission issues sentencing--one more citation I would like to draw the commission's attention to is Zant vs. Stephens, where the Court referred to both, quote, "Legislative or court-imposed standards," end quote, in determining whether or not the procedures are constitutional.

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 not to seek it. However, by drafting appropriate guidelines, we believe that both prosecutors and judges will begin to realize that capital punishment can, indeed, be imposed.

In terms of the legal authority of this commission to draft guidelines, I think I mentioned all of that in my prior testimony. We think the law is clear under 28 U.S.C. Sections 944(a)(1), (2) and (b), where the Congress mandated the commission to promulgate guidelines in determining the sentence to be imposed in criminal cases, including--the word "including," I underline--probation, fine or term of imprisonment. They did not exclude capital punishment and regardless of what certain Members of Congress thought was omitted from the legislation it does not mean that, thereby, Congress intended to repeal the federal capital punishment laws. The statute is clear and, being clear, it is totally irrelevant, and the Supreme Court has held, on numerous occasions, to look at what maybe Members of Congress have thought about the particular issue.

If this commission decides not to issue any

guidelines, we suggest that the commission make clear, in its preface to its other guidelines to the Congress, that its failure to issue such guidelines should in no way indicate that capital punishment is not an available and proper form of punishment in the federal system.

Now, just a little point on the policy argument that we have heard the prior two speakers talk about--the policy argument for the death penalty--we think Congress has already answered that question, when they passed the death penalty laws that are currently on the books. This commission need not go plow that ground again.

However, we do want to point out several things. One is that the death penalty does serve a deterrent effect as well as serve the valid principle of retribution, not to be confused with hatred or personal revenge. These value judgments were, as I said, made clearly by the Congress in enacting the death penalty laws. For retribution, as a principle, by not having capital punishment as an available punishment, society demeans the value of innocent human lives by saying, in effect, to the murderer, to the terrorist, to the traitor, "No matter how many innocent lives you slaughter, or how much you have jeopardized the safety of an entire nation,

we, as a society, will not impose the ultimate punishment on you but merely incarcerate you at best for life."

It should be noted, for example, that John Walker was given several life sentences; however, those are phony life sentences. He is eligible for parole in 10 short years and, under the Parole Commission's own guidelines, he is a very good candidate for parole. He scores 10 points out of 10 for being--in terms of their salient factors, for being eligible for parole.

The second function we think is important is the deterrent function. A recent study by Professor Stephen Layson, from the University of North Carolina, showed that for every execution of a convicted murderer, on the average, prevents 18 murders from occurring. And Professor Layson concluded, quote, "The evidence is clear, by taking the life of a murderer, we can save innocent lives," end quote.

Layson's study basically confirms an earlier study by Isaac Ehrlich, who he thinks--Layson thinks Isaac Ehrlich underestimated the deterrent aspect of capital punishment. And we think for federal capital crimes, the deterrent value would be even greater, because, for crimes such as espionage and hijacking, et cetera, you have the element of planning

and thought that goes into it and, therefore, the deterrent effect would be a lot higher.

There are those who criticize the death penalty as being discriminatory against minorities; however, the statistics show otherwise. In fact, according to a Department of Justice study, issued in August of '85, 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 desparately and heretofore unsuccessfully argued that capital punishment discriminates on the basis of the race of the victim. This amorphous novel argument is based on a flawed study by Professor Baldus. It has been attacked by the lower courts consistently, and we think the Supreme Court, in the case of McClesky vs. Kemp, will find the study flawed, as well.

And there was reference to the Bedau study here just a minute ago, saying that innocent people are executed. That is really--if you look at that study, that is also flawed. I mean, they even cite Ethel and Julius Rosenberg as people who were innocent and who shouldn't have been given the death penalty.

Finally we, in conclusion, submit that this commission

has authority and duty to issue sentencing guidelines for capital crimes. We think that you can promulgate guidelines of offender characteristics, offense characteristics along the lines of certain states.

We think we should shy away from some of the excess baggage that is in legislation in S. 239, which I believe was the Senate version of the capital--what they call "reinstating"--what I call "refurbishing" the death penalty, because there are a lot of encumbrances there that I think will involve unnecessary litigation and it may be 10 years, as a prior speaker suggested, before we have the death penalty because of all of these encumbrance procedures.

My suggestion is to keep the procedures very simple and as the Court has ruled, as long as there's one aggravating circumstance, the death penalty can be imposed in those cases. Thank you very much.

CHAIRMAN WILKINS: Thank you, Mr. Kamenar.

Any questions from any commissioner?

COMMISSIONER MAC KINNON: What about that 36-percent figure? We just had another one stated that said something like 40 percent that whites were more likely to receive the death penalty than non-whites.

MR. KAMENAR: That's correct.

COMMISSIONER MAC KINNON: Is that in state courts or federal courts?

MR. KAMENAR: That's in the state courts. The federal statistics are--I don't have those available.

COMMISSIONER MAC KINNON: Well, we had some federal statistics.

MR. KAMENAR: I wasn't here for that. So, I can't speak to that.

COMMISSIONER MAC KINNON: We had 33, 28 of which were white, who got it; five were black.

Let me ask you this. How do you get that figure? Does that come out just on the--well, you take an equal amount of blacks and an equal amount of whites?

MR. KAMENAR: Precisely; the Justice Department took 1,000 whites who were charged with homicide and 1,000 blacks who were charged with homicide, and found that for every 1,000 whites, 16 received the death penalty; and, out of 1,000 blacks, only 12 received the death penalty. And when you do the computation between the 12 and the 16, it comes out to approximately a third percentage higher for the whites.

COMMISSIONER MAC KINNON: Well, I am very interested

in that statistic, because we've got to get some approach like that if we are going to look at it realistically. If we just take the fact that there might be more blacks convicted than there are whites, why you distort the result, but if you take 1,000 from each group--

MR. KAMENAR: That's correct.

COMMISSIONER MAC KINNON: --then you get some accurate estimate of what a statistical--

MR. KAMENAR: I think so, but I would like to further say that, you know, there could be arguments and other statistics from the other side, but the bottom line is, what do these statistics show? It really doesn't even show that there is discrimination in the system if, in fact, what that does is presuppose that there is one jury that goes around the country trying every death penalty case and is putting thumbs down on minorities and letting white males go free.

I might add, by the way, that not even the ACLU or Amnesty International would argue that if we gave the death sentence to John Walker it would be discriminatory unless they want to argue that it is discriminatory to execute white, middle-class males, which is the 95 percent of the pool of espionage. Those who have been arrested for

espionage have been white, middle-class males.

COMMISSIONER MAC KINNON: Let me ask you a further question for clarification. There are, however, are there not, more blacks on death row than whites?

MR. KAMENAR: No. There are more whites on death row currently today than blacks.

COMMISSIONER MAC KINNON: There are?

MR. KAMENAR: That's correct.

COMMISSIONER MAC KINNON: We are talking about the states?

MR. KAMENAR: The states.

COMMISSIONER MAC KINNON: Thank you.

CHAIRMAN WILKINS: Judge Breyer?

COMMISSIONER CORROTHERS: Blacks are, however, represented in disproportional numbers, is that not correct?

MR. KAMENAR: Blacks are represented in--

COMMISSIONER CORROTHERS: You are saying the numbers are higher with regard to blacks?

MR. KAMENAR: No, I don't think so. Like I said, whites are more likely to receive the death sentence than blacks.

I might also add that a majority of blacks support

the death penalty and for very good reason. Blacks, as a population, are eight times more likely to be the victim of a homicide than their white counterparts. So, it's not surprising to see that a majority of blacks support the death penalty, as well.

CHAIRMAN WILKINS: Judge Breyer?

COMMISSIONER BREYER: It's a little hard for me-- if it's capricious and discriminatory against whites, I don't know that it would make it any better than if it was discriminatory against blacks, but I suspect that those studies just show that it's pretty hard to measure and maybe it's a little capricious. I mean, I think capriciousness is capriciousness whether it's white or black but--

MR. KAMENAR: Precisely. All I am suggesting is that the Supreme Court has said you focus on the procedure on this particular case, and that is you have the sentencing authority look at the circumstances of the crime, et cetera, and if it turns out that by happenstance it could be that they were a higher number, it doesn't mean that statistically significant differences mean that there's discrimination going on.

COMMISSIONER BREYER: But actually you had a rather

interesting idea that I wanted to follow up on. I absolutely agree with you from an institutional point of view that if this commission were not to go into the death penalty its action or inaction should be neutral in respect to the lawfulness of the death penalty. It should not make lawful that which is now unlawful; it should not make unlawful that which is now lawful.

And so I think that you have thought about that and your idea, which I wanted you to focus on, which seemed rather interesting is that, if we were not to go into it, we should then take care to suggest that in not going into it we do not intend to change the legal status quo. I think that was your point, is that right? And then you had some other--

MR. KAMENAR: That's correct, but the other part of that equation is not necessarily true when you said that you can make lawful that which is unlawful. I think that what you can do is make--let's put it another way--more lawful than what was lawful to begin with by having the guidelines to dispel doubt that is lingering, I think, with certain judges and prosecutors that, because there are no guidelines spelled out in the statute, that they cannot seek the death

penalty.

COMMISSIONER BREYER: But am I right when I theorize, if we were not to go into it--

MR. KAMENAR: If you were not, than to say that it's neutral--

COMMISSIONER BREYER: But the fact that we have not gone into it doesn't mean that a judge, if otherwise lawful, couldn't give it, et cetera, in an unusual case because we do not intend to change the status quo.

MR. KAMENAR: Correct.

COMMISSIONER BREYER: Yes, I see.

CHAIRMAN WILKINS: All right. Thank you very much, Mr. Kamenar.

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CHAIRMAN WILKINS: Our next witness is Reverend L. William Yolton, NISBICO. We're delighted to see you again.

REVEREND YOLTON: I'm glad to be back again. I'm sorry we are on this particular subject, however.

I am William Yolton, the Director of the National Interreligious Service Board of Conscientious Objectors, and I am a member of this National Interreligious Task Force on Criminal Justice. You have the testimony there that describes in some detail the nature of development of the Interreligious Task Force on Criminal Justice. There are some details that I think you might be interested in, that they do maintain a record of religiously sponsored chaplaincies, and programs for victims, there are a whole range of concerns, as well as also producing a compilation of religious statements on capital punishment, which have now just been distributed. I had to get them to send them down from New York because I couldn't find that many copies in Washington.

I want to jump immediately beyond the asterisks in my testimony, to look at the question of the circumstances of the issue of the option for capital punishment as one of the subjects of the work of this Commission. 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 the agenda after preliminary guidelines, and now after the revised guidelines were published is a surprise for which we were not prepared.

Our organizations are unalterably opposed to this new development which is irregulllar and morally questionable and I question first of fairness and disparity. So long as the possibility exists that one person could be executed who is innocent of a 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 always remains a fundamental consideration for the sentencing guidelines you have. n the over 10 years of debate about the effectiveness or fruitlessness of efforts of rehabilitation, the committees in Congress have consistently rejected the extreme view, and the Congressional instructions to you retain that objective for rehabilitation, and I go back to a place where at an early time when this wholle issue of the death penalty was separated out. 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 in prison is appropriate in a particular case. And I know that rehabilitation has dropped somewhat low in the considerations of developing the guidelines, but I think that one should see that Congress never abandoned that intention.

Surely, Congress - - had the Congress considered inclusion of capital punishment in your options it would have noted that this goal of sentencing could not have been achieved for this particular sentence. Despite the unpredictability of rehabilitative measures, especially imprisonment, rehabilitation of murderers does not take place. It does if they are executed. But it does take place where they are incarcerated.

A good friend of mine, William Goudis, served 20 years for murder, emerged self-educated, and despite prison conditions, rehabilitated himself, which is my personal view that God had something to do with that, but he served as Codirector of the Prison Education Program of Massachusetts, of which I was the President, and rehabilitation is possible, his work after imprisonment was a significant contribution to

the society, and he became a field supervisor for the Ministry, of the studies program of Harvard Divinity School when I was on the faculty, and thereby he was an adjunct faculty member, probably shared the faculty club with you sometime.

The Commission must satisfy itself that 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, and 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, and I should say notwithstanding the long memorandum from the Justice Department which says it ain't so. But I can't imagine any of us who lived through those events believing the Sentencing Commission had not set aside the death penalty question.

So long as there is considerable doubt that the Congress intended inclusion of capital punishment as a sentencing option, political prudence should indicate that the death penalty should be excluded in order that Congress not send the entire effort of the Commission to the scrap heap. Were I tha manipulative sort I might urge you to include the death penalty so the rest of the guidelines which are contrary to some of my earlier testimony might be defeated as a whole. Instead I am willing to accept the 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, U. S. Catholic Conference, that's the Catholic Bishops, the American Baptist Church; I notice the Justice Department testimony at some point mentions them as if they were in favor of capital punishment; the Episcopal Church, the Lutheran Church of America, United Methodist Church, the Presbyterian Church, USA, the United Church of Christ; the Christian Church of the Disciples of Christ. the Mennonites, Brothers and Friends, many others; and liberal religious

groups, such as Unitary and Universal Association, have long led the opposition to capital punishment. Even those conservative bodies with traditions of support for capital punishment, such as the American utgheran Church and the Christian Church, have withdrawn their support and have asked their members to study the question.

This virtual unanimity denominational policy statement does not mean that the teaching of the religious groups is accepted by their adherence. I presume many of you continue your religious affiliation, and yet are probably not even aware your religious group has a position, and perhaps don't care. And the reality of our religious constituencies is that the position of the religious leaders, which is reflected in the teachings of the religious bodies is not based on polling the members. And several national bodies, however, have encouraged special study of the issue among their members in an effort to develop a more responsible participation in moral questions.

For instance, I think of the Presbyterian studies that took place over several years, produced a large packet of materials for study in the lower systems of their court system in the denomination in order that they could have at

least the benefit of people who looked at the issue as they formed their policy nationally.

The newly universal teaching of contemporary religious emphasis is in opposition to capital punishment. As a member of the Christian Society of Ethics, and the Association of Teachers and Scholars in Colleges and Universities and Theological Schools, I can recall no support for capital punishment in the papers presented, nor in the books reviewed. So I think probably the consensus of people who look at it from an ethical side is opposition in general to capital punishment.

Now, on the question as to what polls say, a decade ago the polls opposed capital punishment. It depends upon where the issue is, and how the matter is treated in the public press, where the religious groups have been involved publicly in this sort of this, so that I think it is very difficult to look at the Gallup Poll either that decade and be confident that the religious adherence really believe that or to look at it this decade and say that is really what people believe, if they really consider the question. So I think the problems of looking at what popular opinion is are clouded in fact by the ephemeral character of opinion in

those areas.

And although the matter is outside of my own 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 the test of the Constitutionality of the guidelines themselves.

Since the issue is already raised in terms of the power of the President to appoint, to remove the members of the Commission, and the compensation of the Federal judges who were members of the Commission during the time their District judges is affected by the supplementary compensation, there are Constitutional problems with the composition of the Commission, I understand.

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 at this hearing, in a sense?

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, as there was down in Florida, for the moral threshold has been breached. Capital punishment tends to brutalize the society that condones it. And the international consensus is moved toward a complete bar to capital punishment. Our European allies have completely abandoned it, and surely, we can do without the ultimate sanction, I think that there are many other ways that we can accomplish deterrence and maintain the society's sense of justice without capital punishment, and I. of course, quote Roman 12.5, that Vengeance is mine, sayeth the Lord. So I think that there is a concern that I have simply in terms of the moral questions that you address, entirely apart from your function as members of the Commission.

CHAIRMAN WILKINS: Thank you very much, Reverend Yolton.

Any questions from any of the Commissioners to my right?

(No response.)

CHAIRMAN WILKINS: Yes, Judge Mackinnon?

COMMISSIONER MACKINNON: Is amnesty international, or a religious organization?

REVEREND YOLTON: Amnesty International was included in that compilation of statements, because there are many, many church groups that are operating Amnesty International programs in their own church organization. The inclusion of that list is not that it is a religious organization, per se, but that many church bodies have endorsed participation in Amnesty International. You should understand that American Amnesty International groups do not participate in any American cases. They participate in the advocacy for cases in other parts of the world, either in the Third World, or behind the Iron Curtain, they are not involved primarily, at all, in the U. S. situations. So we are encouraging people to participate in the Amnesty International program, and they participate not in domestic questions, but in advocacy for persons in other countries.

COMMISSIONER MacKINNON: I notice that there isn't any statement in here on the position of the Catholic Church.

REVEREND YOLTON: Yes, the U. S. Catholic Conference is listed there.

COMMISSIONER MacKINNON: Where?

REVEREND YOLTON: It should be listed under U. S. Catholic Conference. Let me see what I got in my copy with

me. I think it is --

COMMISSIONER MacKINNON: Oh, I got it.

REVEREND YOLTON: Have you got it?

COMMISSIONER MacKINNON: Yes.

REVEREND YOLTON: It should be in the 1968 statement, the one they dealt with on human life.

Since that time, the U. S. Catholic Conference has spoken about this seamless garment that is, not only does it extend from the questions of abortion, and the preservation of life in the womb, but it is also said that includes the Catholic punishment issue as well. It is a seamless robe in terms of protection of life. And that is the position of the Catholic Church.

COMMISSIONER MacKINNON: Thank you.

CHAIRMAN WILKINS: Judge Breyer?

COMMISSIONER BREYER: Reverend Yolton, you mentioned you thought the version of the guidelines themselves didn't reflect a lot of your concerns. I hope you were thinking of the September version. Perhaps you have not thoroughly studied the --

REVEREND YOLTON: I have thoroughly studied it, and do share with Professor Robinson concern that in the case of

the sentences that are presented as a range of sentencing is not 600 percent, but 1,000 percent when you calculate it for war objectors, and that does exceed the 25 percent, and I will have my chance to testify on that.

COMMISSIONER BREYER: What was that last word you said?

REVEREND YOLTON: Rather that the 25 percent, from the lowest to the highest, the range is 1,000 percent, according to the guidelines.

COMMISSIONER BREYER: In some instances?

REVEREND YOLTON: In the case of war objectors.

COMMISSIONER BREYER: In the case of what?

REVEREND YOLTON: Of war objectors.

COMMISSIONER BREYER: War objectors, that is what I didn't understand. Thank you.

REVEREND YOLTON: So I know that I will get a chance again.

COMMISSIONER MacKINNON: Well, would you agree that the basic value for that offense would nevertheless, despite the disparity going up and above, still result in less disparity?

REVEREND YOLTON: No.

COMMISSIONER MacKINNON: Well, wait a minute.

REVEREND YOLT

COMMISSIONER MacKINNON: Oh, I got it.

REVEREND YOLTON: Have you got it? parity.

COMMISSIONER MacKINNON: Yes.

REVEREND YOLTON: It should be in the 1968 statement,
the one they dealt with on human life.

COMMISSIONER MacKINNON: Still result in less
disparity than exists under the present statute?

REVEREND YOLTON: Yes, only - -

Of course it would.

REVEREND YOLTON: The present statute allows from
zero to five years.

COMMISSIONER MacKINNON: Yes.

REVEREND YOLTON: The sentencing guidelines that
propose will allow zeros in

71 months, which happens to exceed the statutory limit.

CHAIRMAN WILKINS: Well, we will get into that when
we have our next hearing.

(Laughter.)

CHAIRMAN WILKINS: Thank you very much.

Any other questions?

CHAIRMAN WILKINS: Thank you very much, Reverend Volton.

Our next witnesses include the Executive Director of the Police Executive Research Forum, Darrell Stephens; the Chairman of the National Law Enforcement Council, Ordway Burden; and the Executive Director of the National Law Enforcement Council, Donald Baldwin.

Gentlemen, we are delighted to have you. Please come around.

MR. STEPHENS: Mr. Chairman, Commissioners, ladies and gentlemen, I appreciate the opportunity to appear before you today. I believe that the Commission's efforts to bring together representatives from - -

COMMISSIONER MACKINNON: What is your name?

MR. STEPHENS: Excuse me, Mr. MacKinnon, my name is Darrell Stephens, I am the Executive Director of the Police Executive Research Forum.

I believe that the Commission's efforts to bring together representatives from policing and from 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 mandated to debate issues that gives concerns to the police and the communities that 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. 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 communities rely on a system of criminal justice that promises to keep - - excuse me - - that promises to keep identified violent offenders from committing further offenses against society. Unfortunately, there are flaws in this system. The absence of sentencing guidelines for those convicted of the most heinous crimes is just one example of how a 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 sentencing is fair and reasonable.

As I understand it, there are two questions being considered before the Commission today. I will speak 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 the 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. 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 our police and correctional officers. In order to properly represent the views of our members, we conducted a short telephone survey of over 20

of our police chief members. They were asked do you support the efforts of the United States Sentencing Commission to develop guidelines for seeking the death penalty on Federal cases where the law provides for its use. Of those responding, 18 answered affirmatively. More telling than the numbers are the remarks they provided.

Of particular concern were premeditated murders, particularly those committed by police officer killers, and serial murders. In addition, local law enforcement authorities are growing more and 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 our Nation. There was consensus among the chiefs surveyed that these categories of offenders are among those that should receive the death penalty, and the guidelines should be formulated to allow for the 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 an evaluation of whether or not the offender is a public menace. For example, in one street gang in his community, initiation for membership involves a prospective member robbing and beating an individual. There is a bonus if the inductee happens to kill a 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 a loss of life, or significant threat to society, capital punishment guidelines should be helpful to remove the menace from society.

Conversely, in other heat of passion situations, the death penalty would 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 situation in which a defense 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 orders 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, and we will do everything in our power to see that these incidents are minimized, and the offenders will be held accountable for their actions. This signal may be best communicated through the imposition of dramatic penalties for those offenders who take the lives of law enforcement officers, or their loved ones.

In 1975, 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 year, two more Federal agents were killed by individuals who were convicted

for Federal felonies. As you know, recent research suggested a large proportion of serious crime was committed by a small percentage of repeat offenders.

The Bureau of Justice statistics states that among those for whom legal status at the time that the capital offense was reported, about 40 percent had been in an active status. Half of those were on parole, while the rest had charges pending, were on probation, or were prison inmates, or were escapees. In addition, a significant percentage of prisoners under sentence of death, at the time of the study, had previous convictions for homicide.

We in local law enforcement are too familiar with murders 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 cognizant of what he or she was doing, and the causes for such action. Yet the court must also impose some standards to ensure fair and consistent treatment of the offenders, free from discrimination and bias.

Because an error in sentencing is irreversible, 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, or others.

We also support automatic appellate review of death penalty sentences. While this might create additional work for the courts, it would insure 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 as

well. 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 you.

CHAIRMAN WILKINS: Thank you very much, Mr. Stephens.

MR. BALDWIN:

Would you like for us to proceed, and then if you have questions - -

CHAIRMAN WILKINS: I think it would be best to do

that.

MR. BALDWIN: I am Donald Baldwin, the Executive Director of the National Law Enforcement Council, and our testimony will be presented by our Chairman, Mr. Ordway Burden of New York City.

CHAIRMAN WILKINS: Fine.

MR. BURDEN: 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 15 national law enforcement organizations, representing through the executive heads of these organizations, over 300,000 law enforcement officers. Currently, 15 national associations are NLEC members. The Airborne Law Enforcement Association, The Association of Federal Investigators, The Federal Criminal Investigators Association, the FBI National Academy Associates, the Paternal Order of Police, the International Association of Chiefs of Police, the International Narcotics Enforcement Officers Association, Incorporated, the

International Union of Police Associations, the Law Enforcement Assistance Foundation, the National Association of Police Organizations, the National District Attorneys Association, the National Sheriffs Association, the National Troopers Coalition, the Society of Former Special Agents of the FBI and Victims Assistance Legal Organization.

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 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 foundation 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. A study by Stephen K. Layson of the University of North Carolina at Greensboro indicates that for every execution, 15 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 visible way, 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 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.

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

The Commission should no more 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 five 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 catalyst 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.

Thank you for your attention.

MR. WILKINS: Thank you very much, Mr. Burden. Any questions from the Commissioners?

Thank you very much. We appreciate not only your testimony but your written submissions--Mr. Stephens, Mr. Burden, and Mr. Baldwin, thank you. We look forward to seeing you again soon.

Our next witness is Professor David C. Baldus from the University of Iowa College of Law. Professor Baldus, we look forward to hearing from you.

MR. BALDUS: Thank you.

Mr. Chairman, and members of the Commission, I want to thank you for this opportunity to be here today and to share with you briefly what I have learned about the operation of the state death sentencing system since the 1972 decision of Furman v. Georgia with respect to the issues of arbitrariness and discrimination. I will also seek to indicate how that experience in the states concerning this issue may suggest that the Commission may want to consider certain procedures if it decides to take jurisdiction over the question of federal capital sentencing. Over the last ten years, I have

spent a major proportion of my profesional time studying the operation of the death sentencing systems in the states. I have conducted two large empirical studies, one in Coloraado, one in Georgia. I have collected nation-wide data, to the extent it's available, on all states. I've closely read the growing literature on the operation of the state capital sentencing systems, and I have extensively studied how state supreme courts over the last 20 years have conductded comparative proportionality review.

Comparative proportionality review is a procedure that's required in about 20 of the death sentencing states, which requires that the state supreme court examine each death sentence and compare it with other similar cases to see if the sentence is excessive or disproportionate or aberrantd when compared to similar cases.

Last spring I was invited to testify before the House Criminal Justice Subcommittee on the question of the fedeeral death sentencing bills that were pending before it, and asked to see what relevance my knowledge about state systems might have to the federal laws.

At first I asked myself, how could the experience ofd the states possibly be related to the federal death

sentencing bills that I'd been reading in the newspapers. The state death sentencing systems are primarily involved with what are regrettably routine and generally low-visibility crimes that attract little attention.

In contrast, the proposals for federal death sentencing bills that I had read focused on important federal crimes such as espionage, Presidential assassination attempts--these are high visibility crimes, very serious affronts to the national interest, that quite properly attracted sustained national attention.

However, when I began to study the crimes that actually are processed through the federal criminal justice systems, and the crimes that would likely result in death sentences under the proposals that were then before the House of Representatives, I found that most death-eligible federal crimes will not be of the high-stakes, high-visibility type crimes which affect national interests of great importance.

Rather I found that most of these death-eligible cases arising in the federal system would involve such crimes as first-degree murder, homicides committed in the course of a bankruptcy--pardon me, bank robbery, or arson, or in federal prisons--

COMMISSIONER MacKINNON: You're talking about Iowa, now.

MR. BALDUS: That's true. Or in federal prisons or in homicides involving federal drug officers.

These are exactly the kinds of crimes that routinely attract the attention of the death sentencing systems in the state. These are low visibility crimes that in and of themselves, while important, do not constitute the kind of high visibility crimes tthat I had come to expect would be the principal subjects of federal death sentencing.

These are the kinds of crimes--death eligible crimes--that will constitute the largest proportion of death-eligible crimes processed under the federal laws as they now stand. This realization raised the further question of whether the processing of these low-visibility federal homicides would be likely to produce the same kinds of problems with arbitrariness, discrimination, and lack of consistency that have arisen in the states since 1972 udner the post-Furman laws.

On further investigation, I concluded that in this regard, two problems would likely emerge under a reinstituted federal death sentencing system.

Specifically, I believe, that under the federal proposals to reinstitute the death penalty, that we would see only a handful of death sentences actually imposed in this low-visibility category of crimes, and that there would be a considerable risk; that these few death sentences would be excessive, in that they could not be meaningfully distinguished from other similar crimes in which lesser penalties were regularly imposed.

Second, I think that under the proposed federal capital sentencing system, there would be a substantial risk that the justice delivered would not be color-blind.

I would like to elaborate just briefly on these two principal points with my testimony.

First, on the issue of the frequency and the excessiveness of death sentences, the experience of the states suggests that there would be very, very few federal death sentences. One of the most striking things that I've observed in the study of the state death sentencing systems is the very low rate at which death sentences are imposed. To be sure there are 1800 people on death row, but that's an accumulated population that has developed over the last 15 years. But that's an accumulated population that has

developed over the the last 15 years. In fact, from the two to four thousand potentially death eligible cases that are processed through the system each year, death sentences are only returned in from 250 to 300 of those cases.

This is an incredibly stable number. It's as if the nation had placed a quota, an arithmetic quota, on the number of death sentences that would be imposed. It accounts for something on the order of 10 to 15% of all the death-eligible cases processed through the system.

There are several reasons for this. The first is that the state death-sentencing statutes are overly broad in terms of the populations that they deem death-eligible, and they do not in any way reflect the judgments of prosecutors and juries as to what cases really are death-eligible and should receive the death-sentence. This is in spite of the broad public opinion and broad support for capital punishment expressed in public opinion polls.

In fact, the people who apply these systems reveal very little taste for capital punishment. This is particularly true with respect to prosecutors. These capital sentencing systems are dominated by the exercise of prosecutorial discretion. More than 60 percent of the death-eligible cases

are pled out by prosecutors, and very few of them ever reach penalty trials. Also, the system is highly decentralized, and there are substantial differences in attitudes toward the death-eligibility of given crimes on the part both of prosecutors and juries in different sections of different states.

The result is that many--not all--I would say about 50 percent of the death sentences that are imposed in the places that I have examined--those death sentences would be considered even-handed and not excessive. However there is a substantial proportion of the death sentences that are imposed, in my estimation, that are excessive in a comparative sense, that is, that they can't be distinguished in any meaningful rational way from the many other cases that result in prison terms.

Now when we look at the federal death sentencing system as it is contemplated, we see the ingredients for the same sort of problems with excessiveness.

First, we can expect very few death sentencing cases, to begin with. There are only about 150 homicide convictions generated in the system each year. About 30 or 40 of those are murder one. Only about 20 of those are

deemed serious enough by the system to result in a prison sentence of more than five years, as the system is currently operating.

My estimate would be--and it's based on very very rough data because that's all there are available at the moment--that there probably would be no more than 10 to 12 death-eligible cases processed through the system. If the experience of the states is any guide, I would expect to see at most one or two death sentences imposed a year in this category of low-visibility crimes that I am talking about.

The second ingredient of the federal system that creates a risk of excessiveness is that these cases will be prosecuted under statutes which in terms of the classes of death-eligible crimes defined are fully as broad as, in some cases broader than, those that are applied in the state systems.

Also, the federal system is dominated by the exercise of prosecutorial discretion. Plea bargaining in the disposition of federal homicide cases is the common method of disposition. And very few of these low visibility cases would be likely, in my estimation, to result in a penalty trial.

Fourth, the federal system is even more decentralized than the state systems, which further increases, in my

estimation, the risk of aberrant death sentences being imposed.

I would like to turn next to the question of racial discrimination. Here the record of the states since 1972 is mixed. As for discrimination against minority defendants, the results constitute a distinct improvement, in my estimation, from the results that we saw from the empirical research conducted before *Furman v. Georgia*.

However the new development that has emerged in the empirical research is the influence of the race of the victim. The research that was done before *Furman v. Georgia*, in the main, did not include any controls for the race of the victim. But the work that's been done since that time has, and it shows that defendants who kill whites have a substantially higher risk of receiving a death sentence than those who kill blacks.

And indeed in the state of Georgia, it's our estimate, on the basis of a very close examination of a large sample of cases, that as many as 30 percent of the death sentences that were imposed in the system between the period 1973 to 1978 would not have been imposed had the victims in those cases been black. I think this phenomenon of race-of-the-victim discrimination explains in part Mr. Kamenar's

observation that the death sentencing rate is higher for blacks than it is for whites in the post-Furman period.

I think that's correct, his statement, but I think the explanation for it is that most whites kill whites, and the race-of-the-victim discrimination enhances the risk of a death sentence for those who kill whites. That's what's driving up the rate of death sentencing for white defendants.

The correlate is that the overall average rate for black defendants is lower because they tend to kill blacks, and therefore enjoy a reduced risk of a death sentence.

The way I look at how this federal system would operate, I see no reason to suspect that the factors that produce these race-of-victim disparities in the states would be any different in the federal system. This is particularly true with respect to the cases that reach a penalty trial before a sentencing jury.

The juries that would be drawn in federal cases come from the same general population as the juries that operate in the state systems. In Georgia and in other states we see significant race-of-victim effects in their decisions.

There are two other features of the presently projected federal system that raise concern about color-blind

justice.

First, a large percentage of federal homicides arise on Indian reservations. As Commissioner Block has pointed out, it's not exactly clear what proportion of those would be death-eligible cases, but some are likely to be, and the important point is that when Indians are charged with serious federal crimes, they're not tried on reservations by their peers. Rather, they are tried in federal courts, in which the juries are drawn from the general population of the State.

Second, there's an interesting little quirk of the law which states that the jurisdiction of the federal courts in a case arising in a homicide, arising on an Indian reservation, is a function of the defendant-victim racial combination of the case. If there is an Indian defendant or an Indian victim, then the federal courts have jurisdiction. However if there are not Indians involved in the case, then there is no federal jurisdiction.

This analysis of the potential risk of arbitrariness and discrimination under federal law that I have sketched out raises the obvious issue of whether it would be possible for this Commission to limit the exercise of discretion in a way that would avoid the risk of arbitrariness and discrimination

that we have observed in the state system since Furman.

First, the experience of the states indicates that the statutory aggravating circumstances and mitigating circumstances of the type that are in the bills proposed in Congress last session, and that are currently in the Air Piracy Act, are not adequate, because it is precisely those kinds of aggravating and mitigating circumstances that are found in virtually every state's jurisdiction, and the record is plain that the presence of aggravating and mitigating circumstances, merely listed, in which the jury is asked to weigh and measure them, is insufficient to constrain the exercise of discretion on the part of both prosecutors and juries.

If you want to proceed to develop guidelines, it seems to me that it would be incumbent upon you to consider the possibility of narrowing the scope of the statutory aggravating circumstances, in particular so that you would be at the outset limiting death-eligible cases to those that are truly the most aggravated cases. Many death sentences are imposed in the state systems in cases that are not among the most aggravated at all.

Justice Harlan 20 years ago presented the hypothesis

that this was impossible, that it was before the fact, that it was beyond human capacity to limit by statutory aggravating circumstances or any other sort of guidelines the cases to those that are most death-worthy.

I think that Justice Harlan's hypothesis has been partially borne out by the experience of the last 15 years. Those statutory aggravating circumstances have reduced, I believe, substantially the amount of excessiveness that's in the state systems. But still a very substantial proportion of the sentences that are imposed would be reasonably characterized as excessive, in my estimation.

The second possible method to control excessiveness, and also to limit the effects of racial discrimination that might evolve from the system, would be to develop a procedure for the proportionality review of every death case. The system of proportionality review holds the theoretical possibility of controlling the problem of aberrant and excessive death sentences and also racial discrimination.

In my estimation, an effective system of proportionality review would require the development of an extensive data base of cases. The procedure that I would envision would be one in which the Justice Department, through its

prosecutors, would collect information on all death-eligible cases that are processed through the system, and transmit that information through the Courts of Appeals, and the individual Court of Appeals that would be hearing the proportionality review arguments in a given case.

With that sort of information, the court would be in a position to identify groups of cases that it perceived to be of similar culpability, and address the question, in a factual way, whether or not the death sentence it was looking at before it was excessive or disproportionate; and indeed, in looking at groups of cases, it could determine whether the race of the victim or the race of the defendant was influencing sentences in the system.

Whether or not such a system at the federal level would be successful raises an important and interesting question. Justice Rehnquist in 1976 stated the hypothesis that comparative proportionality review, as it was envisioned for the states, was not likely to be effective.

I think that the record of the last 15 years supports Chief Justice Rehnquist's hypothesis. The state courts in this 15-year period have vacated only 30 death sentences as comparatively excessive under this system of

comparative proportionality review. That's out of a population approaching 3000--2500 death cases that have been reviewed in state appellate courts.

I for one have written extensively about this, and I have great hopes that state supreme courts would undertake a more comprehensive form of proportionality review, because I think that if they did they could reduce much of the excessiveness and discriminatory effects in their current systems. But to date, the state supreme courts have not accepted the invitation, and the system has been singularly ineffective.

So the question, it would seem to me, that you would want to consider if you took jurisdiction over this question, is whether you think that you could devise a system that would be better than what has been developed in the states; and address the question of whether or not you think the federal courts would be any more effective at monitoring and policing their systems for arbitrariness and discrimination than have the state courts to date.

MR. WILKINS: Thank you very much, Professor.

Some of the state courts do have proportionality review, do they not?

MR. BALDUS: Oh, yes, they do it.

MR. WILKINS: But what they do review is review those cases where the death penalty was sought, and may be given or not by the jury, but they don't have in their data bank those cases where the case was death-eligible but the prosecuting attorney elected not to seek it. Is that--

MR. BALDUS: It varies. In some jurisdictions, the court does look at the cases in which the death sentence was not sought, but in the main you're correct, that the pools of cases that are examined are those that advance to a penalty trial, and in fact in a number of states the appellate court only looks at other death cases.

MR. WILKINS: Where the death penalty was--

MR. BALDUS: Right, where the death sentence was imposed. So it says, here's a death case before us, and they try to find another case that looks similar to it where a death sentence was imposed. If they find one, then that satisfies the requirement of proportionality and evenhandedness in the system.

But in the main, you're correct. Even the states that look at life sentence cases in their analysis restrict it to that tiny fraction of cases that actually reach a

penalty trial.

One of the recommendations at the National Center for State Courts project on proportionality review--one of the principal recommendations was that the state supreme courts in the conduct of these reviews should expand the scope of their enquiry to consider all cases that were potentially at risk of a death sentence at any place in the system.

MR. WILKINS: Do you consider proportionality review mandated by any law or standard or constitutional provision?

MR. BALDUS: It's not required by the Constitution as it is currently interpreted, is the way I read Pulley (phonetic) but it is required, as a matter of state law, in about 23 or 24 of the death sentencing jurisdictions.

MR. WILKINS: Is there a federal requirement that we have proportionality review?

MR. BALDUS: No, I don't believe that there is a federal requirement. The Constitution does not require it for the states, and I don't see how it could be argued that it would apply to the federal government.

My only suggestion is that if the guidelines that you are

contemplating for capital punishment are to have any effect at all, it seems to me they must include some provision for proportionality review.

Without that, it seems to me almost a certainty that you're going to have excessive sentences emerging in the process. With the level of decentralization, the breadth of the statutes that are currently before you, I don't see that there's any way you can avoid the problem that the states are having.

MR. WILKINS: Thank you.

Mr. Block?

MR. BLOCK: First of all, as we discussed earlier this morning, I had to research that, do a quick calculation of the 1985 convictions that would be death-eligible. There were about 18 cases overall, 18 convictions, so your number is in the ballpark.

What concerns me is that I--or the research group--could only find one American Indian defendant that would be so subject. I'm wondering, is there anything that we've missed that would make American Indians than they show up, at least in this sample, here--

MR. BALDUS: I think it may have something to do

with the exercise of prosecutorial discretion. These are convictions.

The Section 1111 of the Federal Code provides for capital punishment for persons guilty of first-degree murder. I would find it astonishing that out of the very substantial numbers of homicides that come out of Indian reservations that only one of those involves a first-degree murder.

It may be that those cases are pled down to much lower offenses. That would be my explanation for it off the top of my head, that the sentences imposed in homicides are quite low. That's what's amazing--only 20 homicides result in a punishment of more than five years. That gives you some idea of the way those cases are being perceived. Whether it has anything to do with the race of the victim or not, I don't know, but I certainly would think it would be appropriate to get more detailed information about how those cases are being disposed of.

MR. MacKINNON: There is one more follow-up question, and that's on the likely infrequency of the imposition. Let me ask a question which I don't mean to be facetious. You don't mean to suggest by that that you'd want to see a larger proportion of death sentences, say of 20

death-eligible, that you'd rather see half than the two or three that you mentioned, or are the two or three symbolic of another problem?

MR. BALDUS: No, I'm not suggesting that there should be more. I'm not in favor of increasing the number of death sentences. All I'm saying is, our society has made that determination. The judgments of the prosecutors and the juries have said, we are going to hold the level of death sentencing down as the way we're going to manage this tragic choice, if you will, that society has presented for itself.

But in the process of doing that, they create important questions of comparative justice, both from a racial standpoint and also basic fairness. Once you make the decision to limit the group to a symbolically selected population that only represents a fraction of of those that are eligible, then the questions of comparative justice loom very large.

MR. MacKINNON: But you can solve the comparative justice question by increasing--

MR. BALDUS: That's right.

MR. MacKINNON: I guess what's problematic with your approach is that there are two approaches to that. One

is to expand the application so that it's not so discretionary.

MR. BALDUS: That's right. That would be a possible solution. I think, though, that this is a highly decentralized system, and I think it's extremely unlikely that we're going to see any changes in that direction.

MR. WILKINS: Any other questions?

MR. Nagel?

MR. NAGEL: Professor Baldus, I just wanted to make certain I was clear on the analyses that you did of the state data.

MR. BALDUS: Yes.

MR. NAGEL: When you controlled for the race of the victim, is there any remaining statistically significant effect for the race of the defendant post 1972?

MR. BALDUS: Not in any strong way. You see effects of it at certain parts of the system. You see certain interaction effects, in a regression analysis, for example, at various points in the system, but it is not a dominant force. It's nothing to compare in terms of its magnitude with the magnitude of the race-of-victim effect.

The race-of-the-victim effect is as important as all but the most important factor in the cases, and that is,

how many statutory aggravating circumstances are there in the case? It's in the level of order of magnitude of whether or not somebody had a prior murder conviction, whether the victim was a stranger, whether there was excessive violence in the case. It's an extremely important factor.

The race-of-defendant effects are nothing like that.

MR. NAGEL: So the discrimination, in terms of the administrative impact, is on defendants whose victim is white.

MR. BALDUS: Right. That's what explains that paradox, how we can have a racist society and have more whites on death row than blacks.

MR. NAGEL: Is that regardless of whether the defendant is white or non-white?

MR. BALDUS: Yes, it is, that's right. For example, in Georgia--

MR. NAGEL: Is there any difference between white on white and black on white?

MR. BALDUS: No, there isn't. In Georgia, there is not a significant difference.

MR. NAGEL: So that interaction is not--

MR. BALDUS: No. In Colorado, you see a little bit of that effect. In other places, you see it. But that was

one of the big surprises of the post-Furman empirical research, that you did not see, within that category--for example, in the piece I just published, we looked at state by state figures on the disposition of death-eligible cases involving a contemporaneous felony that involved a white victim, so you could compare how the black on white was treated with respect to the white on white. And you don't see a race effect.

MR. BREYER: It is rather interesting if murder of strangers might more often call for death penalty than murder of family. Does it?

MR. BALDUS: Yes.

MR. BREYER: How about, murder of strangers may disproportionately involve whites because they're richer?

MR. BALDUS: That's true but--

MR. BREYER: Then, one explanation of the race of victim thing is that society values a black life less than a white life, which is highly discriminatory; and I guess there are other explanations, such as strangers are more often white.

MR. BALDUS: No, no, I've adjusted for all those.

MR. BREYER: You've adjusted for all those.

MR. BALDUS: Oh, yes.

MR. BALDUS: And you've adjusted for those. In other words, every one is adjusted out and it does--

MR. BALDUS: With respect to the stranger relationship, the race-of-victim effect is stronger in cases involving stranger victims.

MR. NAGEL: That might just reflect the fact that stranger victims are likely to be richer, and whites--because if you're just a stranger, you might be after the money. I'm making it up. Then the strangers who are richer are more likely to be white. And that's likely to be a case where it's the strangers that are more likely to get the death penalty.

But what I'm interested in is that you've adjusted all those things out, and having adjusted that it still turns out that there is this discriminatory impact.

MR. BALDUS: Yes, there's no question about it. No matter how you adjust for the background characteristics of the type you're talking about--you see this strong race-of-victim effect.

MR. MacKINNON: Is that just because is a better indicator of the included factors? The problem here is that you're testing a theory with--you're testing what I think is

an undeveloped notion of racism without it being very well specified.

Judge Breyer's comment about the race proxying for the race of the victim--the problem with it, at least as you've described it, and I must admit that I have not read it, so I will just go on the description at this point--is that there isn't any way, at least from the description, of differentiating whether race is a better indicator of the real aspects of the victim-offender characteristic, or of the crime.

MR. BALDUS: All I can tell you is that after you adjust for the socioeconomic status of the victim, the race-of-victim effect is still there.

I guess what I'm suggesting is that you can adjust for these background factors of the type you're describing in any way you want, with the data, and you'll see those effects. There are a number of rival hypotheses. That's what I've spent the last five years doing, is testing each one of them to see if the effects would go away when you controlled for these factors. No one can make them go away, to date, in the data that I'm working with.

I'm not suggesting that these effects are found in

every jurisdiction. They aren't. It varies from state to state, even on the issue of the race-of-the-victim effect, there's a lot of variability between jurisdictions.

MR. NAGEL: But essentially your research would not support the oft-heard claim that one major problem with the imposition of the death penalty is that it discriminates against black defendants.

MR. BALDUS: Let me explain. For example--

MR. NAGEL: Let me carry that out. It would be more that to the extent that there is racial discrimination, it's in the instance in which the victim is black and a comparable white victim might have gotten a death penalty, but not in the case of the black victim. So there's less value attached to the black victim.

MR. BALDUS: Let me explain. In Georgia, for example, you find race-of-victim discrimination in urban areas and in rural areas. When it comes to the race of the defendant, in urban areas black defendants are at an advantage in the system. In rural areas, black defendants are at a disadvantage in the system. So when you aggregate the data, the two effects wash themselves out. But there is the suggestion that being a black in Atlanta, for example, gives

one an advantage in operating in the system. Being a black out in the rural part of Georgia puts one at something of a disadvantage. But the effects are not all that large. From a technical standpoint they're statistically significant effects at some places in the system. They wash out in the aggregate, but even if they're significant, statistically, they aren't all that large. That is, you just aren't getting the magnitude of impact like you have associated with the race of the victim.

MR. MacKINNON: Does the race of the victim differ between those areas in the same manner?

MR. BALDUS: No. That's the interesting part. What perplexes me, and it seems like a serious scientific question, is how the same process can generate these seemingly contradictory results.

Let me give you the results that bother me. One thing that bothers me is the fact that you don't get the difference between race of victim and race of offender. You'd think that if it was discrimination, it would work both on the victim and on the defendant.

Then you get geographic differences on the race of the defendant, but not on the strength of the race of the

victim.

MR. MacKINNON: Let me try--it seems to me there has to be a unifying process. If the theory is that there's "racism" in the state or in the nation, it has to be generating some sort of systematic results. What I hear described are results that don't seem to be overall consistent with that theory.

MR. BALDUS: One possible explanation is that if you have an area where blacks are at an advantage, blacks kill blacks, and therefore that would tend to suppress the rate of death sentencing in the black victim cases.

See, one argument has been made--it's a very interesting thing--that the race of victim phenomenon is a product of more lenient treatment of black offenders in the system, because since blacks kill blacks, if they're treated morer leniently, then that tends to suppress the death sentencing rate in black victim cases.

We've done an extensive analysis to test that hypothesis, and that's simply not true, generally, but it may be true in certain urban areas. That would partially explain the curiosity that you've put your finger on.

It also may have something to do with a reaction to

social class of the victims. Beyond that, I don't have a hypothesis that would explain it.

MR. MacKINNON: That seems to me to be even more troubling, because then what we have, in urban areas we have a preference for blacks, and in the rural areas we have neutrality. Nowhere, then, do we have discrimination against blacks.

MR. BALDUS: No, no, no, wait a minute. What I said was, in the urban areas black offenders are at a slight advantage.

MR. MacKINNON: That would automatically give the results that you find on victims.

MR. BALDUS: In part, it contributes to it in part.

MR. MacKINNON: If that was what was happening in the urban areas, and you had not-that in the rural areas, you would have not shown any discrimination at all against blacks. You would have shown some discrimination for blacks.

MR. BALDUS: Can I explain to you what we did find? That is, in the rural areas there was some discrimination, that is, black defendants were at greater risk of having their cases advanced to a penalty trial at the hands of the prosecutors.

We find, however, that black juries tend to be much more evenhanded in their treatment than the prosecutors are. So that produces a slight adverse disadvantage for blacks in rural areas. However, there's a very strong race of victim effect in the rural areas. I guess I don't--

MR. MacKINNON: So then, put together, then you would find, if you segregate the urban areas, the data in the urban areas is not inconsistent--it is consistent with the hypothesis favoring black defendants.

In the rural areas, it's not inconsistent with a hypothesis disfavoring black defendants.

MR.: That's right, that's what I said, and the two wash themselves out.

MR. MacKINNON: If the rural areas--then all you've really found is the victim effect in the rural areas, the same place that you have the defendant effect.

MR. BALDUS: It's very hard to disentangle them

MR. MacKINNON: Is that a fair reading?

MR. BALDUS: No. No. It's very hard to disentangle which is driving which, whether it's preferential treatment of offenders that's producing the race-of-victim effect, or vice versa. That's what you can't tell. All I'm suggesting

to you is that when I look at these data and control for the race of the offender, the race-of-the-victim effect is strong. It isn't as strong--except for Georgia. I haven't been able to control for all these urban and rural distinctions in other places, because we don't have as fine-grained data as we have in Georgia.

But all I did was invite you to look at the data and see if you as a social scientist disagree.

MR. MacKINNON: Isn't what you're saying really attributable to the fact that in the rural areas where the blacks are more even, and you're dependent upon black juries and prosecutive officials who are directly responsible to substantial black votes, that they treat a black criminal with more severity than they do where you get a larger white influence in the organization of the prosecutorial system?

MR. BALDUS: I'm not sure I quite follow that. MNY statistics do not--

MR. MacKINNON: We didn't go into your juries and your prosecutors, and things like that, but those are the things that are being reflected.

MR. BALDUS: Yes. What the social process is that's producing these different responses that correlate

with race in the cases, I can't--I can hypothesize about what they are, and I think political concerns--the race of the people who were on the juries--

MR. MacKINNON: And they're closer to those people, too, the victims, in a county that's trying a murder case, than you are in a large city where your jury comes from a large area.

You said also that federal guidelines must provide for proportionality review if we include death sentences. That's an exact statement that you made, isn't it?

MR. BALDUS: Yes, that's my recommendation.

MR. MacKINNON: Yes. And you think we have to?

MR. BALDUS: No, no, no. Look--I'm fully aware of the powers that you have if you exercise jurisdiction over this question--

MR. MacKINNON: But you say we ought to.

MR. BALDUS: Yes. If you want to deal seriously with the question of excessiveness in capital sentencing in the federal context, it's imperative that you undertake such a provision.

MR. MacKINNON: Do you think you can do that with a guideline?

MR. BALDUS: In fact, it is--

MR. MacKINNON: Or haven't you looked at our authority on that?

MR. BALDUS: I understand this distinction that's been drawn here this morning between guidelines and other procedural changes, that is, whether you can have a bifurcated jury system. It seems to me that even though the Supreme Court has not ruled that you have to have a bifurcated system, that--I don't know the answer to that, to what your authority is. But it seems to me that if you're going to take seriously the question of excessiveness, that proportionality review is critical to it.

MR. MacKINNON: The next question is, what state of the ones that you have studied do you believe has the best proportionality review procedures?

MR. BALDUS: North Carolina has vacated more death sentences on the ground of excessiveness than any other.

But I think that the states that have the most effective data bases with which to conduct the proportionality review would be Pennsylvania and New Jersey. New Jersey has not started their situation. They're allowing enough population cases to accumulate so they can do it in a more

—
scientifically valid way. Those are two good jurisdictions, I think.

Other jurisdictions who have thought a lot about this are Delaware and Maryland and the state of--

MR. MacKINNON: You're talking about death cases.

MR. BALDUS: Yes. I've thought about this process of proportionality review.

MR. MacKINNON: For death cases.

MR. BALDUS: Yes. That's all I'm talking about.

MR. MacKINNON: Not for other offenses.

MR. BALDUS: No.

CHAIRMAN WILKINS: Thank you very much, Professor. It's been a very interesting discussion we've had and we do appreciate your sharing your opinions with us. We look forward to a continued working relation with you.

We stand in recess until 2:00 sharp.

[Whereupon, at 1:25 p.m., the proceedings adjourned to reconvene at 2:00 p.m., this same day.]

AFTERNOON SESSION

CHAIRMAN WILKINS: Let me call this public hearing back to order.

We are very delighted to have back with us as our next group of witnesses some very distinguished people.

Mr. Norman Dorsen is the President of the American Civil Liberties Union. With him is Mr. Martin Halperin, who is the Executive Director, and Diane Ross Tierney, who is legislative council.

Also at the witness table is Mr. William Allen, with the firm of Covington & Burling. With Mr. Allen is, I presume, his lawyer, Elizabeth Danello, with that same firm.

Thank you very much for coming. We will be glad to hear from you in any order that you shall choose.

MR. DORSEN: Thank you very much, Judge. I would like to say very briefly that, apart from being the President of the ACLU, I am a member of the bar of the District of Columbia and New York State, and have participated in many cases in the U.S. Supreme Court and other courts, after clerking for Justice John Marshall Harlan on the Supreme Court.

As you said to Mr. Allen a moment ago, they have been our lawyers to a very great extent, and we are very grateful

for the fine work that Covington & Burling has done.

In approaching this problem, which I know is one that concerns the entire Commission, let me say very explicitly--first of all, that the issue here is not whether capital punishment is a good idea. There are obviously deep-seated feelings about this on both sides of the issue. We do not propose to address that issue.

The question is one of statutory interpretation, of what Congress intended in its statute, and in its history of the statute, in establishing this Commission and authorizing it to proceed with its important responsibilities.

I hesitate to introduce my remarks in this way, but I will do so anyway.

In our view, this is one of the rare cases in which all of the indicia of statutory interpretation point in one direction. This is not a case where there are conflicting signals as exist in so many cases that come to the courts. Indeed, not only do the indicia point in one direction, but the indician, in a sense, traverse the group of conservative, liberal, and other politics.

For example, the most important feature in understanding whatd Congress meant is the statutory language. In this

case, we have searched hard and long for statutory language that even arguably could be presented as authorizing the Commission to deal with the matter of capital punishment.

There is no statutory language. There is no mention of capital punishment as sentencing options. The other sentencing options are referred to explicitly. This is widely known as a conservative argument.

For example, in the prepared statement which with your permission we will introduce into the record, Justice Rehnquist--then Associate Justice, now Chief Justice--said, 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.

There are dozens of cases in which Justice Rehnquist, former Chief Justice Burger, and other "conservatives" have taken that position, and it is fully applicable here. An argument about legislative interpretation that is sometimes referred to as liberal is the argument that slides over the statute and looks at legislative history.

I do not think it is a very good way for liberals or

anybody else to look at a statute, frankly, but people sometimes say that is a more liberal approach.

If one looks at the legislative history in this case, every single indication we have found makes it perfectly clear that the members of Congress knew exactly what they were doing when they legislated for this Commission. They gave it wide and broad responsibility, but there were limits to that responsibility. Everyone clearly understood that the recent Supreme Court cases that had been decided, after a decade of preparation in the Supreme Court, put capital punishment outside the purview of what was understood to be the Sentencing Commission's responsibility.

And that leads to the third approach to statutory interpretation, one that--as I learned many years ago at law school--is universally applied. That is that people looking for statutory intent always must assume that the body that is legislating is fully aware of the law that existed at the time that they acted. That is a well-known canon, that you must expect Congress to be aware that they were operating in this case under a situation where the statutes providing for capital punishment were inoperative. They were unenforceable under prevailing Supreme Court cases, such as the Furman

cases and other cases which you are familiar with.

Therefore, it is almost frivolous--we respectfully would suggest--to talk about repeal by implication. There was nothing to repeal. The Supreme Court had already repealed the laws that did not have the criteria and the other requirements that the Furman case had provided.

Now, those are the three main approaches that apply here, and for us they amount to an overwhelming case, but if one had the slightest doubt about the result, there are three other sets of factors which the Commission could consider which are equally indicative of the same result.

The first one is par excellence a conservative argument: the argument based on democracy, the argument that the elected representatives of the people should make the important decisions in our society. This Commission was set up; it has important work. But it is not elected. It is not responsible to an electorate. The decisions regarding capital punishment, as everybody knows, are enormously complex. They are not only complex but they are enormously controversial. Those decisions should be made, if there is any doubt at all, by the elected representatives of the people in the Congress.

Secondly, beyond the argument from democracy, there is the argument from prudence. This Commission has a reputation for being committed, for being hard-working, and not only that, for facing an extremely difficult mandate on one of the most difficult problems facing our society--the proper control of crime and criminals, the ability to balance the need for proper law enforcement with the rights of individuals.

If the Commission moves into this capital punishment area, there is not the slightest doubt that it will be--if I may say so--a self-inflicted wound. It will undercut the professional reputation of the Commission. It will move you into situations that are wholly unnecessary for you to attempt in order to fulfill your mandate which I know you have been working at with great diligence for a long time.

The final argument is that there are practical considerations. If you do decide to move into sentencing guidelines for capital punishment, what procedures will apply? Will there be bifurcated trials? What will be the decisions, and how will you make the decisions, regarding the dozens of contested and controversial issues that capital punishment has raised for the courts and for the Congress in

— this society?

So we say, as I said at the beginning--although possibly it is bad advocacy to do so--that this is a case where all the arguments seem to us to move in one direction. The mandate of this Commission is broad. It is important. It is bipartisan. It is even nonpartisan. To move into the area of capital punishment against the weight of the statutory language, the legislative history, the context, the arguments from democracy, prudence, and practicality, would seem to us to be a great mistake.

Thank you very much, sir.

CHAIRMAN WILKINS: Thank you.

Anyone else?

Any questions, from any Commissioner? Commissioner Baer?

MR. BAER: I would like to ask--since from reliable polls, 35% of the American people believe that there should be a death penalty in limited cases--they agree on limited cases--why do you think the Congress refuses to act on that, or to vote on it even?

MR. DORSEN: I think because the death penalty, as you properly say, has been subject to polls, differences of

opinion--but it was so tied up in Congress that Congress knew when they passed this law that it could not get the law passed if the death penalty was going to interfere with the many other important responsibilities.

For example, here is a memorandum from Senators McClelland and Hruska, two important and responsible conservative members of the Senate, writing about the predecessor bill to the bill that was passed, in a memorandum to Senators Hart, Kennedy, and Aboresq, dated March 25, 1976. This is what Senators McClelland and Hruska said, which I think, sir, relates to your point.

"With respect to the death penalty provisions, you propose"--Hart, Kennedy, and so forth--"that these sections be deleted."

"Since the statute was reported by the Subcommittee, five cases on the death penalty issue have been accepted for review by the Supreme Court. Thus it is expected that the Constitutional limitations, if any, on the death penalty, will be decided during this term of the Court."

"It therefore seems appropriate that, rather than incur the risk of needlessly processing legislation that might prove defective in the context of the Court's decision,

legislative efforts to deal with this subject should be deferred until we have the benefit and guidance of the Court's decisions in these cases. For this reason only, we consent to the deletion of sections 2401-03 of this bill, the death penalty provisions."

They knew that the whole thing was tied up.

MR. BAER: Suppose you could have the whole thing-- you would separate it from the rest of the guidelines, and let Congress vote just on the issue of the death penalty, up or down. Are you against that vote?

MR. DORSEN: I think that that is an appropriate matter for Congress to consider within its foreseen--

MR. BAER: Would you support Congress voting on that issue?

MR. DORSEN: I would have to see the Bill. I do not think Congress votes on the death penalty. Congress would have to vote on the specific bill. There are some bills that would be clearly unconstitutional.

MR. BAER: Ones that are clearly constitutional.

MR. DORSEN: I am sorry, sir?

MR. BAER: On bills that provided no question-- clearly constitutional--would you like to see--

MR. DORSEN: We do not believe that there are such bills. If there were such a bill, and it came up before the Congress pursuant to proper procedure, Congress should vote on it. Yes, sir. Yes, sir.

CHAIRMAN WILKINS: Commissioner Nagel?

COMMISSIONER NAGEL: Yes, I want to just follow up on Commissioner Baer's question.

In the course of today's hearing, we have heard from a number of witnesses, and while I think we were honestly seeking guidance, in some ways it is unfortunate that from all those groups in favor, largely, of the imposition of the death penalty, they read our statute as providing statutory authority; and from those groups who are largely not in favor of the imposition, they read us as not having a statutory authority. I think that we are still left with this very difficult question.

One suggestion made this morning by Bill Weld, in the Department of Justice, was that we decouple the guidelines for sentences for all offenders and offenses from any guidelines that would be specific to those offenses for which Congress has specifically indicated the death penalty is included among the range of sentence.

I think that was the question that Commissioner Baer was posing. I guess the question to you would be, is that an appropriate way for us to respond, if it is the decision of the Commission that we cannot resolve this question, that is, there is a disagreement, or if we decide that we do have the statutory authority, but it is not clear, when we look at the prudential question about what we should do, given what Congress intended. Then, we might, as I understood Mr. Weld, send up a separate set and say to Congress, Congress--here are the guidelines for all-offense offenders; here are the guidelines for capital; you vote on these, up or down. Do you have any problem with that?

CHAIRMAN WILKINS: That is an imaginative proposal and I can certainly understand why it is being made. It is not for me, of course, to suggest how the Commission should operate internally. But my instinct is that it would not cure the problem. The reason it would not cure the problem is that the Commission has to operate pursuant to the statutory authorization. If it is not authorized, as we believe is clear--

COMMISSIONER NAGEL: Absolutely. Right.

CHAIRMAN WILKINS: --then the Commission is not

legally capable of making a recommendation on the matter, even in an uncoupled way.

COMMISSIONER NAGEL: This follows the assumption that it does have the statutory authority.

CHAIRMAN WILKINS: Of course, and if it does, that might be a good way to do it, and I would not comment on that. But as I said in the start of my testimony, the language does not support it, the legislative history does not support it, the Constitutional context does not support, and all the other features of this matter all point in the same direction.

In our judgment, however much one understands, or thinks one understands, the motivation of the Department of Justice, Congress still makes the laws in this country. And Congress, in our opinion, has not authorized the Commission to do this.

Maybe they should have. Maybe it would have been better. Maybe some of the problems that the country faces could be better dealt with and we would not be holding this hearingk, for one thing.

But the fact of the matter is, and it is as clear as anything after my study of the record, and after the

— excellent work of the Covington & Burling law firm, it just is not there.

MR. BREYER: I notice in your prepared testimony, too, you quote quite a number of Congressional statements. You quote Senator Thurmond, Senator Biden, Senator Kennedy. Senator Thurmond is saying, capital punishment is controversial, so we took it out of the package--the package that later became law.

I recall, when I was working with them, that the ACLU, even after capital punishment was taken out of the package, had a number of problems with the bill that eventually became law. I remember in the version that I was working on--and we didn't always agree with the ACLU on some of these things--the ACLU prepared a memorandum, as I asked Mr. Shattuck this morning, he was working on it--the memorandum had 18 objections--there might have been more, actually, but there I think there were at least 18--to parts of this law, this bill, that you thought could lead to a bad result.

Now in that memorandum of 18 objections, you nowhere mentioned capital punishment. Why didn't you?

MR. DORSEN: I'm pretty sure--I work closely with the Washington office--that everyone assumed, as did Senators

Biden and all the others, that capital punishment wasn't included.

And if I may say so, ACLU people have sometimes been accused of being paranoid, and as someone said, they're paid to be paranoid. But the fact of the matter is, when we looked at that bill some of our people raised questions that in retrospective, frankly, might have been excessive-- although as I say, their job is to think of questions of that kind.

The fact that nobody would mention the capital punishment issue is simply inconceivable. It's a hard-core issue for the ACLU. It's a hard-core issue in different ways for a lot of other groups whose motivations we do not question. We know that there are different opinions. It's not possible that we wouldn't have raised an objection to capital punishment if it were even arguably within the bill.

MR. BREYER: Do you remember about Henry Kissinger? I think he said that anyone in Washington who isn't paranoid must be crazy.

MR. MACKINNON: Mr. Dawson, you said that in 1976, the memo by Senators McLelland and Hruska took out capital punishment to defer to the consideration of some pending

Supreme Court cases. Did those particular Supreme Court cases come out--did they solve the problem or didn't they?

MR. DORSEN: They did not. I think that's a very fair question. They were the cases--the Woodson, Gregg, and Profit cases were decided in 1976--we cite them on page 15 of our memorandum, and probably elsewhere.

They did--cases like Gregg in particular--did authorize capital punishment, but with very explicit guidelines in the statutes. None of the statutes that theretofore had existed had those guidelines because by definition they were passed before the Supreme Court criteria were enunciated, so we were left pretty much with the status quo, Judge MacKinnon.

MR. MACKINNON: There were 76. The Air Piracy Act was passed in when?

MR. DORSEN: '74.

MR. MACKINNON: '74.

MR. DORSEN: After the Furman decision but before the ones you've just enquired about.

MR. MACKINNON: That's all I have, thank you.

CHAIRMAN WILKINS: I thank all of you very much. We appreciate the very thoughtful written submission that this Commission received.

MR. DORSEN: Thank you, very kindly, Judge Wilkins, and members of the panel. We appreciate the opportunity to be heard.

CHAIRMAN WILKINS: Thank you.

Our next witness is Professor Albert W. Alschuler, University of Chicago Law School.

MR. ALSCHULER: Thank you.

The Office of Legal Counsel has concluded that this Commission can breathe life into some currently dormant death penalty statutes, and in that way empower the federal courts to sentence some offenders to death.

In my written remarks, I 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 resurrect the statutes?

Third, could any regime of sentencing guidelines cure the defects of the old statutes and yield an appropriate capital sentencing system.

Fourth, as a prudential matter, should the Commission under take the task that it is currently considering?

In the limited time available, I won't try to

— discuss with you at any length the first two questions. One the Constitutional issue, I was a little surprised at Mr. Weld's testimony this morning--that he hadn't even bothered to think about whether this Commission's power to issue capital sentencing guidelines was mandatory or discretionary. As I read the memorandu, it was arguing that the Commission had the power but not the duty to issue capital sentencing guidelines.

I think that a statute that in effect says to an administrative agency, issue capital sentencing guidelines, if you feel like it, is unconstitutional. Leaving to an administrative agency the effective decision whether certain offenses will be punishable by death seems to me to be an unconstitutional delegation of Congress' legislative responsibilities.

On the statutory question, it seems, as a nuumber of witnesses have suggested today, that there was a pretty clear understanding in Congress that the 1984 Sentencing Reform Act would not resurrect the death penalty. There was a deliberate decision to leave that issue aside, and if legislators had suspected that that legislation did resurrect the death penalty, in effect, by giving this condition the

power to promulgate sentencing guidelines, it seems apparent that it wouldn't have passed.

At least that was the testimony of the Senators who were most influential in securing its passage. There was an explicit understanding, and the Office of Legal Counsel has invited this Commission to undo that understanding.

But let's leave all of that aside. What I do want to talk to you about at greater length is, assume that the Commission has authority to promulgate capital sentencing guidelines, and ask, what good would the guidelines do?

The Office of Legal Counsel maintains that these guidelines would be an all-purpose elixir for moribund death penalty statutes. It says, "any constitutional defect in existing federal statutes authorizing the imposition of the death penalty, can be cured by the Congressional or administrative promulgation of regulations specifying appropriate sentencing procedures."

I think that conclusion is erroneous. The Office of Legal Counsel apparently assumed that only one Supreme Court decision, Furman against Georgia, opposed any limits on the government's power to inflict the death penalty.

But in Coker against Georgia, the Supreme Court

held that the Eight Amendment forbids capital punishment for rape. Coker apparently precludes capital punishment for all non-homicidal offenses, with the possibled exceptions of espionage and treason. So the principal focus of capital sentencing guidelines must be on murder and other federal homicidal offenses.

I noted that Mr. Fein's proposed guideliines this morning dealt only with homicidal offenses, and I very much doubt that any guidelines could restore the death penalty for these crimes.

Analysis can begin with the United States against Jackson, 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." Maybe the Kidnapping Act could have been read differently, but the Supreme Court held that it authorized the death penalty only when a defendant had been convicted at a jury trial. If the defendant pleaded guilty or waived the right to jury trial, the maximum punishment was life imprisonment. The Supreme Court said that circumstance made the death penalty provision unconstitutional; the provision

— needlessly encouraged guilty pleas and jury waivers in violation of the Fifth and Sixth Amendments.

Notice that the Jackson defect cannot be cured by any sort of legislative or sentencing guidelines.

Now look at the pre-Furman federal murder statute. It says, whoever is guilty of murder in the first degree shall suffer death unless the jury qualifies its verdict by adding thereto without capital punishment. The federal statutes concerning assassination of the President, Vice President, and members of Congress, authorized punishment "as provided by the federal murder statute."

And all of these statutes seem to me to suffer from the Jackson defect. All appear to authorize the death penalty only for defendants convicted at jury trials. If I'm right about that, then these provisions are beyond this Commission's powers of redemption.

There is a way to avoid that conclusion. You can read the statutes in a highly 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 the verdict the words "without capital punishment."

So maybe the murder statute doesn't forbid the death penalty for people who plead guilty or waive the right to jury trial. Maybe it establishes a mandatory death penalty for people who plead guilty or waive the right to jury trial.

If you read the statute that way you cure the Jackson defect, but I think you impale the statute on the opposite horn of the dilemma.

One problem is if the Murder Statute were construed to provide a mandatory death penalty for some defendants. It might violate the requirements of Woodson against North Carolina, and Roberts against Louisiana, which held mandatory capital punishment statutes unconstitutional.

I don't take that objection too seriously. The defendant always could demand a jury trial, so it isn't really a mandatory penalty; but isn't it a little strange to force a defendant to demand a jury trial whenever he or she wishes to avoid the death penalty?

I don't suppose there's anything unconstitutional about doing that. But it certainly illustrates this Commission's inability to establish a sensible regime of capital sentencing.

In any event, the federal homicide statute requires sentencing by "the jury." Does this Commission have authority to promulgate guidelines for jury sentencing? The statute authorizes the Commission to issue sentencing guidelines for the use of a sentencing court.

Does the word "court" include jury? Look at the things that the court's supposed to do under the Sentencing Reform Act. It's supposed to state reasons for the imposition of every sentence. Does Congress contemplate that a jury was going to do that?

It has to make findings if it's going to go outside the guideline range. Did Congress contemplate that a jury was going to make findings? It seems to me clear that the statute did not contemplate the promulgation of guidelines for jury sentencing, and a lot of federal death penalty statutes require jury sentencing.

A third problem is that all of these statutes seem to provide for a non-bifurcated procedure. The jury determines guilt at the same time that it determines punishment. There was a Supreme Court decision prior to Furman that says the Constitution doesn't require bifurcated guilt and penalty for proceedings in capital cases, but I don't think that decision

can survive Furman and the post-Furman Supreme Court decisions.

The plurality in Gray against Georgia declared the 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, read the majority's decision as requiring bifurcation despite the absence of an expressed declaration to that effect.

Congress' one post-Furman death penalty statute provides for bifurcation. Every current state death penalty statute provides for bifurcation. If you had authority to issue guidelines for non-bifurcated jury sentencing proceedings, I suppose they'd have to be read to the jury along with the court's instructions on substantive issues of homicide law.

And what do you do about mitigating evidence? The Supreme Court said the defendant must have an unfettered opportunity to present any mitigating evidence. But how can the defendant do that at a non-bifurcated proceeding? Defendant can't explain the circumstances that motivated the murder without admitting that he committed the murder. Apparently he has to choose between his Fifth Amendment privilege against self-incrimination and his Eighth Amendment

right to present mitigating evidence.

Even if a non-bifurcated proceeding could pass Constitutional muster, which I think is doubtful, it's obviously a cumbersome and unjust proceeding. I don't see anything in the statute that empowers the Commission to mandate a bifurcated rather than a non-bifurcated proceeding.

Now there are some other federal pre-Furman death penalty statutes that don't involve the jury in capital sentencing--just authorize the judge to impose the death penalty on the same terms that the judge imposes any other punishment.

They include the treason and espionage statutes. As to those statutes, I think that sentencing guidelines, if the Commission had authority to issue them, would make the statutes Constitutional. There is no Constitutional requirement of jury participation in the capital sentencing decision, and maybe the guidelines would provide sufficient certainty to cure the Furman defects.

But think about whether you really want to do that. In the anti-skyjacking act, Congress required jury participation in the sentencing decision, even when a defendant pleaded guilty or waived the right to a jury trial on the issue of

— guilt. Only four of the 37 states with capital punishment provisions don't provide for jury participation in the sentencing decision.

The responsibility of deciding whether to sentence somebody to death without any input from a jury is not one that most federal judges whom I know would be likely to value. The Supreme Court itself, even as it upheld the constitutionality of sentencing by the judge alone, said we do not denigrate the significance of the jury's role as a link between the community and the penal systems, and as a bulwark between the accused and the State.

So maybe the sentencing guidelines could cure the Constitutional guidelines of pre-Furman death penalty statutes that provide for sentencing by the judge alone, but there is an overwhelming current consensus in favor of jury sentencing in capital cases.

So with those statutes you're going to have sentencing by the judge alone, which is unfortunate. With the other statutes, you can have sentencing at a unitary non-bifurcated jury trial, which is unfortunate and probably unconstitutional.

The point is that this Commission plainly cannot

provided a safeguarded capital sentencing scheme of the sort that Congress almost certainly would provide were it to consider the issue of capital punishment and determine that capital punishment was 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 sentencing guidelines would be unfortunate; I think it also bears on the question of whether Congress intended the Commission to undertake this task.

Let me turn, just in the last moment, from some legal issues. I am a criminal lawyer. I don't claim any powers of political punditry. But I can't resist a comment on the dangers of the course that the Office of Legal Counsel has invited this Commission to follow.

The OLC memorandum traces the legislative history of the Sentencing Reform Act to its history almost 20 years ago in proposals for a new federal criminal code. That code was needed 20 years ago. It's still needed. We don't have it, and the reason was that it's foundered over a very few controversial issues, most prominently the death penalty.

Opponents of a new federal criminal code have

resisted a code that authorized the penalty. Proponents of the death penalty have resisted a code without it. For 20 years the tail has wagged the dog. The death penalty is still divisive in Congress. In the last Congress, opponents of the death penalty blocked the death penalty provisions of the Comprehensive Drug Control Act.

It seems to me dangerous for this Commission, whose work has so much promise to bring order out of criminal sentencing, to invite the opposition of all the opponents of the death penalty in Congress, and perhaps of members who support capital punishment but oppose the wholesale resurrection of currently dormant statutes that are plainly ill-suited to current conditions.

Thank you.

CHAIRMAN WILKINS: Thank you very much, Professor. I want to say, too, I think the written submission that you have given the Commission was an excellent brief. We appreciate the obvious hard work and thought that has gone into it.

I can't resist citing the last line, either.

MR. ALSCHULER: I would have done it except I ran out of time.

CHAIRMAN WILKINS: "With its lack of authority to issue sentencing guidelines, the Commission does, however, have the power to shoot itself in the foot."

Any questions to my right? Questions, anyone?

Fine. Thank you very much, Professor. Againi, we appreciate your good work, and we look forward to working with you in the future. Thank you.

Our next witness is Mr. Charlie Sullivan, representing Citizens United for Rehabilitation of Errants. Mr. Sullivan?

MR. SULLIVAN: I've got copies of my statement, which is very brief. If I could just make those available to the Commission afterwards?

CHAIRMAN WILKINS: Somebody will pick them up from you.

MR. 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, aggraavating or mitigating circumstances, and procedural safeguards should be covered by any guidelines to ensure that capital punishment is imposed on a fundamentally fair and on-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 it has already been covered.

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 cannot outline criteria 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 considering 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--I guess it's been over a year now--

CHAIRMAN WILKINS: Seems like it.

MR. SULLIVAN: --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.

Secondly, 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 death penalty amendment.

In fact, the House sent the Senate the drug bill three times with the death penalty in it, and three times it was rejected by the Senate, by a Republican Senate.

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 payraise, the burden would be on the opponents to block the guidelines.

However, do not underestimate the opponents of the death penalty in the Senate. 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, CARE, which organizes families of prisoners into a lobby, is rerrelative 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 Capital Hill, and discuss our national agenda on prison reform. I am hopeful that one of the top items on ouor agenda will be the urginig 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 other organizations might be in the same position.

Therefore, I urge you, for the sake of the guidelines, and for many other reasons, not to consider a federal death penalty.

CHAIRMAN WILKINS: Thank you very much, Mr. Sullivan.

Any questions from any Commissioner? Goerge MacKinnon?

MR. MACKINNON: I take it, then, that if it isn't in there, that you will support it?

MR. SULLIVAN: I haven't really gone into the latest draft, but from what we can gather, and what the word is among the people that are following this whole thing, they seem like we've made a lot of progress in that. Like I say, I think it's going to poison it.

MR. MACKINNON: What were the circumstances of the rejection of the death penalty in the drug enforcement act? It was late in the session, as I recall it.

MR. SULLIVAN: That's right.

MR. MACKINNON: How late?

MR. SULLIVAN: It was the last week.

MR. MACKINNON: Yes, where a few people with a threatened filibuster could stop it. How many, would you say, were lined up against it?

MR. SULLIVAN: Of course the filibuster had to be cut off, and so we had to gather 60 votes to stop the filibuster, so the people for the death penalty had to come up with 60 votes, and they came up with 58.

We had some people who were opposed to the death penalty. I could use the example, I guess, of Senator Cranston, who is on record opposed to the death penalty, voted at this point, or at least had implied that he was for the death penalty because he--

MR. MACKINNON: He was up for election.

MR. SULLIVAN: Right, he was up for election. So you've got a situation where I think there is much more opposition than what we saw in the fall that is there when there is not the election pending, so I feel that there is a great deal of opposition.

I think what's going to happen--if I may make one other comment, and I talked about the whole idea of coupling. I've been listening to that, and the question, I think, has been asked by one of the Commissioners, too. It just seems like Congress is giving you a trust.

This trust, in a deal that was cut by Senator Kennedy and certainly Senator Thurmond, who were very much

opposite on this and certainly went along with this, was Congressman Conyers, who is very opposed to the death penalty. This trust, it seems like you're abusing. My concern is--

MR. MACKINNON: We haven't yet.

MR. SULLIVAN: It's like being invited to a party, and once they open the door and let you in, you bring in some people who are not welcome. If I was host at that party, my reaction might be to kick both people out.

That's like what I think Congress may do. At least that will be the reaction of people like Kennedy and Conyers. They will say, look, we gave them this trust.

Also, from what I can see, they're setting it up very much like the Congressional pay raise, that they're giving you this trust that the death penalty will not be stopped by a filibuster if you decide to go into this. They're pretty well putting their trust in you in a deal that was cut.

I think that they would say, if they could, to shoot the whole thing down. I think that that's going to be the damage, because I do think that our organization is very interested in citizen guidelines. We deal with people who

are in prison. Many times their cell partner might be in for the same crime, and they're serving twice or three times as long.

I think sentencing guidelines--the concept behind it--is very, very important, and something everybody--or at least our organization--supports. What's going to happen is, it's going to focus all of our attention, instead of lobbying the guidelines, it's going to force our attention on what? The death penalty.

We didn't care about the drug bill, that much. We should have been looking at the merits of that, and how it affects people, and all, but what happened is, all of our energy was expended on the death penalty, on stopping the entire drug bill.

I think that's what's going to happen with this. I think that we're with the group, an anti-death penalty group. We're going to be gathering and focusing in, not on selling the guidelines to Congress, but on the death penalty, and I think that's tragic.

MR. MACKINNON: But the drug bill did pass.

MR. SULLIVAN: Without the death penalty.

MR. MACKINNON: Yes. Yes. What punishment did

— they provide? Life imprisonment?

MR. SULLIVAN: Yes.

MR. MACKINNON: Without parole or with parole?

MR. SULLIVAN: I don't think they want it without parole; I think it was life imprisonment.

MR. MACKINNON: It just says life imprisonment. But it will be without parole on the guidelines.

MR. SULLIVAN: Right, on the guidelines.

CHAIRMAN WILKINS: Thank you very much, Mr. Sullivan, we appreciate your comments not only today but the working relationship that we've had with you and your organization over the past year plus, now.

MR. SULLIVAN: Right.

CHAIRMAN WILKINS: Thank you very much.

MR. SULLIVAN: Thank you.

CHAIRMAN WILKINS: Our next witnesses include the Executive Director of the International Association of Chiefs of Police, Jerald R. Vaughn. Mr. Vaughn?

(Tape change.)

CHAIRMAN WILKINS: M. Wayne Huggins, Sheriff of Fairfax, County, Virginia, representing the National Sheriffs' Association; and Donald L. Cahill representing the Fraternal

Order of Police. Mr. Cahill?

This is the first time in over a year of thirteen hearings we're running a few minutes of schedule, so I was going to delay things until Mr. Cahill got here, but I'm delighted he has now arrived, and I'm delighted to have you three gentlemen with us.

Sheriff Huggins, do you know my Sheriff, Johnny Mack Brown?

MR. HUGGINS: Excuse me, sir?

CHAIRMAN WILKINS: Do you know my Sheriff, Johnny Mack Brown?

MR. HUGGINS: Yes, sir, I know him very well. He's a good friend.

CHAIRMAN WILKINS: Good. We're glad to hear from you.

MR. HUGGINS: Thank you.

MR. VAUGHN: Good afternoon. I appreciate the opportunity to appear before you to discuss the views of the International Association of Chiefs of Police on the Sentencing Commission's--

MR. MACKINNON: And who are you?

MR. VAUGHN: My name is Gerald Vaughn. I'm the Executive Director of the International Association--

MR. MACKINNON: You've got three of you there, and we have to decide who's who.

MR. VAUGHN: I apologize--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 offences.

By way of introduction, please allow me to tell you a little bit about the organization I represent. The International Organization of Chiefs of Police is a professional law enforcement organization established in 1893. It's composed of over 14,000 Chiefs of Police and other top law enforcement officials from all sections of the United States and 67 nations.

I'll leave to the legal scholars the in-depth discussion of this Commission's authority to promulgate sentencing guidelines for federal capital crimes. I must comment however that the IOCP 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 3553A2 of Title 18 of the United

States Code is met.

Specifically, the guidelines should ensure that federal sentences are designed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; and to protect the public from further crimes of the defendant; and 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 guidelines of policy statements concerning the imposition of sentences of probation, of 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 (28USCode994C).

This section appears to express the recognition by

— Congress that penalties other than fines, probation or imprisonment, should 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 the 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'd like to turn now to a discussion of the position of the International Association of Chiefs of Police members on capital punishment. The Association is very much in favor of the imposition of the death penalty for certain crimes.

While others may not be as convinced, we strongly,

as police administrators, believe that capital punishment is in fact a deterrent to the commission of certain crimes, particularly premeditated murder, murder committed during the perpetration of a 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 murder while incarcerated. What does such a person have to lose by his barbarious behavior if not his life?

The seriousness of this 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. It is much more tragic for an innocent person to lose his or her life than for a government to take the life of a criminal convicted of capital offenses.

I can't point to any conclusive statistics that prove capital punishment does indeed deter other capital crimes. However, a study published just two 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 studies are significant in that they've 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 committing a murder, and there is considerable news coverage of it, a decrease of 3.32% in homicides occurs.

The researchers call 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's some direction provided in the quest for an answer to the varied deterrents issue.

At one time in the history of man, 168 violations were capital offenses. It's to the credit of our forefathers that they realized that the death penalty could not properly 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 going to have to apply these 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 vehicle. The murderer was found not guilty and committed to a 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 viciously to 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 continually 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 our society again.

Opponents of capital punishment argue that there is a danger that we'll execute a person convicted of a murder he did not commit. I'll 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 every experience while protecting the citizens he or she 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 a 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 contains 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 crime 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 mitigation 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 which will determine the appropriate penalties.

Another step would be to require the sentencing authority to specify factors it used in reaching its decision. The information would be important to an Appellate Court,

— should the defendants 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 be properly 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 if the murder was committed by a convict under sentence of imprisonment; if the defendant was previously convicted of another murder, or of a felony involving the use or threat of violence to the person; if at the time the murder was committed, the defendant also committed another murder; if the defendant knowingly created a great risk of death to many persons; if the murder was committed while the defendant 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.

In the interest of time, there are some 16 of those, so I think I'll leave those for your review in the written testimony.

I've focussed 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 the appropriate standards are quickly adopted to permit capital punishment to be reinstituted.

Thank you for the consideration of these views.
I'd be happy to entertain any of your questions.

CHAIRMAN WILKINS: Thank you very much, Mr. Vaughn.

Sheriff Huggins or Mr. Cahill, do you all have statements you'd like to present now, and then we'll perhaps ask questions of you as a group?

MR. CAHILL: Mr Chairman, ladies and gentlemen of the Commission, my name is Wayne Huggins. I'm the Sheriff of Fairfax County, Virginia, and today I represent the National Sheriffs' Association. The National Sheriffs' Association thanks you for the invitation to address this U.S. Sentencing Commission on this most important issue of capital punishment.

Before concentrating on the specific issues to be

covered today, I'd like to provide you with some background about the National Sheriffs' Association, and why the sheriffs of this country 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 3100 sheriffs. The National Sheriffs' Association has over 40,000 members, including sheriffs, under-sheriffs, deputy sheriffs, 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 court rooms, and for the service of civil and criminal process. You may ask why local law enforcement officials are concerned about federal capital offenses.

There are several issues why sheriffs want to speak out on these issues. First and foremost, sheriffs believe in capital punishment. As the chief law enforcement officer in our jurisdictions, we see first-hand the results of heinous

criminal acts that seriously jeopardize the security of our nation and of our citizens. We believe that certain offenses require an equally serious response.

We 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 the National Sheriffs Association passed a resolution in support of legislation that would have enacted guidelines allowing for the imposition of the death penalty in federal cases.

One other reason why we believe that sheriffs should involve themselves in this national issue is that most criminals don't know whether they're violating a federal law or a local law. They don't know whether bank robbery is a federal law or a local law. They don't know, when they kill a law enforcement officer, whether they're killing a federal law enforcement officer or a local law enforcement officer.

Most of these people have extremely lengthy criminal records. Few people being considered for the death penalty is this their first blush, if you will, or their first contact with the criminal justice system. As we have

dealt with these people, now the federal authorities are dealing with them; and if the federal authorities don't deal with them in an equal manner as the local authorities do, then we're going to have them right back in our counties and our cities, causing the same problems that they have in the past.

We feel that the federal government can provide a model for the states. As a result of the United States Supreme Court decision in Furman v. Georgia, 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 the leadership role in formulating model guidelines that could be adopted by the states. Lack of sanctions for inmates serving life sentences, we feel, provides 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, and we read of this happening more and more often,

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 our officers and inmates in those facilities.

We would like now to address the two specific issues posed by the Commission today. First, does the Commission have the authority to promulgate sentencing guidelines for federal capital offenses? And second, if the Commission does have the authority, what specific statutory crimes should be covered by the guidelines?

The U.S. Sentencing Commission, we feel, does have the authority to issue guidelines. While we are not lawyers, we believe that the U.S. Sentencing Commission does have the 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 U.S. Sentencing Commission ability to promulgate these guidelines. The sentencing reform act of 1984 established a comprehensive federal sentencing scheme for use by the United States Courts in determining the sentence to be imposed in a criminal case.

Section 3551, Subsection a of 18 U.S. Code, indicates, and I quote, that "except as otherwise specifically provided, the defendant who has been found guilty of an offense described in federal statute shall be sentenced in accordance with the provisions of this act.

Subsection c goes on to outline the sentencing options. However, it does not specifically mention the death penalty or other nonstandard sanction such as those for 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 credance to the theory that Congress intended to repeal the numerous death penalty provisions, or other sanctions listed in the U.S. Code.

When Congress sought to supersede legislation through the Act, they did so in explicit fashion. In fact, the Act contains two separate sections dealing with repealers and technical and conforming 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 of these issues, it is impossible to imagine that

they merely overlooked the death penalty.

Finally, in the area of statutory crimes that should be punished 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 correctional officer or other person by an inmate; the killing of a federal law enforcement officer during the performance of his or her official duties; indiscriminate killing related to terrorist activities; the killing of witnesses; and finally, the murder of hostages, and murder for hire.

It seems to me that in two recent polls conducted in 1985, the overwhelming majority of the citizens of this country are in favor of capital punishment, and it seems to the National Sheriffs' Association that we ought to get on with it, and that the federal courts ought to be doing what many state courts already have the ability to do.

Once again, thank you for the opportunity to appear before you today.

CHAIRMAN WILKINS: Thank you very much, Sheriff Huggins. --Mr. Cahill?

MR. CAHILL: Mr. Chairman, members of the Sentencing Commission, my name is Donald Cahill. I serve at 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 the chief of police, including federal law enforcement officers from all agencies.

On behalf of the National President of the Fraternal Order of Police, Richard Boyd, I'd like to take this opportunity to thank the Sentencing Commission for reaching out to the people their decisions eventually effect, 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.

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 lead 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 endorses 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 witness after witness to testify favorably about capital punishment. We believe that this would be counter-productive.

In recent polls conducted by the Associated Press across the country, it was found that most people do support capital punishment in certain cases. These are cases involving murder during other violent crimes, and murder during drug dealing.

In addition to punishing the offender, the respondents felt, it would be also a protection to society. Mr. Chairman and members of the Commission, I assure you that the citizens of this 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 heinous crimes, not considering race, color, or creed, but considering the crime and 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 a police officer at this time. I presently serve on a police department in Virginia, and have for over 15 years. During this period of time I investigated, testified, and sat through well over 600 felony trials in our courts, not only in my jurisdiction, but in other counties, states, federal courts, and in 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, and the People's Republic of China, where I've recently returned from.

In evaluating these courts, trials, and systems, I believe ours to be 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. Among 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 reconvening, the jury has a question. Time after time, that question is, how much time will the defendant serve if we sentence him to so many years?

Certainly this is not a concern for them legally, and yes, the presiding judge always tells them they cannot concern themselves with that question. But they are concerned, they are very concerned, and they have the right to be concerned. I know I am.

When a juror 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 that the defendant will do 20 years in prison when the jury gives him 20 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, usually 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 the sentences were too harsh, some harsher than those imposed currently by those judges.

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 too quick to shop for the sentence discount as a defense counsel. Maybe we are too quick to look for the 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 branch 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 deterrent, and also serve as a punishment for the crime committed. This would not only serve as a deterrent to this offender to

commit further criminal acts after his release, but to other criminals as well.

Does the death penalty serve as a deterrent to criminals? We believe that it does. We've seen the number of criminal homicides increase tremendously in the last 20 years. This may or may not be as a result of the dormant time and death penalties, but we believe it does have some bearing.

It is still too soon for the figures to give us a true picture since the death penalty has been reinstituted in most states, but in most of the interviews that I have conducted with major offenders, I have had the response "that I didn't want to burn, or I would have taken him out."

All too often, we tend to go overboard while looking after the rights of the accused, while we treat the citizenry ex legelaire (phonetic). The recidivism rate is very high in the United States, and so is the crime rate. That tells me, and other members of my organization, that the system is not really working very well, and it needs to be changed.

I want to emphasize 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 offenses.

The Fraternal Order of Police believes that the difficulty shown in trying to pass legislation shows that this is an area not taken lightly by anyone. We believe in the United States Sentencing Commission, and that they should be impromptu to promulgate these guidelines for imposing capital punishment wherever the statute calls for it.

I thank the Commission for affording us this forum.

CHAIRMAN WILKINS: Thank you, Mr. Cahill.

Any questions from the Commissioners to my right?

Any Commissioners have any questions?

Gentlemen, thank you very much, and we appreciate not only your appearance, your testimony, the cooperation your various organizations have given the Commission over the past months; and we look forward to a continuing working relationship with all of you.

Thank you very much.

Is Dr. Charles Ogletree here? Dr. Ogletree? Yes, glad to see you. Or next witness is Dr. Charles Ogletree,

representative of the National Association of Criminal Defense Lawyers. Dr. Ogletree is a member of the Harvard Law School. We would be glad to hear from you.

MR. OGLETREE: Two preliminary matters, first, a disclaimer. I've never been called a doctor before. I'm actually a professor and a lawyer. I appreciate the title, but will disclaim it in my testimony.

CHAIRMAN WILKINS: It might be in the motion. I'd better change it.

DR. OGLETREE: Very well. The second is that with me is Scott Wallace, from the National Association of Criminal Defense Lawyers.

CHAIRMAN WILKINS: Mr. Wallace, glad to see you.

DR. OGLETREE: I just, within the last two hours, lectured my advanced criminal procedure class on the virtues of the Sentencing Commission's guidelines with respect to other charges. My students were not persuaded, but I still think I held the day.

Today, I'm taking a different tack. I'd like to at least state some part of what's in the written comments in my belief that the Commission does not have the authority to address the issues of capital punishment.

As I indicated, my name is Charles Ogletree, and I am at the present time a visiting Professor of Law at Harvard Law School. I appear today on behalf of the National Association of Criminal Defense Lawyers.

The National Association of Criminal Defense Lawyers is a nationwide voluntary bar association comprising approximately 5000 lawyers and law professors, most of whom are actively engaged in defending criminal prosecution and individual rights.

I am pleased today to have the opportunity to address the Commission on the two questions outlined before us: (1) does the Commission have the statutory authority to promulgate sentencing guidelines for federal capital offenses? And (2) if the Commission is found to have such authority, what specific crimes, aggravating and mitigating circumstances, and procedural safeguards should be covered by any guidelines to ensure that capital punishment is opposed in a fundamentally fair and non-discriminatory manner?

Because I believe the answer to the first question is affirmatively no, I will largely confine myself to that issue, and only address the second question briefly at the end of my testimony, and in the event that there are any

questions.

I'd like to preface the remarks by noting that, in a memorandum to the Sentencing Commission, and an addendum submitted today, the Department of Justice maintains that the Commission has the authority to promulgate Constitutional procedures to reinstate the death penalty.

However, as the Justice Department points out, there is no textual provision that authorizes this Commission to issue such procedures, nor does it rely on any explicit legislative history. Rather, in reaching its conclusions, the Department of Justice relies on silence, implication, and a strained reading--in my view--of legislative history.

The text and the legislative history of the Conference of Crime Control Act of 1984 clearly demonstrate the Commission does not have the authority to issue procedures for reinstituting the federal death penalty; and moreover, Congress has explicitly retained any authority for issuing such procedures as remove any question concerning the death penalty from the Commission's authority.

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 penalties.

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.

Instead, the statute only provides for probation, fines, imprisonment, forfeiture, restitution, notice to victims, and a certain combination of these various sanctions. Thus, nowhere on the face of the statute is there clear 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 noted, "it outlines in one place the purposes of sentencing, and describes in detail the kinds of sentences that may be imposed to carry out those procedures."

On the contrary, the Justice Department suggests that Title 18, United States Code Section 994, supports the view that the Commission has authority to reinstate the death penalty. It further claims that the word, "including," precedes the list of authorized sentences, as well as the

phrase, "'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, as if it were the last item on a grocery list. Indeed, perhaps the most formidable task facing Congress is to determine who shall die and who shall live.

The death penalty is one of the most unique and controversial issues in our society. As Justice Steward observed in *Furman*, the form of death differs from all other forms, not in degree but in kind. To suggest that Congress would delegate and relegate the death penalty to other status, or contain it in the phrase, "including," is to exceed a reasonable statutory interpretation.

In short, the text of the Conference of 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. It's detailed. With respect to reinstituting the death penalty, it is unambiguous, and is intended to be so.

Alternatively, the Justice Department suggests that since various federal death penalty provisions remain on the books from the pre-Furman days, it remains an authorized punishment within the Commission's purview, unless those provisions have been impliedly repealed by the Act.

But this is a straw man argument, and not a real 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 as well.

In enacting the Sentencing Reform Act of 1984, 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 15 years since Furman, bills to restore the federal death penalty have been introduced in each session but never have passed.

Moreover, the awesome task of restoring the death penalty is Congress', and outside the province of this Commission. As pointed out in the Department of Justice memo, for example, the Conference of Crime Control Act, as passed, explicitly contained the only post-Furman death penalty statute, and that is the Anti-hijacking Act.

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.

The question is not whether the Act repliedly repealed the death penalty, as the Justice Department would argue, but whether through the Act the Congress has chosen to restore it. The text plainly suggests the answer is no, and the legislative history, as I will address now, affirms that result.

In debating Bill 1765, Senator Specter observed that there is no more difficult question, either philosophically or from a practical point of view, than the issue of the death penalty. These sentiments were echoed by others during the debate on S.1765, a bill that failed to pass the house.

The Commission, in its mission, must assess whether Congress would include such a critical issue in a bill by way of implication, or through ambiguous savings clause, as the Department of Justice maintains. But common sense, political realities, and the clear legislative history suggest that the answer to that question is no.

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. That has never been any proposal to give the Sentencing Commission independent authority to reinstate the death penalty.

Interestingly, four months after the bill was introduced, the Senate Judiciary Committee ordered the original bill to be split in five separate bills, with the death penalty provisions being treated as a separate bill. The main bill, which includes the Sentencing Commission, was reported in Senate Bill 1762, while the bill containing the death penalty was reported separately in Senate Bill 1765.

The purpose of splitting the Bills was clear. I quote: "to enhance the potential for ultimate enactment of a conference of crime bill." Accordingly, the Committee

— decided to deal with a number of more controversial pending issues, such as habeas corpus, the exclusionary rule, and capital punishment, in separate bills.

Likewise, Senator Thurmond, the chief sponsor of the Conference of Crime Control Act, has stated clearly, and I quote: "Senator Biden and I have worked on this criminal package for several years. We have removed from its provisions on the death penalty, habeas corpus, the exclusionary rule, and the federal Torts Claims Act, because these matters were controversial. We tried to take out what we thought might cause controversial questions. They will come up individually after this package has been completed. I am sure that some of them will be opposed, but on this package, we all agree."

Similarly, Senator Thurmond indicated that the effort to make the death penalty a part of the Crime Act was inadvisable, and that a separate bill on that was necessary.

Moreover, Senator Kennedy has take a similar position on the death penalty legislation, as well as other members of Congress.

It is interesting to note that the vote on the crime bill was nearly unanimous, whereas the vote on the death penalty legislation reflected considerable disagreement among the

Senators. It is impossible to imagine that so volatile an issue would be delegated to this Commission through the use of vague and superfluous passages in the Sentencing Reform Act.

It is even more difficult to understand how the authority is within the purview of this Commission, and yet the Department of Justice has continued to urge Congress a federal death penalty law since 1984.

Congress has continued to wrestle with this issue. The Justice Department has taken the lead in urging Congress to authorize a federal death penalty law. The continuing controversy over the issue is demonstrated by the Senate's intense debate and rejections of death penalty legislation in the context of this past fall's Omnibus Drug Legislation. Supporters of the death penalty were unable to muster the 60 votes necessary to break the filibuster that occurred.

In interpreting the statute, and in concluding, I'd say the following. The Department of Justice is now trying to pass legislation through the Sentencing Commission that it was unable to push through Congress. As I 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.

But those efforts failed, and the Administration should not be allowed to gain through the Commission what it could not gain through Congress. The Justice Department seems to recognize some of these problems. But by focusing on the issue of whether the Crime Control Act was created 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, again, is no.

When construing a statute, it is important to try to effectuate and adhere to legislative purposes. In this way, the interpreter must try to decide how the legislators would have wanted the statute to be construed.

The Department of Justice, of course, cites the Matthews Case, a case which I believe has limited or no relevance. In that case, the court was relying on the President's power as Commander-in-Chief, under Article 2, Section 2, where the President admittedly had broad powers. No such power or authority is implicated in the present situation.

Finally, even assuming arguendo that the statute or

legislative history were effect designed and intended to give the Commission authority over the death penalty--and that is a difficult position to imagine--it is unlikely that such a delegation would have had 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 the balance in non-capital cases. The Supreme Court has said that in capital cases there are three levels of enquiry: first, whether the defendant committed the crime; second, whether at least one aggravating factor as established by statutory definitions exists, so the defendant is actually death-eligible; and third, a balancing of all the circumstances of the case--that is, extenuating, aggravating, and mitigating factors against each other.

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 crime itself, and telling a system-wide policy judgment of who shall die and who shall live. The Supreme Court has held that such determinations, regarding the proper apportionment of punishment, are peculiarly

questions of legislative policy.

The keystone in the Justice 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. 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.

In conclusion, I would urge the Commission to not conclude that it has the authority to enact a federal death penalty statute; and if it does enact a death penalty, and assuming it does have the authority, to follow the narrowly prescribed procedures that we have set forth in the testimony submitted earlier. Thank you.

CHAIRMAN WILKINS: Thank you very much, Professor Ogletree. We appreciate your testimony, and in particular the written statement that you submitted, that we will certainly study in the next few days in great detail.

Any questions from Commissioners? Commissioner Block?

MR. BLOCK: Will the suggestion that was made this

morning by Mr. Weld, decoupling the death penalty provisions from the guidelines themselves, address some of your concerns?

DR. OGLETREE: I didn't hear his testimony this morning. Can I confer for just a minute?

MR. WALLACE: That question, the issue of decoupling, raises I think a very important question about the balance of the legislative process. There's a very big difference that that would make on the way the death penalty is enacted. It's a lot easier to go through the Commission than through the Congress alone. Look at the Senate rules.

Legislation to affirmatively enact a death penalty can be blocked in the Senate by a filibuster, and a filibuster can be maintained indefinitely if there are 40 votes against shutting off debate. But if legislation is not necessary to disapprove the Commission's death penalty guidelines, 51 votes would be necessary to pass it, sixty to shut off a pro-death penalty filibuster, and 67 to override the inevitable presidential veto. That's a difference of 27 votes.

It is this difference which drives the Justice Department's efforts today, and they are frustrated, they have not been able to succeed through the legislative process, and they had their best shot last year with a

Republican Senate, and an unprecedented anti-drug fervor sweeping the Hill, yet they couldn't break the Senate filibuster.

If you send death penalty guidelines up to the Congress, you're not simply giving the Congress an innocuous opportunity to have their up or down vote on the issue. You would be fundamentally altering the legislative balance. You, the seven voting members of this unelected body would, in effect, be sitting in for 27 United States Senators in deciding one of the most divisive and complicated political and social issues of our time.

CHAIRMAN WILKINS: Any other questions?

COMMISSIONER BROYER: You obviously went through this legislative history with some care, and, when you were doing that, did you find, after the death penalty provision was taken out of the bill that eventually became the law that authorized this Commission, did you find any statement by any Senator or any Congressman, or any phrase, or few words-- whatever it is--that suggested that they were giving the Commission--that they did foresee the possibility that the Commission would come up with capital punishment, restoring -

MR. OGLETREE: Clearly not, and I would actually use the Department of Justice's research as the authority to support my thorough research as well as theirs. There are references to some bills that were passed and some innocuous statements, but nothing at all that indicated any indication by Congress to delegate that authority.

CHAIRMAN WILKINS: Any other questions?

(No response.)

CHAIRMAN WILKINS: Well, again, thank you very much, Professor Ogletree, Mr. Wallace, we appreciate it very much.

MR. OGLETREE: Thank you.

MR. WALLACE: Thank you.

CHAIRMAN WILKINS: Our next witnesses are Mr. Mickey Veich, Congressional Affairs Officer for the Federal Criminal Investigators Association, and Mr. Robert Kliesmet, who is the president of the International Union of Police Associations.

Gentlemen, we're delighted to have both of you with us.

MR. VEICH: Thank you. Good afternoon.

CHAIRMAN WILKINS: Good afternoon.

MR. VEICH: My name is Mickey Veich, Congressional Affairs Officer for the Federal Criminal Investigators

Association, speaking on behalf of our national president and the association. Our national president is Mr. Robert Fusel. 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 some fifty or so Federal agencies, and the special agents and criminal investigators in those agencies.

They are the men and women charged with the enforcement responsibilities of our Federal laws and the day-to-day activities.

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.

Of course Title 18, U.S.C. Section 844(i) calls for the imposition of a death penalty if someone dies as a result of an arson. Of course that provision has never been applied. A common instance would be the fire in Puerto Rico, recently, that you've all heard about where 98 people died.

Federal agents rarely work on criminals commonly engaged in what is referred to as a "crime of opportunity." An occasional tax fraud by an amateur is a "crime of oppor-

tunity." A citizen who saws off the barrel of a shotgun, who has nothing better to do that day, just to have something to do with that shotgun, that's a "crime of opportunity." He may even stick up a bank with that. It might be his first time. That's what we feel is a "crime of opportunity."

Or some foolish individual who's convinced that the odds against his getting caught for a one-time drug affair is a "crime of opportunity."

The Federal agents we're representing are engaged in the discovery of criminals and offenders. They're the recidivists, professional criminals, the guys who plan "big capers." This is the "top gun" of criminal activities. 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 sometimes, the world, and they have the time it takes to "get their man," so to speak. They don't have those same pressures and jurisdictional constraints that local and county law-enforcement have, and sometimes, state law enforcement.

In certain situations, however, 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 imprisonment might be more appealing.

We feel that the criminal element should be put on notice that at any time certain crimes are committed, they will have to pay the price.

We're not talking about people who are temporarily seized with emotional problems. We're talking about well-planned bank robbers who planned the murder of FBI agents in Florida, DEA agents raiding drug dealers, who kill agents because of a well-planned ripoff, well-planned in advance.

We're talking about the murder of Secret Service agents on surveillance in Los Angeles of counterfeiters. We're talking about drug smugglers who kill DEA agents because they're getting "hot" on the violators' 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 protesters who form major groups throughout our land, arm themselves, then shoot it out with the Federal agents because they think taxing is unfair.

We're talking about international weapons smugglers who sell Ghadafi explosives and sell him the 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, we feel, are the only hope for the 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 that clear mandate.

You now have an opportunity to show Americans once and for all that you have spoken, or that Americans have spoken, and the criminals will listen.

There will be "listening guidelines," we say, for the Federal capital offenses, listening guidelines, that is, for the criminals.

Frequently, Federal agents are asked to apprehend dangerous persons fleeing from having committed serious crimes under state law--for example--drug trafficking.

These crimes frequently carry heavy prison sentences but are not subject to a death penalty. Drug trafficking, as an example, and I use Illinois as a further example because that's where I am currently working. And the 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's already subject to.

The felon has every reason to kill the Feds in a shoot-out. He knows he'll get caught and sentenced to perhaps 40 years. If he kills the agent, he gets away. He has everything to win. He gains everything. If he kills the agent and still gets caught, he still only gets 40 years.

The persons we're dealing with can best be illustrated by the recent Colombian drug czar brought to the United States, who boasted that he would have a Federal judge murdered every day until he's released.

That's the kind of person that we're dealing with as far as the Federal Criminal Investigators Association is concerned.

Thank you very much.

CHAIRMAN WILKINS: Thank you, Mr. Veich. Mr. Kliesmet.

MR. KLIESMET: My name is Robert Kliesmet and I am the president of the International Union of Police Associations, AFL-CIO. I'd like to 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 the complex issue of capital punishment. As before, I come to you with the perspective of the street cop. Most street cops approach their role on responsibility as a segment of the criminal justice system with a pragmatic view.

That view generally runs along these lines. The police investigate and apprehend, prosecutors charge and present the facts, juries decide guilt and innocence, and judges rule on courtroom order and set the punishment.

Street cops, in their pragmatic view, believe, as do 86 percent of the public, that the death penalty is a viable deterrent for persons convicted of certain crimes.

A search of the literature shows that there are a number of studies and articles that show a direct deterrent effect by imposing and carrying out the death penalty.

One such study goes as far as to point out that for each execution carried out 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 blameless victims' lives.

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 this nation's criminal justice system.

Congress, as the advocate of the will of the people, adopted and funded the creation of this Commission. Now this Commission finds itself distracted from its mission of establishing sentencing guidelines which include 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 enacted the Justice Department sanction, and the people demand the death penalty be imposed for certain Federal criminal convictions. What more needs to be said?

I'm dominated 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 capital offenses in which the death penalty should be imposed.

Conviction of premeditated murder. Murder committed during the commission of a Federal capital offense. Murder of a law enforcement officer or corrections officer while they are acting in the line of duty.

Certain cases of espionage, sabotage, and the third offender's conviction as a major drug dealer. To further illustrate the will of the people and the intention of the street cops, one only needs to look to the recent 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 Supreme Court Justice Rose Bird's reelection 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. I thank you, and I would be happy to respond to any questions.

CHAIRMAN WILKINS: Thank you. Any questions?
Commissioner Baer.

COMMISSIONER BAER: I wanted to make a comment. First, it appears today, almost at the end of the day, that all of the people who favor the death penalty said in effect that the Sentencing Commission should deal with this issue.

those who are opposed to the death penalty said the Sentencing Commission shouldn't.

Now my question to you, as the president of this AFL-CIO International Union is: has your union proposed to the executive committee--whoever runs AFL-CIO--that the AFL-CIO support your position on this issue?

MR. KLIESMET: No, we haven't, sir. There's a number of reasons for it. First of all, all of the Internationals in the AFL-CIO operate independent of each other.

The question, such as you bring up, would have taken at least a year, a year and a half's worth of pre-work before we could have got to that point. It's an interesting question. Had we been aware of it a year and a half ago, we could have introduced in the form of a resolution for the convention that's now going on.

COMMISSIONER BAER: Don't you think the rank-and-file of the other unions would support your position?

MR. KLIESMET: I think in an actual rank-and-file vote of the members of the various International it would happen. However, given the attitude of some of the leaders in the AFL, I don't think that it would carry through the executive council.

COMMISSIONER BAER: And this is a democracy, and the leaders don't care about what the people thing? That's what you're saying.

MR. KLIESMET: It's my belief that in some cases they don't.

CHAIRMAN WILKINS: Any other questions? Judge Broyer.

COMMISSIONER BROYER: Thank you. I think your testimony is very good. This is a practical problem, to see what you think, and it's suggested by what you've heard today, and also what Mr. Cahill said when he testified. Mr. Veich gave an example of a person who doesn't really mind about the shoot-out, and he'll got to jail for 40 years and --

MR. VEICH: Yes.

COMMISSIONER BROYER: Well, you said he'd get a 40-year sentence. It might mean 13 years in jail; it might not mean 40 years. And I suppose you feel like the others do, and like we do that, I mean, there ought to be definite sentences.

If this book, or something like it actually takes effect, the person will go to jail for 40 years, not thirteen, and if he shoots somebody he will be there for the rest of his life. Not there for ten years, and then he's paroled.

Now, the practical problem, when you start talking about distractions, is what will happen if we now decide to go into this different subject of capital punishment. I mean, you've heard today that there are a lot of people who feel pretty strongly about it.

You've heard that there are a lot of people who feel, in Congress, both ways. What will happen to this book? It might get through, and maybe putting capital punishment on it would make it more likely to get through. Maybe it would be the opposite. Maybe you know. I don't know.

I have a sort of feeling--well, if we go with this thing we're--you know--it's like you train for a year, and it's been a fairly tough year, really tough, because everything in here has two sides to it, or six sides. So we finally get to the point where we're going to play the game, and then we're told, if there's capital punishment on it, the winner's going to be determined not on the football field but by flipping a coin. Do you see what I mean?

And you represent both. That is, I understand you want capital punishment, but I also understand that you, and the people you represent, have a strong interest in having certainty of sentencing.

So given that very practical problem that I think we face, I'd be interested in any reactions that you have.

MR. VEICH: It's been some time since I studied Introduction To Law Enforcement 101 at university. It has been variously stated that 95 to 97 percent of all crime is solved through the use of informants. I think most law enforcement types will agree to that.

And the rest of it, if we solve a crime, is blind, dumb luck. I don't know where we're going with that, and in listening to the different sides reported here today, one of the interesting statistics, if we could add them up quickly, is that in 1985, I think it was reported, 75 law enforcement officers were killed in the line of duty, and Mr. Burden from the Law Enforcement Council reported that 33 people were executed at the Federal level and Congressman Biaggi reported about two weeks ago, that in recorded statistics for deaths of law enforcement personnel in the line of duty, some eleven or 1200 will be honored by the memorial that was mentioned by another witness.

Isn't it interesting to note that your chances of being killed are greater, if you're a law enforcement officer than if you're a convicted felon sentenced to death.

COMMISSIONER BREYER: Thank you.

MR. KLIESMET: I'd like to make a comment, if I could, in response to you. It's difficult for me, as the leader in the advocate for police officers who annually go tot he bargaining to ask for salary increases, when it costs thousands of dollars more to keep a convicted felon such as a murderer in a prison than they pay most police officers.

And I'm talking about ten to \$12,000 more in certain parts of the country. So it's difficult for me to sit here and speak sympathetically about a person who's been "through the mill", so to speak, of the criminal justice system, and gets convicted of a serious felony offense, and he gets much better protection.

In terms of grievance procedure, many police officers don't have the right to file grievances. In many cases they never get to know who their accusers are when citizens complain about their actions.

Criminals have all those rights written into the whole Federal penal system. They have the right to collectively bargain. They do many things which very few of them get punished for, such as the recent Lorton uprisings.

There were a lot more actors in that than those who

were charged with some crime. So, when you talk to police about what their job is and what their role is, and they see what their counterparts in the criminal justice system, if you will--the criminals--get, it's difficult for me to stand at an annual convention and try and convince my colleagues that this is not the best way to go.

COMMISSIONER WILKINS: Go ahead.

COMMISSIONER BLOCK: I just wanted a postscript on Judge Breyer's concern.

Judge Breyer mentioned that he thought that maybe the addition of the death penalty would imperil the guidelines and hence determine sentences. I'd like you to also think about in that context, that one of the aspects of the guidelines that are being proposed is that when a life imprisonment sentence is given now, there'll be no parole. So that a life sentence will essentially be a life sentence, and I'd like you to think about the necessity of having a death penalty under those conditions for murder of a correctional officer.

MR. KLIESMET: Well, to respond to that, it just goes back to my argument. If it costs you \$38,000 a year to keep some con man in the joint, and it only costs you \$18,000

a year to keep the law officer out there on the street putting them in, it seems a great disparity in what the cost to the taxpayer is, and that's, you know, a rather cavalier and perhaps simplistic approach to it, but when you have to negotiate for those meager tax dollars out there, it gets to be very important.

CHAIRMAN WILKINS: Judge MacKinnon.

COMMISSIONER MacKINNON: Mr. Veich, your association is the Federal Criminal Investigatory-Association?

MR. VEICH: Investigators Association. Yes, sir.

COMMISSIONER MacKINNON: And you actually represent the employees of the Federal government that investigate crime, Federal crimes?

MR. VEICH: Those persons who are members of our association, yes, sir, I do.

COMMISSIONER MacKINNON: And that's Secret Service agents, FBI's, API members?

MR. VEICH: Internal Revenue Service, Bureau of Alcohol, Tobacco and Firearms, United States Customs, Immigration, Bureau of Indian Affairs, Department of Transportation, Social Security.

COMMISSIONER MacKINNON: Agriculture?

MR. VEICH: Yes, sir, every one of them, if they're members.

COMMISSIONER MacKINNON: Yes. And how many members do you have?

MR. VEICH: Active hard-core members, probably about 2300, 2400, and we have a like amount of associate members. Associate members are identified as law enforcement officers from law enforcement jurisdictions who cannot be a full-time voting member, such as a police officer.

COMMISSIONER MacKINNON: How long has this organization been in existence?

MR. VEICH: As the Federal Criminal Investigators Association which we're now called--it used to be called the Treasury Agents Association. Years ago, in the history of the FCIA, the Federal government didn't transfer special agents around the United States. Elliott Ness was born and raised, if you will, from Ohio, but he worked in Chicago. They didn't transfer Elliott Ness around to work on booze ion New York.

But in about 1964 or '65, when we started needing certain expertise of a Federal agent in another area, that is, the Federal government--let's say we needed an arson

specialist or a machine gun specialist, or a tax fraud investigator, or a customs excise investigator in Los Angeles, from San Francisco or New York, then he was transferred at the convenience of the government.

So our little clique, if you will, that started with the Treasury Agents Association in Chicago, moved around, and the agents started chapters in various cities in the United States. We currently have 99 chapters in the United States.

COMMISSIONER MacKINNON: Now you mentioned the fire in Puerto Rico.

MR. VEICH: Yes, sir.

COMMISSIONER MacKINNON: In what context did you bring that in? In what context do you think that's relevant here?

MR. VEICH: The fire was determined to be arson, and under 844(i) of Title 18, it carries a death penalty if anybody dies as a result of an arson?

COMMISSIONER MacKINNON: I know that, but what's the federal hook to it? You can't go into a hotel--that's a local offense? Where does it get to be a federal offense?

MR. VEICH: Because of the fact that it was an arson. Arson is a federal crime.

COMMISSIONER MacKINNON: Local arson is not a federal crime. What you're talking about is arson that affects insurance and interstate commerce, is that your answer?

MR. VEICH: No, sir, just pure arson under the Explosives Control Bill of 1968--how the arson was established, if it was established by the use of accelerants or not, or explosive, meets the criteria of the explosives.

COMMISSIONER MacKINNON: Yes, material transported in interstate commerce, or presumably so.

Have you ever testified in Congress on this?

MR. VEICH: No, sir, I have not.

COMMISSIONER MacKINNON: Don't you think you ought to?

MR. VEICH: I would think that would more properly be in the jurisdiction of the agency which has primary responsibility for that investigation, which in that case is two agencies--the Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco, and Firearms.

COMMISSIONER MacKINNON: Mr. Kliesmet, you stated that if the locals supported this, that the international officers would not.

MR. KLIESMET: That's speculative. Given a good

shot at it, I think I could convince them.

COMMISSIONER MacKINNON: But what you're really saying is that it would get down to a political question, aren't you?

MR. KLIESMET: I think the whole thing is political right now, sir.

COMMISSIONER MacKINNON: Yes. And you say that the political aspect of it comes out in a negative conclusion so far as the adoption of these guidelines is concerned, or putting the death sentence into the guidelines is concerned.

MR. KLIESMET: If you're asking me how the AFL-CIO Executive Council would choose up sides, I can you how they would choose up sides--they'd take the democratic decision.

COMMISSIONER MacKINNON: Yes. That's what I was--I didn't say that directly, but I assumed there was something like involved in it.

MR. KLIESMET: Being a pragmatic person who's been in a lot of trouble for it.

COMMISSIONER MacKINNON: And why is that?

MR. KLIESMET: Any why is that>

COMMISSIONER MacKINNON: Generally, the Democratic Party has always supported organized labor, whereas my

brothers and sisters in the Republican Party have not. However, there has been somewhat of a change in that, and as you can see, given by Lane Kirkland's comments lately, he's opened a door to those labor-oriented Republicans to come to the Executive Council and to our International and others to ask for our support.

I think it's unique and it's certainly a change in the attitude of organized labor.

COMMISSIONER MacKINNON: But why would they support your position if the locals went for it?

MR. KLIESMET: Because they have a doctrine which is called, you help your friends and defeat your enemies.

COMMISSIONER MacKINNON: How are they helping the Democrats by not supporting your particular position?

MR. KLIESMET: It seems that the leadership for this entire question, at least in my perspective, comes from those liberal Democrats in both houses.

MR. BREYER: And some Republicans--I guess on both sides.

CHAIRMAN WILKINS: Gentlemen, thank you very much.

COMMISSIONER MacKINNON: Thank you.

MR. VEICH: Thank you.

CHAIRMAN WILKINS: Our next witness is Mr. Robert L. Weinberg. He's a member of the law firm of Williams and Connelly. Glad to see you, sir.

MR. WEINBERG: Thank you, Mr. Chairman. I appreciate the action of the Commission in sending as you did letters--I'm sure hundreds of them--to individual members of the Bar inviting us to have input into the decision that you are making today. From reviewing the agenda, I gather that most of those who have responded have responded on behalf of organizations.

I was perhaps the only one listed who has responded as an individual practicing attorney. However, in this case, my organization, the American Bar Association, has not taken any position. Remarkably enough, it has no position on capital punishment, and so while I have been pleased, as a member of the Association, to have our views so effectively represented on the other matters the Commission has been considering, and in its comments on the draft guidelines, I did feel a responsibility as an individual member of the bar to respond to the Commission's invitation today.

I speak as one who has practiced in the federal criminal courts as well as the civil side of the courts for

more than 25 years. Unfortunately, I'm old enough to have litigated in this courthouse the issues of a death sentence imposed under an Act of Congress, as used to be the case in the District of Columbia in the 1960's. I was engaged in a litigation which went on for some five years in the 1960s, and became familiar with the federal death sentencing laws as they existed at that time, and more recently I've been engaged in litigation before the Supreme Court of Florida involving one of the state capital punishment statutes.

So I hope I'm able to bring before the Commission some appreciation of the practicalities of litigating capital cases, and to address the question of whether the Commission should reject the recommendation made by the Department of Justice made to the Commission because of the tremendous practical problems that it will impose in litigation, because of the issues that will be raised as to the invalidity of the approach that the Justice Department has urged you to recommend.

I gather from the notice of the public hearing that your own Counsel has yet to take your position on the questions that are to be heard today, and I would certainly urge your own counsel not to recommend that the Commission proceed to promulgate guidelines on capital punishment unless

— your counsel is able to advise that all of the substantial challenges that can be posed would not be challenges having merit.

First of all, at the very threshold of the Department of Justice's position, it challenges the very first sentence of the Commission's own report, its Revised Draft Sentencing Guidelines.

Your first sentencing starts out, "United States Sentencing Commission is an independent agency in the judicial branch. The very first part of the Justice Department memorandum at the threshold rejects that position, and tells you of the commission that indeed you are part of the executive branch, part of the same branch that prosecutes the cases for which you are promulgating guidelines.

If you are to accept the Justice Department's view, or if the courts are to accept it in the future, I venture to suggest that it will pose problems as to the validity not only of any guidelines that you may promulgate on capital punishment, but indeed of all the sentencing guidelines. For if Congress has failed in its express intent to establish a Commission that is an independent part of the judicial branch, then indeed there may be great questions as to the

— validity of guidelines promulgated by the executive branch of the government, the very branch that is litigating in criminal cases on the prosecution's side.

So I would urge you to consider very seriously rejecting the threshold position that the Justice Department adopted as the predicate for rendering you any advice from the Department at all.

Second, I'd like to comment on the legislative history analysis tendered by the Justice Department, and make this point. Even if one were to accept its reading of the implied intent of the Senate, and I think Judge Frankl this morning very effectively answered the Justice Department's arguments, but even if one were to assume that the Senate had that implied intent, the memorandum says nothing as to the intent of the other half of Congress, the House of Representatives. The legislative history of the Comprehensive Crime Control Act of 1984 shows that in the House the legislation was, to say the least, passed by a highly unusual process, by parliamentary maneuverings which attached the Crime Bill to an appropriations bill which had to be passed under great time pressures, and I think that nobody could fairly say that the members of the House had any intention on the issue of capital punishment,

or indeed on many other myriad issues in the bill.

So I think that to take the position that the House of Representatives intended this Commission to be able to promulgate guidelines that would restore capital punishment in the federal courts would be a very far-fetched reading indeed of the legislative intent, and as I read the Department of Justice memorandum, it did not even address the intent of the House. It talked about the implied intent of the Senate, and then would use that interchangeably with the intent of Congress, but did not address the question of the history of the passage of the bill in the House.

Next, I would ask the Commission, considering the problem that the Justice Department would put before it, to focus in particular on the federal homicide statute, because this is the statute under which in all likelihood the great majority of potentially capital prosecutions would occur. It's contained in Sections 11.11 and following of Title 18.

I believe the formulation of sentencing procedures made in that statute not only is clearly invalid on deferment, but is one on which you would find it difficult, if not impossible, to mesh the guidelines procedures that the Commission is adopting the other offenses for which sentence

is imposed by the judge and not the jury.

What Section 11.11 says is, 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 even he shall be sentenced to imprisonment for life. 11.11 applies to murder in the maritime and territorial jurisdiction of the United States, and Section 11.14, which covers homicides against federal officials, adopts the provisions of 11.11. But I think as a practical matter those are the sections under which most capital prosecutions would arise.

How would you of the Commission promulgate guidelines that should be followed by a jury, not a sentencing judge, as are all your other guidelines, but a jury that would mesh with the Congressional intent in enacting that statute? I submit that Congress simply did not envision that the Commission's guidelines would be guidelines to be applied by a jury, but under the provisions that Congress enacted, the pre-Furman provisions, it is a jury that in the vast majority of cases would be passing on the issue of life versus death.

11.11 of Title 18 was construed by the Supreme Court to require one verdict, one verdict which includes a

— verdict both on guilt and the recommendation as to whether the sentence should be without capital punishment. It was so construed in *Andress v. United States*, 333US740 in 1948.

So I do not think there is any way a jury returning one verdict could constitutionally implement guidelines that this Commission propounded, even if the Commission took the view that it could propound guidelines for consideration by a jury.

Again I note the Justice Department memorandum seems totally silent on the issues that arise from promulgating guidelines for a jury to apply, as distinct from guidelines to be applied by a sentencing court. The Commission, I believe, has no power under the statute to require that there be a bifurcated trial; and it appears that Congress did not intend a bifurcated trial when it adopted the homicide provision. So I don't think this Commission could amend the statute adopted by Congress to cover federal homicides, even if it wished to provide a bifurcated trial.

Absent a bifurcated trial, it would seem that the challenges under *Furman* would be insuperable.

In addition, the Commission's mandate is, as I understand it, to promulgate guidelines which take into consideration at the Commission stage the potential mitigating

— factors. The guidelines are not binding on the court if there are mitigating factors presented that had not been considered by the Commission.

While this may be quite practical, as compared to non-capital offenses, in the capital area, the Supreme Court has made clear that anything may be a mitigating circumstance. As in Lockett v. Ohio, and in Skipper v. North Carolina, the Supreme Court has made it clear that the jury may consider any circumstance as a mitigating circumstance, so I believe it would be impossible for the Commission in the discharge of its duties to promulgate or to consider all the mitigating factors that could arise, and in all likelihood would arise in many capital trials.

So you would be promulgating guidelines which by the very terms of the enabling statute would not be binding because all the mitigating factors had not been considered. So the whole idea of applying the guidelines to existing federal statutes on capital punishment, I respectfully submit, is unworkable, is not intended by Congress, and would give rise, on the part of conscientious defense counsel, to a myriad of challenges, quite apart from the issues peculiar to any one defendant in any one case.

But you would have in every federal capital prosecution, right from the time of the jury voir dire, if not before, issues raised as to the validity of this Commission's action in promulgating guidelines which, if not overruled by Act of Congress, became law through promulgation by what the Justice Department has said is a Commission in the executive branch of the government.

I respectfully urge the Commission not to enter that thicket, but to leave it up to Congress through the ordinary legislative process to decide if and under what procedures capital punishment is to be reinstituted in the federal courts.

MR. WEINBERG: Thank you, Mr. Weinberg. We appreciate you taking your time to share those views with us.

Any questions for Mr. Weinberg? Mr. Block?

MR. BLOCK: The last point I just wanted to follow up on, in terms of guidelines for--the impossibility of meeting the guideline requirement. It's your position, then, that death penalty guidelines would have to be mandatory to pass constitutional muster, and they couldn't be mandatory under the terms of the statute which says if a mitigating factor was present and was not considered--

MR. WEINBERG: I'm not saying that they'd have to

be any more mandatory than they are in other cases, but in other cases you normally will have considered the potential mitigating factors. The statute, I believe, says the sentencing court isn't bound by the guidelines where there's a mitigating factor that the Commission didn't consider.

I submit by the nature of capital prosecutions, and the almost unlimited range of mitigating circumstances that the Supreme Court has said constitutionally must be considered, that you'd be engaging in an act of futility, because there would invariably be mitigating factors that hadn't been considered by the Commission so that the guidelines wouldn't be binding.

MR. BLOCK: Is that a practical concern, or is that a legal concern?

MR. WEINBERG: It's both.

MR. BLOCK: Is it a practical concern in the sense that we couldn't write a set of guidelines that would be useful--or is it a legal concern in the sense that the guidelines can have that type of out that they have for non-capital?

MR. WEINBERG: It's both practical and legal. It's practical for the reasons I've indicated, but I think it's legal in interpreting the legislative history.

Should Congress be deemed, through the very convoluted process that I think the Justice Department traces in its memorandum--should Congress be deemed to have intended to give the Commission that task when in this instance, unlike all the other offenses you consider, the task would be a well-nigh impossible one; and when it's a sentencing task that has to be performed by a jury, and whereas all of Congress' focus was on sentencing by a judge.

So it's a legal consideration in the sense it bears on a proper interpretation of the legislative history. I don't think Congress intended the Commission to have that task.

MR. BLOCK: Thank you.

MR. WILKINS: Any other questions? Thank you again, sir. Thank you very much.

MR. WEINBERG: Thank you very much.

MR. WILKINS: Judge MacKinnon.

COMMISSIONER MacKINNON: You referred to the legislative history in the '84 Act in the House. Was there an open rule on that bill when it came out?

MR. WEINBERG: No, I don't believe so, Judge MacKinnon. I believe it was an appropriation resolution that was pending, and Congressman Lindman, I believe it was, of

California, I found a parliamentary means of attaching the crime control bill that had been passed by the Senate to the resolution. But I don't believe there was any opportunity for amendments to the crime control part of federal--

COMMISSIONER MacKINNON: You mean they could amend the appropriations bill but they couldn't amend the amendment?

MR. WEINBERG: I don't believe under the procedure that came up that there was a procedure for considering amendments.

COMMISSIONER MacKINNON: You had difficulty in applying guidelines to a jury determination. There isn't any difficulty with the special verdict, is there?

MR. WEINBERG: I guess I have difficulty on two levels. One, I don't think that you can read the statute as drawn to ask the Commission to promulgate guidelines for a jury.

COMMISSIONER MacKINNON: No, that's another question.

MR. WEINBERG: Secondly, the Supreme Court has construed the statute, at least the homicide statute, to call for a unified verdict, one verdict.

COMMISSIONER MacKINNON: Yes, but as I took it your objection was the fact that you could[']t apply guidelines to a jury verdict, but you could with a special verdict,

couldn't you?

MR. WEINBERG: The jury could be instructed, as it is in the state courts, that there are certain mitigating factors, however the jury would also have to be instructed, under Lockett and Skipper that it could also consider any other mitigating factors besides those in the guidelines.

COMMISSIONER MacKINNON: Thank you.

MR. WEINBERG: Thank you, Judge MacKinnon.

MR. WILKINS: Thank you, again, sir.

MR. WEINBERG: Thank you very much, Mr. Chairman.

MR. WILKINS: In keeping with our policy that we've followed with other hearings, we now invite anyone in the audience who wishes to come forward and address the Commission on the issues that we've been discussing today.

Anyone like to speak? Yes sir. Come around Mr. You were supposed to be here earlier, but we're going to overlook that, and let you testify now.

MR. TROUTT: I appreciate it.

MR. WILKINS: Thank you. I appreciate your coming, Mr. Troutt.

MR. TROUTT. I apologize for not being here. However, my boss sent me on an errand, and since he pays my

— salary and you don't--.

My name is Jeffery Troutt. I am an attorney and the research director for the Institute for Government Politics. By way of atoning for being (inaudible), I will cut this as short as is really possible, because there's really points I would like--

MR. WILKINS: Speak into that microphone, please.

MR. TROUTT. There are two points that I would like to make, and I think I'll just make them to the exclusion of other things I have written.

I would like to make the point that I believe that not only does the Commission have the authority to promulgate guidelines for the imposition of the death penalty; but that it's arguable that under the statute you have the responsibility of doing it.

Section 944a enumerates several specific sentences, such as imprisonment and fine, which the Commission is to consider. It does not mention the death penalty specifically. However, I don't believe that that means the Congress excluded the death penalty from the Commission's consideration. The statute says that the Commission is to promulgate sentencing guidelines for the use of the sentencing court to determine

the sentence to be imposed in a criminal case, including fines, imprisonment, etc.

The word, "including," clearly indicates that the list of sentences in Section 944 was not inclusive. I might add that all of those sentences are also covered in Section 3551, which opponents of the death penalty would argue is inclusive. I think the language of the statute, then, no way indicates an intent by the Congress to exclude the death penalty from scope of the Commission's authority, or to repeal existing death penalty statutes by implication.

Section 944b, however, provides that the Commission in the guidelines promulgated pursuant to Section 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.

I believe the word "shall" indicates the Commission is mandated to consider the entire universe of sentences prescribed under Title 18. I don't see how you can follow that statutory outline without considering the death penalty. As the death penalty is part of the sentencing scheme, the Commission is charged by the statute to promulgate guidelines for its implementation.

That was the first point I'd like to make. The second has to do with essentially bifurcating your guidelines. I would suggest that if many of you are in doubt about your authority perhaps the best way of doing this would be to submit death penalty guidelines in a separate package to the Congress.

I'm certain, personally, that the Commission has the statutory authority to promulgate guidelines for the imposition of the death penalty. However, I think that most of the death penalty's opponents would also agree that there is a reasonable basis for this belief.

If some Commissioners are in doubt as to wheether or not they have the authority, it seems to be that a good compromise approach would be to submit separate guidelines on the death penalty and let the Congress and the courts decide the matter finally.

However, in any event, given that it is to many a close question, the Congress and the courts, I think, are the appropriate entities to decide the matter of legislative intent. If Congress disagrees with your guidelines, or if the Congress believes that you've acted ultra vires, they can vote against what you submit--they can vote against the

— guidelines. Court--also I believe we can fairly assume that if you pass guidelines for the imposition of the death penalty, someone will challenge it in court. I would postulate further that the question of legislative intent is going to become very important. I think that the courts will eventually decide this issue, and perhaps this Commission is not--although you certainly want to discover whether or not you have the authority--I believe that maybe the Commission is not the best place, and it certainly will not be the final place in which this issue will be decided.

However, I would reiterate that if you refuse to take action on the death penalty, in my view you will have failed to discharge the duty that Congress has given you. I'm sure that no one of you would like to do that, so I urge you to follow the most logical path, to promulgate guidelines for the imposition of the death penalty, and leave the issue of legislative intent to the bodies which are most competent to discern it, the Congress and the courts.

MR. WILKINS: Thank you very much, Mr. Troutt.

Any questions?

Any other questions?

Fine. Thank you again.

MR. TROUTT: Thank you.

MR. WILKINS: Anyone else like to testify, so
please come forward.

Seeing no takers, the record will remain open for
seven days to receive written submissions. We stand adjourned.

[Whereupon, at 4:25 p.m., the proceedings concluded.]