

Death Penalty Information Center

DPIC Homepage

Federal Death Penalty

Updated March 8, 2000

Crime
Death
Penalty

Background

In addition to the death penalty laws in many states, the federal government has also employed capital punishment for certain federal offenses. For example, between 1927 and 1963, the U.S. executed 34 individuals, including two women. There have been no federal executions since Victor Feguer was hanged in Iowa for kidnapping in 1963.

In 1972, the United States Supreme Court ruled that all state death penalty statutes were unconstitutional because they allowed for arbitrary and capricious application. The federal statute suffered from the same infirmities as the state statutes and no death sentence employing the older federal statutes has been upheld.

For further discussion of the history of the federal death penalty, see R. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urban Law Journal 347 (1999).

1988 Drug Kingpin Statute

In 1988, a new federal death penalty statute was enacted for murder in the course of a drug-kingpin conspiracy. This statute was modeled on statutes which had been approved by the Supreme Court after its 1972 ruling. Between its enactment and the 1994 expansion of the federal death penalty described below, 6 people were sentenced to death for violating this law, though none has been executed. One of the defendants, John McCullah, had his death sentence overturned and was later re-sentenced to life in prison. Another defendant, David Ronald Chandler, had his sentence overturned by the 11th Circuit U.S. Court of Appeals. The panel of federal judges ruled that Chandler was not properly defended by his attorney during the sentencing phase of the trial. Chandler is awaiting the decision of a re-hearing *en banc* on this ruling from the 11th Circuit.

1994 Crime Bill Expansion

In 1994, as part of an omnibus crime bill, the federal death penalty was expanded to some 60 different offenses. Among the federal crimes for which people in any state or territory of the U.S. can receive a death sentence are murder of certain government officials, kidnapping resulting in death, murder for hire, fatal drive-by shootings, sexual abuse crimes resulting in death, car jacking resulting in death, and certain crimes not resulting in death, including the running of a large-scale drug enterprise.

Judicial Conference Report on Federal Death Penalty

In May 1998, the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services of the Judicial Conference of the United States prepared a report entitled "**Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation.**" Listed below are some of the major findings of that report:

- The **number** of federal prosecutions in which an offense punishable by death is charged, and to which special statutory requirements for the appointment and compensation of counsel apply, increased sharply after the 1994 Federal Death Penalty Act increased the number of federal crimes punishable by death.
 - **Number** of defendants charged with offenses **punishable** by death:
 - 1991--12
 - 1992--45
 - 1993--28
 - 1994--45
 - 1995--118
 - 1996--159
 - 1997--153
 - The **Number** of cases where the Attorney General has **authorized** seeking the death penalty has increased since the 1994 Federal Death Penalty Act was passed, increasing the number of crimes punishable by death. The number of cases authorized as death penalty cases by year in which the authorization decision was made (figures provided by the Department of Justice):
 - 1990--2
 - 1991--6
 - 1992--16
 - 1993--5
 - 1994--7
 - 1995--17
 - 1996--20
 - 1997--31
- The **cost** of defending cases in which the Attorney General decides to seek the death penalty for commission of an offense potentially punishable by death (authorized cases) is much higher than the cost of defending cases in which the Attorney General declines to authorize the death penalty for an offense punishable by death.
 - Average total cost per representation of a sample of cases in which the defendant was charged with an offense punishable by death and the Attorney General **did not authorize** seeking the death penalty: **\$55,772**
 - Average total cost per representation of a sample of cases in which the defendant was charged with an offense punishable by death and the Attorney General **authorized** seeking the death penalty: **\$218,112**
 - The cost of defending a federal death penalty case that is resolved by means of a trial is higher than the cost of defending a case that is resolved through a guilty plea, even though many guilty pleas are entered after most of the preparation for trial has been completed. The number of federal death penalty trials, and the number of individual defendants tried on capital charges, has increased since the federal death penalty was revived by Congress in 1988.
 - Average total cost per representation of a sample of authorized federal death penalty cases resolved through a guilty plea: **\$192,333**
 - Average total cost per representation of a sample of authorized federal death penalty cases resolved through a trial: **\$269,139**
 - Average total cost of **prosecuting** an authorized federal death penalty case, not including non-attorney investigative costs or the costs of experts and other assistance provided by law enforcement agencies: **\$365,000**

Race and the Federal Death Penalty

Of the inmates on federal death row now, over three-quarters are members of racial minorities. According to statistics from the Federal Death Penalty Resource Counsel Project (3/8/00), of the 196 federal death penalty prosecutions authorized by the Attorney General since 1988, 47 have been white, 38 Hispanic, 10 Asian/Indian and 101 African-American. 149 of the 196 prosecutions (76%), have been against minority defendants. See also Racial Disparities in Federal Death Penalty Prosecutions:

1988-1994, prepared by the Death Penalty Information Center at the request of the Chair of the House Judiciary Subcommittee on Civil and Constitutional Rights.

Disposition of the Cases (as of 3/8/00)

Of the 196 defendants approved by the Attorneys General for capital prosecution since 1988:

62 cases were discontinued as death penalty cases after a plea bargain
24 requests for the death penalty withdrawn before trial
32 were sentenced to less than death after jury or judge voted against death
18 were sentenced to death and are pending on appeal
10 were acquitted or the capital charge was dismissed
3 died/committed suicide before sentencing
3 awaiting retrial or resentencing after reversal on appeal
44 awaiting, or now on trial for capital charges
(Source: Federal Death Penalty Resource Counsel Project, 3/8/00)

Other Notes on Dispositions (not updated)

Since the 1994 law expanding the federal death penalty went into effect, 243 cases have been reviewed for capital prosecution and the review committee recommended seeking the death penalty in 69 of these cases.

(Source: Justice Dept. as quoted in Washington Post, 1/11/98)

Since the federal death penalty resumed, the Attorney General's review process has considered seeking the death penalty against 418 defendants, in 283 capital prosecutions were not authorized, and in 135 seeking the death penalty was authorized. The comparable numbers for 1998 alone are: 166 defendants reviewed, 122 not authorized, 44 authorized for the death penalty.

(Source: R. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urban L.J. 347, 429 (1999)).

Method of Execution

Under the 1988 federal death penalty law, no method of execution was provided in the statute. President Bush did issue regulations in 1993 authorizing lethal injection as the method of execution. Under the 1994 law, the manner of execution will be that employed by the state in which the federal sentence is handed down. If that state does not allow the death penalty, the judge may choose another state for the carrying out of the execution. The federal Bureau of Prisons has converted an old cell block in Terre Haute, Indiana, into a new facility for condemned federal prisoners.

Appeals

There is only one appeal granted to the defendant as a matter of right and that is an appeal of the sentence and conviction to the U.S. Court of Appeals for the Circuit in which the case was tried. There is also one chance to present any facts which were overlooked or unavailable at the time of the trial. All other review, such as Supreme Court review, is discretionary and can only be requested once, except under the rarest of factual situations requiring both clear proof of innocence and certain constitutional violations.

Clemency

For Federal Death Row inmates, the President alone has pardon power.

Native Americans

The use of the federal death penalty on Native American reservations has been left to the discretion of

the tribal governments. Almost all the tribes have opted **not** to use the federal death penalty. As of January 1, 2000 there were 46 Native Americans on **state** death rows. (NAACP Legal Defense Fund)

U.S. Military

The U.S. military has its own death penalty statute, utilizing lethal injection, though no executions have been carried out in over thirty years. There are 7 men on the military death row, five of whom are black, one white, and one Asian.

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Death Row USA

Death Row Statistics As of April 1, 2000

TOTAL NUMBER OF DEATH ROW INMATES KNOWN TO LDF: 3,670

Race of Defendant:

| | | |
|-----------------------|-------|----------|
| White | 1,698 | (46.27%) |
| Black | 1,574 | (42.89%) |
| Latino/Latina | 321 | (8.75%) |
| Native American | 46 | (1.25%) |
| Asian | 31 | (.84%) |
| Unknown at this issue | 0 | (.0%) |

Gender:

| | | |
|--------|-------|----------|
| Male | 3,615 | (98.50%) |
| Female | 55 | (1.50%) |

Juveniles:

| | | |
|-------|----|---------|
| Males | 69 | (1.88%) |
|-------|----|---------|

JURISDICTIONS WITH CAPITAL PUNISHMENT STATUTES: 40
(Underlined jurisdiction has statute but no sentences imposed)

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming, U.S. Government, U.S. Military.

JURISDICTIONS WITHOUT CAPITAL PUNISHMENT STATUTES: 13

Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin.

Additional Information:

⊗ **In the United States Supreme Court - October Term 1999**
(Significant Criminal, Habeas, & Other Pending Cases)

⊗ **Execution Update**
(total executions by year, gender, race, and defendant-victim racial combinations)

⊗ **Execution Breakdown by State**

⊗ **Summary of State Lists of Prisoners on Death Row**
(total of prisoners on death row in each state, by race)

⊗ **State Lists of Prisoners on Death Row**

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Death Row USA

Summary of State Lists of Prisoners on Death Row As of April 1, 2000

| State | Total | Black | | White | | Latino/a | | Native American | | Asian | | Unknown | |
|-------|-------|-------|-----|-------|------|----------|-----|-----------------|-----|-------|-----|---------|-----|
| AL | 185 | 86 | 46% | 97 | 52% | 1 | .5% | 0 | --- | 1 | .5% | 0 | --- |
| AZ | 118 | 14 | 12% | 82 | 69% | 19 | 16% | 3 | 3% | 0 | --- | 0 | --- |
| AR | 41 | 24 | 59% | 16 | 39% | 1 | 2% | 0 | N | 0 | N | 0 | --- |
| CA | 568 | 207 | 36% | 229 | 40% | 106 | 19% | 14 | 2% | 12 | 2% | 0 | --- |
| CO | 6 | 2 | 33% | 2 | 33% | 2 | 33% | 0 | N | 0 | N | 0 | --- |
| CT | 7 | 3 | 43% | 4 | 57% | 0 | --- | 0 | N | 0 | N | 0 | --- |
| DE | 18 | 10 | 56% | 8 | 44% | 0 | --- | 0 | N | 0 | N | 0 | --- |
| FL | 391 | 139 | 36% | 213 | 54% | 36 | 9% | 1 | .3% | 2 | .5% | 0 | --- |
| GA | 137 | 64 | 47% | 70 | 51% | 2 | 1% | 0 | N | 1 | .7% | 0 | --- |
| ID | 21 | 0 | N | 21 | 100% | 0 | --- | 0 | N | 0 | N | 0 | --- |
| IL | 167 | 106 | 63% | 53 | 32% | 8 | 5% | 0 | N | 0 | N | 0 | --- |
| IN | 43 | 14 | 33% | 28 | 65% | 1 | 2% | 0 | N | 0 | N | 0 | --- |
| KS | 4 | 0 | N | 4 | 100% | 0 | N | 0 | N | 0 | N | 0 | --- |
| KY | 41 | 8 | 20% | 33 | 80% | 0 | N | 0 | N | 0 | N | 0 | --- |
| LA | 90 | 61 | 68% | 26 | 29% | 2 | 2% | 0 | N | 1 | 1% | 0 | --- |
| MD | 18 | 13 | 72% | 5 | 28% | 0 | N | 0 | N | 0 | N | 0 | --- |
| MS | 63 | 34 | 54% | 29 | 46% | 0 | N | 0 | N | 0 | N | 0 | --- |
| MO | 82 | 37 | 45% | 45 | 55% | 0 | N | 0 | N | 0 | N | 0 | --- |
| MT | 6 | 0 | N | 6 | 100% | 0 | N | 0 | N | 0 | N | 0 | --- |
| NE | 9 | 0 | --- | 8 | 89% | 0 | N | 1 | 11% | 0 | N | 0 | --- |
| NV | 89 | 35 | 39% | 45 | 51% | 8 | 9% | 0 | N | 1 | 1% | 0 | --- |
| NJ | 16 | 7 | 44% | 9 | 56% | 0 | N | 0 | N | 0 | N | 0 | --- |
| NM | 5 | 0 | N | 4 | 80% | 1 | 20% | 0 | N | 0 | N | 0 | --- |
| NY | 5 | 1 | 20% | 3 | 60% | 1 | 20% | 0 | N | 0 | N | 0 | --- |
| NC | 228 | 127 | 56% | 87 | 38% | 2 | .9% | 11 | 5% | 1 | .4% | 0 | --- |
| OH | 200 | 98 | 49% | 98 | 49% | 2 | 1% | 2 | 1% | 0 | N | 0 | --- |

| | | | | | | | | | | | | | |
|--------------|-------------|-------------|------------|-------------|------------|------------|-----------|-----------|-----------|-----------|------------|----------|------------|
| OK | 145 | 49 | 34% | 79 | 54% | 4 | 3% | 11 | 8% | 2 | 1% | 0 | --- |
| OR | 27 | 1 | 4% | 23 | 85% | 2 | 7% | 1 | 4% | 0 | N | 0 | --- |
| PA | 232 | 146 | 63% | 70 | 30% | 14 | 6% | 0 | N | 2 | 9% | 0 | --- |
| SC | 70 | 35 | 50% | 35 | 50% | 0 | --- | 0 | --- | 0 | --- | 0 | --- |
| SD | 3 | 0 | --- | 3 | 100% | 0 | --- | 0 | --- | 0 | --- | 0 | --- |
| TN | 100 | 34 | 34% | 60 | 60% | 2 | 2% | 2 | 2% | 2 | 2% | 0 | --- |
| TX | 460 | 188 | 41% | 166 | 36% | 103 | 22% | 0 | --- | 3 | 7% | 0 | --- |
| UT | 11 | 2 | 18% | 6 | 55% | 2 | 18% | 1 | 9% | 0 | --- | 0 | --- |
| VA | 28 | 11 | 39% | 16 | 57% | 1 | 4% | 0 | --- | 0 | --- | 0 | --- |
| WA | 16 | 3 | 19% | 12 | 75% | 0 | --- | 0 | --- | 1 | 6% | 0 | --- |
| WY | 2 | 0 | --- | 2 | 100% | 0 | --- | 0 | --- | 0 | --- | 0 | --- |
| US Gov. | 20 | 14 | 70% | 4 | 20% | 1 | 5% | 0 | --- | 1 | 5% | 0 | --- |
| Military | 7 | 5 | 71% | 1 | 14% | 0 | --- | 0 | --- | 1 | 14% | 0 | --- |
| TOTAL | 3679 | 1578 | 43% | 1702 | 46% | 321 | 9% | 47 | 1% | 31 | .8% | 0 | --- |

Note: 8 prisoners were sentenced to death in more than one state, 1 of them in 3 states. They are included in the chart above for each state in which they were sentenced to death, but the total number of prisoners under sentence of death is 3670.

Additional Information:

Death Row Statistics

In the United States Supreme Court - October Term 1999

(Significant Criminal, Habeas, & Other Pending Cases)

Execution Update

(total executions by year, gender, race, and defendant-victim racial combinations)

Execution Breakdown by State

State Lists of Prisoners on Death Row

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Draft
7-25-00

Criminal
Death
Penalty

MEMORANDUM FOR THE PRESIDENT

FROM: BETH NOLAN
BRUCE LINDSEY
MEREDITH CABE

SUBJECT: Death Penalty

I. Federal Death Row

Currently, there are 19 inmates on federal death row. Thirteen are black, 4 are white, 1 is Hispanic, and 1 is Asian. Five were Bush Administration prosecutions. The convictions occurred in the following states: Alabama, Arkansas, Colorado, Georgia, Illinois, Kansas, Missouri (2), Pennsylvania, Texas (6), and Virginia (4).

Three more individuals whose juries recommended the death penalty await formal sentencing. One is white, two are black/Hispanic. They were convicted in Arkansas and Missouri (2).

II. Department of Justice Statistical Survey

The Department of Justice has completed a survey of the racial/ethnic composition of defendants and their victims in death penalty-eligible cases that have been submitted by U.S. Attorneys to the Attorney General's capital case review committee.¹ The DOJ survey covers the 633 cases submitted between January 27, 1995 (when the review process was put into place) and February 14, 2000.² The DOJ survey therefore does not include data on pre-1995 federal cases; cases in which the federal government does not charge a defendant with a death-eligible offense, either out of deference to a state prosecution or for another reason; or cases with a death-eligible charge in which the death penalty is foreclosed as part of a plea agreement.

¹ The survey covers cases in which a U.S. Attorney has charged a defendant with an offense that can carry the death penalty. Under the Department's death penalty protocol, U.S. Attorneys should submit to the Attorney General for review "all federal cases in which a defendant is charged with an offense subject to the death penalty," regardless of whether the U.S. Attorney intends to request authorization to seek the death penalty. Prior to 1995, U.S. Attorneys submitted cases only when they wished to seek the death penalty.

² Only 12 of the prisoners currently on death row were sentenced during the survey's reporting period. (A total of 15 defendants were sentenced to death during the reporting period, but 3 have since had their death sentences vacated). Five were charged before the current review process was in place, and 2 were convicted after end of the study period.

The DOJ survey includes data at each stage of the Attorney General's review process: submission of a case to the Attorney General's review committee; review of the case and decision by the Attorney General whether to authorize the U.S. Attorney to seek the death penalty; and trial and sentencing. The DOJ survey also includes statistics on defendants broken down by the geographic districts of the U.S. Attorneys' offices that prosecuted the defendants.

In brief, the DOJ survey shows that, of the cases submitted, 19% of defendants were white, and 82% were minorities.³ The Attorney General authorized seeking the death penalty against 143 defendants, 29% of whom were white, and 71% of whom were minorities. Of the 143 defendants against whom the Attorney General authorized seeking the death penalty, 49 pleaded guilty prior to trial, and the death penalty authorization was withdrawn. Of those who pleaded guilty and avoided the death penalty, 43% were white, and 57% were minorities.⁴ With respect to geographic disparity, of the 633 total cases submitted to the Attorney General's review process, 267 (or 42%) came from just 5 of the 94 districts. Twenty-five districts did not submit any cases to the Attorney General during the survey period.

DOJ has noted that, while the statistics show the Attorney General's review process is not racially biased – the Attorney General authorized seeking the death penalty against a lower percentage of minority defendants than the percentage of minority defendants whose cases she reviewed – they are aware that many homicide cases are not submitted to the review process at all. And, despite the apparent fairness of the review process, the statistics on federal death row (although limited to 19 cases) do not compare favorably with state statistics. For example, only Maryland has a higher percentage of black prisoners on death row, and no state has as low a percentage of white prisoners on death row.

A brief summary of some of the DOJ survey's findings is attached. Also attached is state-by-state information on the race of defendants on death row and a recent article from the *Chicago Tribune* about racial disparity in plea bargaining in the federal system.

III. Matters for Response and/or Further Study

- A. Why do five U.S. Attorneys' offices submit cases to the Attorney General at a much higher rate than the other 89 offices, including 25 offices that have not submitted any cases to the Attorney General since the protocol went into effect? A study might look at the pattern of submissions by the U.S. Attorneys' offices taking into consideration, among other things, the charging practices of nearby U.S. Attorneys' offices and state and local prosecutors.
- B. Why are some homicide cases that could carry death-eligible charges not submitted to the Attorney General's review process? Representative rural, suburban, and urban areas could be analyzed to determine the ways in which, and

³ Percentages may not total 100 because of rounding.

⁴ The statistics on pleas also show that 51% of all white defendants against whom the Attorney General authorized seeking the death penalty entered into plea agreements foreclosing the death penalty. By contrast, only 27% of black defendants against whom the death penalty was authorized pleaded guilty.

the reasons why, homicide cases are (1) directed to the state or federal system and (2) charged with either capital or non-capital offenses.

- C. Why is there a disparity between the racial makeup of those for whom the death penalty is authorized and those who plead guilty prior to trial as part of plea bargains under which the death penalty is foreclosed?

IV. Who Should Perform Study

Further study could take two basic forms: either (1) a "blue-ribbon commission," like that appointed by Governor Ryan, or (2) the Attorney General could conduct further study. A commission could probably be created by Executive Order, but would require funding to operate.⁵ It also seems that it would take far longer for a commission to be created, appointed, funded, and to start its work, much less reach any meaningful conclusions.⁶ Given those considerations, we recommend that you direct the Department of Justice to execute a study, or studies, of these issues. In either case, DOJ has estimated that a study of these issues probably could not be completed in 6 months, and is more likely to take at least a year.

DECISION:

AGREE _____

DISAGREE _____

DISCUSS _____

⁵ Senator Feingold has introduced legislation that would institute a moratorium on the death penalty, and that would establish a "National Commission on the Death Penalty" to study "all matters relating to the administration of the death penalty." Senator Feingold's proposed commission would study the death penalty in both the federal and state systems.

⁶ A DOJ study could also have a "commission" element; for example, at the Attorney General's direction, the director of the National Institute for Justice appointed a National Commission on the Future of DNA Evidence to carry out a study of DNA evidentiary issues, including post-conviction testing. That study was supported by a DOJ component but had the input of several "outside" commissioners.

*Cover -
Death Penalty*

SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM (1988-2000)

**U.S. Department of Justice
Washington, D.C.
August __, 2000**

INTRODUCTION

During the twentieth century, the federal government infrequently carried out the death penalty against criminal defendants. From 1927 to 1963, the federal government executed 34 criminal defendants. There has not been a federal execution since 1963.

On November 18, 1988, the President signed into law the Anti-Drug Abuse Act of 1988. A section of this law, known as the Drug Kingpin Act (DKA), made the death penalty available as a possible punishment for certain drug-related offenses. The availability of capital punishment in federal criminal cases expanded further on September 13, 1994, when the President signed into law the Violent Crime Control and Law Enforcement Act. A section of this law, known as the Federal Death Penalty Act (FDPA), designated approximately 60 federal offenses as capital crimes. In signing the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the President added another four federal offenses to the list of capital crimes

Despite this expansion of the federal death penalty over the last 12 years, the vast majority of capital cases have been prosecuted in the states. As of the end of 1998, there were 3,433 defendants with pending death sentences in the states, compared with 19 defendants with currently pending death sentences in the federal system as a result of convictions under the DKA and the FDPA. Federal death row inmates thus account for approximately one-half of one percent of all the defendants on death row in the United States.

Part I of this Survey provides an overview of the decision-making process in the federal death penalty system. Part II provides available racial/ethnic data about each stage of the federal decision-making process from November 18, 1988 to July 20, 2000. Part III provides available racial/ethnic data about the overall federal decision-making process during the same period. Given that certain percentages in Parts II and III are based on small subsets of individuals, the reader should use care in drawing conclusions from them about the overall application of the federal death penalty. Part IV provides limited racial/ethnic data about the prosecution of homicides and the imposition of the death penalty in the states. Given that the pool of state defendants is much greater than the pool of federal defendants, the reader also should use care in drawing comparisons between the state data in Part IV and the federal data in Parts II and III. Finally, percentages in this survey do not always add up to 100 because of rounding.

PART I: AN OVERVIEW OF THE DECISION-MAKING PROCESS IN THE FEDERAL DEATH PENALTY SYSTEM

Part I of this Survey presents an overview of the decision-making process in the federal death penalty system. Section A describes the initial stage of the process, in which a decision is made whether a particular case will be prosecuted in the state or federal system. For those cases that are prosecuted in the federal system, Section B describes how one of the 93 United States Attorneys across the country decides whether to recommend to the Attorney General that he or she be authorized to seek the death penalty in the case. Section C describes the next stage in the process, in which the Attorney General's Review Committee on Capital Cases in Washington, D.C. (the Review Committee) decides whether or not it agrees with the United States Attorney's recommendation as to whether the death penalty should be sought. Section D describes the Attorney General's decision-making process. Section E describes the various decisions and procedural routes that are followed after the Attorney General authorizes a United States Attorney to seek the death penalty.

A. STATE VERSUS FEDERAL PROSECUTION

Prior to 197__, the states and the federal government executed individuals who had committed murder and a variety of other crimes, such as rape and kidnapping. Today, however, all defendants on death row, both in the state and federal systems, were convicted of crimes specifically related to homicides.¹

As with most crimes, homicides principally are investigated and prosecuted by state law enforcement authorities, either as capital or non-capital cases. From 1988 to 1998, the latest year from which statistics are available, a total of 238,320 homicides were reported (but not necessarily prosecuted, either as a capital or non-capital case) throughout the United States. See Table __. During the same time period, approximately __ defendants (__ %) were prosecuted and convicted in the federal system for acts of homicide (either as a capital or non-capital case). See Table __.

Even where federal jurisdiction technically may exist over a particular homicide, such as homicides committed during street-level robberies, state prosecutors continue to prosecute the bulk of murders in this country without any involvement of federal authorities. In those instances where both state and federal law enforcement officials have concurrent jurisdiction over a particular homicide, and there is more than an insubstantial federal interest in the case, there are a wide range of considerations that affect how, and by whom, such a case will be handled. When homicides are prosecuted federally -- either as a capital or non-capital case -- it is

¹While the vast majority of crimes subject to the death penalty under federal law involve homicides, a few do not. See 18 U.S.C. §§ 794 (espionage); 2381 (treason); 3591(b)(1) (certain aggravated narcotics trafficking offenses). The federal government has not sought the death penalty in any such case since 1988.

often because of the availability of certain federal laws or federal investigative or prosecutorial tools. For example, federal authorities have certain laws available (*e.g.*, the racketeering statutes) that may make it easier to prosecute simultaneously many members of a violent organizations that engage in a pattern of violent activities. At the same time, federal prosecutors do not face the same evidentiary or procedural restrictions that state prosecutors face in certain jurisdictions. Additionally, many states lack the equivalent of the federal witness protection program and the investigative resources and expertise of federal law enforcement agencies. For these and other reasons, state prosecutors may decide to refer certain homicides to their federal counterparts.

Apart from these differences in laws and resources, which often affect whether a particular homicide is prosecuted in state or federal court (as a capital or non-capital case), state and federal law enforcement officials often work cooperatively to maximize their overall ability to prevent and prosecute violent criminal activity in their respective communities. Indeed, it is a central feature of current federal law enforcement policy that the 93 United States Attorneys across the country work closely with their state and local counterparts to develop initiatives to combat the most pressing crime problems affecting their jurisdictions. In some areas, these cooperative efforts lead to agreements that certain kinds of offenses will be handled by federal authorities. In Puerto Rico, for example, the United States Attorney has agreed with his local counterpart that the federal government will prosecute carjackings involving death, which has led to a disproportionately large number of homicides being handled by that particular United States Attorney's Office. In other areas, by contrast, these cooperative efforts lead to a federal emphasis on crimes other than homicides, leaving most homicides to be handled primarily by state prosecutors. These decisions are not, however, static ones. A given homicide that appears to be of purely local interest may, upon further investigation months or years after the offense, prove to be related to organized multi-jurisdictional criminal activity that is being investigated by federal law enforcement officials, who may seek to transfer the case from state prosecutors to federal prosecutors.

These and other individual considerations are not readily susceptible to meaningful statistical analysis.

B. THE UNITED STATES ATTORNEYS

Once a particular homicide case has come into the federal law enforcement system, the first decision for the United States Attorney is whether to consider the case at all as capital-eligible. Not all homicides in the federal system are capital-eligible. For example, a United States Attorney that has jurisdiction over a highway that runs through federal land may decide at the outset of an investigation that a vehicular homicide was negligent at best and should not even be considered as capital-eligible.

For those cases that are potentially capital-eligible, however, the United States Attorney must decide whether he or she wishes to recommend to the Attorney General that he or she be

authorized to seek the death penalty in that case. With the enactment of the Drug Kingpin Act in 1988, the Department of Justice instituted a policy that required a United States Attorney to submit to the Attorney General for review and approval those cases in which the United States Attorney affirmatively wished to seek the death penalty. Under this policy, the decision *not* to seek the death penalty was left entirely to the United States Attorney's discretion. On January 27, 1995, following the enactment of the FDPA, the Department altered this policy to require United States Attorneys to submit to the Attorney General for review "all Federal cases in which a defendant is charged with an offense subject to the death penalty, regardless of whether the United States Attorney intends to request authorization to seek the death penalty."

This new protocol does not require United States Attorneys to submit to the Attorney General *all* of the potentially capital-eligible defendants in the federal system. First, even when United States Attorneys charge a defendant with a capital-eligible offense, they have the discretion to conclude a plea agreement with the defendant foreclosing the death penalty before submitting the case to the Attorney General for review. For example, soon after indicting several defendants for capital-eligible offenses, a United States Attorney may decide to enter into a cooperation agreement with one of the defendants, under which the defendant agrees to provide truthful testimony against his co-defendants in exchange for a promise that he or she will not face the death penalty. Second, United States Attorneys have the same discretion to enter into pleas after arresting a defendant but before asking the grand jury to charge him in an indictment with a capital-eligible offense. Third, United States Attorneys have the discretion *not* to charge a defendant in the first place with a capital-eligible offense. For example, a United States Attorney might decide in a particular case that he or she simply could not prove to a jury beyond a reasonable doubt that the defendant had the requisite level of intent to be charged with a capital-eligible offense. Fourth, United States Attorneys have the discretion not to submit to the Attorney General for review those potentially capital-eligible cases in which the United States Attorney initially considered the case for federal prosecution, but ultimately decided to defer prosecution to state authorities because the federal interest in the case was insubstantial. For example, while an isolated homicide committed during a street robbery might in some circumstances technically be subject to federal prosecution, most such homicides are handled by state prosecutors.] ?

The reader should note that there has been no centralized data collection process in place regarding these four categories of cases. As a result, the data regarding submissions by United States Attorneys that are set forth in Part II of this Survey do not include information regarding the entire pool of capital-eligible defendants in the federal system since 1988.

Beyond these four categories of cases, there remains a significant number of cases that United States Attorneys must submit to the Attorney General for review since the current protocol went into effect, namely, those in which a United States Attorney charges a capital-eligible offense and does not enter into a plea with the defendant before making a submission to the Attorney General. In making submissions in these cases, the United States Attorney must recommend to the Attorney General whether or not he or she believes that the death penalty

should be authorized in that case. Prior to doing so, the United States Attorney or his or her designee will meet with the defendant's attorneys and allow them to make written and oral presentation as why the death penalty should not be sought in the case.²

Once a United States Attorney decides whether or not to seek authorization from the Attorney General to pursue the death penalty, he or she is required to submit detailed information about the case to the Capital Crimes Unit (CCU) of the Criminal Division of the Department of Justice.³ In particular, the United States Attorney must submit a comprehensive discussion of the theory of liability; the facts and evidence relating to the issue of guilt or innocence; the facts and evidence relating to any aggravating factors (including victim impact) or mitigating factors; the defendant's background and criminal history; the basis for Federal prosecution; and any other relevant information. The United States Attorney is also required to submit any material received from defense counsel in opposition to the death penalty, and other significant documents such as confessions, key witness statements, and autopsy and crime scene reports⁴.

Under current Department policy, bias based on characteristics such as an individual's race or ethnicity can play no role in a United States Attorney's decision to recommend the death penalty. Moreover, a United States Attorney may not provide information about the race/ethnicity of the defendant to the CCU attorneys handling the case, to the Review Committee, or to the Attorney General. As a result, the decision-making process in Washington, D.C., which is described below, is race/ethnicity-blind, unless such information is explicitly raised by defense counsel.⁵

²Since _____, federal law has expressly required that, upon the request of an indigent capital defendant, a federal judge appoint two attorneys to represent the defendant and make available sufficient funds for reasonable investigative and expert services. The attorneys appointed to represent an indigent defendant must have the "background, knowledge, or experience [that] would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation." Further, at least one defense attorney must be "learned in the law of capital cases."

³The CCU was created in 1998 and consists of a small group of experienced capital litigators who assist in handling various aspects of the Department's death penalty processes.

⁴On occasion, United States Attorneys have changed their recommendations about particular cases after new information about the case came to light or after further consideration. Since the data on these changed recommendations has not, to date, been systematically captured, the data presented below is limited to the *initial* recommendations of United States Attorneys.

⁵The only individuals in Washington, D.C. who are privy to the race/ethnicity information are paralegals in the CCU who collect this data under separate cover from the United States Attorneys. This data forms the pool from which all of the federal data on race/ethnicity

C. THE ATTORNEY GENERAL'S REVIEW COMMITTEE

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

For each case submitted by a United States Attorney, the Review Committee receives all of the underlying materials that have been submitted by the United States Attorney, including the materials from defense counsel. The Review Committee then meets with defense counsel either in person or on video conference, along with attorneys from the United States Attorney's Office and the CCU. During this meeting, defense counsel are invited to make an oral presentation to the Review Committee as to why the Attorney General should not authorize the United States Attorney to seek the death penalty. Thereafter, the Review Committee makes its recommendation to the Attorney General as to why the death penalty should, or should not, be sought in that case.⁶

D. THE ATTORNEY GENERAL

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

that is reported below is drawn.

⁶As with the recommendations of United States Attorneys, the Review Committee has, on occasion, changed its recommendations about particular cases after new information about the case came to light or after further deliberation. Since the data on these changed votes has not, to date, been systematically captured, the data presented below is limited to the *initial* recommendations of the Review Committee.

such a notice.⁷

E. POST-AUTHORIZATION ACTIVITY

A decision by the Attorney General to authorize a United States Attorney to seek the death penalty is always subject to reconsideration until the jury has recommended a sentence. Thus, even after such a decision has been made, additional facts or arguments may be brought to the Attorney General's attention in support of a request to withdraw a notice of intent to seek the death penalty. Such reconsideration can be sought by defense counsel, the United States Attorney, the Review Committee, or the Attorney General herself.

In addition to reconsideration by the Attorney General, the Attorney General's decision to authorize the seeking of the death penalty can also be changed by means of a plea agreement between the United States Attorney and the defendant that forecloses the possibility of capital punishment. This may occur, for example, when a key witness recants testimony or otherwise becomes unavailable on the eve of trial. Under current Department policy, such agreements do not require the Attorney General's prior authorization.

For those defendants who proceed to trial, there are two phases to the case. In the "guilt phase," the jury must decide unanimously whether the prosecution proved beyond a reasonable doubt that the defendant has committed the underlying death-eligible offense. If the jury finds the defendant guilty, the case proceeds to the "sentencing phase."

At the sentencing phase, in order to meet legal requirements for the imposition of the death penalty, the prosecution must prove beyond a reasonable doubt that the defendant committed the capital offense with a certain level of intent. In addition, the prosecution must prove any aggravating factors beyond a reasonable doubt, and must prove at least one from a list of specific factors set out in the applicable statute.⁸ In recommending a sentence, the jury may only consider aggravating factors that it unanimously finds to have been proven beyond a

⁷In some instances, the Attorney General does not make a decision on a case submitted for review by a United States Attorney. For example, in some cases the United States Attorney may enter into a plea agreement with a defendant while the case is under consideration by the Attorney General (or the Review Committee). In other cases, consideration of a given defendant may be indefinitely suspended if the defendant is a fugitive.

⁸Although the exact list of aggravating factors varies depending on the nature of the offense, the statutory list of factors generally includes: killing multiple victims; committing the capital offense against particularly vulnerable victims or high-level public officials; paying someone else to commit the murder; committing the murder for pecuniary gain; committing the murder while committing other serious crimes; causing a grave risk of death to persons other than the actual victims; committing the offense in a particularly heinous manner; engaging in substantial planning or premeditation in committing the murder; or having a previous convictions for other serious offenses. See U.S.C. § 3592(b)-(d); 21 U.S.C. § 848().

reasonable doubt. Mitigating factors can include any of several specific factors listed in the statute, as well as anything else "in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence."⁹ Mitigating factors need only be proven by a preponderance of the evidence, and each juror can make an individual decision as to which factors have been proven to his or her satisfaction. Both the prosecution and defense may, in the judge's discretion, rely on information that might not be admissible as evidence in the guilt phase of the trial (such as hearsay, for example); and may also rely on all of the evidence submitted during the guilt phase without having to present it anew during the penalty phase.

At the end of the sentencing phase, the federal judge instructs the jurors that they must each weigh the aggravating and mitigating factors and decide upon a sentence. The judge also instructs the jury that they may not in any way consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching a verdict. Jurors are then given at least two sentencing options: death or life in prison without any possibility of release. With respect to certain offenses, jurors are also given a third option -- to have the judge impose a lesser sentence authorized by statute. In reaching their verdict, which must be unanimous, each juror must certify that he or she did not, in fact, consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching his or her determination and that his or her determination would have been the same regardless of those factors. In all cases, the jury's decision is binding upon the judge.

⁹The specific mitigating factors listed in the FDPA are impaired capacity, duress, minor participation, equally culpable defendants who will not be punished by death, lack of a prior criminal record, mental or emotional disturbance, and consent by the victim. 18 U.S.C. § 3592(a); see also 21 U.S.C. 848() (similar list of mitigating factors under Drug Kingpin Act).

PART II: STATISTICAL DATA REGARDING PARTICULAR STAGES OF THE FEDERAL DECISION-MAKING PROCESS

A. STATE VERSUS FEDERAL PROSECUTION

As noted above, the decision whether a homicide is prosecuted in state court rather than federal court (as a capital case or a non-capital case) is not readily susceptible to meaningful statistical analysis and no data is presented in this Survey on this stage of the decision-making process.

B. THE UNITED STATES ATTORNEYS' RECOMMENDATIONS

From November 18, ¹⁹⁹⁸1995 to January 27, 1995, when Department policy required United States Attorneys to submit to the Attorney General for review and approval only those cases in which they affirmatively wished to seek the death penalty, United States Attorneys submitted a total of _____ requests for review, all under the Drug Kingpin Act, and all carrying the United States Attorney's recommendation that the Attorney General authorize seeking the death penalty.¹⁰ Starting on January 27, 1995, when United States Attorneys were required to submit to the Attorney General for review all cases in which a defendant was charged with a capital-eligible offense and the case was not resolved by plea bargain prior to consideration by the Attorney General, United States Attorneys have submitted _____ capital-eligible defendants for review. This section provides statistical data regarding these _____ total submissions.¹¹

Overall

[add text]

By United States Attorneys' Recommendations

¹⁰Of these _____ submissions, Attorney General Thornburgh decided _____, Attorney General Barr decided _____, Acting Attorney General Gerson decided _____, and Attorney General Reno decided _____.

¹¹In addition to the _____ total submissions described above, there were seven cases that cannot properly be considered within the pre-protocol or post-protocol categories. In each of these seven cases, arising during the transition from the former procedures to the current ones, the United States Attorney submitted to the Attorney General a recommendation *not* to seek the death penalty -- before such approval was in fact required under the new procedures. Because these cases were not in fact reviewed under the new protocol, and need not have been submitted under the former protocol, they are essentially indistinguishable from an uncounted number of cases from the 1988-1995 period (during which a United States Attorney's decision not to seek the death penalty was not submitted for the Attorney General's approval) that are not accounted for in this Survey. Accordingly, these seven cases are likewise excluded from the data reported below. For information, six of the seven cases involved offenses under the Drug Kingpin Act, and the seventh was charged under a racketeering provision, 18 U.S.C. § 1959(a).

As explained above, only cases submitted since January 27, 1995 include cases in which the United States Attorneys recommended both for and against seeking the death penalty. This section reports for this group of cases the prosecutors' recommendations, by race/ethnicity and geographical district (Table __). Caution should be exercised in comparing data from different districts for the reasons set forth above in Part I.A.

[add highlight bullets]

By Capital-Eligible Statutory Offense Charged

[add highlight bullets]

By Victim

[add highlight bullets]

C. THE REVIEW COMMITTEE'S RECOMMENDATIONS

Tables __ to __ report information concerning the racial/ethnic and geographical breakdown of the results of the review by the Review Committee in the __ cases submitted by United States Attorneys since the current protocol went into effect on January 27, 1995. No corresponding information for the pre-protocol period is reported because, as noted above, the Review Committee was not created until the revision of the capital case review protocol in early 1995.

Overall

[add text]

By United States Attorneys' Recommendations

[add highlight bullets]

By Capital-Eligible Statutory Offense Charged

[add highlight bullets]

By Victim

[add highlight bullets]

D. THE ATTORNEY GENERAL'S DECISION

Overall

[add text]

By United States Attorneys' Recommendations

[add highlight bullets]

By Review Committee Recommendations

[add highlight bullets]

By Capital-Eligible Statutory Offense Charged

[add highlight bullets]

By Victim

[add highlight bullets]

E. POST-AUTHORIZATION ACTIVITY

Overall

[add text]

By United States Attorneys' Recommendations

[add highlight bullets]

By Review Committee Recommendations

[add highlight bullets]

By Capital-Eligible Statutory Offense Charged

[add highlight bullets]

By Victim

[add highlight bullets]

F. FEDERAL DEFENDANTS SENTENCED TO DEATH

As noted above, since 1988, federal juries have recommended the death sentence for a total of 25 defendants, of whom five were initially indicted before the protocol took effect on January 27, 1995. The sentences of four of these 25 defendants (one white and three black; all indicted under the Department's current protocol) were vacated in subsequent judicial proceedings. In addition, two defendants (both Hispanic) are currently awaiting formal sentencing following the jury's recommendation of death. Thus, as of July 20, 2000, there were 19 defendants with pending federal death sentences.

Table __ provides a case-by-case report of information about each of the 25 defendants as to whom a federal jury recommended the imposition of the death penalty. For each such defendant, the table provides the defendant's name, race/ethnicity and gender, the race/ethnicity and sex of the victim(s) of the defendant's capital offense(s), the current procedural status of the case, whether the case was authorized for capital prosecution before or after the implementation of the current protocol, the capital offense(s) of conviction, and the district in which the case was indicted.

- As to the 19 defendants under a pending sentence of death as of July 20, 2000:
 - 21 percent (4) are white;
 - 68 percent (13) are black;
 - 5 percent (1) are Hispanic;
 - 5 percent (1) is other (Asian).
- These 19 defendants were prosecuted in 14 separate cases – 10 cases had one defendant convicted of capital charges and sentenced to death, while 4 cases had two or more capital defendants sentenced to death. The 14 cases were prosecuted in 12 different judicial districts in 10 different states. Only two United States Attorney's Offices have prosecuted more than one capital case resulting in a death sentence, and none has prosecuted more than two such cases.
- 10 of these 19 defendants (53 percent) had capital convictions related to only one victim. 9 of the 19 defendants (47 percent) had capital convictions related to two or more victims.
- 18 of these 19 defendants were sentenced to death for crimes involving a total of 27 victims. 22 of the 27 victims were male. Of the total 27 victims:
 - 26 percent (7) were white;
 - 59 percent (16) were black;
 - 11 percent (3) were Hispanic; and

- 4 percent (1) was other (Asian).
- The remaining defendant, Timothy McVeigh, was found responsible for the deaths of 168 individuals, both male and female and of various races/ethnicities in connection with the 1995 bombing of the Murrah Federal Building in Oklahoma City, Oklahoma.
- 13 of these 19 defendants (68 percent) were sentenced to death for crimes against victims exclusively of the same race/ethnicity. Of these 13 defendants:
 - 23 percent (3) were white;
 - 62 percent (8) were black;
 - 8 percent (1) was Hispanic; and
 - 8 percent (1) was other.
- 6 of these 19 defendants (32 percent) were sentenced to death for crimes against at least one victim of a different race/ethnicity. Of these 6 cases:
 - 17 percent (1) involved a white defendant and at least one victim who was not white; and
 - 83 percent (5) involved a black defendant and at least one victim who was not black.

PART III: STATISTICAL DATA REGARDING THE OVERALL FEDERAL DECISION-MAKING PROCESS

Part III presents an overview of the data reported in Part II in a manner that more easily allows the reader to compare statistics between different stages of the Department's capital case review process. Section A provides a cross-sectional comparison of the race/ethnic data in each stage of the review process. Section B provides a longitudinal analysis of each racial/ethnic group as it progresses through the various stages of the review process. Section C provides summary data about the extent to which there has been consensus among the United States Attorneys, the Review Committee (in the post-protocol period only), and the Attorney General during the review process.

A. CROSS-SECTIONAL ANALYSIS

Tables __ to __ summarize the racial/ethnic distribution of defendants within each stage of the Department's review process for various reporting periods. Thus, for example, the reader can compare the racial/ethnic breakdown of defendants submitted for review against the breakdown for the smaller group as to whom capital prosecution is authorized. Specifically, Table __ presents an overall cross-sectional analysis of the race/ethnic breakdown for each stage of the overall Departmental review process for the __ cases submitted from 1988 to 2000. Table __ reports similar data for the __ pre-protocol cases in which United States Attorneys recommended seeking the death penalty for violations of the Drug Kingpin Act (although Table __ presents no data concerning the Review Committee, which did not exist in the pre-protocol period). Table __ reports similar data for the __ post-protocol cases.

B. LONGITUDINAL ANALYSIS

The flow charts in Tables __ to __ summarize the progression of decisions made during the reporting period. Each flow chart reports, with respect to the specified racial/ethnic group and reporting period, the number and percentage of defendants as to whom particular decisions were made. Thus, for example, the reader can compare the rates at which defendants of different groups who were authorized for capital prosecution were in fact convicted of a capital offense. A separate set of such flow charts is presented, respectively, for all __ cases since 1988, the __ cases in the pre-protocol period, and the __ post-protocol cases. Within each set there is first presented a flow chart for all defendants, and then one each for white, black, Hispanic, and other defendants, respectively, as summarized below:

| <u>Table</u> | <u>Reporting Period</u> | <u>Group of Defendants</u> |
|--------------|-------------------------|----------------------------|
| x | All cases since 1988 | All defendants |
| x | All cases since 1988 | White defendants |
| x | All cases since 1988 | Black defendants |

| | | |
|---|----------------------|---------------------|
| x | All cases since 1988 | Hispanic defendants |
| x | All cases since 1988 | Other defendants |
| x | Pre-protocol cases | All defendants |
| x | Pre-protocol cases | White defendants |
| x | Pre-protocol cases | Black defendants |
| x | Pre-protocol cases | Hispanic defendants |
| x | Pre-protocol cases | Other defendants |
| x | Post-protocol cases | All defendants |
| x | Post-protocol cases | White defendants |
| x | Post-protocol cases | Black defendants |
| x | Post-protocol cases | Hispanic defendants |
| x | Post-protocol cases | Other defendants |

C. THE DEGREE OF CONSENSUS WITHIN THE DEPARTMENT

Table __ compares the Attorney General's decisions in the __ post-protocol cases with the recommendations of the Committee and the United States Attorneys on a district-by-district basis. In addition, Table __ compares the Attorney General's decisions with the United States Attorneys' recommendations in the __ pre-protocol cases (the Committee did not exist in this period), and Table __ provides such a comparison for all __ cases since 1988. A summary of some of the findings is set forth below:

[add highlights]¹²

¹²[add footnote regarding initial v. final recommendations of United States Attorneys and Review Committee]

PART IV: LIMITED STATISTICAL DATA REGARDING THE THE PROSECUTION OF HOMICIDES AND THE IMPOSITION OF THE DEATH PENALTY IN THE STATES

The criminal justice systems in the 38 states that permit the death penalty handle the vast majority of the capital prosecutions in the United States.¹³ These states apply the death penalty to varying categories of criminal offenses and have varying practices both with respect to how cases are selected for capital prosecution -- selection procedures can vary widely even within a given state from one county to another -- and how state laws provide procedural protections to capital defendants. There is thus no unitary "state system" against which to compare the data about federal capital cases reported above. Because the factors affecting the choice between state and federal prosecution in cases of overlapping jurisdiction also vary from one locality to another, the relatively small group of federal defendants charged with capital-eligible crimes may not constitute a fairly representative subset of all defendants in the United States who can be charged with capital crimes. Accordingly, there are significant limits on the ability to compare state and federal data regarding the implementation of the death penalty.

Nevertheless, to the extent that such comparisons can be made, Part IV briefly examines aggregate data concerning the states' implementation of the death penalty since 1988. By way of background, Section A presents data on individuals who commit homicides and individuals who are victims of homicides nationwide, regardless whether the offenders are charged with capital or non-capital offenses. Section B presents data on defendants who have been convicted of capital offenses and sentenced to death in the 38 states where the death penalty is available. Finally, Section C presents data about the ____ state defendants who have actually been executed during the reporting period.¹⁴

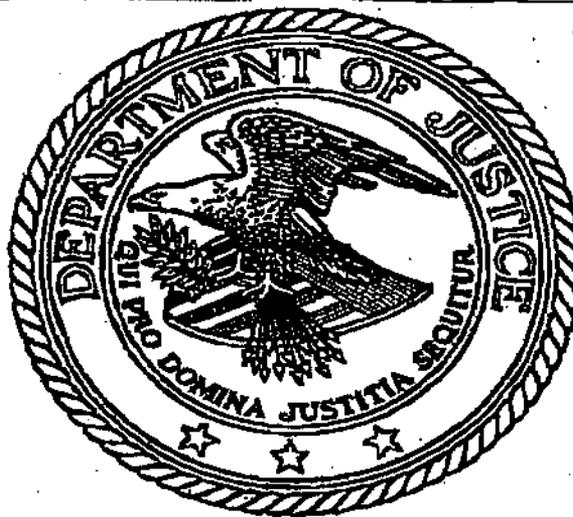
¹³The 38 states that provide for imposition of the death penalty are: [list]. Twelve states ([list]) and the District of Columbia ban the death penalty in their respective state court systems altogether

¹⁴Additional information concerning individual states' implementation of the death penalty is reported in a BJS Bulletin entitled Capital Punishment 1998 (Dec. 1999).

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*Crime -
Death Penalty*

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DRAFT - July 6, 2000 (6:27PM)

TALKING POINTS FOR THE STATISTICAL SURVEY OF THE APPLICATION OF THE FEDERAL DEATH PENALTY

BACKGROUND

- The Department of Justice has completed a statistical survey of the racial/ethnic composition of defendants and their victims in 633 capital-eligible cases that were submitted by the 94 United States Attorneys across the country to the Attorney General for review between January 27, 1995 (when the Department's current death penalty protocol went into effect) and February 14, 2000 (the close of the survey period).
- This statistical survey includes data on defendants at each stage of the Attorney General's review process as of the close of the survey period. The statistics on defendants are also broken down by the geographic districts of the United States Attorneys who charged the defendants.
- Under the death penalty protocol currently in effect, United States Attorneys are required to submit to the Attorney General for review only those cases in which they have actually charged an offense subject to the death penalty and have not entered into a plea agreement with respect to that charge. In such a circumstance, a United States Attorney must make a submission to the Attorney General, even if the United States Attorney recommends that he or she not be authorized by the Attorney General to seek the death penalty.
- Three categories of capital-eligible defendants fall outside the current protocol and therefore need not be submitted by United States Attorneys to the Attorney General for review: (1) cases in which a United States Attorney charged an offense subject to the death penalty but concluded a plea agreement prior to submitting the case to the Attorney General (e.g., because the United States Attorney entered into a cooperation agreement with the defendant); (2) cases in which a United States Attorney exercised his or her prosecutorial discretion not to charge a capital-eligible offense in the first place; and (3) cases in which a United States Attorney deferred federal prosecution altogether to a state prosecution. Defendants in cases falling in these three categories are not covered by this statistical survey.
- The statistical survey differentiates between those cases in which the Attorney General ultimately authorized the death penalty and those in which she did not. By contrast, the survey does not differentiate between cases in which United States Attorneys recommended the death penalty and those in which they did not.
- Percentages in this statistical survey may not add up to 100 because of rounding. Many of the percentages are based on very small subsets of individuals; especially in such cases, the

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reader should exercise caution in drawing conclusions about the overall application of the death penalty in the federal system.

SUMMARY

- **During the survey period, United States Attorneys submitted for review to the Attorney General cases involving 633 defendants, with a recommendation either to seek or not to seek the death penalty. Of those 633:**
 - 19 percent (119) were white;
 - 48 percent (303) were black;
 - 29 percent (183) were Hispanic; and
 - 4 percent (28) were from other racial/ethnic groups.

- **Of the 633 submitted cases, the Attorney General reached a final decision with respect to 521 defendants as of the close of the survey period. Of those 521, the Attorney General authorized United States Attorneys to seek the death penalty against 143 (27%) of the defendants and not to seek it against 378 (73%). Of the 378 defendants against whom the Attorney General did not authorize the death penalty:**
 - 16 percent (60) were white;
 - 49 percent (187) were black;
 - 31 percent (118) were Hispanic; and
 - 3 percent (13) were other.

- **Of the 143 against whom seeking the Attorney General did authorize the death penalty:**
 - 29 percent (41) were white;
 - 45 percent (64) were black;
 - 20 percent (28) were Hispanic; and
 - 7 percent (10) were other.

- **Of the 143 against whom the death penalty was authorized, 49 pleaded guilty prior to trial as part of plea bargain pursuant to which the death penalty authorization was withdrawn. Of those 49:**
 - 43 percent (21) were white;
 - 35 percent (17) were black;
 - 16 percent (8) were Hispanic; and
 - 6 percent (3) were other.

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- **Of the remaining 94 against whom the death penalty was authorized, 53 had their trial pending and 41 had their trials completed as of the end of the survey period. Of those 41 defendants, 37 were convicted of a capital offense at the guilt/innocence stage of trial. Of those 37, 22 did not receive the death penalty. Of the remaining 15 who were sentenced to death:**
 - 20 percent (3) were white;
 - 73 percent (11) were black;
 - 0 percent (0) were Hispanic; and
 - 7 percent (1) were other.

- **Two of the 15 defendants sentenced to death had their sentences vacated before the close of the survey period, leaving 13 with pending death sentences at the conclusion of the survey period. Additionally, 5 defendants who were charged before the current death penalty protocol took effect had pending death sentences at the conclusion of the survey period. Of the 18 total defendants with pending death sentences at the conclusion of the survey period:**
 - 22 percent (4) were white;
 - 67 percent (12) were black;
 - 6 percent (1) were Hispanic; and
 - 6 percent (1) were other.

- **With respect to victims, of the 514 defendants charged in cases with identified victims, 373 (73%) were the same race/ethnicity as all the victims associated with their capital charges:**
 - When both the defendant and all victims were white (80 defendants), the death penalty was authorized for 45 percent (36) of defendants;
 - When both the defendant and all victims were black (171 defendants), the death penalty was authorized for 20 percent (35) of defendants; and
 - When both the defendant and all victims were Hispanic (108 defendants), the death penalty was authorized for 20 percent (22) of defendants.

- **Of the 514 defendants charged in cases with identified victims, 141 (27%) were of a different race/ethnicity than at least one victim associated with their capital charges:**
 - When the defendant was white and at least one victim was not white (15 defendants), the death penalty was authorized for 33 percent (5) of defendants;
 - When the defendant was black and at least one victim was not black (78 defendants), the death penalty was authorized for 37 percent (29) of defendants;
 - When the defendant was Hispanic and at least one victim was not Hispanic (37

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defendants), the death penalty was authorized for 16 percent (6) of defendants.

- With respect to geographic rates, of the 633 submissions by United States Attorneys to the Attorney General (with a recommendation for or against the death penalty), 267 submissions (42 percent) came from the following 5 Districts:
 - 11 percent (67) were from the District of Puerto Rico (San Juan);
 - 10 percent (62) were from the Eastern District of Virginia (Alexandria);
 - 8 percent (51) were from the Eastern District of New York (Brooklyn);
 - 7 percent (47) were from the Southern District of New York (Manhattan);
 - 6 percent (40) were from the District of Maryland (Baltimore).
- The remaining 366 submissions (58 percent) came from 64 other Districts, none of which submitted more than 17 cases. 25 Districts did not submit any cases to the Attorney General during the survey period.

POSSIBLE NEXT STEPS (NOT YET CLEARED WITHIN DOJ):

- Direct the Criminal Division and the Attorney General's Advisory Committee of U.S. Attorneys (AGAC) to develop detailed guidelines for deciding which homicide cases to prosecute in the federal system rather than in the state systems.
- Amend the current death penalty protocol to require United States Attorneys to submit to the Attorney General for review *all* capital-eligible cases, not just those in which a United States Attorney actually charges a capital-eligible crime.
- Amend the current death penalty protocol to require United States Attorneys to seek the Attorney General's permission before allowing a defendant to plead guilty to an offense not carrying the death penalty in cases in which the Attorney General previously authorized the United States Attorney to seek the death penalty.
- Direct the Criminal Division, the AGAC, and the National Institute of Justice to commission studies along the following lines:
 - A study of a representative rural, suburban, and urban areas that analyzes the ways in which, and the reasons why, homicide cases are: (i) directed to the state or federal systems, and (ii) charged either non-capitally or capitally.
 - A study of the pattern of submissions by the United States Attorneys' Offices, including, but not limited to, an analysis of the factors contributing to the fact that: (1) five Offices submit cases to the Attorney General at a

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much higher rate than the others 89 Offices; and (ii) 25 Offices have not submitted any cases to the Attorney General since the protocol went into effect, taking into consideration, among other things, the charging practices of nearby Offices and state and local prosecutors.

A study of the factors contributing to pleas by defendants after the Attorney General has authorized a United States Attorney to seek the death penalty.

THE WHITE HOUSE
WASHINGTON
COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

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AGENDA FOR DEATH PENALTY MEETING

June 28, 2000

Crime - Death Penalty

AG: Pres. Comm? in large sense of how to get young black male

Project recently announced

I. THE STATISTICAL SURVEY

A. Gaps in the Survey

1. Explanation and data relating to why certain potential murder defendants are charged federally but not others
2. Explanation and data relating to why certain potential federal murder defendants are not submitted by the USAOs to Main Justice for review
3. Explanation and data relating to the standards that certain USAOs use in pleading out cases that the AG has authorized for the death penalty
4. Data on race of victims are not complete (submissions are race-blind) (explanation)
5. Data on the initial and final recommendations of the USAOs and the Capital Case Review Committee are not complete
6. Limited to cases since the DP protocol went into effect in January 1995
- NTT focused on post-88

(don't know if pleas were rejected)
(initial recomm of US Atty, not final)

B. Possible Short-Term Measures

1. Revise the DP protocol
 - a. Require all DP-eligible cases to be submitted to Main Justice by the USAOs
 - b. Require the AG to approve pleas in all authorized cases
2. Require the Criminal Division prospectively to collect from the USAOs all available data on race of victim
3. Require the Criminal Division prospectively to maintain complete records on the initial and final recommendations made by the USAOs and the Capital Case Review Committee
4. Retain experts to look at survey and recommend appropriate follow-up

So little guy doesn't get death

US Atty pleads at the big guy Texas is low Helen Fisher says I'm the only guy charging

VA - I-95 drug corridors

AG: If I ever get case from Wash DC, I'd fall over. You're not going to get in, family into the fed system. Write book about why WA + MD are so against it.

Whites plead out at higher rate. We don't have plea rejection records. Plea rate + submission rates are statistically significant, but 19 on death row are not stat. significant for geographic disparities. - Stats. say look at 90's upward carbon - if I keep use white - We can't say what it means w/o data on cases that didn't come in. So we can't say whether race was a factor.

Lynch - for every 2 death case submitted, they plead 2.
Holder
90% of black victims are black peeps.
- We. district problem districts (high low) on non-DP districts - interested.

AG
1. Disparity in pleas taken before and after authoriz.
2. Disparity in fines coming in.
More black on black crime

1. US Atty
AG: Statute says if agreement outweighs mitigating I shd seek DP. Miller says AG must sign off on all
Robt: Top districts seeing 300 of 500 - not a single white made US Atty among them.
Jamie John Holder

C. Releasing the Survey

I. Advantages

- a. Public/congressional/other inquiries
- b. Much of the raw data is available
- c. Allows us to separate data from conclusions

2. Disadvantages

- a. Conclusions to be drawn are not final
- b. Absence of information regarding gaps in the survey

II. GARZA

A. Status of Preparations

1. BOP Manual
2. Logistics
3. Deadline for knowing whether execution will proceed on August 5

B. Clemency Issues

1. DOJ reaction to WH comments on draft procedures
2. Extent to which, if at all, new procedures should apply to Garza
3. Request from defense counsel for clemency procedures and the statistical survey
4. Timing
 - a. Should we tell defense counsel there's a filing deadline?
 - b. If so, what is it?
 - c. Will it be enforced? What if there's a last-minute petition?
 - d. Steps being taken to prepare in advance of filing petition

III. OTHER CASES

A. Chandler

1. Background/update
2. Whether there's anything that can be done before the 11th Circuit decides
3. Options if the 11th Circuit reverses
 - found ineffective assistance of counsel 2-1
 - then heard en banc
 - recantation of witness (low level drug dealer)

B. Hammer

1. Background/update
2. Options if 3d Circuit decides appeal and/or habeas are waiveable
 - a. Set execution date (what procedures are necessary?)
 - b. Wait for lapse of time to file habeas
 - keeps changing mind about counsel
 - wants to waive all appeals

C. Other Federal Defendants Sentenced to Death

1. Breakdown of numbers
2. What if anything should be done to assure guilt and due process prior to execution (aside from existing litigation options open to defendant)?

IV. THE LEAHY AND HATCH BILLS

- A. Background/status
- B. Standard for testing
- C. Standard for relief
- D. Competent counsel standard
- E. Implementation – how to enforce the standard in the states

AG is reviewing all 19 for innocence, ineffectiveness of counsel,

→ How can we develop funding to do proper forensic work (autj-st DNA)

V. CHANGES, IF ANY, TO THE FEDERAL SYSTEM

- A. Blue ribbon commission
- A. Revise DP protocol, as outlined above
- B. Limit categories of death-eligible cases (e.g., mass murders, cop killers)
- C. Moratorium

Sec. 2291. DNA testing

Crime -
Death Penalty

(a) APPLICATION-

(1) FEDERAL CRIME - A person convicted of a federal crime may apply to the appropriate federal court for DNA testing to support a claim that the person did not commit the crime.

(2) QUALIFYING FEDERAL SENTENCE - A person currently serving a qualifying federal sentence, who was convicted of a State crime which was a predicate for the qualifying federal sentence, may apply to the appropriate federal court for DNA testing to support a claim that the person did not commit the State crime, if the State of conviction has no process by which it can consider the applicant's request for postconviction DNA testing. For purposes of this subsection, 'qualifying federal sentence' means a death sentence or a federal sentence imposed under the following statutory provisions:

- (i) [Sentencing Guideline 4b1.1] [Career offender]
- (ii) 18 U.S.C. 924(e) [Armed Career Criminal]
- (iii) 18 U.S.C. 3559 [Three Strikes]

(b) NOTICE TO GOVERNMENT-

(1) IN GENERAL- The court shall notify the Government of an application made under subsection (a) and shall afford the Government an opportunity to respond.

(2) NOTICE TO STATE- The court shall notify the State of conviction of an application made under subsection (a)(2) and shall afford the State of conviction an opportunity to respond.

(3) PRESERVATION OF REMAINING BIOLOGICAL MATERIAL- Upon receiving notice of an application made under subsection (a), the Government shall take such steps as are necessary and within its jurisdiction to ensure that any remaining biological material that was secured in connection with the case is preserved pending the completion of proceedings under this section.

(c) ORDER- The court shall order DNA testing pursuant to an application under subsection (a) if -

(1) there is a reasonable likelihood that the results of the proposed DNA testing will entitle the applicant to relief under subsection (f) or applicable State law;

(2) the proposed DNA testing is reasonable in scope;

(3) the proposed DNA testing uses scientifically sound methods and is consistent with accepted forensic practice; and



(4) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, contaminated, tampered with, replaced, or altered in any material respect and that DNA testing will yield reliable results.

In making the determination required under paragraph (1), the court shall consider the entire record in the case, including whether the proposed DNA testing was available at the time of trial, and whether identity was at issue in the trial. If the court orders DNA testing under this subsection, the court shall ensure that the testing occurs under reasonable conditions that protect the integrity of the evidence and the testing process and the reliability of the test results.

(d) COST- The cost of DNA testing ordered under subsection (c) shall be borne by the Government or the applicant, as the court may order in the interests of justice, except that --

(1) an applicant shall not be denied testing because of an inability to pay the cost of testing; and

(2) if the test results do not establish grounds for relief under subsection (f), or if a retrial is ordered under subsection (f) and the applicant is reconvicted, the court shall assess the applicant for the cost of the testing.

(e) COUNSEL- The court may appoint counsel for an indigent applicant under this section pursuant to section 3006A(a)(2)(B) of title 18.

(f) POST-TESTING PROCEDURES-

(1) If the results of testing ordered pursuant to an application under subsection (a)(1) establish grave doubt that the applicant committed the crime to which the application relates, the court shall order a new trial for that crime.

(2) If an applicant for whom testing is ordered pursuant to an application under subsection (a)(2) is unable to have the test results considered in State proceedings or under 28 U.S.C. 2254 because of a time limitation rule, the court shall determine whether the test results establish grave doubt that the applicant committed the State crime. Before making this determination, the court shall notify the State of conviction of its intention to do so and shall afford the State of conviction an opportunity to respond. If the test results establish grave doubt that the applicant committed the State crime, the court shall vacate the qualifying federal sentence and resentence the applicant without relying on the State conviction. The sentence shall be modified on no ground other than the change in the defendant's criminal history since the imposition of sentence. In determining whether or to what extent a sentence should be modified, the court shall consider all other convictions, including those not relied upon at the time of the imposition of the qualifying federal sentence.

For purposes of this subsection (f), 'grave doubt that the applicant committed' a crime is established if innocence is more probable than guilt or guilt and innocence are equally probable.

(g) CERTIFICATE OF APPEALABILITY- Unless a circuit justice or judge issues a certificate of appealability, a defendant may not take an appeal to the court of appeals from a final order on an application filed under this section. A certificate of appealability may issue only upon a substantial showing that the application was denied based on the court's erroneous conclusion that it lacked authority to order a new trial or vacate a qualifying federal sentence.

(h) RULES OF CONSTRUCTION-

(1) Nothing in this section shall be construed to limit the circumstances under which a person may obtain DNA testing or other post-conviction relief under any other provision of law.

(2) An application under this section shall not be considered a motion pursuant to 28 U.S.C. 2255 for purposes of determining whether it or any other motion is a second or successive motion under 28 U.S.C. 2255.

(i) DEFINITIONS- As used in this section -

(1) 'appropriate federal court' means -

(A) the United States District Court which imposed the conviction for a federal crime to which the application relates; or

(B) in relation to a crime under the Uniform Code of Military Justice, the United States District Court having jurisdiction over the place where the court martial was convened that imposed the conviction for a federal crime to which the application relates, or the United States District Court for the District of Columbia if no United States District Court has jurisdiction over the place where the court martial was convened;

(2) 'federal crime' includes a crime under the Uniform Code of Military Justice and does not include a crime under the law of a State; and

(3) 'State' means a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States."

(b) TECHNICAL AND CONFORMING AMENDMENTS. - (1) The analysis for part VI of title 28, United States Code, is amended by inserting after the item relating to chapter 155 the following:

"156. DNA Testing 2291".

(2) Section 3006A(a)(2)(B) of title 18, United States Code, is amended by striking "or 2255" and inserting "2255, or 2291".

PATRICK J. LEAHY
VERMONT

United States Senate
WASHINGTON, DC 20510

COMMITTEES:
AGRICULTURE, NUTRITION,
AND FORESTRY
APPROPRIATIONS
JUDICIARY

TO: Bruce Reid c/o Melissa

OF: _____

FROM: Luke Albee

OF: _____

DATE: 6/21/2000

TIME: 4:20

PAGES (INCLUDING COVER SHEET)

5

Crime -
Death
Penalty

MEMORANDUM

TO: Bruce Reed
cc: John Podesta
FR: Leahy Staff
DA: June 21, 2000
RE: Death Penalty Reform

Maintaining a clear focus on a few matters of central concern to the basic, commonsense reform of the nation's capital punishment system is important to avoid a splintering of the debate into incompatible rival proposals and competing ideologies. We believe that the discussion can best be advanced by focusing on the principles needed to address the underlying causes for the public's primary concern — the executing or imprisoning of the innocent for long periods — and the balanced, bipartisan legislative solution reflected in the Leahy-Smith-Delahunt-LaHood bill.

The First Principle: Access to DNA Testing. The first principle already enjoys broad bipartisan support, and, in opinion polls, support of over 90% of respondents: Death row inmates must have access to DNA testing that could cast doubt on their conviction or sentence. The issue of DNA testing — and the preservation of biological evidence — is addressed in title I of the Leahy-Smith-Delahunt-LaHood bill. Senator Hatch and the Senate Republican leadership have also prepared (but not yet introduced) limited and defensive DNA legislation.

The essential elements of any DNA legislation (which are included in the Leahy-Smith-Delahunt-LaHood bill) are:

1. **A serious claim of innocence should never be time-barred.** The Hatch bill sets up a one-time window for access to DNA testing, effectively lasting only 18 months in State cases, and 30 months in federal cases. The Leahy-Smith-Delahunt-LaHood bill — like the model legislation approved by the National Commission on the Future of DNA Evidence — does not impose such arbitrary time limits.
2. **The legislation should not establish other artificial, legalistic barriers to DNA testing.** The Hatch bill uses an overly narrow standard that would be difficult or impossible for most inmates to satisfy. First, it requires proof that "technology for [DNA] testing was not available at the time of the trial," thus excluding both cases in which the inmate was unable to obtain such testing because of attorney error, prosecutorial misconduct or court rulings, and cases in which an early form of DNA technology was available at the time of trial but superior technology that could yield more probative results has since become available. Second, it requires prima facie evidence that DNA testing, if exculpatory, would establish the inmate's "actual innocence," thus leaving room for States to argue, as many have done, that DNA testing should be denied because of a theoretical possibility that the inmate could be guilty in a manner not suggested by the State at trial, regardless of DNA results that undermine the State's original theory of prosecution.

3. DNA testing must be available to all prisoners, not just those sentenced to death. Only 8 of the over 70 post-conviction DNA exonerations have involved prisoners on death row. People who have been sentenced to decades of incarceration but can prove their innocence also deserve an opportunity for justice.
4. There must be a duty to preserve biological evidence. DNA testing of biological evidence is feasible and remains highly reliable even decades after a conviction. Yet the rules for the preservation of biological evidence are totally haphazard across the country. In many cases in which DNA testing could demonstrate innocence if it were favorable to the inmate, the evidence has been lost or destroyed. There should be a general requirement to preserve biological evidence while an inmate remains incarcerated, subject to the ability of law enforcement to move for destruction of such evidence in an orderly way after notice. This would not only preserve the rights of inmates to produce proof of their innocence through DNA testing, but also help law enforcement re-test old cases to catch the real perpetrators.

The Second Principle: Competent Defense Counsel. Even more important than DNA tests to the reliability of verdicts in capital cases is competent counsel. Nothing guarantees the conviction of the innocent more than an incompetent or underfunded lawyer. The key to the adversarial system is a defense lawyer who is qualified, has adequate funds for investigators and experts, and is compensated well enough to provide good representation.

Governor Ryan highlighted these issues in discussing his concerns with the administration of the death penalty in Illinois earlier this year, and the Columbia Law School report on the death penalty issued earlier this month found incompetent counsel to be the most common cause of reversible error in capital cases nationwide over the past quarter of a century.

In 1989, the American Bar Association (ABA) proposed guidelines to improve the quality of representation afforded to poor defendants charged with capital offenses. The ABA premised its proposal on the recognition that all too often, capital defendants are provided the services of attorneys who are inexperienced or otherwise unqualified to handle the high-stakes, complex litigation involved in a death penalty case, or attorneys who are not provided the resources to adequately assist their clients.

The National Center for State Courts has also recognized the too-frequent inadequacies of representation in capital cases. It identifies the same causes: lack of standards and criteria for choosing defense counsel and lack of funding for this type of legal services.

The essential elements to ensure competent counsel (which are included in the Leahy-Smith-Delahunt-LaHood bill) are:

1. Establishment of an effective, centralized and independent authority within each State that authorizes the death penalty to appoint counsel at all stages of capital cases. While some States, like Colorado and New York, have model systems for providing capital representation, many States have no system at all. As long as State court judges continue to make capital case appointments from the regular list of attorneys for appointment in criminal cases, and to compensate them at patently inadequate rates, the problems of incompetent counsel inevitably will continue.

The Leahy-Smith-Delahunt-LaHood bill calls for each State to establish an effective system for appointing counsel modeled on the ABA guidelines. Minimum criteria for an effective system would be set at the federal level, but the specifics of how those criteria are met would be determined by each individual State. The appointing authority may be centralized in the public defender office or assigned counsel program of the State, or in a special appointments committee, provided that it is independent and professionally staffed. Its responsibilities would include: setting qualification and performance standards appropriate for that State; recruiting qualified attorneys to handle capital cases; providing specialized training for capital counsel; making the appointments of counsel in all cases; and monitoring performance and workload.

2. Adequate funding for defense legal work and investigation at all stages of capital cases. The under-funding of capital representation discourages competent counsel from accepting assignments in capital cases and expending the substantial time, effort and investigational costs a case may require. An effective system of capital representation must provide reasonable compensation for attorneys who represent capital defendants that reflects the qualifications and experience of the attorneys, and the local or regional compensation practices. It must also reimburse counsel for the reasonable costs of investigators, experts, and scientific tests, and other support necessary in the representation of capital defendants.

Third Principle: Due Process Must Be An Informed Process. Other aspects of the administration of capital punishment need reform, as suggested below.

1. Juror Access to Information on the Alternative of life without possibility of parole. Polls show that support for the death penalty falls below 50 percent when respondents are given the alternative of life without the possibility of parole. Jurors who support the death penalty in principle have also been shown to be much more likely to impose a life sentence when accurately informed that "life" means life without parole. The alternative of life without parole helps to ensure against recidivism, and thus eliminates a false choice between the death penalty and future danger to society. This alternative should be made available to jurors in all capital cases. (This issue is addressed by the

Leahy-Smith-Delahunt-LaHood bill, but concerns sentencing rather than guilt or innocence.)

2. Increased funding for forensic science for prosecution and defense. As both supporters and detractors of capital punishment reform have noted, DNA and other scientific evidence can both exculpate the innocent and help catch the guilty. Several pending bills would provide additional funding to the States to help improve their forensic capabilities and eliminate the substantial backlog of untested biological evidence for the national DNA database. (This issue is not addressed by the Leahy-Smith-Delahunt-LaHood bill.) Because our first two principles concern basic obligations of justice and constitutional law, we do not believe that they should be made part of a bargain whereby States are given extra money for fulfilling their existing obligations, and we also note that State law enforcement agencies already receive substantial federal funding that could be used for these purposes. However, the backlog of untested evidence is a real problem, and an additional federal grant that is properly tied to the preservation and testing of forensic evidence could both improve the efficacy and reliability of the criminal justice system and deflect complaints (which we believe are unwarranted) about the costs of compliance with our first principle.
3. Open File Policy: Disclosure of Evidence by Prosecutors. The recent Columbia Law School study identifies prosecutorial abuses, including failure to disclose potentially exculpatory evidence, as the second most frequent cause of reversible error in capital cases (after incompetence of defense counsel), and the withholding of exculpatory evidence has led to convictions of the innocent in a significant number of cases. Current Supreme Court precedent deems withholding of exculpatory evidence a violation of due process, but arguably encourages such prosecutorial abuse by allowing prosecutors who have withheld evidence to claim "harmless error" if they are subsequently caught. A bill currently pending in Illinois would instead require a new trial in cases in which the prosecution is shown to have intentionally withheld exculpatory evidence. Another approach would be to require full pre-trial disclosure of all evidence -- not just evidence judged by the prosecutor to be exculpatory -- subject to appropriate exceptions where necessary to protect a compelling government interest such as ensuring the safety of an informant, undercover agent, or witness. (This issue is not addressed by the Leahy-Smith-Delahunt-LaHood bill.)

*Crime -
Death Penalty*

**STATISTICAL SURVEY OF THE
APPLICATION OF THE FEDERAL DEATH PENALTY
FROM JANUARY 27, 1995 TO FEBRUARY 14, 2000**

U.S. Department of Justice

Washington, D.C.

June __, 2000

BACKGROUND:

This statistical survey summarizes the racial/ethnic composition of defendants and their alleged victims in capital-eligible cases that were submitted by United States Attorneys to the Attorney General for review between January 27, 1995 (when the current Department of Justice death penalty protocol became effective) and February 14, 2000. In all, the United States Attorneys submitted 633 capital-eligible defendants for Attorney General review during the reporting period. Thirteen of these defendants had pending death sentences at the conclusion of the reporting period.¹ This survey includes data on defendants at each stage of the Attorney General review process, as of the close of the reporting period. The statistics on defendant race/ethnicity are also broken down by the geographic districts of the United States Attorneys who charged the defendants.²

On January 27, 1995, Attorney General Janet Reno revised the policies and procedures that pertain to federal capital-eligible cases. Since that time, the Department's death penalty protocol has applied to "all Federal cases in which a defendant is charged with an offense subject to the death penalty, regardless of whether the United States Attorney intends to request authorization to seek the death penalty."³ Thus, the 633 submissions by the United States Attorneys include those in which they recommended the death penalty and those in which they did not.

¹Fifteen defendants were sentenced to death during the reporting period, but 2 of them had their sentences vacated on appeal and their cases remanded for re-sentencing in 1999. The death sentence of 1 of the remaining 13 defendants was vacated after the close of the reporting period. The death row statistics in this survey do not account for 5 defendants who have pending death sentences but were charged before the current death penalty protocol took effect; furthermore, the statistics do not account for 2 defendants who were convicted and sentenced to death after the close of the reporting period. As of June __, 2000, there are 19 defendants with pending federal death sentences; 2 more defendants await sentencing in a federal case in which the jury has recommended the death sentence.

²For the sake of comparison, an appendix to the survey summarizes recent statistics on race/ethnicity of persons sentenced to death in state systems and the race/ethnicity of homicide offenders and victims nationwide.

³Prior to 1995, the United States Attorneys were only required to submit to the Attorney General for review cases in which they wished to seek the death penalty.

Three categories of capital-eligible defendants fall outside the protocol and therefore need not be submitted by United States Attorneys to the Attorney General for review: (1) cases in which a United States Attorney does not charge a capital offense out of deference to a state capital or non-capital prosecution; (2) cases in which a United States Attorney concludes a plea agreement foreclosing the death penalty prior to charging a capital-eligible offense; and (3) cases in which a United States Attorney otherwise exercises prosecutorial discretion not to charge a capital-eligible offense. Because there is no uniform data collection process in place throughout the offices of the United States Attorneys, defendants in cases falling in one of these categories are not covered by this statistical survey.

By statute, each defendant in the federal system who is charged with a capital-eligible offense is entitled to two attorneys, one of whom must be learned in the capital litigation. These defense counsel are afforded the opportunity to make a written and oral presentation to the United States Attorney. Thereafter, they are also afforded an opportunity to make a written and oral presentation to the Attorney General's Review Committee on Capital Cases in Washington, D.C. The Attorney General is responsible — after receiving recommendations from the United States Attorney and the Capital Case Review Committee — with making the ultimate decision whether the death penalty should be sought against the defendant.⁴

Percentages in this survey may not add up to 100 because of rounding. Many of the percentages are based on very small subsets of individuals; especially in such cases, the reader should exercise caution in drawing conclusions about the overall application of the death penalty in the federal system. Finally, due to the Criminal Division's system of data compilation, the survey accounts for individuals of Hispanic descent as a separate category from white, black, and other defendants.

1. 1st limitation = cases that could go either state or fed
2. US Atty's don't have to submit all death-eligible murders (eg choosing RICO) or pleas

⁴Information on the race/ethnicity of a defendant is not included in the individual case materials that the United States Attorneys submit to the Attorney General for review.

1. CROSS-SECTION BY RACE/ETHNICITY OF DEFENDANTS IN THE DEATH PENALTY REVIEW PROCESS:

The table on page 5 presents cross-section “snapshots,” by race/ethnicity, of the defendants submitted by the United States Attorneys to the Attorney General for review pursuant to the death penalty protocol as they moved through the review process during the reporting period. A summary of the findings follows:

- **633 defendants facing capital-eligible charges were submitted by the United States Attorneys to the Attorney General for review. Of these:**
 - 19 percent (119) were white;
 - 48 percent (303) were black;
 - 29 percent (183) were Hispanic; and
 - 4 percent (28) were from “other” racial/ethnic groups.⁵

- **Of the 633 defendants submitted, 44 (7%) were pending Attorney General review at the end of the reporting period, while 55 (9%) had pleaded guilty prior to review. Of the remaining 534 (84%) who were reviewed by the Attorney General:**
 - 19 percent (104) were white;
 - 48 percent (256) were black;
 - 28 percent (150) were Hispanic; and
 - 4 percent (24) were other.

- **Of the 534 defendants reviewed by the Attorney General, decisions on whether or not to seek the death penalty were deferred for 13 — 10 defendants who were fugitives and 3 who were subject to pending state prosecution. For the remaining 521 defendants reviewed by the Attorney General, the Attorney General authorized United States Attorneys to seek the death penalty against 143 (27%) and not to seek it against 378 (73%). Of the 143 against whom seeking the death penalty was authorized:**
 - 29 percent (41) were white;
 - 45 percent (64) were black;
 - 20 percent (28) were Hispanic; and
 - 7 percent (10) were other.

⁵“Other” includes defendants of other racial/ethnic backgrounds, such as Asian, Pacific Islander, American Indian, and Alaskan Native.

- **Of the 378 defendants against whom the Attorney General did not authorize seeking the death penalty:**

- 16 percent (60) were white;
- 49 percent (187) were black;
- 31 percent (118) were Hispanic; and
- 3 percent (13) were other.

**NUMBER AND PERCENT OF DEFENDANTS BY RACE/ETHNICITY AND STAGE IN DEATH PENALTY (DP) PROCESS
FOR POST-PROTOCOL SUBMISSIONS
(JANUARY 27, 1995 - FEBRUARY 14, 2000)**

| STAGE | TOTAL | WHITE | | BLACK | | HISPANIC | | OTHER | |
|--------------------------------------|-------|-------|-----|-------|-----|----------|-----|-------|----|
| | | # | % | # | % | # | % | # | % |
| POST-PROTOCOL SUBMISSIONS | 633 | 119 | 19% | 303 | 48% | 183 | 29% | 28 | 4% |
| Pending AG Review | 44 | 7 | 16% | 25 | 57% | 10 | 23% | 2 | 5% |
| Plea Before AG Review | 55 | 8 | 15% | 22 | 40% | 23 | 42% | 2 | 4% |
| REVIEWED BY AG | 534 | 104 | 19% | 256 | 48% | 150 | 28% | 24 | 4% |
| Decision Deferred by AG* | 13 | 3 | 23% | 5 | 38% | 4 | 31% | 1 | 8% |
| NOT Authorized by AG to Seek | 378 | 60 | 16% | 187 | 49% | 118 | 31% | 13 | 3% |
| AUTHORIZED BY AG TO SEEK | 143 | 41 | 29% | 64 | 45% | 28 | 20% | 10 | 7% |
| Authorization Withdrawn (Plea) | 49 | 21 | 43% | 17 | 35% | 8 | 16% | 3 | 6% |
| Pending Trial or Completion of Trial | 53 | 9 | 17% | 23 | 43% | 17 | 32% | 4 | 8% |
| TRIAL COMPLETED | 41 | 11 | 27% | 24 | 59% | 3 | 7% | 3 | 7% |
| Not Convicted of Capital Charge | 4 | 0 | 0% | 1 | 25% | 3 | 75% | 0 | 0% |
| CONVICTED OF CAPITAL CHARGE | 37 | 11 | 30% | 23 | 62% | 0 | 0% | 3 | 8% |
| DP Not Imposed | 22 | 8 | 36% | 12 | 55% | 0 | 0% | 2 | 9% |
| DP IMPOSED BY COURT** | 15 | 3 | 20% | 11 | 73% | 0 | 0% | 1 | 7% |
| Appeals/Reviews Pending | 15 | 3 | 20% | 11 | 73% | 0 | 0% | 1 | 7% |
| Executed | 0 | 0 | 0% | 0 | 0% | 0 | 0% | 0 | 0% |

* The decision was deferred for 10 defendants who are fugitives and for 3 pending state prosecutions.

**The sentences for two of these individuals were vacated during the report period by the appellate courts and they were remanded for resentencing, which had not occurred by the end of the period. The number 15 does not include 5 defendants (1 white, 3 black, and 1 Hispanic) sentenced to death who were submitted pre-Protocol and still have pending appeals/reviews.

2. PROGRESSION OF DEFENDANTS THROUGH THE DEATH PENALTY REVIEW PROCESS

The flow charts on pages 9 through 13 summarize the progression of decisions made during the reporting period, first for all 633 defendants submitted pursuant to the protocol, and then for white, black, Hispanic, and other defendants, respectively. A summary of findings is presented below:

Overall

- **633 defendants facing capital-eligible charges were submitted by the United States Attorneys to the Attorney General for review. Of these:**
 - 7 percent (44) were pending Attorney General review at the end of the reporting period;
 - 9 percent (55) pleaded guilty prior to review; and
 - 84 percent (534) were reviewed by the Attorney General.
- **Of the 534 defendants reviewed by the Attorney General, the Attorney General did not authorize seeking the death penalty against 378 (71%) and deferred a decision with respect to 13 (2%). Of the 143 defendants against whom the Attorney General authorized seeking the death penalty:**
 - 37 percent (53) awaited trials or their trials were in progress at the end of the reporting period;
 - 34 percent (49) pleaded guilty and were not sentenced to death; and
 - 29 percent (41) had completed trials.
- **Of the 41 defendants whose trials were completed:**
 - 10 percent (4) were not convicted of a capital offense⁶; and
 - 90 percent (37) were convicted of a capital offense.
- **Of the 37 defendants convicted of a capital offense:**
 - 59 percent (22) were not sentenced to death during the reporting period (8 of whom were white, 12 black, none Hispanic, and 2 other); and
 - 41 percent (15) were sentenced to death during the reporting period (3 of whom were white, 11 black, none Hispanic, and 1 other). Two of the 15 defendants sentenced to death, both black, had their death sentences vacated and their cases remanded for re-sentencing before the conclusion of the reporting period.

⁶This occurred for one or more of the following reasons: the defendant was convicted of a lesser offense or otherwise acquitted of the capital charge; the capital charge was dropped; or the court dismissed the death penalty notice as untimely.

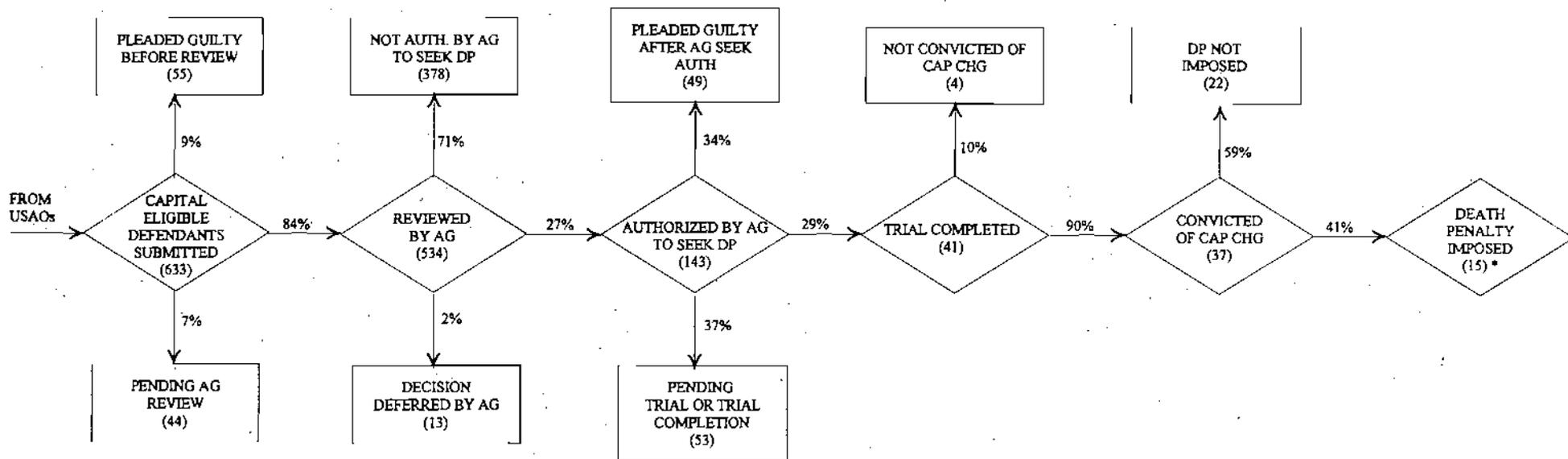
By Race/Ethnicity

- **The Attorney General reviewed 534 defendants who were submitted by the United States Attorneys for review during the reporting period. Those who were reviewed included:**
 - 87 percent (104) of whites who were submitted for review;
 - 84 percent (256) of blacks who were submitted for review;
 - 82 percent (150) of Hispanics who were submitted for review; and
 - 86 percent (24) of others who were submitted for review.
- **143 (27%) of the 534 defendants reviewed by the Attorney General were authorized for the death penalty. These included:**
 - 39 percent (41) of whites who were reviewed;
 - 25 percent (64) of blacks who were reviewed;
 - 19 percent (28) of Hispanics who were reviewed; and
 - 42 percent (10) of others who were reviewed.
- **Of the 41 authorized white defendants, at the end of the reporting period:**
 - 22 percent (9) awaited trials or their trials were in progress;
 - 51 percent (21) pleaded guilty and were not sentenced to death;
 - 27 percent (11) were tried.
 - 100 percent (11) of those tried were convicted of a capital charge.
 - 73 percent (8) of those convicted did not receive the death penalty; and
 - 27 percent (3) of those convicted were sentenced to death.
- **Of the 64 authorized black defendants, at the end of the reporting period:**
 - 36 percent (23) awaited trials or their trials were in progress;
 - 27 percent (17) pleaded guilty and were not sentenced to death;
 - 38 percent (24) were tried.
 - 96 percent (23) of those tried were convicted of a capital charge.
 - 52 percent (12) of those convicted did not receive the death penalty; and
 - 48 percent (11) of those convicted were sentenced to death.
 - 18 percent (2) of those sentenced to death had their sentences vacated; and
 - 82 percent (9) of those sentenced to death have appeals/reviews pending.
- **Of the 28 authorized Hispanic defendants, at the end of the reporting period:**
 - 61 percent (17) awaited trials or their trials were in progress;
 - 29 percent (8) pleaded guilty and were not sentenced to death;
 - 11 percent (3) were tried.
 - 0 percent (0) of those tried were convicted of a capital charge.

● **Of the 10 authorized other defendants, at the end of the reporting period:**

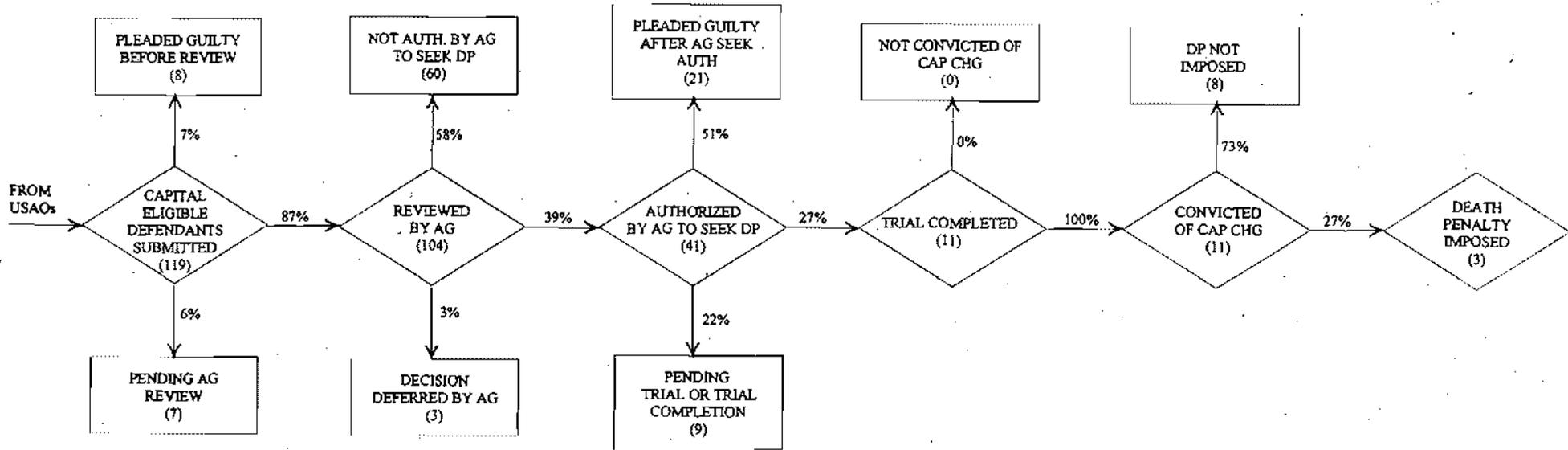
- 40 percent (4) awaited trials or their trials were in progress;
- 30 percent (3) pleaded guilty and were not sentenced to death;
- 30 percent (3) were tried.
- 100 percent (3) of those tried were convicted of a capital charge.
- 67 percent (2) of those convicted did not receive the death penalty; and
- 33 percent (1) of those convicted were sentenced to death.

**FEDERAL DEATH PENALTY PROCESS
TOTAL NUMBER OF DEFENDANTS BY STAGE
(FOR SUBMISSIONS MADE 1/27/95-2/14/00)**

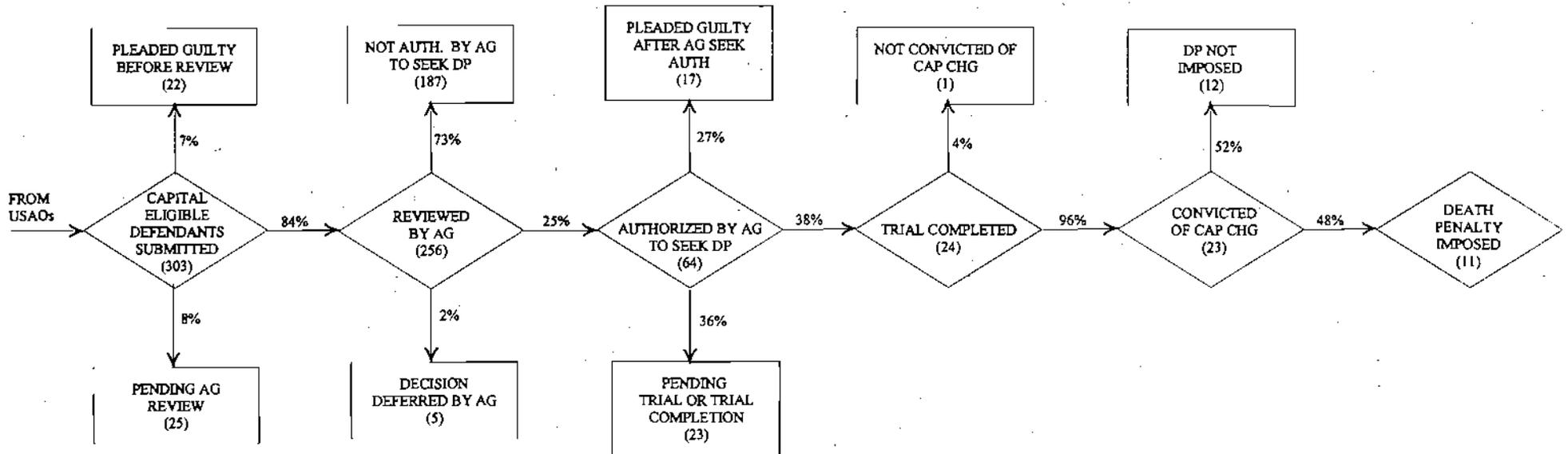


*The sentences for two of these individuals were vacated during the report period and the defendants had not been resentenced by the end of the period. Also, this number does not include five defendants (1 white, 3 black, and 1 Hispanic) sentenced to death who were submitted pre-Protocol and still have pending appeals/reviews.

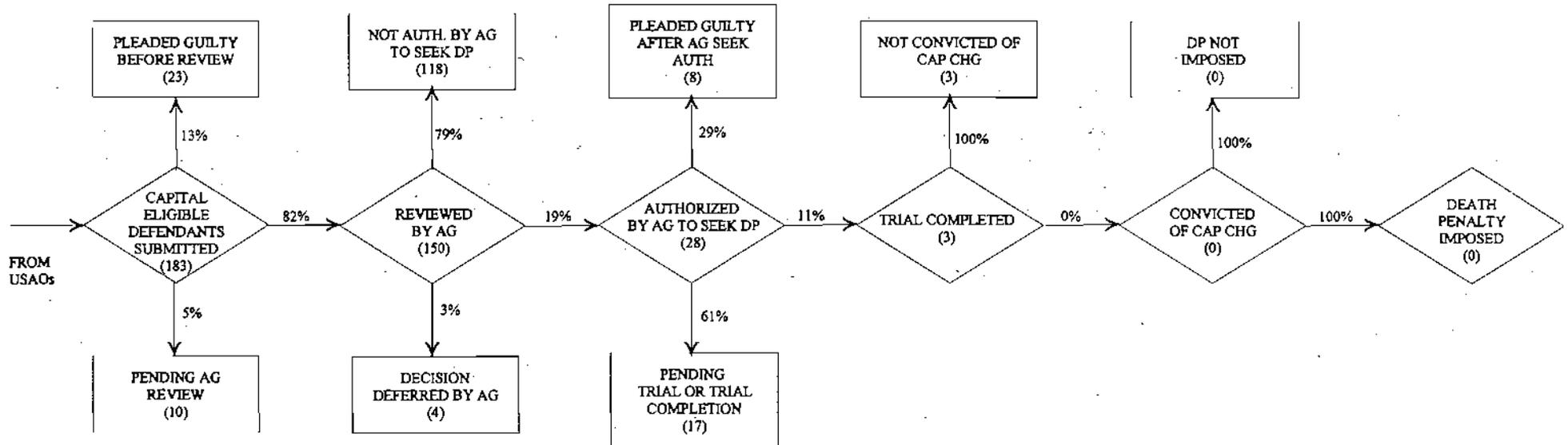
FEDERAL DEATH PENALTY PROCESS
 NUMBER OF WHITE DEFENDANTS BY STAGE
 (FOR SUBMISSIONS MADE 1/27/95-2/14/00)



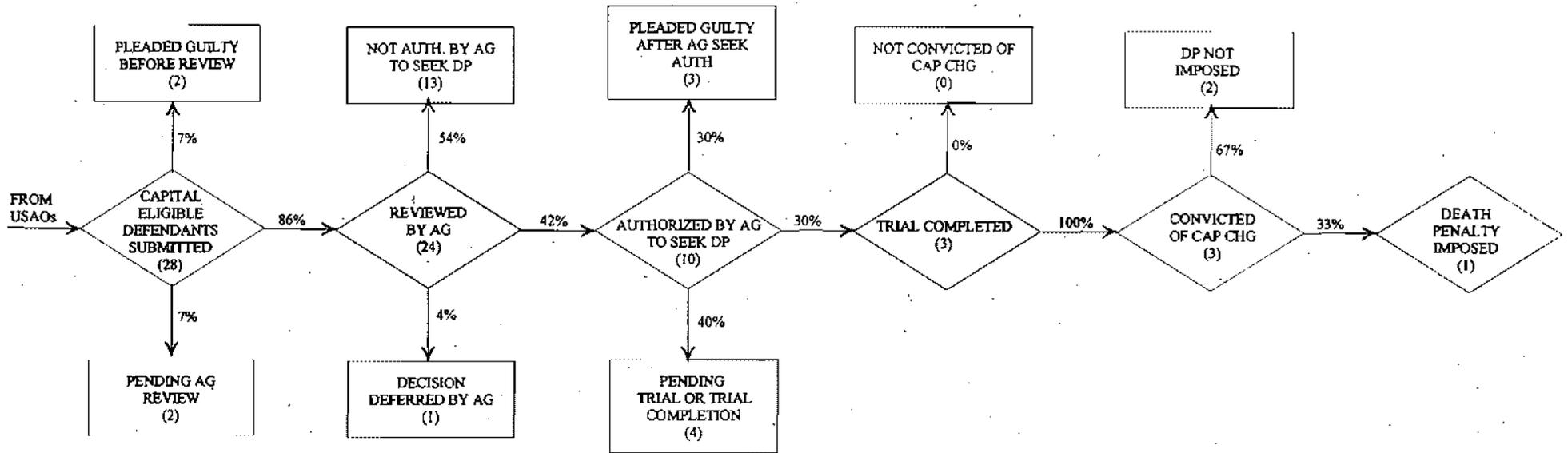
FEDERAL DEATH PENALTY PROCESS
 NUMBER OF BLACK DEFENDANTS BY STAGE
 (FOR SUBMISSIONS MADE 1/27/95-2/14/00)



**FEDERAL DEATH PENALTY PROCESS
NUMBER OF HISPANIC DEFENDANTS BY STAGE
(FOR SUBMISSIONS MADE 1/27/95-2/14/00)**



**FEDERAL DEATH PENALTY PROCESS
NUMBER OF OTHER DEFENDANTS BY STAGE
(FOR SUBMISSIONS MADE 1/27/95-2/14/00)**



3. DEFENDANTS BY GEOGRAPHIC DISTRICT AND RACE/ETHNICITY:

The table on pages 15 and 16 breaks down the 633 defendants in capital-eligible cases submitted for review by the geographic district in which they were prosecuted and by their race/ethnicity. The submissions represent all cases in which a defendant was charged with a capital-eligible offense and submitted for review during the reporting period, regardless whether the United States Attorneys recommended seeking the death penalty.

**DEATH PENALTY DEFENDANT SUBMISSIONS BY DISTRICT AND RACE/ETHNICITY OF DEFENDANT
(JANUARY 27, 1995 - FEBRUARY 14, 2000)**

| DISTRICT | TOTAL DEFENDANTS | WHITE | BLACK | HISPANIC | OTHER |
|---------------------------|------------------|-------|-------|----------|-------|
| Alabama, Middle | 0 | 0 | 0 | 0 | 0 |
| Alabama, Northern | 2 | 2 | 0 | 0 | 0 |
| Alabama, Southern | 2 | 0 | 2 | 0 | 0 |
| Alaska | 1 | 1 | 0 | 0 | 0 |
| Arizona | 11 | 1 | 3 | 6 | 1 |
| Arkansas, Eastern | 3 | 2 | 1 | 0 | 0 |
| Arkansas, Western | 3 | 3 | 0 | 0 | 0 |
| California, Central | 15 | 3 | 4 | 6 | 2 |
| California, Eastern | 10 | 7 | 2 | 0 | 1 |
| California, Northern | 4 | 3 | 0 | 0 | 1 |
| California, Southern | 0 | 0 | 0 | 0 | 0 |
| Colorado | 5 | 4 | 0 | 0 | 1 |
| Connecticut | 10 | 0 | 1 | 9 | 0 |
| Delaware | 0 | 0 | 0 | 0 | 0 |
| District of Columbia | 17 | 1 | 16 | 0 | 0 |
| Florida, Middle | 4 | 0 | 0 | 4 | 0 |
| Florida, Northern | 5 | 2 | 3 | 0 | 0 |
| Florida, Southern | 9 | 0 | 6 | 3 | 0 |
| Georgia, Middle | 4 | 0 | 4 | 0 | 0 |
| Georgia, Northern | 5 | 1 | 4 | 0 | 0 |
| Georgia, Southern | 5 | 0 | 3 | 2 | 0 |
| Guam | 0 | 0 | 0 | 0 | 0 |
| Hawaii | 6 | 1 | 0 | 2 | 3 |
| Idaho | 0 | 0 | 0 | 0 | 0 |
| Illinois, Central | 0 | 0 | 0 | 0 | 0 |
| Illinois, Northern | 7 | 0 | 2 | 5 | 0 |
| Illinois, Southern | 3 | 2 | 1 | 0 | 0 |
| Indiana, Northern | 4 | 0 | 3 | 1 | 0 |
| Indiana, Southern | 2 | 0 | 2 | 0 | 0 |
| Iowa, Northern | 4 | 1 | 0 | 3 | 0 |
| Iowa, Southern | 2 | 2 | 0 | 0 | 0 |
| Kansas | 10 | 2 | 6 | 0 | 2 |
| Kentucky, Eastern | 1 | 0 | 1 | 0 | 0 |
| Kentucky, Western | 6 | 3 | 1 | 0 | 2 |
| Louisiana, Eastern | 7 | 0 | 6 | 1 | 0 |
| Louisiana, Middle | 0 | 0 | 0 | 0 | 0 |
| Louisiana, Western | 0 | 0 | 0 | 0 | 0 |
| Maine | 0 | 0 | 0 | 0 | 0 |
| Mariana Islands, Northern | 0 | 0 | 0 | 0 | 0 |
| Maryland | 40 | 4 | 35 | 0 | 1 |
| Massachusetts | 13 | 3 | 9 | 1 | 0 |
| Michigan, Eastern | 17 | 0 | 14 | 3 | 0 |
| Michigan, Western | 10 | 4 | 2 | 4 | 0 |
| Minnesota | 7 | 0 | 7 | 0 | 0 |
| Mississippi, Northern | 1 | 1 | 0 | 0 | 0 |
| Mississippi, Southern | 0 | 0 | 0 | 0 | 0 |
| Missouri, Eastern | 5 | 0 | 4 | 0 | 1 |
| Missouri, Western | 8 | 3 | 2 | 3 | 0 |

**DEATH PENALTY DEFENDANT SUBMISSIONS BY DISTRICT AND RACE/ETHNICITY OF DEFENDANT
(JANUARY 27, 1995 - FEBRUARY 14, 2000)**

| DISTRICT | TOTAL DEFENDANTS | WHITE | BLACK | HISPANIC | OTHER |
|-------------------------|------------------|------------|------------|------------|-----------|
| Montana | 0 | 0 | 0 | 0 | 0 |
| Nebraska | 0 | 0 | 0 | 0 | 0 |
| Nevada | 9 | 7 | 0 | 0 | 2 |
| New Hampshire | 0 | 0 | 0 | 0 | 0 |
| New Jersey | 3 | 1 | 1 | 1 | 0 |
| New Mexico | 11 | 2 | 0 | 8 | 1 |
| New York, Eastern | 51 | 15 | 20 | 9 | 7 |
| New York, Northern | 6 | 0 | 5 | 1 | 0 |
| New York, Southern | 47 | 2 | 16 | 28 | 1 |
| New York, Western | 5 | 0 | 5 | 0 | 0 |
| North Carolina, Eastern | 29 | 2 | 7 | 0 | 0 |
| North Carolina, Middle | 0 | 0 | 0 | 0 | 0 |
| North Carolina, Western | 5 | 1 | 3 | 0 | 1 |
| North Dakota | 1 | 1 | 0 | 0 | 0 |
| Ohio, Northern | 4 | 1 | 3 | 0 | 0 |
| Ohio, Southern | 0 | 0 | 0 | 0 | 0 |
| Oklahoma, Eastern | 0 | 0 | 0 | 0 | 0 |
| Oklahoma, Northern | 0 | 0 | 0 | 0 | 0 |
| Oklahoma, Western | 2 | 2 | 0 | 0 | 0 |
| Oregon | 1 | 1 | 0 | 0 | 0 |
| Pennsylvania, Eastern | 6 | 0 | 3 | 3 | 0 |
| Pennsylvania, Middle | 4 | 2 | 0 | 2 | 0 |
| Pennsylvania, Western | 1 | 0 | 1 | 0 | 0 |
| Puerto Rico | 67 | 0 | 0 | 67 | 0 |
| Rhode Island | 4 | 0 | 3 | 1 | 0 |
| South Carolina | 7 | 1 | 5 | 0 | 1 |
| South Dakota | 3 | 3 | 0 | 0 | 0 |
| Tennessee, Eastern | 0 | 0 | 0 | 0 | 0 |
| Tennessee, Middle | 6 | 3 | 3 | 0 | 0 |
| Tennessee, Western | 7 | 1 | 6 | 0 | 0 |
| Texas, Eastern | 5 | 0 | 5 | 0 | 0 |
| Texas, Northern | 10 | 4 | 4 | 2 | 0 |
| Texas, Southern | 5 | 0 | 0 | 5 | 0 |
| Texas, Western | 7 | 3 | 3 | 1 | 0 |
| Utah | 0 | 0 | 0 | 0 | 0 |
| Vermont | 1 | 1 | 0 | 0 | 0 |
| Virgin Islands | 3 | 0 | 2 | 1 | 0 |
| Virginia, Eastern | 62 | 5 | 57 | 0 | 0 |
| Virginia, Western | 5 | 1 | 4 | 0 | 0 |
| Washington, Eastern | 0 | 0 | 0 | 0 | 0 |
| Washington, Western | 0 | 0 | 0 | 0 | 0 |
| West Virginia, Northern | 8 | 4 | 3 | 1 | 0 |
| West Virginia, Southern | 0 | 0 | 0 | 0 | 0 |
| Wisconsin, Eastern | 0 | 0 | 0 | 0 | 0 |
| Wisconsin, Western | 0 | 0 | 0 | 0 | 0 |
| Wyoming | 0 | 0 | 0 | 0 | 0 |
| Total | 633 | 119 | 303 | 183 | 28 |

4. DEFENDANTS AND VICTIMS BY RACE/ETHNICITY:

As noted above, the Attorney General reviewed 534 defendants who were submitted by the United States Attorneys during the reporting period. The Attorney General deferred a decision whether to authorize or not to authorize seeking the death penalty for 13 defendants and reached a decision for 521. Of these 521 defendants, 514 were charged in cases with identified victims.⁷

- **Of the 514 defendants charged in cases with identified victims, 373 (73%) were the same race/ethnicity as all the victims associated with their capital charges:**
 - When both the defendant and all victims were white (80 defendants), the death penalty was authorized for 45 percent (36) of defendants;
 - When both the defendant and all victims were black (171 defendants), the death penalty was authorized for 20 percent (35) of defendants; and
 - When both the defendant and all victims were Hispanic (108 defendants), the death penalty was authorized for 20 percent (22) of defendants.

- **Of the 514 defendants charged in cases with identified victims, 141 (27%) were of a different race/ethnicity than at least one victim associated with their capital charges:**
 - When the defendant was white and at least one victim was not white (15 defendants), the death penalty was authorized for 33 percent (5) of defendants;
 - When the defendant was black and at least one victim was not black (78 defendants), the death penalty was authorized for 37 percent (29) of defendants;
 - When the defendant was Hispanic and at least one victim was not Hispanic (37 defendants), the death penalty was authorized for 16 percent (6) of defendants.

⁷Seven defendants were charged in cases with unidentified victims: five charged with espionage and two with illegal alien smuggling, in a case in which the race/ethnicity of the victims was not recorded.

5. DEFENDANTS BY NUMBERS OF VICTIMS AND RACE/ETHNICITY:

- Of the 514 defendants facing capital-eligible charges in cases with identified victims that the Attorney General reviewed, 405 (79%) were charged in single-victim cases (i.e., cases in which the capital charges involved only one victim),⁸ and 109 (21%) were charged in multiple-victim cases (i.e., cases in which the capital charges involved more than one victim).
 - Of the 95 white defendants in such cases, 76 (80%) were charged in single-victim cases, and 19 (20%) were charged in multiple-defendant cases.
 - Of the 249 black defendants in such cases, 190 (76%) were charged in single-victim cases, and 59 (24%) were charged in multiple-defendant cases.
 - Of the 147 Hispanic defendants in such cases, 120 (82%) were charged in single-victim cases, and 27 (18%) were charged in multiple-defendant cases.
 - Of the 23 other defendants in such cases, 19 (83%) were charged in single-victim cases, and 4 (17%) were charged in multiple-defendant cases.

⁸While 405 defendants had capital charges related to only one victim, in many of these cases multiple defendants were charged with the death of the same victim.

6. DEFENDANTS SENTENCED TO DEATH:

- Of the 633 defendants facing capital-eligible charges who were submitted for review, only 13 had pending death sentences at the conclusion of the reporting period.⁹ Additionally, 5 defendants who were charged before the current death penalty protocol took effect had pending death sentences at the conclusion of the reporting period. All 18 of these federal death row defendants are male. 22 percent (4) are white, 67 percent (12) are black, 6 percent (1) is Hispanic, and 6 percent (1) is other (Asian).
- These 18 defendants represent 14 separate cases — 11 cases have one defendant convicted of capital charges and 3 cases have multiple defendants.
- 17 of these 18 defendants were sentenced to death for crimes involving a total of 27 victims: 6 white, 17 black, 3 Hispanic, and 1 other (Asian). 81 percent (22 of 27) of the victims were male. One defendant on federal death row, Timothy McVeigh, was responsible for killing 168 individuals, both male and female, of various races/ethnicities in the 1995 bombing of the Murrah Federal Building in Oklahoma City.
- 44 percent (8) of these 18 defendants had capital convictions related to only one victim.
- 72 percent (13) of these 18 defendants were sentenced to death for crimes against victims exclusively of the same race/ethnicity.

⁹See footnote 1.

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AEN (Beth)
Maria Ede



**FROM THE OFFICE OF
THE SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION,
FEDERALISM, AND PROPERTY RIGHTS**

U. S. SENATOR RUSSELL FEINGOLD
ph: (202) 224-5573
fax: (202)228-0466

DATE: 6/30/00

TO: Beth Nolan, Esq.
White House Counsel

FAX: 456-1647

FROM: Farhana Khera, Minority Counsel
(direct dial: 202-224-5674)

Total Pages (including this cover page): 4

MESSAGE:

United States Senate
WASHINGTON, DC 20510

Crime-
Death Penalty

June 30, 2000

The Honorable William J. Clinton
President of the United States of America
The White House
Washington, DC 20500

Dear Mr. President:

We write to urge you to suspend all federal executions to allow time for the creation of a national commission to review the fairness and accuracy of the administration of the federal death penalty. This would allow us to better ensure that innocent individuals are not being put to death as a result of the administration of the federal death penalty.

We understand that the Department of Justice has undertaken a review of the racial disparities in the prosecution, conviction and sentencing of those who commit crimes eligible for the federal death penalty. That study has not yet been completed. A recent article in *The New York Times* ("Charges of Bias Challenge U.S. Death Penalty," June 24, 2000), however, discusses the kind of data this study is expected to reveal:

- Since the significant expansion of the federal death penalty in 1994, federal prosecutors in a dozen Southern states have accounted for more than half the federal cases in which the death penalty was sought.
- Between 1994 and 1999, one-third of the U.S. Attorney's offices did not file a single capital prosecution request.
- More than three-quarters of the federal prosecutions where the death penalty was sought have been against African Americans, Hispanic Americans or other minorities.

We find it difficult to believe that crimes eligible for the federal death penalty were committed predominantly in Southern states. And we find it equally difficult to believe that crimes eligible for the federal death penalty were not committed in every state, if not almost every state, since 1994.

In addition to the data contained in the Justice Department report, we also know that

between 1988 and 1993, nearly 90% of the defendants against whom the federal government sought the death penalty under the Drug Kingpin statute were African American or Hispanic American.

The result of this apparently racially biased system of prosecution, conviction and sentencing is disturbing. We now have a high proportion of minorities on federal death row. Fifteen of the 19 federal death row inmates facing execution are African American, Hispanic American or members of other minority groups. In fact, the proportion of African Americans on federal death row is greater than in all states with the death penalty, with the exception of only five states – Arkansas, Maryland, Louisiana, Illinois and Pennsylvania. And on military death row, six of the seven inmates are members of minority groups.

Since Governor George Ryan announced his intention in January to suspend executions in Illinois until a state panel can examine whether Illinois is administering the death penalty fairly and justly, the nation has begun a re-evaluation of the system by which we impose the sentence of death. Real questions are being raised about whether innocent people are being condemned to die. Americans are becoming increasingly concerned that the death penalty is visited disproportionately on the poor and minorities.

As you know, the first federal execution since the reinstatement of the modern death penalty – and in fact the first federal execution since 1963 – could take place soon. A federal judge has set August 5, 2000 as the execution date for Juan Raul Garza.

The judge in that case set a date notwithstanding the fact that guidelines for the submission and consideration of a clemency petition have not been implemented by the Department of Justice. All aspects of the capital decision-making process, from authorization through clemency, require a heightened level of reliability. Indeed, the Supreme Court has said that the death penalty is qualitatively different from other punishments and subject to additional procedural requirements, and has declared the death penalty constitutional only when the process by which it is imposed is not an arbitrary one.

Mr. President, in light of the serious questions we expect to be raised by the study of racial disparities in the administration of the federal death penalty and the fact that procedures for the submission and consideration of clemency petitions have not yet been enacted, we respectfully urge you to suspend federal executions and undertake a thorough review of the administration of the federal death penalty. Before the federal government executes anyone, the federal government should be absolutely certain that the system by which it imposes the ultimate punishment is administered fairly and justly. It must ensure that the federal death penalty is applied in a fair and just manner, sought against

defendants free of even a hint of racial bias, and sought evenly from U.S. Attorney district to U.S. Attorney district across the nation. In short, before using the immense power of the federal government to take the life of a fellow citizen on our behalf, our government has a solemn responsibility to every American to prove that its actions are consistent with our nation's fundamental principles of justice, equality and due process.

Thank you for your attention to this issue. We look forward to hearing from you.

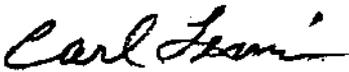
Respectfully,



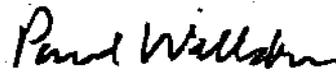
Russell D. Feingold
U.S. SENATOR



Jesse L. Jackson, Jr.
U.S. REPRESENTATIVE



Carl Levin
U.S. SENATOR



Paul D. Wellstone
U.S. SENATOR



Tom Harkin
U.S. SENATOR

Bill Summary & Status for the 106th Congress

Item 1 of 6

Crime
Death
Penalty

PREVIOUS | NEXT
PREVIOUS:ALL | NEXT:ALL
NEW SEARCH | HOME | HELP

S.2073

Sponsor: Sen Leahy, Patrick J. (introduced 2/10/2000)

Latest Major Action: 2/10/2000 Referred to Senate committee

Title: A bill to reduce the risk that innocent persons may be executed, and for other purposes.

Jump to: [Titles](#), [Status](#), [Committees](#), [Related Bill Details](#), [Amendments](#), [Cosponsors](#), [Summary](#)

TITLE(S): *(italics indicate a title for a portion of a bill)*

- **SHORT TITLE(S) AS INTRODUCED:**
Innocence Protection Act of 2000
- **OFFICIAL TITLE AS INTRODUCED:**
A bill to reduce the risk that innocent persons may be executed, and for other purposes.

STATUS: *(color indicates Senate actions)*

2/10/2000:

Read twice and referred to the Committee on the Judiciary.

COMMITTEE(S):

| | |
|--------------------------------|------------------|
| Committee/Subcommittee: | Activity: |
| <u>Senate Judiciary</u> | Referral |

RELATED BILL DETAILS:

NONE

AMENDMENT(S):

NONE

COSPONSORS(5), ALPHABETICAL [followed by Cosponsors withdrawn]: (Sort: by date)

| | |
|---|---|
| <u>Sen Akaka, Daniel K.</u> - 2/10/2000 | <u>Sen Feingold, Russell D.</u> - 2/10/2000 |
| <u>Sen Kerrey, J. Robert</u> - 4/6/2000 | <u>Sen Levin, Carl</u> - 2/10/2000 |
| <u>Sen Moynihan, Daniel Patrick</u> - 2/10/2000 | |

SUMMARY AS OF:

2/10/2000--Introduced.

TABLE OF CONTENTS:

- Title I: Exonerating the Innocent Through DNA Testing
- Title II: Ensuring Competent Legal Services in Capital Cases
- Title III: Compensating the Unjustly Convicted
- Title IV: Miscellaneous Provisions

Innocence Protection Act of 2000 - **Title I: Exonerating the Innocent through DNA Testing** - Amends the Federal judicial code to authorize a person in custody pursuant to the judgment of a court established by an Act of Congress, at any time after conviction, to apply to the court that entered the judgment for forensic DNA testing of any biological material that: (1) is related to the investigation or prosecution that resulted in the judgment; (2) is in the actual or constructive possession of the Government; and (3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results.

Sets forth procedures regarding notice to the Government and preservation of remaining biological material. Directs the court to order DNA testing pursuant to such application upon a determination that testing may produce non-cumulative, exculpatory evidence relevant to an applicant's claim that the applicant was wrongfully convicted or sentenced. Specifies that the cost of DNA testing shall be borne by the Government or the applicant, as the court may order in the interests of justice, if it is shown that the applicant is not indigent and possesses the means to pay. Authorizes the court at any time to appoint counsel for an indigent applicant.

Establishes post-testing procedures, including ordering a hearing and entering any order that serves the interests of justice, including an order setting aside the judgment or granting a new trial or re-sentencing if the results of the DNA testing are favorable to the applicant.

Requires the Government to preserve any biological material secured in connection with a criminal case for such period as any person remains incarcerated in connection with that case, with exceptions.

(Sec. 103) Amends the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act) to include among the requirements for DNA identification grants, and for drug control and system improvement (Byrne) grants, that the State will: (1) preserve all biological material secured in connection with a State criminal case for not less than the period of time that biological material is required to be preserved under this Act in the case of a person incarcerated in connection with a Federal criminal case (biological material preservation requirements); and (2) make DNA testing available to any person convicted in State court to the same extent, and under the same conditions, that DNA testing is available under this Act to any person convicted in a court established by an Act of Congress.

Makes DNA samples obtained by, and DNA analyses performed at, a forensic laboratory accessible for criminal defense purposes to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant was charged or convicted.

Requires applications for public safety and community policing grants, if any part of funds received from such a grant is to be used to develop or improve a DNA analysis capability in a forensic laboratory, or to obtain or analyze DNA samples for inclusion in the Combined DNA Index System, to make specified certifications including that: (1) DNA analyses performed at such laboratory will satisfy or exceed the current standards for a quality assurance program for DNA analysis issued by the Director of the Federal Bureau of Investigation under the DNA Identification Act of 1994; (2) DNA samples and analyses obtained and performed by such laboratory will be accessible only consistent with specified requirements; (3) the laboratory and each analyst performing DNA analyses at the laboratory will undergo, at regular intervals not exceeding 180 days, external proficiency testing by a DNA proficiency testing program that meets certain standards; and (4) the State will meet biological material preservation requirements.

(Sec. 104) Prohibits a State from denying a request, made by a person in custody resulting from a State court judgment, for DNA testing of biological material that: (1) is related to the investigation or prosecution that resulted in the conviction of the person or the sentence imposed on the person; (2) is in

the actual or constructive possession of the State; and (3) was not previously subjected to DNA testing, or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate and probative results. Makes an exception upon a judicial determination that testing could not produce non-cumulative evidence establishing a reasonable probability that the person was wrongfully convicted or sentenced.

Bars a State from relying upon a time limit or procedural default rule to deny a person an opportunity to present non-cumulative, exculpatory DNA results in court, or in an executive or administrative forum in which a decision is made in accordance with procedural due process.

Authorizes a person to enforce this section in a civil action for declaratory or injunctive relief, filed either in a State court of general jurisdiction or in U.S. district court. Specifies that no State or State executive or judicial officer shall have immunity from such actions.

Title II: Ensuring Competent Legal Services in Capital Cases - Amends the Safe Streets Act (regarding Byrne grant programs) to require that State applications include, if the State prescribes, authorizes, or permits the **death penalty** for any offense, a certification that the State has established and maintains an effective system for providing competent legal services to indigents at every phase of a State criminal prosecution in which a **death** sentence is sought or has been imposed, up to and including direct appellate review and post-conviction review in State court.

Requires the Director of the Administrative Office of the United States Courts to promulgate regulations specifying the elements of an "effective system" including: (1) a centralized and independent appointing authority which shall have authority and responsibility to undertake specified activities, such as to recruit attorneys who are qualified to represent indigents in capital proceedings, draft and annually publish a roster of such attorneys, draft and annually publish qualifications and performance standards for such attorneys, and periodically review the roster, monitor attorney performance, provide a mechanism by which members of the Bar may comment on the performance of their peers, and delete the name of any attorney who fails to meet specified requirements; and (2) specified compensation and reimbursement requirements of private attorneys and public defender organizations.

Requires applications for discretionary (justice system improvement) grants to include satisfying such certification requirement.

Requires the Director of the National Institute of Justice to include in a report to Congress on such grants to each State a description and a comparative analysis of the systems established by each State in order to satisfy the certification requirement, including qualifications and performance standards, rates of compensation, and rates of reimbursement.

(Sec. 202) Amends the judicial code to direct the court, in a proceeding instituted by an indigent applicant under sentence of **death**, to neither presume a finding of fact made by a State court to be correct nor decline to consider a claim on the ground that the applicant failed to raise such claim in State court at the time and in the manner prescribed by State law, unless: (1) the State provided the applicant with legal services at the stage of the State proceedings at which the State court made the finding of fact or the applicant failed to raise the claim; and (2) the legal services the State provided satisfied the regulations promulgated by the Director of the Administrative Office pursuant to the Safe Streets Act.

(Sec. 203) Amends the Federal criminal code to require the Director of the Administrative Office to: (1) award grants to, or enter into contracts with, public or private nonprofit organizations for the purpose of providing defense services in capital cases; and (2) develop guidelines to ensure that defense services provided by recipients of such grants and contracts are consistent with applicable legal and ethical proscriptions governing the duties of counsel in capital cases.

Title III: Compensating the Unjustly Condemned - Rewrites judicial code provisions regarding compensation for unjust imprisonment. Limits the amount of damages awarded to \$50,000 for each 12-month period of incarceration, except that a plaintiff who was unjustly sentenced to **death** may be awarded not more than \$100,000 for each 12-month period of incarceration.

Directs the court, in assessing damages, to consider: (1) the circumstances surrounding the unjust conviction, including any misconduct by Federal officers or employees; (2) the length and conditions of the unjust incarceration; and (3) family circumstances, loss of wages, and pain and suffering of the plaintiff.

(Sec. 302) Amends the Safe Streets Act to require applicants for criminal justice facility construction grants to provide reasonable assurance that the applicant, or the State in which it is located, does not prescribe, authorize, or permit the **death penalty** for any offense, or: (1) has established and maintains an effective procedure by which any person unjustly convicted of an offense against the State and sentenced to **death** may be awarded reasonable damages upon substantial proof that the person did not commit any of the acts with which the person was charged; and (2) the conviction of that person was reversed or set aside on the ground that the person was not guilty of the offense or offenses of which the person was convicted, the person was found not guilty of such offenses on new trial or rehearing, or the person was pardoned upon the stated ground of innocence and unjust conviction.

Title IV: Miscellaneous Provisions - Amends the criminal code to prohibit the Government from seeking the **death penalty** in any case initially brought before a U.S. district court that sits in a State that does not prescribe, authorize, or permit the imposition of such **penalty** for the alleged conduct, except upon written certification of the Attorney General (or designee) that: (1) the State does not have jurisdiction or refuses to assume jurisdiction over the defendant with respect to the alleged conduct; (2) the State has requested that the Government assume jurisdiction; or (3) the offense charged is one of certain listed offenses, including destruction of aircraft or aircraft facilities, assassination, kidnapping, and assault of specified Government officials.

(Sec. 402) Rewrites Controlled Substances Act provisions regarding continuing criminal enterprises to direct the court, upon a recommendation that the defendant should be sentenced to **death** or life imprisonment without possibility of release, to sentence the defendant accordingly (otherwise, the court shall impose any lesser sentence that is authorized by law).

(Sec. 403) Rewrites provisions of the Violent Crime Control and Law Enforcement Act of 1994 regarding Violent Offender Incarceration and Truth-In-Sentencing Incentive Grants to require State applicants to provide assurances to the Attorney General that: (1) the State has implemented policies that provide for the recognition of the rights and needs of crime victims; and (2) in any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court, at the defendant's request, shall inform the jury of all statutorily authorized sentencing options in the particular case, including applicable parole eligibility rules and terms.

(Sec. 404) Requires the Attorney General, within two years and annually thereafter, to prepare and transmit to Congress a report concerning the administration of capital punishment laws by the Government and the States.

Directs the Attorney General or the Director of the Bureau of Justice Assistance, as appropriate, to ensure that the reports are: (1) distributed to national print and broadcast media; and (2) posted on an Internet website maintained by the Department of Justice.

(Sec. 405) Amends the judicial code to provide that, regarding exhaustion of remedies available in State courts, if the highest court of a State has discretion to decline appellate review of a case or a claim, a petition asking that court to entertain a case or a claim is not an available State court procedure.

(Sec. 406) Expresses the sense of the Senate that the **death penalty** is disproportionate and offends contemporary standards of decency when applied to a person who is mentally retarded or who had not attained age 18 at the time of the offense.

U.S. Senator Patrick Leahy

(Feb 11) Opening Remarks of Senator Patrick Leahy, Chief Sponsor, the Innocence Protection Act (S.2073) News Conference on the Bill's Introduction

February 10, 2000

A few days ago, Governor Ryan imposed a new moratorium on the death penalty in his State of Illinois after it was shown that not one, not two, but 13 innocent people had been sentenced to death. But wrongful convictions and death row errors are not just an Illinois problem; this is a national crisis.

Clyde Charles is here with us from Louisiana today, and Kirk Bloodsworth is here from Maryland. They can tell you firsthand that innocent people get wrongly convicted across the country; between them, they spent close to 30 years of their lives in prison for crimes that they did not commit. I cannot imagine what that is like, but you will hear from them. And as you listen to these innocent citizens, bear this in mind: these are not isolated cases. Clyde and Kirk got lucky, if you can call it that. In America in the last 20 years, for every 7 people executed, 1 person sentenced to death was later proved to be innocent.

Perhaps the most urgent problem in the administration of our capital punishment laws is the failure of some states to provide competent representation to defendants facing the death penalty. Most of those defendants cannot afford their own lawyers. Many states are simply unwilling to make sure they have proper representation. The result is what you would expect. Defendants too often find their lives placed in the hands of lawyers who are hopelessly incompetent – lawyers who were drunk during the trial; lawyers who were fast asleep during the trial; and lawyers who never bothered to investigate the case or even meet with their client before the trial.

States that choose to impose capital punishment must be prepared to foot the bill, and the public and Congress have an obligation to make sure they do. Congress gives hundreds of millions of dollars to the States each year to spend on law enforcement, staff and prisons.

I came to the Senate after working for several years as a prosecutor. The saddest fact of all, to me, is that the society facing this crisis is not a medieval one. It is our 21st Century America, the wealthiest, most technically proficient and most powerful nation on earth. Americans disagree about a lot of things, including whether we should have a death penalty at all.

But we share a love of justice, and we expect our institutions to work properly. One vindication for every seven executions is not a criminal justice system that's working properly, it's Russian roulette. The American people are entitled to expect something better from their government than "whoops, we executed the wrong guy."

The American people fundamentally understand that not only does our criminal justice system succeed whenever we convict someone who is guilty; it also succeeds whenever an innocent person is exonerated. It is just plain wrong for the world's greatest nation to go into the 21st Century tolerating such mistakes when they can be prevented at minimal cost. That is what we aim to do with this common-sense bill.

There is nothing abstract about this crisis and there is nothing abstract about how to solve it. The bill I have introduced is not about whether, in theory, you support or oppose the death penalty. Polls show that Americans are divided on that question. But polls also show an overwhelming consensus that we should not execute innocent people, and that everyone has the right to a fair trial with a competent lawyer.

The public expects us to stop posturing about being "tough on crime" and actually do something to make

the criminal justice system works. When I took on an effort to ban the use of anti-personnel landmines, I found that the public quickly understood that civilized societies cannot accept use of a weapon that indiscriminately kills the innocent. I believe that same sense of decency and common sense is going to prevail in this crisis, too.

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106TH CONGRESS
2D SESSION

S. 2073

To reduce the risk that innocent persons may be executed, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 10, 2000

Mr. LEAHY (for himself, Mr. LEVIN, Mr. FEINGOLD, Mr. MOYNIHAN, and Mr. AKAKA) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To reduce the risk that innocent persons may be executed,
and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Innocence Protection Act of 2000”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.

TITLE I—EXONERATING THE INNOCENT THROUGH DNA TESTING

Sec. 101. Findings and purposes.

Sec. 102. DNA testing in Federal criminal justice system.

Sec. 103. DNA testing in State criminal justice systems.

Sec. 104. Prohibition pursuant to section 5 of the 14th amendment.

TITLE II—ENSURING COMPETENT LEGAL SERVICES IN CAPITAL CASES

Sec. 201. Amendments to Byrne grant programs.

Sec. 202. Effect on procedural default rules.

Sec. 203. Capital representation grants.

TITLE III—COMPENSATING THE UNJUSTLY CONDEMNED

Sec. 301. Increased compensation in Federal cases.

Sec. 302. Compensation in State death penalty cases.

TITLE IV—MISCELLANEOUS PROVISIONS

Sec. 401. Accommodation of State interests in Federal death penalty prosecutions.

Sec. 402. Alternative of life imprisonment without possibility of release.

Sec. 403. Right to an informed jury.

Sec. 404. Annual reports.

Sec. 405. Discretionary appellate review.

Sec. 406. Sense of the Senate regarding the execution of juvenile offenders and the mentally retarded.

1 **TITLE I—EXONERATING THE IN-** 2 **NOCENT THROUGH DNA** 3 **TESTING**

4 **SEC. 101. FINDINGS AND PURPOSES.**

5 (a) **FINDINGS.**—Congress makes the following find-
 6 ings:

7 (1) Over the past decade, deoxyribonucleic acid
 8 testing (referred to in this section as “DNA test-
 9 ing”) has emerged as the most reliable forensic tech-
 10 nique for identifying criminals when biological mate-
 11 rial is left at a crime scene.

12 (2) Because of its scientific precision, DNA
 13 testing can, in some cases, conclusively establish the
 14 guilt or innocence of a criminal defendant. In other

1 cases, DNA testing may not conclusively establish
2 guilt or innocence, but may have significant pro-
3 bative value to a finder of fact.

4 (3) While DNA testing is increasingly common-
5 place in pretrial investigations today, it was not
6 widely available in cases tried prior to 1994. More-
7 over, new forensic DNA testing procedures have
8 made it possible to get results from minute samples
9 that could not previously be tested, and to obtain
10 more informative and accurate results than earlier
11 forms of forensic DNA testing could produce. Con-
12 sequently, in some cases convicted inmates have
13 been exonerated by new DNA tests after earlier tests
14 had failed to produce definitive results.

15 (4) Since DNA testing is often feasible on rel-
16 evant biological material that is decades old, it can,
17 in some circumstances, prove that a conviction that
18 predated the development of DNA testing was based
19 upon incorrect factual findings. Uniquely, DNA evi-
20 dence showing innocence, produced decades after a
21 conviction, provides a more reliable basis for estab-
22 lishing a correct verdict than any evidence proffered
23 at the original trial. DNA testing, therefore, can and
24 has resulted in the post-conviction exoneration of in-
25 nocent men and women.

1 (5) In the past decade, there have been more
2 than 65 post-conviction exonerations in the United
3 States and Canada based upon DNA testing. At
4 least 8 individuals sentenced to death have been ex-
5 onerated through post-conviction DNA testing, some
6 of whom came within days of being executed.

7 (6) The 2 States that have established statutory
8 processes for post-conviction DNA testing, Illinois
9 and New York, have the most post-conviction DNA
10 exonerations, 14 and 7, respectively.

11 (7) The advent of DNA testing raises serious
12 concerns regarding the prevalence of wrongful con-
13 victions, especially wrongful convictions arising out
14 of mistaken eyewitness identification testimony. Ac-
15 cording to a 1996 Department of Justice study enti-
16 tled "Convicted by Juries, Exonerated by Science:
17 Case Studies of Post-Conviction DNA Exonera-
18 tions", in approximately 20 to 30 percent of the
19 cases referred for DNA testing, the results excluded
20 the primary suspect. Without DNA testing, many of
21 these individuals might have been wrongfully con-
22 victed.

23 (8) Laws in more than 30 States require that
24 a motion for a new trial based on newly discovered
25 evidence of innocence be filed within 6 months or

1 less. These laws are premised on the belief—inappli-
2 cable to DNA testing—that evidence becomes less
3 reliable over time. Such time limits have been used
4 to deny inmates access to DNA testing, even when
5 guilt or innocence could be conclusively established
6 by such testing. For example, in *Dedge v. Florida*,
7 723 So.2d 322 (Fla. Dist. Ct. App. 1998), the court
8 without opinion affirmed the denial of a motion to
9 release trial evidence for the purpose of DNA test-
10 ing. The trial court denied the motion as proce-
11 durally barred under the 2-year limitation on claims
12 of newly discovered evidence established by the State
13 of Florida, which has since adopted a 6-month limi-
14 tation on such claims.

15 (9) Even when DNA testing has been done and
16 has persuasively demonstrated the actual innocence
17 of an inmate, States have sometimes relied on time
18 limits and other procedural barriers to deny release.

19 (10) The National Commission on the Future
20 of DNA Evidence, a Federal panel established by
21 the Department of Justice and comprised of law en-
22 forcement, judicial, and scientific experts, has issued
23 a report entitled “Recommendations For Handling
24 Post-Conviction DNA Applications” that urges post-
25 conviction DNA testing in 2 carefully defined cat-

1 egories of cases, notwithstanding procedural rules
2 that could be invoked to preclude such testing, and
3 notwithstanding the inability of the inmate to pay
4 for the testing.

5 (11) The number of cases in which post-convic-
6 tion DNA testing is appropriate is relatively small
7 and will decrease as pretrial testing becomes more
8 common and accessible.

9 (12) The cost of DNA testing has also de-
10 creased in recent years. The typical case, involving
11 the analysis of 8 samples, currently costs between
12 \$2,400 and \$5,000, depending upon jurisdictional
13 differences in personnel costs.

14 (13) In 1994, Congress authorized funding to
15 improve the quality and availability of DNA analysis
16 for law enforcement identification purposes. Since
17 then, States have been awarded over \$50,000,000 in
18 DNA-related grants.

19 (14) Although the Supreme Court has never an-
20 nounced a standard for addressing constitutional
21 claims of innocence, in *Herrera v. Collins*, 506 U.S.
22 390 (1993), a majority of the Court expressed the
23 view that, "a truly persuasive demonstration of 'ac-
24 tual innocence'" made after trial would render im-
25 position of punishment by a State unconstitutional.

1 (15) If biological material is not subjected to
2 DNA testing in appropriate cases, there is a signifi-
3 cant risk that persuasive evidence of innocence will
4 not be detected and, accordingly, that innocent per-
5 sons will be unconstitutionally incarcerated or exe-
6 cuted.

7 (16) To prevent violations of the Constitution
8 of the United States that the Supreme Court antici-
9 pated in *Herrera v. Collins*, it is necessary and prop-
10 er to enact national legislation that ensures that the
11 Federal Government and the States will permit
12 DNA testing in appropriate cases.

13 (17) There is also a compelling need to ensure
14 the preservation of biological material for post-con-
15 viction DNA testing. Since 1992, the Innocence
16 Project at the Benjamin N. Cardozo School of Law
17 has received thousands of letters from inmates who
18 claim that DNA testing could prove them innocent.
19 In over 70 percent of those cases in which DNA
20 testing could have been dispositive of guilt or inno-
21 cence if the biological material were available, the
22 material had been destroyed or lost. In two-thirds of
23 the cases in which the evidence was found, and DNA
24 testing conducted, the results have exonerated the
25 inmate.

1 (18) In at least 14 cases, post-conviction DNA
2 testing that has exonerated a wrongly convicted per-
3 son has also provided evidence leading to the appre-
4 hension of the actual perpetrator, thereby enhancing
5 public safety. This would not have been possible if
6 the biological evidence had been destroyed.

7 (b) PURPOSES.—The purposes of this title are to—

8 (1) substantially implement the Recommenda-
9 tions of the National Commission on the Future of
10 DNA Evidence in the Federal criminal justice sys-
11 tem, by ensuring the availability of DNA testing in
12 appropriate cases;

13 (2) prevent the imposition of unconstitutional
14 punishments through the exercise of power granted
15 by clause 1 of section 8 and clause 2 of section 9
16 of article I of the Constitution of the United States
17 and section 5 of the 14th amendment to the Con-
18 stitution of the United States; and

19 (3) ensure that wrongfully convicted persons
20 have an opportunity to establish their innocence
21 through DNA testing, by requiring the preservation
22 of DNA evidence for a limited period.

1 **SEC. 102. DNA TESTING IN FEDERAL CRIMINAL JUSTICE**
 2 **SYSTEM.**

3 (a) **IN GENERAL.**—Part VI of title 28, United States
 4 Code, is amended by inserting after chapter 155 the fol-
 5 lowing:

6 **“CHAPTER 156—DNA TESTING**

“Sec.

“2291. DNA testing.

“2292. Preservation of biological material.

7 **“§ 2291. DNA testing**

8 “(a) **APPLICATION.**—Notwithstanding any other pro-
 9 vision of law, a person in custody pursuant to the judg-
 10 ment of a court established by an Act of Congress may,
 11 at any time after conviction, apply to the court that en-
 12 tered the judgment for forensic DNA testing of any bio-
 13 logical material that—

14 “(1) is related to the investigation or prosecu-
 15 tion that resulted in the judgment;

16 “(2) is in the actual or constructive possession
 17 of the Government; and

18 “(3) was not previously subjected to DNA test-
 19 ing; or can be subjected to retesting with new DNA
 20 techniques that provide a reasonable likelihood of
 21 more accurate and probative results.

22 “(b) **NOTICE TO GOVERNMENT.**—

23 “(1) **IN GENERAL.**—The court shall notify the
 24 Government of an application made under subsection

1 (a) and shall afford the Government an opportunity
2 to respond.

3 “(2) PRESERVATION OF REMAINING BIOLOGI-
4 CAL MATERIAL.—Upon receiving notice of an appli-
5 cation made under subsection (a), the Government
6 shall take such steps as are necessary to ensure that
7 any remaining biological material that was secured
8 in connection with the case is preserved pending the
9 completion of proceedings under this section.

10 “(c) ORDER.—The court shall order DNA testing
11 pursuant to an application made under subsection (a)
12 upon a determination that testing may produce noncumu-
13 lative, exculpatory evidence relevant to the claim of the
14 applicant that the applicant was wrongfully convicted or
15 sentenced.

16 “(d) COST.—The cost of DNA testing ordered under
17 subsection (c) shall be borne by the Government or the
18 applicant, as the court may order in the interests of jus-
19 tice, if it is shown that the applicant is not indigent and
20 possesses the means to pay.

21 “(e) COUNSEL.—The court may at any time appoint
22 counsel for an indigent applicant under this section.

23 “(f) POST-TESTING PROCEDURES.—

24 “(1) PROCEDURES FOLLOWING RESULTS UNFA-
25 VORABLE TO APPLICANT.—If the results of DNA

1 testing conducted under this section are unfavorable
2 to the applicant, the court—

3 “(A) shall dismiss the application; and

4 “(B) in the case of an applicant who is not
5 indigent, may assess the applicant for the cost
6 of such testing.

7 “(2) PROCEDURES FOLLOWING RESULTS FA-
8 VORABLE TO APPLICANT.—If the results of DNA
9 testing conducted under this section are favorable to
10 the applicant, the court shall—

11 “(A) order a hearing, notwithstanding any
12 provision of law that would bar such a hearing;
13 and

14 “(B) enter any order that serves the inter-
15 ests of justice, including an order—

16 “(i) vacating and setting aside the
17 judgment;

18 “(ii) discharging the applicant if the
19 applicant is in custody;

20 “(iii) resentencing the applicant; or

21 “(iv) granting a new trial.

22 “(g) RULE OF CONSTRUCTION.—Nothing in this sec-
23 tion shall be construed to limit the circumstances under
24 which a person may obtain DNA testing or other post-
25 conviction relief under any other provision of law.

1 **“§ 2292. Preservation of biological material**

2 “(a) IN GENERAL.—Notwithstanding any other pro-
3 vision of law and subject to subsection (b), the Govern-
4 ment shall preserve any biological material secured in con-
5 nection with a criminal case for such period of time as
6 any person remains incarcerated in connection with that
7 case.

8 “(b) EXCEPTION.—The Government may destroy bio-
9 logical material before the expiration of the period of time
10 described in subsection (a) if—

11 “(1) the Government notifies any person who
12 remains incarcerated in connection with the case,
13 and any counsel of record or public defender organi-
14 zation for the judicial district in which the judgment
15 of conviction for such person was entered, of—

16 “(A) the intention of the Government to
17 destroy the material; and

18 “(B) the provisions of this chapter;

19 “(2) no person makes an application under sec-
20 tion 2291(a) within 90 days of receiving notice
21 under paragraph (1) of this subsection; and

22 “(3) no other provision of law requires that
23 such biological material be preserved.”.

24 (b) TECHNICAL AND CONFORMING AMENDMENT.—

25 The analysis for part VI of title 28, United States Code,

1 is amended by inserting after the item relating to chapter
2 155 the following:

“156. DNA Testing 2291”.

3 **SEC. 103. DNA TESTING IN STATE CRIMINAL JUSTICE SYS-**
4 **TEMS.**

5 (a) DNA IDENTIFICATION GRANT PROGRAM.—Sec-
6 tion 2403 of title I of the Omnibus Crime Control and
7 Safe Streets Act of 1968 (42 U.S.C. 3796kk-2) is
8 amended—

9 (1) in paragraph (2)—

10 (A) in the matter preceding subparagraph

11 (A), by striking “shall” and inserting “will”;

12 (B) in subparagraph (C), by striking “is
13 charged” and inserting “was charged or con-
14 victed”; and

15 (C) in subparagraph (D), by striking
16 “and” at the end;

17 (2) in paragraph (3)—

18 (A) by striking “shall” and inserting
19 “will”; and

20 (B) by striking the period at the end and
21 inserting “; and”; and

22 (3) by adding at the end the following:

23 “(4) the State will—

24 “(A) preserve all biological material se-
25 cured in connection with a State criminal case

1 for not less than the period of time that biological
2 cal material is required to be preserved under
3 section 2292 of title 28, United States Code, in
4 the case of a person incarcerated in connection
5 with a Federal criminal case; and

6 “(B) make DNA testing available to any
7 person convicted in State court to the same extent,
8 and under the same conditions, that DNA
9 testing is available under section 2291 of title
10 28, United States Code, to any person convicted
11 in a court established by an Act of Congress.”.

12 (b) DRUG CONTROL AND SYSTEM IMPROVEMENT
13 GRANT PROGRAM.—Section 503(a)(12) of title I of the
14 Omnibus Crime Control and Safe Streets Act of 1968 (42
15 U.S.C. 3753(a)(12)) is amended—

16 (1) in subparagraph (B)—

17 (A) in clause (iii), by striking “is charged”
18 and inserting “was charged or convicted”; and

19 (B) in clause (iv), by striking “and” at the
20 end;

21 (2) in subparagraph (C), by striking the period
22 at the end and inserting “; and”; and

23 (3) by adding at the end the following:

24 “(D) the State will—

1 “(i) preserve all biological material se-
2 cured in connection with a State criminal
3 case for not less than the period of time
4 that biological material is required to be
5 preserved under section 2292 of title 28,
6 United States Code, in the case of a per-
7 son incarcerated in connection with a Fed-
8 eral criminal case; and

9 “(ii) make DNA testing available to a
10 person convicted in State court to the
11 same extent, and under the same condi-
12 tions, that DNA testing is available under
13 section 2291 of title 28, United States
14 Code, to a person convicted in a court es-
15 tablished by an Act of Congress.”.

16 (c) PUBLIC SAFETY AND COMMUNITY POLICING
17 GRANT PROGRAM.—Section 1702(c) of title I of the Om-
18 nibus Crime Control and Safe Streets Act of 1968 (42
19 U.S.C. 3796dd-1(c)) is amended—

20 (1) in paragraph (10), by striking “and” at the
21 end;

22 (2) in paragraph (11), by striking the period at
23 the end and inserting “; and”; and

24 (3) by adding at the end the following:

1 “(12) if any part of funds received from a grant
2 made under this subchapter is to be used to develop
3 or improve a DNA analysis capability in a forensic
4 laboratory, or to obtain or analyze DNA samples for
5 inclusion in the Combined DNA Index System
6 (CODIS), certify that—

7 “(A) DNA analyses performed at such lab-
8 oratory will satisfy or exceed the current stand-
9 ards for a quality assurance program for DNA
10 analysis, issued by the Director of the Federal
11 Bureau of Investigation under section 210303
12 of the DNA Identification Act of 1994 (42
13 U.S.C. 14131);

14 “(B) DNA samples and analyses obtained
15 and performed by such laboratory will be acces-
16 sible only—

17 “(i) to criminal justice agencies for
18 law enforcement purposes;

19 “(ii) in judicial proceedings, if other-
20 wise admissible under applicable statutes
21 and rules;

22 “(iii) for criminal defense purposes, to
23 a defendant, who shall have access to sam-
24 ples and analyses performed in connection

1 with the case in which the defendant was
2 charged or convicted; or

3 “(iv) if personally identifiable infor-
4 mation is removed, for a population statis-
5 tics database, for identification research
6 and protocol development purposes, or for
7 quality control purposes;

8 “(C) the laboratory and each analyst per-
9 forming DNA analyses at the laboratory will
10 undergo, at regular intervals not exceeding 180
11 days, external proficiency testing by a DNA
12 proficiency testing program that meets the
13 standards issued under section 210303 of the
14 DNA Identification Act of 1994 (42 U.S.C.
15 14131); and

16 “(D) the State will—

17 “(i) preserve all biological material se-
18 cured in connection with a State criminal
19 case for not less than the period of time
20 that biological material is required to be
21 preserved under section 2292 of title 28,
22 United States Code, in the case of a per-
23 son incarcerated in connection with a Fed-
24 eral criminal case; and

1 “(ii) make DNA testing available to
2 any person convicted in State court to the
3 same extent, and under the same condi-
4 tions, that DNA testing is available under
5 section 2291 of title 28, United States
6 Code, to a person convicted in a court es-
7 tablished by an Act of Congress.”.

8 **SEC. 104. PROHIBITION PURSUANT TO SECTION 5 OF THE**
9 **14TH AMENDMENT.**

10 (a) **REQUEST FOR DNA TESTING.—**

11 (1) **IN GENERAL.—**No State shall deny a re-
12 quest, made by a person in custody resulting from
13 a State court judgment, for DNA testing of biologi-
14 cal material that—

15 (A) is related to the investigation or pros-
16 ecution that resulted in the conviction of the
17 person or the sentence imposed on the person;

18 (B) is in the actual or constructive posses-
19 sion of the State; and

20 (C) was not previously subjected to DNA
21 testing, or can be subjected to retesting with
22 new DNA techniques that provide a reasonable
23 likelihood of more accurate and probative re-
24 sults.

1 (2) EXCEPTION.—A State may deny a request
2 under paragraph (1) upon a judicial determination
3 that testing could not produce noncumulative evi-
4 dence establishing a reasonable probability that the
5 person was wrongfully convicted or sentenced.

6 (b) OPPORTUNITY TO PRESENT RESULTS OF DNA
7 TESTING.—No State shall rely upon a time limit or proce-
8 dural default rule to deny a person an opportunity to
9 present noncumulative, exculpatory DNA results in court,
10 or in an executive or administrative forum in which a deci-
11 sion is made in accordance with procedural due process.

12 (c) REMEDY.—A person may enforce subsections (a)
13 and (b) in a civil action for declaratory or injunctive relief,
14 filed either in a State court of general jurisdiction or in
15 a district court of the United States, naming either the
16 State or an executive or judicial officer of the State as
17 defendant. No State or State executive or judicial officer
18 shall have immunity from actions under this subsection.

19 **TITLE II—ENSURING COM-**
20 **PETENT LEGAL SERVICES IN**
21 **CAPITAL CASES**

22 **SEC. 201. AMENDMENTS TO BYRNE GRANT PROGRAMS.**

23 (a) CERTIFICATION REQUIREMENT; FORMULA
24 GRANTS.—Section 503 of title I of the Omnibus Crime

1 Control and Safe Streets Act of 1968 (42 U.S.C. 3753)
2 is amended—

3 (1) in subsection (a), by adding at the end the
4 following:

5 “(13) If the State prescribes, authorizes, or
6 permits the penalty of death for any offense, a cer-
7 tification that the State has established and main-
8 tains an effective system for providing competent
9 legal services to indigents at every phase of a State
10 criminal prosecution in which a death sentence is
11 sought or has been imposed, up to and including di-
12 rect appellate review and post-conviction review in
13 State court.”; and

14 (2) in subsection (b)—

15 (A) by striking “(b) Within 30 days after
16 the date of enactment of this part, the” and in-
17 serting the following:

18 “(b) REGULATIONS.—

19 “(1) IN GENERAL.—The”; and

20 (B) by adding at the end the following:

21 “(2) CERTIFICATION REGULATIONS.—The Di-
22 rector of the Administrative Office of the United
23 States Courts, after notice and an opportunity for
24 comment, shall promulgate regulations specifying
25 the elements of an effective system within the mean-

1 ing of subsection (a)(13), which elements shall
2 include—

3 “(A) a centralized and independent ap-
4 pointing authority, which shall have authority
5 and responsibility to—

6 “(i) recruit attorneys who are quali-
7 fied to represent indigents in the capital
8 proceedings specified in subsection (a)(13);

9 “(ii) draft and annually publish a ros-
10 ter of qualified attorneys;

11 “(iii) draft and annually publish quali-
12 fications and performance standards that
13 attorneys must satisfy to be listed on the
14 roster and procedures by which qualified
15 attorneys are identified;

16 “(iv) periodically review the roster,
17 monitor the performance of all attorneys
18 appointed, provide a mechanism by which
19 members of the Bar may comment on the
20 performance of their peers, and delete the
21 name of any attorney who fails to complete
22 regular training programs on the represen-
23 tation of clients in capital cases, fails to
24 meet performance standards in a case to
25 which the attorney is appointed, or other-

1 wise fails to demonstrate continuing com-
2 petence to represent clients in capital
3 cases;

4 “(v) conduct or sponsor specialized
5 training programs for attorneys rep-
6 resenting clients in capital cases;

7 “(vi) appoint lead counsel and co-
8 counsel from the roster to represent a de-
9 fendant in a capital case promptly upon re-
10 ceiving notice of the need for an appoint-
11 ment from the relevant State court; and

12 “(vii) report the appointment, or the
13 failure of the defendant to accept such ap-
14 pointment, to the court requesting the ap-
15 pointment;

16 “(B) compensation of private attorneys for
17 actual time and service, computed on an hourly
18 basis and at a reasonable hourly rate in light of
19 the qualifications and experience of the attorney
20 and the local market for legal representation in
21 cases reflecting the complexity and responsi-
22 bility of capital cases;

23 “(C) reimbursement of private attorneys
24 and public defender organizations for attorney
25 expenses reasonably incurred in the representa-

1 tion of a client in a capital case, computed on
2 an hourly basis reflecting the local market for
3 such services; and

4 “(D) reimbursement of private attorneys
5 and public defender organizations for the rea-
6 sonable costs of law clerks, paralegals, inves-
7 tigators, experts, scientific tests, and other sup-
8 port services necessary in the representation of
9 a defendant in a capital case, computed on an
10 hourly basis reflecting the local market for such
11 services.”.

12 (b) CERTIFICATION REQUIREMENT; DISCRETIONARY
13 GRANTS.—Section 517(a) of title I of the Omnibus Crime
14 Control and Safe Streets Act of 1968 (42 U.S.C. 3763(a))
15 is amended—

16 (1) in paragraph (3), by striking “and” at the
17 end;

18 (2) in paragraph (4), by striking the period at
19 the end and inserting “; and”; and

20 (3) by adding at the end the following:

21 “(5) satisfies the certification requirement es-
22 tablished by section 503(a)(13).”.

23 (c) DIRECTOR’S REPORTS TO CONGRESS.—Section
24 522(b) of title I of the Omnibus Crime Control and Safe
25 Streets Act of 1968 (42 U.S.C. 3766b(b)) is amended—

1 (1) in paragraph (4), by striking “and” at the
2 end;

3 (2) by redesignating paragraph (5) as para-
4 graph (6); and

5 (3) by inserting after paragraph (4) the fol-
6 lowing:

7 “(5) descriptions and a comparative analysis of
8 the systems established by each State in order to
9 satisfy the certification requirement established by
10 section 503(a)(13), except that the descriptions and
11 the comparative analysis shall include—

12 “(A) the qualifications and performance
13 standards established pursuant to section
14 503(b)(2)(A)(iii);

15 “(B) the rates of compensation paid under
16 section 503(b)(2)(B); and

17 “(C) the rates of reimbursement paid
18 under subparagraphs (C) and (D) of section
19 503(b)(2); and”.

20 (d) EFFECTIVE DATE.—

21 (1) IN GENERAL.—Subject to paragraph (2),
22 the amendments made by this section shall apply
23 with respect to any application submitted on or after
24 the date that is 1 year after the date of enactment
25 of this Act.

1 (2) EXCEPTION.—The amendments made by
2 this section shall not take effect until the amount
3 made available for a fiscal year to carry out part E
4 of title I of the Omnibus Crime Control and Safe
5 Streets Act of 1968 equals or exceeds an amount
6 that is \$50,000,000 greater than the amount made
7 available to carry out that part for fiscal year 2000.

8 (e) REGULATIONS.—The Director of the Administra-
9 tive Office of the United States Courts shall issue all regu-
10 lations necessary to carry out the amendments made by
11 this section not later than 180 days before the effective
12 date of those regulations.

13 **SEC. 202. EFFECT ON PROCEDURAL DEFAULT RULES.**

14 Section 2254(e) of title 28, United States Code, is
15 amended—

16 (1) in paragraph (1), by striking “In a pro-
17 ceeding” and inserting “Except as provided in para-
18 graph (3), in a proceeding”; and

19 (2) by adding at the end the following:

20 “(3) In a proceeding instituted by an indigent
21 applicant under sentence of death, the court shall
22 neither presume a finding of fact made by a State
23 court to be correct nor decline to consider a claim
24 on the ground that the applicant failed to raise such

1 claim in State court at the time and in the manner
2 prescribed by State law, unless—

3 “(A) the State provided the applicant with
4 legal services at the stage of the State pro-
5 ceedings at which the State court made the
6 finding of fact or the applicant failed to raise
7 the claim; and

8 “(B) the legal services the State provided
9 satisfied the regulations promulgated by the Di-
10 rector of the Administrative Office of the
11 United States Courts pursuant to section
12 503(b)(2) of title I of the Omnibus Crime Con-
13 trol and Safe Streets Act of 1968.”

14 **SEC. 203. CAPITAL REPRESENTATION GRANTS.**

15 Section 3006A of title 18, United States Code, is
16 amended—

17 (1) by redesignating subsections (i), (j), and (k)
18 as subsections (j), (k), and (l), respectively; and

19 (2) by inserting after subsection (h) the fol-
20 lowing:

21 “(i) CAPITAL REPRESENTATION GRANTS.—

22 “(1) DEFINITIONS.—In this subsection—

23 “(A) the term ‘capital case’—

24 “(i) means any criminal case in which
25 a defendant prosecuted in a State court is

1 subject to a sentence of death or in which
2 a death sentence has been imposed; and

3 “(ii) includes all proceedings filed in
4 connection with the case, including trial,
5 appellate, and Federal and State post-con-
6 viction proceedings;

7 “(B) the term ‘defense services’ includes—

8 “(i) recruitment of counsel;

9 “(ii) training of counsel;

10 “(iii) legal and administrative support
11 and assistance to counsel;

12 “(iv) direct representation of defend-
13 ants, if the availability of other qualified
14 counsel is inadequate to meet the need in
15 the jurisdiction served by the grant recipi-
16 ent; and

17 “(v) investigative, expert, or other
18 services necessary for adequate representa-
19 tion; and

20 “(C) the term ‘Director’ means the Direc-
21 tor of the Administrative Office of the United
22 States Courts.

23 “(2) GRANT AWARD AND CONTRACT AUTHOR-
24 ITY.—Notwithstanding subsection (g), the Director
25 shall award grants to, or enter into contracts with,

1 public agencies or private nonprofit organizations for
2 the purpose of providing defense services in capital
3 cases.

4 “(3) PURPOSES.—Grants and contracts award-
5 ed under this subsection shall be used in connection
6 with capital cases in the jurisdiction of the grant re-
7 cipient for 1 or more of the following purposes:

8 “(A) Enhancing the availability, com-
9 petence, and prompt assignment of counsel.

10 “(B) Encouraging continuity of represen-
11 tation between Federal and State proceedings.

12 “(C) Decreasing the cost of providing
13 qualified counsel.

14 “(D) Increasing the efficiency with which
15 such cases are resolved.

16 “(4) GUIDELINES.—The Director, in consulta-
17 tion with the Judicial Conference of the United
18 States, shall develop guidelines to ensure that de-
19 fense services provided by recipients of grants and
20 contracts awarded under this subsection are con-
21 sistent with applicable legal and ethical proscriptions
22 governing the duties of counsel in capital cases.

23 “(5) CONSULTATION.—In awarding grants and
24 contracts under this subsection, the Director shall
25 consult with representatives of the highest State

1 court, the organized bar, and the defense bar of the
2 jurisdiction to be served by the recipient of the grant
3 or contract.”

4 **TITLE III—COMPENSATING THE** 5 **UNJUSTLY CONDEMNED**

6 **SEC. 301. INCREASED COMPENSATION IN FEDERAL CASES.**

7 Section 2513 of title 28, United States Code, is
8 amended by striking subsection (e) and inserting the fol-
9 lowing:

10 “(e) DAMAGES.—

11 “(1) IN GENERAL.—The amount of damages
12 awarded in an action described in subsection (a)
13 shall not exceed \$50,000 for each 12-month period
14 of incarceration, except that a plaintiff who was un-
15 justly sentenced to death may be awarded not more
16 than \$100,000 for each 12-month period of incarcer-
17 ation.

18 “(2) FACTORS FOR CONSIDERATION IN ASSESS-
19 ING DAMAGES.—In assessing damages in an action
20 described in subsection (a), the court shall
21 consider—

22 “(A) the circumstances surrounding the
23 unjust conviction of the plaintiff, including any
24 misconduct by officers or employees of the Fed-
25 eral Government;

1 “(B) the length and conditions of the un-
2 just incarceration of the plaintiff; and

3 “(C) the family circumstances, loss of
4 wages, and pain and suffering of the plaintiff.”.

5 **SEC. 302. COMPENSATION IN STATE DEATH PENALTY**
6 **CASES.**

7 (a) **CRIMINAL JUSTICE FACILITY CONSTRUCTION**

8 **GRANT PROGRAM.**—Section 603(a) of title I of the Omni-

9 bus Crime Control and Safe Streets Act of 1968 (42

10 U.S.C. 3769b(a)) is amended—

11 (1) in paragraph (5), by striking “and” at the
12 end;

13 (2) in paragraph (6), by striking the period at
14 the end and inserting “; and”; and

15 (3) by adding at the end the following:

16 “(7) reasonable assurance that the applicant, or
17 the State in which the applicant is located—

18 “(A) does not prescribe, authorize, or per-
19 mit the penalty of death for any offense; or

20 “(B)(i) has established and maintains an
21 effective procedure by which any person un-
22 justly convicted of an offense against the State
23 and sentenced to death may be awarded reason-
24 able damages upon substantial proof that the

1 person did not commit any of the acts with
2 which the person was charged; and

3 “(ii)(I) the conviction of that person was
4 reversed or set aside on the ground that the
5 person was not guilty of the offense or offenses
6 of which the person was convicted;

7 “(II) the person was found not guilty of
8 such offense or offenses on new trial or rehear-
9 ing; or

10 “(III) the person was pardoned upon the
11 stated ground of innocence and unjust convic-
12 tion.”

13 (b) EFFECTIVE DATE.—The amendments made by
14 this section shall apply with respect to any application
15 submitted on or after the date that is 1 year after the
16 date of enactment of this Act.

17 **TITLE IV—MISCELLANEOUS** 18 **PROVISIONS**

19 **SEC. 401. ACCOMMODATION OF STATE INTERESTS IN FED-** 20 **ERAL DEATH PENALTY PROSECUTIONS.**

21 (a) RECOGNITION OF STATE INTERESTS.—Chapter
22 228 of title 18, United States Code, is amended by adding
23 at the end the following:

1 **“§ 3599. Accommodation of State interests; certifi-**
2 **cation requirement**

3 “(a) IN GENERAL.—Notwithstanding any other pro-
4 vision of law, the Government shall not seek the death
5 penalty in any case initially brought before a district court
6 of the United States that sits in a State that does not
7 prescribe, authorize, or permit the imposition of such pen-
8 alty for the alleged conduct, except upon the certification
9 in writing of the Attorney General or the designee of the
10 Attorney General that—

11 “(1) the State does not have jurisdiction or re-
12 fuses to assume jurisdiction over the defendant with
13 respect to the alleged conduct;

14 “(2) the State has requested that the Federal
15 Government assume jurisdiction; or

16 “(3) the offense charged is an offense described
17 in section 32, 229, 351, 794, 1091, 1114, 1118,
18 1203, 1751; 1992, 2340A, or 2381, or chapter
19 113B.

20 “(b) “STATE DEFINED.—In this section, the term
21 ‘State’ means each of the several States of the United
22 States, the District of Columbia, and the territories and
23 possessions of the United States.”

1 (b) TECHNICAL AND CONFORMING AMENDMENT.—

2 The analysis for chapter 228 of title 18, United States
3 Code, is amended by adding at the end the following:

“3599. Accommodation of State interests; certification requirement.”.

4 **SEC. 402. ALTERNATIVE OF LIFE IMPRISONMENT WITHOUT**
5 **POSSIBILITY OF RELEASE.**

6 Section 408(l) of the Controlled Substances Act (21
7 U.S.C. 848(l)), is amended by striking the first 2 sen-
8 tences and inserting the following: “Upon a recommenda-
9 tion under subsection (k) that the defendant should be
10 sentenced to death or life imprisonment without possibility
11 of release, the court shall sentence the defendant accord-
12 ingly. Otherwise, the court shall impose any lesser sen-
13 tence that is authorized by law.”.

14 **SEC. 403. RIGHT TO AN INFORMED JURY.**

15 (a) ADDITIONAL REQUIREMENTS.—Section 20105 of
16 the Violent Crime Control and Law Enforcement Act of
17 1994 (42 U.S.C. 13705) is amended by striking subsection
18 (b) and inserting the following:

19 “(b) ADDITIONAL REQUIREMENTS.—To be eligible to
20 receive a grant under section 20103 or 20104, a State
21 shall provide assurances to the Attorney General that—

22 “(1) the State has implemented policies that
23 provide for the recognition of the rights and needs
24 of crime victims; and

1 “(2) in any capital case in which the jury has
2 a role in determining the sentence imposed on the
3 defendant, the court, at the request of the defend-
4 ant, shall inform the jury of all statutorily author-
5 ized sentencing options in the particular case, in-
6 cluding applicable parole eligibility rules and
7 terms.”.

8 (b) **EFFECTIVE DATE.**—The amendments made by
9 this section shall apply with respect to any application for
10 a grant under section 20103 or 20104 of the Violent
11 Crime Control and Law Enforcement Act of 1994 (42
12 U.S.C. 13703; 13704) that is submitted on or after the
13 date that is 1 year after the date of enactment of this
14 Act.

15 **SEC. 404. ANNUAL REPORTS.**

16 (a) **REPORT.**—Not later than 2 years after the date
17 of enactment of this Act, and annually thereafter, the At-
18 torney General shall prepare and transmit to Congress a
19 report concerning the administration of capital punish-
20 ment laws by the Federal Government and the States.

21 (b) **REPORT ELEMENTS.**—The report required under
22 subsection (a) shall include substantially the same cat-
23 egories of information as are included in the Bureau of
24 Justice Statistics Bulletin entitled “Capital Punishment

1 1998" (December 1999, NCJ 179012), and the following
2 additional categories of information:

3 (1) The percentage of death-eligible cases in
4 which a death sentence is sought, and the percent-
5 age in which it is imposed.

6 (2) The race of the defendants in death-eligible
7 cases, including death-eligible cases in which a death
8 sentence is not sought, and the race of the victims.

9 (3) An analysis of the effect of *Witherspoon v.*
10 *Illinois*, 391 U.S. 510 (1968), and its progeny, on
11 the composition of juries in capital cases, including
12 the racial composition of such juries, and on the ex-
13 clusion of otherwise eligible and available jurors
14 from such cases.

15 (4) An analysis of the effect of peremptory
16 challenges, by the prosecution and defense respec-
17 tively, on the composition of juries in capital cases,
18 including the racial composition of such juries, and
19 on the exclusion of otherwise eligible and available
20 jurors from such cases.

21 (5) The percentage of capital cases in which life
22 without parole is available as an alternative to a
23 death sentence, and the sentences imposed in such
24 cases.

1 (6) The percentage of capital cases in which life
2 without parole is not available as an alternative to
3 a death sentence, and the sentences imposed in such
4 cases.

5 (7) The percentage of capital cases in which
6 counsel is retained by the defendant, and the per-
7 centage in which counsel is appointed by the court.

8 (8) A comparative analysis of systems for ap-
9 pointing counsel in capital cases in different States.

10 (9) A State-by-State analysis of the rates of
11 compensation paid in capital cases to appointed
12 counsel and their support staffs.

13 (10) The percentage of cases in which a death
14 sentence or a conviction underlying a death sentence
15 is vacated, reversed, or set aside, and the reasons
16 therefore.

17 (c) PUBLIC DISCLOSURE.—The Attorney General or
18 the Director of the Bureau of Justice Assistance, as ap-
19 propriate, shall ensure that the reports referred to in sub-
20 section (a) are—

21 (1) distributed to national print and broadcast
22 media; and

23 (2) posted on an Internet website maintained
24 by the Department of Justice.

1 **SEC. 405. DISCRETIONARY APPELLATE REVIEW.**

2 Section 2254(c) of title 28, United States Code, is
3 amended—

4 (1) by inserting “(1)” after “(c)”; and

5 (2) by adding at the end the following:

6 “(2) For purposes of paragraph (1), if the highest
7 court of a State has discretion to decline appellate review
8 of a case or a claim, a petition asking that court to enter-
9 tain a case or a claim is not an available State court proce-
10 dure.”

11 **SEC. 406. SENSE OF THE SENATE REGARDING THE EXECU-**
12 **TION OF JUVENILE OFFENDERS AND THE**
13 **MENTALLY RETARDED.**

14 It is the sense of the Senate that the death penalty
15 is disproportionate and offends contemporary standards of
16 decency when applied to a person who is mentally retarded
17 or who had not attained the age of 18 years at the time
18 of the offense.

○

THE WHITE HOUSE
WASHINGTON

DOMESTIC POLICY COUNCIL

FACSIMILE FOR: Bruce Reed / Carney

DATE: _____

TELEPHONE: _____

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NUMBER OF PAGES (INCLUDING COVER): 2

COMMENTS: _____

02/14/2000 MON 00:10 FAX

Talking Points on Federal Death Penalty

2-14-00

Draft

To
Leanne
Shimabukuro
x67028
1 of 1
Crime -
Death
Penalty

Is there a moratorium on the federal death penalty? Is anyone considering placing a moratorium on the federal death penalty?

We do not believe there is a need for a moratorium on the federal death penalty at this time. Because it's been close to 40 years since a federal death row inmate has been executed, we are engaged in a process of ensuring that appropriate guidelines and procedures exist for last-minute requests for clemency. [Those procedures will provide individual prisoners on death row the opportunity to raise arguments relevant to whether the death penalty is appropriate in their individual cases.] There is, however, no moratorium in place.

What is the "racial disparity review"? Could it lead to legislation?

It's a gathering of data on the federal death penalty that is conducted periodically as part of the Justice Department's ongoing process of ensuring the federal death penalty is administered fairly.

Are you going to respond to Senator Feingold's letter?

Yes, of course. But, as we've indicated before, we do not believe a moratorium on the federal death penalty to be necessary or appropriate at this time.

What do you think of Leahy's bill?

We would support any legislation that helps guarantee that the death penalty is implemented fairly. We have not, however, had a chance to review Senator Leahy's bill carefully enough to comment on it at this point.

Basic Statistics on Federal Death Row:

Currently, there are 20 inmates on federal death row. There are 7 inmates on death row in the military justice system. (For your information, of the 20 who are on death row in the federal system, 14 are African-American, 4 are Caucasian, 1 is Hispanic, and 1 is Asian.)

The last time a federal prisoner was executed was 1963.

Draft

THE WHITE HOUSE

7.02.00

Bruce Reed —

See the President's note on
an intelligence piece this week.
Is there more we can / should
do on gun exports?

Jaddy

← Leanne —
Any ideas?

BR

(The note was
classified.)

Crime -
Death
Penalty

Charges of Bias Challenge U.S. Death Penalty

By RAYMOND BONNER

WASHINGTON, June 23 — In the current debate over the death penalty, the focus has been largely on the states, primarily Illinois, whose governor has declared a moratorium, and Texas, which puts more inmates to death than most countries and whose governor, of course, is running for president.

This has allowed the Clinton administration to remain largely above the fray because there has not been a federal execution in nearly 40 years. Although Vice President Al Gore favors the death penalty, he has not faced the tough questioning that Gov. George W. Bush has, and Mr. Gore has said little other than that he does not see the need for a federal moratorium.

But the case of a condemned migrant worker may soon call attention to the federal capital punishment system.

Juan Raul Garza, a migrant farm worker and high school dropout who was convicted seven years ago of marijuana smuggling and three drug-related murders in Brownsville, Tex., is scheduled to be executed on Aug. 5. It would be the first federal execution since John F. Kennedy was president, when a man was put to death by hanging in Iowa for kidnapping and murder.

The Garza case raises broad and, for many, troubling issues about the application of the federal death penalty, most specifically, whether race and geography determine who is sentenced to die at the hands of the United States government.

Seventeen of the 21 federal prisoners facing the death penalty are members of minorities, and federal prosecutors in a dozen Southern states have accounted for more than half of the federal cases in which the death penalty has been sought.

Mr. Garza's lawyers have exhausted their legal appeals and are turning to the court of public opinion and politics. They have enlisted the American Bar Association, which in a highly unusual move last month, called on President Clinton to declare a moratorium on federal executions.

Mr. Garza wants to ask the president for clemency. But his lawyers said they are facing some formidable handicaps.

Although the Constitution gives presidents absolute authority to grant clemency and presidents could do so on their own at any time, they rarely do.

And while the procedure for seeking clemency in noncapital cases is

clear, the procedures in capital cases are still being drafted, Mr. Clinton said in February.

The absence of clear guidelines, Mr. Garza's lawyers believe, severely hampers their ability to make an effective case for clemency.

"We're really between a rock and a hard place," said Gregory Wiercioch, a lawyer with the Texas Defender Service, who has been representing Mr. Garza in his appeals. "A lot of the information we want to put in the petition, we don't have. It's in the hands of the government."

This included a government study on whether race is a factor in applying the death penalty in federal cases. The Justice Department has turned down Mr. Garza's request for the study or the raw data that the department has gathered. A department spokesman said the study had not been completed and the data would not be made public.

Mr. Garza's lawyers have also requested information on how the Justice Department has handled other capital cases. There are a dozen cases like Mr. Garza's — multiple drug-related murders — in which federal prosecutors did not seek the death penalty, including six in New York, Mr. Wiercioch said.

He wants to know why the death penalty was sought in Mr. Garza's case, and he believes race was a factor. Of the 27 defendants against whom the Bush administration sought the death penalty for drug-related killings, including Mr. Garza who was convicted after Mr. Bush left office, 23 were African-American or Hispanic, Mr. Wiercioch said.

In 1994, when Congress was considering sweeping death penalty legislation, Attorney General Janet Reno said in a letter to a congressman who opposed the death penalty that the department was developing procedures that would allow for the disclosure of its capital prosecution decisions "so that the public can review and understand the basis for such decisions."

A Justice Department official said this week that the procedures had not yet been adopted.

After the Supreme Court declared in 1972 that the death penalty, as it was then being applied, was unconstitutional, states quickly adopted laws that the court upheld. But Congress spent the next 16 years struggling to find a way around the court's concerns. In 1988, Congress adopted what has become known as the "drug kingpin statute," which allows for the death penalty against an individual who commits murder as part of a larger drug enterprise.

Six years later, in 1994, Congress enacted the Federal Death Penalty

Act, which expanded the crimes for which a defendant could be executed. They included the assassination of the president, large-scale drug trafficking even when no one is killed, drive-by killings, sexual abuse resulting in death and destruction of a plane, train or motor vehicle resulting in death.

Federal law requires the appointment of two lawyers for an indigent defendant facing the death penalty,

1/2

sions at Bridgton Academy, a boys' school in Maine just for post-graduates. "Whether it's starting kindergarten or starting college, a lot of them need that extra year to focus."

While it is still not common, a few students are choosing a post-graduate program even after being admitted to the college of their choice: Bryson Grover, for example, de-

ferred admission to the University of Virginia for a year so he could attend Deerfield Academy in Massachusetts.

"Every one of my siblings told me that when they got to college, they didn't know how to study, they didn't know how to sit down and organize their time," said Mr. Grover, who feels uncertain about his college readiness, despite completing a slew of advanced placement courses at his Virginia high school. "Deerfield has dynamite facilities, like an awesome observatory. U. Va. will hold a place for me, and I'll still have four years for the college experience. I don't see any downside."

For many post-graduates, though, the programs are more a fallback than a positive choice.

"I'd applied to four schools where I thought I had a pretty good chance — Amherst, Williams, Middlebury and Colby — and I didn't get in anywhere," said Jared Passmore, a football star at his Massachusetts high school who spent this year at Northfield Mount Hermon. "It was pretty awful. In high school I could get B's and a couple A's without much work, and colleges saw that as not applying myself, which was true. And I used to have this tendency, when I was taking standardized tests, and filling in all those ovals, to start thinking about football plays, and fill in the one in the position I needed to make the play."

As a post-graduate, Mr. Passmore worked hard, improved his College Board scores and won admission to Swarthmore, one of the nation's most competitive colleges.

"There's absolutely no way I could have gotten into Swarthmore without this year," he said. "It was really awkward at the beginning. My friends were going off to M.I.T. and Harvard. And I'm at this place where they lock the dorms at 10:30 and turn the phones off from 8 p.m. to 10 for study hall. But I'm very glad I did it. I think I've matured as a person, and I think it helped colleges see me as someone who's serious about what he wants to do in life."

Like colleges, post-graduate programs vary widely. Some, like Exeter, are known for rigorous academic standards, while others are celebrated for their athletics: Dozens of Division I college coaches come to watch promising players at schools like Maine Central Institute, and New Hampton in New Hampshire.

"Usually, there's two groups of post-graduates on the team," said Jamie Arsenault, the basketball coach at New Hampton. "There are those that would go to college if they could, but they don't qualify academically. And there's another group that come from small schools, where they haven't been seen, so they need the exposure."

Whether at New Hampton or Exeter, most post-graduate programs are small, in part because having too many outstanding older athletes — by their very nature, ringers in high school competition — inevitably keeps some home-grown students who played throughout high school from making varsity; many schools have limits on how many post-graduates can play on a team.

And as more musicians and actors have been drawn to the programs, similar concerns are beginning to arise about featured roles in school plays or chamber ensembles.

Often, students are referred to a prep school by a college admissions officer who thinks they could benefit from a post-graduate year.

"When I applied to Wesleyan, the director of admissions suggested that I would be a good post-graduate candidate," said Angelique Owanga, who moved to Atlanta from Zaire three years ago and will be a post-grad this year at Northfield Mount Hermon. "When I got into the program, with financial aid, I thought it would be right for me. I had a good grade point average but my SAT's were not as good as I expected, and I want to do better."

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at least one of whom must be experienced in capital cases. As a result, claims of ineffective assistance of counsel do not mark the federal system, as they do many states, such as Texas, where defendants have been represented by lawyers who have slept through trials or have otherwise displayed gross incompetence.

The principal concerns about the federal death penalty are whether it is being applied fairly and uniformly. Since 1988, the Justice Department

Concerns about whether a law is being applied fairly.

has allowed the death penalty to be sought against 199 defendants, according to the Federal Death Penalty Resource Counsel in Columbia, S.C. Seventy-six percent of those defendants are minorities, and 52 percent are African-Americans.

Of the 21 federal inmates currently facing execution — including Timothy J. McVeigh, who was convicted in the Oklahoma City bombings — about 62 percent, or 13, are African-Americans. This is a greater percentage of blacks on death row than in all but four states: Maryland, Louisiana, Illinois and Pennsylvania. In Texas, by contrast, 41 percent of the death row population is black, and in Alabama, 46 percent, according to the Death Penalty Information Center, a private organization in Washington that opposes the death penalty.

"If some back county in the South had the same kind of numbers, the

Department of Justice would be down here investigating, handing out indictments," Mr. Wierciuch said.

In an interview last week, Mr. Gore said, "The question of racial disparity is right now being investigated thoroughly within the Justice Department."

He added that the factors that led Columbia University researchers to raise questions about the death penalty in a recent study, like prosecutorial misconduct and incompetent defense counsel, "are the kinds of mistakes that could conceivably have a connection to racial attitudes in the aggregate."

In his letter to Mr. Clinton on May 2 calling for a federal moratorium, the president of the American Bar Association, William G. Paul of Oklahoma City, urged a "comprehensive examination of the federal death penalty that would not be limited to the question of racial discrimination." The bar association has not taken a position for or against the death penalty.

There are glaring geographic disparities in the application of the federal death penalty law.

Fourteen of the 21 defendants on federal death row, in Terre Haute, Ind., are from three states — Texas, 6; Virginia, 4, and Missouri, 4.

Under a system put in place by Ms. Reno, United States attorneys who file charges in which the death penalty is a possibility are required to send a memorandum to the Justice Department for review by a four-member committee, the Capital Case Review Committee. The system is intended to ensure uniformity and fairness in the application of the death penalty.

Yet, from 1994 to 1999, one-third of the United States attorney's offices did not file a capital prosecution re-

quest, a former member of the review committee, Rory K. Little, wrote in an article in the *Fordham Urban Law Journal* in March 1999.

Mr. Little noted that federal prosecutors have considerable discretion but he said this suggested that the federal death penalty was not being applied uniformly.

"It is difficult to believe that not a single murder in those 11 states since 1994 was a possible candidate for federal prosecution," Mr. Little wrote in the article, "The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role." He went on: "There are, sadly, gang-related killings in every urban center in America, and drug-related killings occur not only in Miami, but also in urban centers such as New York, San Francisco, Chicago and Seattle."

In a telephone interview, Mr. Little, a former federal prosecutor who is now a professor of criminal law and legal ethics at Hastings College of Law in San Francisco, said he was not an "emotional opponent" of the death penalty, but that he had "grave misgivings" about the way it is administered by the states.

On the federal level, he said, further study was needed before a judgment could be made. He added: "In my view, it isn't fair that if somebody who commits a bank robbery and a guard dies is going to get the death penalty if it happened in Texas, but someone who does the same thing in Massachusetts isn't."

He said he was aware of a case in Missouri that was very similar to Mr. Garza's in which the government did not seek the death penalty.

Mr. Garza was accused of being a major drug dealer and convicted of smuggling more than 1,000 kilos of marijuana from Mexico between 1982 and 1992, as well as of three murders.

At the punishment phase of Mr. Garza's trial, prosecutors introduced testimony that Mr. Garza committed four murders in Mexico. But he has never been prosecuted for the murders.

"In the history of the modern death penalty, we are unaware of any case where prosecutors introduce evidence of unadjudicated foreign crimes at the penalty phase," said Bruce W. Gilchrist, a lawyer with Hogan & Hartson, who has joined Mr. Garza's defense team pro bono.

Federal courts have rejected the claim that the testimony violated Mr. Garza's constitutional protections. But the Inter-American Commission on Human Rights, a body of the Organization of American States, is investigating whether it violated the American Declaration of the Rights and Duties of Man, which the United States has signed.

Pending the outcome of that investigation, the organization has called on the Clinton administration to delay Mr. Garza's execution.

In February, Senator Russell D. Feingold, Democrat of Wisconsin, sent a letter to the president and Ms. Reno asking them to suspend federal executions, and he has introduced legislation calling for a national moratorium on the death penalty.

2/2

Women Are Defaced by Acid And Bengali Society Is Torn

Al

By BARRY BEARAK

GOSARIGAON, Bangladesh — The village elders met under a litchi tree, applying their collective wisdom to put a value on Peyara Begum's grotesquely ruined face.

The crime was hideous, they soberly agreed. A young man had become obsessed with her, but she was married and he was turned away. He took his revenge with sulfuric acid, to erase the beauty that had once enchanted him and to empty her life of happiness.

Her cheeks melted. Her right eye was blinded and hollowed like a crater.

But what is done cannot be undone, the elders said. The attacker had been arrested. And his uncle, a respected religious man, had long pressed them to hold a shalesh — or informal court — to mediate between the parties as is the tradition. He was willing to pay the victim's family a reasonable sum to atone for the wrong and buy his nephew's freedom.

So when the seven elders met in April, taking an unusually long time, they tried hard to be fair. Some who

had seen the horrible disfigurement thought \$10,000 a proper settlement. But others wondered aloud: his had been a crime of wild passion. Do a man's emotions go so wild unless a woman has done something improper? To them, \$1,000 seemed enough.

And so the arguing went on for three hours.

In Bangladesh, such stories have become plentiful. In the 12 months through March 1999, 174 acid attacks were reported. Most often, the culprit is a spurned suitor.

No one is sure why this crime occurs here at such a high pace, for this nation is not so different from many others in its poverty or its treatment of women. Inexplicably, some aberrant ripple is moving through the countryside. Nariphokko, a woman's rights group, has kept statistics: 80 attacks in 1996, 117 in 1997, 130 in 1998.

The horror for the victim is overwhelming. "It felt like someone had poured boiling water on me," said Bilkis Khatun, a 13-year-old girl attacked as she slept. Her right ear is now only a nub. "My mother and father rushed in. They thought I was having a bad dream, but when they saw my face burning, they shrieked."

Some victims die, but that seems unintended. The purpose of the attackers is to manufacture a living hell, and in that there is most often fulfillment.

Survivors are left not only with their deformities but also with the

peculiarities of village reckoning. One young woman was forced by her parents to marry her attacker, solving the urgent matter of who would support a woman unwanted as a bride. Another was forbidden to come home until she allowed her husband to take a second wife.

"The man who did this to me is in jail," said Peyara Begum, her eyes behind dark glasses that conceal her worst scars. "But I am in jail, too, and for me there is no door, no escape, nothing."

Early in April, she worried that there would be no justice as well. The crime has a maximum penalty of death, but policemen and prosecutors are often corrupt. Most attackers are never arrested; most of the arrested are never tried. No one has ever been executed.

Fifteen months had passed since the attack. A 20-year-old man, Rakimuddin, who like many here uses only one name, is the accused. Peyara Begum's husband, Afsaruddin, 38, had been forced to bribe prosecutors before they would pursue the case. Medical bills had already left the family destitute. He and his brothers had to sell off their legacy, a parcel of land.

And now, to Peyara Begum's disbelief, the elders were agreeing to a shalesh, suggesting a bargain could be struck. This was unthinkable, she said. It would seem like forgiveness.

Peyara Begum's village is Gosarigaon, 40 miles north of Dhaka. Her home is made of tin and mud, in a clearing surrounded by mangoes, banyans and mahogany. Rice paddies reach to the horizon.

The most respected man in the area is Moti Master, 74, a former school principal whose stringy white beard goes well with his reputation for wisdom. He had reluctantly decided to intercede. Usually, a shalesh settles property disputes and petty grievances. Brutal assault is not on its agenda.

But Moti Master knew both the families and suggested that each could benefit from a compromise. He said it surprised him when Mr. Afsaruddin — a quiet, well-liked man who sells cooked rice along the roadside — responded with uncharacteristic boldness.

"Haven't you seen my wife's face?" he said with anger. "My family has been destroyed. This is not a matter about money."

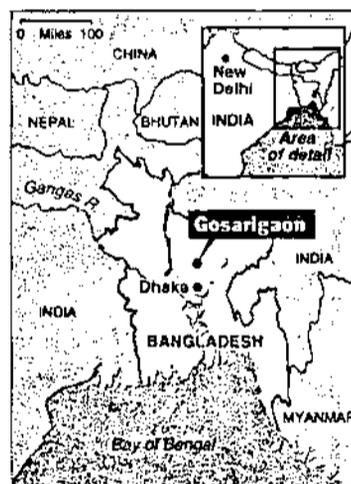
But one of Mr. Afsaruddin's brothers was more open to settling. He signed a paper for the family, and Moti Master said this was enough to convene the elders. No outcome could be imposed on Mr. Afsaruddin,

but Moti Master said he felt confident that Mr. Afsaruddin would respect the decision of his betters.

"My husband loves me very much," Peyara Begum said during these fretful days. "But he is not a strong man, and I am afraid the influential people can make him agree to a deal."

Since the attack, she had returned to the village only once. Her 8-year-old son, Awiad, had been struck with errant splashes of the acid. His burns were on his arm, chest and stomach. The two were living in a house for acid victims recovering from surgery, the rent paid by a charity.

There, secreted away, 20 women and the boy shared their common grief, safe from insults and pity. Anger sometimes rose in a chorus. Just once, they said, they would like to ask



The New York Times

Mediators in Gosarigaon debated punishment for an attacker.

some man to marry them and then throw acid in his face when he said no. Maybe then the world would understand.

Most often, though, melancholy and guilt held sway. Bangladesh is an Islamic country, and the victims asked themselves what they had done to offend Allah.

Learned women from the rights groups of Dhaka are inclined to talk of "frustrated gender relations," reproaching a male-dominated, conservative society where boys and girls are not free to meet and get acquainted. But the disfigured women are more likely to reach quite a different conclusion, saying their nation has grown too permissive and they would have been better off veiled, with their flesh out of sight.

"Now I believe in strict purdah," Peyara Begum said. "If I had been kept under the veil, Rakim would not

Crime -
Death Penalty -

Clinton Halts Execution Until Federal Clemency Policy Is Set

Delay Could Ease Potential Campaign Dilemma for Gore

By CHARLES BARINGTON
and BILL MILLER
Washington Post Staff Writers

The White House confirmed yesterday that it will postpone next month's scheduled execution of a Hispanic man convicted in Texas, a decision that could remove a troublesome issue for Vice President Gore as some of his allies continue to criticize Gov. George W. Bush's record in applying the death penalty in Texas.

Administration officials said President Clinton will postpone the scheduled Aug. 5 federal execution of convicted drug kingpin Juan Raul Garza until the Justice Department finishes drafting guidelines for seek-

ing presidential clemency in such cases.

Garza, convicted of ordering the murder of three people in the course of his drug-smuggling enterprise, would be the first federal inmate to be executed in 37 years. The vast majority of capital cases are handled by state courts.

White House spokesman Jake Siewert said Clinton "wants to make sure that Mr. Garza has a full opportunity to submit a request for clemency" under the new guidelines. "We expect the president will want to take some time and make sure that he has a full opportunity to [do so]."

Currently, there are no guidelines for a federal death row inmate in-

mate who is seeking clemency from the president.

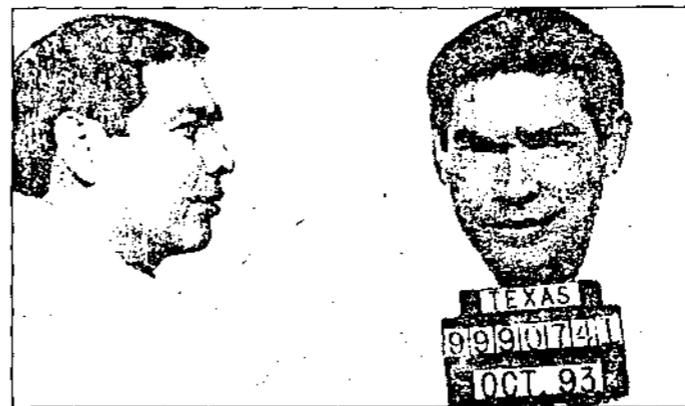
Several prominent Republicans yesterday said a review of clemency procedures in federal death cases may be appropriate. But they noted somewhat ruefully that the postponement's timing could rid Gore of an inconvenient issue during the upcoming presidential campaign, while some of his supporters are hammering Bush, the presumptive GOP nominee, on the death penalty issue.

Texas has executed 135 inmates under Bush's administration. Bush says he's confident that no innocent person has been put to death during his tenure. But a number of recent reports have questioned the quality of legal representation and other constitutional safeguards afforded Texas's capital defendants.

Garza, 43, is among 21 people awaiting federal execution. Seventeen of them are black, Asian or Hispanic. Garza's lawyers plan to argue that the federal death penalty has been unevenly applied, heavily targeting minorities. The Justice Department is wrapping up its own statistical study of federal death cases, commissioned in February amid concerns about racial disparities.

Bruce W. Gilchrist, a Washington lawyer for Garza, said his client's clemency-request will hinge on a "public sense of fairness" about the death penalty's application.

Death penalty opponents have complained about racial biases ever since Congress reinstated the feder-



TEXAS DEPARTMENT OF CORRECTIONS PHOTO VIA AGENCE FRANCE PRESSE

Juan Raul Garza, sentenced to death on a drug-related murder conviction, could become the first federal inmate executed since 1963.

al death penalty in 1988. At first the law covered only certain drug crimes. But in 1994 it was expanded to include a broader reach of offenses.

Clinton and Gore support the death penalty and therefore have been cautious in making comments that might be seen as critical of Bush's record.

Speaking with reporters yesterday near Pittsburgh, Gore said he supported the postponement of Garza's execution, but not the requests by some organizations to stay all death sentences until deeper studies can be made of procedures in capital cases.

"I have not seen evidence that to me would justify a nationwide moratorium," Gore said. "If such evidence emerges, I would not hesitate to support that step."

But others have been less reticent

to criticize Bush.

Sen. John F. Kerry (D-Mass.), among those Gore is considering as a running mate, this week said the recent execution of Texas inmate Gary Graham "underscores how Bush has turned a blind eye to justice, risking lives of wrongly accused death row inmates." Several organizations questioned the evidence that led to Graham's conviction on murder charges.

Bush's campaign declined to comment directly on the Garza postponement decision. Rep. Asa Hutchinson, an Arkansas Republican and frequent critic of Clinton's, said in an interview yesterday: "I don't think there's anything unusual about an initial delay when you're looking at the first federal death penalty being carried out in more than 30 years. . . . But I think the question is how long will the delay

be. The most important thing is that politics not be factored into this at all."

Siewert declined to say how long the postponement might last. Asked if the White House was trying to delay the Garza execution issue beyond the November election, he replied: "No, this is an effort to establish clear guidelines that govern capital cases that this prisoner will have an opportunity—and other prisoners will have an opportunity—to seek executive clemency through well-established guidelines."

A Justice Department source said the new clemency procedures would likely be established within two weeks. They could call for deciding an inmate's clemency request within 90 or 120 days. Under the longer time frame, a final decision on Garza's fate might come after the November election.

Democratic leaders drafting their party's platform this week in St. Louis say it will continue to support the death penalty but will call for DNA testing of defendants whenever appropriate and for the hiring of fully qualified defense lawyers.

Debate about capital punishment has accelerated throughout the year. Illinois Gov. George Ryan (R) imposed a moratorium on executions in January after 13 death row inmates were exonerated. Since then, Sen. Russell Feingold (D-Wis.) and others have urged Clinton to impose a moratorium on federal executions.

Staff writers Ceci Connolly and Thomas B. Edsall contributed to this report.

The Washington Post
SATURDAY, JULY 8, 2000

On summer nights in Marion County, there is not much to do. Columbia, the county seat located a two-hour drive from New Orleans, has only about 7,000 people. The teenagers from the surrounding countryside do what restless kids have done for decades—gather in a parking lot, come and go, sit on car hoods. Here, the designated spot was the lot next to the Big K gas station on Highway 98.

Roger Johnson, who works at a tire distribution company, considered himself his brother's best friend. They often gravitated to the Big K. On the Saturday after Raynard died, the two had planned to attend a festival in the park. "We knew a lot of girls would be there," Roger said with a smile.

"We didn't have what you'd call girlfriends," he said. "We didn't want anybody telling us what to do. We had a lot of friend-girls, though, and some of them were white. We would get stares sometimes."

Nothing can convince him his brother would have killed himself. "If something was bothering him, he would have told me. He was always telling me things."

The last time Roger saw Raynard was about 6:30 p.m. on June 16, less than three hours before he died. Roger's car was broken down, and Raynard gave him a ride into town in his 1979 Thunderbird.

"I said, 'All right, punk. See you later,'" Roger said.



Jackson says that Raynard Johnson's death reminds him of one of the more gruesome and notorious hate crimes in Mississippi's past.

"This thing in Kokomo smells a lot like Emmett Till," he said.

Emmett Till was a 14-year-old black youth from Chicago who was visiting his Mississippi cousins during the summer of 1955. On a dare, he reportedly wolf-whistled at a young married white woman who was tending a country grocery alone. Later, his body, with the face crushed and a gunshot wound in the head, was fished out of the Tallahatchie River. No one was ever arrested.

"There's a New South today, where blacks and whites live and work together—it's a very different South. And then there's an underbelly of the culture that never moved," Jackson said. "It's not just peculiar to Mississippi. It's a mistake to use Mississippi as a scape-

goat again."

The racial climate here is like that of many southern communities nowadays, where blacks and whites live side by side, attend school together and fish together in the many local creeks and rivers. But the line appears to be drawn at interracial dating, which is not common.

Interracial romance remains "the last great bogeyman, the last great taboo," in American race relations, said Mark Potok, spokesman

for the Southern Poverty Law Center in Montgomery, Ala., which monitors hate crimes. From its beginnings, the overriding purpose of the Ku Klux Klan, he pointed out, was to protect the chastity of white women.

Whether the Raynard Johnson case will live forever as another example of that sort of crime is unclear at this point. Jackson notes, for what it is worth, that the two young women who were such good friends of the Johnson brothers did

not attend Raynard's funeral, at which sobbing teenage mourners overflowed into the churchyard. The two women have not spoken to the news media since Raynard's death.

"This doesn't suggest that they did something—it does suggest that somebody might have put pressure on them," said Jackson, who helped conduct the funeral and whose Rainbow/PUSH Coalition has put up a \$10,000 reward and established a telephone hot line for information leading to arrests.

The FBI, which was called in at the family's request, has assigned an agent "who is very experienced in this type of matter" to work on the case, said Deborah Madden, spokeswoman for the FBI office in Jackson, Miss. After the agent completes his report, it will go to the civil rights division of the U.S. Department of Justice to determine whether a federal violation occurred, she said.

In the meantime, area residents are hoping the community's harmony will not be shattered forever.

"People live close together around here, they grew up together and they know each other," said the Rev. Barry Dickerson, pastor of the First United Methodist Church in Columbia, who recently met with black and white ministers to air the issue. "We want to find out the truth about what happened. We want to get to the bottom of it."

2/2

We're Not Executing the Innocent

Critique -
Death
Penalty

By PAUL G. CASSELL

On Monday avowed opponents of the death penalty caught the attention of Al Gore among others when they released a report purporting to demonstrate that the nation's capital punishment system is "collapsing under the weight of its own mistakes." Contrary to the headlines written by some gullible editors, however, the report proves nothing of the sort.

At one level, the report is a dog-bites-man story. It is well known that the Supreme Court has mandated a system of super due process for the death penalty. An obvious consequence of this extraordinary caution is that capital sentences are more likely to be reversed than lesser sentences are. The widely trumpeted statistic in the report—the 68% "error rate" in capital cases—might accordingly be viewed as a reassuring sign of the judiciary's circumspection before imposing the ultimate sanction.

Deceptive Factoids

The 68% factoid, however, is quite deceptive. For starters, it has nothing to do with "wrong man" mistakes—that is, cases in which an innocent person is convicted for a murder he did not commit. Indeed, missing from the media coverage was the most critical statistic: After reviewing 23 years of capital sentences, the study's authors (like other researchers) were unable to find a single case in which an innocent person was executed. Thus, the most important error rate—the rate of mistaken executions—is zero.

What, then, does the 68% "error rate" mean? It turns out to include any reversal of a capital sentence at any stage by appellate courts—even if those courts ultimately uphold the capital sentence. If an appellate court asks for additional findings from the trial court, the trial court complies, and the appellate court then affirms the capital sentence, the report finds not extraordinary due process but a mistake. Under such curious scorekeeping, the report can list 64 Florida postconviction cases as involving "serious errors," even though more than one-third of these cases ultimately resulted in a reimposed death sentence, and in not one of the Florida cases did a court ultimately overturn the murder conviction.

To add to this legerdemain, the study skews its sample with cases that are several decades old. The report skips the most recent five years of cases, with the

study period ostensibly covering 1973 to 1995. Even within that period, the report includes only cases that have been completely reviewed by state appellate courts. Eschewing pending cases knocks out one-fifth of the cases originally decided within that period, leaving a residual skewed toward the 1980s and even the 1970s.

During that period, the Supreme Court handed down a welter of decisions setting constitutional procedures for capital cases. In 1972 the court struck down all capital sentences in the country as involving too much discretion. When California, New York, North Carolina and other states responded with mandatory capital-punishment statutes, the court in 1976 struck

A new report says the capital-punishment system is filled with error. But the study is too biased to be trusted.

these down as too rigid. The several hundred capital sentences invalidated as a result of these two cases inflate the report's error totals. These decades-old reversals have no relevance to contemporary death-penalty issues. Studies focusing on more recent trends, such as a 1995 analysis by the Criminal Justice Legal Foundation, found that reversal rates have declined sharply as the law has settled.

The simplistic assumption underlying the report is that courts with the most reversals are the doing the best job of "error detection." Yet courts can find errors where none exist. About half of the report's data on California's 87% "error rate" comes from the tenure of former Chief Justice Rose Bird, whose keen eye found grounds for reversing nearly every one of the dozens of capital appeals brought to her court in the 1970s and early 1980s. Voters in 1986 threw out Bird and two of her like-minded colleagues, who had reversed at least 18 California death sentences for a purportedly defective jury instruction that the California Supreme Court has since authoritatively approved.

The report also relies on newspaper articles and secondhand sources for factual assertions to an extent not ordinarily found in academic research. This approach produces some jarring mistakes.

To cite one example, the study claims William Thompson's death sentence was set aside and a lesser sentence imposed. Not true. Thompson remains on death row in Florida today for beating Sally Ivester with a chain belt, ramming a chair leg and nightstick into her vagina and torturing her with lit cigarettes (among other depravities) before leaving her to bleed to death.

These obvious flaws in the report have gone largely unreported. The report was distributed to selected print and broadcast media nearly a week in advance of Monday's embargo date. This gave ample time to orchestrate favorable media publicity, which conveniently broke 24 hours before the Senate Judiciary Committee began hearings on capital-sentencing issues.

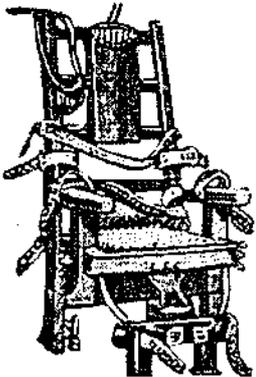
The report continues what has thus far been a glaringly one-sided national discussion of the risk of error in capital cases. Astonishingly, this debate has arisen when, contrary to urban legend, there is no credible example of any innocent person executed in this country under the modern death-penalty system. On the other hand, innocent people undoubtedly have died because of our mistakes in failing to execute.

Real Mistakes

Colleen Reed, among many others, deserves to be remembered in any discussion of our error rates. She was kidnapped, raped, tortured and finally murdered by Kenneth McDuff during the Christmas holidays in 1991. She would be alive today if McDuff had not narrowly escaped execution three times for two 1966 murders. His life was spared when the Supreme Court set aside death penalties in 1972, and he was paroled in 1989 because of prison overcrowding in Texas. After McDuff's release, Reed and at least eight other women died at his hands. Gov. George W. Bush approved McDuff's execution in 1998.

While no study has precisely quantified the risk from mistakenly failing to execute justly convicted murderers, it is undisputed that we extend extraordinarily generosity to murderers. According to the National Center for Policy Analysis, the average sentence for murder and non-negligent manslaughter is less than six years. The Bureau of Justice Statistics has found that of 52,000 inmates serving time for homicide, more than 800 had previously been convicted of murder. That sounds like a system collapsing under the weight of its own mistakes—and innocent people dying as a result.

Mr. Cassell is a professor of law at the University of Utah.



A Modern Family Celebration

By TUNKU VARADARAJAN

On Sunday, Alice, age 8, will bear down on my bed with a cup of coffee, overfull and scarcely potable. I shrink from it already: too much milk added to weak, lukewarm liquid, flecked with shoals of coffee sediment that swim upstream with every sip. Katherine, 10 years old, will make a slightly better job of the scrambled eggs and toast. She is sure to bring the newspapers, too, and a glass of orange juice—all part of the simple, zestful acts of homage that young children perform on Father's Day.

Later the girls, armed with cards and presents, will go out for a special lunch with their father—a big, juicy cheeseburger down the road, or pizza, perhaps, at Patsy's. I will stay at home, make myself a potent cup of coffee, read the newspapers, and bask in the sudden quiet of an apartment emptied of children. I am their stepfather.

My domestic situation is not rare or atypical. One in 10 children in the U.S. lives with a stepfather, so Alice and Katherine are part of quite a large platoon. They know other boys and girls who have stepfathers too, and I have met some of these brave men at school gatherings. Heads do not turn, nor tongues wag, at parent-teacher meetings, when I introduce myself to some little child's parent as "Katherine's stepfather" or "Alice's stepdad." Stepfatherhood is an increasingly normal—though not quite prosaic—condition in our society, where more than 50% of all marriages end in separation or divorce.

Father's Day, like Mother's Day, is an essentially spurious marker in the calendar, and no grown-up I know pays it much court. Children, however, set great store by ritual; for them, such "holidays," imbued with the gravitas of gift-giving, are occasions of import. As a result, children with stepfathers often find themselves in a world where ritual and reality sit awkwardly together—where they must suddenly, briefly, confront the conundrum of having "two daddies."

Children are particularly ruffled, paradoxically, in situations like ours: Their biological father lives down the block, and they enjoy a full, healthy and loving relationship with him. He has joint custody of the children, and all three of us—mother, stepdad and bio-dad—have evolved a kind of parental coalition to ensure that the kids have the sense of living happily, and securely, in two homes.

But children, being children, can have a rather picturesque sense of fair play. Alice, still young enough to be agitated by such issues, is always pained in the runup to Father's Day. "It's so unfair," she once pronounced, an indignant knit in her brow. "It's so unfair that they don't have a Stepfather's Day in America." Her older

sister, now too cool to say such things, shares silently in the mild consternation. Father's Day puts them on the spot in a way that they'd rather not be put. They never, in their daily lives, have to choose

between their father and me. Yet on Father's Day, they feel compelled to underline a difference. And this makes them flustered.

The most charming aspect of their discomfort—indeed, the most touching aspect of their approach to Father's Day—is that they feel bad for me. They believe, sincerely, that I'm missing out on a bond

that is basic, on something cardinal to "fatherhood." Built in to this reasoning is the unshakable belief that it is a privilege to have them as children. So, to compensate for my incomplete state, as well as to show me their fierce loyalty, they will bring me breakfast in bed. Iffy coffee. Scorched eggs. Plus orange juice—hard to destroy since it's poured straight from the carton. (Or is it?)

And each girl will give me the card she made for Father's Day, drawn on paper pulled from my fax machine. "To Tunku, our stepfather, on Father's Day. Hope you like the card."

Mr. Varadarajan is a senior editorial page writer at the Journal.



Averting Death Row Mistakes

Push for Execution Safeguards Grows On Capitol Hill

By HELEN DEWAR
Washington Post Staff Writer

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Propelled by the mounting national debate over capital punishment, a bipartisan drive to ensure that innocent people are not executed—including expanding access to DNA testing for convicted criminals—is gaining momentum on Capitol Hill.

For the first time in more than a decade, large numbers of lawmakers are pushing for safeguards against errors in imposing death sentences rather than working to impose the death penalty for more crimes, limit death row appeals and reduce delays in executions.

Evidence is growing that "a significant number of people sentenced to death in America in the late 20th century have been absolutely, undeniably innocent," Sen. Patrick J. Leahy (D-Vt.), a leading sponsor of one of the bills, told the Senate Judiciary Committee this week. "A system that works in one case out of three is not good enough."

Sen. Gordon Smith (Ore.), one of three Republican co-sponsors of Leahy's proposal, said some kind of death penalty legislation "has a very realistic chance of being passed, even this year."

All the major proposals that have been offered would provide for DNA testing, and Leahy's bill would also mandate a variety of other safeguards in federal criminal proceedings. These requirements would not be binding in state and local trials, where most death sentences are imposed, but states that did not follow the rules would lose federal money, usually a powerful inducement for compliance.

Although any new initiative faces a struggle in the waning days of this pre-

election session, the congressional push on capital punishment draws strength from a wave of second thoughts in state capitols across the country, prompted by the discovery of sentencing errors and reinforced by extensive media coverage of them.

DNA tests of physical evidence have figured in many of the reversals.

The reassessment started with the moratorium on executions that Illinois Gov. George Ryan (R) imposed in January after learning that his state had freed more death row inmates than it had executed in recent years.

Since then, other governors, including Texas's George W. Bush, the presumptive Republican presidential nominee, have ordered DNA testing that could establish a person's innocence, have delayed executions, have commuted sentences and have considered inquiries into the role of racial bias in determining sentences.

In light of such events, sponsors of the congressional initiatives predict that legislation to impose new capital punishment safeguards will be enacted next year if not this year.

"It's picked up a lot of steam ... but we're running out of time," said Rep. Ray LaHood (R-Ill.), who is sponsoring the Leahy-drafted measure in the House. "Realistically, we're probably looking at next year."

LaHood noted that both Bush and Vice President Gore, the presumptive Democratic nominee, have spoken positively of the legislation. Neither candidate has endorsed a specific proposal.

The most recent sign of new momentum came Tuesday when Senate Judiciary Committee Chairman Orrin G. Hatch (R-Utah) announced he is introducing a bill to allow DNA testing for those convicted before the procedure became used in crime cases, so long as identity was an issue at trial and the test results could establish a person's innocence.

The time for making such requests would be limited.

Hatch's sponsorship is significant because he has been a staunch supporter of the death penalty and led the successful fight several years ago to limit death row appeals.

Moreover, his proposal was co-sponsored by Senate Majority Leader Trent Lott (R-Miss.) and most other conservative GOP

leaders.

"While reasonable people can differ about capital punishment, it is indisputable that advanced DNA testing lends support and credibility to the accuracy and integrity of capital verdicts," Hatch said.

Without endorsing any specific legislation, Attorney General Janet Reno told reporters yesterday that defendants in capital cases should have access both to DNA tests and to competent counsel before they are convicted, along with "access to other forensic and investigatory resources that will permit them to properly explore their claim of innocence."

The legislation sponsored by Leahy and LaHood goes significantly beyond Hatch's proposal. It would erect fewer barriers to convicts who want DNA tests, essentially making them available in any case—including non-capital cases—if the results might be relevant to their conviction or death sentence.

It would also require a half-dozen other safeguards, including competent counsel in capital cases, increased compensation for wrongfully condemned inmates and jury instructions about alternatives to death sen-

tences, such as life without parole.

In the House, Speaker J. Dennis Hastert (R-Ill.) and Judiciary Committee Chairman Henry J. Hyde (R-Ill.)—who, like LaHood, are from Ryan's home state—have indicated interest in capital punishment safeguards but have not endorsed a specific bill.

Like Hatch, who held a hearing on the issue this week, Hyde has scheduled a hearing for next week.

In a statement earlier this week, Hyde, who supports capital punishment, said lawmakers "should distinguish between going slow in death penalty cases and support for the death penalty itself" and added that "every effort humanly possible should be expended to ensure that a defendant is indeed guilty." It is, he said, "an issue I continue to worry about."

LaHood said he believes that chances for the legislation in the House this year hinge on whether Hyde supports it. Otherwise, he said, there will be "just a lot of talk."

In the Senate, Smith said he believes that prospects depend on whether Hatch and Leahy can reach a compromise.

Crime -
Death Row

In Schools, 'A' Is for Arm-Twisting

Competition, Inconsistency Spell Grade Pressure on Area Teachers

By JAY MATHEWS
Washington Post Staff Writer

Bob Weber used to think he could decide on his students' final grades in the privacy of his office, carefully weighing each one's effort and progress, and reach a judgment they would understand and respect.

Now he knows better. Tired of arguing with students and parents who don't like what he puts on report cards, the social studies teacher at Charles County's

McDonough High School has switched to a completely different system.

Weber assigns a point value to every assignment. Students are required to keep track of their point total, and the numbers are posted in the classroom and updated each week. When the final grades are issued, no student is caught off guard.

"My combat experience convinced me that for my own survival, I needed a system of grading that was straightforward and difficult to protest," Weber explained.

In a competitive era when a small drop in a grade-point average can doom one's chances of getting into an elite college, educators say they are being cajoled, pressured and second-guessed more than ever about the final grades they bestow. Many of them also acknowledge that they have sometimes changed a grade after a student or parent complained to them—or after a parent went over their head and contacted the principal.

Teachers tend to explain the protests by saying that many parents simply can't accept that their child isn't meeting their expectations. But a growing number of studies show that teachers themselves are creating confusion with wildly varying grading philosophies. Some use grades to reward effort, while others look strictly at the quality of a student's work. Some give a break to conscientious students who came close to passing muster. Others will not

budge even if a student is just a wink away from a higher grade.

The widespread irregularities have become more noticeable in recent years with the new wave of state achievement tests. Students can compare their final grade in a subject with their score on the corresponding state test, and some experts think that will only aggravate the clashes over grading. "Some of the principals I have talked to are quite concerned about this," said Stephen J. Friedman, professor of educational measurement and statistics at the University of Wisconsin at Whitewater.

A recent study co-written by Friedman found wide variation in grading policies and practices at one midwestern high school. Thirty percent of teachers counted homework; 47 percent did not; and the others did not have a clear policy. Fifty-nine percent counted quizzes; 25 percent did not. Forty-two percent counted class participation; 36 percent did not.

Teachers and principals concede that grading remains one of the few areas of public education without uniform standards.

"An enormous range of grading practices would be an understatement," said Don C. Leydig, principal of Hillsdale High School in San Mateo, Calif.

Allen Freeman, a history teacher at Western Albemarle High School in Crozet, Va., said that in 28 years he has seen everything from students virtually grading themselves to "the most oppressive and anal grading imaginable. I know two teachers who record grades to the hundredth decimal point and absolutely do not round up—a 92.99 percent is a B!"

Beth Whiteman, who graduated last year from Fairfax County's Oakton High School, said teachers offered a bewildering variety of routes to an A or a B. The erratic policies "make students either frustrated or cynical," said Whiteman, now a freshman at Greensboro (N.C.) College. "You can try to shut them out of your mind or laugh about it."

Nor is it any news to parents that teachers' grading systems differ. "I do think it is arbitrary. There can be so many differences from one teacher to another," said Linda Henderson, a PTA official in Arlington.

Stefanie Weldon, a parent in Montgomery County, is bothered by the inconsistencies and also by the protests they spawn. She thinks schools in the most affluent neighborhoods tend to give the highest grades because that's where "the most aggressive parents are advocating for their children."

Some superintendents and principals say they have tried to impose order on the chaos of grading systems. But such attempts usually fail to change teachers' traditional insistence on grading their way.

Friedman said the teachers he interviewed for his study said they wanted "to keep some level of flexibility in the grading process—what one teacher called "wiggle room"—so they could use grades as a tool to reform undisciplined or unmotivated teenagers.

His study of the midwestern high school, which he conducted with Anthony L. Truog, associate professor of educational foundations at the University of Wisconsin at Whitewater, concluded that grading policies "were dictated by classroom realities, and nothing seemed more real than the need for teachers to address behavior issues in their classrooms."

Freeman, the history teacher at Western Albemarle High, recalled that when an unruly student complained to him about not rounding up a high C to a B, he told the student, "I never subtract from a grade for poor behavior, but I never cut a jerk a break." The student received A's the rest of the semester, and his behavior improved, Freeman said.

But teachers also say that factoring behavior into the process can make it harder to justify a grade when it's challenged. There is rarely any written record to support the teacher's impression of the student's conduct.

Many of the grading discrepancies stem from differences over whether and how to give credit for effort. An earlier study by Friedman found that although some teachers did not give credit for effort at all, others counted it as much as 50 percent of the semester grade.

To encourage class participation, Whiteman said, some of her Oakton High teachers gave a ticket—good for extra points—to any student who gave a correct answer in class.

Many school districts have tried to limit grading disputes by setting precise percentages for certain grades. In Fairfax County, for instance, a 94 is an A but a 93 is a B-plus. Teachers are often warned to have their grade books in good order in case of complaints, and many principals collect them at the end of the year so they can be prepared for trouble.

Almost all teachers say they have been pressured to raise grades. Sometimes parents call them, and sometimes administrators come see them.

"This year, I have been pressed hard by the administration to adjust my math class averages to meet the parental, or departmental, expectations," said Karen Gruner, who teaches at a private school in Maryland.

Jim Jarvis, a physics teacher who heads the science department at Chantilly High School in Fairfax County, said administrators check each teacher's "D/F ratio," the percentage of students who receive D's or F's. "It's not in writing anymore," he said, "but all understand that if that number goes over 15 or 20 percent, a conference with an administrator will follow."

"This becomes an integrity issue for some teachers," Jarvis said. "Others simply make sure there are never more than 15 percent D's and F's, regardless of performance."

Sometimes, educators acknowledge, the teacher is at fault for not letting the parent know what was going on. Marjorie Myers, principal of Key Elementary School in Arlington, said a parent recently complained about his child getting a B. Myers discovered when she talked to the teacher that the pupil had gotten D's on some assignments but that the parent had not been told. "The grade stood," Myers said, "but now far more communication is taking place between the teacher and the parent."

Many teachers say they will give a student an extra boost if he or she is cooperative and not far from the desired grade. "If a student is close and has made an effort, I will up the grade if within a couple of points," said George D. Bond, who teaches at Woodbridge High School in Prince William County. "I know that those with many D's will never be rocket scientists, so I will help them graduate."

Gruner said: "I have never failed a senior. They always can be cajoled into doing enough work that I feel I can pass them."

But other teachers stand firm, hoping the temporary failure will motivate more effort and future success.

Weber, the Charles County high school teacher, got a call from an upset mother after final report cards were delivered last month. Her daughter had failed his sociology course and could not graduate with her class.

He told the mother that it was too late. "The grade was an accurate reflection of what happened in the classroom, and there was nothing that I could do at that point," he said. "You feel empathy for the parent and child, but if you cave in, you ultimately corrupt the educational process."

David S. Broder

Broken Justice

In the annals of politics, there have been few pieces of social research which have decisively affected the course of policy debate. Michael Harrington's "The Other America" opened the eyes of the nation—and of Presidents Kennedy and Johnson—to the extent of poverty in this nation. Daniel Patrick Moynihan's essay on "The Negro Family" alerted President Nixon and his successors to the plight of female-headed welfare families.

Now there may be a third. James S. Liebman's just-published report, "A Broken System: Error Rates in Capital Cases 1973-1995," transforms the debate on the death penalty as much as those earlier works did the understanding of poverty and welfare in America.

Liebman, a professor at Columbia University law school, and his principal academic collaborators, Jeffrey Fagan of Columbia and Valerie West of New York University, undertook the daunting task of tracking every death sentence case that went through the legal system in the 23 years following the 1972 Supreme Court decision that began the modern death-sentencing era.

Their principal findings made headlines last week. Of the 4,578 death sentences adjudicated completely during these two-plus decades, serious error was found in an astonishing 68 percent of the cases.

Contrary to popular myth that death row prisoners find appointed federal judges more sympathetic to their pleas than the supposedly hard-nosed state court jurists, 47 percent of the errors were discovered on appeal to the state courts and another 21 percent on federal habeas corpus petitions.

The principal sources of the "serious error," meriting a new trial, were two: egregiously incompetent defense lawyers, and prosecutors who suppressed evidence that would have exonerated the defendant or mitigated the penalty.

Of the 301 cases retried during this period, 247 (or 82 percent) resulted in sentences less severe than death, including 22 cases in which the defendant was found not guilty.

Those are the facts. But numbers alone hardly convey the appalling reality. Here is a New Orleans case, in which, according to the report, "police accepted the word of longtime criminal and police informant Beanie . . . while suppressing a variety of statements that were inculpatory, self-contradictory and inconsistent with Beanie's trial testimony . . . and then manipulated eyewitnesses into identifying the defendant at trial, which they had failed to do initially. In three subsequent retrials, a majority of jurors voted to acquit the defendant, and he was finally freed.

And here is an Oklahoma case in which, according to the report, "appointed counsel, who received no funding for expert or investigative services and was paid the statutory maximum of \$3,200, failed to investigate a videotaped statement by another person confessing to the crime and extensive evidence of petitioner's mental illness and likely incompetence to stand trial." DNA testing subsequently established the innocence of this prisoner.

When the report was released, Josh Marquis, an Oregon prosecutor and official of the National District Attorneys Association, told Brooke A. Masters, my colleague at The Post, that the findings "confirm that the system is working. Mistakes that are made by prosecutors and judges are caught."

That might be plausible if one out of a hundred or even one out of 10 capital cases were handled in such a slipshod fashion as to merit reversal. But when two-thirds of them involve "serious error" in the eyes of reviewing state and federal judges, Liebman is justified in saying, "By anyone's standards, this is not a system that is working."

Among those who ought to recognize that fact are the advocates of the death penalty. The delays involved in appeals from this error-ridden trial system are such that during this 23-year period, the 5,760 death sentences imposed led to only 313 executions. If the goal is swift and certain justice, that is the opposite of what we are getting.

This research underlines the importance of the capital punishment study being undertaken by a blue-ribbon citizens' group, including both supporters and opponents of the death penalty, about which I wrote in a recent column.

It justifies the decision of Illinois Republican Gov. George Ryan to impose a moratorium on executions in his state. Illinois, by the way, is two points below the 68 percent national average of cases in which the death penalty does not stand up well under scrutiny. Texas, which has attracted comment because of Gov. George W. Bush, ranks much lower, with a 52 percent detected error rate.

But everywhere, "A Broken System" is exactly what we have.

Crime -
Death Penalty

George F. Will

A Gross-Out Culture

In physics, a "unified field theory" purports to explain all fundamental relationships between elementary particles. With summer, and more "gross-out" movies, arriving, it is time for a unified field theory of contemporary vulgarity.

Someday, cultural historians sifting the shards of America's fractured taste and manners will note that the late 1990s were golden years for that movie genre. In "There's Something About Mary" (1998). . . . But wait. How to describe the problem of the desensitizing of America without aggravating the problem? Journalism must here justify some indelicacy.

In "Mary" a man gets his genitals caught in his zipper, and years later when he meets Mary for a date, unaware that the result of masturbation is deposited on his ear, she mistakenly uses it as hair gel. The highlight of "American Pie" (1999)—it cost \$11 million to make and has grossed, so to speak, more than \$230 million worldwide—is a young man having sexual intercourse, so to speak, with a pie. "South Park: Bigger, Longer & Uncut" (1999), a crudely drawn cartoon musical, was a pastiche of flatulence jokes, a giant clitoris and permutations of the F-word. Highlights of this year's "Road Trip" are the sperm bank scene and the way a

waiter removes the powdered sugar that a customer did not want on the french toast he then eats.

Now, such movies have funny moments—execrable taste can be a guilty pleasure—and will always have an audience among adolescents. But such movies are finding adult audiences, which suggests diminishing differences between adults and adolescents.

And not only in America. John Gross reports in *The New Criterion* that a hugely popular British television show "features such stunts as thrusting a see-in-the-dark camera down the trousers of a member of the audience and taking live footage of his penis." During her guest appearance on the show, a member of Prime Minister Tony Blair's Cabinet made a clitoris joke.

The vulgar are always with us. However, today's casual coarseness suggests that it is a facet of a larger phenomenon, of which incivility is a part.

Incivility is becoming normal. The Zagat Survey, which reviews restaurants, reports that complaints about service have tripled in five years. Customer service complaints by air travelers doubled last year. The shrew at the next table, bellowing into her cell phone? That imbecile in

the car behind you, who tailgated up to the intersection and now is leaning on his horn because you want to turn left? Nancy Ann Jeffrey, writing in the *Wall Street Journal*, suggests, plausibly, that America's epidemic of such rudeness may be a "dark side of the New Economy."

It has showered sudden wealth on many people who behave as badly as the arrivistes in Balzac novels. Worse, actually. Balzac's parvenus were ignorant of, but not hostile to, manners. Today's are both.

They are creatures of the e-culture that, Jeffrey says, "glorifies speed over decorum and innovation over tradition." With their cell phones, pagers, Game Boys and other high-tech toys—again, note the disappearance of the difference between children and adults—these arrested-development 13-year-olds do not distinguish between being in private and being in public. Wherever they are, they are the center of the universe, served by gadgets that—like their stock market windfalls—tell them, Jeffrey says, "they can have whatever they want when they want it."

The sovereignty of wants becomes the imperialism of whims; impatience turns appetites into aggressions among those for whom today's technological marvels are mere in-

struments to facilitate their self-absorption. People who, while dining or driving or walking down the street are electronically disassociated from their social context, are not so much antisocial as unsocial. But the result is the same: boorishness.

Because they immoderately value efficiency and crave immediacy, they are impervious to the idea that manners should soften social life. Literature is painfully slow for these high-tech barbarians, so Moliere's "Misanthrope" may be as foreign to them as Mongolia, and they probably think they are having a new idea when they say considerateness and other social conventions impede "honesty," "authenticity" and "sincerity."

A version of that idea invests gross-out movies with an aura of seriousness, even social beneficence: Such movies supposedly enlarge liberty by being "iconoclastic" toward "taboos." Hence this unified field theory of today's vulgarians: Infantilism, meaning life lived in subordination to elemental and unceded appetites, increases rapidly when prosperity puts technological sophistication at the service of a society decreasingly sophisticated about other matters, such as manners and why they matter.

Crime
Death
Penalty

U.S. PLANS DELAY IN FIRST EXECUTION IN FOUR DECADES

JUSTICE DEPT. REPORT DUE

Officials Cite Lack of Clemency Rules and Issues of Racial and Regional Disparity

By RAYMOND BONNER
and MARC LACEY

WASHINGTON, July 6 — The Clinton administration is planning to postpone the first federal execution in nearly 40 years because of the absence of clemency procedures and concerns about racial and geographic disparities in death penalty cases, administration officials said today.

The White House is awaiting Justice Department regulations for death row inmates to follow in seeking clemency from the president.

Juan Raul Garza, who was convicted seven years ago of three drug-related murders, is scheduled to be executed on Aug. 5, and his lawyers said today that they would use the new procedures as soon as they have them to ask President Clinton to spare Mr. Garza's life.

Mr. Clinton has supported the death penalty since his days as governor of Arkansas, where he declined to commute several death sentences.

The department is also finishing a report on whether members of racial minorities or defendants in certain parts of the country are more likely to face the federal death penalty.

Data gathered so far by the Justice Department shows that members of minorities make up more than three-quarters of the defendants in federal capital cases and that federal prosecutors in five districts, including two in New York, have filed nearly half of the federal cases in which the death penalty was an option, officials said.

The Justice Department report, to be released this month, is certain to generate questions about the fairness of the federal death penalty beyond the Garza case, which would be the first federal execution since John F. Kennedy was president, officials said. Twenty-one men now face the death penalty for federal crimes.

The new clemency procedures, the first in federal capital cases since the federal death penalty was reinstated in 1988, should be completed within a week or two, a Justice Department spokesman said.

They will allow for the death row inmate's lawyer to make an oral presentation to a clemency panel, and the process, from filing to final decision, will take at least 90 days, officials said.

A White House official said Mr. Garza, who was convicted in 1993 in Federal District Court in Brownsville, Tex., would be allowed to take advantage of the new procedures. Thus, his execution will have to be postponed, officials said.

A Justice Department spokesman said that the department had no authority to grant a reprieve to Mr. Garza now and that the sole power for such a reprieve now lay with the president.

Under the Constitution, the president's pardon powers are absolute. Thus, options in the Garza case include a pardon, which would erase the criminal record, commutation to a life sentence or a temporary reprieve, allowing Mr. Garza to follow the new clemency procedures.

"We're cautiously optimistic," said Mr. Garza's lawyer, Gregory W. Wiercioch of the Texas Defender Service in Houston. Mr. Wiercioch added that he had not been given official notice of any reprieve.

"Until then, we have to move forward on other fronts," he said. Mr. Wiercioch was in Washington today looking for support for his client.

Mr. Garza has had his hopes dashed before. When Judge Filemon B. Vela first proposed setting an August execution date, United States Attorney Mervyn M. Mossbacher Jr. joined the defense in asking that he not do so. Noting that it would be the first federal execution in more than three decades, Mr. Mossbacher said the Justice Department was developing guidelines and procedures to ensure that it would be carried out "in an appropriate, dignified and expeditious manner."

Although declaring that he was "not a proponent of the death penalty," Judge Vela rejected the arguments and set the date, after which the United States attorney dropped further opposition.

Mr. Garza, a high school dropout who is the son of migrant farm workers, was the head of a drug-running operation that smuggled in tons of marijuana from Mexico, the federal charges said. He was convicted of ordering the execution of three people as part of his criminal enterprise.

Although Mr. Garza has declared that he was not responsible for the murders, his lawyers, in seeking clemency, do not intend to argue that he is innocent. Rather, they will argue that it is unfair to put Mr. Garza to death because the federal death penalty system, as it currently operates, discriminates against members of minorities and is unevenly applied across the nation.

The administration of the federal death penalty is like a "rigged lottery," with the outcome determined by "the color of your skin and where you purchased your ticket," Mr. Wiercioch said.

At a news conference last week, President Clinton said that he was concerned about "the disturbing racial composition" of the federal death penalty population, and that a handful of federal districts account for the majority of death penalty cases, "which raises the question of

whether, even though there is a uniform law across the country, what your prosecution is may turn solely on where you committed the crime."

As a result, Mr. Clinton said, he had asked the Justice Department to undertake a review.

The Supreme Court declared in 1972 that the death penalty as it was then applied was unconstitutional. In 1988, Congress enacted legislation that allowed prosecutors to seek the death penalty for certain crimes. It was first applied to drug-related crimes, in what has become known as the "drug kingpin statute."

Over the course of his political career, Mr. Clinton has been a stalwart backer of the death penalty. In his 1992 campaign, Mr. Clinton, then

governor of Arkansas, interrupted his campaign to deny clemency to two inmates who subsequently were executed by lethal injection. As president, he signed legislation in 1994 that expanded the federal death pen-

alty to about 60 crimes. Two years later, after the Oklahoma City bombing, he backed a law streamlining the appeals process, which applied to both state and federal prisoners.

Twenty-one men have a death sentence hanging over them, said the Federal Death Penalty Resource Project, an organization in Columbia, S.C., that opposes the death penalty. Fourteen are African-American, three are Hispanic, one is Asian and three are white, including Timothy J. McVeigh, who was convicted in the Oklahoma City bombings.

With most of these men having only recently exhausted all their appeals, the Justice Department has not been under pressure to adopt federal rules for clemency, which is an inmate's last hope after all the courts have spoken. Even without formal procedures, however, federal inmates are able to petition the president for redress.

A United States attorney needs the approval of the attorney general be-

fore seeking the death penalty, and Attorney General Janet Reno has instituted a formal procedure for federal prosecutors to follow in seeking that approval.

In a case in which the death penalty is an option, the prosecutor is required to send a memorandum to the Justice Department, with a recommendation on whether or not it should be sought. A committee set up by Ms. Reno then reviews the file and makes a recommendation to her.

A defendant's lawyer is allowed to make a presentation to the federal prosecutor before the government seeks the death penalty, and then to the Justice Department review committee, two levels of protection that do not exist for a defendant in state capital cases.

Going back to 1988, the attorney general has authorized the death penalty against 199 defendants, according to the death penalty project. Three-fourths of these defendants have been members of minority groups, with 103 of them African-Americans, the project said.

A former member of the death penalty review committee, Rory K. Little, has described Ms. Reno's death-penalty case review system as "consciously race-blind."

The racial disparities creep into the system, said Mr. Little, who now teaches at Hastings College of Law in San Francisco, because of the wide discretion given to federal prosecutors. They decided in the first instance whether to charge a defendant with a crime that carries the death penalty and then whether to plea bargain for a life sentence.

This same discretion explains the geographic disparities in the system, he said. A chart published by Mr. Little in a law review article showed that for the years 1995 through 1998, United States attorneys submitted 471 death penalty cases to the Justice Department for review. Slightly more than 200 were from five judicial districts. Puerto Rico was at the top, with 59 submissions; the Eastern District of Virginia followed, with 52; the Eastern District of New York, 42; the Southern District of New York, 30; and Maryland, 24.

A Clinton administration official said that the numbers would be updated in the department's current report, but that the five districts still led in death penalty cases.

What Death-Penalty Errors?

By James Q. Wilson

MALIBU, Calif. For those who support capital punishment, as I do, the possibility that innocent people could be executed is profoundly disturbing. No human arrangement can guarantee perfection, but if perfection is not possible, then the number of errors ought to be kept as low as possible. For that reason, it is worth studying "Broken System: Error Rates in Capital Cases," the recent report by Professor James Liebman and others at the Columbia University Law School, especially since that document has stimulated an outpouring of media coverage.

Its essential finding is that, for the last two decades or so, courts have found "serious, reversible error" in a large fraction of the cases they reviewed. These errors, the report claimed, often involved weak or incompetent defense attorneys and the withholding of important evidence from the juries.

But notice what the report did not say. Its authors did not attempt to discover whether any innocent person had been executed, and they made no claim that it has happened. Instead, they said that the large number of appeals leaves "grave doubt whether we do catch" all of the errors. The clear implication is that, were the truth known, we might well be killing many innocent people.

James Q. Wilson is the author of "Moral Judgment" and "The Moral Sense."

But that truth is not known. The Death Penalty Information Center, a rallying point for opponents of execution, reports that since 1973, when the Supreme Court reinstated the death penalty, 69 people have been released from death row after they were found to be innocent. But the center does not say that any innocent person has been put to death, though if it had found such a case it surely would have proclaimed it.

The Columbia University report shows that death sentences are intensively reviewed by appeals courts. Some critics of these reviews think they take too long and involve too many unnecessary bites at the apple, and that may be true. But if we are to err, it is best that we err on the side of safety.

Nine or 10 years usually pass between the imposition of the death penalty and its being carried out. It took 19 years and appeals heard by more than 30 judges before Gary Graham was executed last month in Texas. It is hard to imagine that this much time is necessary for an adequate appeal, but offsetting the cost and delay is the assurance of only a small chance that an innocent person will be killed. The 5,760 death sentences handed out since 1973 had, by 1995, led to only 313 executions.

Mr. Liebman suggests that the high rate of appeals means that serious errors are often made by the trial courts. But before we can accept that conclusion, we must first know whether the errors were serious enough to affect the outcomes of the cases when they were sent back for new trials. Did an "error" cause a new trial that set aside the death penalty? Unfortunately, Mr. Lieb-

man was able to learn this for only a small number of the reversals.

Because of Supreme Court decisions, every death-penalty conviction leads to an appeal to the state's highest court. About two-fifths of these cases were reversed. As I read the report, we have no information about what happened in the new trials.

Then there are state appeals after convictions. These also led to many reversals, but we don't know what happened to the great majority of these cases when they were retried because trial courts ordinarily do not publish their findings. Mr. Liebman and his colleagues managed to find 301 cases that had been retried, but we have no idea whether these were representative of all of those appealed or were only a few dramatic ones that somehow came to the atten-

What a study
really shows is
how well courts
shield the accused.

tion of outsiders.

Of these 301 new actions by trial courts, 22 found that the defendant was not guilty of a capital crime, 54 reimposed the death sentence and 247 imposed prison sentences.

Then there were appeals to the federal courts that also led to reversals in about two-fifths of the cases,

but again we are not certain what happened in all the new trials.

The report also lumps together cases going back to 1973 with those decided more recently, even though the Supreme Court in 1976 created new procedural guarantees that automatically overturned many of the death-penalty decisions made between 1973 and 1976. It is not clear from the Columbia report what fraction of its reversals date back to these big changes in the rules.

In short, in the vast majority of death-penalty cases we have no idea whether the finding of error that led to a reversal was based on a legal technicality, a changing high-court standard about how a capital crime ought to be tried or a judgment that the defendants might be innocent. All we know for certain is that a lot of death-penalty cases are reviewed over a long period of time — a fact that dramatically reduces the chances of innocent people having been executed.

More procedural reforms may be coming. Congress is now considering a bill that would require federal courts to order DNA testing, at government expense if the defendant is indigent, whenever DNA evidence from the crime is available. It also would require states seeking federal crime-control funds to certify that they have effective systems for providing competent legal services to indigent defendants in death-penalty cases.

But more might be done at the state level. States ought to have laws that create imprisonment without possibility of parole for first-degree murder convictions, and the judge in every such case should instruct the jurors in

the sentencing phase that they can choose that or the death penalty. This allows jurors who may have some doubts about the strength of the evidence or some other plausible worry to hedge their bets if they are so inclined.

Not every state now has such laws. In Texas, the alternative to the death sentence is life in prison, but without an absolute guarantee that the offender will actually spend his life there. Jurors rightly suspect that the perpetrator will find some way to get back on the street, and so they often vote for death.

The American Law Institute, a group of legal scholars that designs uniform state legal codes, has recommended that even when a jury decides that capital punishment is appropriate, the judge should be allowed to bar the death penalty if the evidence "does not foreclose all doubt respecting the defendant's guilt." The states have not adopted this rule, but perhaps they should, especially if this change could be coupled with procedures designed to reduce the seemingly endless number of post-trial appeals.

In the meantime, we ought to calm down. No one has shown that innocent people are being executed. The argument against the death penalty cannot, on the evidence we now have, rest on the likelihood of serious error. It can only rest, I think, on moral grounds. Is death an excessive penalty for any offense? I think not, but those who disagree should make their views on the morality of execution clear and not rely on arguments about appeals, costs and the tiny chance that someday somebody innocent will be killed. □

Chavez
Death Penalty

The Proper Dosage of Judgment

By Sherwin B. Nuland

THAN DEN, Conn. The easy availability of medical information on the Internet has been a mixed blessing to both patients and doctors. Well-informed patients now have an appreciation of the complexities of decision-making and can better participate in their own care. But the proliferation of data and detail has also convinced far too many Americans that the management of health is less complex than they had thought.

By their lights, knowing a drug's therapeutic actions and side effects is qualification enough to treat one's own high blood pressure or elevated cholesterol.

A few years ago, such a dubious proposition would have been rejected out of hand. But astoundingly, the Food and Drug Administration recently held hearings on the possibility of making a number of potent drugs, including several that are used to treat potentially dangerous chronic conditions, available over the counter. And, of course, several pharmaceutical companies have their own reasons for pushing the agency to allow such a thing. What seems to have been overlooked is something doctors call clinical judgment.

Hippocrates called medicine "the Art," because he knew that mere information was only the beginning of the study of disease. And despite the advances in the art of healing in the last two and a half millennia, Hippocrates's famous first aphorism remains as true as it ever was: "Life is short, and the Art is long; the occasion fleeting; experience delusive; judgment difficult."

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sive; judgment difficult."

In today's biomedicine, caring for patients requires a doctor's burnished wisdom, which finds its first coalescence during the long period of training and continues to be shaped thereafter in the crucible of focused thought.

Young doctors are taught to observe dispassionately. They must understand the difference between valid evidence and spurious appearances. They must critically evaluate medical literature, distinguishing between new practices that promise to make lasting contributions to health and new practices that are of fleeting import. Then they must choose a course of treatment that is individualized to each patient's circumstances, yet supported by studies of large groups. Finally, they must monitor treatment meticulously, making changes as necessary.

It is not information that leads to the best medical care, but judgment. It is in the best interest of all, doctors and non-doctors alike, to recognize the distinction.

Until now, over-the-counter medications have, by and large, been useful in the treatment of temporary and rather mild problems like headaches, colds and allergies. Does it make any sense at all to expand this category to include drugs that treat conditions like hypertension or elevated cholesterol, which have permanent effects on many organs in the body?

Every drug has multiple side effects, and the danger is compounded when drugs interact with one another. The possible complications listed in the manufacturer's package inserts are the result of chemical activity, and are not merely nuisances to be put up with or ignored.

The F.D.A. should be wary of letting more drugs be sold over the counter.

Before prescribing pharmaceuticals, doctors must consider the benefits and risks for each patient, sometimes based on subtle factors in that individual's physiology or health profile.

But what happens if a patient self-medicates? As one example, let's say a patient knows he has high blood pressure and decides to treat it himself. If he also has heart disease or

diabetes, which are common in patients with hypertension, the medication might change his heart rhythms or create abnormalities in the blood, which could lead to a cardiac arrest.

Or say a 35-year-old smoker wants birth-control pills. Normally, a doctor would not prescribe pills to this woman, because of an increased incidence of heart attacks. But if the contraceptive is available over the counter, she is free to buy it, regardless of the risk.

The F.D.A., the drug companies and lawmakers would do well to consult a passage from Hippocrates's Book I of "Epidemics." Meant as an admonition to doctors, it applies equally to those who would make decisions without benefit of clinical judgment: "As in diseases, make a habit of two things: to help, or at least to do no harm." [1]

E. J. Dionne

Death Penalty Pendulum

If you want to know how much the debate over the death penalty is changing before our eyes, watch the deliberations over the Democratic Party's platform.

For more than three decades—ever since Richard Nixon's successful law and order campaign in 1968—Democrats have been trying to sound tougher on crime than Kojak and every Clint Eastwood character combined. Concern became obsession after 1988, when Democratic nominee Michael Dukakis was brought down by, among other things, a certain furlough program and his opposition to the death penalty.

President Clinton became the nation's avenger, bragging regularly about his support for the death penalty. The Democratic platform in 1996 bragged, too: "We established the death penalty for nearly 60 violent crimes, including murder of a law enforcement officer, and we signed a law to limit appeals." Yes, those '96 Democrats were so pro-death penalty that they no longer worried about limiting appeals or other legal niceties.

Enter the 2000 Democrats. They're still for capital punishment and want you to know they're tough on crime. But the latest platform draft reduces the role of the death penalty to a mere clause within dashes.

Clinton and Vice President Gore, the draft says, "put in place a tougher more comprehensive strategy than anything tried before, a strategy to fight crime on every single front: more police on the streets to thicken the thin blue line between order and disorder, tougher punishments—including the death penalty—for those who dare to terrorize the innocent,

and smarter prevention to stop crime before it even starts."

There are two other references to the death penalty, a minor piece of bragging—"They funded new prison cells, and expanded the death penalty for cop killers and terrorists"—and a suggestion that maybe some brakes might be applied on the road to the death house, after all. An amendment, adopted at platform hearings in St. Louis last Friday, declares: "We believe that in death penalty cases, DNA testing should be used in all appropriate circumstances and defendants should have effective assistance of counsel."

Note that the new platform contains not a word about limiting appeals. That would clash with the new language about DNA tests and adequate counsel—and with word last week that the Clinton administration was delaying the first federal execution in nearly 40 years so the Justice Department could issue regulations on death row clemency requests.

Resist the temptation to believe that party platforms are meaningless. Political scientists note that platforms are remarkably predictive of what a party will do in office. Subtle shifts in language on matters ranging from the death penalty and abortion to civil rights and economics almost always reflect shifts in the mood of the public and the party's supporters.

David Carle, a spokesman for Sen. Pat Leahy (D-Vt.), sees the change of heart among platform writers as closely reflecting popular opinion. "They were clinging to a pendulum that was swinging pretty far that way at the time," he said of attitudes on the death penalty in 1996, "and now it's starting to swing back."

Philip D. Harvey

Divorce For the Best

We hear much these days about the decline of cultural and moral values in America. As proof of this decline critics cite the coarse content of movies and popular songs, the continuing crisis of out-of-wedlock births and "skyrocketing" divorce rates.

But divorce does not belong in this equation. Indeed, a reasonable level of divorce may be a symptom of a healthy and mobile society, a society in which men and women are living unprecedentedly long lives, lives for which the companionship of but a single other person for 30 or 40 or 50 years may simply be inappropriate.

To be sure, some long marriages are deeply rewarding. For couples who are suited to spend a lifetime together, and choose to do so, such marriages can provide the optimum form of love and companionship.

But 50- and 60-year bonding through marriage is not the "natural" order of things. Few human beings over the course of time have ever lived together as mates for such long periods. Prior to the 20th century, one spouse or the other typically died, leaving the survivor to seek a new mate or to live alone.

Longevity is only part of the picture. When the (extended) family was an economic unit on the farm, there were many practical reasons for couples to stay together. Today's multi-skilled women and men, on the other hand, have many valid economic (and other) reasons for being mobile, reasons that may lead appropriately to divorce and, often, remarriage.

That most Americans categorically oppose divorce on principle is a function more of our aspiration to the ideal state than a realistic acceptance of how we humans actually behave. In an ideal world there would be no spousal abuse, no child abuse and no such thing as a marriage troubled beyond repair. Certainly divorce is very hard on children, particularly young children. Yet there is now a recognition that some marriages cannot be fixed, that they are damaging to children as well as parents and are better ended.

We tend to be idealistic about divorce too. While opinion polls reveal that we oppose it in the abstract, we generally approve of Sister Sally's divorce or Uncle Joe's. These are real people for us, and we tend to think they've made appropriate changes in their lives. Of course, many divorces are unfortunate or financially disastrous for one party or another, but the seeds of bitterness and even of financial conflicts are often planted well before divorce takes place.

The freedom to have more than one mate over a 75-year lifespan may be a positive thing. Is it not possible that the ideal companion for our younger, child-rearing years will not be the ideal companion for our middle and later years? Is it not reasonable to suggest that the radical differences in the way we live in our fifties and sixties and beyond may be, under many circumstances, most appropriately lived with a different person from the one with whom we reared children? My wife and I have been married for 10 years and we are both in our second marriages, as is my wife's former husband. It appears to me that all parties concerned have benefited from the change. She and her first husband raised their two children to adulthood before separating; they now have changed their lives in ways that seem good for all who have been involved. Is this a symptom of "moral decline"? I think not.

The interests of children must be given a very high priority. But allowing for that, it seems to me that a reasonable level of divorce is more likely to be a quality of a mobile and healthy modern society than a sign of moral decay.

Philip D. Harvey is a writer and businessman who lives in Cabin John.

Crime
Death Penalty

What's awkward for Democrats is that while support for capital punishment has dropped from 80 percent to 66 percent in the past six years, 66 percent is still a big number—as George W. Bush's campaign knows. Ari Fleischer, a Bush spokesman, made pointed reference to the Democrats' dropping their endorsement of "bipartisan legislation to speed up the appeals process." He said the newly ambivalent platform language suggests the death penalty is "obviously an issue on which Al Gore is very uncomfortable" and "unsure what to believe."

In fact, Gore has been careful to maintain his support for the death penalty. The Gore camp is hoping groups opposed to the death penalty will raise questions about how capital cases have been handled in Bush's Texas, leaving Gore free to reiterate his support for capital punishment in general terms.

Bush's lieutenants will do all they can to disrupt this balancing act. The Bush camp would love a big, divisive debate on the death penalty within the Democratic Party, knowing that party activists are more strongly opposed to capital punishment than the rank and file. The modest shifts in the platform away from too much boasting about the party's eagerness to pull the switch are designed to hedge the issue for this election season, at least.

But that hedge is "almost a sea change in the way politicians are approaching the issue," says Sen. Russell Feingold, a Wisconsin Democrat who favors a moratorium on executions. Once, he says, capital punishment was "another third rail of American politics." Now, some politicians are willing to touch it.

The Washington Post

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Michael Kinsley

I Did Not Have Leaks With That Newspaper

It's not about sex.

No, no, it really isn't about sex this time. No one has even suggested that Charles Bakaly, former deputy to independent counsel Kenneth Starr, had sexual relations with New York Times reporter Don Van Natta. The accusation is that Bakaly leaked a story to Van Natta back in January 1999. Other than that small difference, though, the parallels are pretty tasty. Bakaly was—according to informed sources—a promiscuous leaker who just got caught this time. As with Starr's main target, there is speculation whether he was hoodwinking the boss or had an "understanding." And Bakaly is in legal trouble not for the initial sin but for lying about it in the subsequent investigation. His trial starts Thursday.

Oddly, Bakaly's defenders seem unable on this occasion to keep the original behavior and the subsequent denials distinct in their minds. Because they feel there was nothing wrong with the leaking (and indeed a circuit-court panel held as much last September), they feel it is unfair to punish Bakaly for the attempted coverup. The purity of obstruction of justice—the principle that it is wrong to give false answers in the criminal justice system, even to questions that never should have been asked—no longer beguiles them. Don't try to tell them it's not about leaks, it's about lying. They don't buy it. This time.

The New York Times, at least, is consistent. It opposed the impeachment of President Clinton and it opposes the prosecution of Charles Bakaly (in which the Times itself plays the role of Monica). "Ill-considered," thundered the Times editorial page July 8. "A regrettable denouement," it roared. Actually, that's more like a meow than a roar, isn't it? But then the whole world of leaks puts news media in a comically difficult position.

A friend of mine defends dishonest adulterous politicians on the grounds that (a) adultery should not be a public issue; (b) lying is inherent to adultery; therefore (c) lying about adultery should not be a public issue. Something similar might be said in defense of dishonest talkative public officials: (a) Leaking serves the public interest; (b) lying is essential to leaking; and therefore (c) lying about leaking serves the public interest. This might be said but never is said because it is too embarrassing. How can professional truth-tellers defend lying? So instead we deny step (b): that leaking and lying are inseparable.

The New York Times story that led to the Bakaly prosecution reported that "several associates of Mr. Starr" had said that Starr believed he had constitutional authority to indict a sitting president. As the story ran on, these unnamed associates chatted away about sundry implications of this factoid. But not Charles Bakaly! "Charles G. Bakaly 3d, the spokesman for Mr. Starr, declined to discuss the matter. 'We will not discuss the plans of this office or the plans of the grand jury in any way, shape or form,' he said." Thus the Times not only allowed Bakaly to tell what the reporter knew to be a lie in its pages, but it told a knowing lie itself. Bakaly did not "decline to discuss the matter."

Unless Bakaly actually wasn't the leaker, as he still maintains, (This is pretty unlikely, unless Starr—who defended him for a while, then fired him after a supposed investigation—is a total dastard. But suppose Bakaly actually did not have leakal relations with that newspaper. In that case the Times has been reporting on the criminal prosecution of a man it knows to be innocent, while failing to report that rather pertinent bit of information.)

The media also tend to be disingenuous, at least, about the general function of leaks. In this case, whether or not Bakaly was the leaker, and whether or not Starr was in on the plot, it was a strategic leak, intended to unnerve the Clinton forces during the impeachment proceedings. Most leaks are like this: not courageous acts of dissent from the organization but part of the organization's game plan.

And thus leaks often suck the media into a conspiracy of hype. Was the fact that Starr thought a sitting president could be indicted really so new, so important, so surprising? (He never actually tried it, so intentionally or not, the leak turned out to be misleading.) In what the Times may have regarded as a somewhat backhanded defense of its scoop, The Washington Post editorialized that "this information was not really even news at all." The Times itself took the opposite approach, declaring that the story "was obviously of great national moment." Too small to matter? Too big to stop? Each is a plausible defense, but both can't be true.

The point here is not to pick on the Times. (Is that true? Sources inside my head, who spoke on the condition they not be identified, say it's hard to tell.) Let's say the point is that even the New York Times has leak fever. Its editorial last week, just after declaring that the Starr story was "of great national moment," suddenly pooh-poohed this historic scoop as merely "discussions Mr. Starr and his aides may have had with reporters about [their] deliberations." May have had? The story was what anonymous Starr aides had told the Times about their deliberations! In its pious agnosticism regarding matters it must know the truth about, the Times seems to be raising the possibility that it made the whole thing up.

Now that I wouldn't believe. Even if it said so in the New York Times.

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