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I. Sentencing Guidelines That Include Capital Sentences
Are Required To Achieve The Purposes Of Sentencing

Congress has directed the Sentencing Commission to assure that federal criminal sentences achieve four purposes: just punishment, deterrence, incapacitation, and (where possible) rehabilitation. In the words of the statute, 18 U.S.C. §3553(a)(2) (Supp. III 1985), federal sentences must be designed:

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;"

These goals have binding effect on the Commission. 28 U.S.C. §991(b)(1)(A) (Supp. III 1985).

The issue the Sentencing Commission must consider in the capital sentencing context is whether and to what extent capital sentences for the serious capital offenses contained in title 18 and elsewhere in the United States Code¹ are needed to achieve these purposes. One could simply argue that this issue has already been resolved by Congress, which from the inception of this country to the present day has chosen to provide capital punishment for numerous crimes. Even so, however, the Commission's decisions in drafting capital punishment guidelines may still be guided by the extent to which capital punishment meets these purposes in particular contexts. For this reason, it is important to assess the utility of capital punishment in achieving the goals of just punishment, deterrence, and incapacitation.² This review amply supports the judgment of Congress that capital punishment is proper for certain egregious federal offenses.

¹ A list of federal statutes that provide for capital sentences is attached as Appendix A.

² Rehabilitation is irrelevant to the Commission's deliberations on these matters. See section I. D, infra.

A. Just Punishment

The first congressionally-mandated purpose of criminal sentences is "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. §3553(a)(2) (Supp. III 1985). The legislative history of this provision reveals that:

"This purpose -- essentially the 'just deserts' concept -- should be reflected clearly in all sentences; it is another way of saying that the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense." S. Rep. No. 98-225, 98th Cong., 1st Sess. 75 (1983).

A death penalty is the "just deserts" for the extremely serious offenses covered by capital statutes in title 18. The offenses listed in those statutes are among the most serious crimes -- if not in fact the most serious crimes -- that can be committed in the United States today. At the top of the list is assassination of the President, proscribed by 18 U.S.C. §1751, an act that has global implications. Indeed, the crime is so serious that the Department has expressed its view that even an attempt to kill the President could constitutionally be punished by death:

"As the most powerful and visible of the nation's leaders, the President maintains a unique position within the Federal Government. As Commander-in-Chief of the armed forces, he discharges unique responsibilities for the security of the country. As head of the Executive Branch, he is entrusted with the authority of coordinating and executing all laws of the United States. For these reasons, an assault on the President threatens the national security in a distinctive fashion. Even if the attempt is unsuccessful, it may produce a national sense of embarrassment, fear, or trauma. An attempt on the life of the President is, as a result, different in kind, not merely in degree, from an attempt on the life of any other public or private citizen." Letter from Ted Olson, Asst. Attorney General, Office of Legal Counsel, to Lowell Jensen, Apr. 30, 1981, reprinted in Capital Punishment: Hearings Before the Sen. Judiciary Comm., 97th Cong., 1st Sess. 54, 64 (1981).

Indeed, it is difficult to envision a single crime in this country more atrocious than assassination of the President.

Other federal statutes protect important federal officials from assassination. Title 18 U.S.C. §351(a) covers "any individual who is a Member of Congress or a Member-of-Congress-elect, a member of the executive branch of the Government who is the head, or a person nominated to be head during the pendency of such nomination, of [an important Executive department], the Director (or a person nominated to be Director during the pendency of such nomination) or Deputy Director of Central Intelligence, or a Justice of the United States." Assassination of such persons obviously has a grave effect on the proper functioning of government and, in appropriate cases, deserves to receive the highest penalty available under law.

Federal statutes also contain several vital national security provisions. Title 18 U.S.C. §2381 prohibits treason; 18 U.S.C. §794 does the same for serious forms of espionage. These crimes also are extremely serious, and it is worth exploring the need for the death penalty in this area at some length. Espionage has far-reaching implications for the security of the nation. From 1984 to 1986, twenty-seven U.S. citizens were charged with espionage and all but one (Craig Smith) who have been brought to trial have been convicted. A Report by the House Permanent Select Committee on Intelligence entitled "United States Counterintelligence and Security Concerns -- 1986," published this month, catalogued some of the more serious cases:

-- John Walker during a 15-year period provided the Soviets with code cards and the plans to code machines used widely by the Navy. The Soviets undoubtedly read many of the classified messages concerning submarine movements and tactics sent using these machines during that period.

-- Jerry Whitworth provided other code cards and code machine plans that allowed the Soviets access to the same kind of messages both before and after Walker retired. He also provided copies of coded messages and other classified information about U.S. aircraft carriers.

-- For two years, Jonathan Pollard provided thousands of highly classified intelligence reports to Israel, including reports the U.S. chose to share with no other country.

-- Ronald Pelton, in a series of clandestine meetings with the Soviets in Washington and Vienna, provided detailed information on NSA's efforts at

breaking Soviet codes and intercepting sensitive Soviet military communications. In those meetings, he gave the Soviets a good description of many U.S. signal intelligence capabilities against the Soviet Union and betrayed collection programs it had taken decades to establish.

-- For 30 years, Larry Wu Tai Chin spied for China. During the last nine years of his career at CIA, he saw, and in turn gave to the Chinese, a great many classified CIA analyses about China.

-- Sharon Scranage betrayed the identities of CIA agents in Ghana and perhaps in other African countries. Her disclosures crippled CIA capabilities in Ghana.

-- Edward Howard betrayed the most sensitive operations of the United States in Moscow, which had a severe adverse impact on U.S. collection of intelligence in Moscow.

The House Report also concludes that "[m]ost of the Americans who were caught spying between 1984 and 1986 had no ideological commitment to another foreign country. They sold U.S. secrets for financial reasons."

That serious cases of espionage, both wartime and peacetime,³ might be appropriately be punished by a death penalty has long been recognized. Judge Kaufman's opinion in United States v. Rosenberg, 109 F. Supp. 108 (S.D.N.Y. 1953), denying the motion for reduction of death sentences imposed for a

³ In the first few months of this Administration, the Department advised Senator Thurmond that "serious consideration" should be given to the issue of whether the death penalty is appropriate for peacetime espionage. Letter from Ted Olson, Office of Legal Counsel, to Senator Thurmond, May 26, 1981, at 10, reprinted in Capital Punishment: Hearings Before the Senate Judiciary Comm., 97th Cong., 1st Sess. 25 (1981). Since then, the Senate has concluded that the penalty is proper for aggravated cases of peacetime espionage. See S. Rep. 98-251, 98th Cong., 1st Sess., at 26 (1983). And the Department has considered the matter at length, particularly in light of some of the recent serious cases of peacetime espionage recited above. The Department is now firmly of the view that capital punishment is needed for aggravated cases of peacetime espionage. The Department has previously expressed its view that such punishment is constitutionally permissible. See letter from Ted Olson, supra.

conspiracy to violate the Espionage Act, sets forth cogent reasons why the death penalty may be imposed for espionage. As he stated, "Throughout history the crime of traitors stands as the most abhorred by people. At the time of the imposition of the sentence, ... I pointed out that the crime for which these defendants stood convicted was worse than murder. The distinction is based upon reason. The murderer kills only his victim while the traitor violates all the members of his society, all the members of the group to which he owes his allegiance." Id., at 110.

Significantly, espionage under 18 U.S.C. §794 is a crime not very different from treason, United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965), cert. denied, 384 U.S. 1013 (1966), an offense of such grave importance as to be singularly defined in the Constitution, U.S. Const., Art. III, Sec. 3, and which Congress has elected to treat as a capital offense from the earliest days of the Nation. See 1 Stat. 112 (1790). See generally Haupt v. United States, 330 U.S. 631 (1947). Treason and espionage strike at the very existence of government and at the safety of the Nation. They may expose millions to danger or death.⁴ Moreover, in the nuclear age, even if the disclosure of defense-related information ultimately does not in fact weaken national defense, such disclosure does make it significantly more likely that a nuclear superpower will misjudge the defensive capabilities of the United States and as a result take an aggressive step that will escalate to an all-out conflagration. A death penalty for aggravated forms of treason and espionage therefore would appear to constitute "just punishment."

Federal capital statutes also proscribe various deliberate crimes that might be expected to result in multiple deaths and therefore are particularly heinous. For instance, 18 U.S.C. §1992 forbids the willful wrecking of a train resulting in death, an offense that ordinarily would be expected to produce numerous

⁴ An affidavit submitted by Rear Admiral William Studeman, Director of Naval Intelligence, in the Whitworth case reported that: "Naval intelligence analysis has led us to conclude that the Walker-Whitworth espionage activity was of the highest value to the intelligence services of the Soviet Union, with the potential, had conflict erupted between the two superpowers, to have powerful war-winning implications for the Soviet side." Affidavit of RADM Studeman, United States v. Walker, Crim. No. 85-0552 (N.D. Cal. 1986).

deaths and grievous injuries.⁵ Similarly, 18 U.S.C. §§32 & 33 and 49 U.S.C. §§1472 & 1473 cover destruction of aircraft, motor vehicles, or related facilities resulting in death as well as aircraft hijacking resulting in death, offenses that could well produce multiple homicides.⁶ Title 18 U.S.C. §1716, which forbids mailing bombs that result in death, is also an important statute: even in situations where the crime covered by this statute involves "only" one murder, a death penalty could be appropriate to maintain public confidence in the sanctity of widely-used channels of commerce.

The final statute that should be discussed is §1111, which covers "merely" murder within federal jurisdiction. Although the offense described in this statute may not be as serious as those discussed above, the intentional and unjustified taking of an innocent person's life is nonetheless an offense that, in aggravated cases, deserves a capital sentence. Any other sentence would be insufficiently severe because, as the Senate Judiciary Committee has concluded:

"Murder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought also to differ in kind. It must acknowledge the inviolability and dignity of innocent human life. It must, in short, be proportionate." S. Rep. 98-251, 98th Cong., 1st Sess. 13 (1983).

⁵ Constitutional questions have been raised about the status of §1992 since its terms do not mention the possibility of a death sentence if the defendant waives his right to trial by jury and is instead tried by the court. Under the analysis of United States v. Jackson, 390 U.S. 570 (1968), such an arrangement might be found to place an unconstitutional burden on the right to a jury trial. However, the Commission might be able to fashion its guidelines so as to avoid this particular constitutional infirmity. The Department is analyzing this issue and will respond more fully at a later date.

It must be emphasized, however, that the possible flaw in §1992 does not appear to infect any of the other federal death penalty statutes with the sole exception of 18 U.S.C. §2113 (bank robbery-related murder).

⁶ It is not clear whether the Sentencing Commission should promulgate death penalty guidelines for aircraft hijacking since constitutionally valid procedures for imposing a capital sentence are already contained in the statute itself.

And Walter Berns has explained:

"The purpose of the criminal law is not merely to control behavior -- a tyrant can do that -- but also to promote respect for that which should be respected, especially the lives, the moral integrity, and even the property of others. In a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement and, thereby, hope to promote this respect. To be successful, what it says -- and it makes this moral statement when it punishes -- must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made to be awful or awe inspiring is to entitle it to inflict the penalty of death." W. Berns, Defending the Death Penalty, Crime and Delinquency (Oct., 1980), reprinted in S. Rep. 98-251, 98th Cong., 1st Sess. 10 (1983).

To punish aggravated murders and other heinous federal crimes with less than a penalty of death conveys a deplorable message. This point can readily be appreciated by contemplating the essentially immoral effect that the Commission's guidelines will have if they do not provide for the death penalty. As currently drafted, the Commission's guidelines specify lengthy prison terms, if not in effect life terms, for crimes such as second degree murder and forcible rape of a minor in aggravated circumstances.⁷ These sentences are entirely proper. But without a death penalty, the guidelines will essentially "top out" and equate second degree murder or rape with assassination of the President or treason involving the nation's nuclear secrets. Only if the guidelines provide a substantially greater penalty for these most serious federal crimes will the sentencing scheme fully "reflect the seriousness of the offense." As then-Solicitor General Bork argued before the Supreme Court in defense of death penalty statutes, "Capital punishment marks some crimes as particularly outrageous and offensive, and therefore to be avoided by those individuals with even a trace of social responsibility." Brief for United States as Amicus Curiae in Fowler v. North Carolina, No. 73-7031, at 40 (1975).

⁷ This latter example is particularly troubling since it demonstrates that in some circumstances a rapist will face a life sentence for his crimes. In the absence of a death penalty, he may decide to kill his victim to avoid leaving a witness, secure in the knowledge that he can receive no additional punishment for doing so.

Further support for capital sentencing guidelines is provided by the overwhelming public recognition that the death penalty is just punishment for murder and other serious crimes. The sentencing guidelines legislation and its drafting history indicate that the determination of questions of proportionality between offenses and penalties imposed for them optimally should not depend primarily on the theories of particular writers or the personal feelings of Commission members about what sort of punishment is fitting for what sort of offense and offender, but should take account of public attitudes on this question. This point is implicit in the statutory specification that sentences should be fashioned so as to "promote respect for the law," §3553(a)(2)(A), and is also supported by more explicit statements in the legislation and the Committee Report indicating that sentencing levels may appropriately be coordinated to "the community view of the gravity of the offense" and should "reflect current views as to just punishment." See 28 U.S.C. §994(c)(4); S. Rep. 98-225, 98th Cong., 1st Sess. 170-71, 178-80 (1984).

The public overwhelmingly supports the death penalty for serious crimes. The most recent national poll regarding the death penalty was published last month by Media General-Associated Press. The poll reveals that 85% of Americans favor, and only 11% oppose, the death penalty for some murders. The poll also reveals that support for the death penalty crossed all religious, educational, economic, and regional differences. The Media General poll is consistent with numerous surveys taken by various organizations, all of which demonstrate tremendous public acceptance of capital punishment. For instance, the 1986 Gallup poll found 70% of Americans in favor of the death penalty for murder, and only 22% opposed.⁸ A more complete compilation of

⁸ The Gallup Poll gives lower approval rates for the death penalty than does the Media General-Associated Press Poll cited previously. The reason is that the Gallup poll gives respondents only two choices: Do you favor or oppose the death penalty for persons convicted of murder? Professor Philip Harris, Assistant Professor of Criminal Justice at Temple University has observed, "The way a question gets asked makes a big difference. [The Media General question] is probably a more accurate reading of where the American public is. They don't support [the death penalty] in all circumstances." 84% In Poll Support Death Penalty, Los Angeles Times, Feb. 3, 1985, at 8.] Since the Sentencing Commission presumably would promulgate guidelines permitting the death penalty only in some circumstances, the Media General poll is a more accurate indicator of prevailing views on whether the death penalty would constitute just punishment within the framework of a sentencing guidelines (continued...)

these polls and their results is contained in Appendix B to this report.

In the face of these kinds of numbers, sometimes the argument is made by death penalty abolitionists that the weight of "enlightened" public opinion is opposed to the death penalty. Often this argument boils down to nothing more than that those who are opposed to capital punishment find the views of the majority of Americans who favor capital punishment to be "unenlightened." Made more narrowly, the argument might be that thoughtful persons, when fully informed about the arguments on both sides of the capital punishment issue, will oppose the penalty. In fact, however, as an empirical matter, this argument has little basis. For example, as of last year, 37 of the 50 states in this country had recently enacted or reaffirmed death penalty provisions. Bureau of Justice Statistics, Bulletin: Capital Punishment, 1985, at 3. This represents a broad approval for the death penalty from the nation's elected representatives, who have reached their judgment on the issue only after extensive fact-finding, hearings, and legislative debate. Also, Congress has repeatedly adopted death penalty statutes -- most recently in 1974 for aircraft hijacking, see P.L. 93-366, 88 Stat. 410 -- and large majorities in both Houses of Congress have within the last two years passed bills providing for the death penalty for some crimes.⁹ Since Congress has wide-ranging fact-finding abilities,

⁸(...continued)
system.

⁹ On February 22, 1984, the Senate passed S. 1765, a bill providing constitutional procedures for imposition of the death penalty, by a vote of 63-32. In October, 1986, the House passed an amendment by Congressman Gekas to permit the imposition of the death penalty for individuals involved in certain continuing criminal enterprise drug offenses by a vote of 296-112.

it is clear that "informed" opinion supports the death penalty.¹⁰

Our society rightly considers the death penalty the only fitting punishment for certain offenses; for some crimes, it alone is the sanction that "reflect[s] the seriousness of the offense, ... promote[s] respect for the law, and ... provide[s] just punishment."

B. Deterrence

The second purpose the Commission is charged with meeting is "to afford adequate deterrence to criminal conduct." 18 U.S.C. §3553(a)(2) (Supp. III 1985). As Congress has recognized, a death penalty is the only adequate deterrent for some crimes. Support for this conclusion comes from three sources: logic, anecdotes, and statistical studies.

1. Logic

Logic compels the conclusion that the death penalty is the most effective deterrent for some kinds of murders -- those that require reflection and forethought on the part of persons of

¹⁰ The community of nations shares in this judgement. The Department of State recently surveyed our embassies in all countries in the world with which the United States shares diplomatic relations. One hundred and twenty-nine, or roughly four-fifths responded. Of these countries, approximately 98 retain the death penalty for some crimes while only 31 have abolished it. It is also interesting that many countries retain the death penalty for the types of crimes currently covered by federal capital statutes. For instance, Great Britain retains the death penalty for certain exceptional crimes such as wartime treason.

While it is true that some Western European countries have in recent years abandoned the death penalty, in part because of abuse of the penalty by past totalitarian regimes, it must also be observed that the death penalty was long found by these countries to be entirely proper. Moreover, within countries that have abolished capital punishment, public support for the penalty often remains strong. For instance, more than 70% of Canadians favor the death penalty for some crimes. Crime in Canada Spurs Calls for Reviving Capital Punishment, Christian Science Monitor, Sept. 23, 1982, p. 6.

reasonable intelligence and unimpaired mental faculties.¹¹ Such persons logically can be assumed to be deterred to some extent by the existence of the death penalty, and more deterred by the finality of death than they would be by the next most serious penalty -- life imprisonment without parole. As the Supreme Court observed in Gregg v. Georgia, 428 U.S. 153, 186 (1976): "There are carefully contemplated murders, such as the murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." In a footnote, the Court added, "other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime." Id., at n. 53.

Sometimes it is argued that capital offenses are committed in the "heat of passion" and therefore are not susceptible to deterrence. This argument is particularly misplaced when levelled against the federal statutes that provide for the death penalty. Title 18 capital offenses include the retaliatory murder of a member of the immediate family of law enforcement officials, murder of important government officials, espionage, murder by mailing a injurious articles with intent to kill, assassination of the President, willful wrecking of a train resulting in death, bank-robbery related murder, or treason. See 18 U.S.C. §§ 115(b)(3), 351, 794, 1716, 1751, 1992, 2113, 2381. It is obvious that none of these offenses is typically a "heat of passion" crime. Therefore, one would expect that death penalties for the federal capital offenses would be particularly likely to have a significant deterrent effect. As Solicitor Bork observed,

"Treason, espionage, sabotage, aircraft piracy and deliberate wrecking of trains (all of them federal capital offenses) are prime examples of entire categories of offense committed after calculation and in pursuit of ulterior goals. The people who commit such crimes are rational (albeit misguided or evil) individuals and there is no reason to believe they will not attend their own self-interest and consider the potential severity of the penalty that might be meted out in response. These crimes (at least) are sufficiently narrow and clearly defined, and sufficiently open to dissuasion by deterrence, that capital punishment is

¹¹ Espionage and treason are to an even greater extent crimes of premeditation for which the sanction of death should operate as a particularly effective deterrent. See United States v. Rosenberg, 109 F. Supp. 108, 115 (S.D.N.Y. 1953) (Kaufman, J.).

permissible for them regardless of its deterrent value as applied to other crimes." Brief for the United States as Amicus Curiae in Fowler v. North Carolina, No. 73-7031, at 34 (1975).

Even when the federal murder statute alone is considered, however, the heat of passion argument is a weak one. We know from experience that a substantial number of murders are premeditated. Indeed, we can collect the data on this point through our law enforcement agencies. According to the Federal Bureau of Investigation's Uniform Crime Reports, in 1985, the most recent year for which complete statistics are available, 17,545 murders¹² were reported. Of these, 19.9 percent occurred as a result of felonious activities or suspected felonious activities, including 9.2 percent because of robbery, 2.9 percent because of narcotics offenses, 1.5 percent because of sex offenses, 1.2 percent because of arson, and 3.1 percent because of other felonies. Federal Bureau of Investigation, Uniform Crime Reports 1985, at 12.¹³ Thus, even ignoring other categories in the report, more than 3,400 murders in 1985 arose out of presumably premeditated felonious activity and would be susceptible to deterrence. Another way of demonstrating the same result is by reference to FBI data in the same publication that of all 1985 murders, 14 percent were committed by "strangers", i.e., persons unknown to the victim. Id., at 11.¹⁴ Hence, again even ignoring other categories in the report, more than 2,400 murders in 1985 arose out of "stranger" murders that are most likely to be susceptible to deterrence.

Finally, as a general proposition, the "heat of passion" argument is a weak one. "The fact that murder tends to be a crime of passion does not prove that murder cannot be deterred by the threat of severe punishment. It is possible that precisely because of the severe punishments prescribed, murders tend to be

¹² "Murders" is defined in the Uniform Crime Reporting Program as the willful (nonnegligent) killing of one human being by another.

¹³ To round out the data, 39.3 percent were committed because of an argument (including 2.3 percent because of a romantic triangle), 18.1 percent because of other motives or circumstances, and 22.8 percent because of unknown motives.

¹⁴ In addition, 41 percent were committed by persons "acquainted" with the victim, 17 percent by relatives, and 27 percent were committed by a person of "unknown relationship."

committed, on the whole, only by those unable to weigh the possible costs against the probable benefits." W. Berns, For Capital Punishment 104-05 (1979).

2. Anecdotal Evidence

Anecdotal evidence in support of the deterrent value of capital sentences comes from examples of persons who have been deterred from murdering, or risking a murder, because of the death penalty. For instance, Justice McComb of the California Supreme Court collected from the files of the Los Angeles Police Department fourteen examples within a four year period of defendants who, in explaining their refusal to take a life or carry a weapon, pointed to the presence of the death penalty. For instance, Louis Turck was arrested for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery in Los Angeles. He told investigating officers that, although he had been in California for only one month, he was aware of the state's death penalty. He used a simulated gun because: "I knew that if used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber." People v. Love, 56 Cal.2d 720, 366 P.2d 33, 41, 16 Cal. Rptr. 777 (1961) (McComb, J., dissenting). Similarly, Jack Colevris committed an armed robbery at a supermarket about a week after escaping from San Quentin prison. He was soon stopped by a motorcycle officer. As an escaped convict with two prior armed robbery convictions, Colevris knew he faced another along prison term. But he did not use the loaded revolver on the seat next to him because, he said, he preferred a possible life sentence to a death sentence. Id., 366 P.2d, at 41-42.

Further anecdotal evidence is recounted by Frank Carrington:

"In 1970 and 1971 the Los Angeles Police Department surveyed persons whom they had arrested for violent crimes, but who either had carried no weapons, had not used their weapons, or had carried inoperative weapons. Of the ninety-nine criminals who responded to the question about why they had not killed, or, alternatively, why they deliberately had avoided placing themselves in a position where they could have killed, their responses indicated that fifty percent were deterred by fear of the death penalty; about eight percent were unaffected by the death penalty because it was not being enforced; ten percent were undeterred by the death penalty and would kill whether it was enforced or not; and approximately thirty-two percent were unaffected by the death penalty because they would not carry a weapon under any circumstances, primarily because of a fear either of being injured themselves or of injuring someone else. Thus, one out of every two

persons who had avoided circumstances in which they might have killed provided the best possible empirical basis for believing in the deterrent effect of the death penalty -- their own statements that a fear of the gas chamber governed their actions." Carrington, Deterrence, Death, and the Victims of Crime: A Common Sense Approach, 35 Vand. L. Rev. 587, 597 (1982).¹⁵

Anecdotes also reveal that some criminals committed homicides or attempted to commit homicides specifically because of the absence of a death penalty. For instance, according to the Attorney General of Kansas, one of the contributing factors leading to the reenactment in the 1930's of the death penalty in Kansas for first-degree murder was numerous deliberate murders committed in Kansas by criminals who had previously committed murders in states surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured. Report of the Royal Commission on Capital Punishment 375 (1953). More recently, in March of 1973, four men entered a warehouse complex in Landover, Maryland and took numerous hostages. Five of the hostages were shot, but they all miraculously survived. Eleven others were pistol-whipped. One of the victims, who had been shot in the throat, later testified that one of the robbers "told us he had a hand grenade and was going to blow us all up. He said it didn't matter to him who died, since the worst that would happen to him was that he would be taken care of the rest of his

¹⁵ These figures have been criticized on the ground that they "indicate that but for capital punishment, we would have a massively higher murder rate." Kaplan, The Problem of Capital Punishment, 1983 Univ. of Ill. L. Rev. 555, 558 (1983). While one can question the magnitude of the figures, Kaplan's criticism appears misplaced when one recognizes that the study included persons who had "deliberately ... avoided placing themselves in a position where they could have killed," a category including persons who carried no gun or a disarmed gun to avoid even the possibility of shooting their victim. If more persons decided to carry fully operative guns in committing armed robberies, the murder rate would surely rise, but not necessarily to a "massively higher" rate.

The L.A.P.D.'s survey is corroborated by California Supreme Court Justice Schauer's statement that during his years as a trial court judge "I repeatedly heard from the lips of robbers ... substantially the same story: 'I used a toy gun [or a simulated gun or a gun in which the firing pin or hammer had been extracted or damaged] because I didn't want my neck stretched.'" People v. Love, supra, 366 P.2d, at 47 (Schauer, J., dissenting).

life" in prison. No hand grenade was found, but the fact that the robbers shot five people clearly indicates that they were quite willing to kill in the recognized absence of a death penalty. Four Guilty, In Holdup, Shootings, Washington Post, Dec. 8, 1973, at B1.

A more complete list of the anecdotal evidence in support of the deterrent effect of the death penalty is attached to this report as Appendix C. These examples strongly suggest that our intuition is correct in suggesting that a death penalty will deter some crimes.

3. Deterrence Studies

The area of the capital punishment and deterrence has been the subject of a long and lively debate in the scholarly literature. This section reviews the prominently-cited articles and concludes that the best statistical evidence available supports the conclusion that the death penalty has a deterrent effect on homicide. It also points out that this finding is consistent with a growing number of deterrence studies that establish that more severe punishment deters crimes.

It may be useful to turn first to a statistical argument that is occasionally raised in opposition to the death penalty. Opponents of capital punishment sometimes argue that the death penalty is "brutalizing" and that it may actually lead to more homicides. The studies supporting this theory, however, are seriously flawed. For instance, one study theorizes that the death penalty may encourage murder because some criminals want to be put to death. Solomon, Capital Punishment as Suicide and Murder, 45 Am. J. Orthopsychiatry 701 (1975). It cites as evidence two case studies where suicidally-inclined individuals committed murder hoping to be caught and executed. They had earlier tried more conventional ways to commit suicide but failed. Undoubtedly, there are always going to be individuals who do not fit the deterrence model, but this is no reason to tailor the laws to their individuals unless they comprise a significant segment of the population. It is ironic that the two individuals cited by Solomon could have probably mounted an insanity defense.

Another study is Bowers and Pierce, Deterrence or Brutalization: What is the Effect of Executions?, 26 Crime & Delinquency 453 (1980). They use execution and homicide data in the state of New York from 1864 to 1967 to estimate the effect of lagged executions on the current homicide rate. They find a short-run positive ("brutalization") effect. There are several flaws in their analysis, beginning with the use of monthly data. Sampling at such close intervals makes their results extremely sensitive to assumptions about the timing of the effect of

executions on homicides and to assumptions about the amount of homicides that would "normally" occur in the month. They try to predict the "normal" amount of homicides with a seasonal dummy and a time trend, but it is likely that the number of homicides committed in the previous months also affects the number of homicides committed in the current month. Failure to correct for this type of autocorrelation could result in finding of a brutalization effect when there is none.

A final study on this point is McFarland, Is Capital Punishment a Short-Term Deterrent to Homicide? A Study of the Effects of Four Recent American Executions, 74 J. of Crim. Law & Criminology 1014 (1983). McFarland studies the effects of four recent, highly publicized, executions in the United States and looks for the effects of the executions on the number of "normal" weekly homicides before and after the execution date. He finds neither a deterrent nor a brutalization effect. His study is better than Bowers and Pierce's because it allows past homicides to affect current homicides, a better definition of "normal," but this is still an ad hoc definition. Also, like any "event" study, it is vulnerable to criticism about the time and geographic scope of the effect.¹⁶

In sum, the "brutalization" effect is found in only a few studies that use questionable methodology and in case studies of deranged individuals. The brutalization effect, without a general theory of behavior to support it, is a very poor candidate for forming public policy. Reductio ad absurdum, it leads to the conclusion that by reducing the level of punishment we can reduce the crime rate, a proposition that is uniformly rejected by the fifty states and Congress.¹⁷

Studies that purport to demonstrate that the death penalty fails to deter are equally flawed. Consider, for instance, the

¹⁶ A similar study by David Phillips finds a short term deterrent effect to executions in London, particularly highly publicized ones. Phillips, The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy, 86 Am. J. of Sociology 139 (1980). However, it appears to suffer from the same flaws as McFarland's study.

¹⁷ The sophisticated studies in this area, which generally find a negative correlation between capital punishment and homicide rates, automatically take any "brutalization" effect into account. Because they find a negative correlation, they demonstrate that any "brutalization" effect, if it exists, is outweighed by the deterrent effect.

study by Bailey, Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago, 74 J. of Criminal Law & Criminology 827 (1983). The study is similar to that of Bowers and Pierce discussed above. Bailey tries to estimate the effects of lagged and contemporaneous executions on current homicides. He uses weekly data from the city of Chicago from 1915 to 1921. The flaws in this study are the same as those in Bowers and Pierce: First, it is unlikely that a deterrent effect would be limited to a geographic area. An execution in Chicago might well deter murders in adjacent Evanston, Illinois or Gary, Indiana. Second, Bailey uses weekly data which makes his results extremely sensitive to assumptions about the timing of the effect of executions on homicides. Third, the correction for the "normal" amount of murders is as bad as the attempt by Bowers and Pierce to correct for the same thing for identical reasons.

Next is Forst, Capital Punishment and Deterrence: Conflicting Evidence?, 74 J. of Criminal Law & Criminology 927 (1983). Forst examines the 1960's by state to determine what caused the growth in homicide rates between 1960 and 1970. He concludes that the execution rate does not have an effect on the homicide rate and interprets his findings as evidence against the deterrent effect. His interpretation is not convincing because he does find a significant negative effect of the conviction rate on the murder rate. Most empirical attempts to estimate deterrence find that the arrest rate, the conviction rate given arrest, and the punishment rate given conviction have effects in descending order of magnitude on the crime rate, and his results are consistent with this finding. This could be interpreted as evidence of deterrence of the death penalty because conviction does not have an effect totally independent of the punishment to follow. Further problems with his analysis are ones common to all studies that use aggregate data. What is interesting in his paper are his attempts at post hoc theorizing to explain his results. He offers several explanations: First, there are more incentives to kill witnesses if you are facing the ultimate penalty. But removing the death penalty does not get rid of this problem; even in the absence of a death penalty, first degree murderers will face a maximum sentence such as life in prison. He also speculates that juries are less likely to convict criminals of capital offenses and that capital punishment increases the acceptability of violence. These are examples of what might be called the "demand for crime," the reaction of the rest of the criminal justice system to the "supply of crime" that Forst estimated. As discussed below, it is the interaction of the supply and demand equations that determines how much crime is committed, but Forst makes no attempt to try to account for the demand equation. The fourth explanation is the one offered by Solomon and discussed above.

A simplistic study is Archer, Gartner, and Beittel, Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis, 74 J. of Criminal Law and Criminology 927 (1983). The authors look at fourteen countries where the death penalty was abolished. They conclude that homicide rates do not significantly increase following the de jure abolition of the death penalty. The study is primitive and does not try to account in any systematic fashion for other factors that may influence changes in the murder rate in each country. Moreover, the study uses as its "before and after" point the date of de jure abolition of the death penalty rather than de facto abolition, introducing bias against a finding of deterrence.

A study by Decker and Kohfeld, A Deterrence Study of the Death Penalty in Illinois, 1933 - 1980, 12 J. of Criminal Justice 367 (1984), predicts murder rates from the absolute numbers of executions with annual data in Illinois from 1933 to 1960. They find no effect, but this is understandable given their variable construction. The theory of deterrence says that execution rates should affect murder rates. They also fail to include an arrest rate or conviction rate in their equation. Finally, they do not attempt to correct for changes in the demand for crime.

A widely-cited study is found in T. Sellin, The Penalty of Death (1980). Sellin compares homicide rates in states with and without the death penalty and following changes in a state's death penalty status in the 20th century. He finds no significant differences between "abolitionist" states (those that abolished the death penalty) and "retentionist" states, or within a state before and after imposition of the death penalty. This analysis is too simplistic to detect a deterrent effect and does not take into account other factors that might influence changes in the murder rate in each state. It also fails to even attempt to estimate a supply of crime equation, much less a demand for crime equation. Finally, he tries to identify a deterrent effect with the statutory availability of capital punishment and not its actual use.

While these studies are flawed, that is not to say that statistical research in this area has nothing to tell us about deterrence in general and capital punishment in particular. To the contrary, some sophisticated studies have been done in this area, particularly in recent years, that provide clear support for the hypothesis that the death penalty deters crimes.

In constructing a statistical model to measure deterrent effects, it is important to model both the "demand" and the "supply" for crime. In all the studies discussed above, the criminal was modelled as reacting to the penalties imposed by an outside authority -- that is, as punishment goes up, criminal

activity will move up or down. The model implicitly assumes that punishment is not affected by criminal activity.

This assumption is important because without it, any result can be interpreted as evidence that the outside authority is reacting to changes in crime. For example, suppose that a larger number of homicides makes judges and juries less tolerant of murder and more likely to sentence criminals to death. This would appear as a positive correlation in the data -- i.e., crime goes up while punishment goes up -- that has nothing to do with brutalization (or deterrence).

To complete the theoretical model, it is necessary to model the behavior of the outside authority: the police, the judges, the prosecutors, the juries, the jailers, the legislature, and ultimately the members of a given society. It is necessary to know how these groups will react to changes in crimes because they are the ones who determine the punishment faced by a criminal. Once their behavior is modelled, one has a suitable model for measuring the deterrent effect of punishment on crimes. This supply-demand analysis is widely accepted in the empirical literature as the proper way for modelling deterrence questions. See, e.g., Nagin, General Deterrence: A Review of the Empirical Evidence, in Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates (Blumstein, Cohen, and Nagin, eds. 1978).

Several sophisticated studies have done this and provide support for the deterrent effect of the death penalty. The most recent substantial empirical study was performed by Professor Stephen K. Layson of the University of North Carolina at Greensboro, who utilized sophisticated time-series techniques and data from the United States from 1936 to 1976. His study takes into account previous important criticisms of time-series research on the death penalty. Earlier studies had been criticized on the following grounds: (1) the FBI data used to measure homicides and the probabilities of punishment were suspect, especially during the 1930's; (2) the results were sensitive to the inclusion of additional explanatory variables and the choice of functional form; (3) the regressions were unstable over the 1960's; and (4) the negative correlations between the homicide rate and the execution rate could be explained by the response of law enforcement efforts to changes in the homicide rates rather than the response of potential offenders to execution rates. Layson, Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence, 52 S. Economic J. 68, 68 (1985) [hereinafter cited as "Layson"]. To solve these problems, Layson: (1) used more reliable Vital Statistics data on homicide deaths in place of FBI data; (2) employed additional explanatory variables and various functional forms; (3) ran the regressions over various time periods,

including and excluding the 1960's; and (4) demonstrated that the negative correlations were not the result of law enforcement responses but rather were indicative of a deterrent effect on potential offenders. Layson's study concluded that increases in the probability of execution reduced the homicide rate.¹⁸ Specifically, Layson found that on average each execution deterred more than eighteen murders. While complete confidence in Layson's study must await further review (which is already underway), his most recent finding provides clear support for the proposition that the death penalty deters murder. A copy of his study is attached to this memorandum as Appendix D.

One major consideration that must be addressed here (as in evaluating all non-experimental analysis) is the prejudices of the individual researchers. Analyzing one cross-sectional data set, Leamer has concluded that a prejudiced researcher could find the death penalty either deterred or did not deter by using various alternative assumptions. Leamer, Let's Take the Con out of Econometrics, 73 American Economic Rev. 31 (1983). Layson, however, recognized this concern and examined a wide array of alternative specifications. He found that, while the precise quantitative estimates are sensitive to prior beliefs, the deterrence finding in his time series analysis is robust. Layson, supra, 52 S. Economic J., at 77-86.

Layson's study of the United States data is consistent with an earlier study of his concerning the deterrent effect of capital punishment in Canada. Layson, Another View of the Canadian Time-Series Evidence, 16 Canadian J. of Economics 52 (1983). In addition, Layson's results are insensitive to assumptions about the timing of the deterrent effect. Layson, United States Time-Series Homicide Regressions with Adaptive

18 "The econometric evidence presented in this paper provides solid support for the deterrence hypothesis. The deterrence findings reported in this paper are not fragile. Different sets of explanatory variables have been used, alternative functional forms for the homicide functions have been used and the homicide function has been estimated over different time periods. The regression results consistently support the deterrence hypothesis that increases in the probabilities of arrest, conviction, and execution reduce the homicide rate. Even murderers appear to obey the law of demand." Layson, supra, at 89 (emphasis added).

Expectations, 62 Bull. of the N.Y. Academy of Medicine 589 (1986).

Layson's study is also consistent with sophisticated econometric studies that model both the supply and demand equations done by other scholars. Important empirical work in this area has been done by Isaac Ehrlich, notably his 1975 study, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 American Economic Rev. 397 (1975). While Ehrlich's study has been criticized,¹⁹ he has responded to those criticisms in some detail. He has made a particularly strong response in Capital Punishment: Some Further Thoughts and Additional Evidence, 85 J. of Political Economy 741 (1977). There Ehrlich estimates his supply-of-crime function across states in 1940 and 1950, years in which there was considerable variation across states in execution rates. He finds a deterrent effect that is insensitive to different punishment variables, to the choice of functional form, and to the choice of estimate procedure. He also finds that his results are stable across the two periods and across different regions of the country. In this article, Ehrlich answers much of the criticism of his earlier study about measurement error, choice of functional form, and stability.

Both Ehrlich's studies and Layson's studies can be attacked for failure to include data on the effect of imprisonment length as an alternative cause of the deterrent effect observed. Because such data do not appear to exist at this time for the United States, such a criticism is hard to refute definitively.²⁰

¹⁹ For instance, Bowers and Pierce argued strenuously that Ehrlich's model was flawed because it used FBI data for homicides, which appears to be, at least for certain time periods, less reliable than Vital Statistics data. Bowers & Pierce, The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment, 85 Yale L.J. 187 (1975). Interestingly, however, for whatever reason, they did not present alternative estimates utilizing the Vital Statistics data. Had they done so, they would have discovered that the Vital Statistics data provides an even stronger deterrence result than does FBI data. See Layson, supra, 52 S. Economic J., at 73; Cantor & Cohen, Comparing Measures of Homicide Trends: Methodological and Substantive Differences in the Vital Statistics and Uniform Crime Report Time-Series (1933-1975), 9 Soc. Sci. Res. 121 (1980).

²⁰ For instance, Layson's estimate for the effect on the murder rate from the reduction in executions over time may include the effect from the reduction in length of imprisonment over time. Cf. Klein, Forst & Filatov, The Deterrent Effect of
(continued...)

One study, however, has included such a variable in the equations and still found a unique deterrent effect attributable to the death penalty. The study -- Wolpin, Capital Punishment and Homicide in England: A Summary of Results, 68 American Economic Rev. 422 (1978) -- examines annual homicide and execution rates in England from 1929 to 1968. It finds a significant deterrent effect. It also estimates the effects of various punishments compared to alternatives and finds that execution is a better deterrent relative to life imprisonment.

The few "supply-demand" studies that have concluded that capital punishment does not deter are unpersuasive. Passell and Taylor, The Deterrent Effect of Capital Punishment: Another View, 67 American Economic Rev. 445 (1977), is a critical re-evaluation of Ehrlich's 1975 study using aggregate United States data on murder rates and arrest rates, conviction-given-arrest rates, and execution-given-conviction rates. The difference is that the authors use an odd functional form that makes interpretation of their results difficult: They estimate a deterrent effect assuming that the arrest rate is held constant. The authors are able to reproduce Ehrlich's results, but find that Ehrlich's equation is not stable over the 1960's. Ordinarily this would be fatal to inference drawn from time series data, but their odd functional form makes their study difficult to evaluate.

A study by Hoenack and Weiler argues that the Ehrlich's results are spurious because an increase (decrease) in homicide increases (decreases) the work-loads of the police and courts causing the arrest, conviction, and execution rates to decline (rise), at least in the short run. Hoenack & Weiler, A Structural Model of Murder Behavior and the Criminal Justice

20 (...continued)

Capital Punishment: An Assessment of the Estimates, in Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 345 (Blumstein, Cohen, and Nagin, eds. 1978). However, this observation does not refute the basic finding of Layson. Murderers who are sensitive to a reduction in the average length of imprisonment would presumably also be sensitive to a reduction in the probability of execution. Also, Layson's result holds over a variety of different time periods. See Layson, supra, 52 S. Economic J., at 80-81. Since it is not clear that average sentence length was falling during all of the time periods, the probability of execution likely has at least some deterrent effect.

It should also be observed that Layson's estimates for the deterrent effect of the death penalty may have been biased downward by his use of aggregate United States data for periods when the penalty was effectively limited to a subset of states.

System, 70 American Economic Rev. 327 (1980). Professor Layson, however, has shown that they failed to correct for autocorrelation. The correct estimation of their equations yields results consistent with deterrence theory: the probability of arrest, the probability of conviction given arrest, and the probability of execution given conviction all decrease the homicide rate, although only the negative coefficient supporting the deterrent effect of arrest rates is statistically significant. Layson, supra, 52 S. Economic J., at 71. For the reasons discussed in connection with the Forst study above, however, the finding of a statistically significant negative effect of arrest rates could be interpreted as proof of a deterrent effect to capital punishment.

From the perspective of the Sentencing Commission, it seems clear that, to the extent the decision whether to adopt capital sentencing guidelines hinges on the question of deterrence, the best statistical studies to date support a finding that capital punishment deters crime, specifically homicide. Particularly important, however, is the fact that these studies, in stark contrast to those finding no deterrent effect, are consistent with a large body of empirical work that provides support for a deterrence model of individual behavior.

A substantial body of literature has found a general deterrent effect to criminal sanctions through the use of aggregate data modelling both the supply and the demand for crime. A deterrent effect of punishment on crime has been found in a wide variety of settings. For example, Corman found a deterrent effect using aggregate felony crime rates across 61 New York counties in 1970. Corman, Crime Deterrence in New York: The Relation Between Court Activities and Crime, 19 Economic Inquiry 476 (1981). Bartel found a deterrent effect in a personal and property supply-of-crime equation for women across 33 U.S. states in 1970. Bartel, Women and Crime: An Economic Analysis, 17 Economic Inquiry 29 (1979). Block, Nold, and Sidak, in a study of bakeries in 20 U.S. cities between 1965 and 1976 find that price fixing is deterred when nearby suits are filed. Block, Nold & Sidak, The Deterrent Effect of Antitrust Enforcement, 89 J. of Political Economy 429 (1981).

All studies using aggregate data are susceptible to the charge of data manipulation. However, the apparently contradiction seen in some of the results of aggregate studies are not as prevalent in studies that used individual data. Studies using individual data can be more carefully controlled and measurement of the relevant crime and punishment variables is more easily done. As a result, most of these studies report results consistent with a deterrent effect to punishment. For example, Witte and Woodbury estimate a deterrent effect of audits on individual income tax cheating. Witte & Woodbury, The Effect

of Tax Laws and Tax Administration on Tax Compliance: The Case of the U.S. Individual Income Tax, 38 National Tax J. 1 (1985). Witte, in a study of 641 felons released in North Carolina in 1971 finds that felons are less likely to recidivate the higher they perceive the probability of being apprehended. Witte, Estimating the Economic Model of Crime with Individual Data, Quarterly J. of Economics 57 (1980). The evidence is not completely one-sided. One study failing to find a deterrent effect using individual data is Myers, Estimating the Economic Model of Crime: Employment vs. Punishment Effects, Quarterly J. of Economics 157 (1983).

The most recent and perhaps the best study using individual data is Viscusi, who uses a sample of 2000 inner-city black teenagers in Boston, Philadelphia, and Chicago to estimate the risks and rewards for various types of crimes. He finds that crime incomes are higher where the risk of apprehension and punishment is highest, which is to be expected in a labor market where criminals are compensated for committing relatively hazardous crimes. By implication, if there are risk premiums associated with criminal activity, then criminals can be deterred by simply increasing the risks associated with those activities. Viscusi, The Risks and Rewards of Criminal Activity: A Comprehensive Test of Criminal Deterrence, 4 J. of Labor Economics 317 (1986).

While these general deterrence studies -- based on both aggregate and individualized data -- focus on the deterrent effect of sanctions other than capital punishment, there is no a priori reason for artificially limiting their findings merely to imprisonment. The studies support the hypothesis that increased levels of punishment decrease crime. As the net expected benefit of one particular activity decreases, criminals substitute others -- in short, more serious punishment deters crime. No one would dispute the proposition that a death sentence is a more serious punishment than a lengthy prison sentence. Thus, the findings of the general deterrence studies also provide support for a deterrent effect for the death penalty. They support our intuition and, indeed, the basic premise of our federal sentencing system that potential offenders, or at least a significant portion of them, make rational choices. We can debate the magnitude of the effects, but deterrence appears to be an undeniable fact of life.

4. Innocent Lives Would Be Risked Without The Death Penalty

Given the inherent plausibility of the deterrent power of the threat of death, society must choose between: (1) trading the certain shortening of the life of a convicted murderer against the survival of an unknown number of innocent persons whose future murder by others becomes more probable unless the

convicted murderer is executed; and (2) trading the certain survival of the convicted murderer against the loss of the lives of an unknown number of innocent victims, who are more likely to be murdered by others if the convicted murderer is permitted to live. This choice must be made in favor of protecting society. As Professor van den Haag has put it: "It seems immoral to let convicted murderers survive at the probable -- or even at the merely possible -- expense of the lives of innocent victims who might have been spared had the murderers been executed." E. van den Haag, In Defense of the Death Penalty: A Legal - Practical - Moral Analysis, 14 Crim. L. Bull. 51, 59 (1978).²¹ In short, under the statutory scheme, only the death penalty can be deemed "to afford adequate deterrence" to homicide and other federal capital offenses.

C. Incapacitation

The Commission's guidelines must also serve "to protect the public from further crimes of the defendant." 18 U.S.C. §3553(a)(2)(C) (Supp. III 1985). In some circumstances, only a death sentence can properly protect the public by incapacitating violent offenders.

It is obvious that the death penalty is the most effective means of incapacitating murderers from committing further crimes of any sort. Incapacitation of such persons is important because it is generally acknowledged that some persons who commit capital crimes will commit other crimes -- capital or otherwise -- if given the opportunity. As the Senate Judiciary Committee has explained:

"In some cases, imprisonment is simply not a sufficient safeguard against the future actions of criminals. Some criminals are incorrigibly anti-social and will remain potentially dangerous to society for the rest of their lives. Mere imprisonment offers these people the possibility of escape or, in

²¹ As Professor Kaplan points out, this argument assumes that the imposition of executions will not "backfire" and lead through its "brutalizing" effects to more homicides than it prevents. See Kaplan, The Problem of Capital Punishment, 1983 Univ. of Ill. L. Rev. 555, 560-61. For the reasons discussed previously, however, it is reasonable to conclude that the chance of this counter-intuitive "brutalization" effect is much less than the chance that the death penalty actually deters murder and other crimes.

some cases, release on parole." S. Rep. 98-251, 98th Cong., 1st Sess. 12 (1983).

This point can be demonstrated with specific examples. For instance, Eddie Simon Wein was sentenced to death in Los Angeles Superior Court in 1957. Instead of being executed, he was released from prison in 1975 to live in West Los Angeles, without warning to his neighbors. Within months, he began to attack and kill women in the area. Fortunately for other potential victims, his apprehension was swift. He was convicted in 1976 of first degree murder of one woman, attempted murder of another, and numerous sexual offenses. The woman who was killed by Wein and the women who were scarred by him for life would not have been victims if Eddie Wein had been executed as originally decreed. Here the death penalty would have spared an innocent life.

Similarly, Henry Jarrette -- a double murderer -- was sentenced to a long prison term instead of executed. During an outside-the-prison trip, he eluded a guard and escaped. Two days later he abducted a sixteen-year old girl and raped her. Finally he killed a sixteen-year-old boy who was driving a car Jarrette decided he liked. W. Berns, For Capital Punishment 103 (1979). Had Jarrette been executed, these crimes would never have occurred.

Statistical studies prove that these are not just isolated examples. Out of a sample of 164 paroled Georgia murderers, eight committed subsequent murders within seven years of release. Heilbrun, Heilbrun & Heilbrun, Impulsive and Premeditated Homicide: An Analysis of Subsequent Parole Risk of the Murderer, 69 J. Criminal Law & Criminology 108, 110-13 (1978). A study of twenty Oregon murderers released on parole in 1979 found that one (i.e., five percent) had committed a subsequent homicide within five years of release. J. Wallerstedt, Bureau of Justice Statistics Special Report: Returning to Prison 4 (1984). Hugo Bedau reports that data supplied by the National Council on Crime and Delinquency shows that, between the years 1965 and 1974, of 11,404 persons originally convicted of "willful homicide" and subsequently released from prison, 170 were returned for commission of a felony and 34 were returned during for a subsequent criminal homicide during the first year alone. H. Bedau, The Death Penalty in America 175 (3d ed. 1982).²² Had the

²² From this data, Bedau argues:

"If we cannot improve release and parole procedures so as to turn loose no one who will commit a further murder or other felony, we have three choices. Either we can undertake to execute every convicted murderer;
(continued...)"

death penalty been imposed on some of the murderers in these studies, innocent lives would have been saved.

While it is not possible to determine precisely how many innocent lives have been saved by the execution of convicted murderers who would have killed again had their lives been spared, the data available suggest that it is not an insignificant number. For example, according to the Bureau of Justice Statistics ("BJS"), of the roughly 52,000 inmates in state prisons in 1984 serving time for murder, an estimated 810 had previously been convicted of murder, and had killed 821 persons following their prior murder convictions. If each of these inmates had been executed following his first murder conviction, an estimated 821 lives would have been saved. Of course, since only a fraction of convicted murderers receive the death penalty, 821 is not a fair estimate. Instead, the number of innocent lives saved would be substantially less.²³ Nonetheless, these figures are surely a testimonial to the incapacitative benefits of the death penalty.

Even the alternative to eventual parole -- a "real life" sentence -- will not effectively incapacitate. Prisoners incarcerated rather than executed will continue to pose a serious threat to guards, inmates, and others in the prison setting. See

22 (...continued)

or we can undertake to release none of them; or we can reconcile ourselves to the fact that release procedures, like all other human institutions, are not infallible, and continue to try to improve rehabilitation and prediction during incarceration." Id., at 180 (emphasis in original).

There is, of course, another option: we can undertake to execute those murderers who may be predicted to pose a great risk of subsequent murder, as evidenced by the previous commission of a particularly aggravated homicide.

²³ For instance, one might derive a rough estimate by multiplying 810 convicts by 3.1 percent -- the proportion of convicted murderers who had been sentenced to death out of those admitted to prison for homicide in 1983. See Bureau of Justice Statistics, Bulletin: Capital Punishment, 1984, Table A-1 (attached as Appendix F). This calculation yields a figure of approximately 24 innocent lives saved, a figure which is probably too low since those executed might be expected to pose a greater risk of a subsequent homicide than the population of convicted murderers generally.

S. Rep. 98-251, 98th Cong., 1st Sess. 12 (1983). Recent events confirm the serious problem of protecting prison officers and inmates from dangerous prisoners already serving life sentences for murder without any realistic possibility of parole and who therefore currently have "nothing to lose" by killing yet again. At least five federal prison officers have been killed since December 1982, and the inmates in at least three of the incidents were already serving life sentences for murder. In the most secure cell block of America's highest security prison -- the Control Unit of the Marion, Illinois, penitentiary -- there were, in March 1984, 19 prisoners who had murdered prison officials or other inmates while in prison. In view of the long sentences (including "real life" sentences) that the Sentencing Commission is recommending for capital crimes, this problem can be expected to increase in the future.

Analytically, the problem of prison killings has both an incapacitative component and a deterrent component. With respect to incapacitation, imprisonment rather than execution will fail to protect prison officials by permitting a convicted killer the opportunity to kill again. With respect to deterrence, if the Commission does not provide for the death penalty for federal prison killings, "lifers" can -- literally -- "get away with murder" since they will receive no additional punishment for slaying prison guards or prison inmates.²⁴ For both reasons, capital sentencing guidelines appear justified.

D. Rehabilitation Is Irrelevant
For Capital Offenders

It might be argued that the fourth purpose of sentencing the Commission is charged with satisfying -- "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective

²⁴ One study looked at the rates of prison homicides committed in capital punishment jurisdictions as opposed to abolitionist jurisdictions and concluded that no deterrent effect existed. Wolfson, The Deterrent Effect of the Death Penalty upon Prison Murder, in H. Bedau, The Death Penalty in America 159 (3d ed. 1982). As with the unsophisticated anti-death penalty studies discussed earlier, no attempt was made to control for the variety of other factors that might influence prison homicide. Moreover, the years selected for the study -- 1964, 1965, and 1973 -- all were periods of virtual de facto abolition of the death penalty. In those years, 15, 7, and 0 persons were executed respectively in the entire United States. Bureau of Justice Statistics, Capital Punishment 1984: A National Prisoner Statistics Report, at 12.

manner" -- argues in favor of imprisonment rather than execution of offenders. This view is inconsistent with the Sentencing Reform Act. As the principal legislative history to the Act explains, "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." S. Rep. 98-225, 98th Cong., 1st Sess. 38 (1983). Thus, the statutory scheme rejects rehabilitation as a general purpose for providing a prison sentence. See 28 U.S.C. §994(k) (Supp. III 1985) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant"). Since imprisonment is, under the Act, an inappropriate sentence for the purpose of rehabilitating any offenders, and since a lesser sentence would generally be plainly inadequate for a capital offender, it follows that concern for rehabilitating capital offenders is an inappropriate consideration in designing sentences for such offenders.

E. Other Arguments Against The
Death Penalty Are Misplaced

The foregoing sections demonstrate that, under certain circumstances, capital sentences are needed to meet the purposes of punishment explicitly recognized by the Sentencing Reform Act. Sometimes, however, arguments are made that capital sentences are improper, despite serving the purposes of punishment. It is not immediately clear whether these other issues may be considered by the Sentencing Commission, since Congress has defined the Commission's mandate and explicitly authorized capital sentences. Nonetheless, for purposes of completeness, this section reviews these miscellaneous issues.

Occasionally it is suggested that the death penalty is "degrading" and therefore an improper punishment. This argument carries little weight. As Professor van den Haag has explained:

"Why would execution degrade human dignity more than life imprisonment? One may prefer the latter; but it seems at least as degrading as execution. Philosophers, such as Immanuel Kant and G.F.W. Hegel, thought capital punishment indispensable to redeem, or restore, the human dignity of the executed. Perhaps they were wrong. But they argued their case, whereas no one has explained why capital punishment degrades. Apparently those who argue that it does degrade dignity simply define the death penalty as degrading. If so, degradation (or dehumanization) merely is a disguised synonym for their disapproval." E. van den Haag, The Death

Penalty Once More, 18 U.C. Davis L. Rev. 957, 969 (1985).

It is also sometimes contended that the death penalty violates "natural law." Setting aside the question of the relation of jus naturale to the Sentencing Commission, it is enough to note that there is little support for the position that natural law proscribes the death penalty. Immanuel Kant explained that where a criminal has willed a criminal act such as murder, the author of the penal law may appropriately specify a penalty of death. Immanuel Kant, The Metaphysical Elements of Justice 104-05 (trans. John Ladd 1965). John Locke argued that "Political power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties." John Locke, Second Treatise of Civil Government, chapt. 1. Similar views on the propriety of the death penalty were shared by Thomas Hobbes, see Leviathan, pt. 2, chapter 21; Jean-Jacques Rousseau, see The Social Contract, book 2, chapter 5; the baron de Montesquieu, see The Spirit of the Laws, book 6, chapter 2; and John Stuart Mill, see Speech Delivered before the House of Commons, April 21, 1868. These examples were collected by Professor Walter Berns, who wrote that "Indeed, no political philosopher before or after Cesare Beccaria, with the qualified exception of Jeremy Bentham, has opposed the death penalty as such, although some have opposed its imposition for some (in fact, for most) crimes." W. Berns, For Capital Punishment 22 (1979).

Less frequently, it has been suggested that the death penalty violates the Constitution's prohibition of cruel and unusual punishments. U.S. Const., amend. VIII. The Supreme Court has rejected this argument, however, explaining that respect "for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, requires us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." Gregg v. Georgia, 428 U.S. 153, 186-87 (plurality opinion). No other conclusion seems possible, since the Constitution by its terms explicitly recognizes the possibility of imposing the penalty, see U.S. Const., amend. V (authorizing deprivation of "life" so long as due process of law is followed), amend. XIV (same), and since the original intent of the framers of the constitution was undoubtedly to permit such penalties, see R. Berger, Death Penalties: The Supreme Court's Obstacle Course (1982).

In short, capital sentences serve the purposes of sentencing specified by Congress and do not contravene any other principle -- legal or otherwise -- that would forbid their use.

II. The Federal Death Penalty Has Been Properly Administered

Although the death penalty is for some crimes the only appropriate punishment, it is often argued that difficulties in the administration of the penalty should preclude its use. This section considers these arguments and finds them wanting.

A. Distributional Arguments Against The Death Penalty Are Entitled To Little Weight

Opponents of the death penalty occasionally argue that because some persons who deserve the penalty of death do not receive it, it is "unjust" to impose it on others. This distributional argument fundamentally misconceives the nature of justice. It is clear that some number of murderers who deserve capital punishment will never be caught, some number will never be convicted, and some will never be sentenced to death. The fact that these murderers fortuitously escape the death penalty, however, does not affect the justice of imposing it on other murderers who also deserve it: by assumption, these murderers still have received a just penalty.

To be sure, every effort should be made to sentence criminals guilty of equally severe crimes to the same punishment. That enterprise, after all, is what animated the Sentencing Reform Act and the creation of the Sentencing Commission. But no one has ever suggested that the prison gates should swing open for all robbers because some have been sentenced to probation while others equally blameworthy have been sent to prison. By the same token, the option of a capital sentence should not be barred for those who deserve it merely because all who deserve it will not receive it.

Professor van den Haag has addressed this point at some length. His analysis bears repeating:

"Since it is never possible to punish equally all equally guilty murderers, we should punish, as they deserve, as many of those we apprehend and convict as possible. Thus, even if the death penalty were inherently discriminatory -- which is not the case -- but deserved by those who receive it, it would be morally just to impose it on them. If, as I contend, capital punishment is just and not inherently discriminatory, it remains desirable to eliminate inequality in distribution, to apply the penalty to all who deserve it, sparing no racial or economic class. But if a guilty person or group escaped the penalty through our porous system, wherein is this an argument for sparing others?" E. van den Haag, The Death

Penalty Once More, 18 U.C. Davis L. Rev. 957, 962-63 (1985).

B. The Federal Death Penalty Can
Be Administered Without Regard
To The Race Of The Defendant

Since 1930, the date to which Bureau of Justice Statistics extend, 33 federal, non-military²⁵ executions have been carried out. Of the 33 persons executed, 28 were white, 3 were black, and 2 were American Indians. See Appendix E, Federal Executions, 1930-63. These figures do not suggest racial bias in the past administration of the federal death penalty, even though all of those executions took place prior to the imposition of rigorous procedural safeguards by the Supreme Court.²⁶ To be sure, one would like more elaborate data in reviewing this issue. For instance, one would like to know the percentage of minorities arrested, tried, convicted, and sentenced to death for federal capital offenses. But racial breakdowns of this type are not available through BJS historical statistical series.²⁷

This lack of evidence of discrimination in the federal capital statutes leads opponents of these statutes to argue by analogy from state death penalty system. The analogy is clearly imperfect, however, because the opportunities for hidden discrimination in the administration of, for example, the statute proscribing assassination of the President are much more limited. Moreover, even focusing on the administration of State death penalty statutes, the available data do not suggest racial bias against defendants. Although it is true that as of 1984, according to data reported by the Bureau of Justice Statistics, some 42% of inmates under a death sentence were black and blacks constituted only about 12% of the general population, any inference of discrimination derived from these figures dissolves

²⁵ The Sentencing Commission does not have jurisdiction over offenses prosecuted under the Uniform Code of Military Justice. See 18 U.S.C. §3551 (Supp. III 1985).

²⁶ It is not surprising that the figures reveal a larger percentage of American Indian defendants than would be expected on the basis of population alone because many murders committed by Indians would be expected to fall within federal jurisdiction. See 18 U.S.C. §1111.

²⁷ Data on the race of the victim of federal capital homicide offenders is not available through BJS either.

on closer examination. In fact, a white person arrested for homicide was far more likely to be sentenced to death than a black arrestee. Between 1980 and 1984 blacks constituted 48.5% of adults arrested for homicide, but only 41% of those admitted to prison under a death sentence.²⁸ Whites constituted 50% of those arrested but 58% of those sent to prison under a death sentence. Finally, among every 1,000 whites arrested for homicide during this period, 16 were admitted to prison under a death sentence, but for every 1,000 blacks arrested, only 11.6 entered prison under a death sentence. While these data do not control for the severity of the crime or the likelihood that an offender will be arrested, they strongly suggest that black offenders do not fare worse than whites once they are brought into the justice process. Surely if juries were acting on the basis of racial prejudice this situation would be reversed.

Some have suggested, however, that even if the death penalty is administered without regard to the race of the defendant, it has been administered with regard to the race of the victim. In particular, statistical studies have been prepared that purport to show that killers of blacks are less likely to receive the death penalty than are killers of whites.

The most extensive of these studies, conducted by Professor David Baldus, was relied on by the offender in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985), cert. granted, ___ U.S. ___ (1986), where the en banc court rejected the statistical argument as insufficient to prove discriminatory intent, as required by the Fourteenth Amendment. Even if the Supreme Court should reverse the judgment in McCleskey, its holding is extremely unlikely to affect the validity of federal death penalty statutes. The impact of a reversal would necessarily be limited to those areas in which statistics demonstrate discriminatory administration of the death penalty. Since the last federal execution occurred in 1963 and any future death penalties would be imposed under new sentencing guidelines, there would simply be no basis for a statistical challenge to a federal death penalty. And, of course, none of the existing studies have demonstrated disparity on the basis of the race of the victim in the administration of the federal death penalty.

Moreover, the nature of many federal crimes precludes any demonstration of bias in the administration of the federal death penalty based on the race of the victims. Many of the capital

²⁸ These figures, along with the data in the remainder of this paragraph, are drawn from the Bureau of Justice Statistics publication Bulletin: Capital Punishment, 1984, Tables A-1, A-2, and A-3, which is attached to this memorandum as Appendix F.

federal offenses do not have a single, identifiable victim. For example, incidents of espionage or treason harm all members of society -- rich and poor, young and old, black and white. Similarly, the crimes of assassination of the President or of a Member of Congress are capital offenses not only because of the harm done to the specific victim but also because of the damage done to vital institutions and the electoral process. These crimes are not susceptible to the meaningful race-of-the-victim analysis.

In addition, broad statistical studies that produce an apparent correlation between the race of the victim and imposition of the death penalty do not argue against imposition of the death penalty.²⁹ Rather, the essential question remains whether the individual defendant was fairly tried and whether the evidence supports his conviction of a crime for which the death penalty is appropriate. Broad statistical evidence that aggregates dozens of crimes, defendants, and trials and the results reached by numerous different juries as decision-makers does little to inform this essential inquiry. Indeed statistics that might be relevant, for example, in proving employment discrimination by an employer because they reflect repeated decisions by a single decision-maker and, therefore, establish a pattern that may give rise to an inference do not have the same relevance in proving discrimination in the administration of justice by juries. Each jury is a new and unique decision-maker whose judgment does not reflect the continuation of a pattern started by an earlier jury. Each jury's determination must be evaluated according to the evidence presented to it and whether that evidence justifies imposition of the death penalty. As explained earlier, the fact that some defendants whose crimes justify imposition of the death penalty do not receive it does not invalidate the penalty's imposition in those cases where it is proper.

Ample means exist to insure that racial discrimination does not affect the result in a particular case. Beyond the extensive safeguards that the Constitution requires in every death penalty case to protect against arbitrary infliction of the penalty, there are protections aimed specifically at eliminating racial discrimination. For example, the Supreme Court has long prohibited racial discrimination in grand and petit jury selection. See, e.g., Vasquez v. Hillery, ___ U.S. ___ (1986); Strauder v. West Virginia, 100 U.S. 303 (1880). Only recently, the Court held that a criminal defendant could establish a prima

²⁹ Indeed, a strong case could be made that these correlations argue for greater use of the penalty to eliminate the disparities and to protect all members of society equally.

facie violation of the Fourteenth Amendment by showing that a prosecutor used peremptory challenges to strike members of the defendant's race from the jury venire. Batson v. Kentucky, 476 U.S. ____ (1986).

The Department of Justice already has in place mechanisms to continue to ensure that federal prosecutors do not seek capital sentences on a racial basis. The Department's "Principles of Federal Prosecution," which are set forth in the United States Attorneys' Manual, specify that "[i]n determining whether to commence or recommend prosecution or take other action, the attorney for the government should not be influenced by ... [t]he person's race; religion; sex; national origin; or political association, activities, or beliefs." United States Attorneys' Manual §927.1260. In addition, the Department's Civil Rights Division and Office of Professional Responsibility stand ready to investigate charges of prosecutorial misconduct. Indeed, discrimination on the basis of race by a federal prosecutor would not only be grounds for dismissal but also a crime under federal law. See 18 U.S.C. §242.

In view of these substantial safeguards against racial discrimination, there is simply no credible basis for believing that any defendant will be sentenced to death on account of race. Indeed, there is no evidence to suggest that the death penalty is administered in a more discriminatory fashion than any other criminal penalty. Thus, unless the assumption that the criminal justice system can be administered fairly prevails, every criminal penalty, no matter how fair or reasonable, will be invalidated solely because of an unsubstantiated fear that they will be discriminatorily applied.

In promulgating guidelines, the Commission could supplement the substantial safeguards already in place to insure that the federal death penalty would continue to be administered without regard to the fact of a defendant. The Sentencing Reform Act contains mechanisms for monitoring the administration of federal death penalties. The Commission's duties specifically include

"establish[ing] a research and development program within the Commission for the purpose of

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

"(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound

sentencing practices" 28 U.S.C.
§995(12) (Supp. III 1985).

Pursuant to these duties, the Commission could monitor the imposition of federal death penalties. If the Commission detects any problems, it can immediately remedy them and/or report them to Congress for prompt corrective action. See 28 U.S.C. §995(20) (Supp. III 1985) (charging Commission with the duty to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy").³⁰ The Department of Justice is likewise charged with such a reviewing function that could (and undoubtedly would) be employed to correct deficiencies in the administration of the federal death penalty. See 28 U.S.C. §994(n) (Supp. III 1985). Of course, the death penalty guidelines promulgated by the Commission would explicitly spell out racially neutral criteria by which the death penalty would be imposed.

Because of the Commission's high visibility, it has the opportunity to establish death penalty guidelines that will serve as a model for state judicial systems. If the Commission can design procedures for minimizing the chance of racial animus infecting sentencing procedures, the states may well choose to follow the example. In this fashion, the Sentencing Commission's adoption of death penalty guidelines might assure fairness not only the federal death penalty system, but also improve the state systems, which involve a far greater number of capital cases.

³⁰ Pursuant to this provision, the Commission should also urge Congress to provide for capital sentences for other offenses where they are needed, notably first degree murder of a foreign official in violation of 18 U.S.C. §1116 (an offense created in 1972 after the Furman decision); kidnapping resulting in death in violation of 18 U.S.C. §1201 (a crime which for many years was punishable by death but which was amended shortly after the Furman case to eliminate the death penalty); hostage taking resulting in death in violation of 18 U.S.C. §1203 (an offense enacted in 1984); murder for hire in violation of 19 U.S.C. §1952A or §1952B (provisions enacted in 1984); and terrorist murder of a United States national abroad in violation of 18 U.S.C. §2331 (an offense enacted in 1986).

C. The Minute Risk Of Executing The
 Innocent Does Not Justify Abolition
 Of The Death Penalty

The danger of executing an innocent person, including the uniquely irremedial nature of such a mistake, has long been recognized -- by proponents of the death penalty as well as by opponents. Opponents contend that, because of this remote possibility, the safest course is to eschew the use of the death penalty.

There are two principal difficulties with this argument against capital punishment. The first is that it gives excessive weight to what is in fact an extraordinarily small risk of an erroneous execution; the second is that it fails to consider the countervailing benefits of capital punishment. Each of these issues is considered in turn.

Although it is generally agreed that the use of capital punishment entails some chance that an innocent person will be executed, this risk is not great. See, e.g., Establishing Constitutional Procedures for the Imposition of Capital Punishment, Report No. 98-251 of the Committee on the Judiciary of the United States Senate on S.1765, 98th Cong., 1st Sess. (1983), at 14 (the risk is "minimal"). This is so because of great array of safeguards to insure that the judicial system functions properly. Within the federal system, constitutional requirements, current provisions in title 18, along with actions that the Sentencing Commission would presumably take if it were to promulgate death penalty guidelines would result in the following safeguards against unjust executions.

First, the federal statutes limit imposition of capital punishment to the most serious offenses against society -- intentional crimes that involve the taking of human life, espionage, and treason.

Second, the federal statutes may not be invoked unless the accused has been found guilty of such an offense. Under long-settled principles of law, guilt must be proved beyond a reasonable doubt at a trial that is open to the public, that is conducted before a jury if the defendant so wishes, and that provides the defendant with a variety of procedural protections including the right to be represented by counsel at all stages of the process. Indeed, under 18 U.S.C. §3005, a federal capital defendant is entitled to the appointment of two attorneys for his defense. With respect to treason, the Constitution itself also guarantees that a defendant shall not be convicted "unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. Const., Art. III, sec. 3.

Third, prior to trial, the defendant must be notified of the federal government's intention to seek the imposition of the death penalty. Moreover, the defendant must be provided with a copy of the indictment and a list of the veniremen and witnesses to be produced at trial. 18 U.S.C. §3431. The Commission could require that the government inform the defendant of the aggravating factors it proposes to prove as justifying a sentence of death, so that the defendant will have a sufficient opportunity to make ready his defense to the charge and to prepare for the post-trial penalty hearing if he is found guilty.

Fourth, if the trial results in a verdict that the defendant is guilty, a post-verdict hearing could be held to determine the penalty to be imposed. The hearing would be conducted before a jury if the defendant wishes, and he would be entitled to continued representation by counsel.

Fifth, in order to justify imposition of the death penalty, the Commission could establish a system under which the government must prove beyond a reasonable doubt the existence of at least one aggravating factor that is not outweighed by any mitigating factors. Aggravating factors that might be specified are discussed at greater length in Part III below, and include commission of the offense by use of torture, commission of the offense against multiple victims, commission of the offense by a person who had previously been convicted of a serious violent crime, commission of the offense for money, and commission of the offense against certain designated public officials. Mitigating factors might include the defendant's youth, his impaired mental capacity, his commission of the offense under unusual and substantial duress, and his role as a relatively minor subordinate to the principal offender in the commission of the offense.

Sixth, the Commission could require that the jury make a unanimous determination, on the basis of its findings concerning aggravating and mitigating factors, whether the death penalty is justified, or whether a lesser penalty -- usually life imprisonment -- should be imposed instead.

Seventh, the Sentencing Reform Act provides for review of sentences, including death sentences, to ensure that there is an adequate legal basis for imposition of the death penalty. 18 U.S.C. §3742. In addition, federal constitutional and statutory habeas corpus provisions permit the lower federal courts and the Supreme Court to review death sentences that have previously been upheld. After all judicial remedies have been exhausted, a condemned defendant may seek executive clemency. Of course, execution of the sentence is stayed during non-frivolous judicial appeals.

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Seventh, the Sentencing Reform Act provides for review of sentences, including death sentences, to ensure that there is an adequate legal basis for imposition of the death penalty. 18 U.S.C. §3742. In addition, federal constitutional and statutory habeas corpus provisions permit the lower federal courts and the Supreme Court to review death sentences that have previously been upheld. After all judicial remedies have been exhausted, a condemned defendant may seek executive clemency. Of course, execution of the sentence is stayed during non-frivolous judicial appeals.

Since these kinds of procedural requirements and evidentiary burdens in capital sentencing situations operate against imposition of the death penalty, any error that occurs is likely to be in favor of the accused. Thus, if these safeguards were adopted, there would be virtually no risk that an innocent person would be put to death in the federal system.

It should also be observed that few serious claims of injustice have been leveled against the federal death penalty. A draft study by Hugo Bedau³¹ claims that two cases involving federal crimes within the Sentencing Commission's jurisdiction resulted in the possible execution of "innocent" persons -- the Rosenberg case and a 1910 Indian case. Without entering into a discussion of the guilt of these defendants, it is clear that even those who are opposed to the death penalty can not make a historically-based claim that the federal death penalty system has malfunctioned often.

This much said, it must be conceded that an extremely small risk of executing an innocent person still remains. Nonetheless, a fair assessment of the risk and the benefits demonstrates that society has made a reasonable decision in opting to make the death penalty available for certain offenses, since 37 states and the federal government have determined to impose the death penalty in appropriate circumstances. The reason is simple: while the risk of executing an innocent person is extremely slim, the benefits flowing from the death penalty are great. In such circumstances, it is only reasonable for society to retain the death penalty. As Professor van den Haag has written:

"Because justice is done by fallible humans, some miscarriages will occur despite all efforts to minimize them. They will lead to the unintended execution of innocents who never consented to take the relevant risk. The driving of trucks by government employees will lead to the unintended death of innocents, such as children playing on the sidewalk, who did not consent to take the relevant risk. Yet, nobody urges abolishing trucks, or preventing the government from using them. Any human activity can lead to the death of innocents. We nevertheless persist in our activities when we find them useful enough to bear the harm they cause. Is justice less useful than truck driving? I think justice is useful enough and morally

³¹ The current draft of the study appears to contain serious flaws and has been criticized elsewhere. The Department will release a more thorough response when a final version is released.

desirable enough to outweigh the moral and material harm done by its miscarriages." E. van den Haag, Comment on John Kaplan's "Administering Capital Punishment, 34 Univ. of Fla. L. Rev. 193, 195 (1984).

The foregoing discussion of the manner in which innocent lives are protected through the incapacitative and deterrent functions of capital punishment and of the role of the penalty in a system of just punishment demonstrates the wisdom of those who have concluded that the very remote chance of a mistaken execution is outweighed by the protection afforded to society by the death penalty. Given this judgment, it is imperative that society demonstrate the courage of its convictions. Unless it is prepared to forsake the actual and potential victims of the murderers in its midst, society must demonstrate its self-confidence and steadfastness of purpose by actually imposing and carrying out the death penalty in cases that reasonably meet the stringent requirements of the law. In short, the minimal but unavoidable risk of error in the administration of capital punishment must not be allowed to paralyze society from taking the steps necessary to protect its citizens.

III. Specific Aggravating And Mitigating Factors For Capital Sentencing Guidelines

Having considered the general propriety of the imposition of capital sentences, some attention should be given to the issue of what specific aggravating and mitigating factors should be included in capital sentencing guidelines. The Commission need not sail into uncharted waters in designing factors to be considered in the capital sentencing decision. Much work has already been done in this area, by both the states and the Congress. The simplest way for the Commission to proceed in designing its scheme would be to pattern it after one of these approaches. The Commission might follow the path taken by the Senate, which passed a comprehensive federal death penalty bill in 1984. As reported by the Senate Judiciary Committee, that bill provided for consideration of the following aggravating and mitigating factors:

§3592. Factors to be considered in determining whether a sentence of death is justified

(a) Mitigating Factors. -- In determining whether a sentence of death is justified for any offense, the jury, or if there is no jury, the court, shall consider each of the following mitigating factors and determine which, if any, exist:

(1) the defendant was less than eighteen years of age at the time of the offense;

(2) the defendant's mental capacity was significantly impaired, although the impairment was not such as to constitute a defense to prosecution;

(3) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution; and

(4) the defendant was an accomplice whose participation in the offense was relatively minor. The jury, or if there is no jury, the court, may consider whether any other mitigating factors exist.

(b) Aggravating Factors for Espionage and Treason. -- In determining whether a sentence of death is justified for an offense described in section 3591(a) [covering espionage and treason], the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

(1) the defendant has previously been convicted of another offense involving espionage or treason for which either a sentence of life imprisonment or death was authorized by statute;

(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security; and

(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

(c) Aggravating Factors for Homicide and for Attempted Murder of the President. -- In determining whether a sentence of death is justified for an offense described in section 3591 (b) or (c) [covering homicide and attempted assassination of the President], the jury, or if there is no jury, the court, shall consider each of the following aggravating factors and determine which, if any, exist:

(1) the death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 844(i) (destruction of property in

interstate commerce by explosives), section 118 (prisoners serving life term), section 1201 (kidnaping) or section 2381 (treason) of this title, or section 902 (i) or (n) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1472 (i) or (n)) (aircraft piracy);

(2) the defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute;

(3) the defendant has previously been convicted of two or more Federal or State offenses, punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person;

(4) the defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victim of the offense;

(5) the defendant committed the offense in an especially heinous, cruel, or depraved manner;

(6) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;

(7) the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value;

(8) the defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism; or

(9) the defendant committed the offense against--

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section

1116(b)(3)(A) of this title, if he is in the United States on official business; or

(D) A Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution--

(i) while he is engaged in the performance of his official duties;

(ii) because of the performance of his official duties; or

(iii) because of his status as a public servant.

For purposes of this paragraph, a 'law enforcement officer' is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution of an offense.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor exists.

S. Rep. 98-251, 98th Cong., 1st Sess. 31-33 (1983).

To be sure, some modifications of this approach will be required. The Commission should adhere strictly to the existing list of capital offenses contained in title 18 and elsewhere and not expand them.³² The Commission, in contrast to the procedure described above, should not attempt to impose capital sentences for attempted assassination of the President because federal statutes do not currently provide such liability. But we believe the procedures outlined by the Senate provide a useful, comprehensive model that can be adopted to the capital sentencing guideline context.

CONCLUSION

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

³² Neither should the Commission contract the list. For all capital statutes where it is constitutionally permissible, the guidelines should provide for the death penalty in sufficiently aggravated cases.

APPENDICES

- A. Federal Statutes Providing For
The Death Penalty
- B. Public Opinion And The Death Penalty
- C. Anecdotal Evidence In Support Of The
Deterrent Effect Of The Death Penalty
- D. Professor Layson's Study On Homicide
And Deterrence
- E. Federal Executions, 1930-1963
- F. 1984 Capital Punishment Statistics

APPENDIX A

FEDERAL STATUTES PROVIDING FOR THE DEATH PENALTY

APPENDIX A

FEDERAL STATUTES PROVIDING FOR THE DEATH PENALTY

- 10 U.S.C. §918 (murder while member of Armed Forces).
- 18 U.S.C. §§32, 33 and 34 (destruction of aircraft, motor vehicles, or related facilities resulting in death).
- 18 U.S.C. §115(b)(3) (Supp. III 1985) (retaliatory murder of member of immediate family of law enforcement officials) (by cross reference to 18 U.S.C. §1111).
- 18 U.S.C. §351 (murder of member of Congress, important executive official, or Supreme Court justice) (by cross reference to 18 U.S.C. §1111).
- 18 U.S.C. §794 (espionage).
- 18 U.S.C. §844(f) (destruction of government property resulting in death)
- 18 U.S.C. §1111 (first degree murder within federal jurisdiction).
- 18 U.S.C. §1716 (mailing of injurious articles with intent to kill resulting in death).
- 18 U.S.C. §1751 (assassination or kidnapping resulting in death of President or Vice President) (by cross reference to 18 U.S.C. §1111).
- 18 U.S.C. §1992 (willful wrecking of train* resulting in death).
- 18 U.S.C. §2031 (rape)**.
- 18 U.S.C. §2113 (bank robbery-related murder or kidnapping)*.
- 18 U.S.C. §2381 (treason).
- 49 U.S.C. §§1472 & 1473 (death resulting from aircraft hijacking).

*Possibly constitutionally infirm in light of United States v. Jackson, 390 U.S. 570 (1968).

**Repealed by S.1236, Criminal Law and Procedure Technical Amendments Act of 1986.

APPENDIX B

PUBLIC OPINION AND THE DEATH PENALTY

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Media General/Associated Press Poll

November 7 - 14, 1986

Death Penalty

Methodology

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

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

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

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

Q. 1

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

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

Q. 1
CONTINUED

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

Q. 2

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

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

Q. 2

CONTINUED

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

Q. 3

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

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

Q. 3

CONTINUED

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

Q. 4

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

(respondents who said - only in certain circumstances)

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

Q. 4 - page 2
CONTINUED

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

Q. 4

CONTINUED

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

Q. 4 - page 3
CONTINUED

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

Q. 5

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

(respondents who believe in death penalty)

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

Q. 5

CONTINUED

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

Q. 6

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

(respondents who believe in death penalty)

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

Q. 6

CONTINUED

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

Q. 7

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

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

Q. 7

CONTINUED

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

Q. 8

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

(respondents who believe in death penalty)

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

Q. 8

CONTINUED

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

Q. 9

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

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

Q. 9

CONTINUED

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

Q. 10

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

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

Q. 10

CONTINUED

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

**FEBRUARY 3
DEATH PENALTY**

Interviewing Date: 1/11-14/85
Survey #248-G

*Are you in favor of the death penalty for
persons convicted of murder?*

Yes72%
No20
No opinion8

By Sex

Male

Yes78%
No16
No opinion6

Female

Yes67%
No24
No opinion9

By Ethnic Background

White

Yes75%
No18
No opinion7

Nonwhite

Yes56%
No34
No opinion10

Black

Yes57%
No35
No opinion8

By Education

College Graduate

Yes74%
No22
No opinion4

College Incomplete

Yes76%
No16
No opinion8

High-School Graduate

Yes74%
No19
No opinion7

Less Than High-School Graduate

Yes65%
No23
No opinion12

Gallup Poll

By Region

East

Yes66%
No25
No opinion9

Midwest

Yes73%
No19
No opinion8

South

Yes74%
No19
No opinion7

West

Yes77%
No16
No opinion7

By Age

18-29 Years

Yes71%
No24
No opinion5

30-49 Years

Yes73%
No20
No opinion7

50 Years and Over

Yes73%
No17
No opinion10

By Politics

Republicans

Yes82%
No13
No opinion5

Democrats

Yes	65%
No	25
No opinion	10

Independents

Yes	72%
No	21
No opinion	7

By Occupation

Professional and Business

Yes	74%
No	21
No opinion	5

Clerical and Sales

Yes	78%
No	15
No opinion	7

Manual Workers

Yes	72%
No	20
No opinion	8

Nonlabor Force

Yes	67%
No	21
No opinion	12

Selected National Trend

	Yes	No	No opinion
1981	66%	25%	9%
1978	62	27	11
1976	65	28	7
1972	57	32	11
1971	49	40	11
1969	51	40	9
1966	42	47	11
1965	45	43	12
1960	51	36	13
1953	68	25	7

1937	65	35	*
1936	61	39	*

*Not included in these surveys

Asked of the 72% who favor the death penalty: Why do you favor the death penalty for persons convicted of murder?

Revenge: an "eye for an eye"	30%
Acts as deterrent	22
Murderers deserve punishment	18
Costly to keep them in prison	11
Keeps them from killing again	9
Removes potential risk to community	7
All other	13
No opinion	2
	112%*

Asked of the 20% who oppose the death penalty: Why do you oppose the death penalty for persons convicted of murder?

Wrong to take a life	40%
Wrongful convictions	15
Punishment should be left to God	15
Doesn't deter crime	5
Possibility of rehabilitation	5
Unfairly applied	3
All other	7
No opinion	16
	106%*

*Multiple responses were given.

Asked of the 72% who favor the death penalty: Suppose new evidence showed that the death penalty does not act as a deterrent to murder—that it does not lower the murder rate. Would you favor or oppose the death penalty?

Would still favor death penalty	51%
Would now oppose it	15
No opinion	6

Asked of the 20% who oppose the death penalty: Suppose new evidence showed that the death penalty acts as a deterrent to murder—

that it lowers the murder rate. Would you favor or oppose the death penalty?

Would still oppose death penalty 13%
 Would now favor it 4
 No opinion 3

As I read off each of these statements would you tell me whether you agree or disagree with it:

A poor person is more likely than a person of average or above average income to receive the death penalty for the same crime?

Agree 64%
 Disagree 31
 No opinion 5

By Ethnic Background

White

Agree 63%
 Disagree 32
 No opinion 5

Nonwhite

Agree 67%
 Disagree 25
 No opinion 8

Black

Agree 69%
 Disagree 23
 No opinion 8

By Income

\$40,000 and Over

Agree 68%
 Disagree 27
 No opinion 5

\$30,000-\$39,999

Agree 66%
 Disagree 31
 No opinion 3

\$20,000-\$29,999

Agree 61%
 Disagree 35
 No opinion 4

\$10,000-\$19,999

Agree 65%
 Disagree 29
 No opinion 6

Under \$10,000

Agree 58%
 Disagree 32
 No opinion 10

A black person is more likely than a white person to receive the death penalty for the same crime?

Agree 39%
 Disagree 53
 No opinion 8

By Ethnic Background

White

Agree 37%
 Disagree 56
 No opinion 7

Nonwhite

Agree 53%
 Disagree 38
 No opinion 9

Black

Agree 56%
 Disagree 37
 No opinion 7

What do you think should be the penalty for murder—the death penalty or life imprisonment, with absolutely no possibility of parole?

NINETEEN HUNDRED EIGHTY-FIVE 37

Death penalty	56%
Life imprisonment	34
Neither (volunteered)	4
No opinion	6

By Ethnic Background

White

Death penalty	58%
Life imprisonment	31
Neither (volunteered)	4
No opinion	7

Nonwhite

Death penalty	43%
Life imprisonment	48
Neither (volunteered)	4
No opinion	7

Black

Death penalty	44%
Life imprisonment	46
Neither (volunteered)	4
No opinion	6

Do you feel that the death penalty acts as a deterrent to the commitment of murder, that it lowers the murder rate, or not?

Yes	62%
No	31
No opinion	7

Those Who Favor Death Penalty

Yes	78%
No	18
No opinion	4

Those Who Oppose Death Penalty

Yes	19%
No	74
No opinion	7

Apart from your own opinion about the death penalty, what form of punishment do you consider to be the most humane—the electric

chair, the gas chamber, lethal injection, firing squad, or hanging?

Lethal injection	56%
Electric chair	16
Gas chamber	8
Firing squad	3
Hanging	1
None (volunteered)	7
No opinion	9

Note: Public support for the death penalty is at the highest point recorded in nearly half a century of scientific polling, with seven in ten Americans (72%) favoring capital punishment for persons convicted of murder. At the same time, however, the survey shows that support for the death penalty would decline dramatically (from 72% to 56%) if life imprisonment, without any possibility of parole, were a certainty for murderers. A similar decline (from 72% to 51%) among supporters would occur, the survey indicates, if new evidence were to show conclusively that the death penalty does not act as a deterrent to murder.

Those in the current survey who favor capital punishment for murder most often give these reasons: revenge, or an "eye for an eye"; these persons deserve punishment; it is costly to keep them in prison; the death penalty acts as a deterrent; it keeps them from killing again; it removes the potential risk to society if they are released. Those who oppose the death penalty most often cite these reasons: it is wrong to take a life; the person may be wrongly convicted; punishment should be left to God; the death penalty does not deter crime; there is always the possibility of rehabilitation; and the penalty is unfairly applied.

The current survey also reveals that many Americans hold the belief that the death penalty is unfairly applied. Two-thirds (64%) think poor persons are more likely than average or above average income people to receive the death penalty for the same crime, and four in ten (39%) believe blacks are more likely than whites to be sentenced to death for the same crime. Lethal injection, viewed by the public as the most humane method of execution, is named by 56%; this form of execution is followed by 16% who say the

electric chair; 8%, the gas chamber; 3%, the firing squad; and 1%, hanging.

From the end of a de facto ten-year moratorium on capital punishment in 1977 through 1983, only eleven Americans were put to death. Since 1983, the rate of execution has greatly increased; currently there are more than 1,400 inmates on death row. Thirty-nine states now have death penalty statutes on the books, but the debate continues among penal experts over whether the death penalty discourages potential killers and whether it can be imposed fairly.

**NOVEMBER 28
DEATH PENALTY**

Interviewing Date: 11/11-18/85
Special Telephone Survey

*Do you favor or oppose the death penalty for
persons convicted of murder?*

Favor	75%
Oppose	17
No opinion	8

By Sex

Male

Favor	78%
Oppose	15
No opinion	7

Female

Favor	73%
Oppose	20
No opinion	7

By Ethnic Background

White

Favor	78%
Oppose	15
No opinion	7

Nonwhite

Favor	50%
Oppose	37
No opinion	13

Black

Favor	46%
Oppose	43
No opinion	11

West

Favor	78%
Oppose	12
No opinion	10

By Education**College Graduate**

Favor	71%
Oppose	22
No opinion	7

By Age**18-29 Years**

Favor	69%
Oppose	23
No opinion	8

College Incomplete

Favor	76%
Oppose	19
No opinion	5

30-49 Years

Favor	75%
Oppose	18
No opinion	7

High-School Graduate

Favor	79%
Oppose	15
No opinion	6

50 Years and Over

Favor	80%
Oppose	12
No opinion	8

Less Than High-School Graduate

Favor	72%
Oppose	15
No opinion	13

Selected National Trend

	<i>Favor</i>	<i>Oppose</i>	<i>No opinion</i>
1985	72%	20%	8%
1981	66	25	9
1978	62	27	11
1976	65	28	7
1972	57	32	11
1971	49	40	11
1969	51	40	9
1966	42	47	11
1965	45	43	12
1960	51	36	13
1953	68	25	7
1937	65	35	*
1936	61	39	*

By Region**East**

Favor	75%
Oppose	21
No opinion	4

Midwest

Favor	74%
Oppose	19
No opinion	7

South

Favor	74%
Oppose	17
No opinion	9

*Not included

Do you favor or oppose the death penalty for persons convicted of rape?

Favor	45%
Oppose	45
No opinion	10

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By Sex**Male**

Favor	47%
Oppose	43
No opinion	10

Female

Favor	43%
Oppose	46
No opinion	11

By Ethnic Background**White**

Favor	46%
Oppose	44
No opinion	10

Nonwhite

Favor	37%
Oppose	51
No opinion	12

Black

Favor	35%
Oppose	56
No opinion	9

By Education**College Graduate**

Favor	37%
Oppose	55
No opinion	8

College Incomplete

Favor	43%
Oppose	47
No opinion	10

High-School Graduate

Favor	49%
Oppose	41
No opinion	10

Less Than High-School Graduate

Favor	48%
Oppose	38
No opinion	14

By Region**East**

Favor	42%
Oppose	50
No opinion	8

Midwest

Favor	46%
Oppose	46
No opinion	8

South

Favor	47%
Oppose	41
No opinion	12

West

Favor	45%
Oppose	41
No opinion	14

By Age**18-29 Years**

Favor	48%
Oppose	43
No opinion	9

30-49 Years

Favor	42%
Oppose	50
No opinion	8

50 Years and Over

Favor	47%
Oppose	39
No opinion	14

Selected National Trend

	<i>Favor</i>	<i>Oppose</i>	<i>No opinion</i>
1981	37%	53%	10%
1978	32	56	12

Do you favor or oppose the death penalty for persons convicted of attempting to assassinate the president?

Favor	57%
Oppose	37
No opinion	6

By Sex

Male

Favor	63%
Oppose	31
No opinion	6

Female

Favor	52%
Oppose	41
No opinion	7

By Ethnic Background

White

Favor	58%
Oppose	36
No opinion	6

Nonwhite

Favor	50%
Oppose	43
No opinion	7

Black

Favor	44%
Oppose	49
No opinion	7

By Education

College Graduate

Favor	45%
Oppose	46
No opinion	9

College Incomplete

Favor	52%
Oppose	43
No opinion	5

High-School Graduate

Favor	63%
Oppose	31
No opinion	6

Less Than High-School Graduate

Favor	63%
Oppose	30
No opinion	7

By Region

East

Favor	56%
Oppose	38
No opinion	6

Midwest

Favor	57%
Oppose	38
No opinion	5

South

Favor	55%
Oppose	38
No opinion	7

West

Favor	60%
Oppose	32
No opinion	8

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By Age**18-29 Years**

Favor	50%
Oppose	41
No opinion	9

30-49 Years

Favor	55%
Oppose	41
No opinion	4

50 Years and Over

Favor	64%
Oppose	29
No opinion	7

Do you favor or oppose the death penalty for persons convicted of spying for a foreign nation during peacetime?

Favor	48%
Oppose	47
No opinion	5

By Sex**Male**

Favor	56%
Oppose	41
No opinion	3

Female

Favor	40%
Oppose	53
No opinion	7

By Ethnic Background**White**

Favor	48%
Oppose	47
No opinion	5

Nonwhite

Favor	40%
Oppose	52
No opinion	8

Black

Favor	37%
Oppose	57
No opinion	6

By Education**College Graduate**

Favor	36%
Oppose	57
No opinion	7

College Incomplete

Favor	42%
Oppose	54
No opinion	4

High-School Graduate

Favor	52%
Oppose	43
No opinion	5

Less Than High-School Graduate

Favor	58%
Oppose	38
No opinion	4

By Region**East**

Favor	45%
Oppose	51
No opinion	4

Midwest

Favor	44%
Oppose	51
No opinion	5

South

Favor	51%
Oppose	44
No opinion	5

West

Favor	49%
Oppose	43
No opinion	8

Female

Favor	42%
Oppose	51
No opinion	7

By Age**18-29 Years**

Favor	40%
Oppose	54
No opinion	6

By Ethnic Background**White**

Favor	47%
Oppose	46
No opinion	7

30-49 Years

Favor	42%
Oppose	54
No opinion	4

Nonwhite

Favor	33%
Oppose	60
No opinion	7

50 Years and Over

Favor	59%
Oppose	35
No opinion	6

Black

Favor	29%
Oppose	66
No opinion	5

Selected National Trend*

	<i>Favor</i>	<i>Oppose</i>	<i>No opinion</i>
1981	39%	49%	12%
1978	36	50	14

By Education**College Graduate**

Favor	37%
Oppose	55
No opinion	8

*Question asked was: "Do you favor or oppose the death penalty for persons convicted of treason?"

College Incomplete

Favor	40%
Oppose	53
No opinion	7

Do you favor or oppose the death penalty for persons convicted of airplane hijacking?

Favor	45%
Oppose	48
No opinion	7

High-School Graduate

Favor	46%
Oppose	48
No opinion	6

By Sex**Male**

Favor	48%
Oppose	45
No opinion	7

Less Than High-School Graduate

Favor	57%
Oppose	34
No opinion	9

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By Region

East

Favor	47%
Oppose	48
No opinion	5

Midwest

Favor	46%
Oppose	49
No opinion	5

South

Favor	45%
Oppose	49
No opinion	6

West

Favor	43%
Oppose	44
No opinion	13

By Age

18-29 Years

Favor	34%
Oppose	60
No opinion	6

30-49 Years

Favor	42%
Oppose	52
No opinion	6

50 Years and Over

Favor	57%
Oppose	35
No opinion	8

Selected National Trend

	Favor	Oppose	No opinion
1981	22%	68%	10%
1978	37	52	11

Note: In the last seven years, public support for the death penalty for a variety of serious crimes has increased sharply. * Three Americans in four, for example, now favor the death penalty for murder—the largest proportion to do so in the Gallup Poll's fifty-year history—up from 62% in 1978. Twenty years ago a 47% plurality opposed the death penalty for murder.

The current survey also reveals growing public support for the death penalty for persons convicted of rape or hijacking an airplane. In addition, a high level of support is found for two crimes studied for the first time: attempting to assassinate the president and espionage during peacetime.

With each recent week bringing new revelations of Americans spying for the Soviet Union, Israel, and most recently, China, 48% in the new poll favor, while 47% oppose, capital punishment for espionage during peacetime. As a capital offense, espionage is seen as less serious than either murder or attempting to assassinate the president; 75% and 57%, respectively, advocate the death penalty for these crimes.

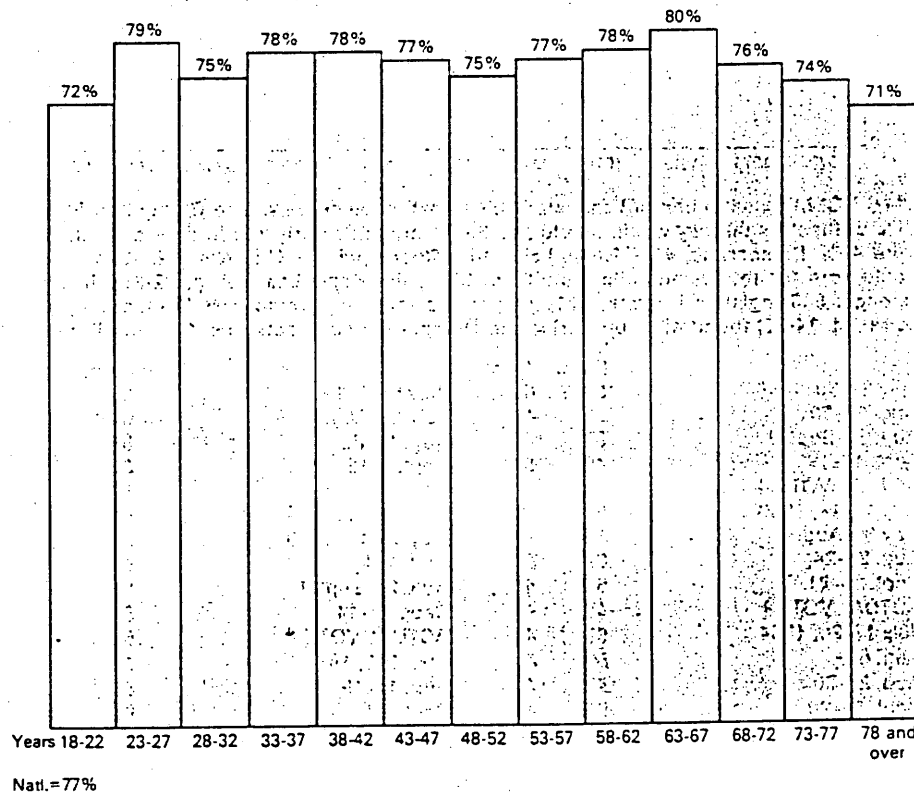
Spying for a foreign power during peacetime ranks with rape and hijacking an airplane as crimes meriting the death penalty; slightly less than one-half the public favors capital punishment for persons convicted of each type of crime. Public support for the death penalty for persons convicted of airplane hijacking has doubled since 1981, when 22% believed that this crime should be punishable by death. Today, 45% think this way.

*Twenty-three percent favor the death penalty in all cases, while 14% oppose it.

National Opinion Research Corp.

Do you favor or oppose the death penalty for persons convicted of murder?

4. Favor death penalty for persons convicted of murder



Source: National Opinion Research Corp., 1983, 1984, 1985, and 1986 data combined.

APPENDIX C

ANECDOTAL EVIDENCE IN SUPPORT OF
THE DETERRENT EFFECT OF THE DEATH PENALTY

APPENDIX C

ANECDOTAL EVIDENCE IN SUPPORT OF THE DETERRENT EFFECT OF THE DEATH PENALTY

Note: These anecdotes -- many of which are taken from Frank Carrington's thoughtful book Neither Cruel Nor Unusual (1978) -- are offered to provide general support for the proposition that the death penalty deters. The proposition that the death penalty deters, however, is based not only on these anecdotes but also on the fully-developed argument contained in part II. B of this analysis.

- * In March, 1973, four men entered a warehouse complex in Landover, Maryland. They forced several hostages to lie down on a bathroom floor. Five of the hostages were shot, but they all miraculously survived. Eleven others were pistol-whipped. One of the victims, who had been shot in the throat, later testified that one of the robbers said, "You better hope there is a God -- you're going to need one." He then stood on the stomach of another victim and said, "Die, bitch." He also "told us he had a hand grenade and was going to blow us all up. He said it didn't matter to him who died, since the worst that would happen to him was that he would be taken care of the rest of his life" in prison." No hand grenade was found, but the fact that the robbers shot five people clearly indicates that they were quite willing to kill in the absence of a death penalty. Four Guilty, In Holdup, Shootings, Washington Post, Dec. 8, 1973, p. B.1.
- * In one prison break, an escape convict released hostages at the State line, because, as he later told police when he was recaptured, he was afraid of the death penalty for kidnapping in the neighboring State. Capital Punishment: Hearings before the House Judiciary Comm., 92d Cong., 2d sess. 34 (testimony of Asst. Attorney General Henry E. Peterson) (citing floor debate on capital punishment in the New Jersey Assembly, Apr. 6, 1959).
- * Carol S. Vance, the district attorney of Harris County (Houston), Texas has stated:

The death penalty deterred an escape from a Texas prison. The inmate abducted a woman, stole her car, and headed west. When asked why he didn't kill this person who told police his direction of travel, [which] led to his capture, the inmate, already under a life sentence, said he didn't want to ride "Old Sparky." I have talked to robbers who said the only reason they didn't kill the

only eyewitness was the threat of the electric chair.

Source: F. Carrington, Neither Cruel Nor Unusual 96 (1978).

- * Soon after the Furman case was decided, an incident in New York City demonstrated that, with the death penalty no longer in effect, some people felt a significant deterrent to killing was gone. John Wojtowicz and another criminal held eight bank employees as hostages and threatened to kill them before FBI agents captured Wojtowicz and killed his companion. In threatening to kill the hostages, Wojtowicz explicitly stated:

"I'll shoot everyone in the bank. The Supreme Court will let me get away with this. There's no death penalty. It's ridiculous. I can shoot everyone here, then throw my gun down and walk out and they can't put me in the electric chair. You have to have a death penalty, otherwise this can happen every day."

Source: Id., at 97-98.

- * Larry Derryberry, the attorney general of the state of Oklahoma, called the abolition of the death penalty an invitation to murder and presented this example to support his thesis:

"After Furman a striking example of the effect of the decision occurred in Oklahoma. Shortly after the decision, a young family was brutally murdered in an armed robbery of a small 24-hour grocery store in Oklahoma City. There was evidence tending to show that the killings were for the purpose of insuring that there would be no eyewitnesses to the robbery. After all, the killer had nothing to lose in taking the lives of his victims. His act of murder carried no greater punishment than his robbery of the victims by means of a firearm."

Source: Id., at 98.

- * Testimony to the deterrent effect of the death penalty is found in a letter written to Keith Sanborn, district attorney of Sedgwick County (Wichita), Kansas (a state without the death penalty at that time), by victims of crime:

June 7, 1975

Keith Sanborn
Sedgwick County Attorney
Sedgwick County Court House
Wichita, Kansas

Dear Sir:

Will capital punishment be used again?
Although we had been previously opposed to it
for the usual "moral" reasons, we recently
learned that our society needs it!

Last September 17th at four in the morning,
three people held us captive at gun-point for
three hours during an attempt to rob our
bank. During that time they discussed their
sentences if they were caught. They decided
to kill us, rather than to leave witnesses.
There wouldn't be that much difference in
the "time" they would serve. They mocked the
law, for we have become more concerned with
the criminals' rights than those of the law-
abiding citizen.

Capital punishment is not excessive, unnecessary
punishment for those who willfully, with premeditation,
set out to take the lives of others. Even though it
may be used infrequently, it does impose a threat to
the criminal.

Rosie escaped, but they shot me twice in the head and
left me for dead in the bank vault. Thank God that we
lived so that we can tell you that capital punishment
does make a difference. Capital punishment will save
the lives of the innocent. Our first "moral"
obligations should be to the law abiding citizen.

Sincerely yours,

Mr. and Mrs. _____.

Source: Id., at 99.

* Margaret Elizabeth Daly, of San Pedro, was arrested
August 28, 1961, for assaulting Pete Gibbons with a knife.
She stated to investigating officers: "Yeh, I cut him and I

should have done a better job. I would have killed him but I didn't want to go to the gas chamber."

Source: People v. Love, 366 P.2d 33, 41, 16 Cal. Rptr. 777 (1961) (McComb, J., dissenting) (citing material from L.A.P.D. files).

- * Robert D. Thomas, alias Robert Hall, an ex-convict from Kentucky; Melvin Eugene Young, alias Gene Wilson, a petty criminal from Iowa and Illinois; and Shirley R. Coffee, alias Elizabeth Salquist, of California, were arrested April 25, 1961, for robbery. They had used toy pistols to force their victims into rear rooms, where the victims were bound. When questioned by the investigating officers as to the reason for using toy guns instead of genuine guns, all three agreed that real guns were too dangerous, as if someone were killed in the commission of the robberies, they could all receive the death penalty.
Source: Id.
- * Louis Joseph Turck, alias Luigi Furchiano, alias Joseph Farino, alias Glenn Hooper, alias Joe Moreno, an ex-convict with a felony record dating from 1941, was arrested May 20, 1961, for robbery. He had used guns in prior robberies in other states but simulated a gun in the robbery here. He told investigating officers that he was aware of the California death penalty although he had been in this state for only one month, and said, when asked why he had only simulated a gun, "I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber."
Source: Id.
- * Ramon Jesse Velarde was arrested September 26, 1960, while attempting to rob a supermarket. At that time, armed with a loaded .38 caliber revolver, he was holding several employees of the market as hostages. He subsequently escaped from jail and was apprehended at the Mexican border. While being returned to Los Angeles for prosecution, he made the following statement to the transporting officers: "I think I might have escaped at the market if I had shot one or more of them. I probably would have done it if it wasn't for the gas chamber. I'll only do 7 or 10 years for this. I don't want to die no matter what happens, you want to live another day."
Source: Id.
- * Orelus Mathew Stewart, an ex-convict with a long felony record, was arrested March 3, 1960, for attempted bank robbery. He was subsequently convicted and sentenced to the state prison. While discussing the matter with his probation officer, he stated: "The officer who arrested me

was by himself, and if I had wanted, I could have blasted him. I thought about it at the time, but I changed my mind when I thought of the gas chamber."

Source: Id.

- * Paul Anthony Brusseau, with a criminal record in six other states, was arrested February 6, 1960, for robbery. He readily admitted five holdups of candy stores in Los Angeles. In this series of robberies he had only simulated a gun. When questioned by investigators as to the reason for his simulating a gun rather than using a real one, he replied that he did not want to get the gas chamber. Source: Id.
- * Salvador A. Estrada, a 19-year old youth with a four-year criminal record, was arrested February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: "I want to ask you one question, do you think they will repeal the capital punishment law. If they do, we can kill all you cops and judges without worrying about it." Source: Id.
- * Jack Colevris, a habitual criminal with a record dating back to 1945, committed an armed robbery at a supermarket on April 25, 1960,, about a week after escaping from San Quentin Prison. Shortly thereafter he was stopped by a motorcycle officer. Colevris, who had twice been sentenced to the state prison for armed robbery, knew that if brought to trial, he would again be sent to prison for a long term. The loaded revolver was on the seat of the automobile beside him and he could easily have shot and killed the arresting officer. By his own statements to interrogating officers, however, he was deterred from this action because he preferred a possible life sentence to death in the gas chamber. Source: Id., 366 P.2d, at 41-42.
- * Edward Joseph Lapienski, who had a criminal record dating back to 1948, was arrested in December 1959 for a holdup committed with a toy automatic type pistol. When questioned by investigators as to why he had threatened his victim with death and had not provided himself with the means of carrying out the threat, he stated, "I know that if I had a real gun and killed someone, I would get the gas chamber." Source: Id., 366 P.2d, at 42.
- * George Hewlitt Dixon, an ex-convict with a long felony record in the East, was arrested for robbery and kidnaping committed on November 27, 1959. Using a screwdriver in his

jacket pocket to simulate a gun, he had held up and kidnaped the attendant of a service station, later releasing him unharmed. When questioned about his using a screwdriver to simulate a gun, this man, a hardened criminal with many felony arrests and at least two known escapes from custody, indicated his fear and respect for the California death penalty and stated, "I did not want to get the gas."
Source: Id.

- * Eugene Freeland Fitzgerald, alias Edward Finley, an ex-convict with a felony record dating back to 1951, was arrested February 2, 1960, for the robbery of a chain of candy stores. He used a toy gun in committing the robberies, and when questioned by the investigating officers as to his reasons for doing so, he stated: "I know I'm going to the joint and probably for life. If I had a real gun and killed someone, I would get the gas. I would rather have it this way."
Source: Id.

- * Quentin Lawson, an ex-convict on parole, was arrested January 24, 1959, for committing two robberies, in which he had simulated a gun in his coat pocket. When questioned on his reason for simulating a gun and not using a real one, he replied that he did not want to kill someone and get the death penalty.
Source: Id.

- * Theodore Rossevelt Cornell, with many aliases, an ex-convict from Michigan with a criminal record of 26 years, was arrested December 31, 1958, while attempting to hold up the box office of a theater. He had simulated a gun in his coat pocket, and when asked by investigating officers why an ex-convict with everything to lose would not use a real gun, he replied, "If I used a real gun and shot someone, I could lose my life."
Source: Id.

- * Robert Ellis Blood, Daniel B. Gridley, and Richard R. Hurst were arrested December 3, 1958, for attempted robbery. They were equipped with a roll of cord and a toy pistol. When questioned, all of them stated that they used the toy pistol because they did not want to kill anyone, as they were aware that the penalty for killing a person in a robbery was death in the gas chamber.
Source: Id.

- * Great Britain's Royal Commission on Capital Punishment recounts the example of a gang that continued operations when one of its members had been sentenced to death for murder and reprieved, but which broke up upon the conviction

and execution of two other members. Police officers who dealt with the gang concluded that the death penalty had made the difference.

Source: Report of the Royal Commission on Capital Punishment 22 (1953).

- * According to the Attorney General of Kansas, one of the contributing factors leading to the reenactment in the 1930's of the death penalty in Kansas, for first-degree murder were numerous deliberate murders committed in Kansas by criminals who had previously committed murders in states surrounding Kansas, where their punishment, if captured, could have been the death penalty. Such murders in Kansas were admittedly made solely for the purpose of securing a sentence to life imprisonment in Kansas if captured. Id., at 375.

APPENDIX D

PROFESSOR LAYSON'S STUDY ON HOMICIDE AND DETERRENCE

Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*

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I. Introduction

Since the publication of Isaac Ehrlich's controversial articles [6; 9] on murder and capital punishment, there has been extensive criticism of his findings. Using regression analysis with U.S. time-series data, Ehrlich found that increases in the relative frequency of arrest, the relative frequency of conviction given arrest and the relative frequency of execution given conviction, reduce the number of homicides per capita and that the magnitudes of these effects are consistent with sharp predictions—the "elasticity conditions"—derived from the hypothesis that potential murderers act as if they were maximizing expected utility.¹

Among the criticisms of Ehrlich's time-series work on homicide, the most important are: (1) The FBI data used by Ehrlich to measure homicides and the probabilities of punishment is highly suspect, especially during the 1930s [3]. (2) Ehrlich's results are sensitive to the inclusion of additional explanatory variables and the choice of functional form [3; 19; 26]. (3) Ehrlich's regressions are unstable over the 1960s [26]. (4) The negative correlations between the homicide rate and the probabilities of punishment found by Ehrlich may be explained by the effect of the homicide rate on the probabilities of punishment not vice versa [17].

Ehrlich has responded to these criticisms in some detail [7; 8; 9; 11]; perhaps his strongest rebuttal is his cross-sectional study of homicide [9] which replicated the deterrence findings reported in his 1975 time-series article. Recently, however, Ehrlich's cross-sectional results have also come under fire. McManus [25] and Leamer [22; 23] have argued that Ehrlich's cross-sectional finding that capital punishment is a deterrent to homicide is sensitive to one's prior beliefs concerning the variables to be included in the homicide regression.

The purpose of this paper is not to debate the merits of Ehrlich's research but to move the debate forward by presenting new updated time-series estimates of the U.S. homicide function. Within the context of the new estimates presented in this paper, the criticisms of

*The author thanks Gary Becker, Isaac Ehrlich, Terry Seaks and George Stigler for helpful suggestions.

1. Let E_{PA} = the elasticity of homicide with respect to the probability of arrest, E_{PC} = the elasticity of homicide with respect to the conditional probability of conviction and E_{PE} = the elasticity of homicide with respect to the conditional probability of execution. For a group of expected utility maximizing individuals it can be shown that $-E_{PA} > -E_{PC} > -E_{PE}$. See Ehrlich [6, 401].

Ehrlich's results are considered. In section II of the paper Hoenack and Weiler's [17] results are critically examined. In the third section of the paper several improvements are made in the estimation of the U.S. homicide function: the time-series sample is updated to 1977, numerous alternative sets of explanatory variables are considered and most importantly, the homicide rate is measured using Vital Statistics data rather than FBI data. The results in this section confirm Ehrlich's findings. The *t*-statistics of the estimated coefficients on the probabilities of punishment are, in general, highly significant and much larger than the *t*-statistics reported by Ehrlich. Also, the magnitudes of the coefficients on the probabilities of punishment are consistent with the "elasticity conditions" derived by Ehrlich.

In section four the stability and proper functional form of the homicide function are analyzed. The homicide function is shown to be reasonably stable over time. The choice of the proper functional form is carefully analyzed using the Box-Cox analysis; the hypothesis that the homicide function is log-linear cannot be rejected whereas the hypotheses that the homicide function has a semi-logarithmic or a linear functional form are decisively rejected. Also, the optimal functional form resulting from the Box-Cox analysis is highly consistent with the deterrence theory.

II. Hoenack and Weiler's Results Reconsidered

The crucial idea underlying Hoenack and Weiler's [16; 17] (hereafter H&W) argument that Ehrlich's results are spurious is that an increase (decrease) in homicides increases (decreases) the work-loads of the police and courts causing the arrest, conviction, and execution rates to decline (rise), at least in the short run. If the increase (decrease) in homicides is found to be permanent, the amount of resources devoted to enforcing the law against homicide may be increased (decreased), but this occurs only after a time lag. According to this theory, even if potential murderers are unaware of, or unaffected by, changes in the relative frequencies of punishment, one would still expect to observe negative short run correlations between the homicide rate and the relative frequencies of punishment.

After specifying a complete structural model of homicide depicting the response of the law enforcement system to changes in homicides and the response of homicides to changes in deterrence variables, H&W estimate 4 different homicide functions using 2SLS. In their first two regressions which contain the same variables used by Ehrlich, H&W report results that are similar to Ehrlich's. However, after including another age distribution variable not used by Ehrlich, or after replacing Ehrlich's single age distribution variable with two different age distribution variables, H&W get dramatically different results.

In the latter two regressions, the coefficients on the relative frequencies of conviction and execution are both positive. Using tests of overidentifying restrictions and FBI data on the age distribution of arrests, H&W argue that their homicide regressions containing two age distribution variables are superior to Ehrlich's homicide regression containing only one age distribution variable. H&W conclude their paper by arguing that Ehrlich's findings supporting the deterrence theory are spurious and reflect the response of the relative frequencies of punishment to changes in the homicide rate, not the response of the homicide rate to changes in the relative frequencies of punishment. H&W's criticism of Ehrlich's results is too ambitious. At best, they have shown that their 2SLS estimates of the para-

Table I. Definition of Variables in the Regression Analysis

$\ln q^*$	= Natural logarithm of non-negligent homicides per 1000 civilian population based on FBI data.
$\ln q$	= Natural logarithm of non-negligent homicides per 1000 civilian population based on Vital Statistics data.
$\ln PA$	= Natural logarithm of probability of arrest.
$\ln PC$	= Natural logarithm of conditional probability of conviction given arrest.
$\ln PE$	= Natural logarithm of conditional probability of execution given conviction.
$\ln LFP$	= Natural logarithm of proportion of the population in the labor force.
$\ln U$	= Natural logarithm of percent of labor force unemployed.
$\ln Y$	= Natural logarithm of Friedman's estimate of real permanent income per capita.
$\ln NW$	= Natural logarithm of the proportion of the population which is nonwhite.
$\ln REL$	= Natural logarithm of the proportion of the population which belongs to a religion.
$\ln HWF$	= Natural logarithm of the proportion of families that have both husband and wife present.
TT	= Time trend: 1933 = 1, 1934 = 2, . . . , 1977 = 45.
$\ln A1424$	= Natural logarithm of the proportion of the population within the 14-24 age group.
$\ln A2124$	= Natural logarithm of the proportion of the population within the 21-24 age group.
$\ln A2529$	= Natural logarithm of the proportion of the population within the 25-29 age group.
$\ln A2129$	= Natural logarithm of the proportion of the population within the 21-29 age group.

Note: Except for the variable q , the data used in this paper is identical to the data used by Hoenack and Weiler for 1933-1969. For a listing of the instrumental variables used in the 2SLS regressions, see Hoenack and Weiler [17, 329]. A detailed listing of the data sources and data used in this paper is available from the author on request.

meters of the homicide function are sensitive to the inclusion of additional explanatory variables.

In Table II, H&W's 2SLS estimates of the U.S. homicide function are replicated² in equations (1) and (2). Table I defines the variables used in the regression analysis. There is a serious flaw in H&W's estimates replicated in equations (1) and (2). They fail to correct for statistically significant first-order autocorrelation. Possibly they were misled by the reasonable looking Durbin-Watson statistics. The Durbin-Watson statistic, however, is not valid for 2SLS estimation.

Equations (3) and (4) report the 2SLS estimates with a correction for first-order autocorrelation.³ The estimates of the first-order autocorrelation, $\hat{\rho}$, in equations (3) and (4), .572 and .535, respectively, are large and statistically significant. Contrary to H&W's estimates in equations (1) and (2), the coefficients on the probabilities of conviction and execu-

2. See Hoenack and Weiler [17, 334], table 2, equations 10 and 11. The author wishes to thank Hoenack and Weiler for providing me with their data.

3. Beach and MacKinnon's [1] method which retains the first observation has been used to correct for autocorrelation in the residuals. The instrumental variables include the lagged value of the dependent variable and the lagged values of the explanatory variables except for the time trend [12; 14].

Table II. H & W's Results Reconsidered

Equation	(1)	(2)	(3)	(4)	(5)	(6)
Dependent Variable	q^*	q^*	q^*	q^*	q^*	q^*
$\ln PA$	-.186 (2.81)	-.213 (2.70)	-.075 (2.20)	-.097 (2.55)	-.074 (2.60)	-.079 (2.69)
$\ln PC$	.0046 (.39)	.010 (.72)	-.0079 (1.33)	-.0030 (.45)	-.0080 (1.55)	-.0057 (1.03)
$\ln PE$	.00016 (.05)	.00021 (.05)	-.00098 (.63)	-.0019 (1.15)	-.0011 (.94)	-.0016 (1.31)
$\ln U$	-.0024 (.78)	-.0030 (.82)	-.0027 (1.35)	-.0028 (1.27)	-.0026 (1.36)	-.0027 (1.30)
$\ln Y$	-.0048 (.13)	-.023 (.50)	.0159 (.64)	-.0036 (.14)	.016 (.67)	.0021 (.08)
$\ln LFP$	.046 (.57)	.068 (.62)	-.053 (.88)	-.036 (.51)	-.055 (.94)	-.053 (.80)
TT	.00042 (.24)	.00093 (.44)	-.00041 (.46)	-.000047 (.05)	-.00045 (.54)	-.00016 (.18)
$\ln A1424$	.022 (1.59)		.036 (2.65)		.035 (2.68)	
$\ln A2124$		.016 (1.07)		.021 (1.50)		.022 (1.48)
$\ln A2529$	.039 (1.74)	.035 (1.43)	.031 (2.27)	.021 (1.13)	.030 (2.38)	.020 (.96)
C	1.08 (2.08)	1.30 (2.01)	.445 (1.81)	.636 (2.41)	.438 (2.09)	.516 (2.40)
$\hat{\rho}$			.572 (3.46)	.535 (3.08)	.568 (3.42)	.679 (4.53)
DW	1.75	1.75	1.70	1.80	1.71	1.71
Period	1935-69	1935-69	1935-69	1935-69	1935-69	1935-69

Note: Equations (1)-(4) are estimated with 2SLS. Equations (1) and (2) replicate H & W's [17, 334] results. Equations (3) and (4) are estimated with a correction for first order autocorrelation. Equations (5) and (6) are estimated assuming PA , PC and PE are exogenous variables again with a correction for first order autocorrelation. The absolute value of t -statistics are given in parentheses.

tion in equations (3) and (4) are negative. Also, the ranking of the coefficients on $\ln PA$, $\ln PC$ and $\ln PE$ in equations (3) and (4) is consistent with the "elasticity conditions."

The correct estimation of H & W's specification of the homicide function yields results consistent with the deterrence theory. The coefficients on the conviction and execution variables, however, remain insignificant in the correctly estimated regressions reported in equations (3) and (4). The weakness of H & W's argument will be demonstrated more convincingly in section III where the OLS regression estimates with lagged relative frequencies of punishment are reported. While both H & W and Ehrlich have used 2SLS estimation

Table III. Results of Hausman's Test

Regression Specification	Coefficients (Absolute Value of <i>t</i> -statistics in parentheses)		
	$\ln \hat{P}A$	$\ln \hat{P}C$	$\ln \hat{P}E$
A1424 and A2529	.006 (.09)	-.0022 (.16)	-.0016 (.67)
A2124 and A2529	.027 (.35)	.012 (.81)	-.0024 (1.06)

based on different theoretical models,⁴ the econometric justification for 2SLS estimation of the U.S. homicide function is weak.⁵ It is possible to test whether the homicide function estimated with OLS methods is misspecified. Using a test developed by Hausman [15], which tests for correlation between the error term in an equation and the possibly endogenous variables, one cannot reject the hypothesis that the probabilities of punishment are exogenous variables. This result is of some importance because in cases where the explanatory variables are orthogonal to the error term, the use of 2SLS estimation yields inefficient estimates, whereas ordinary least squares methods yield efficient estimates.

The test is performed by estimating the regression

$$q^* = X_1 \beta_1 + X_2 \beta_2 + \hat{X}_1 \alpha + u, \quad (7)$$

where q^* is the $T \times 1$ vector of observations on homicides per capita, X_1 is the $T \times 3$ matrix of observations on the relative frequencies of punishment, X_2 is a $T \times 7$ matrix of exogenous variables in the homicide function and $\hat{X}_1$ is a $T \times 3$ matrix of instruments for the relative frequencies of punishment. β_1 , β_2 , and α are coefficient vectors and u is a vector of error terms subject to first-order autocorrelation. The matrix of instruments, $\hat{X}_1$, is found by regressing each of the relative frequencies of punishment on a set of instrumental variables which include the dependent variable lagged one year and the right-hand-side variables in the homicide function lagged one year as well as all the predetermined variables in H&W's [17, 329] model. A test of $H_0: \alpha = 0$ is a test for correlation between the error terms and the probabilities of punishment. If $H_0: \alpha = 0$ is rejected, this indicates that the OLS regression is misspecified and that the homicide function should be estimated with 2SLS. Estimation of equation (7) for the two specifications of the homicide function with different age distribution variables yields the estimates of α reported below in Table III.

The coefficients on the instruments for the probabilities of punishment in Table III are, with only one exception, less than their standard errors. The F -value for the test of the hypothesis $H_0: \alpha = 0$ is .67, well below the critical value of F for this test.⁶ Clearly one cannot reject the hypothesis that the probabilities of punishment are exogenous. Because there is no evidence that the probabilities of punishment are endogenous and because

4. Ehrlich's decision to estimate the homicide function with 2SLS was based on an optimal law enforcement model. Ehrlich hypothesized that exogenous increases in the homicide rate would lead to increases in the probabilities of arrest, conviction, and execution. H&W's disequilibrium model of law enforcement predicts exogenous increases in the homicide rate will cause the probabilities of arrest, conviction and execution to fall.

5. The author [20: 21] did use 2SLS to estimate the Canadian homicide function. Unlike the U.S., Canada has a uniform crime code and law enforcement authority. Because of this difference it is more plausible to believe that law enforcement behavior is endogenous in Canada. The use of 2SLS estimation for the Canadian homicide function was supported by the use of Hausman's test.

6. The 5% critical value of F for 3 and 22 degrees of freedom is 3.05.

2SLS is less efficient than OLS when the explanatory variables are exogenous, the remaining regressions are estimated with OLS methods. Equations (5) and (6) in Table II report the results of estimating the homicide function assuming that PA , PC and PE are exogenous variables. As expected, the coefficients on the deterrence variables in (5) and (6) have smaller standard errors than the coefficients on the deterrence variables in equations (3) and (4) but the difference is not dramatic. The coefficients on the probabilities of conviction and execution in equations (5) and (6) are still less than twice their standard errors.

III. Updating the Homicide Regression and the Choice of Explanatory Variables

In this section the homicide function is estimated using the Vital Statistics data to measure homicides per capita. Bowers and Pierce [3, 187-89] argue persuasively that the FBI measure of homicides during the 1930s is suspect. In the 1930s when the FBI reporting system was just beginning the number of reporting agencies was relatively small. As Bowers and Pierce note, the FBI measure of homicides during the 1930s is 15% below the Vital Statistics measure of homicides. However, after 1939 the two series are in much closer agreement.

Despite Bowers and Pierce's criticism of Ehrlich for using the FBI measure of homicides, they do not present alternative regression estimates utilizing the Vital Statistics measure of homicides. Had Bowers and Pierce shown that the probabilities of punishment have insignificant coefficients in the regression with the Vital Statistics measure of homicides, their claim that Ehrlich's results are an illusion would have been strengthened considerably. H&W [17, 339] are aware of Bowers and Pierce's criticism of the FBI measure of homicides yet they too report only estimates of the homicide function using the FBI measure of homicides. Had Bowers and Pierce or H&W estimated the homicide function with the Vital Statistics measure of homicide they would have found that the resulting regression estimates support the deterrence theory more strongly than the regression estimates with the FBI measure of homicides.⁷

Measuring the Execution Risk

Before the homicide regression can be updated, some provision must be made for measuring the subjective probability of execution from 1968-76 when the relative frequency of execution was zero. Despite the fact that there were no executions in the U.S. from 1968-76, it is doubtful that potential murderers believed there was no possibility of being executed in these years. Another problem with assuming the subjective probability of execution is zero is that it makes the use of the log-linear functional form impossible because the logarithm of zero is undefined.

One solution to this problem is to use an alternative functional form that does not

7. For example reestimating equation (2), Table II with the Vital Statistics measure of homicides yields the following:

Variable	$\ln PA$	$\ln PC$	$\ln PE$
Coefficient	-.136	-.029	-.0058
t-statistic	-1.86	-2.66	-1.64

measure the probability of execution in logarithms.⁸ This approach will be discussed later in section IV. Ehrlich [6, 409] dealt with the problem of zero relative frequencies of execution in the last two years of his sample, 1968 and 1969, by assuming for measurement purposes that 1 execution occurred in each of the years 1968 and 1969. In this section two methods of measuring the probability of execution are used. First Ehrlich's approach is followed by arbitrarily assuming 1 execution per year from 1968 to 1976. Secondly, a Bayesian approach is used which allows potential criminals to annually revise their subjective probabilities in light of new information. The latter method is explained below.

Assume that potential murderers' uncertainty about the relative frequency of execution in 1968 can be described by a beta prior density function

$$f(Pe(t_0)|\alpha, \beta) = [\Gamma(\alpha + \beta)Pe(t_0)^{\alpha-1}(1-Pe(t_0))^{\beta-1}]/[\Gamma(\alpha)\Gamma(\beta)], \quad (8)$$

where $0 < Pe < 1$, $t_0 = 1968$ and Γ is the gamma function defined by

$$\Gamma(\alpha) = \int_0^{\infty} u^{\alpha-1} e^{-u} du \quad \alpha > 0. \quad (9)$$

The expected value of the relative frequency of execution in 1968 is

$$E[Pe(t_0)] = \alpha/(\alpha + \beta). \quad (10)$$

Given $c(t_0)$ independent convictions in 1968, $e(t_0)$ of which result in executions, the posterior distribution of $Pe(t_0)$ is also a beta distribution with a density function⁹ $f(Pe(t_0+1)|\alpha+e(t_0), \alpha + \beta + c(t_0) - e(t_0))$. The expected value of Pe in 1969 is given by

$$E[Pe(t_0 + 1)] = [\alpha + e(t_0)]/[\alpha + \beta + c(t_0) - e(t_0)]. \quad (11)$$

The annual revision of the beta distribution in light of new sample information gives the expected value of $Pe(t)$ in year $t_0 + j$ of

$$E[Pe(t_0 + j)] = [\alpha + \sum_{i=0}^{j-1} e(t_0 + i)]/[\alpha + \beta + \sum_{i=0}^{j-1} c(t_0 + i) - e(t_0 + i)], \quad (12)$$

where $j = 1, \dots, 8$. Because $e(t) = 0$ from 1968 to 1976 equation (12) simplifies to

$$E[Pe(t_0 + j)] = \alpha/[\alpha + \beta + \sum_{i=0}^{j-1} c(t_0 + i)]. \quad (13)$$

The values of α and β are chosen in the following manner. After the class action suits filed by Anthony Amsterdam [17, 331] in 1965 there were only 3 executions in the U.S. in 1966 and 1967. From 1968 to 1976 there were no executions. The estimated sum of homicide convictions in 1966 and 1967 is 9436.¹⁰ Based on the sample information in 1966 and 1967, it is assumed that $\alpha = 3$ and $\alpha + \beta = 9436$, yielding an expected value of Pe in 1968 in percentage points of .032. The implied values of the subjective probabilities of execution for 1969-76 are .0207, .0156, .0124, .0099, .0083, .0071, .0061, and .0052.¹¹

8. Ehrlich [9] argues on both theoretical and empirical grounds that the probabilities of punishment should be measured in logarithms.

9. See DeGroot [4, 40, 60].

10. The number of convictions in 1966 and 1967 are calculated using the formula $PA_i \cdot PC_i \cdot Q_i$ where Q_i is the number of homicides and i is a subscript referring to the year.

11. The value of PE from 1933-67 and 1977 is measured by the number of executions divided by the estimated number of homicide convictions lagged one year. The estimates of homicide convictions are calculated as explained in footnote 10.

The Updated Regressions

The log-linear functional form is used in this section rather than the semilogarithmic form used by H&W. Ehrlich [9] found the cross-sectional evidence to be consistent with the log-linear functional form. Statistical justification for the log-linear functional form is presented in the next section. In the equations in Table IV, a single age distribution variable $A2/29$, the proportion of the population between 21 and 29 years of age, is used rather than two separate age distribution variables.¹² Finally, three new explanatory variables are added to the regressions in Table IV. NW , the proportion of the population that is nonwhite, REL , the proportion of the population that belongs to a religion and HWF , the proportion of families with both husband and wife present.

Equations (14) and (15) in Table IV present the updated estimates of H&W's homicide regression treating the probabilities of punishment as exogenous variables. In equation (14) the probability of execution is measured using the Bayesian approach discussed previously. In equation (15) the probability of execution is measured by assuming 1 execution per year in the years when there were no executions, 1968-1976. The alternative measures of the probability of execution used in equations (14) and (15) yield similar estimates of the elasticity of homicide with respect to the conditional probability of execution, respectively, $-.076$ and $-.068$. These estimates are comparable to the estimates reported by Ehrlich [6, 410].

The probability of arrest, the conditional probability of conviction and the conditional probability of execution all have negative and statistically significant coefficients in equations (14) and (15). Furthermore, the magnitudes of the coefficients on the probabilities of punishment are consistent with the "elasticity conditions." The coefficients on the probability of arrest in equations (14) and (15) are larger at the 5% significance level than the coefficients on the conditional probability of conviction which are in turn larger at the 5% significance level than the coefficients on the conditional probability of execution.

As expected, the age distribution variable $A2/29$ has positive and statistically significant coefficients in equations (14) and (15). The unemployment rate and the labor force participation rate are included in the regressions as measures of the opportunity costs of committing homicide. The unemployment rate is expected to have a positive effect on the homicide rate and the labor force participation rate is expected to have a negative effect. Although the coefficients on the unemployment and labor force participation rates have the expected signs in equations (14) and (15), none of these coefficients are significant. The coefficient on permanent income has a positive but insignificant coefficient in equations (14) and (15) and the coefficients on the time trend are negative and insignificant. Finally, neither equation exhibits much autocorrelation in the residuals.

In the next four equations in Table IV potential murderers' subjective probabilities of punishment are measured by averaging the current values of PA , PC and PE with the two previous years' values. Thus $PA3 = (PA + PA_{-1} + PA_{-2})/3$, $PC3 = (PC + PC_{-1} + PC_{-2})/3$ and $PE3 = (PE + PE_{-1} + PE_{-2})/3$ are used rather than the current values of PA , PC , and PE . This averaging process produces a smoother, less erratic series for these variables which probably corresponds more closely to potential murderers' subjective probabilities than the current relative frequencies.

12. The use of a single age distribution variable instead of two separate age distribution variables makes little difference in the regressions results.

Table IV. Updated OLS Estimates of the U.S. Homicide Function

Equation	(14)	(15)		(16)	(17)	(18)	(19)
Dependent Variable	ln q	ln q		ln q	ln q	ln q	ln q
ln <i>PA</i>	-2.24 (5.91)	-2.31 (5.47)	{ln <i>PA</i> 3}	-1.57 (4.57)	-1.34 (4.81)	-1.21 (3.95)	-1.37 (4.00)
ln <i>PC</i>	-.315 (4.79)	-.307 (4.12)	{ln <i>PC</i> 3}	-.436 (11.8)	-.544 (11.6)	-.547 (9.78)	-.548 (10.45)
ln <i>PE</i>	-.076 (5.21)		{ln <i>PE</i> 3}	-.103 (12.0)	-.098 (13.0)	-.102 (13.2)	-.103 (13.51)
ln <i>PE</i> *		-.068 (3.99)					
<i>TT</i>	-.013 (1.35)	-.011 (1.02)		-.023 (3.33)	-.005 (1.32)	-.013 (1.51)	-.008 (2.06)
ln <i>A2129</i>	.462 (3.15)	.533 (3.36)		.392 (4.44)	.200 (2.89)	.159 (1.33)	.103 (2.08)
ln <i>U</i>	.010 (.31)	.015 (.40)		-.025 (1.51)	-.027 (1.86)		
ln <i>LFP</i>	-1.03 (1.50)	-.842 (1.03)		-2.33 (7.48)	-2.18 (8.11)	-2.04 (7.35)	-1.95 (6.35)
ln <i>Y</i>	.244 (.87)	.256 (.80)		.297 (1.98)	.244 (2.28)	.422 (5.42)	.340 (2.94)
ln <i>NW</i>				1.10 (1.91)		.333 (.50)	
ln <i>REL</i>					-1.11 (3.47)	-1.17 (2.44)	-1.29 (3.97)
ln <i>HWF</i>							.378 (.67)
<i>C</i>	7.33 (4.84)	7.74 (4.56)		6.22 (7.08)	2.21 (1.50)	1.20 (.67)	1.60 (.80)
$\hat{\rho}$	.004 (.024)	.153 (.87)		-.272 (1.60)	-.403 (2.48)	-.360 (2.13)	-.364 (2.17)
R^2	.973	.957		.996	.998	.997	.997
Period	1936-77	1936-77		1936-77	1936-77	1936-77	1936-77

Note: Absolute value of *t*-statistics in parentheses.

Another advantage of averaging the current values of *PA*, *PC*, and *PE* with their lagged values is that it further justifies treating the probabilities of punishment as exogenous variables. Changes in the current homicide rate may affect current and future relative frequencies of punishment in the manner suggested by H&W, but the current homicide rate should have no effect on past values of *PA*, *PC* and *PE*.

As mentioned earlier, some new variables have been added to the regressions in Table IV. Because a disproportionate number of homicide victims and persons arrested for

homicide are nonwhite. NW is expected to have a positive effect on the homicide rate. Ehrlich [5: 9] found in his cross-sectional studies that the proportion of state population that is nonwhite is positively associated with homicide and other felony crime rates. The religion variable, REL , is included in the regressions as a measure of the quality of the environment, moral inhibitions of committing homicide, or possibly as a measure of fears of other worldly punishment for committing homicide.

In equations (16)-(19) in Table IV, the coefficients on $PA3$, $PC3$ and $PE3$ are all negative and highly significant. Comparing equations (14) and (15) with equations (16)-(19), the averaging process reduces the magnitude of the coefficients on the arrest variable but increases the magnitude of the coefficients on the conviction and execution variables. In the latter 4 equations in Table IV, the coefficients on the conviction and execution variables have much larger t -statistics than in equations (14) or (15). The t -statistics on $PC3$ in equations (16)-(19) range from -9.78 to -11.8 ; the t -statistics on $PE3$ in equations (16)-(19) range from -12 to -13.5 . The much larger t -statistics on the conviction and execution variables in the last 4 regressions in Table IV are consistent with the belief that averaging the relative frequencies of punishment over a number of years produces a better measure of criminals' subjective probabilities of punishment than the use of the current relative frequencies of punishment.

Averaging the relative frequencies of punishment has some important effects on the other estimated coefficients too. In contrast to the positive coefficients on the unemployment rate, U , in equations (14) and (15), the coefficients on the unemployment rate are negative in equations (16) and (17). In equation (18) and subsequent equations the unemployment rate is dropped from the regression. The coefficients on the labor force participation, LFP , in equations (16)-(19) are negative, as expected, and highly significant. The t -statistics on the permanent income variable, Y , are also much larger in equations (16)-(19) than in equations (14) and (15).

The coefficient on $\ln NW$ in equation (16) is positive as expected but not quite significant at the 5% level. The coefficient on $\ln REL$ in equation (17), -1.11 , is an estimate of elasticity of homicide with respect to the proportion of the population that belongs to an organized religion. According to this estimate a 10% increase in REL would reduce the homicide rate by approximately 11%. The coefficient on the religion variable in equation (17) is significant at the 1% level.

Equation (18) shows the results of including both the nonwhite and religion variables in the regression. The religion variable remains significant at the 5% level but the t -statistics on the nonwhite variable drops sharply. The age distribution variable also becomes insignificant in equation (18). The coefficients on the nonwhite and age distribution variables in Table IV illustrate what Leamer [22; 23; 24] and other econometricians have been emphasizing recently, that the significance and even the sign of regression coefficients often depend on the set of explanatory variables chosen by the researcher.

Fragility of the Regression Results

To examine the fragility of the regression results in Table IV in a systematic way, the homicide function is estimated with a large number of alternative specifications. Each specification consists of a different subset of explanatory variables taken from a set of variables that includes all the variables listed in Table IV plus the following variables: the

Table V. Specification Search

Variable	<i>N</i>	Negative Coefficient	Negative and Significant	Positive Coefficient	Positive and Significant
ln <i>PA3</i>	210	209 (.995)	134 (.638)	1 (.005)	0 (.0)
ln <i>PC3</i>	210	210 (1.0)	210 (1.0)	0 (.0)	0 (.0)
ln <i>PE3</i>	210	210 (1.0)	210 (1.0)	0 (.0)	0 (.0)
<i>TT</i>	210	173 (.824)	111 (.529)	37 (.176)	2 (.01)
ln <i>A2129</i>	210	7 (.033)	0 (.0)	203 (.962)	87 (.414)
ln <i>LFP</i>	84	84 (1.0)	84 (1.0)	0 (.0)	0 (.0)
ln <i>Y</i>	84	10 (.119)	0 (.0)	74 (.881)	25 (.298)
ln <i>REL</i>	84	84 (1.0)	72 (.857)	0 (.0)	0 (.0)
ln <i>HWF</i>	84	0 (.0)	0 (.0)	84 (1.0)	26 (.310)
ln <i>U</i>	84	63 (.750)	29 (.345)	21 (.250)	0 (.0)
ln <i>NW</i>	84	13 (.155)	0 (.0)	71 (.845)	12 (.143)
ln <i>MALE</i>	84	84 (1.0)	18 (.214)	0 (.0)	0 (.0)
ln <i>WELF</i>	84	49 (.583)	10 (.119)	35 (.417)	3 (.036)
ln <i>SCH</i>	84	27 (.321)	7 (.083)	57 (.690)	28 (.357)
<i>INF</i>	84	6 (.071)	0 (.0)	78 (.929)	4 (.048)

Note: *N* = number of specifications in which variable appeared. Percentages expressed as a proportion of *N* are given in parentheses.

proportion of the population that is male (*MALE*), real welfare payments (*WELF*), median years of schooling (*SCH*), inflation (*INF*) and the proportion of families that have both husband and wife present (*HWF*).

Each specification consists of 9 explanatory variables: *PA3*, *PC3*, *PE3*, *TT*, *A2129*, plus 4 other variables taken from the 10 remaining variables described above.¹³ The total number of specifications is given by $10^C 4 = 210$. Table V summarizes the results by the sign and significance of the estimated coefficients. A coefficient is considered "significant" in Table V if its *t*-statistic is greater than 2 in absolute value.

In every regression but one, *PA3* has a negative coefficient and the arrest variable is negative and significant in 134 of the 210 specifications. The conviction and execution variables are negative and significant in every one of the 210 specifications. Clearly the conviction and execution variables are robust with respect to the choice of explanatory variables. A further examination of the regressions shows that in 183 of the 210 specifications the magnitude of the coefficients on ln *PA3*, ln *PC3* and ln *PE3* are in accordance with the "elasticity conditions."

Concerning the non-deterrence variables, the labor force participation rate has negative and significant coefficients in each of the 84 specifications in which this variable was used. The religion variable also has negative coefficients in each of the 84 regressions in

13. To provide a valid test of the deterrence theory one must include all 3 of the conditional probabilities of punishment.

which it was used.¹⁴ In 72 of the 84 specifications the coefficient on the religion variable is significant. Two other variables that have coefficients with the same sign in each specification are: (1) the proportion of families with husband and wife present and (2) the proportion of the population that is male. Ironically, both of these variables have coefficients with unexpected signs.

In each of the 84 specifications the proportion of families with both husband and wife present has positive coefficients. It was thought that the proportion of families with both husband and wife present would measure the quality of the social environment and hence would be negatively related to the homicide rate. However, an alternative explanation for the effect of *HWF* consistent with the positive coefficients on this variable is that separation of antagonistic spouses reduces the number of homicides by spouses. The coefficients on *HWF* are significant in 26 of the 84 specifications. Because a disproportionate number of the persons arrested for homicide are males, it was thought that the proportion of the population that is male might have a positive effect on the homicide rate. However, in each case the coefficient on this variable is negative, although the coefficients are significant in only 18 of the 84 specifications.

The age distribution variable *A2129*, has positive coefficients in 203 of the 210 specifications in which this variable appears. In 87 of these specifications the coefficients on the age distribution variable are positive and significant. The time trend has negative coefficients in 173 of the 210 specifications in which it appears and in 111 specifications the coefficients are negative and significant. The permanent income variable, *Y*, has positive coefficients in 74 of the 84 specifications in which it appears and has positive and significant coefficients in 25 of the specifications.

Interestingly, the inflation rate has positive coefficients in 78 of the 84 specifications in which this variable appears. However, this variable is only significant in 4 of the 84 specifications in which it appears. The proportion of the population that is nonwhite has positive coefficients in 71 of the 84 specifications in which it appears but has positive and significant coefficients in only 12 cases. The effects of the remaining 3 variables — unemployment, real federal welfare payments, and schooling — are inconsistent and in most specifications insignificant.

Based on the specification search described in Table V and other considerations equation (19) in Table IV represents the specification of the homicide function that is used for subsequent analysis in this paper. Aside from the deterrence variables, *PA3*, *PC3* and *PE3*, the explanatory variables included are the time trend, age distribution, labor force participation, permanent income per capita, the proportion of the population that is a member of a religious group and the proportion of families with both husband and wife present. The coefficient on $\ln HWF$ in equation (19), .378, is positive but insignificant. The inclusion of the new variable in the homicide function has little effect on the other estimated coefficients as can be seen by comparing equations (16)-(18) to equation (19).

Tradeoff of Executions for Murders

The *ceteris paribus* tradeoff of executions for homicides evaluated at the mean number of homicides $\bar{Q}$ and the mean number of executions $\bar{E}$ is given by

14. However, if the probabilities of punishment are measured by their current values *PA*, *PC*, and *PE*, rather than their averaged values *PA3*, *PC3*, and *PE3*, the coefficient on the religion variable is sometimes positive.

$$\Delta Q / \Delta E = \hat{\alpha} (\bar{Q} / \bar{E}), \quad (20)$$

where $\hat{\alpha}$ is the estimate of the elasticity of homicide with respect to the probability of execution. Letting $\hat{\alpha} = -.1$ based on the estimates reported in equations (16)-(19) of Table IV, the tradeoff of executions for murders is approximately -18.5 .

This tradeoff is considerably larger than the estimate tradeoffs of -7 to -8 reported by Ehrlich [6, 414]. There are two reasons for the higher tradeoff reported in this paper. First from equation 20 the tradeoff increases proportionally with $\bar{Q} / \bar{E}$. In the updated sample used in this paper the value of $\bar{Q} / \bar{E}$ is larger than in Ehrlich's sample.¹⁵ Secondly the value of $\hat{\alpha}$ ($-.10$) used in computing the tradeoff in this paper is larger than the $\hat{\alpha}$ values used by Ehrlich [6, 410], $-.06$ and $-.065$.

A number of qualifications should be considered in interpreting the estimated tradeoff of executions for homicides. First the standard errors of the point estimates of α should be considered. From equations (19) in Table IV, the 99% confidence interval for α is $(-.082, -.124)$. The confidence intervals for α based on equations (16)-(18) yield similar ranges. Evaluating the tradeoff at the lower and higher range of the confidence interval yields tradeoffs of -15.2 and -23 , respectively. More importantly the estimated value of α varies considerably depending on the choice of explanatory variables used. From the specification search discussed earlier, 210 different regressions were considered. The values of α in these regressions ranged from a low of $-.046$ to a high of $-.152$. The corresponding tradeoff of executions for homicides ranges from -8.5 to -28 . It is interesting to note that even at the lower range of α the tradeoff is still substantial.

Finally the estimated tradeoffs reported in this paper are calculated under the *ceteris paribus* assumption. Under certain conditions this may give misleading estimate of the true tradeoff. For example, if juries react to an increased relative frequency of execution by demanding greater proof of guilt before convicting, an increase in the probability of execution may reduce the probability of conviction, wholly or partially offsetting the deterrent effect of the increase in the probability of execution.¹⁶ The author investigated this possibility by regressing the probability of conviction on the probability of execution and other explanatory variables. These regressions provide no evidence in favor of the hypothesis that the probability of execution has a negative effect on the probability of conviction.

IV. The Choice of Functional Form and the Stability of the Homicide Function over Time.

As mentioned in the introduction, Bowers and Pierce [3], Passell and Taylor [26] and Klein, Forst and Filatov [19] have criticized Ehrlich's time-series results as being sensitive to the choice of time period and functional form. To check the stability of the homicide regression over time, equations (21)-(24) in Table VI report the results of estimating the homicide regression over alternative subperiods of the full sample. Equation (21) presents the full sample (1963-77) regression. Equation (22) is estimated over the 1936-69 period to check how sensitive the regression results are to omitting the 1970s data from the sample.

15. For the updated sample used in this paper $\bar{Q} = 10696$ and $\bar{E} = 58$. For Ehrlich's [6, 414] sample $\bar{Q} = 8965$ and $\bar{E} = 75$.

16. The author [20, 68] found some evidence of a negative relationship between PC and PE in his study of homicide in Canada.

Table VI. OLS Estimates of the Homicide Function Over Alternative Time Periods

Equation	(21)	(22)	(23)	(24)
Dependent Variable	ln q	ln q	ln q	ln q
ln <i>PA3</i>	-1.37 (4.00)	-1.20 (3.66)	-2.02 (3.57)	-1.62 (3.78)
ln <i>PC3</i>	-.548 (10.4)	-.543 (11.4)	-.382 (3.34)	-.576 (7.34)
ln <i>PE3</i>	-.103 (13.5)	-.130 (9.11)	-.073 (1.52)	-.119 (9.26)
<i>TT</i>	-.0083 (2.06)	-.017 (3.34)	-.016 (1.64)	-.0075 (1.69)
ln <i>A2129</i>	.103 (2.08)	-.0087 (.13)	-.226 (1.73)	.130 (2.00)
ln <i>LFP</i>	-1.95 (6.35)	-2.86 (6.39)	-3.28 (6.02)	-1.93 (5.63)
ln <i>Y</i>	.340 (2.94)	.319 (1.79)	-.225 (.64)	-.063 (.20)
ln <i>REL</i>	-1.29 (3.97)	-.886 (2.44)	.173 (.21)	-.685 (1.24)
ln <i>HWF</i>	.378 (.67)	1.14 (.96)	4.47 (2.03)	.063 (.10)
<i>C</i>	1.60 (.80)	.731 (.29)	7.93 (1.69)	6.02 (1.57)
$\hat{\rho}$	-.364 (2.17)	-.465 (2.66)	-.605 (2.64)	-.439 (2.25)
R^2	.997	.998	.999	.998
Period	1936-77	1936-69	1936-57	1944-77

Note: Absolute value of *t*-statistics are given in parentheses.

Equation (23) reports the regression estimated over the even shorter 1936-57 period. In equation (24) the regression is estimated from 1944-77 to check how sensitive the results are to omitting the first 8 years of the sample. Bowers and Pierce [3] argue that the FBI data on conviction rates is unreliable until the 1940s.

Comparing equations (22) and (24) to the full sample regression, equation (21), one can see that deleting the first 8 observations or the last 8 observations from the sample does not substantially alter the coefficient estimates, or their *t*-statistics. Deleting the last 8 observations from the sample causes the coefficient on the age distribution variable to switch from positive to negative; deleting the first 8 observations causes the coefficient on permanent income per capita to switch from positive to negative. In equation (23), estimated from 1936-57, the *t*-statistic on the coefficient on ln *PE3* falls to -1.52 which is not significantly different from 0 at the 5% level. It is possible, as Passell and Taylor [26] argue, that the sharp decline in the execution rate in the late 1950s and 1960s is a proxy for some

Table VII. Stability of the Homicide Function Over Time

Period	SSR $\times$ 100	SE $\times$ 100	F	F _{.05}	F'
1936-55	.405078	2.01265	.82	2.30	1.75
1936-56	.503054	2.13851	1.65	2.30	1.44
1936-57	.539733	2.12080	1.54	2.30	1.30
1936-58	.694215	2.31087	1.08	2.30	.823
1936-59	.699655	2.23552	1.39	2.30	1.22
1936-60	.725234	2.19884	1.60	2.30	1.14
1936-61	.725258	2.12905	1.84	2.30	1.26
1936-62	.737985	2.08353	2.64	2.30	1.59
1936-63	.763841	2.05999	3.06	2.30	1.70
1936-64	.848132	2.11278	2.55	2.30	1.15
1936-65	.852513	2.06460	2.52	2.30	1.31
1936-66	.894152	2.06346	2.01	2.28	1.35
1936-67	.978733	2.10921	1.92	2.30	1.22
1936-68	.979003	2.06314	2.23	2.32	1.46
1936-69	.999335	2.04056	2.51	2.36	1.66
1936-70	1.00338	2.00338	2.96	2.41	2.04
1936-71	1.11938	2.07492	2.77	2.47	1.70
1936-72	1.18212	2.09242	2.98	2.57	1.76
1936-73	1.31173	2.16443	2.79	2.71	1.08
1936-74	1.41293	2.20730	2.89	2.93	.0002
1936-75	1.41294	2.17020	4.48	3.32	—
1936-76	1.76421	2.38558	1.24	4.15	—
1936-77	1.83472	2.39447	—	—	—

unknown omitted variables that are really responsible for the rising homicide rate during this period. Another explanation for the insignificant coefficient on $\ln PE3$ (and $\ln PA3$) in equation (23) is the small number of degrees of freedom—13—combined with the multicollinearity among the explanatory variables.¹⁷

To examine the stability of the homicide regression more systematically, Table VII reports the sum of squared residuals (SSR) and the standard error of the homicide regression (SE) over different time periods beginning with 1936-55 and ending with 1936-77. From column 3 in Table VII one can see that the standard error of the regression is reasonably stable over time, exhibiting no systematic trend. Inspection of column 2 in the table shows a very large increase in the SSR from 1975 to 1976. The large jump in the SSR from 1975 to 1976 is associated with a sharp decline in the homicide rate in 1976. The homicide rate reached its minimum sample value in 1957 and except for a very slight

17. Examples of first-order correlations between variables for the 1936-57 period are: TT and $\ln Y$ (.976), TT and $\ln REL$ (.973), TT and $\ln PE3$ (-.954), $\ln PE3$ and $\ln Y$ (-.936), $\ln PE3$ and $\ln REL$ (-.906), $\ln PE3$ and $\ln PA3$ (-.899).

decline in 1961 the homicide rate increased steadily from 1957 to 1974. From 1962 to 1974 the average annual rate of increase in the homicide rate was 6%. In 1975 the homicide rate fell by a small amount and then fell very sharply by more than 9% in 1976. The large increase in the SSR from 1975 to 1976 in column 2 reflects the fact that the regression equation does not predict the sharp decline in the homicide rate in 1976.

Column 4 reports the F -values for the Chow tests of the equality of the coefficients for the subperiod in column 1 and the subperiod consisting of the remaining years in the full sample. For example, the first F -value in column 4 is for the test of the hypothesis that the regression coefficients are equal over the 1936-55 and 1956-77 subperiods. Beginning with the 1936-66 and 1967-77 subperiods the F -values are calculated using the Chow test for the case of insufficient degrees of freedom. The 5% critical values of F are reported in column 5.

If the full sample is divided between 1962 and 1965 or between 1969 and 1973 the hypothesis that the coefficients are equal over the two subperiods is rejected at the 5% level. However, if one divides the sample between 1955 and 1961 or between 1966 and 1968, the hypothesis that the regression coefficients are equal over the two subperiods is not rejected. One might argue that dividing the sample at 1957 provides the most plausible division. The trend of the homicide rate was negative from the early 1930s to 1957. In 1957 the homicide rate reached its minimum sample value; thereafter the trend of the homicide rate was increasing until 1974. The F -statistic for the hypothesis that the coefficients are equal from 1936-57 and 1958-77 is 1.54 which is well below the 5% critical value of F .

Even if one were to believe that the division of the sample between 1962 and 1965 or between 1969 and 1973 is more appropriate than some other division, the increased efficiency from using the full sample regression estimates may outweigh the bias in the coefficient estimates resulting from the restriction that the coefficient estimates be equal in the two subperiods. Wallace [28] has shown that if the goal is to minimize the weighted average of the mean square errors of the coefficient estimates, the resulting critical values of F are higher than the conventional F -values for Chow tests. Using Goodnight and Wallace's [13] tables for the weak MSE test for restrictions in regressions, the critical 5% F -value is, 4.29. From column 3 of Table VII the 5% critical value of F for the weak MSE test is never exceeded.

Column 6 presents the F -values for the hypothesis of equal coefficients over the subperiod indicated in column 1 and the remaining years in the full sample except for the last two years, 1976 and 1977. The largest F -value in column 6 is 2.04 which is below the 5% critical of F for the conventional Chow test. Even the weak evidence of instability in the homicide function depends critically on the last two years of the sample. By deleting the last two years from the sample there is no partition of the sample that yields an F -value which exceeds the 5% critical value of F for the Chow test. In summary, the homicide function appears to be reasonably stable over time. The evidence for instability of the homicide is weak and critically dependent on the last two years of the sample.

To test for the optimal functional form for the time-series data, suppose the model to be estimated with the time-series data is

$$q_t^{(1)} = c + B_1 PA3_t^{(12)} + B_2 PC3_t^{(12)} + B_3 PE3_t^{(12)} + B_4 Y_t^{(12)} + B_5 LFP_t^{(12)} \\ + B_6 TT + B_7 A2I29_t^{(12)} + B_8 REL_t^{(12)} + B_9 HWF_t^{(12)} \quad (25)$$

$$u_t = \rho u_{t-1} + \epsilon_t,$$

where $|\rho| < 1$ and ϵ_t is $NID(0, \sigma^2)$. The Box-Cox [2] transformation of the dependent variable is defined by

$$q_t^{(\lambda_1)} = (q_t^{\lambda_1} - 1)/\lambda_1 \quad \text{for } \lambda_1 \neq 0, \quad (26)$$

and

$$q_t^{(\lambda_1)} = \ln q_t \quad \text{for } \lambda_1 = 0.$$

The transformation of the right-hand-side variables are similarly defined. The log-linear functional form is represented by $(\lambda_1, \lambda_2) = (0, 0)$ and the linear functional form is represented by $(\lambda_1, \lambda_2) = (1, 1)$.

Letting $q^{(\lambda_1)}$ be the vector of transformed observations on the homicide rate, $X^{(\lambda_2)}$ the matrix of transformed observations on the right-hand-side variables, and B the vector of coefficients, the log likelihood function for the sample of observations on the homicide rate is

$$L = -T/2[\ln(2\pi\sigma^2)] + 1/2\ln(1-\rho^2) - 1/2(\sigma^2)[q^{(\lambda_1)} - X^{(\lambda_2)}B]' V^{-1}[q^{(\lambda_1)} - X^{(\lambda_2)}B] + (\lambda_1 - 1) \sum_{t=1}^T \ln q_t, \quad (27)$$

where V^{-1} is the matrix

$$\begin{bmatrix} 1 & -\rho & 0 & . & . & . & 0 & 0 \\ -\rho & 1+\rho^2 & -\rho & 0 & . & . & 0 & 0 \\ 0 & -\rho & 1+\rho^2 & . & . & . & . & . \\ . & 0 & . & . & . & . & . & . \\ . & . & . & . & . & . & . & . \\ . & . & . & . & . & . & . & . \\ . & . & . & . & . & . & 1+\rho^2 & -\rho \\ 0 & 0 & . & . & . & . & -\rho & 1 \end{bmatrix}$$

Letting the first three terms in equation (27) be denoted by L_1 , equation (27) simplifies to

$$L = L_1 + (\lambda_1 - 1) \sum_{t=1}^T \ln q_t. \quad (28)$$

For given values of λ_1 and λ_2 , maximizing L_1 with respect to B , σ^2 , and ρ is the same as maximizing the log-likelihood function for a linear regression with autocorrelated errors. Beach and MacKinnon's [1] maximum-likelihood technique is used to estimate L_1 for given values of λ_1 and λ_2 and then it is a simple matter to add L_1 and $(\lambda_1 - 1) \sum \ln q_t$ to find L .¹⁸

In Table VIII, the values of the estimated log likelihood function for the 1936-77 data

18. See Seaks and Layson [27] for a more detailed discussion of this procedure.

Table VIII. Test for Functional Form

λ_2	λ_1^*	L	λ_2	λ_1^*	L
-2.0	.0	197.4	.1	-.4	222.0
-1.9	.0	197.5	.2	-.5	220.5
-1.8	.0	197.5	.3	-.5	218.3
-1.7	.0	197.4	.4	-.5	215.6
-1.6	-.1	197.5	.5	-.4	212.6
-1.5	-.1	197.4	.6	-.3	209.6
-1.4	-.1	197.4	.7	-.1	207.0
-1.3	-.1	197.3	.8	.0	204.7
-1.2	-.1	197.2	.9	.1	203.0
-1.1	-.1	197.1	1.0	.2	201.9
-1.0	-.1	197.1	1.1	.2	201.2
-.9	-.1	197.0	1.2	.3	201.0
-.8	-.1	197.0	1.3	.3	201.0
-.7	-.1	197.1	1.4	.3	201.2
-.6	-.1	197.4	1.5	.3	201.6
-.5	.0	198.0	1.6	.4	202.0
-.4	.8	199.8	1.7	.4	202.6
-.3	.6	209.0	1.8	.4	203.2
-.2	.3	216.5	1.9	.4	203.9
-.1	.0	220.8	2.0	.4	204.5
.0	-.3	222.3	2.1	.4	205.1

are computed for different pairs of (λ_1, λ_2) . In constructing Table VIII the value of λ_2 was allowed to vary between -2 and 2.0 in increments of .1, and then for each value of λ_2 , the value of λ_1 was allowed to vary between -2 and 2 in increments of .1. Letting λ_1^* be the value of λ_1 that maximizes L for a given value of λ_2 , the values of L for different ordered pairs (λ_1^*, λ_2) are reported in Table VIII.

The global maximum value of the likelihood function in Table VIII is 222.33 at $(\hat{\lambda}_1, \hat{\lambda}_2) = (-.3, 0)$. The results of estimating this regression are given by

$$\begin{aligned}
 q^{(-.3)} = & 3.04 - 2.82 \ln PA3 - 1.25 \ln PC3 - .246 \ln PE3 \\
 & (.70) \quad (3.84) \quad (11.1) \quad (15.2) \\
 & - .020 TT + .207 \ln A2I29 - 5.41 \ln LFP \\
 & (2.30) \quad (1.98) \quad (8.23) \\
 & + .839 \ln Y - 3.27 \ln REL + .717 \ln HWF, \quad \hat{\rho} = -.465. \quad (29) \\
 & (3.32) \quad (4.71) \quad (.58)
 \end{aligned}$$

Table IX. Likelihood Ratio Tests for Alternative Simple Functional Forms

Functional Form	(λ_1, λ_2)	$L(\lambda_1, \lambda_2)$	χ^2
Log-linear	(0, 0)	220.96	2.75
Semi-log	(0, 1)	201.70	41.26
Semi-log	(1, 0)	205.06	34.54
Linear	(1, 1)	198.55	47.56
Optimal	(-0.3, 0)	222.33	

In equation (29) the coefficients on the probabilities of punishment are all negative, statistically significant,¹⁹ and consistent with the elasticity conditions. It is interesting to note that the transformation of the independent variables, $\lambda_2 = 0$, is consistent with Ehrlich's [9, 734-44] theoretical arguments for measuring the probabilities of punishment in logarithms.

The values of the log likelihood function for 4 alternative simple functional forms and the optimal functional form, $(\hat{\lambda}_1, \hat{\lambda}_2) = (-0.3, 0)$, are presented in Table IX. The likelihood ratio test statistic for the hypothesis $H_0: (\lambda_1, \lambda_2) = (\lambda_1^0, \lambda_2^0)$ is $2[(\hat{\lambda}_1, \hat{\lambda}_2) - L(\lambda_1^0, \lambda_2^0)]$ which has a χ^2 distribution with 2 degrees of freedom. The last column in Table IX reports the values of this test statistic for 4 alternative simple functional forms. The 5% and 1% critical values of χ^2 are, respectively, 5.99 and 9.21. The hypothesis that the homicide function is log-linear cannot be rejected at the 5% significance level. However, both versions of the semi-log functional form and the linear functional form are easily rejected at the 1% significance level. The finding that the time-series estimates of the homicide function are consistent with the log-linear specification corroborates Ehrlich's [9] finding that the optimal functional form for the cross-sectional homicide function is close to the log-linear specification.

Table X reports the coefficient estimates and *t*-statistics of the probabilities of punishment for the 4 simple functional forms. For all 4 functional forms the probabilities of punishment are negative and statistically significant at the 1% level. The deterrence findings are clearly robust with respect to the choice of functional form. However, the *t*-statistics on the probability of execution measured in natural values are considerably lower than the *t*-statistics on probability of execution measured in logarithms.

V. Conclusion

This paper has presented updated estimates of the U.S. homicide function that strongly confirm Ehrlich's [6; 9] deterrence findings. The basic deterrence results reported here are also consistent with the author's [20; 21] studies of Canadian homicide and Wolpin's [29] study of homicide in England and Wales. For the full sample regressions estimated in this paper, the probability of arrest, the conditional probability of conviction given arrest, and the conditional probability of execution given conviction have negative and statistically significant effects on the homicide rate. In addition the ranking of the estimated elasticities of homicide with respect to the probabilities of punishment is consistent with sharp predictions derived from the hypothesis of expected utility maximization.

19. In equation 29 all *t*-statistics are conditional on the assumption that $\lambda_1 = -0.3$ and $\lambda_2 = 0$.

Table X. Coefficients on the Probabilities of Punishment for Alternative Functional Forms

Functional Form	Variables		
	$\ln PA3$	$\ln PC3$	$\ln PE3$
Log-linear	-1.37 (4.00)	-.548 (10.4)	-.103 (13.5)
Semi-log	-.118 (3.18)	-.035 (6.01)	-.0058 (6.13)
	$PA3$	$PC3$	$PE3$
Semi-log	-.028 (3.72)	-.021 (7.70)	-.073 (3.28)
Linear	-.0018 (3.71)	-.0014 (7.89)	-.0044 (3.08)

Note: Absolute value of *t*-statistics in parentheses.

In this paper the homicide rate is measured using the Vital Statistics measure of homicides rather than the FBI series. Previous researchers have used exclusively the FBI data in their time-series analysis. Bowers and Pierce [3], however, argue forcefully that the Vital Statistics measure of homicides is superior to the FBI measure. It is found in this paper that the Vital Statistics data supports the deterrence theory more strongly than the FBI series.

Two other important differences between previous research in this area and the estimates presented in this paper are: (1) OLS methods are used in this paper rather than 2SLS and (2) the probabilities of punishment are measured by averaging the current relative frequencies of punishment with their lagged values of the two previous years. The use of OLS methods rather than 2SLS is justified by an application of Hausman's test and by the use of lagged relative frequencies of punishment to measure murders subjective probabilities of punishment. The particular lag structure used to measure the probabilities is very simple and somewhat arbitrary. However, the deterrence findings reported in this paper are found to be robust with respect to the lag structure used.

Three other important issues that have arisen in the debate over Ehrlich's homicide work are carefully discussed: (1) the sensitivity of the deterrence results to the choice of explanatory variables, (2) the stability of the homicide function over time and (3) the choice of functional form. The deterrence findings are found to be robust with respect to the choice of explanatory variables and functional form. The use of the log-linear functional form is justified by the Box-Cox analysis. The homicide function estimated in this paper is also shown to be reasonably stable over time.

From the specification search, it was found that the proportion of the population that belongs to a religion has a negative and significant effect on the homicide rate in most specifications. Two variables often used by researchers in estimating homicide functions — the unemployment rate and the proportion of the population that is nonwhite — were found to have inconsistent and generally insignificant effects on the homicide rate depending on the choice of explanatory variables. The labor force participation rate has a negative and significant effect on the homicide rate in most specifications. Permanent income per

capita and the proportion of the population between 21 and 29 years of age have positive effects on the homicide rate in most specifications.

The econometric evidence presented in this paper provides solid support for the deterrence hypothesis. The deterrence findings reported in this paper are not fragile. Different sets of explanatory variables have been used, alternative functional forms for the homicide function have been used and the homicide function has been estimated over different time periods. The regression results consistently support the deterrence hypothesis that increases in the probabilities of arrest, conviction, and execution reduce the homicide rate. Even murderers appear to obey the law of demand.

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APPENDIX E

FEDERAL EXECUTIONS, 1930-1963

APPENDIX E

Federal Executions, 1930-63

<u>Year</u>	<u>Total</u>	<u>Murder</u>	<u>Kidnap</u>	<u>Rape</u>	<u>Espionage</u>	<u>Sabotage</u>	<u>States in Which Executed</u>
Total	33	22	1	2	2	6	
1930	1	1					Kansas
1936	3	2	1				Indiana, Arizona, Oklahoma
1938	5	5 ^a					Kansas (2), Illinois, Indiana, Michigan
1939	1	1					Alaska
1942	6					6	District of Columbia
1943	1	1					Tennessee
1945	1	1					Wyoming
1948	5	5					California (3), Alaska, Florida
1950	1	1					Alaska
1953	4	2 ^b			2		Missouri (2), New York (2)
1954	1	1					New York
1956	1	1 ^c					Missouri
1957	2			2			Georgia
1963	1	1 ^d					Iowa

Note: Of the 33 persons executed, 28 were white, 3 black, and 2 American Indians. Of the three executions of blacks, two took place in 1948, one in 1950. Of the two executions of American Indians, one took place in 1936 and one in 1939.

Since 1930, the U.S. Army carried out 160 executions--148 from 1942 to 1950, three each in 1954, 1955, and 1957 and one each in 1958, 1959 and 1961. Of the total, 106 were for murder (including 21 rape/murder), 53 were for rape, and 1 was for desertion. The U.S. Navy has not carried out an execution since 1849.

a Includes 2 cases of bank robbery/murder and 1 kidnap/murder.

b Includes 2 cases of kidnap/murder.

c Includes 1 case of kidnap/murder.

d Includes 1 case of kidnap/murder.

Source: Bureau of Justice Statistics, Capital Punishment 1984: A National Prisoner Statistics Report, Table 5 (and supplemental data).

APPENDIX F

1984 CAPITAL PUNISHMENT STATISTICS



Bureau of Justice Statistics Bulletin

Capital Punishment 1984

At yearend 1984, States reported a total of 1,405 prisoners under sentence of death. During that year, 280 prisoners were received under sentence of death and 84 prisoners were removed from the population under sentence of death (including 21 prisoners executed). The 21 executions carried out during 1984 brought to 32 the total number executed since 1976 when the death penalty was affirmed in three cases before the United States Supreme Court. Since 1930, when national reporting began, 3,891 executions have been conducted under civil authority in the United States.¹

All persons under sentence of death at yearend 1984 were convicted of murder. Of the 1,405 inmates, 1,388 were male and 17 were female; 804 were white, 585 were black, and 16 were classified as other races.² The median age of those under sentence of death was 31 years and the median time since sentence was imposed was 33 months. Approximately 2 of every 3 offenders under sentence of death had a prior felony conviction; nearly 1 out of 10 had previously been convicted of homicide. About 2 out of 5 were under some criminal justice status at the time of their capital offense; half of these—20% of all those under sentence of death—were on parole, while the rest either were on probation, were prison inmates or escapees, or had pending charges.

Nearly 63% of those under sentence of death were held by States in the South. Western States accounted for an additional 21% of those sentenced to death, North Central States for 12%, and Northeastern States for 4%.

¹An additional 160 executions have been carried out under military authority since 1930.

²Other races include American Indians and Asian Americans. For additional discussion of race and capital punishment see the appendix.

August 1985

Capital Punishment 1984 marks the 54th consecutive year that data describing prisoners under sentence of death have been published by the Federal government. This year's report incorporates information on the criminal histories of those under sentence of death, including the number with prior felony convictions and prior convictions for homicide, as well as their criminal justice status at the time of the capital offense (e.g., on probation or parole, facing pending charges for other crimes, or a prison inmate or

escapee). Given the continuing interest in race data relating to capital punishment, this report presents data for 1980 through 1984 comparing the race of those arrested, imprisoned, sentenced to death, and executed for murder. The Bureau of Justice Statistics gratefully acknowledges the cooperation and participation of State officials whose generous assistance makes this reporting program possible.

Steven R. Schlesinger
Director

Florida had the largest number of inmates under sentence of death (215), followed by Texas (178), California (172), and Georgia (111). Of those received under sentence of death in 1984, 56% were in the South, 20% in the West, 16% in North Central States, and 8% in the Northeast. Twenty-seven States received prisoners under a sentence of death in 1984; by yearend 1984 a total of 32 states had prisoners under sentence of death.

The 21 executions in 1984 were carried out by six States: 8 in Florida, 5 in Louisiana, 3 in Texas, 2 in Georgia, 2 in North Carolina, and 1 in Virginia. Of those executed, 13 were white males, 7 were black males, and 1 was a white female. Between 1977 and 1984, about 1.4% of those under sentence of death were executed and approximately 36% received other dispositions resulting in removal from the population under sentence of death. Those executed between 1977 and 1984 spent an average of 6 years between the time the death sentence was originally imposed and the date it was carried out.

Capital punishment in the courts

In the 1972 decision *Furman v. Georgia*, the Supreme Court struck down on Eighth Amendment grounds State and Federal capital punishment laws that permitted wide discretion in the application of the death penalty. In response, many States revised their statutes to conform to the guidelines in *Furman*. The High Court clarified these guidelines in a series of five decisions announced on July 2, 1976. In *Woodson v. North Carolina* and *Roberts v. Louisiana* the Court struck down State statutes that required mandatory imposition of the death penalty for specified crimes. As a direct consequence, mandatory death penalty provisions in 21 States were invalidated either through subsequent court action or repeal by State legislatures. This resulted in the modification (to life imprisonment) of death sentences imposed upon hundreds of offenders in these States. In three other major cases, however, the Supreme Court upheld State death penalty laws that afforded sentencing authorities

discretion to impose death sentences for specified crimes (*Gregg v. Georgia*, *Jurek v. Texas*, and *Proffitt v. Florida*). The Court validated statutes that permitted the imposition of the death penalty after consideration of aggravating and mitigating circumstances.

Further refinements in the Court's views of State death penalty statutes were offered in cases during the late 1970's and early 1980's relating to such issues as whether rape may be punishable by death (*Coker v. Georgia*), mitigating factors only listed in statute (*Lockett v. Ohio*), excusing jurors from service (*Adams v. Texas*), findings by juries on lesser included offenses (*Beck v. Alabama*), the use of testimony from a pretrial competency hearing (*Estelle v. Smith*, failure to consider mitigating factors (*Eddings v. Oklahoma*), conviction under a statute that has been partially struck (*Hopper v. Evans*), jury instructions regarding possible commutation by a governor (*California v. Ramos*), commission of "harmless, error" by sentencing judge (*Barclay v. Florida*), and admissibility of psychiatric evidence predicting future dangerousness (*Barefoot v. Estelle*).

During 1984 the U.S. Supreme Court made a key decision on the issue of proportionality in capital cases. This is the concept that States should compare each death sentence with sentences imposed in comparable cases throughout the State to determine whether similar cases are being handled in a similar way. On January 23, 1984, the Court upheld the death sentence in a California murder case, holding that a proportionality review by an appellate court was not a Constitutional requirement, even though many State death penalty laws provided for such a review (*Pulley v. Harris*).

On May 14, 1984, in *Strickland v. Washington*, the U.S. Supreme Court handed down an important decision bearing on the Sixth Amendment's guarantee of a defendant's right to "reasonably effective" counsel in capital cases. The defendant had originally appealed a Florida court's death sentence in a multiple murder case on grounds that his counsel had been ineffective in failing to seek out character witnesses or to request a psychiatric examination. The appeals to the State Supreme Court and Federal District Court were rejected because "aggravating circumstances" had justified the death penalty, and although it was conceded that the counsel had erred in failing to investigate mitigating evidence, "no prejudice" to the defendant's sentencing had resulted.

Table 1. Profile of capital punishment statutes and legal changes during 1984

Jurisdictions authorizing capital punishment at some time during 1984	Struck down by courts	Revised or replaced by legislature	Automatic appeals required	Capital offenses
Federal				Aircraft piracy
Alabama		Yes	Yes	Murder
Arizona			Yes	First degree murder
Arkansas	Partially			Capital murder
California				First degree murder w/special circumstances
Colorado		Yes		First degree murder, first degree kidnapping w/death of the victim
Connecticut			Yes	Murder
Delaware			Yes	First degree murder
Florida		Yes		First degree murder
Georgia				First degree murder
Idaho		Yes	Yes	First degree murder, kidnapping w/aggravating factors
Illinois		Yes	Yes	Murder
Indiana			Yes	Murder
Kentucky			Yes	First degree murder, kidnapping when victim is killed
Louisiana			Yes	First degree murder
Maryland	Wholly	Yes	Yes	First degree murder
Massachusetts				
Mississippi			Yes	Capital murder, rape in the commission of another felony, felonious child abuse, rape of a female child under the age of 12 by a person age 18 or older
Missouri		Yes	Yes	First degree murder
Montana			Yes	Deliberate homicide, aggravated kidnapping resulting in victim death
Nebraska			Yes	First degree murder
Nevada			Yes	First degree murder
New Hampshire			Yes	Contract murder or murder of a law enforcement officer or kidnapping victim
New Jersey				Knowing or purposeful murder, contract murder
New Mexico			Yes	First degree murder
New York	Wholly			
North Carolina			Yes	First degree murder
Ohio				Aggravated murder
Oklahoma			Yes	Murder
Oregon		Yes	Yes	Aggravated murder
Pennsylvania			Yes	First degree murder
South Carolina			Yes	Murder with specified aggravating circumstances
South Dakota		Yes	Yes	First degree murder, kidnapping with gross permanent physical injury
Tennessee			Yes	First degree murder
Texas			Yes	Murder of public safety officer, fireman, or prison employee; murder during specified felonies or escapes; contract murder
Utah			Yes	First degree murder, aggravated assault by a prisoner
Vermont				Murder of police or corrections officer, kidnapping for ransom
Virginia			Yes	Capital murder
Washington			Yes	Aggravated murder
Wyoming		Yes	Yes	First degree murder

Note: Jurisdictions not authorizing the death penalty during 1984 were Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Rhode

Island, West Virginia, and Wisconsin. For additional detail on revisions and capital offenses see table 2.

Although the Federal Court of Appeals reversed these judgments, citing the Sixth Amendment, the High Court upheld the trial court's decision on grounds that the counsel's conduct had been "reasonable" and that no omitted evidence "would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances."

Another important issue—whether trial judges may override jury recommendations of life imprisonment and

impose a death penalty—was dealt with by the High Court in *Spaziano v. Florida* on July 2, 1984. In this case, which involved a murder preceded by torture of the victim, the judge had overridden a jury recommendation for life imprisonment, which under Florida law was advisory only.

The High Court held that (1) it is not error for a trial judge to fail to instruct a jury on lesser included offenses when no such offense is asserted by the prosecution, (2) there is no

Attachment 1
Authority Of the Commission Over Capital Sentencing Issues

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A number of important federal statutes embody legislative judgments that capital punishment is an appropriate sentence in some circumstances for particularly heinous crimes. See, e.g., 18 U.S.C. §351 (murder of member of Congress); 18 U.S.C. §1751 (assassination or kidnapping resulting in death of the President); 18 U.S.C. §2381 (treason); 18 U.S.C. §1111 (first degree murder). A list of these statutes is provided in Attachment 4. These federal statutes are currently inoperative only because they possibly do not contain constitutionally adequate procedures for weighing aggravating and mitigating circumstances as required by the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) and later cases.

Examination of the Sentencing Reform Act of 1984, enacted as chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98th Cong., 2d Sess., and relevant legislative history leads to the conclusion that the Sentencing Commission's jurisdiction includes the promulgation of guidelines for the imposition of the death sentence under these statutes. Indeed, guidelines without death penalty sanctions may not comply with the statutory directives to the Commission.

A. The Commission Has Broad General Supervisory Powers over Federal Criminal Sentences

It is apparent that the provisions of the Sentencing Reform Act of 1984 are sweeping in their scope. As one commentator has observed, the provisions "are intended to reform federal sentencing practices and procedures. Their likely effect, however, will not be to reform criminal sentencing, but to revolutionize it." Rezneck, *The New Federal Criminal Sentencing Provisions*, 22 Am. Crim. L. Rev. 785, 785 (1985).

The Commission's principal purposes are to establish sentencing policies and practices for the federal criminal justice system, including promulgating guidelines and prescribing the appropriate form and severity of punishment for offenders convicted of federal crimes. As specified in 28 U.S.C. §991(b), the policies, practices and sentencing guidelines established by the Commission are designed to:

"(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code [in brief, those purposes are just punishment, deterrence, incapacitation, and rehabilitation];

"(B) provide certainty and fairness in sentencing practices, by avoiding unwarranted sentencing disparities among offenders with similar characteristics convicted of similar criminal conduct, while permitting sufficient

judicial flexibility to take into account relevant aggravating or mitigating factors"

"(C) reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process"

The Commission is also charged with the on-going responsibilities of: evaluating the effects of the sentencing guidelines on the criminal justice system, including the impact on the resources of the Bureau of Prisons; recommending to Congress appropriate modifications of substantive criminal law and sentencing procedures, as well as revisions of the sentencing guidelines; establishing a research and development program on sentencing practices and procedures; and other related duties.

The power given the Commission over criminal sentences is very broad. Congress in fact recognized the "extraordinary powers and responsibilities vested in the Commission." S. Rep. 98-225, 98th Cong., 1st Sess., p. 160 (1983). At first blush, then, the Commission -- as the agency charged with reviewing criminal sentencing -- seems to have death sentence issues within its bailiwick.

B. Sentencing Guidelines that Include Death Sentences
are Required to Achieve the Purposes of Sentencing
Reform Act

The Commission's guidelines are required to achieve several purposes. Specifically, the guidelines should ensure that federal sentences are designed:

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;...." 18 U.S.C. §3553(a)(2) (Supp. III 1985).

These goals have binding effect on the Commission: The Sentencing Commission is charged by 28 U.S.C. §991(b)(1)(A) with establishing sentencing policies and practices that "assure the meeting of [these] purposes" For certain aggravated federal offenses, only sentencing guidelines that provide for death sentences will comply with this statutory charge to the Commission.

1. Just Punishment

Congress has explained that the first purpose -- just punishment -- "should be reflected clearly in all sentences; it is another way of saying that the sentence should reflect the gravity of the defendant's conduct." S. Rep. No. 98-225, 98th Cong., 1st Sess. 75 (1983).

The intentional and unjustified taking of an innocent person's life is an offense that, in the presence of aggravating factors and in the absence of mitigating factors, deserves a death sentence.¹ The Senate Judiciary Committee has recognized:

"Murder does not simply differ in magnitude from extortion or burglary or property destruction offenses; it differs in kind. Its punishment ought also to differ in kind. It must acknowledge the inviolability and dignity of innocent human life. It must, in short, be proportionate." S. Rep. 98-251, 98th Cong., 1st Sess. 13 (1983).

What sanction is proportionate and, therefore, what constitutes just punishment for persons who commit certain types of murder, is admittedly a subjective judgment. Nevertheless, when there is widespread public agreement that the death penalty is a just punishment for certain kinds of murder -- as there is

¹ If murder is such a crime, a fortiori treason and espionage also constitute such crimes. As Judge Kaufman explained in United States v. Rosenberg, 109 F.Supp. 108, 110 (S.D.N.Y. 1953), "At the time of the imposition of the sentence, ... I pointed out that the crime for which these defendants stood convicted was worse than murder. The distinction is based upon reason. The murderer kills only his victim while the traitor violates all the members of his society, all the members of the group to which he owes his allegiance."

in this country today² -- then the Commission is obliged to act accordingly. The legislation and its drafting history indicate that the determination of questions of proportionality between offenses and penalties imposed for them optimally should not depend primarily on the theories of particular writers or the personal feelings of Commission members about what sort of punishment is fitting for what sort of offense and offender, but should take account of public attitudes on this question. This point is implicit in the statutory specification that sentences should be fashioned so as to "promote respect for the law," §3553(a)(2)(A), and is also supported by more explicit statements in the legislation and the Committee Report indicating that sentencing levels may appropriately be coordinated to "the community view of the gravity of the offense" and should "reflect current views as to just punishment." See 28 U.S.C. §994(c)(4); S. Rep. 98-225, 98th Cong., 1st Sess. 170-71, 178-80 (1984).

The retributive function of the death penalty does not serve only to vindicate the abstract moral principle that a criminal should receive his just deserts. Equally important, it also affirms the sanctity of innocent human life and, thereby, protects such life. Walter Berns has traced the process by which the retributive aspect of punishment prevents crime -- including capital crime. To summarize his explanation: we punish in part because we are angry at what the criminal has done, and want to pay him back; the law respects and rewards our anger (which is a sign of caring for others) when it punishes the object of that anger; in so doing, the law praises and promotes law-abiding habits. In short, the retributive aspect of punishment has what has been described as a "general deterrent effect"; it deters crime not by instilling fear of punishment, but -- through a process of rewarding the anger aroused by the sight of crime -- by praising law abidingness. Testimony of W. Berns, Capital Punishment, Hearings before the Senate Committee on the Judiciary, 97th Cong., 1st Sess. 246-247 (1981).

² A Gallup poll released on February 3, 1985, reported that 72 percent of Americans favor capital punishment for persons who commit murder -- the highest rate of public approval of the death penalty in the half-century of scientific polling. By comparison, the approval rate was 66 percent in 1981 and 49 percent in 1971. The report also noted, however, that the approval rate would decline to 56 percent if life imprisonment without parole were a certainty for murderers.

Similarly, according to a Media General-Associated Press Survey released at the same time, 84 percent of Americans approve the death penalty.

Of course, in order to protect lives through the operation of this "general deterrent effect," retribution must be appropriate to the offense committed. "So the question becomes," as Berns puts it, "how do we pay back those who are the objects of great anger because they have committed great crimes against us?" The answer Berns gives is worth quoting at some length:

"The purpose of the criminal law is not merely to control behavior -- a tyrant can do that -- but also to promote respect for that which should be respected, especially the lives, the moral integrity, and even the property of others. In a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement and, thereby, hope to promote this respect. To be successful, what it says -- and it makes this moral statement when it punishes -- must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made to be awful or awe inspiring is to entitle it to inflict the penalty of death. W. Berns, "Defending the Death Penalty," Crime and Delinquency (Oct., 1980), reprinted in S. Rep. 98-251, 98th Cong., 1st Sess. 10 (1983).

2. Deterrence

The second purpose the Commission is charged with meeting is "to afford adequate deterrence to criminal conduct." 18 U.S.C. §3553(a)(2) (Supp. III 1985). As Congress has recognized in adopting death penalty provisions, a death penalty is the only adequate deterrent for some crimes.

The most recent substantial empirical study concludes that the death penalty does deter homicide. The study, by Professor Stephen K. Layson of the University of North Carolina at Greensboro, utilizes sophisticated time-series techniques and data from the United States from 1936 to 1976. The study takes into account virtually all previous important criticisms of time-series research on the death penalty. Previous studies had been criticized on the following grounds: (1) the FBI data used to measure homicides and the probabilities of punishment were suspect, especially during the 1930s; (2) the results were sensitive to the inclusion of additional explanatory variables and the choice of functional form; (3) the regressions were

unstable over the 1960's; and (4) the negative correlations between the homicide rate and the probabilities of punishment could be explained by the effect of the homicide rate on the probabilities of punishment, not vice versa. Layson, Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence, 52 S. Economic J. 68, 68 (1985) (emphasis added). To solve these problems, Layson: (1) used more reliable Vital Statistics data on homicide deaths in place of FBI data; (2) employed additional explanatory variables and various functional forms; (3) ran the regressions over various time periods, including and excluding the 1960's; and (4) demonstrated that the negative correlations could only be explained by deterrence theory.³

Layson's study concluded that increases in the probability of execution reduced the homicide rate.⁴ Specifically, Layson

³ Data limitations in the Layson study make it difficult to respond to one observation regarding previous studies. Since accurate time-series data on imprisonment length is not available, Layson's estimate for the effect on the murder rate from the reduction in executions over time may include the effect from the reduction in length of imprisonment over time. However, this observation does not undercut the basic finding of Layson. Murderers who are sensitive to a reduction in the average length of imprisonment would presumably also be sensitive to a reduction in the probability of execution. Also, Layson's result holds over a variety of different time periods. See Layson, supra, at 80-81. Since it is not clear that average sentence length was falling during all of the time periods, the probability of execution likely has at least some deterrent effect.

It should also be observed that Layson's estimates for the deterrent effect of the death penalty may have been biased downward by his use of aggregate United States data for periods when the penalty was effectively limited to a subset of states.

⁴ "The econometric evidence presented in this paper provides solid support for the deterrence hypothesis. The deterrence findings reported in this paper are not fragile. Different sets of explanatory variables have been used, alternative functional forms for the homicide functions have been used and the homicide function has been estimated over different time periods. The regression results consistently support the deterrence hypothesis that increases in the probabilities of arrest, conviction, and (continued...)"

found that on average each execution deterred more than eighteen murders. The basic deterrence result of the study is consistent with other studies by Layson,⁵ Isaac Ehrlich,⁶ and Kenneth Wolpin.⁷ While complete confidence in Layson's study must await replication (which is already underway), his most recent finding provides strong support for the proposition that the death penalty deters murder.

Entirely apart from sophisticated econometric studies, logic compels the conclusion that the death penalty is the most effective deterrent for some kinds of murders -- those that require reflection and forethought on the part of persons of reasonable intelligence and unimpaired mental faculties.⁸ Such persons logically can be assumed to be deterred to some extent by the existence of the death penalty, and more deterred by the finality of death than they would be by the next most serious penalty, life imprisonment without parole. As the Supreme Court observed in Gregg v. Georgia, 428 U.S. 153, 186 (1976): "There are carefully contemplated murders, such as the murder for hire, where the possible penalty of death may well enter into the cold

4 (...continued)
execution reduce the homicide rate. Even
murderers appear to obey the law of demand."
Layson, supra, at 89 (emphasis added).

⁵ See Layson, Another View of the Canadian Time-Series Evidence, Canadian J. of Economics, pp. 52-73 (1983); Layson, A Reexamination of the United States and Canadian Time-Series Evidence on Homicide and Deterrence, Ph.D. dissertation, Univ. of Chicago (June, 1983).

⁶ See Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, Journal of Political Economy, pp. 741-88 (Aug. 1977).

⁷ See Wolpin, Capital Punishment and Homicide in England: A Summary of Results, American Econ. Review: Papers and Proceedings, pp. 422-27 (May 1978).

⁸ Espionage and treason are also generally crimes of premeditation for which the sanction of death should operate as a particularly effective deterrent. See United States v. Rosenberg, 109 F. Supp. 108, 115 (S.D.N.Y. 1953) (Kaufman, J.).

calculus that precedes the decision to act." In a footnote, the Court added: "other types of calculated murders, apparently occurring with increasing frequency, include the use of bombs or other means of indiscriminate killings, the extortion murder of hostages or kidnap victims, and the execution-style killing of witnesses to a crime." Id., at n. 53.

Given the inherent plausibility of the deterrent power of the threat of death, society must choose between: (1) trading the certain shortening of the life of a convicted murderer against the survival of an unknown number of innocent persons whose future murder by others becomes more probable unless the convicted murderer is executed; and (2) trading the certain survival of the convicted murderer against the loss of the lives of an unknown number of innocent victims, who are more likely to be murdered by others if the convicted murderer is permitted to live. As Professor van den Haag has put it: "It seems immoral to let convicted murderers survive at the probable -- or even at the merely possible -- expense of the lives of innocent victims who might have been spared had the murderers been executed." E. van den Haag, In Defense of the Death Penalty: A Legal - Practical - Moral Analysis, 14 Crim. L. Bull. 51, 59 (1978). In short, under the statutory scheme, only the death penalty can be deemed "to afford adequate deterrence" to homicide.

3. Incapacitation

The third purpose the Commission is charged with meeting through its guidelines is "to protect the public from further crimes of the defendant." 18 U.S.C. §3553(a)(2)(C) (Supp. III 1985). In some circumstances, only a death sentence can provide the proper level of protection to the public.

It is obvious that the death penalty is the most effective means of incapacitating murderers from committing further crimes of any sort. Incapacitation of such persons is important because it is generally acknowledged -- and can be proven by specific examples⁹ -- that some persons who commit capital crimes will

⁹ For example, Eddie Simon Wein was sentenced to death in Los Angeles Superior Court in 1957. Instead of being executed, he was released from prison in 1975 to live in West Los Angeles, without warning to his neighbors. Within months, he began to attack and kill women in the area. Fortunately for other potential victims, his apprehension was swift. He was convicted in 1976 of first degree murder of one woman, attempted murder of another, and numerous sexual offenses. The woman who was killed by Wein and the women who were scarred by him for life would not have been victims if Eddie Wein had been executed as originally

(continued...)

commit other capital crimes if given the opportunity. As the Senate Judiciary Committee has explained:

"In some cases, imprisonment is simply not a sufficient safeguard against the future actions of criminals. Some criminals are incorrigibly anti-social and will remain potentially dangerous to society to the rest of their lives. Mere imprisonment offers these people the possibility of escape or, in some cases, release on parole. Even if they are successfully imprisoned for life, prison itself is an environment presenting dangers to guards, inmates, and others. In each of these cases, society is the victim. Basically, there is no satisfactory alternative sentence for these individuals. Life imprisonment without parole, although at first appearing to be a reasonable answer, is in reality highly unsatisfactory. Such a sentence greatly increases the danger to guards and to other prisoners who come into contact with those who have been so sentenced." S. Rep. 98-251, 98th Cong., 1st Sess. 12 (1983).¹⁰

⁹(...continued)
decreed. Here the death penalty would have spared an innocent life.

¹⁰ Recent events confirm that the Senate Report is entirely correct in highlighting the serious problem of protecting prison officers and inmates from dangerous prisoners already serving life sentences for murder without any realistic possibility of parole. At least five federal prison officers have been killed since December 1982, and the inmates in at least three of the incidents were already serving life sentences for murder. In the most secure cell block of America's highest security prison -- the Control Unit of the Marion, Illinois, penitentiary -- there were, in March 1984, 19 prisoners who had murdered prison officials or other inmates while in prison. Is it a just result that no additional punishment be imposed for such crimes, leaving these inmates essentially free to murder with impunity? In view of the long sentences (including "real life" sentences) that the Sentencing Commission is recommending for some crimes, this problem can be expected to increase in the future.

While it is not possible to determine how many innocent lives have been saved by the execution of convicted murderers who would have killed again had their lives been spared, the data available suggest that this is not an insignificant number. For example, according to the Bureau of Justice Statistics ("BJS"), of the roughly 52,000 inmates in state prisons in 1984 serving time for murder, about 810 had previously been convicted of murder, and had killed 821 persons following their prior murder convictions. If each of these inmates had been executed following his first murder conviction, 821 lives would have been saved. Of course, since only a small fraction of convicted murderers receive the death penalty, 821 is not a fair estimate. A more reliable number can be derived by multiplying 810 convicts by 2.7 percent -- the proportion of convicted murderers who had been sentenced to death and were awaiting execution at the end of 1984, according to BJS. This calculation yields a figure of 21 innocent lives saved -- surely a testimonial to the incapacitative benefits of the death penalty -- and strongly suggests that in some circumstances life sentences in lieu of death sentences would not adequately "protect the public from further crimes" by defendants, as required by §3553(a)(2)(6).

4. Rehabilitation

It might be argued that the fourth purpose the Commission is charged with satisfying -- "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner" -- rules out the possibility of death penalties. Entirely apart from running afoul of the strong presumption against implied repeals discussed below, see part D.2 infra, such a claim would be facetious at best. As the Commission itself has recognized, rehabilitation is to be achieved only "to the extent consistent with the objectives of protecting the public and providing just punishment and deterrence." U.S. Sentencing Commission, Preliminary Draft Guidelines, p. 7 (Sept., 1986). Moreover, for all candidates for the death penalty, the alternative sentence will be a lengthy term of imprisonment. In such circumstances, rehabilitative goals are unimportant and the Commission need not consider them. See 18 U.S.C. §3551(A) (Supp. III 1985) (defendants shall be sentenced to achieve the specified purposes "to the extent that they are applicable in light of all the circumstances of the case"). As the Senate Report to the Act explains, "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated." S. Rep. 98-225, 98th Cong., 1st Sess. 38 (1983). Thus, the statutory scheme rejects rehabilitation as a general purpose for providing a prison sentence. See 28 U.S.C. §994(k) (Supp. III 1985) ("The Commission shall insure that the guidelines reflect the

inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant").

In summary, the goals the Commission's guidelines are statutorily instructed to achieve require the use of a death penalties, in proper circumstances and where Congress has so provided. Sentencing guidelines that do not permit death penalties in those situations would apparently fail to comply with the statutory directive.

C. The Commission Has the Power, and Possibly the Statutory Responsibility, to Draft Guidelines That Provide for the Death Penalty for Some Crimes

The most important power given to the Commission is the power to draft "guidelines" specifying sentences for virtually all convicted federal offenders.¹¹ The guidelines are not intended to be merely precatory. The statute provides that the sentencing court "shall impose a sentence of the kind, and within the range" referred to in the applicable guidelines, unless the court finds that "an aggravating or mitigating circumstance exists" in the particular case that was not adequately taken into consideration by the Sentencing Commission in formulating guidelines. 18 U.S.C. §3553(b) (Supp. III 1985). Both the government and the defendant may appeal sentences that fall outside of the guidelines. 18 U.S.C. §3742 (Supp. III 1985).

The guidelines the Commission must promulgate could specify capital sentences where Congress has authorized such sentences. The statutory authority for the Commission to issue sentencing guidelines is found in 28 U.S.C. §994(a)(1) (Supp. III 1985). This provision authorizes the Commission to promulgate and distribute

"guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including --

"(A) a determination whether to impose a sentence [of] probation, a fine, or a term of imprisonment;

¹¹ The statutory scheme generally excludes persons convicted of offenses unique to the District of Columbia or covered by the Uniform Code of Military Justice. See 18 U.S.C. §3551 (Supp. III 1985).

"(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment...." (Emphasis added.)

The statute speaks in general terms and delegates broad authority to the Sentencing Commission. The Commission's charge is simply to promulgate guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." Indeed, the legislative history reveals that "[t]he Commission is free to include in the guidelines any matters it considers pertinent to satisfy the purposes of sentencing." S. Rep. 98-225, 98th Cong., 1st Sess. 168-169 (1983) (emphasis added). The plain meaning of this grant of authority encompasses guidelines pertaining to death sentences and related issues.¹²

At this point, it may be useful to anticipate a counter-argument. It might be suggested that the specific Congressional requirement that the guidelines "include" ranges concerning certain sanctions -- probation, imprisonment, and fines -- rules out guidelines for other sanctions, such as capital punishment. This restrictive interpretation, however, is clearly not required by the language of the statute.¹³ It is also refuted by the

¹² Nothing in the Act would prevent the Commission from adopting guidelines that would govern jury determination of aggravating and mitigating circumstances in capital cases. Such guidelines would be "for use of a sentencing court in determining the sentence to be imposed in a criminal case," 28 U.S.C. §994(a), since a jury can be regarded as part of a "court," and its action in determining a sentence can be regarded as an action of the "sentencing court". See BLACK'S LAW DICTIONARY (5th ed. 1979) (defining "court" as "[a] body organized to administer justice, and including both judge and jury"). Moreover, the Commission is given several broad delegations of power that would subsume jury-related sentencing issues. For example, under 28 U.S.C. §995(a)(22), the Commission has the power to "perform such other functions as are required to permit Federal courts to meet their responsibilities [to insure that sentences reflect the seriousness of the offense, afford adequate deterrence, etc.] and to permit others involved in the Federal criminal justice system to meet their related responsibilities." (emphasis added).

¹³ "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." Federal Land Bank of St. Paul v.

legislative history, which states explicitly that "[t]he list of determinations [in §994(a)(1)] concerning which the guidelines should make recommendations is not necessarily inclusive" and that the guidelines may include specifications concerning other types of sanctions. S. Rep. 98-225, 98th Cong., 1st Sess. 165 (1983) (emphasis added). Moreover, in §994(c) the Commission is instructed to consider a number of factors

"in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment" (emphasis added).

The reference to "other authorized sanctions" is further evidence that sanctions other than probation, fines, and imprisonment may be addressed in the guidelines. A death sentence is, of course, an "authorized sanction" for certain federal crimes. See, e.g., 18 U.S.C. §1111(b); 18 U.S.C. §2381; 18 U.S.C. §351.

Indeed, the Commission's statutory mandate may require that guidelines for capital sentencing be provided in connection with statutes that authorize that sanction. Section 994(b) provides:

"The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum." (emphasis added).¹⁴

¹³(...continued)
Bismarck Co., 314 U.S. 95, 100 (1941).

¹⁴ Section 994(b) has been "technically" amended by S.1236, which redesignated the first sentence as §994(b)(1) and the second sentence as §994(b)(2). At the end of the second
(continued...)

As noted earlier, several provisions of Title 18, United States Code provide for the death penalty. See, e.g., 18 U.S.C. §1111(b) (first degree murder); 18 U.S.C. §2381 (treason), 18 U.S.C. §351 (murder of member of Congress).¹⁵ These title 18 statutes embody legislative judgments that capital punishment is the appropriate penalty for the most aggravated forms of the offenses defined by their provisions. Accordingly, guidelines that preclude capital punishment even for the most aggravated offenses under these statutes would not be "consistent with all pertinent provisions of title 18."

This conclusion is bolstered by the relevant legislative history. The pertinent history states that "[f]or a particular penal offense all the ranges together ... would be expected to cover the spectrum from no, or little, imprisonment to the statutory maximum, or close to it, for the applicable class of offense." S. Rep. 98-225, 98th Cong., 1st Sess. 168 (1983). This statement reveals that Congress believed that the Sentencing Commission could promulgate sentencing ranges up to "the statutory maximum"¹⁶, a maximum that includes the death penalty in some statutes. The legislative statement that the range should at least extend to "close to" the statutory maximum penalty supports the conclusion that the range should include

¹⁴(...continued)
sentence, S.1236 adds that "if the maximum term of the range is life imprisonment, the minimum shall not be less than 25-years imprisonment." Cong. Rec. p. H11295 (daily ed. Oct. 17, 1986). For ease of reference, this memorandum will refer to §994 as printed in 28 U.S.C. (Supp. III 1985).

¹⁵ Congress has not treated the death penalty provisions in title 18 as dead letters. Congress has not repealed these provisions and indeed since Furman has reenacted two statutes that provide for the death penalty through cross-references to 18 U.S.C. §1111. See Pub. L. 97-285, 96 Stat. 1219 (Oct. 6, 1982) (reenactment of 18 U.S.C. §§351, 1751).

Moreover, the federal death penalty statutes have never been declared unconstitutional, although they may well have been rendered inoperative by Supreme Court decisions. See generally Attachment 3 -- Effect of the Supreme Court's Decisions on Federal Death Penalty Statutes..

¹⁶ Note also that the Report uses the phrase "statutory maximum" not "maximum term of imprisonment."

capital punishment under these statutes. A sentence of life imprisonment would not be "close to" a statutory maximum of death. "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Guidelines that provide only the possibility of life imprisonment for particularly aggravated federal crimes for which title 18 specifies a maximum penalty of death would not span the range to "close to" the maximum penalty and would not comply with the Congressional directive.¹⁷

While the Act does place certain limits on the Commission's power to issue guidelines, none of the limitations precludes the Commission from considering death penalty issues. A recent House Report concerning technical changes in the Sentencing Reform Act stated:

"While the Commission is given considerable discretion to develop such guidelines as it sees fit, the Sentencing Reform Act does require the guidelines to be based on at least 2 factors: offense severity and offender characteristics. 28 U.S.C. 994(c), (d). Perhaps the most significant limitation upon the Commission's discretion is the '25% rule.' If a guideline calls for imprisonment, the maximum term of imprisonment called for in the guideline cannot exceed the minimum term by more than the 25% limitation.

"The Act also places other limitations on the Commission's discretion, but these limitations do not seriously restrict the

¹⁷ In relation to imprisonment, the Senate Report presumably left open the option of an uppermost guideline range that was only "close to" the statutory maximum because the sentencing court could then still impose the statutory maximum in an extraordinarily aggravated case by sentencing above the guideline range. 18 U.S.C. §3553(b) (Supp. III 1985). However, this option is inapplicable to capital punishment. If the Commission does not specify constitutionally adequate standards for imposing the death penalty under the title 18 capital punishment statutes, the effect may be to negate the legislative judgment that capital punishment is the appropriate maximum penalty for offenses defined by these statutes. It is therefore incumbent on the Commission to authorize capital punishment in the guidelines for these statutes.

Commission or prevent it from issuing such guidelines as it deems appropriate."

H.R. No. 99-614, 99th Cong., 2d Sess., pp. 3-4 (1986) (emphasis added).

In sum, the plain language and legislative history pertaining to the Commission's power to issue sentencing guidelines permit, and indeed may require, the Commission to draft guidelines embracing capital sentencing where Congress has provided that a death penalty is a permissible sentence.¹⁸

D. Construing the Commission's Guideline Authority to Reach Death Penalty Issues Is Consistent With Other Portions of the Sentencing Reform Act

Since the plain language of the Commission's sentencing guideline authority encompasses capital punishment issues, the next question is whether the remaining portions of the Sentencing Reform Act and pertinent legislative history support such a construction. But before proceeding further, it is appropriate to emphasize the effect of a finding that the plain language of the Commission's guideline authority embraces capital sentencing.

If death penalty issues fall within a literal reading of the Sentencing Commission's guideline authority, all other arguments become subsidiary. The Supreme Court has emphasized that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms." Caminetti v. United States, 242 U.S. 470, 485

¹⁸ In addition to its broad power to promulgate guidelines, the Commission has even more expansive authority to issue "policy statements" with respect to application of the guidelines "or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code [that is, just punishment, deterrence, incapacitation, and rehabilitation]" 28 U.S.C. §994(a), 98 Stat. 2019 (emphasis added).

Under this provision, it is virtually indisputable that the Commission could promulgate policy statements regarding capital sentencing issues. Because these policy statements are not clearly binding, however, they would raise concerns about inconsistent sentences that the Supreme Court has been especially sensitive to in its death penalty decisions. For this reason, the Commission should draft guidelines relating to capital cases rather than issuing policy statements on the subject.

(1917).¹⁹ In view of this oft-repeated canon of statutory construction and the breadth of the plain language of the Commission's guideline authority, a finding that the Commission does not have jurisdiction over death penalty issues would have to be based on weighty evidence. An examination of the Sentencing Reform Act, however, shows no significant evidence supporting such a limitation.

1. An Express Reference to the Death
Penalty Suggests That the Commission May
Properly Consider Death Penalty Issues

The one provision in the Act that specifically mentions the death penalty is 18 U.S.C. §3559, 98 Stat. 1991, which classifies offenses as follows:

"(1) if the maximum term of imprisonment authorized is --

"(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

"(B) twenty years or more, as a Class B felony

[and so on, through the remainder of the felonies, misdemeanors, and infractions]."

For purposes of discerning congressional intent, this provision reveals a congressional understanding that the new sentencing system would permit the imposition of death sentences. Under 28 U.S.C. §994(c)(1) (Supp. III 1985), the Commission is instructed to consider "the grade of the offense" in "establishing categories of offenses for use in the guidelines." Since the offense grading scheme includes death sentences, so may the guidelines.

2. The Act's Express Enumeration of
Certain Sanctions Does Not Preclude
Death Penalty Sanctions

It might be argued that the focus of the Act on three standard types of sentences -- probation, imprisonment, and fines

¹⁹ Moreover, if the language of a statute reasonably covers a situation, the statute applies irrespective of whether the legislature ever contemplated that specific application. Barr v. United States, 324 U.S. 83, 90 (1945). In our view, however, the Sentencing Commission need not rely on this rule of construction. See generally Part E, infra.

-- precludes the use of other sentences.²⁰ In particular, one might point to chapter 227, added to Title 18 by the Act, which provides:

"An individual found guilty of an offense shall be sentenced to

"(1) a term of probation as authorized by subchapter B;

"(2) a fine as authorized by subchapter C; or

"(3) a term of imprisonment as authorized by subchapter D.

18 U.S.C. §3551(b) (Supp. III 1985).

The specification of these three sentences, the argument would run, rules out other sentences such as capital punishment.

Chapter 227 commences with the proviso that its prescriptions concerning permissible sentences apply "Except as otherwise specifically provided," 18 U.S.C. §3551(a) (Supp. III 1985). It is possible to read this language as not reaching the death penalty provisions. Under this reading, the Sentencing Reform Act would then arguably effectuate an implied repeal of all penalties other than fines, imprisonment, or probation, and a few other specifically provided penalties.²¹

Not only would such a reading repeal by implication the numerous death penalty provisions but also other important provisions in title 18 that provide for non-standard sentences. For example, reading the statute in this fashion would repeal (without any support in the legislative history) the sanction of disqualification from holding public office authorized (though

²⁰ The Act also expressly authorizes the use of forfeiture, notice to victims, and restitution in certain circumstances. See 18 U.S.C. §§3551(b), 3554, 3555, 3556. Capital punishment is not overtly addressed one way or the other, aside from the specification just discussed in 18 U.S.C. §3559 concerning the penalty grading of offenses for which capital punishment is authorized, the provisions regarding aircraft hijacking discussed in the next section, and the miscellaneous provisions discussed in footnote 24 infra.

²¹ Section 3551(b) by its terms also allows criminal forfeiture, notice to victims, and restitution as sanctions.

not invariably required²²) by the public corruption, treason, and insurrection statutes, 18 U.S.C. §§ 201-204, 2381, 2383 & 2385, and numerous other provisions in title 18.²³

This reading cannot be sustained because of the strong presumption against implied repeal of congressional enactments. As Judge Scalia has explained:

"It is a venerable rule, frequently reaffirmed by the Supreme Court, that 'repeals by implication are not favored,'" Tennessee Valley Authority v. Hill, 437 U.S. 153, 189 (1978) (quoting Morton v. Mancari, 417 U.S. 535, 549 ((1974), quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936); see generally 1A SUTHERLAND, STATUTORY CONSTRUCTION §23.10 (C. Sands 4th ed. 1972 & 1985 Supp.), and will not be found unless an

²² Title 18 U.S.C. 201(e) provides that upon conviction for bribery a defendant "may be disqualified from holding any office of honor, trust, or profit under the United States." (emphasis added). The discretionary nature of the penalty underscores the need for the Commission to promulgate guidelines regarding disqualification to "avoi[d] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" 28 U.S.C. §991(b)(1)(B) (Supp. III 1985).

²³ See, e.g. 18 U.S.C. §213 (disqualification from position of Federal Reserve System examiner for acceptance of gratuity from bank); 18 U.S.C. §592 (disqualification from public office for keeping troops at public polls); 18 U.S.C. §593 (disqualification from public office for interfering with election activities through the Armed Forces of the United States); 18 U.S.C. §655 (disqualification from position of FDIC examiner for of theft from bank); 18 U.S.C. §1731 (disqualification from position of postmaster and dismissal from office for fraud in connection with bonds); 18 U.S.C. §1907 (disqualification from position of farm credit examiner for unauthorized disclosure of information); 18 U.S.C. §1908 (disqualification from position of NACC examiner for disclosure of names of borrowers); 18 U.S.C. §1913 (removal from office for lobbying with appropriated moneys); 18 U.S.C. 2071(b) (forfeiture of office and disqualification from public office for willful destruction of official records). Cf. 5 U.S.C. 8312 (denial of retirement pay upon conviction of certain offenses); 29 U.S.C. §§504, 1111 (disability from service in labor union upon conviction of certain offenses).

intent to repeal is "'clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198 (1939) (quoting Red Rock v. Henry, 106 U.S. 596, 602 (1883)). ... [This principle] is one of the fundamental ground rules under which laws are framed." United States v. Hansen, 772 F.2d 940 (D.C. Cir. 1985).

Neither the legislation nor its history afford any basis for finding "clear and manifest" evidence that Congress intended to repeal wholesale the numerous death penalty provisions, disqualification for office provisions, and removal from office provisions that exist in title 18 and elsewhere. When Congress sought to supercede legislation through the Sentencing Reform Act, it did so explicitly not implicitly. Thus, where Congress wished a provision in the Sentencing Reform Act to override provisions of title 18, it stated so explicitly. See, e.g., 18 U.S.C. §3559(b) (Supp. III 1985) (superceding maximum fine provisions but not maximum term of imprisonment provisions in title 18) (discussed in S. Rep. 98-225, 98th Cong., 1st Sess. 51 (1984)). Particularly revealing is the fact that the Sentencing Reform Act contains two separate sections -- entitled "repealers" and "technical and conforming amendments" -- that conform all provisions of the U.S. Code to the provisions of the Sentencing Act. The two sections are very detailed, spanning some five pages in the U.S. Statutes at Large. See 98 Stat. 2027-31. Given the specificity of these sections, it is inconceivable that Congress simply overlooked the death penalty provisions and disqualification from office provisions as something they wished to repeal.²⁴ Thus, in the absence of any clear Congressional

²⁴ The Sentencing Reform Act repeals 18 U.S.C. §3566 (1982), which provided that "[t]he manner of inflicting the punishment of death shall be that prescribed by the laws of the place within which the sentence is imposed." This repeal is not "clear and manifest" evidence of Congress's intention to repeal the death penalty. The legislative history apparently provides no explanation for the deletion of §3566, but Congress may simply have been intended it as a repeal of a limitation on the means of implementing the death sentence. Congress may not have wished to require the Executive Branch to be bound to means of execution prescribed by particular states since new and more humane means of execution (e.g., lethal injection) have been developed but not yet authorized in some states. Cf. H.R. No. 164, 75th Cong., 1st Sess. 1 (1937) (justifying adoption of predecessor to §3566 on the grounds that states permitted means of execution more humane than the then-prescribed federal method of hanging).

Under this view, the authority for implementation of death sentences would remain, inter alia, in general powers of the
(continued...)

intention to repeal the federal death penalties, the presumption against implied repeals requires a reading of §3551 that permits such penalties.

Even apart from the presumption against implied repeals, the Sentencing Reform Act can be read directly to permit the imposition of death penalty. Recall that chapter 227 commences with the proviso that its prescriptions concerning permissible sentences apply "Except as otherwise specifically provided," 18 U.S.C. §3551(a) (Supp. III 1985). This proviso can be read to preserve other sanctions which are specifically provided for in statutes outside of chapter 227, such as the disqualification from office and death penalty provisions. Under this reading, the proviso would be read in a straightforward, literal fashion. Chapter 227 permits standard types of sentences: Other chapter in Title 18 "otherwise specifically provide[s]" that several additional sentences -- i.e., disqualification from office and death -- are also permissible. Of course, nothing in the Act limits the Commission's authority to the standard types of sentences addressed in chapter 227. See Part C supra.

In response, one could suggest that, even if the "except as otherwise specifically provided language" preserves the federal death penalty provisions, reliance on this language removes death penalties from chapter 227 -- the sentencing chapter of the Sentence Reform Act -- and hence from the purview of the Sentencing Act.²⁵ This argument, however, appears to read too

²⁴(...continued)

Executive that have long been recognized. See, e.g., 1 Op. Att'y Gen. 228 (Aug. 19, 1818) (concerning power of the President to issue death warrants). Strongly supporting this view is the undeniable fact that Congress intended the aircraft hijacking death penalty provisions to survive under the Act, as discussed in the following section. Also supporting this view is the fact that Congress reenacted a provision of the Federal Rules of Criminal Procedure regarding death sentences. See 98 Stat. 2016 (reenacting provision of Rule 38 which provides "[a] sentence of death shall be stayed if an appeal is taken").

²⁵ This argument, if accepted, does not remove capital sentencing issues from the Commission's jurisdiction. Instead, it only removes these issues from chapter 227 of the Act. See 18 U.S.C. §3551(a) ("Except as otherwise specifically provided, a defendant ... shall be sentenced in accordance with the provisions of this chapter."). Thus, the effect of this argument is extremely limited. For example, while chapter 227 contains the directions to district courts to sentence offenders in accord
(continued...)

much into the exception. Death penalties are entirely consistent with the provisions of chapter 227 except, arguably,²⁶ for that chapter's specification of three standard types of sentences. Thus, the death penalty provisions in title 18 appear to "specifically provide" only that the portion of chapter 227 listing fines, imprisonment, and probation as the permissible punishments shall not be followed, to the extent (and only to the extent) such a list rules out the death penalty. As the Fifth Circuit has explained:

"Under familiar rules of construction, a negation in or exception to a statute will be construed so as to avoid nullifying or restricting its apparent principal purpose and the positive provisions made to carry them out. No conflict with them will, therefore, be found unless the conflict is clear and inescapable and then only in the precise point of the conflict." Interstate Natural Gas Co. v. FPC, 156 F.2d 949 (5th Cir. 1946) (emphasis added), aff'd, 331 U.S. 682 (1947).

It might also be suggested that "except as otherwise specifically provided" pertains only internally, to other provisions in chapter 227 that are inconsistent or that refer to statutes outside the Sentencing Reform Act. Under this view, the proviso is construed to refer to provisions in the Act such as §3554, which provides that for some drug offenses the sentencing court "shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant forfeit property to the United States in accordance with the

²⁵(...continued)
with the Commission's guidelines, see 18 U.S.C. §3553(a)(4) (Supp. III 1985), the provisions permitting a defendant or the government to appeal a sentence outside the guidelines are found in another chapter, chapter 232. See 18 U.S.C. §3742 (Supp. III 1985). As a result, even if district courts are not directed by chapter 227 to sentence in accordance with the guidelines, they might still be obliged to sentence in accordance with guidelines through the operation of chapter 232.

²⁶ It is not even entirely clear that a death penalty is inconsistent with the chapter's list of punishments, since convicted offenders sentenced to death will invariably be imprisoned and often fined prior to the execution of the death sentence.

provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970."²⁷ The difficulty with this reading, however, is that it renders the proviso superfluous: Provisions contained in chapter 227 such as §3554 would be given effect under any reading of chapter 227 in general and §3551(b) in particular even without the operation of the "except as otherwise specifically provided" clause.²⁸ This is contrary to the rule of statutory construction that "[w]ithout a clear congressional command otherwise, [courts] will not construe a statute in any way that makes some of its provisions surplusage." State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985).²⁹

One final point regarding §3551(b) should also be mentioned. In addition to listing three permissible punishments, §3551(b) directs that the defendant be sentenced "in accordance with the provisions of section 3553." Section 3553(a)(4) requires the sentencing court, in determining the sentence to be imposed, to consider, among other things, "the kind of sentence and the sentencing range established . . . in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1)." 18 U.S.C. 3553(a)(4) (Supp. III 1985). Absent mitigating or aggravating circumstances not taken into account by the Commission, §3553(b) requires the sentencing court to "impose a sentence of the kind, and within the range," established by the guidelines promulgated pursuant to section 994. As discussed

²⁷ Similarly, chapter 227 also contains provisions directing that certain procedures contained in the Federal Rules of Criminal Procedure should be followed. See 18 U.S.C. §3552(a), §3565(a) (Supp. III 1985).

²⁸ Section 3551(b) itself provides that "[a] sanction authorized by section 3554 . . . may be imposed in addition to the sentence required by this subsection [i.e., probation, fine or imprisonment]." The provisions contained in 3552(a) and 3565(a) referred to in the previous footnote do not appear to be inconsistent with any provisions in chapter 227 and therefore likewise do not require resort to the "except as otherwise provided" proviso.

²⁹ For the same reason, it might not be proper to read "except as otherwise specifically provided" to refer only to other statutes that contain language directing that chapter 227 or the Sentence Reform Act not be followed. Such statutes would automatically be given effect entirely apart from the saving proviso.

previously, §994 authorizes, and perhaps requires, the Commission to promulgate capital sentencing guidelines. See Part C, supra. Thus, a court's decision to impose the death sentence in accordance with such guidelines would comply fully with §3551(b)'s direction that defendants be sentenced in accordance with §3553, providing further support for a reading of §3551 that would permit the imposition of death sentences.

3. The Aircraft Hijacking Death Penalty
Is Explicitly Preserved by the Act

It was clear to those who drafted the Sentencing Reform Act during the late 1970's and early 1980's that at least one federal death penalty provision -- the provision in the aircraft hijacking statute, 49 U.S.C. §§1472 & 1473 -- was at the time fully constitutional and operative. That statute, adopted in 1974, contains a number of procedural safeguards designed to meet the Supreme Court's specifications in Furman.³⁰

Congress undoubtedly intended that the death sentence sanction in the aircraft hijacking statute would survive under the Sentencing Reform Act. Entirely apart from the presumption against implied repeals, this is demonstrated by an amendment that Senator Laxalt, a co-sponsor of the Sentencing Reform Act, added to the Act. Senator Laxalt proposed a "noncontroversial" "clarifying" amendment "to make it clear that the new 18 U.S.C. 3559(b)"³¹ [a provision in the Sentencing Act] is not intended to

³⁰ Several other death penalty provisions also appear to comply with constitutional requirements. See Department of Justice Comments Regarding Chapter Two of the Sentencing Commission's Draft Guidelines, p. 8 (Dec. 12, 1986) (expressing view that 18 U.S.C. §§ 115(a), 351(a), and 1751(a) are sufficiently narrowly drawn to survive constitutional challenge under the holding of Jurek v. Texas, 428 U.S. 262 (1976)).

³¹ Title 18 U.S.C. 3559(b) (Supp. III 1985) provides in full that:

"EFFECT OF CLASSIFICATION -- An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

"(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is greater; and;

"(2) the maximum term of imprisonment is the term authorized by the statute describing the

(continued...)

repeal the current death penalty and related procedures applicable to aircraft hijacking, where death results." Cong. Rec., p. S14702 (daily ed. Oct. 26, 1983) (statement of Sen. Laxalt). The Amendment inserted in the aircraft hijacking statute death penalty provisions the following clause: "notwithstanding the provisions of 18 U.S.C. 3559(b)." See 92 Stat. 2031.

This "clarifying" amendment reveals one important fact about the Sentencing Reform Act: the Act was not meant to repeal the death penalty provisions of the hijacking statute. This seemingly simple observation undercuts many arguments that would deny the Commission authority over the death penalty, such as the argument discussed in the preceding subsection. If the Act was meant to nullify existing capital punishment statutes, it would have affected the aircraft hijacking statute as well; but Senator Laxalt's amendment shows that this was not intended.

While this amendment demonstrates that the aircraft hijacking death penalty survives under the new sentencing system, it might be argued that Congress' failure to add comparable provisos to the other death penalty statutes repeals them by implication. However, this interpretation of the Act would flaunt the strong statutory presumption against implied repeals discussed previously. Certainly a "noncontroversial" "clarifying" amendment can not constitute "clear and manifest" evidence to repeal all of the federal death penalty provisions in title 18. And since the death penalty statutes and the Sentencing Act may be construed compatibly, it is incumbent upon the Commission and the courts to do so. See Administrator, FAA v. Robertson, 422 U.S. 255 (1975) (when courts are confronted with statutes capable of coexistence, it is the duty of the courts to regard each as effective absent a clearly expressed congressional intention to the contrary); Morton v. Mancari, 417 U.S. 535 (1974) (same).

In fact, there are a variety of reasons why comparable provisos may have been omitted in connection with other capital statutes that would reflect no intent by Congress to repeal them. The most obvious is a simple desire to avoid controversy. The Laxalt amendment relating to aircraft hijacking was part of a series of amendments that were characterized as "clarifying" and "non-controversial." See Cong. Rec., p. S14701 (daily ed. Oct. 26, 1983). Since it was generally recognized at the time that the aircraft hijacking death penalty was already operative under constitutionally adequate procedures, an express proviso

preserving it was not in fact controversial. However, an amendment expressly reaffirming the potential validity of other capital punishment statutes that were not then operative could have given rise to controversy with the minority of Senators who opposed capital punishment. A desire to avoid a fight on this issue which could have impeded passage of the general Act is one possible reason for limiting the amendment to aircraft hijacking that would reflect no intent by Congress to repeal the other capital statutes.

Moreover, the same proviso may have been considered unnecessary in connection with the other capital statutes. First, all of the generally applicable capital statutes other than aircraft hijacking are in title 18. As noted earlier, 28 U.S.C. §994(b) requires the Commission to establish sentencing ranges consistent with "all pertinent provisions of title 18" It may have been thought that this general directive was adequate to ensure guidelines consistent with the capital punishment authorizations of the title 18 statutes, but that a special proviso was necessary to ensure sentencing ranges consistent with the death penalty authorization of the title 49 aircraft hijacking provision. Second, unlike the title 18 capital statutes, the aircraft hijacking statute already contains "guidelines" spelling out aggravating and mitigating factors, see 49 U.S.C. §1473, and the proponents of the amendment may have wished to make it clear that the Commission was not free to substitute guidelines of its own for the statutory factors.

Finally, it might be suggested that the proponents of the amendment simply did not think about the question whether the Title 18 capital statutes could be revived under the new sentencing system, and therefore did not refer to them in the amendment. This reason, like all of the others noted above, would provide no basis for inferring an affirmative intent by Congress to abrogate the capital punishment authorizations of these statutes by implication.³²

³² Also supporting this conclusion is the rule of statutory construction that "statutes should be construed whenever possible so as to uphold their constitutionality." United States v. Vuitch, 402, U.S. 62, 70 (1971). Construing the Sentencing Reform Act to permit the Sentencing Commission to issue capital sentencing guidelines may be the only way to preserve the constitutionality of the federal death penalty enactments consistent with this presumption. See generally Attachment 2, Part C.

E. The Sentencing Reform Act does not Embody a Silent Congressional Purpose to Exclude Death Penalty Issues.

It might be argued that the lack of an explicit statutory directive to the Sentencing Commission to adopt guidelines including the death penalty demonstrates a congressional determination to exclude death penalty matters from the Commission's authority. Entirely apart from the fact that the death penalty is in fact specifically mentioned in the Sentencing Reform Act, see Part D.1 supra, this approach to statutory construction must be rejected. "[T]he starting point for interpreting a statute," the Supreme Court has noted, "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Accord Aaron v. SEC, 446 U.S. 680, 695 (1980); Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978). Here the plain language of the Sentencing Reform Act permits the Commission adopt guidelines providing for the death sentence.

In addition, reliance on lack of explicit directives to the Commission on the death penalty misconceives the statutory design. Congress did not intend to revise the maximum or minimum sentences for federal offenses through the Act. Those sentences were already prescribed in the U.S. Code in Title 18 and Congress did not revisit them in drafting the Act. Instead, Congress simply instructed the Commission to devise sentencing guidelines "consistent with all pertinent provisions of Title 18, United States Code." 28 U.S.C. §994(b) (Supp. III 1985).

Because of this statutory approach, Congress had no occasion for discussing the penalties contained in Title 18. For example, while the Act does not explicitly state that the Commission is permitted to enforce the death penalty provisions found in Title 18, neither does it explicitly state that the Commission is permitted to enforce (as it obviously can) the life sentence maximum penalty for second degree murder, 18 U.S.C. §1111(b), or the 10 year maximum penalty for manslaughter, 18 U.S.C. §1113(b). The absence of specific discussion of maximum penalties -- be it a death sentence, a life sentence, or a ten year term of imprisonment sentence -- is to be expected in view of the statutory scheme and does not provide any basis for inferring Congressional intention.

Likewise, the Senate's separate consideration and passage of legislation restoring an enforceable death penalty -- S.1765 of the 98th Congress -- does not support an inference that the same result cannot be achieved under the general sentencing reform provisions of the Comprehensive Crime Control Act. S.1765 was split off from the general Act to accommodate a minority of

Senators who opposed capital punishment and accordingly would not accept a tie-in between legislation that would have the indisputable effect of reviving the death penalty and the rest of the Act. The accommodation of death penalty opponents in the Senate on this question of voting procedure obviously does not imply that a majority of Senators -- much less majorities in both Houses -- would have regarded the restoration of capital punishment as beyond the Commission's powers under the general sentencing reform provisions. Rather, the support for capital punishment evidenced by the substantial majority vote for S.1765 suggests that most Senators would regard an interpretation of the general sentencing provisions that permitted restoration of the death penalty as appropriate and desirable.

As a general proposition, Congress (and the Executive Branch) may support legislation governing an issue which they fully believe is within the power of an administrative agency because they want to control the way the issue is resolved. A decision to leave the matter to the agency's discretion in no way implies a view that the agency's power does not extend that far. For example, at the same time as Congress passed the Sentencing Reform Act, it also provided that an offender who uses a gun in a crime of violence may not be placed on probation. See 18 U.S.C. §924 (Supp. III 1985) (adopted as part of Chapter X of the Comprehensive Crime Control Act). No one can seriously maintain that if Congress failed to adopt this provision that the Sentencing Commission would be barred from reaching a similar result through its guidelines.

Conclusion

The Sentencing Commission is statutorily empowered -- and indeed possibly required -- to issue sentencing guidelines that include death sentences where Congress has provided that death is a permissible sentence.

Attachment 2
Capital Sentencing Guidelines Promulgated
by the Commission Would Satisfy the
Constitutional Requirements Established
by the Supreme Court

A.	Commission Guidelines Would Generally Satisfy the Constitutional Requirements	1
B.	The Specific Guidelines Would Be Constitutional	4
1.	Treason and Espionage	4
2.	Homicide	9
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C.	The Title 18 Death Penalty Statutes Are Not Inherently Constitutionally Deficient	10

A. Commission Guidelines Would Generally Satisfy the Constitutional Requirements.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court held that "the punishment of death does not invariably violate the Constitution." Id., at 169 (plurality opinion). The Court explained that "[t]he imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England." Id., at 176 (plurality opinion). The Court also observed that "[i]t is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers. At the time the Eighth Amendment was ratified, capital punishment was a common sanction in every State." Id., at 177 (plurality opinion). In more contemporary terms, "[i]t is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction." Id., at 179 (plurality opinion).

In Gregg, however, the Supreme Court also underscored that certain procedures must be followed in capital sentencing proceedings: "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id., at 189. (plurality opinion). These concerns can be met, the Court concluded, under a sentencing procedure "that ensures that the sentencing authority is given adequate information and guidance." Id., at 195 (plurality opinion).

In general, Commission-promulgated guidelines providing for the death sentence where Congress has authorized this penalty would comply with the constitutional strictures spelled out by the Supreme Court for capital cases. The Supreme Court's cases require that a capital sentencing scheme have guidelines that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Gregg v. Georgia, supra, 428 U.S., at 206 (plurality opinion) (emphasis added). The Commission has authority to consider both factors in its guidelines.

With respect to "the particularized nature of the crime," the Commission is directed to consider a number of factors "to the extent that they ... have relevance," including:

- "(1) the grade of the offense;
- "(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
- "(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

"(4) the community view of the gravity of the offense;

"(5) the public concern generated by the offense;

"(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

"(7) the current incidence of the offense in the community and in the Nation as a whole."

28 U.S.C. §994(c) (Supp. III 1985).

With respect to "the particularized characteristics of the individual defendant," the Commission is directed to consider a number of factors "to the extent that they ... have relevance," including:

"(1) age;

"(2) education;

"(3) vocational skills;

"(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

"(5) physical condition, including drug dependence;

"(6) previous employment record;

"(7) family ties and responsibilities;

"(8) community ties;

"(9) role in the offense;

"(10) criminal history; and

"(11) degree of dependence upon criminal activity for a livelihood."

28 U.S.C. §994(d) (Supp. III 1985).

It is also instructive to observe that the language of the Commission's mandate is substantially the same as that used by the Supreme Court in describing the necessary components of death penalty statutes. Compare 28 U.S.C. §994(c)(2) (Supp. III 1985) (Sentencing Commission shall promulgate guidelines that consider "the circumstances under which the offenses was committed which mitigate or aggravate the seriousness of the offense") with Gregg v. Georgia, supra (upholding Georgia statute with "aggravating" and "mitigating" circumstances determining imposition of capital sentences). In short, capital sentencing guidelines, if properly drafted by the Commission, would be deemed "to minimize the risk of wholly arbitrary and capricious action," Gregg, supra, 428 U.S., at 189 (plurality opinion), and thereby pass constitutional muster.

One line of attack on Commission-promulgated guidelines might be that the Supreme Court in its death penalty decisions contemplated a legislative narrowing of the category of offenders eligible for the death penalty. In support of this position,

passages from the various Supreme Court opinions referring to legislatures or legislative action could be cited. See, e.g., Gregg, supra, 428 U.S., at 197 (plurality opinion) ("[under the Georgia procedures, the jury] must find a statutory aggravating circumstance before recommending a sentence of death") (emphasis in original).

It is clear, however, that this objection rests on a misreading of the Supreme Court's capital punishment decisions. Although the Supreme Court's cases contain references to statutory guidelines, this is so merely because that is the context in which the Court has considered capital punishment cases. The rationale in the Court's opinions for requiring a limitation on the usual degree of sentencing discretion in death cases is that such guidelines are needed to guard against the "wanton and freakish" imposition of the penalty. Gregg v. Georgia, supra, 428 U.S., at 206-207 (plurality opinion). In relation to this rationale, it is irrelevant what agency promulgates the capital sentencing rules, so long as they provide the necessary consistency. As long as the guidelines satisfy Furman requirements, it should make no difference what entity establishes them. The source of the guidelines and limitations does not make a death sentence any more or less cruel or unusual punishment. In this respect, the Commission's guidelines would be fully equal to legislative directives.¹

A more fundamental response can also be made to the argument that legislative action is needed to permit adoption of federal death penalty guidelines: the Sentencing Reform Act constitutes such legislation. In the Act, Congress has given sweeping power to the Sentencing Commission to determine which sentences are appropriate within the parameters established by Congress. Congress has prescribed death as a permissible penalty for

¹ For this reason, United States v. Harper, 729 F.2d 1216, 1225 (9th Cir. 1984), is irrelevant to the issues addressed in this memorandum. Harper held that a district court could not itself adopt procedures for capital cases, reasoning that "it would certainly be anomalous to hold that the guidelines, which are required in order to limit the discretion of a sentencing authority, may be supplied by the sentencing authority. ... The requirement that the discretion be 'suitably limited and directed' [citing Gregg] clearly requires an external limitation." 729 F.2d, at 1225. Of course, guidelines promulgated by the Sentencing Commission would constitute an external check on the power of the sentencing authority. Indeed, the Sentencing Reform Act provides for appellate review of sentences meted out under the guidelines to correct errors. See 18 U.S.C. §3742 (Supp. III 1985).

numerous serious federal offenses. The arguments advanced previously demonstrate that the Act gives the Commission authority to adopt guidelines that include the death penalty for these offenses. See generally Attachment 1.

Nothing in the Supreme Court's death penalty decisions would forbid Congress from delegating in this fashion.² Indeed, since Furman the federal courts have upheld the revision of state capital sentencing procedures by state supreme courts without any legislative authorization whatsoever. See, e.g., Jordan v. Watkins, 681 F.2d 1067, 1079-1080 (5th Cir. 1982); Irving v. Hargett, 518 F. Supp. 1127, 1137-1139 (N.D. Miss. 1981); see also Knapp v. Cardwell, 667 F.2d 1253 (9th Cir.), cert. denied, 459 U.S. 1055 (1982) ("The Supreme Court has established that courts should construe legislation in a constitutional manner 'if fairly possible,' ... and that state courts can use statutory interpretation to validate otherwise questionable death penalty statutes.").

B. The Specific Guidelines Would Be Constitutional.

1. Treason and Espionage.

Title 18 specifies death as a permissible penalty for the crimes of treason and espionage in certain circumstances. See 18

² Nor would the "delegation doctrine" appear to prevent the assignment to the Commission of the tasks it has been given. As a three-judge District Court (Scalia, Johnson, Gasch, JJ.) recently explained: "In the fifty years since A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), was decided, the Court has consistently rejected delegation challenges. Nominally, it has continued to apply the same test ..., scrutinizing the challenged statutes for intelligible standards and statements of purpose which would provide guidance to the officials to whom authority was delegated. Pragmatically, however, the Court's decisions display a much greater deference to Congress' power to delegate, motivated in part by concerns that, "[i]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy.'" Synar v. United States, 626 F.Supp. 1374, 1383-84 (D.D.C. 1986) (citations omitted). As a result, as Judge Becker testified to the Commission, "Because the non-delegation doctrine has not been invoked in recent years by the Supreme Court, ... we assume that the [Sentencing Reform Act] would survive a non-delegability attack if one were made." Testimony of Judge Becker, p. 23 (Dec. 2, 1986).

U.S.C. §2381; 18 U.S.C. §794. The Commission could promulgate guidelines providing for capital sentences for these crimes without constitutional difficulty under Coker v. Georgia, 433 U.S. 584 (1977). The Department of Justice has previously observed that:

"Under Coker, a two-pronged test must be applied to determine whether the death penalty would be excessive in relation to a particular crime. First, it must be determined whether the penalty makes a measurable contribution to acceptable goals of punishment. While there as yet is no resolution to the debate over the deterrent effect of the death penalty, it is reasonable to assume that a court would give deference to the legislative judgment on the deterrent effect of the penalty with respect to the offenses of treason and espionage -- both of which clearly involve a calculated course of conduct -- as long as the judgment appears rational.

"The second part of the test, which is whether the punishment is grossly out of proportion to the severity of the crime, is more difficult to assess. In Coker, the Court looked to the consensus among the States and the international community and the practice of juries in modern times, as well as to historic practice, to assess the relationship between the penalty and the offense of rape. Such an exercise is more difficult, of course, with respect to crimes as rare as treason and espionage.

"Since treason and espionage are crimes which are generally considered federal in nature, reference to the practice of the States is not particularly instructive.³ However, federal law has permitted the death penalty for treason since 1790 and for espionage since 1917. Furthermore, the attitude of the international community demonstrates some consistency in viewing the death penalty as appropriate for these crimes. In a report on capital punishment to the United Nations, the Secretary General noted that many nations which have generally abolished the death penalty retain it for a few exceptional crimes such as those related to the security of the state. Capital Punishment -- Report of the Secretary General, para.

³ It should be noted, however, that as reported in Bedeau, Death Penalty in America, p. 43 (1967), twenty-one States included treason among capital crimes. [Footnote in original.]

18, Feb. 23, 1973. More specifically, the report notes that "the most common exceptional crimes punishable by death are treason and crimes relating to the security of the State." Id. at para. 32. Tables appended to the report show that the majority of member nations of the United Nations retain capital punishment -- about 100 -- and that fifteen other nations, while abolishing capital punishment for ordinary crimes, retain it for exceptional crimes.⁴ While the practice of other nations is not conclusive in interpreting the requirements of our own Constitution, it does constitute a factor which under the Court's analysis in Coker is appropriate to consider in determining whether the death penalty is excessive as applied to treason or espionage.

"Thus, approaching the disproportionality issue as did the Court in Coker, the consistent view of the Congress from the earliest days of the nation and the agreement of most nations that treason warrants the death penalty in some cases strongly argues for the conclusion that the penalty is not disproportionate to the offense of treason. This is particularly true in light of the aggravating circumstances that must be proved under S. 114 before the death penalty may be imposed.⁵ Applying these criteria, it is likely that a court would find the death penalty for treason to be constitutional if imposed in accordance with the procedures established in S. 114, and, in our view, the same conclusion is supportable with respect to wartime espionage, punishable under 18 U.S.C. 794(b), where

⁴ A 1975 update of this report showed that the picture remained largely unchanged. Capital Punishment, UN Doc. 5616, Feb. 12, 1975. [Footnote in original.]

⁵ The aggravating factors provided in S.114 were:

"(1) the defendant has been convicted of another offense involving espionage or treason for which either a sentence of life imprisonment or death was authorized by statute;

"(2) in the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security;

"(3) in the commission of the offense the defendant knowingly created a grave risk of death to another person."

implicit in the nature of the offense is a grave risk of danger to the security or survival of the nation.

"However, the result is less clear in the case of espionage in peacetime. ... While the Department does not view this problem as being such that it would necessarily render the death penalty unconstitutionally excessive in relation to the offense of peacetime espionage, we do believe that as a matter of policy, serious consideration should be given to deleting the death penalty with respect to peacetime espionage punishable under 18 U.S.C. §794(a)." Letter from Michael Dolan to Strom Thurmond, pp. 8-14, reprinted in Capital Punishment: Hearings before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 24-25 (1981) (footnotes renumbered).⁶

Since that time, the Supreme Court has decided Enmund v. Florida, 458 U.S. 782 (1982) (death penalty excessive for felony murder when the defendant did not himself take life, attempt to take life, or intend that a life be taken or that lethal force be used). In Enmund, the Court stressed that the punishment issue should be analyzed by objective factors to the maximum extent possible. This, it said, required an examination of the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made bringing its own judgment to bear on the issue." 458 U.S. at 788-789. The Enmund decision strengthens the argument that a death penalty is constitutionally permissible for treason and espionage, even in peacetime.

Judge Kaufman's opinion in United States v. Rosenberg, 109 F. Supp. 108 (S.D.N.Y. 1953), denying the motion for reduction of death sentences imposed for a conspiracy to violate the Espionage Act, contains the examination called for in Enmund and sets forth cogent reasons why the death penalty may be imposed for espionage. As he stated, "Throughout history the crime of traitors stand as the most abhorred by people. At the time of the imposition of the sentence, ... I pointed out that the crime for which these defendants stood convicted was worse than murder."

⁶ Since these hearings, held in 1981, the Department of Justice has prosecuted several particularly egregious peacetime espionage cases, notably the Walker case. In light of this experience, the Department might now be of the view that, as a policy matter, a death penalty for egregious cases of peacetime espionage is more clearly appropriate. For purposes of this memorandum, it is enough to note that this view is in accord with the legislative judgment currently embodied in 18 U.S.C. §794(a).

The distinction is based upon reason. The murderer kills only his victim while the traitor violates all the members of his society, all the members of the group to which he owes his allegiance." Id. at 110. And as Judge Frank said earlier in affirming the conviction, United States v. Rosenberg, 195 F.2d 583, 609 (2d Cir.), cert. denied, 344 U.S. 838 (1952), in commenting upon a community-attitude test proposed by the Rosenbergs regarding the imposition of the death penalty, "it is impossible to say that the community is shocked and outraged by such sentences resting on such facts."

Significantly, espionage under 18 U.S.C. §794 is a crime not very different from treason, United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965), cert. denied, 384 U.S. 1013 (1966), an offense of such grave importance as to be singularly defined in the Constitution, U.S. Const., Art. III, Sec. 3, and which Congress has elected to treat as a capital offense from the earliest days of the Nation. See 1 Stat. 112 (1790). See generally Haupt v. United States, 330 U.S. 631 (1947), cert. denied, 336 U.S. 918 (1949). Like treason, espionage strikes at the very existence of government and at the safety of the Nation. Like treason, it may expose millions to danger or death. Moreover, in the nuclear age, even if the disclosure of defense-related information ultimately does not in fact weaken national defense, such disclosure does make it significantly more likely that a nuclear superpower will misjudge the defensive capabilities of the United States and as a result take an aggressive step that will escalate to an all-out conflagration.

Beyond this, death penalties for treason and espionage can be said to advance "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Enmund v. Florida, 458 U.S. at 798, quoting Gregg v. Georgia, 428 U.S. at 183. It is logical to assume that the threat that the death penalty will be imposed for espionage will deter those who choose to sell the nation's significant secrets for profit. See United States v. Rosenberg, 109 F. Supp. at 115. As for retribution, it is equally clear that such punishment is justified for espionage because it is a crime rooted in sustained, long-lasting, and intentional wrongdoing that imperils the safety, if not the very existence, of the Nation.

In short, for the offenses of espionage and treason, unlike the crimes charged in Coker and Enmund, society has not rejected the death penalty. Commission guidelines giving effect to the Congressional enactments in the area and permitting the imposition of the death penalty in appropriately defined cases of treason and espionage would survive constitutional challenge.

2. Homicide.

Title 18 provides for the death penalty for homicide committed in various circumstances. See, e.g., 18 U.S.C. § 1111(b) (first degree murder within federal jurisdiction); 18 U.S.S. 1751 (assassination of the President). Numerous state statutory schemes providing the death penalty for homicide have been upheld by the Supreme Court. The Sentencing Commission's guidelines for homicide cases could parallel these state statutes. The guidelines could also be patterned to resemble proposed constitutional safeguards that the Senate has concluded fully comply with constitutional requirements. See S. Rep. 98-251, 98th Cong., 1st Sess. (1983) ("The Committee is convinced that the procedures proposed in S. 1765 for the imposition of the death penalty successfully meet the constitutional requirements of the Supreme Court cases."). In short, constitutional guidelines for homicide cases should not be difficult to design.⁷

3. Safeguards Against Racial Bias and Other Constitutional Problems.

Any capital sentencing guidelines could also contain a number of general safeguards designed to assure their constitutionality. The Sentencing Reform Act contains mechanisms for monitoring the administration of federal death penalties. The Commission's duties specifically include

"establish[ing] a research and development program within the Commission for the purpose of

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

"(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices
....." 28 U.S.C. §995(12) (Supp. III 1985).

Pursuant to these duties, the Commission presumably could monitor the imposition of federal death penalties to detect any problems that might render the administration of the federal death penalty

⁷Of course, the Commission guidelines should make clear that death should not be imposed as a penalty for felony-murder under these statutes where the defendant is a minor participant in the offense. See Enmund v. Florida, 458 U.S. 782 (1982).

constitutionally suspect. If the Commission detects any such problems, it can immediately report them to Congress for prompt corrective action. See 28 U.S.C. §995(20) (Supp. III 1985) (charging Commission with the duty to "make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy). The Department of Justice is likewise charged with such a reviewing function that could (and undoubtedly would) be employed to correct constitutional deficiencies in the administration of the federal death penalty. See 28 U.S.C. §994(n) (Supp. III 1985).

Any capital sentencing guidelines could also contain safeguards to avoid racial discrimination in their administration. For instance, the guidelines could require that a jury, upon recommending a death sentence, shall "return to the court a certificate, signed by each juror, that consideration of the race, color, national origin, creed, or sex of the defendant or any victim was not involved in reaching the juror's individual decision." This provision would be designed to meet concerns that have sometimes been expressed that the death penalty is administered in a biased fashion based on the race of the defendant or his victim. The adoption of such a provision would be permitted, inter alia, by the statutory instruction to the Commission to "assure that the guidelines ... are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. §994(d) (Supp. III 1985).

C. The Title 18 Death Penalty Statutes Are
Not Inherently Constitutionally Deficient.

It might be argued that the death penalty provisions of Title 18 are themselves inherently constitutionally deficient. For example, one might point to 18 U.S.C. §1111, which provides that a convicted first degree murderer "shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life."⁸ Since §1111 does not itself comply with the

⁸ Other Title 18 death penalty provisions contain varying language. For instance, 18 U.S.C. §34 & §1716 provide that a convicted offender "shall be subject to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct." Sections §794 and §1751 provide that an offender "shall be punished by death or by imprisonment for any term of years or for life. Section 2031 provides that an offender "shall suffer death, or imprisonment for any term of years or for life." A
(continued...)

constitutional requirements established by Furman v. Georgia, Gregg v. Georgia, and other decisions, the argument would conclude, no death sentence may be given under these statutes.

This argument is unpersuasive for several reasons. First, "when interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature ..."
Kokoszka v. Belford, 417 U.S. 642, 651 (1974) (quoting Brown v. Duchesne, 19 How. 183, 194 (1857)). Thus, the Title 18 death penalty provisions must be read in conjunction with the relevant provisions of the Sentencing Reform Act.

The Sentencing Reform Act gives the Sentencing Commission the power to issue appropriate guidelines that will channel judge and jury discretion to comply with the constitutional requirements of Gregg and related cases. Under 28 U.S.C. §995(a)(22), the Commission is given the power to "perform such other functions as are required to permit Federal courts to meet their responsibilities [to insure that sentences reflect the seriousness of the offense, afford adequate deterrence, etc.] and to permit others involved in the Federal criminal justice system to meet their related responsibilities." Under this provision, the Commission can prescribe appropriate rules for capital sentencing determinations that comply with the Supreme Court's requirements.

Once prescribed, federal district courts are generally required to follow the Sentencing Commission guidelines. Under 18 U.S.C. §3553(b) (Supp. III 1985), "[t]he court shall impose a sentence of the kind, and within the range [established by the Sentencing Commission guidelines] unless the courts find that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described." As a consequence, the Sentencing Commission would appear to have the power to supplement the Title 18 provisions so as to require district courts to conduct their proceedings in conformity with constitutional requirements, at least in the death penalty area.

⁸(...continued)
complete list of the federal statutes authorizing capital sentences is contained in Attachment 4.

Second, it is a standard rule of statutory construction, binding on courts as well as independent agencies, that "of course statutes should be construed whenever possible so as to uphold their constitutionality." United States v. Vuitch, 402 U.S. 62, 70 (1971). An interpretation that supports the constitutionality of legislation should be consistently sought. United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963). Thus, the task of the Commission, the federal district courts, and federal appellate courts is "not to destroy the [statutes] if [they] can, but to construe [the statutes], if consistent with the will of Congress, to comport with constitutional limitations." United States Civil Service Comm. v. Letter Carriers, 413 U.S. 548, 571 (1973).

It is interesting to observe that, although such a step is not necessary here, "[c]onstitutionally requisite procedures for the administration of a statute may be implied in order to preserve its validity." Sutherland Statutory Construction §45.11, p. 47 (4th ed. 1984). The Supreme Court has exercised this power on at least one occasion to erect a procedural framework necessary to sustain a federal statute against constitutional challenge. In United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971), the Court construed the statute permitting seizure and forfeiture of imported obscene materials, 19 U.S.C. §1305(a), to include a set of rigorous time limits, not alluded to in the statute, within which such seizures and forfeitures must be carried out in order to comply with the First Amendment.

The Supreme Court has been particularly willing to permit accommodating statutory construction in the death penalty area. In Jurek v. Texas, 428 U.S. 262, 272-274, (1976), the Court approved an expansive reading of a state statute to include necessary constitutional protections. The latitude is particularly striking in Jurek, where the state court had interpreted a statutory provision to permit consideration of mitigating factors when the language of the statute only addressed the question whether the offense was aggravated by the possibility of future crimes of violence.

Similarly, the Mississippi Supreme Court in Jackson v. State, 337 So.2d 1242 (Miss. 1976), read a mandatory death penalty statute for "capital murder" enacted after Furman to contain appropriate aggravating circumstances, to provide for appropriate consideration of aggravating and mitigating circumstances, and to permit the court to fill in constitutionally required procedures. It reasoned that although the statute appeared to be unconstitutional, the court was required to read it in a manner that would withstand constitutional scrutiny, 337 So.2d 1249-1251. This judicial revision of state death penalty statutes without express

legislative authorization was upheld by the federal courts. See, e.g., Jordan v. Watkins, 681 F.2d 1067, 1079-1080 (5th Cir. 1982); Irving v. Hargett, 518 F. Supp. 1127, 1137-1139 (N.D. Miss. 1981).

Because of the pertinent rules of statutory construction cited above and because of latitude permitted in conforming death penalty statutes to constitutional requirements, the Title 18 statutes and Sentencing Reform Act must be read to permit the adoption of appropriate rules for weighing aggravating and mitigating circumstances in capital cases. To do otherwise would be to interpret the federal death penalty statutes in a possibly unconstitutional manner and thwart the legislative judgment expressed in those statutes.

Finally, entirely apart from the powers of the Sentencing Commission, the federal district courts have significant power to take steps to preserve the constitutionality of the Title 18 capital sentencing provisions. It has long been established that the federal Article III courts have inherent power to develop rules of practice and procedure in criminal cases where not restrained by an Act of Congress. Indeed, before the promulgation of the Federal Rules of Criminal Procedure, the procedures for conducting trial and pretrial proceedings were almost wholly devised by the courts. In the sentencing area, courts have traditionally had the inherent power to conduct proceedings and receive and consider information as they may direct. See, e.g., Roberts v. United States, 445 U.S. 552, 556 (1980).

The inherent power of the federal district courts survives over some matters under the Federal Rules of Criminal Procedure. As one court has recognized:

"The Federal Rules of Criminal Procedure are intended to constitute a comprehensive procedural code for criminal cases in the federal courts. But even the rules themselves do not purport to set outer limits on the power of the courts. On the contrary, Fed. R. Crim.P. 57(b) states: 'If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.'" United States v. Richter, 488 F.2d 170, 173 (9th Cir. 1973).⁹

⁹ Since Richter, Rule 57(b) has been reformulated to read: "In all cases not provided for by rule, the district judges and (continued...)"

Nothing in the Federal Rules of Criminal Procedure is inconsistent with the administration of capital sentences pursuant to Sentencing Commission guidelines. To the contrary, the Rules contain provisions designed to facilitate the implementation of death sentences. For instance, under Rule 7, "[a]n offense which may be punished by death shall be prosecuted by indictment." Similarly, under Rule 24, "[i]f the offense charged is punishable by death, each side is entitled [to additional] peremptory challenges." And, Rule 38 provides that "[a] sentence of death shall be stayed if an appeal is taken."¹⁰ Construing the Federal Rules consistent with the federal death penalty statutes is also consistent with the general "purpose and construction" provision contained in the rules: "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Fed. R. Crim. P. 2.

In sum, it is apparent that the federal district courts have considerable power to conform their procedures so as to comply with the constitutional requirements of the Supreme Court and with any capital sentencing guidelines that the Sentencing Commission might issue.

⁹(...continued)
magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." This reformulation does not change the point made in the text.

¹⁰ For purposes of ascertaining Congressional intent under the Sentencing Reform Act, it is revealing to observe that this provision was specifically reenacted by Congress as part of the 1984 Act. See 98 Stat. 2031.

Constitutional requirement that a jury recommendation for a life sentence in a capital case be final and preclude the trial judge from imposing the death penalty, (3) there is no Constitutional requirement that juries must decide whether the death penalty can be imposed, and (4) there is no Constitutional prohibition against jury override by a judge.

The application of the Fifth Amendment protection against "double jeopardy" in a capital sentence was decided by the High Court on May 29, 1984 (*Arizona v. Rumsey*). In this case the Court set aside a sentence to death. The defendant, convicted of murder committed during a robbery, had appealed to the Arizona Supreme Court against two consecutive sentences: life imprisonment for murder and 21 years for armed robbery. The State filed a cross-appeal for resentencing of the murder conviction on grounds that the trial judge had erred in not interpreting the "pecuniary gain" motive (the robbery) as an aggravating factor in the case. The State Supreme Court rejected the defendant's appeal and ruled for the State in the cross-appeal, with the result that the trial court resented the defendant to death. In response to an appeal against the death sentence, the State Supreme Court ruled again in this case, holding that the resentencing violated the "double jeopardy" clause and ordered commutation to life imprisonment (the original sentence). This decision was upheld by the U.S. Supreme Court.

Another long-standing issue relating to capital cases—the standards for excusing jurors opposed to the death penalty—was presented to the U.S. Supreme Court during October 1984 in *Wainwright v. Witt*. In this case, a U.S. Court of Appeals had overturned a death sentence imposed by a Florida court on grounds that the trial judge had improperly excused a juror who had expressed qualms about voting for a death sentence. The appeals court cited the High Court's decision in *Witherspoon v. Illinois* (1968), when it had ruled that the State could not excuse jurors simply for expressing doubts about capital punishment, since such a jury thereby might become prosecution-prone in capital cases. In *Wainwright v. Witt*, the U.S. Supreme Court, on January 21, 1985, reversed the appellate court's judgment, holding that the juror in this case had been properly excused. The High Court held that, as a matter of principle, any juror could be excused if his views on capital punishment were deemed by the trial

Table 2. Additional detail on revisions and capital offenses

Federal—Air piracy 49 U.S.C. 1472-3. Arizona—A.R.S. 13-703 (F)(8)—effective date 8/1/84—includes one or more other homicides occurring during the commission of a first-degree murder as an aggravating factor. Arkansas—Article V, Chapter 15, Section 41-1501 defines capital murder as murder during the course of a prescribed felony (rape, kidnapping, arson, vehicular piracy, robbery, burglary, escape) murder of a law enforcement/public safety official in the line of duty, multiple murders, murder of candidates for public office and elected officials, murder while under sentence to life imprisonment, and contract murder. California—California statute partially struck by State Supreme Court on 11/1/84 (<i>People v. Ramos</i> 37 Cal. 3d 136) relating to juror instructions on the possibility of sentence commutation by the Governor. Colorado—Revisions to Sections 1-8, 16-11-103, Colorado Revised Statutes, 1978 Repl. Vol. relating to age of defendant, alternate jurors, evidence used in aggravation or mitigation, witness discovery, and standard of proof required for aggravating factors. Effective date 7/1/84. Florida—Amendment to Section 732.04 incorporating murder resulting from aggravated child abuse into the categories of first degree murder subject to execution. Effective date 5/3/84. Idaho—Revisions to Idaho Code Sections 19-2705, 2708, 2714, 2715, 2719 relating to sentencing procedures, suspension of judgment, pregnancy of the offender, stays of execution, setting of execution dates, and appeals. Effective date 4/2/84. Illinois—Revision to Illinois Revised Statutes, Chapter 38, Section 9-1 (b) (6) (ii) modifies specific felonies to be considered as aggravating factors in murder (armed robbery, robbery, rape, aggravated criminal sexual assault, aggravated kidnapping, forcible detention, arson, aggravated arson, burglary, home invasion, or the attempt to commit any of these felonies). Effective date 7/1/84. Maryland—Revision to Annotated Code of Maryland, Article 27, Section 413 (m) prescribes procedures for alternate jurors with respect to the sentencing of an offender convicted of first degree murder. Effective date 7/1/84. In Maryland, only	sentence review is automatic. Massachusetts—Massachusetts' death penalty statute was struck in whole by a State court decision on October 18, 1984 (<i>Commonwealth v. Colon-Cruz</i> 393 Mass. 150). Mississippi—Capital murder includes murder of a peace officer, murder by a life sentence inmate, murder perpetrated by bomb or explosive, contract murder, felony murder, and murder of an elected official. Missouri—Replaced Sections 565.001 to Sections 565.040 of Missouri Statutes (RSMO Supp. 1984), on murder, manslaughter, trial procedures, and death penalty. Effective date 10/1/84. New Jersey—Case on automatic appeal of death sentence currently pending in New Jersey State Supreme Court (<i>State v. Koedatich</i>). New York—Because of current litigation, the New York State death penalty statute is not being enforced but the statute has not been repealed by the legislature. On 7/2/84, the statute was struck by the State Court of Appeals (63 NY 2d 41 and 479 NYS 2d 706) based on a case involving the murder of a correctional officer by an inmate (<i>People v. Lemuel Smith</i>). The State Court of Appeals found the mandatory death penalty statute did not provide for consideration of mitigating circumstances. Oregon—New death penalty law. See Oregon Revised Statutes 163.105. Effective date 12/6/84. South Carolina—No statutory limitation on age of defendant in South Carolina but there are statutory mitigating circumstances for defendants under the age of 18 which must be considered. South Dakota—Revision to South Dakota Code of Laws Section 23A-27A-32 changing the method of execution from electrocution to lethal injection. Effective date 7/1/84. Virginia—Chapter 4, Article 1, Section 18.2-31 defines capital murder as the murder of a kidnap victim, law enforcement officer, robbery or rape victim, murder by a prisoner in a State or local correctional facility, or multiple murders. Wyoming—Revisions to Wyoming Statutes, 1977 Sections 7-13-904 providing for death by lethal injection. Effective date 6/5/84.
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judge to "prevent or substantially impair the performance of his duties."

An additional issue of importance—which was still pending at yearend 1984—was the use of research findings suggesting racial discrimination in the imposition of the death penalty. During November 1984 and January 1985, the U.S. Supreme Court lifted stays of execution which it had originally granted to two black inmates on Georgia's death row. These inmates had contended that the death penalty in Georgia was applied in a discriminatory fashion based upon the race of murder victims. In both cases, the Supreme Court gave no explanation for lifting the stays of execution. In February 1985 in *McCleskey v. Kemp*, however, the Federal Court of Appeals in Atlanta rejected similar charges that Georgia's death

penalty was racially discriminatory. The Appeals Court held that, unless statistical statewide studies reflected a disparity so great as to compel the conclusion that there was systematic discrimination, only proof of deliberate racial prejudice in a particular case would demonstrate a Constitutional violation.

On October 11, 1983, the U.S. Court of Military Appeals, the Nation's highest military court, ruled that sentencing procedures in the Uniform Code of Military Justice did not conform to U.S. Supreme Court guidelines set down in the 1972 and 1976 landmark decisions. As a result of this decision, *U.S. v. Matthews*, the death sentences of seven men condemned under court-martial procedures were removed. New regulations remedying the defects in the

code were promulgated in an executive order effective January 24, 1984. Under these new regulations one offender was sentenced to death by the United States military in 1984.

Capital punishment laws

At yearend 1984, 37 States and the Federal government had laws authorizing the death penalty (tables 1 and 2).³ Oregon was the only State to enact a new capital punishment law in 1984, through referendum by the voters. The death penalty was struck down in two States: New York and Massachusetts. In New York on July 2, 1984, the State Court of Appeals declared the mandatory death penalty unconstitutional in *People v. Lemuel Smith*, a case involving the murder of a prison guard by an inmate serving a life term. The appeals court, whose judgment was subsequently upheld by the U.S. Supreme Court on February 19, 1985, struck down the law because it did not provide for consideration by the jury of aggravating and mitigating circumstances. In Massachusetts, in a case in October 1984 involving the murder of a police officer (*Commonwealth v. Colon-Cruz*), the State Supreme Court held that the State law's provision for a death penalty only after a jury trial was unconstitutional on grounds that it was likely to discourage defendants from asserting the right to plead not guilty. Guilty pleas would enable defendants to avoid the risk of execution by not seeking a jury trial.

Statutory changes. During 1984, nine States altered their existing death penalty statutes. Two of the nine changed their methods of execution. South Dakota changed from electrocution to lethal injection; Wyoming, which had previously authorized lethal gas, added lethal injection as an alternative method. Florida, Missouri, and Arizona added new aggravating circumstances to their capital punishment laws. Florida included aggravated child abuse in

³The only Federal crime for which capital punishment is now authorized is aircraft piracy (excluding crimes prosecuted under military authority).

Table 3. Method of execution, by State, 1984

Method	States that use method
Electrocution	Alabama, Arkansas*, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Nebraska, Ohio, Oklahoma**, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia
Lethal injection	Arkansas*, Idaho*, Illinois, Montana*, Nevada, New Jersey, New Mexico, North Carolina*, Oklahoma**, Oregon, South Dakota, Texas, Utah*, Washington*, Wyoming*
Lethal gas	Arizona, California, Colorado, Maryland, Mississippi, Missouri, North Carolina*, Wyoming*
Hanging	Delaware, Montana*, New Hampshire, Washington*
Firing squad	Idaho*, Oklahoma**, Utah*

* Provides for two methods of execution.

** Provides for three methods of execution.

its listing of circumstances that may aggravate homicide to "capital murder." Missouri added murders committed in the hijacking of public conveyances and murders of employees of correctional facilities. Arizona revised its statute to incorporate multiple homicides during a first-degree murder as an aggravating factor. Maryland and Colorado established separate sentencing procedures to determine whether the death sentence or life imprisonment should be imposed in murder cases and specified the aggravating or mitigating circumstances to be considered. In California the State Supreme Court limited imposition of the death penalty for murders committed during a felony to cases where it had been proven that the defendant actually intended to kill the victim. Idaho required judges to set execution dates within 1 month of sentencing and enacted other measures to eliminate delays in carrying out sentences to death.

Methods of execution. At yearend 1984, eight States provided for more than one method of execution—lethal injection and one or more alternative methods—at the election of the condemned prisoner (table 3). Electrocution (16 States) and lethal injection (15 States) were the most common methods of execution provided for in the statutes. In addition, lethal gas was

permitted in eight States; hanging in four States; and a firing squad in three States. Some States, anticipating the possibility that lethal injection may be found unconstitutional, have provided for an alternative method. Each of the other four methods, previously challenged on Eighth Amendment grounds as cruel and unusual punishment, has been found to be constitutional.

Automatic review. Most capital punishment statutes provide for an automatic review of all death sentences. Some require a review of both conviction and sentence, while others require a review only of the sentence. Typically, the review is undertaken directly by the State Supreme Court. If either the conviction or sentence is vacated, the case may be remanded to the trial court for additional proceedings or retrial. It is possible that after retrial or resentencing the death sentence may be reimposed. Some statutes also allow the State Supreme Court to commute a death sentence to life imprisonment.

Minimum age. A total of 21 States specify a minimum age for which the death penalty may be imposed (table 4). In some States the minimum age is specified in the capital punishment statute; in others it is, in effect, set forth in the statutory provisions that determine the age at which a juvenile

Table 4. Minimum age authorized for imposition of capital punishment, yearend 1984

10 years	13 years	14 years	15 years	16 years	17 years	18 years	No minimum age specified	
Indiana	Mississippi	Maryland Missouri New Jersey North Carolina South Carolina	Arkansas Louisiana Virginia	Montana Nevada Oregon	New Hampshire Texas	California Connecticut Illinois Nebraska New Mexico Ohio	Federal Alabama Arizona Colorado Delaware Florida Georgia Idaho Kentucky	Oklahoma Pennsylvania South Dakota Tennessee Utah Virginia Washington Wyoming

Note: There was only one individual under sentence of death at yearend 1984 who was under 18 years old; he was 17.

may be transferred to criminal court for trial as an adult. The most frequently specified ages are 18 years old (six States) and 14 years old (five States). Altogether, 15 States authorize capital punishment for those under 18 years old. Sixteen States and the Federal system report no specified minimum age.

Prisoners under sentence of death at yearend 1984

All persons under sentence of death at yearend 1984 were convicted of murder. The FBI's Uniform Crime Reports reveal that during the 10-year period 1975 to 1984, 204,000 Americans were victims of murder or nonnegligent manslaughter and there were an estimated 198,000 arrests for these crimes (table 5). During the same period 2,384 persons entered prisons under sentence of death and 32 offenders were executed.

At yearend 1984 States reported a total of 1,405 persons under sentence of death (table 6). States with the largest number of prisoners under sentence of death were Florida (215), Texas (178), California (172), and Georgia (111). A total of 280 persons entered prison under sentence of death in 1984 and 84 persons were removed (21 by execution). The yearend 1984 population was 16% higher than that of 1983.

While 37 States had statutes authorizing the death penalty (covering 78% of the Nation's adult population), 5 of these reported no prisoners under sen-

tence of death at yearend (Connecticut, New Hampshire, Oregon, South Dakota, and Vermont). New York's sole death-row inmate at yearend 1983 was removed during 1984 as a result of a court decision invalidating the death penalty statute. Oregon was the only State to adopt the death penalty during 1984.

Of the 1,405 persons under sentence of death at yearend 1984, more than three-fifths were in the South. An additional 21% were confined in correctional facilities in the West, 12% in the

North Central States, and 4% in the Northeast. Nearly all were males (98.8%) and most were white (57.2%) (table 7). Blacks constituted 41.6% of those under sentence of death, and another 1.1% were American Indians or Asian Americans. States reported 89 Hispanics under sentence of death, 6.3% of the total. The largest numbers of Hispanics were held in States with relatively large Hispanic populations: Texas (29), California (26), Florida (10), and 7 each in Arizona and Illinois.

The median age of those under sen-

Table 6. Prisoners under sentence of death, by region and State, 1984

Region and State	Prisoners under sentence 12/31/83	Changes during 1984			Prisoners under sentence 12/31/84
		Received under sentence	Removed from death row (excluding executions)	Executed	
United States	1,209	280	63^a	21	1,405
Male	1,196	272	60	20	1,388
Female	13	8	3	1	17
Federal ^b	0	0	0	0	0
State	1,209	280	63	21	1,405
Northeast	39	21	3		57
Connecticut	0	0	0		0
New Hampshire	0	0	0		0
New Jersey	3	7	0		10
New York	1	0	1		0
Pennsylvania	35	14	2		47
Vermont	0	0	0		0
North Central	136	46	8		174
Illinois	64	12	5		71
Indiana	21	7	2		26
Missouri	23	7	1		29
Nebraska	10	3	0		13
Ohio	18	17	0		35
South Dakota	0	0	0		0
South	782	157	36	21	882
Alabama	49	9	0		58
Arkansas	22	1	0		23
Delaware	6	0	0		6
Florida	193	38	8	8	215
Georgia	103	12	2	2	111
Kentucky	18	2	0		20
Louisiana	29	5	2	5	27
Maryland	11	8	0		19
Mississippi	37	7	5		39
North Carolina	33	12	6	2	37
Oklahoma	38	16	5		49
South Carolina	28	9	2		35
Tennessee	32	8	3		37
Texas	163	21	3	3	178
Virginia	20	9	0	1	28
West	252	56	16		292
Arizona	51	12	7		56
California	149	27	4		172
Colorado	1	1	1		1
Idaho	7	7	0		14
Montana	4	0	0		4
Nevada	23	8	3		28
New Mexico	6	0	1		5
Oregon	0	0	0		0
Utah	4	1	0		5
Washington	4	0	0		4
Wyoming	3	0	0		3

Note: States not listed, the District of Columbia, and New York did not have the death penalty as of 12/31/84. Some of the figures shown for yearend 1983 are revised from those shown in *Capital Punishment 1983*, NCJ-93925. The revised figures include 9 inmates who were reported late to the NPS program or who were not in the custody of State correctional authorities by 12/31/83 (5 in Louisiana, 2 in Pennsylvania, 1 in

Georgia, and 1 in Tennessee) and exclude 2 inmates relieved of the death sentence before 12/31/83 (1 in Kentucky and 1 in Oklahoma). ^a Includes 4 inmates who committed suicide, 2 in Florida and 1 each in Indiana and California. ^b Excludes prisoners held under Armed Forces jurisdiction. These tables do not include data for 1 male under a military death sentence for murder.

Table 5. Number of offenses and arrests for murder and nonnegligent manslaughter, entries under sentence of death, and executions, 1975-84

Year	Murder and nonnegligent manslaughter		Number of entries under sentence of death	Number of executions
	Offenses	Arrests		
Total	204,000	197,830	2,384	32
1975	20,510	20,180	322	0
1976	18,780	17,250	249	0
1977	19,120	19,450	159	1
1978	19,560	19,840	209	0
1979	21,460	19,590	172	2
1980	23,040	20,040	200	0
1981	22,520	21,590	250	1
1982	21,010	21,810	284	2
1983	19,310	20,310	259	5
1984	18,690	17,770	280	21

Note: In some years there are more arrests than offenses because a single murder may have multiple offenders. Also, because of the time delay between each of the stages shown in the table, those who were executed in a particular year were not sentenced or arrested in the same year.

Sources: Crime in the United States, 1975-84; *Capital Punishment*, 1975-83.

tence of death was 31 years old. Less than 1% (11 offenders) were under the age of 20 and 1.7% (24 offenders) were 55 or older. The youngest was 17 and the oldest was 76. About 1 in 10 inmates had not gone beyond seventh grade, but a similar proportion had some college education. Approximately one-third were married, one-fifth were divorced or separated, and two-fifths had never been married.

Those admitted to and removed from the population of prisoners under sentence of death in 1984 mirrored those present at yearend with respect to basic demographic characteristics as well as educational attainment and marital status. As might be expected those admitted were younger and those removed were older.

The 17 women under sentence of death at yearend 1984 (1.2% of the total) were held in 12 States, with no State holding more than 2 women (table 8). Since 1972, a total of 15 States have had women under a sentence of death. Since 1976 one woman has been executed.

Entries and removals of persons under sentence of death

During 1984, 27 States reported new entries under sentence of death (table 6). Florida reported the largest number (38), followed by California (27) and Ohio (17).

Of the 280 entries under sentence of death—

- all were convicted of murder;
- 158 were white males, 111 were black males, and 3 were males of other races;
- 6 were white females, 1 was a black female, and 1 was a female of another race;
- 17 were Hispanic.

Twenty States reported a total of 84 persons removed from the population of prisoners under a sentence of death in 1984. Florida reported the largest number of removals, 16 (8 by execution), followed by North Carolina with 8 (1 by execution), and Arizona and Louisiana each with 7 (5 by execution in Louisiana).

Of the 84 prisoners removed from the population of those under a sentence of death in the States—

- 40 had their sentences lifted but convictions upheld;
- 21 were executed by six States;
- 16 had their sentences and convictions vacated;
- 4 died by suicide;

Table 7. Demographic profile of prisoners under sentence of death, 1984

	End of year 1984		1984 admissions		1984 removals	
	Number	Percent	Number	Percent	Number	Percent
Total number under sentence of death	1,405	100.0%	280	100.0%	84	100.0%
Sex						
Male	1,388	98.8%	272	97.1%	80	95.2%
Female	17	1.2	8	2.9	4	4.8
Race						
White	804	57.2%	164	58.6%	52	61.9%
Black	585	41.6	112	40.0	32	38.1
Other ^a	16	1.1	4	1.4	0	0
Ethnicity						
Hispanic	89	6.3%	17	6.1%	0	0%
Non-Hispanic	1,316	93.7	263	93.9	84	100.0
Age ^b						
Less than 20 years	11	0.8%	17	6.1%	2	2.4%
20-24	215	15.3	68	24.3	7	8.3
25-29	391	27.8	65	23.2	16	19.0
30-34	311	22.1	48	17.1	25	29.8
35-39	247	17.6	45	16.1	16	19.0
40-54	206	14.7	31	11.1	15	17.9
55+	24	1.7	6	2.1	3	3.6
Median	31.1 years		28.3 years		32.7 years	
Education						
7th grade or less	121	10.5%	26	11.7%	9	12.3%
8th	137	11.9	17	7.5	4	5.5
9th-11th	401	34.7	72	32.3	34	46.6
12th	385	33.4	81	35.3	20	27.4
Any college	110	9.5	27	12.1	6	8.2
Not reported	251		57		11	
Median	10.6 years		10.9 years		10.4 years	
Marital status						
Married	443	33.7%	81	31.0%	25	31.6%
Divorced/separated	271	20.6	61	23.4	15	19.0
Widowed	29	2.2	7	2.7	2	2.5
Never married	570	43.4	112	42.9	37	46.8
Not reported	92		19		5	

Note: Percentage and median calculations based upon those cases for which data were reported.

^a Consists of 11 American Indians and 5 Asian Americans.

^b The youngest individual under sentence of death was 17 years old and the oldest was 76.

Table 8. Number of women on death row, yearend 1972-84

State	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984
United States	4	3	3	8	7	6	5	7	9	11	14	13	17
California	3			1	2								
Georgia	1	2	1	1	1	1	1	2	3	4	4	3	2
North Carolina		1	2	3			2	1	1	1	1	1	
Ohio				2	3	4						2	2
Oklahoma				1				1	1	1	2	2	1
Florida					1	1	1	1	1				1
Alabama							1	1		1	1	2	2
Texas								1	2	2	2		1
Kentucky									1	1			
Maryland										1	2	1	2
Mississippi											1	1	1
Nevada											1	1	2
New Jersey													1
Arkansas													1
Idaho													1

- 1 had his sentence commuted;
- 1 had his sentence lifted when the State statute was struck down;
- 1 was transferred from one State (California) to another State (Nevada) where he was also under sentence of death.

Of the 58 prisoners whose death sentences were overturned, 30 had been

⁴The only prisoner under sentence of death in New York in 1984 was removed for this reason.

resentenced to life imprisonment by yearend 1984, 2 had been resentenced to terms longer than 20 years, 15 were awaiting new trials, 10 were awaiting resentencing, and in 1 case no further prosecution was sought.

From 1977, the year after the Supreme Court reinstated the death penalty, through 1984, a total of 1,813 persons have entered prison under a sentence of death and 828 persons have

Table 9. Criminal history profile of prisoners under sentence of death, by race, 1984

	Prisoners under sentence of death					
	All races ^a		White		Black	
	Number	Percent	Number	Percent	Number	Percent
Number under sentence of death	1,405	100.0%	804	100.0%	585	100.0%
Prior felony conviction history						
With	856	66.5%	473	63.0%	373	71.6%
Without	432	33.5	278	37.0	148	28.4
Not reported	117		53		64	
Prior homicide conviction history						
With	104	9.4%	50	7.7%	54	12.0%
Without	1,006	90.6	596	92.3	396	88.0
Not reported	295		158		135	
Legal status at time of capital offense						
Charges pending	61	5.5%	38	6.0%	21	4.6%
Probation	60	5.4	36	5.7	22	4.8
Parole	219	19.9	108	17.1	110	24.0
Prison escapee	29	2.6	20	3.2	9	2.0
Prison inmate	37	3.4	19	3.0	18	3.9
Other status ^b	18	1.6	10	1.6	7	1.5
None	678	61.5	401	63.4	271	59.2
Not reported	303		172		127	
Median time elapsed since imposition of death sentence	33 months		32 months		34 months	

Note: Percents calculated on those offenders for whom data were reported.

^a Includes persons classified as other races.

^b Includes 6 persons on mandatory release, 2

on bail, 1 on furlough from prison, 1 for whom charges were pending from the U.S. Army, and 8 on work release from prison.

been removed from the population under a sentence of death (32 by execution). Of those admitted 58% were white (1,046), and 41% were black (746); of those removed 56% were white (467) and 43% were black (356).

Criminal history of death-row inmates in 1984

Of those under sentence of death at yearend 1984 for whom such information was known, two-thirds had prior felony convictions preceding the capital offense (table 9). Nearly 1 in 10 had a prior conviction for homicide. (Where the information was reported for those with prior felony convictions, approximately 1 out of 6 had previously been convicted of homicide.)

Nearly 2 of every 5 prisoners sentenced to death had an active criminal justice status at the time of their capital offense. Half of these—20% of all those under sentence of death—were on parole, while the rest were either on probation (5%), were prison inmates (3%) or escapees (3%), or had pending charges (6%). Excluding those with pending charges, nearly 1 in 3 was already under sentence for another crime when the capital murder occurred.

The criminal history patterns were similar for whites and blacks, although somewhat higher proportions of blacks than whites had prior felony convictions, prior homicide convictions, or

were on parole at the time of the capital offense.

Executions

Since 1930, when data on executions were first collected by the Federal government, 3,891 executions have been conducted under civil authority (table 10). Since the death penalty was reinstated by the Supreme Court in 1976, the States have executed 32 persons.

After 1967, an unofficial moratorium on executions prevailed while legal challenges to the death penalty were pressed at various court levels. There were no executions until 1977, when one occurred, followed by two more in 1979, one in 1981, two in 1982, and five in 1983. In 1984 there were 21 executions.

Table 10. Number of persons executed, by jurisdiction in rank order, 1930-84

State	Number executed	
	Since 1930	Since 1977
U.S. total	3,891	32
Georgia	369	3
New York	329	
Texas	301	4
California	292	
North Carolina	265	2
Florida	180	10
Ohio	172	
South Carolina	162	
Mississippi	155	1
Pennsylvania	152	
Louisiana	139	6
Alabama	136	1
Arkansas	118	
Kentucky	103	
Virginia	94	2
Tennessee	93	
Illinois	90	
New Jersey	74	
Maryland	68	
Missouri	62	
Oklahoma	60	
Washington	47	
Colorado	47	
Indiana	42	1
West Virginia	40	
District of Columbia	40	
Arizona	38	
Federal system	33	
Nevada	30	1
Massachusetts	27	
Connecticut	21	
Oregon	19	
Iowa	18	
Kansas	15	
Utah	14	1
Delaware	12	
New Mexico	8	
Wyoming	7	
Montana	6	
Vermont	4	
Nebraska	4	
Idaho	3	
South Dakota	1	
New Hampshire	1	
Wisconsin	0	
Rhode Island	0	
North Dakota	0	
Minnesota	0	
Michigan	0	
Maine	0	
Hawaii	0	
Alaska	0	

Since 1977, a total of 2,233 offenders have been under a death sentence for varying periods of time (table 11). There were 32 executions and 795 removals for other reasons (most because the State statute or their particular

Table 11. Proportion of those under sentence of death who were executed or received other dispositions, by race, 1977-1984

Race	Total under sentence of death 1977-1984 ^a	Prisoners executed		Prisoners who received other dispositions ^b	
		Number	Percent of total	Number	Percent of total
All ^c	2,233	32	1.4%	796	35.7%
White	1,271	22	1.7	445	35.0
Black	941	10	1.1	346	36.8

^a Those under sentence of death at the beginning of 1977 plus all new admissions under sentence of death between 1977 and 1984.

^b Other dispositions include cases removed from a sentence of death due to statutes struck down on appeal, sentences/convic-

tions vacated, commutations, or death other than by execution (of the 796 removals, 28 resulted from death during confinement—10 from natural causes, 13 by suicide, 2 during escapes, 3 by other inmates).

^c Includes persons classified as other races.

Table 12. Time elapsed from sentencing to execution, by race, 1977-1984

Race	Number of offenders who were executed after:							Average elapsed time
	1 year or less	1.1 to 3 years	3.1 to 5 years	5.1 to 7 years	7.1 to 9 years	9.1 to 11 years	Total	
All	1	4	8	6	8	5	32	6.0 years
White	1	2	5	6	6	2	22	5.8
Black	0	2	3	0	2	3	10	6.6

sentence was overturned). A slightly higher proportion of whites than blacks were executed during this period; removal rates for the two races were virtually identical.

Of those executed since 1977, five were under a sentence of death for 3 years or less and five for 8 years or longer (table 12). The average for the 32 executed offenders was 6 years. For executed whites the average amount of time under a sentence of death was about 10 months less than for executed blacks. (For additional discussion of race and capital punishment see the appendix.)

Methodological note

The statistics reported in this bulletin may differ from data collected by other organizations for any of the following reasons: (1) Inmates are not added to the National Prisoner Statistics death-row counts at the time the court hands down the sentence, but rather when they are admitted to a State or Federal correctional facility. (2) Inmates sentenced to death under statutory provisions later found unconstitutional are removed from the death-row count on the date of the relevant court finding rather than on the date the finding is applied to the individual case. Thus, persons who are technically still under a sentence of death but who are no longer at risk are not counted. (3) NPS death-row counts are always for the last day of the calendar year and thus will differ from counts for more recent periods.

Sources for cases referenced

1. Furman v. Georgia 408 U.S. 238 (1972)
2. Woodson v. North Carolina 428 U.S. 280 (1976)
3. Roberts v. Louisiana 428 U.S. 325 (1976)
4. Gregg v. Georgia 428 U.S. 153 (1976)
5. Jurek v. Texas 428 U.S. 262 (1976)
6. Proffitt v. Florida 428 U.S. 242 (1976)
7. Coker v. Georgia 433 U.S. 584 (1977)
8. Lockett v. Ohio 438 U.S. 586 (1978)
9. Beck v. Alabama 447 U.S. 625 (1980)
10. Estelle v. Smith 451 U.S. 454 (1981); 68 L. Ed. 2d 359 (1981)
11. Eddings v. Oklahoma 455 U.S. 104 (1982)
12. Hopper v. Evans 72 L. Ed. 2d 367 (1982)
13. California v. Ramos 51 USLW 5220; 459 U.S. 1301 (1983)
14. Barclay v. Florida 463 U.S. 939 (1983)
15. Barefoot v. Estelle 51 USLW 5189; 463 U.S. 880 (1983)
16. Pulley v. Harris 104 S. Ct. 871; 79 L. Ed. 2d 29 (1984)
17. Strickland v. Washington 466 U.S. ; 80 L. Ed. 674 (1984)
18. Soaziano v. Florida, No. 83-5596 (1984)
19. Arizona v. Rumsev 81 L. Ed. 164 (1984)
20. Wainwright v. Witt 83 L. Ed. 841 (1985)
21. Witherspoon v. Illinois 391 U.S. 510 (1968)
22. McClesky v. Kemp 753 F. 2d 877 (1985)
23. U.S. v. Matthews 16 M.J. 354 (CMA 1983)
24. People v. Lemuel Smith 63 NY 2d 41; 479 NYS 2d 706; 468 N.E. 2d 879
25. Commonwealth v. Colon-Cruz 393 Mass. 150 (1984); 470 N.E. 2d 116

This bulletin was written by Lawrence A. Greenfeld and David G. Hinners, BJS statisticians, and was edited by Joseph Bessette, deputy director for data analysis, assisted by Marianne W. Zawitz. Marilyn Marbrook, publications unit chief, administered production of the bulletin, assisted by Millie Baldea, Betty Sherman, and Joyce Stanford. Data were tabulated by Arlene Rasmussen and other staff of the U.S. Bureau of the Census.

August 1985, NCJ-98399

Appendix Race and capital punishment

Race of offender. One of the key issues involved in the contemporary debate on capital punishment is whether the death penalty is applied in a way that unfairly discriminates against blacks and other minorities. Several members of the Supreme Court majority in *Furman v. Georgia* specifically cited this issue in overturning the death penalty in 1972.

There is no dispute that the proportion of blacks under sentence of death in the United States (42% at yearend 1984) is much higher than the proportion of blacks in the general population (12%). This difference alone, however, does not prove discrimination against blacks, just as the fact that males constitute 99% of those under sentence of death does not, in itself, demonstrate discrimination against males. Much more relevant is how the population of those under sentence of death compares with those who actually commit capital offenses.

Each State with a capital punishment statute specifies which particular kinds of homicide merit the possible imposition of the death penalty, for example, multiple murders, murders of a police officer or prison guard, or murders in the commission of another felony (table 1). "Capital" homicides constitute only a fraction of all homicides. There are, however, no national data on the racial composition of those arrested for capital murder. Nonetheless, the FBI does report information on the race of those arrested for murder and nonnegligent manslaughter in the annual Uniform Crime Reports. The FBI data can be used to compare the racial distribution of those arrested for murder and nonnegligent manslaughter with those admitted to prison for murder, those admitted under a sentence of death, and those executed (table A-1).

For each of the years 1980 through 1984, blacks constituted a somewhat higher proportion of those arrested for murder and nonnegligent manslaughter than of those admitted to prison under a sentence of death. For the 5 years together, blacks were 48.5% of adults arrested for murder and nonnegligent manslaughter and 40.9% of those admitted to prison under a sentence of death. Whites, on the other hand, were 50.2% of those arrested and 57.9% of those entering prison with a death sentence.

Put somewhat differently, for every

Table A-1. Comparison of racial distribution of homicide arrestees, prison admissions for homicide, admissions under sentence of death, and executions, 1980-84

	Percent of total		Number
	White	Black	
1980			
Homicide arrests of adults	50.2%	48.3%	18,162
Prison admissions for homicide	---	---	---
Admissions under sentence of death	62.0	37.5	200
Executions	0	0	0
1981			
Homicide arrests of adults	49.8%	48.9%	19,605
Prison admissions for homicide	---	---	---
Admissions under sentence of death	52.4	46.0	250
Executions	100.0	0	1
1982			
Homicide arrests of adults	48.9%	49.6%	20,043
Prison admissions for homicide	51.5	46.3	9,060
Admissions under sentence of death	57.7	40.8	234
Executions	50.0	50.0	2
1983			
Homicide arrests of adults	49.0%	49.6%	18,749
Prison admissions for homicide	54.9	44.4	8,218
Admissions under sentence of death	59.5	39.8	259
Executions	80.0	20.0	5
1984			
Homicide arrests of adults	53.7%	44.9%	16,436
Prison admissions for homicide	---	---	---
Admissions under sentence of death	58.6	40.0	280
Executions	61.9	38.1	21
Total, 1980-84			
Homicide arrests of adults	50.2%	48.4%	93,035
Prison admissions for homicide (1982-83)	53.2	45.4	17,278
Admissions under sentence of death	57.9	40.9	1,273
Executions	65.5	34.5	29

Note: Homicide is defined as murder and nonnegligent manslaughter.

--- Data not available.

Sources: Crime in the United States, 1980-84, Federal Bureau of Investigation; National

Corrections Reporting Program on prison admissions for 1982-83; and National Prisoner Statistics series on prisoners under sentence of death, 1980-84.

Table A-2. Prisoners under sentence of death per 1,000 arrests for homicide and per 1,000 prison inmates, by race, 1980-84

Year	Prisoners admitted under sentence of death per 1,000 arrests for homicide			Prisoners under sentence of death per 1,000 prison inmates		
	White	Black	Total	White	Black	Total
1980	13.6	8.5	11.0	2.7	1.9	2.3
1981	13.4	12.0	12.8	2.9	2.2	2.5
1982	16.7	11.7	14.2	3.1	2.5	2.8
1983	16.7	11.1	13.8	3.4	2.7	3.0
1984	18.6	15.2	17.0	---	---	---
Total	15.8	11.6	13.7	2.7	2.3	2.7

--- Data not available.

Sources: Crime in the United States,

1980-84, Federal Bureau of Investigation; and National Prisoner Statistics, 1980-84.

1,000 adult whites arrested for murder and nonnegligent manslaughter for the 5 years, 1980-84, there were 15.8 admissions to prison under a sentence of death; for every 1,000 blacks arrested, there were 11.6 admissions under a sentence of death (table A-2).

Finally, for each of the years with complete data (1980-83), a higher proportion of white prison inmates were under a sentence of death than black prison inmates. For the 4 years overall, 3.0 whites were under a sentence of death for every 1,000 whites in prison, compared to 2.1 blacks under sentence of death for every 1,000 blacks in prison.

Race of victim. Another issue that has been raised in recent years regarding racial patterns in capital punishment sentencing is whether the race of the victim, rather than the race of the offender, influences who is sentenced to death. Some have maintained that an offender who murders a white is more likely to be sentenced to death than one who murders a black. (See, for example, the discussion of *McCleskey v. Kemp* above.)

Each year in its *Uniform Crime Reports* (published under the title, *Crime in the United States*) the FBI shows the racial distribution of the victims of murder and nonnegligent

manslaughter as reported by local police agencies. For the years 1980 to 1984, the distribution is as follows:

	White victims	Black victims
1980	53.3%	42.4%
1981	54.0	43.8
1982	55.4	42.3
1983	54.9	42.5
1984	56.2	41.1
Total	54.7	42.4

While whites constitute about 55% of murder and nonnegligent manslaughter victims, it is not clear that a similar percentage of white victims should be expected for offenders sentenced to death for murder.

Among the 37 States with capital punishment statutes, felony murders (or murders during the commission of another felony such as robbery or rape) are quite often distinguished as a specific type of homicide for which the death penalty may be imposed. The Uniform Crime Reports for 1980 to 1984 indicate that approximately 1 in 5 murders can be identified as a felony murder and two-thirds of these involved robbery or a sex offense. (By contrast, about half of homicides for which the motive was known resulted from an argument.) National Crime Survey data for 1982 reveal that an estimated 77% of rape and robbery victims were white and 89% of persons injured during a robbery were white (table A-3).⁵

While these data suggest that whites may constitute a greater proportion of felony murder victims than of all homicide victims, further research is needed to establish the degree to which such differences affect capital sentences.

⁵The National Crime Survey collects detailed information on criminal victimizations in the United States through interviews with a nationwide representative sample of approximately 125,000 Americans twice each year. The most recent published data are for 1982.

Table A-3. Distribution of rape and robbery, and robbery with injury victimizations, by race of victim and offender, 1982

	White offenders	Black offenders	Total
Rape and robbery victimizations ^a			
White victims	40%	37%	77%
Black victims	2	21	23
Total	42	58	100 ^b
Robbery with injury victimizations ^c			
White victims	50%	39%	89%
Black victims	0 ^d	12	12
Total	50	51	100 ^d

Note: Percents may not add to 100% due to rounding. Table excludes offenders of other races (less than 5% of all victimizations) and excludes mixed races in cases involving multiple offenders.
Source: Criminal Victimization in the United States, 1982, tables 44 and 49, pp. 49 and 51.

^a Includes single or multiple offenders.
^b Represents 1,258,706 victimizations reported by white and black victims.
^c Includes single offenders only.
^d Represents 171,985 victimizations reported by white and black victims.
^e Estimate based on 10 or fewer cases.



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

DEC 15 1986

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

Dear Chairman Wilkins:

In accordance with your request of December 1, 1986, this Office is preparing a formal opinion on the important and difficult question whether the United States Sentencing Commission is authorized to promulgate sentencing guidelines covering capital punishment. We understand that the Commission plans to discuss this issue at its meeting this week, and that some guidance from this Office, even if necessarily preliminary and conclusory in nature, would assist the Commission in its deliberations. In light of these circumstances, we are willing to provide the following brief outline of our conclusions.

The Sentencing Reform Act of 1984 creates a comprehensive scheme for sentencing defendants found guilty of an offense described in any federal statute. 18 U.S.C. 3551(a). The Act creates the United States Sentencing Commission to implement this scheme by promulgating "guidelines for use of a sentencing court in determining a sentence to be imposed in a criminal case." 28 U.S.C. 994(a).

The initial question that must be addressed is whether the death penalty is currently available as a sanction that may be imposed by federal courts as punishment for certain crimes. This question is raised by 18 U.S.C. 3551, subsection (b) which states:

An individual found guilty of an offense
shall be sentenced, in accordance with the
provisions of section 3553, to --

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554 [forfeiture], 3555 [notice to victims], or 3556 [restitution] may be imposed in addition to the sentence required by this subsection.

The most natural reading of this provision, in accordance with the maxim of statutory construction expressio unius est exclusio alterius, is that the list of "authorized sanctions" in section 3551(b) is exclusive -- all forms of punishment not listed in the section apparently cannot be imposed.

Numerous provisions of the United States Code, however, authorize the imposition of capital punishment (see, e.g., 18 U.S.C. 32, 33, 34, 351, 794, 844(f), 1111, 1716, 1751, 1992, 2113, 2381) or authorize or require disqualification from holding federal office (see, e.g., 18 U.S.C. 201-204, 2381, 2383, 2385). Reading section 3551(b) as an exclusive list of authorized sentences may operate implicitly to repeal the additional sanctions of capital punishment and disqualification from office. "The cardinal rule is that repeals by implication are not favored." Posadas v. National City Bank, 296 U.S. 497, 503 (1936). Thus, if the Sentencing Reform Act can be read consistently with the statutes authorizing these sanctions, such a construction must be adopted. See Morton v. Mancari, 417 U.S. 535, 550-51 (1974).

Section 3551(a) bears directly on this question. That section states:

Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any federal statute . . . shall be sentenced in accordance with the provisions of this [Act]
.....

The key language, "[e]xcept as otherwise specifically provided" is illuminated by the statutory evolution of the Sentencing Reform Act. It appears from the legislative history of the Act that the intended meaning of the exception is that defendants must be sentenced in accordance with the Act's provisions unless another statute specifically provides that, notwithstanding the provisions of the Act, an alternative set of sentencing

provisions applies. The Sentencing Reform Act is a direct descendant of S. 1437 -- the Criminal Code Reform Act of 1978 -- a comprehensive revision and recodification of title 18, of which the predecessor to the Sentencing Reform Act was but a small part. Had S. 1437 been enacted, all death penalty provisions, save one, and all disqualification from office provisions, would have been expressly repealed. The sole death penalty provision (dealing with aircraft hijacking) that would have survived passage of S. 1437 specifically provided that the bill's sentencing provisions, which were virtually identical to the Sentencing Reform Act, would not apply. Since S. 1437 revised and reexamined every provision of title 18, and included exhaustive conforming amendments to all other titles of the United States Code, it is not tenable to suggest that the exception was meant to refer to prior inconsistent enactments which were not amended to include specific exemption from the new sentencing provisions. Rather, in our view, the exception is limited to contemporaneously or subsequently enacted provisions specifically referencing the relevant provisions of the Sentencing Reform Act, such as the lone death penalty provision retained under S. 1437.

Because the Sentencing Reform Act was previously a part of a comprehensive statute that expressly repealed death penalty and disqualification from office provisions, it is not reasonable to conclude that, despite the fact that the express repealers were not enacted, an implicit repealer of those provisions was effected by enactment of the Sentencing Reform Act. Additionally, given the meaning, as discussed above, of the phrase "[e]xcept as otherwise specifically provided," and the fact that existing death penalty and disqualification from office provisions do not contain the requisite specificity, a defendant convicted of an offense carrying such penalties must be sentenced "in accordance with the provisions of [The Sentencing Reform Act]." Thus, to avoid the implied repeal of the death penalty and disqualification from office provisions, section 3551(b) must be interpreted to permit the imposition of capital punishment or disqualification from office as additional sanctions beyond those enumerated.

The Sentencing Reform Act refers to the Commission's authority to promulgate "guidelines . . . governing the imposition of sentences of probation, a fine, imprisonment, [and] governing the imposition of other authorized sanctions." 28 U.S.C. 994(c). Because the district courts are authorized under the Sentencing Reform Act to impose the death penalty, the Sentencing Commission properly may issue capital sentencing guidelines.

Our formal opinion on this issue is nearing completion, and we hope to forward it to you within the next few days. In the meantime, I hope this outline of our conclusions proves helpful.

Sincerely,

A handwritten signature in dark ink, appearing to read "C. J. Cooper", written in a cursive style.

Charles J. Cooper
Assistant Attorney General
Office of Legal Counsel



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 15, 1986

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

Dear Judge Wilkins:

As you know, federal statutes currently provide the death penalty for espionage, treason, murder, and certain other felonies such as air piracy and the destruction of aircraft or other common carriers when death results. Except in the case of the air piracy statute, enacted in 1973, these death penalty provisions are not accompanied by procedures designed to control the exercise of the factfinder's discretion in determining whether the death penalty should be imposed. As such, most or all of the death penalty provisions are apparently unenforceable in light of a series of Supreme Court decisions, beginning in 1972 with Furman v. Georgia, 408 U.S. 238, holding such procedures to be constitutionally required. ^{1/}

In my judgment, restoration of enforceable death penalty provisions for those offenses that now include a capital punishment sanction is both necessary and appropriate in the federal criminal justice system. The death penalty is necessary to protect society from heinous crimes and to exact just punishment and retribution for such offenses.

With respect to the deterrent effect of a death penalty, as the Supreme Court has observed, "There are carefully contemplated

^{1/} In Jurek v. Texas, 428 U.S. 262 (1976), the Court in effect held that a statute defining an offense could be so specific that it served the same purpose as if it contained a separate identification of relevant aggravating factors to guide the factfinder's discretion. Some existing federal death penalty offenses, such as that proscribing the killing of the President or other enumerated government officials, would likely be deemed valid under this rationale, provided the court permitted mitigating factors to be considered.

murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act." Gregg v. Georgia, 428 U.S. 153, 186 (1976). Another such example is espionage, where this nation has recently witnessed several instances of clearly calculated reprehensible conduct that might well have been deterred by the known existence of a viable death penalty sanction.

In terms of another important purpose of sentencing, retribution or just punishment, the death penalty serves a vital function. As this Department's representatives and others have repeatedly testified before Congress, and as the Supreme Court has often recognized, there are some crimes which are so harmful that no other penalty, not even life imprisonment without the possibility of parole, would be an adequate response to the defendant's conduct. Political assassination, mass or multiple murders, and some cases of espionage and treason come to mind as examples of such crimes.

The death penalty also can serve the legitimate sentencing purpose of incapacitation. Statistics indicate that prisoners serving life sentences are responsible for numerous killings in prison of guards or other inmates. At least five federal prison officers have been killed since December 1982, and the inmates charged in at least three of the incidents were already serving life sentences for murder. In the most secure cell block of America's highest security prison -- the Control Unit of the Marion, Illinois, penitentiary -- there were, in March 1984, 19 prisoners who had murdered prison officials or other inmates while in prison. It is not a just result that no additional punishment be imposed for such crimes, leaving these inmates seemingly free to murder with impunity.

The death penalty also serves to incapacitate offenders who might later commit crimes after release (or escape) from prison. For example, one Eddie Wein was sentenced to death in Los Angeles Superior Court in 1957. Instead of being executed, he was released from prison in 1975 to live in West Los Angeles, without warning to his neighbors. Within months, he began to attack and kill women in the area. He was convicted in 1976 of first degree murder of one woman, attempted murder of another, and numerous sexual offenses. Here the death penalty would have spared an innocent life.

Those like myself who favor the death penalty do so in full awareness of the risk of error. Such risk is the principal argument advanced by opponents of punishment. While the possibility of a mistaken execution must be acknowledged, I would respectfully submit that the recent decisions of the Supreme Court with respect to the rights of defendants in capital cases have reduced the danger of error to an irreducible minimum. In these circumstances, it is not brutal or unfeeling to conclude that the remote chance of error inherent in any punishment scheme must be weighed against the substantial benefits in terms of

protection of innocent lives from future harms that reinstitution of the death penalty would bring about.

In the fifteen years since the Furman decision, over forty of this country's fifty States have acted to restore the death penalty. Such action reflects a popular consensus in favor of capital punishment. The Federal Government has lagged behind. It is possible that had the death penalty been clearly in force for espionage and Presidential assassination, certain incidents of the past few years might have been avoided.

It is my recommendation that the United States Sentencing Commission promulgate guidelines designed to permit the implementation of the death penalties included in present federal statutes. I have reviewed, and have attached hereto, legal memoranda prepared in the Department of Justice on the question of the validity of such guidelines. I concur with the conclusions reached therein that such action by the Commission is lawful both from the standpoint of its statutory authority and the constitutional effect of such guidelines. Action by the Sentencing Commission to establish death penalty guidelines would fulfill the mandate of the Commission 2/ and represents the most expeditious way to implement these Congressionally authorized capital punishment provisions. 3/

Very truly yours,

William F. Weld

William F. Weld
Assistant Attorney General
Criminal Division

2/ The plain language of the Sentencing Reform Act of 1984 under which the Commission was created and operates contains clear authority for the Commission to develop death penalty guidelines. It is not necessary even to look to the legislative history on this matter. See Caminetti v. United States, 242 U.S. 470, 485 (1917). If the statute is plain, the legislative history would not diminish the Commission's power -- and possibly its duty -- to act in this area.

3/ We believe also that certain new statutory death penalty provisions are required, e.g., for murder in the course of the taking of American hostages by terrorists abroad (18 U.S.C. 1203). In addition, a new offense, with a death penalty, should be created to deal with prison murders by inmates serving a life sentence. I expect the Department of Justice will continue to pursue legislation in Congress to provide the death penalty, as it has done since the inception of this Administration.



U.S. Department of Justice
Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

December 15, 1986

MEMORANDUM

TO: William F. Weld
Assistant Attorney General
Criminal Division

FROM: *Pgk* Paul G. Cassell
Associate Deputy Attorney General

RE: Authority of the Sentencing Commission
Over Capital Sentencing Issues

Attached are the final versions of memoranda relating to the authority of the Sentencing Commission over capital sentencing issues, drafts of which I have previously shown you. Attachment 1 discusses the legal authority of the Commission to promulgate guidelines providing for capital sentences in circumstances where Congress has authorized such a penalty. Attachment 2 reviews the issue of whether Commission-promulgated death penalty guidelines would survive constitutional muster. Attachment 3 considers the status of the death penalty provisions currently contained in Title 18 of the United States Code. Attachment 4 contains the text of the current federal death penalty provisions.

I hope you have found these materials useful in formulating your views on these important subjects.

Attachment 3
Effect of the Supreme Court's Decisions
on Federal Death Penalty Statutes

Beginning in 1972, the Supreme Court has rendered a number of important decisions dealing with the circumstances under which a death penalty may properly be imposed. These decisions have important ramifications for operation of the federal death penalty statutes. Indeed, the decisions may have left many federal death penalty statutes effectively unenforceable without the adoption of additional safeguards.¹

This memorandum, however, addressed a much narrower question: Do the federal death penalty statutes remain a part of substantive criminal law so that additional safeguards may be attached to them? This question must be answered in the affirmative.

The federal death penalty provisions remain a part of the U.S. Code. They are merely portions of larger criminal statutes that the Justice Department routinely enforces. A full list of these statutes is contained in Attachment 4 -- Federal Statutes Providing for the Death Penalty.

The death penalty provisions have not been severed as the result of Supreme Court decisions. In Furman v. Georgia, 408 U.S. 238 (1972), the Court ruled only that the imposition of the penalty in the three state cases before it was unconstitutional. The entire per curiam opinion of the Court in Furman v. Georgia reads:

"PER CURIAM.

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. Sec. 26-1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S.E.2d 5628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. Sec. 26-1302 (Supp. 1971) (effective prior to July 1, 1976) 225 Ga.

¹ The Department has expressed its view that 18 U.S.C. §§1115(a), 351(a), and 1751(a) (the three statutes covering murder of specified federal officials or their families) are sufficiently narrow in scope so as to permit the imposition of the death sentence consistent with constitutional requirements without further legislative action. See Department of Justice Comment Regarding Chapter Two of the Sentencing Commission's Draft Guidelines, p. 8 (Dec. 12, 1986).

790, 171 S.E. 2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Tex. Penal Code, Art. 1189 (1961). 447 S.W. 2d 932 (Ct. Crim. App. 1969). Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" 403 U.S. 952 (19710). The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgement in each case is therefore reversed insofar as it leave undisturbed the death sentenced imposed, and the cases are remanded for further proceedings.

So ordered."

408 U.S., at 239-40 (emphasis added). It is clear that this limited holding does not, by itself, remove the federal death penalty statutes from Title 18, even though its effect may have been to render federal death penalty statutes inoperative in many circumstances.

Indeed, the precise parameters of that decision are unclear. As a House Committee has observed:

"On June 29, 1972, the United States Supreme Court rendered a decision in the case of Furman v. Georgia ... involving three petitioners sentenced to death under provisions of State law. Broadly stated, the Court held that the imposition of the death penalty in the cases before it [emphasis in original] constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The exact scope of the decision is, however, unclear because it was decided by a 5 to 4 vote and handed down in the form of a per curiam opinion accompanied by nine separate written opinion in which each Justice discussed his views of capital punishment. No Justice in the majority concurred in the opinion of any other Justice in the majority. Only two Justices in the majority (Justices Brennan and Marshall) argued that the Constitution

required an absolute prohibition of the death penalty. The other three Justices in the majority (Justices Stewart, White, and Douglas) concurred in the reversals of the death sentences before the court on the ground that the State laws involved left the imposition of the death penalty to the complete discretion of the judge or jury, thus permitting the imposition of the death penalty in a discriminatory manner.

"In the opinion of the committee the decision of the Supreme Court in the Furman case did not [emphasis in original] hold that the death penalty per se is unconstitutional. The committee does agree with the proposition that the Furman case holds unconstitutional the imposition of the death penalty when it is available as a nonmandatory penalty which may be imposed at the complete discretion of the judge or jury." H. Rep. 93-885, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 3980-81.

The observations of the dissenters in Furman can not be taken as removing the federal death penalty provisions from Title 18. Justice Blackmun's "somewhat personal comments," 408 U.S., at 405 (Blackmun, J., dissenting), concluded that the Court's decision "apparently" voided federal death penalty statutes, id., at 411. Justice Powell similarly asserted that the Court had "overturn[ed] the legislative judgments of 40 state legislatures as well as those of Congress." Id., at 433 (Powell, J., dissenting). Finally, Justice Rehnquist's dissent, joined by Chief Justice Burger, Justice Blackmun, and Justice Powell, observed that only three justices -- Douglas, Brennan, and Marshall -- would "consign to the limbo of unconstitutionality" certain "laws enacted by Congress." Id., at 465 (Rehnquist, J., dissenting).

These statements can not be read as striking the federal death penalty statutes from the Code. First, they are obviously expressions in dissenting opinions. As such, they "have no legal effect ... [and] are in no way binding on any court." Bronson v. Board of Education of Cincinnati, 510 F.Supp 1251, 1265 (S.D. Ohio 1980). One should be particularly wary of determining the breadth of a court opinion from the dissents because of the "tendency to cry wolf in judicial dissents and to utter prophecies of doom that become self-fulfilling by drawing attention to and then exaggerating the scope of the majority opinion." Sur v. Glidden-Durkee, 681 F.2d 490, 501 (7th Cir. 1982) (Posner, J., dissenting). Second, the dissenters were expressing their view

as to the ultimate implications of the Court's holding, not the actual status of the federal death penalty statutes.

The Supreme Court's decisions since Furman do not remove the federal death penalty provisions from the U.S. Code. Since Furman, the Court has held that certain state death penalty schemes survived or failed constitutional muster, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976), Gregg v. Georgia, 428 U.S. 153 (1976), Jurek v. Texas, 428 U.S. 262 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), or that particular death sentences rendered under state schemes were or were not in compliance with constitutional requirements, e.g., Lockett v. Ohio, 438 U.S. 86 (1978), Godfrey v. Georgia, 446 U.S. 420, 428 (1980), Barclay v. Florida, 463 U.S. 939 (1983). Obviously, none of these decisions removed the federal death penalty provisions from the U.S. Code.

Various decisions by federal lower courts have not stricken the federal death penalty provisions. Several federal district courts and courts of appeal have held or opined that a capital sentence could not be maintained under 18 U.S.C. §1111, see, e.g., United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977), United States v. Dufur, 648 F.2d 515 (9th Cir. 1980), cert. denied, 450 U.S. 925 (1981), and under 18 U.S.C. §794, see, e.g., United States v. Harper, 729 F.2d 1216 (9th Cir. 1984), United States v. Helmich, 521 F.Supp. 1246 (M.D. Fla. 1981). But these decision did not, and obviously could not, pronounce on the issue of whether additional safeguards could be added to the existing death penalty statutes so as to render them clearly constitutional.

Since Furman, Congress has not treated the death penalty provisions in Title 18 as dead letters. Congress has not repealed these death penalty provisions and indeed since Furman has reenacted two statutes that provide for the death penalty through cross-reference to the penalty provisions of 18 U.S.C. §1111. See Pub. L. 97-285, 96 Stat. 1219 (Oct. 6, 1982) (reenactment of 18 U.S.C. §§ 351, 1751). At the same time, when Congress believes that the Supreme Court has invalidated a death penalty provision, it has repealed that penalty. For instance, the death penalty contained in the former federal rape statute was clearly unconstitutional in light of the Supreme Court's decision in Coker v. Georgia, 433 U.S. 584 (1977). Congress has amended that statute by removing the death penalty. See S. 1236, Criminal Law and Procedure Technical Amendments Act of 1986, p. 21 (specifying maximum sentence of life for crime of "aggravated sexual abuse", the replacement for rape in the new statutory scheme).

In short, the federal death penalty statutes of Title 18 remain a part of the U.S. Code. With appropriate constitutional procedures, there is no doubt that death penalty sentences obtained under them would be sustained in the courts.²

² Again, the extremely limited nature of this conclusion must be underscored. We have not reached any conclusion in this memorandum about the current constitutional status of the federal death penalty provisions, which may well lack certain procedural requirements outlined by the Supreme Court in Gregg v. Georgia and other cases. Instead, we have expressed our view only on the status of the statutes in conjunction with additional constitutional safeguards specified by the Sentencing Commission or some other legally empowered authority.



Washington, D.C. 20530

REPORT TO THE DEPUTY ATTORNEY GENERAL

ON

CAPITAL PUNISHMENT

AND

THE SENTENCING COMMISSION

February 13, 1987

INTRODUCTION

Important federal statutes embody legislative judgments that capital punishment is an appropriate sentence for particularly heinous crimes, such as assassination of the President, espionage, or murder. These statutes are currently inoperative only because they may not contain constitutionally adequate procedures for weighing aggravating and mitigating circumstances in individuals cases, as required by the Supreme Court's in Furman v. Georgia, 408 U.S. 238 (1972) and subsequent decisions.

Last month the Department of Justice reported its conclusion, based on a comprehensive examination of the Sentencing Reform Act of 1984 and relevant legislative history, that the Sentencing Commission's jurisdiction includes the promulgation of guidelines that will permit the constitutional imposition of capital sentences under these statutes. Memorandum for Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission, Office of Legal Counsel, Jan. 8, 1987. The purpose of this report is to examine the separate questions of whether the Commission ought to promulgate such guidelines and, if so, what aggravating and mitigating factors should be included.

Part I considers the purposes of federal criminal sanctions. By statute, 28 U.S.C. §991(b), the Commission is charged with assuring that federal sentences achieve three goals: just punishment, deterrence, and protection of the public from further crimes by offenders.¹ As Congress recognized in adopting capital punishment statutes, for egregious federal crimes only a capital sentence will achieve these purposes.

Federal capital statutes cover the most serious crimes imaginable. They include assassination of the President, an act which strikes at the heart of the nation's political system, as well as treason and espionage, offenses that can threaten the safety and security of literally millions of persons. In aggravated circumstances, only a death sentence could possibly constitute just punishment for such crimes. This fact is recognized by the overwhelming majority of Americans. The most current national poll reveals that 85% of all Americans favor the death penalty for some crimes, while only 11% oppose it.

It is also clear that capital punishment has a deterrent effect. We know this for three reasons. First, logic compels the conclusion that the death penalty is the most effective deterrent for some kinds of crimes -- those that require deliberation and calculation, like the federal capital offenses

¹ A fourth purpose -- rehabilitation -- is not an appropriate consideration for serious offenders. See 28 U.S.C. §994(k).

of political assassination, espionage, train wrecking, and the like. Second, specific examples demonstrate that the thought of the death penalty has entered in the decision of some criminals to commit (or refrain from committing) various crimes. Finally, sophisticated econometric studies provide considerable evidence that capital punishment has a deterrent effect on homicide. These studies are consistent with a growing body of statistical literature that prove the deterrent effect of punishment generally.

In some circumstances, a death penalty is the only effective means of insuring that an offender will not commit other crimes. As proven by depressing examples, all too often a prison sentence in lieu of execution will mean the eventual release of a murderer and the death of subsequent innocent victims. Even a "real life" sentence is no guarantee of safety since it leaves an offender in a position to threaten the lives of prison officials and other prisoners.

Part II considers issues relating to the administration of the federal death penalty system. In particular, this part rebuts the argument that merely because some criminals who deserve a capital sentence escape it, other offenders should elude just punishment as well. It also reviews issues relating to allegations of racial discrimination in the death penalty and to the possibility of an erroneous execution.

Part III observes that the Commission has a considerable body of knowledge it can draw on in crafting specific capital sentencing guidelines. In recent years, both Houses of Congress in recent years passed bills listing the relevant aggravating and mitigating factors, and the Commission could rely on these as a model rather than "starting from scratch."

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

Respectfully submitted,

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Criminal Division

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Federal Statutes Providing for the Death Penalty

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18 U.S.C. §115(b)(3) (Supp. III 1985) (retaliatory murder of member of immediate family of law enforcement officials) (by cross reference to 18 U.S.C. §1111)	A3
18 U.S.C. §351 (murder of member of Congress, important executive official, or Supreme Court justice) (by cross reference to 18 U.S.C. §1111)	A4
18 U.S.C. §794 (espionage)	A5
18 U.S.C. §844(f) (destruction of government property resulting in death)	A6
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18 U.S.C. §1716 (mailing of injurious articles with intent to kill resulting in death)	A8
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18 U.S.C. §2381 (treason)	A16
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*Repealed by S.1236, Criminal Law and Procedure Technical
Amendments Act of 1986.

APPENDIX B

PROVISIONS AND AMENDMENTS TO THE SENTENCING REFORM ACT

The Sentencing Reform Act of 1984, 98 Stat. 1987-2040	B1
The Sentencing Reform Amendments Act of 1985, 99 Stat. 1728	B55
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CHAPTER II—SENTENCING REFORM

SEC. 211. This chapter may be cited as the "Sentencing Reform Act of 1984".

SEC. 212. (a) Title 18 of the United States Code is amended by—

(1) redesignating sections 3577, 3578, 3579, 3580, 3611, 3612, 3615, 3617, 3618, 3619, 3620, and 3656 as sections 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, and 3672 of a new chapter 232 of title 18 of the United States Code, respectively;

(2) repealing chapters 227, 229, and 231 and substituting the following new chapters:

"CHAPTER 227—SENTENCES

"Subchapter

"A. General Provisions	3551
"B. Probation	3561
"C. Fines	3571
"D. Imprisonment	3581

Sentencing
Reform Act of
1984.
18 USC 3551
note.

Post. p. 2175.

Repeals.
18 USC 3561 *et seq.*
3611 *et seq.*
3651 *et seq.*

"SUBCHAPTER A—GENERAL PROVISIONS

"Sec.
"3551. Authorized sentences.
"3552. Presentence reports.
"3553. Imposition of a sentence.
"3554. Order of criminal forfeiture.
"3555. Order of notice to victims.
"3556. Order of restitution.
"3557. Review of a sentence.
"3558. Implementation of a sentence.
"3559. Sentencing classification of offenses.

"SUBCHAPTER A—GENERAL PROVISIONS

18 USC 3551.

"§ 3551. Authorized sentences

"(a) IN GENERAL.—Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

"(b) INDIVIDUALS.—An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

"(1) a term of probation as authorized by subchapter B;

"(2) a fine as authorized by subchapter C; or

"(3) a term of imprisonment as authorized by subchapter D.

A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

"(c) ORGANIZATIONS.—An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to—

"(1) a term of probation as authorized by subchapter B; or

"(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

Post, p. 1992.

Post, p. 1995.

Post, p. 1998.

18 USC 3552.

"§ 3552. Presentence reports

"(a) PRESENTENCE INVESTIGATION AND REPORT BY PROBATION OFFICER.—A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

"(b) PRESENTENCE STUDY AND REPORT BY BUREAU OF PRISONS.—If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall take no more than sixty days. The order shall specify the additional information that the court needs before

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"§ 3553. Imposition of sentence

"(a) FACTORS.—The court shall impose a sentence, in addition to any sentence imposed, shall be

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Oct. 12 CONT. APPROP.—CRIME CONTROL ACT

P.L. 98-473
Sec. 212

determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

Expiration date.

Post, p. 2019.

"(c) PRESENTENCE EXAMINATION AND REPORT BY PSYCHIATRIC OR PSYCHOLOGICAL EXAMINERS.—If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, it may order that the defendant undergo a psychiatric or psychological examination and that the court be provided with a written report of the results of the examination pursuant to the provisions of section 4247.

"(d) DISCLOSURE OF PRESENTENCE REPORTS.—The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant.

"§ 3553. Imposition of a sentence

18 USC 3553.

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

"(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

"(2) the need for the sentence imposed—

"(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

"(B) to afford adequate deterrence to criminal conduct;

"(C) to protect the public from further crimes of the defendant; and

"(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

"(3) the kinds of sentences available;

"(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the

98 STAT. 1989

Post, p. 2019.

applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced; and

"(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

"(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that an aggravating or mitigating circumstance exists that was not adequately taken into consideration by the Sentencing Commission in formulating the guidelines and that should result in a sentence different from that described.

"(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

"(1) is of the kind, and within the range, described in subsection (a)(4), the reason for imposing a sentence at a particular point within the range; or

"(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the sentence does not include an order of restitution, the court shall include in the statement the reason therefor. The clerk of the court shall provide a transcription of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

"(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE OR RESTITUTION.—Prior to imposing an order of notice pursuant to section 3555, or an order of restitution pursuant to section 3556, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

"(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

"(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

"(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

18 USC 3554.

"§ 3554. Order of criminal forfeiture

"The court, in imposing a sentence on a defendant who has been found guilty of an offense described in section 1962 of this title or in title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defend-

21 USC 801, 951.

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ant forfeit property to the United States in accordance with the provisions of section 1963 of this title or section 413 of the Comprehensive Drug Abuse and Control Act of 1970.

Post, p. 2044.

“§ 3555. Order of notice to victims

18 USC 3555.

“The court, in imposing a sentence on a defendant who has been found guilty of an offense involving fraud or other intentionally deceptive practices, may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant give reasonable notice and explanation of the conviction, in such form as the court may approve, to the victims of the offense. The notice may be ordered to be given by mail, by advertising in designated areas or through designated media, or by other appropriate means. In determining whether to require the defendant to give such notice, the court shall consider the factors set forth in section 3553(a) to the extent that they are applicable and shall consider the cost involved in giving the notice as it relates to the loss caused by the offense, and shall not require the defendant to bear the costs of notice in excess of \$20,000.

“§ 3556. Order of restitution

18 USC 3556.

“The court, in imposing a sentence on a defendant who has been found guilty of an offense under this title, or an offense under section 902 (h), (i), (j), or (n) of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to the sentence that is imposed pursuant to the provisions of section 3551, that the defendant make restitution to any victim of the offense in accordance with the provisions of sections 3663 and 3664.

49 USC app.
1472.

“§ 3557. Review of a sentence

18 USC 3557.

“The review of a sentence imposed pursuant to section 3551 is governed by the provisions of section 3742.

Post, p. 2011.

“§ 3558. Implementation of a sentence

18 USC 3558.

“The implementation of a sentence imposed pursuant to section 3551 is governed by the provisions of chapter 229.

Post, p. 2001.

“§ 3559. Sentencing classification of offenses

18 USC 3559.

“(a) CLASSIFICATION.—An offense that is not specifically classified by a letter grade in the section defining it, is classified—

“(1) if the maximum term of imprisonment authorized is—

“(A) life imprisonment, or if the maximum penalty is death, as a Class A felony;

“(B) twenty years or more, as a Class B felony;

“(C) less than twenty years but ten or more years, as a Class C felony;

“(D) less than ten years but five or more years, as a Class D felony;

“(E) less than five years but more than one year, as a Class E felony;

“(F) one year or less but more than six months, as a Class A misdemeanor;

“(G) six months or less but more than thirty days, as a Class B misdemeanor;

“(H) thirty days or less but more than five days, as a Class C misdemeanor; or

"(I) five days or less, or if no imprisonment is authorized, as an infraction.

"(b) EFFECT OF CLASSIFICATION.—An offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation except that:

"(1) the maximum fine that may be imposed is the fine authorized by the statute describing the offense, or by this chapter, whichever is the greater; and

"(2) the maximum term of imprisonment is the term authorized by the statute describing the offense.

"SUBCHAPTER B—PROBATION

"Sec.

"3561. Sentence of probation.

"3562. Imposition of a sentence of probation.

"3563. Conditions of probation.

"3564. Running of a term of probation.

"3565. Revocation of probation.

"3566. Implementation of a sentence of probation.

"SUBCHAPTER B—PROBATION

18 USC 3561.

"§ 3561. Sentence of probation

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—

"(1) the offense is a Class A or Class B felony;

"(2) the offense is an offense for which probation has been expressly precluded; or

"(3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense.

The liability of a defendant for any unexecuted fine or other punishment imposed as to which probation is granted shall be fully discharged by the fulfillment of the terms and conditions of probation.

"(b) AUTHORIZED TERMS.—The authorized terms of probation are—

"(1) for a felony, not less than one nor more than five years;

"(2) for a misdemeanor, not more than five years; and

"(3) for an infraction, not more than one year.

18 USC 3562.

"§ 3562. Imposition of a sentence of probation

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF PROBATION.—The court, in determining whether to impose a term of probation, and, if a term of probation is to be imposed, in determining the length of the term and the conditions of probation, shall consider the factors set forth in section 3553(a) to the extent that they are applicable.

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence of probation can subsequently be—

"(1) modified or revoked pursuant to the provisions of section 3564 or 3565;

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

Post, p. 2015.
Post, p. 2011.

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18 USC 3563.

“§ 3563. Conditions of probation

“(a) MANDATORY CONDITIONS.—The court shall provide, as an explicit condition of a sentence of probation—

“(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, State, or local crime during the term of probation; and

“(2) for a felony, that the defendant also abide by at least one condition set forth in subsection (b)(2), (b)(3), or (b)(13).

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

“(b) DISCRETIONARY CONDITIONS.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553 (a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

“(1) support his dependents and meet other family responsibilities;

“(2) pay a fine imposed pursuant to the provisions of subchapter C;

“(3) make restitution to a victim of the offense pursuant to the provisions of section 3556;

“(4) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

“(5) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

“(6) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

“(7) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

“(8) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

“(9) refrain from possessing a firearm, destructive device, or other dangerous weapon;

“(10) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

“(11) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense in section 3581(b), during the first year of the term of probation;

“(12) reside at, or participate in the program of, a community corrections facility for all or part of the term of probation;

“(13) work in community service as directed by the court;

"(14) reside in a specified place or area, or refrain from residing in a specified place or area;

"(15) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

"(16) report to a probation officer as directed by the court or the probation officer;

"(17) permit a probation officer to visit him at his home or elsewhere as specified by the court;

"(18) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

"(19) notify the probation officer promptly if arrested or questioned by a law enforcement officer; or

"(20) satisfy such other conditions as the court may impose.

"(c) MODIFICATIONS OF CONDITIONS.—The court may, after a hearing, modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the conditions of probation.

"(d) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

18 USC 3564.

"§ 3564. Running of a term of probation

"(a) COMMENCEMENT.—A term of probation commences on the day that the sentence of probation is imposed, unless otherwise ordered by the court.

"(b) CONCURRENCE WITH OTHER SENTENCES.—Multiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other. A term of probation runs concurrently with any Federal, State, or local term of probation, or supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation, except that it does not run during any period in which the defendant is imprisoned for a period of at least thirty consecutive days in connection with a conviction for a Federal, State, or local crime.

"(c) EARLY TERMINATION.—The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may terminate a term of probation previously ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

"(d) EXTENSION.—The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation.

"(e) SUBJECT TO REVOCATION.—A sentence of probation remains conditional and subject to revocation until its expiration or termination.

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“§ 3565. Revocation of probation

Post, p. 2039.
18 USC 3565.

“(a) CONTINUATION OR REVOCATION.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—

18 USC app.

“(1) continue him on probation, with or without extending the term of modifying or enlarging the conditions; or

“(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.

“(b) DELAYED REVOCATION.—The power of the court to revoke a sentence of probation for violation of a condition of probation, and to impose another sentence, extends beyond the expiration of the term of probation for any period reasonably necessary for the adjudication of matters arising before its expiration if, prior to its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

“§ 3566. Implementation of a sentence of probation

18 USC 3566.

“The implementation of a sentence of probation is governed by the provisions of subchapter A of chapter 229.

Post, p. 2001.

“SUBCHAPTER C—FINES

“Sec.

“3571. Sentence of fine.

“3572. Imposition of a sentence of fine.

“3573. Modification or remission of fine.

“3574. Implementation of a sentence of fine.

“SUBCHAPTER C—FINES

“§ 3571. Sentence of fine

18 USC 3571.

“(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to pay a fine.

“(b) AUTHORIZED FINES.—Except as otherwise provided in this chapter, the authorized fines are—

“(1) if the defendant is an individual—

“(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$250,000;

“(B) for any other misdemeanor, not more than \$25,000;

and

“(C) for an infraction, not more than \$1,000; and

“(2) if the defendant is an organization—

“(A) for a felony, or for a misdemeanor resulting in the loss of human life, not more than \$500,000;

“(B) for any other misdemeanor, not more than \$100,000;

and

“(C) for an infraction, not more than \$10,000.

“§ 3572. Imposition of a sentence of fine

18 USC 3572.

“(a) FACTORS TO BE CONSIDERED IN IMPOSING FINE.—The court, in determining whether to impose a fine, and, if a fine is to be imposed, in determining the amount of the fine, the time for payment, and the method of payment, shall consider—

"(1) the factors set forth in section 3553(a), to the extent they are applicable, including, with regard to the characteristics of the defendant under section 3553(a), the ability of the defendant to pay the fine in view of the defendant's income, earning capacity, and financial resources and, if the defendant is an organization, the size of the organization;

"(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent upon the defendant, relative to the burden which alternative punishments would impose;

"(3) any restitution or reparation made by the defendant to the victim of the offense, and any obligation imposed upon the defendant to make such restitution or reparation to the victim of the offense;

"(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to insure against a recurrence of such an offense; and

"(5) any other pertinent equitable consideration.

"(b) LIMIT ON AGGREGATE OF MULTIPLE FINES.—Except as otherwise expressly provided, the aggregate of fines that a court may impose on a defendant at the same time for different offenses that arise from a common scheme or plan, and that do not cause separable or distinguishable kinds of harm or damage, is twice the amount imposable for the most serious offense.

"(c) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

"(1) modified or remitted pursuant to the provisions of section 3573;

"(2) corrected pursuant to the provisions of rule 35 and section 3742; or

"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742; a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(d) TIME AND METHOD OF PAYMENT.—Payment of a fine is due immediately unless the court, at the time of sentencing—

"(1) requires payment by a date certain; or

"(2) establishes an installment schedule, the specific terms of which shall be fixed by the court.

"(e) ALTERNATIVE SENTENCE PRECLUDED.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be served in the event that the fine is not paid.

"(f) INDIVIDUAL RESPONSIBILITY FOR PAYMENT.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

"(g) RESPONSIBILITY TO PROVIDE CURRENT ADDRESS.—At the time of imposition of the fine, the court shall order the person fined to provide the Attorney General with a current mailing address for the entire period that any part of the fine remains unpaid. Failure to provide the Attorney General with a current address or a change in address shall be punishable as a contempt of court.

Post, p. 2015.

Post, p. 2011.

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"(h) **STAY OF FINE PENDING APPEALS.**—Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay—

"(1) a requirement that the defendant, pending appeal, to deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

"(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

"(i) **DELINQUENT FINE.**—A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

"(j) **DEFAULT.**—A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due with thirty days of notification of the default, notwithstanding any installment schedule.

"§ 3573. Modification or remission of fine

18 USC 3573.

"(a) **PETITION FOR MODIFICATION OR REMISSION.**—A defendant who has been sentenced to pay a fine, and who—

"(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for—

"(A) an extension of the installment schedule, not to exceed two years except in case of incarceration or special circumstances; or

"(B) a remission of all or part of the unpaid portion including interest and penalties; or

"(2) has voluntarily made restitution or reparation to the victim of the offense, may at any time petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

Any petition filed pursuant to this subsection shall be filed in the court in which sentence was originally imposed, unless that court transfers jurisdiction to another court. The petitioner shall notify the Attorney General that the petition has been filed within ten working days after filing. For the purposes of clause (1), unless exceptional circumstances exist, a person may be considered to have made a good faith effort to comply with the terms of the sentence only after payment of a reasonable portion of the fine.

"(b) **ORDER OF MODIFICATION OR REMISSION.**—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order, in which case it shall provide the Attorney General with a copy of such order.

"§ 3574. Implementation of a sentence of fine

18 USC 3574.

"The implementation of a sentence to pay a fine is governed by the provisions of subchapter B of chapter 229.

Post, p. 2004.

"SUBCHAPTER D—IMPRISONMENT

- "Sec.
"3581. Sentence of imprisonment.
"3582. Imposition of a sentence of imprisonment.
"3583. Inclusion of a term of supervised release after imprisonment.
"3584. Multiple sentences of imprisonment.
"3585. Calculation of a term of imprisonment.
"3586. Implementation of a sentence of imprisonment.

"SUBCHAPTER D—IMPRISONMENT

18 USC 3581.

"§ 3581. Sentence of imprisonment

"(a) IN GENERAL.—A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

"(b) AUTHORIZED TERMS.—The authorized terms of imprisonment are—

- "(1) for a Class A felony, the duration of the defendant's life or any period of time;
"(2) for a Class B felony, not more than twenty-five years;
"(3) for a Class C felony, not more than twelve years;
"(4) for a Class D felony, not more than six years;
"(5) for a Class E felony, not more than three years;
"(6) for a Class A misdemeanor, not more than one year;
"(7) for a Class B misdemeanor, not more than six months;
"(8) for a Class C misdemeanor, not more than thirty days;
and
"(9) for an infraction, not more than five days.

18 USC 3582.

"§ 3582. Imposition of a sentence of imprisonment

"(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

Post, p. 2019.

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

Post, p. 2015.

Post, p. 2011.

- "(1) modified pursuant to the provisions of subsection (c);
"(2) corrected pursuant to the provisions of rule 35 and section 3742; or
"(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

"(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

"(1) in any case—

"(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the

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extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

“(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

Post, p. 2015.

“(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(n), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Post, p. 2019.

“(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

“§ 3583. Inclusion of a term of supervised release after imprisonment

18 USC 3583.

“(a) IN GENERAL.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment.

“(b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—The authorized terms of supervised release are—

“(1) for a Class A or Class B felony, not more than three years;

“(2) for a Class C or Class D felony, not more than two years;

and

“(3) for a Class E felony, or for a misdemeanor, not more than one year.

“(c) FACTORS TO BE CONSIDERED IN INCLUDING A TERM OF SUPERVISED RELEASE.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

“(d) CONDITIONS OF SUPERVISED RELEASE.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision. The court may order, as a further condition of supervised release, to the extent that such condition—

“(1) is reasonably related to the factors set forth in section 3553 (a)(1), (a)(2)(B), and (a)(2)(D);

Post, p. 2019.

"(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553 (a)(2)(B) and (a)(2)(D); and

"(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); any condition set forth as a discretionary condition of probation in section 3563 (b)(1) through (b)(10) and (b)(12) through (b)(19), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

"(e) MODIFICATION OF TERM OR CONDITIONS.—The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

"(1) terminate a term of supervised release previously ordered and discharge the person released at any time after the expiration of one year of supervised release, if it is satisfied that such action is warranted by the conduct of the person released and the interest of justice;

"(2) after a hearing, extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions applicable to the initial setting of the terms and conditions of post-release supervision; or

"(3) treat a violation of a condition of a term of supervised release as contempt of court pursuant to section 401(3) of this title.

"(f) WRITTEN STATEMENT OF CONDITIONS.—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

18 USC 3584.

"§ 3584. Multiple sentences of imprisonment

"(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

"(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

"(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run consecutively or concur-

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rently shall be treated for administrative purposes as a single, aggregate term of imprisonment.

“§ 3585. Calculation of a term of imprisonment

18 USC 3585.

“(a) COMMENCEMENT OF SENTENCE.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

“(b) CREDIT FOR PRIOR CUSTODY.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—

“(1) as a result of the offense for which the sentence was imposed; or

“(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

“§ 3586. Implementation of a sentence of imprisonment

18 USC 3586.

“The implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229 and, if the sentence includes a term of supervised release, by the provisions of subchapter A of chapter 229.

Post, p. 2007.

“CHAPTER 229—POSTSENTENCE
ADMINISTRATION

“Subchapter

“A. Probation.....	3601
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“SUBCHAPTER A—PROBATION

“Sec.

“3601. Supervision of probation.

“3602. Appointment of probation officers.

“3603. Duties of probation officers.

“3604. Transportation of a probationer.

“3605. Transfer of jurisdiction over a probationer.

“3606. Arrest and return of a probationer.

“3607. Special probation and expungement procedures for drug possessor.

“SUBCHAPTER A—PROBATION

“§ 3601. Supervision of probation

18 USC 3601.

“A person who has been sentenced to probation pursuant to the provisions of subchapter B of chapter 227, or placed on probation pursuant to the provisions of chapter 403, or placed on supervised release pursuant to the provisions of section 3583, shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

Ante, p. 1992.
18 USC 5031 et
seq.

“§ 3602. Appointment of probation officers

18 USC 3602.

“(a) APPOINTMENT.—A district court of the United States shall appoint qualified persons to serve, with or without compensation, as probation officers within the jurisdiction and under the direction of the court making the appointment. The court may, for cause, remove a probation officer appointed to serve with compensation,

and may, in its discretion, remove a probation officer appointed to serve without compensation.

"(b) RECORD OF APPOINTMENT.—The order of appointment shall be entered on the records of the court, a copy of the order shall be delivered to the officer appointed, and a copy shall be sent to the Director of the Administrative Office of the United States Courts.

"(c) CHIEF PROBATION OFFICER.—If the court appoints more than one probation officer, one may be designated by the court as chief probation officer and shall direct the work of all probation officers serving in the judicial district.

18 USC 3603.

"§ 3603. Duties of probation officers

"A probation officer shall—

"(a) instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

"(b) keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court;

"(c) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition;

"(d) be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district;

"(e) keep a record of his work, and make such reports to the Director of the Administrative Office of the United States Courts as the Director may require;

"(f) upon request of the Attorney General or his designee, supervise and furnish information about a person within the custody of the Attorney General while on work release, furlough, or other authorized release from his regular place of confinement, or while in prerelease custody pursuant to the provisions of section 3624(c);

"(g) keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision and report thereon to the court placing such person on probation and report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked; and

"(h) perform any other duty that the court may designate.

18 USC 3604.

"§ 3604. Transportation of a probationer

"A court, after imposing a sentence of probation, may direct a United States marshal to furnish the probationer with—

"(a) transportation to the place to which he is required to proceed as a condition of his probation; and

"(b) money, not to exceed such amount as the Attorney General may prescribe, for subsistence expenses while traveling to his destination.

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"§ 3605. Transfer of jurisdiction over a probationer

18 USC 3605.

"A court, after imposing a sentence, may transfer jurisdiction over a probationer or person on supervised release to the district court for any other district to which the person is required to proceed as a condition of his probation or release, or is permitted to proceed, with the concurrence of such court. A later transfer of jurisdiction may be made in the same manner. A court to which jurisdiction is transferred under this section is authorized to exercise all powers over the probationer or releasee that are permitted by this subchapter or subchapter B or D of chapter 227.

Ante, pp. 1992,
1998.
18 USC 3606.

"§ 3606. Arrest and return of a probationer

"If there is probable cause to believe that a probationer or a person on supervised release has violated a condition of his probation or release, he may be arrested, and, upon arrest, shall be taken without unnecessary delay before the court having jurisdiction over him. A probation officer may make such an arrest wherever the probationer or releasee is found, and may make the arrest without a warrant. The court having supervision of the probationer or releasee, or, if there is no such court, the court last having supervision of the probationer or releasee, may issue a warrant for the arrest of a probationer or releasee for violation of a condition of release, and a probation officer or United States marshal may execute the warrant in the district in which the warrant was issued or in any district in which the probationer or releasee is found.

"§ 3607. Special probation and expungement procedures for drug possessors

18 USC 3607.

"(a) **PRE-JUDGMENT PROBATION.**—If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)—

"(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

"(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

"(b) **RECORD OF DISPOSITION.**—A nonpublic record of a disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall be retained by the Department of Justice solely for the purpose of use by the courts in determining in any subsequent proceeding whether a person qualifies for the disposition provided in subsection (a) or the expungement provided in subsection (c). A disposition under subsection (a), or a conviction that is the subject of an expungement order under

subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

"(c) EXPUNGEMENT OF RECORD OF DISPOSITION.—If the case against a person found guilty of an offense under section 404 of the Controlled Substances Act (21 U.S.C. 844) is the subject of a disposition under subsection (a), and the person was less than twenty-one years old at the time of the offense, the court shall enter an expungement order upon the application of such person. The expungement order shall direct that there be expunged from all official records, except the nonpublic records referred to in subsection (b), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.

"SUBCHAPTER B—FINES

"Sec.

"3611. Payment of a fine.

"3612. Collection of an unpaid fine.

"3613. Civil remedies for satisfaction of an unpaid fine.

"3614. Resentencing upon failure to pay a fine.

"3615. Criminal default.

"SUBCHAPTER B—FINES

18 USC 3611.

"§ 3611. Payment of a fine

Ante, p. 1995.

"A person who has been sentenced to pay a fine pursuant to the provisions of subchapter C of chapter 227 shall pay the fine immediately, or by the time and method specified by the sentencing court, to the clerk of the court. The clerk shall forward the payment to the United States Treasury.

18 USC 3612.

"§ 3612. Collection of an unpaid fine

"(a) DISPOSITION OF PAYMENT.—The clerk shall forward each fine payment to the United States Treasury and shall notify the Attorney General of its receipt within ten working days.

"(b) CERTIFICATION OF IMPOSITION.—If a fine exceeding \$100 is imposed, modified, or remitted, the sentencing court shall incorporate in the order imposing, remitting, or modifying such fine, and promptly certify to the Attorney General—

"(1) the name of the person fined;

"(2) his current address;

"(3) the docket number of the case;

"(4) the amount of the fine imposed;

"(5) any installment schedule;

"(6) the nature of any modification or remission of the fine or installment schedule; and

"(7) the amount of the fine that is due and unpaid.

"(c) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (b). An order

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of restitution, pursuant to section 3556, does not create any right of action against the United States by the person to whom restitution is ordered to be paid.

"(d) NOTIFICATION OF DELINQUENCY.—Within ten working days after a fine is determined to be delinquent as provided in section 3572(i), the Attorney General shall notify the person whose fine is delinquent, by certified mail, to inform him that the fine is delinquent.

"(e) NOTIFICATION OF DEFAULT.—Within ten working days after a fine is determined to be in default as provided in section 3572(j), the Attorney General shall notify the person defaulting, by certified mail, to inform him that the fine is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.

"(f) INTEREST, MONETARY PENALTIES FOR DELINQUENCY, AND DEFAULT.—Upon a determination of willful nonpayment, the court may impose the following interest and monetary penalties:

"(1) INTEREST.—Notwithstanding any other provision of law, interest at the rate of 1 per centum per month, or 12 per centum per year, shall be charged, beginning the thirty-first day after sentencing on the first day of each month during which any fine balance remains unpaid, including sums to be paid pursuant to an installment schedule.

"(2) MONETARY PENALTIES FOR DELINQUENT FINES.—Notwithstanding any other provision of law, a penalty sum equal to 10 per centum shall be charged for any portion of a criminal fine which has become delinquent. The Attorney General may waive all or part of the penalty for good cause.

Waiver.

"§ 3613. Civil remedies for satisfaction of an unpaid fine

18 USC 3613.

"(a) LIEN.—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

Ante, p. 1995.

"(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

26 USC 6325.

"(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

"(b) EXPIRATION OF LIEN.—A lien becomes unenforceable and liability to pay a fine expires—

"(1) twenty years after the entry of the judgment; or

"(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f),

"Sec.
"3621. Imprisonment
"3622. Temporary
"3623. Transfer of
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"SUBCHAPTER C—IMPRISONMENT

- "Sec.
"3621. Imprisonment of a convicted person.
"3622. Temporary release of a prisoner.
"3623. Transfer of a prisoner to State authority.
"3624. Release of a prisoner.
"3625. Inapplicability of the Administrative Procedure Act.

"SUBCHAPTER C—IMPRISONMENT

"§ 3621. Imprisonment of a convicted person

18 USC 3621.

"(a) COMMITMENT TO CUSTODY OF BUREAU OF PRISONS.—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

Ante, p. 1998.

"(b) PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

- "(1) the resources of the facility contemplated;
"(2) the nature and circumstances of the offense;
"(3) the history and characteristics of the prisoner;
"(4) any statement by the court that imposed the sentence—
 "(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
 "(B) recommending a type of penal or correctional facility as appropriate; and
"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

Post, p. 2019.

The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another.

"(c) DELIVERY OF ORDER OF COMMITMENT.—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

"(d) DELIVERY OF PRISONER FOR COURT APPEARANCES.—The United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

"§ 3622. Temporary release of a prisoner

18 USC 3622.

"The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be

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imposed in him, by authorizing him, under prescribed conditions, to—

"(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

"(1) visiting a relative who is dying;

"(2) attending a funeral of a relative;

"(3) obtaining medical treatment not otherwise available;

"(4) contacting a prospective employer;

"(5) establishing or reestablishing family or community ties; or

"(6) engaging in any other significant activity consistent with the public interest;

"(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

"(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

"(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

"(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

18 USC 3623.

"§ 3623. Transfer of a prisoner to State authority

"The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if—

"(1) the transfer has been requested by the Governor or other executive authority of the State;

"(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

"(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

18 USC 3624.

"§ 3624. Release of a prisoner

"(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

"(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration

of his life, shall be released beyond the term of his imprisonment unless the Bureau has not satisfied the regulations issued to the year, the prisoner's sentence determines the credit made within Such credit received. Credit that has last year be prorated.

"(c) PRE-RELEASE.—The extent of practice onment spent last 10 per cent will afford to prepare for Probation Service a prisoner's discharge.

"(d) ALLOCATION.—Upon the re-imprisonment

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of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning after the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

“(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

“(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

“(1) suitable clothing;

“(2) an amount of money, not more than \$500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

“(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

“(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment. The term runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release, except that it does not run during any period in which the person is imprisoned, other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a Federal, State, or local crime. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

18 USC 3625.

"§ 3625. Inapplicability of the Administrative Procedure Act

"The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.";

18 USC 3663.

(3) in section 3663 (formerly section 3579):

(A) by amending subsection (g) to read as follows:

"(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation, modify the term or conditions of supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay."; and

(B) by amending subsection (h) to read as follows:

"(h) An order of restitution may be enforced by the United States in the manner provided in sections 3812 and 3813 or in the same manner as a judgment in a civil action, and by the victim named in the order to receive the restitution in the same manner as a judgment in a civil action.";

(4) adding the following new section at the end of chapter 232:

18 USC 3673.

"§ 3673. Definitions for sentencing provisions

"As used in chapters 227 and 229—

"(a) 'found guilty' includes acceptance by a court of a plea of guilty or nolo contendere;

"(b) 'commission of an offense' includes the attempted commission of an offense, the consummation of an offense, and any immediate flight after the commission of an offense; and

"(c) 'law enforcement officer' means a public servant authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation, or prosecution of an offense."; and

(5) adding the following caption and sectional analysis at the beginning of new chapter 232:

"CHAPTER 232—MISCELLANEOUS SENTENCING PROVISIONS

"Sec.

"3661. Use of information for sentencing.

"3662. Conviction records.

"3663. Order of restitution.

"3664. Procedure for issuing order of restitution.

"3665. Firearms possessed by convicted felons.

"3666. Bribe moneys.

"3667. Liquors and related property; definitions.

"3668. Remission or mitigation of forfeitures under liquor laws; possession pending trial.

"3669. Conveyance carrying liquor.

"3670. Disposition of conveyances seized for violation of the Indian liquor laws.

"3671. Vessels carrying explosives and steerage passengers.

"3672. Duties of Director of Administrative Office of the United States Courts.

"3673. Definitions for sentencing provisions."

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(b) The chapter analysis of part II of title 18, United States Code, is amended by striking out the items relating to chapters 227, 229, and 231, and inserting in lieu thereof the following:

"227. Sentences.....	3551
"229. Post-Sentence Administration.....	3601
"231. Repealed.....	
"232. Miscellaneous Sentencing Provisions.....	3661".

SEC. 213. (a) Chapter 235 of title 18, United States Code, is amended by adding the following new section at the end thereof:

"§ 3742. Review of a sentence

18 USC 3742.

"(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a); or

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"(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is greater than—

"(A) the sentence specified in the applicable guideline to the extent that the sentence includes a greater fine or term of imprisonment or term of supervised release than the maximum established in the guideline, or includes a more limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the maximum established in the guideline; and

"(B) the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

18 USC app.

"(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is greater than the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure.

"(b) APPEAL BY THE GOVERNMENT.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

"(3) was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1), and the sentence is less than—

"(A) the sentence specified in the applicable guideline to the extent that the sentence includes a lesser fine or term of imprisonment or term of supervised release than the minimum established in the guideline, or includes a less limiting condition of probation or supervised release under section 3563 (b)(6) or (b)(11) than the minimum established in the guideline; and

"(B) the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure; or

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Ante, p. 1987.

"(4) was imposed for an offense for which no sentencing guideline has been issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and is less than the sentence specified in a plea agreement, if any, under Rule 11 (e)(1)(B) or (e)(1)(C) of the Federal Rules of Criminal Procedure;

and the Attorney General or the Solicitor General personally approves the filing of the notice of appeal.

"(c) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

"(1) that portion of the record in the case that is designated as pertinent by either of the parties;

"(2) the presentence report; and

"(3) the information submitted during the sentencing proceeding.

"(d) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

"(1) was imposed in violation of law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

"(3) is outside the range of the applicable sentencing guideline, and is unreasonable, having regard for—

"(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

"(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous.

"(e) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—

"(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, it shall—

"(A) remand the case for further sentencing proceedings; or

"(B) correct the sentence;

"(2) is outside the range of the applicable sentencing guideline and is unreasonable, it shall state specific reasons for its conclusions and—

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and—

"(i) remand the case for imposition of a lesser sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a lesser sentence;

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and—

"(i) remand the case for imposition of a greater sentence;

"(ii) remand the case for further sentencing proceedings; or

"(iii) impose a greater sentence; or

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"(3) was not imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, and is not unreasonable, it shall affirm the sentence."
(b) The sectional analysis of chapter 235 of title 18, United States Code, is amended by adding the following new item after the item relating to section 3741:
"3742. Review of a sentence."

SEC. 214. Chapter 403 of title 18, United States Code is amended as follows:

(a) Section 5037 is amended—

- (1) by redesignating subsection (c) as subsection (d); and
- (2) by striking out subsections (a) and (b) and inserting the following new subsections in lieu thereof:

"(a) If the court finds a juvenile to be a juvenile delinquent, the court shall hold a disposition hearing concerning the appropriate disposition no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study pursuant to subsection (e). After the disposition hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court may suspend the findings of juvenile delinquency, enter an order of restitution pursuant to section 3556, place him on probation, or commit him to official detention. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

"(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old, beyond the lesser of—

"(A) three years; or

"(B) the maximum term that would be authorized by section 3561(b) if the juvenile had been tried and convicted as an adult.

The provisions dealing with probation set forth in sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

"(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend—

"(1) in the case of a juvenile who is less than eighteen years old, beyond the lesser of—

"(A) the date when the juvenile becomes twenty-one years old; or

"(B) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult; or

"(2) in the case of a juvenile who is between eighteen and twenty-one years old—

"(A) who if convicted as an adult would be convicted of a Class A, B, or C felony, beyond five years; or

Children and
youth.
18 USC 5037.

Post, p. 2019.

Ante, pp. 1976,
1985.

“(B) in any other case beyond the lesser of—

“(i) three years; or

“(ii) the maximum term of imprisonment that would be authorized by section 3581(b) if the juvenile had been tried and convicted as an adult.”.

Repeal.
18 USC 5041.
18 USC 5042.

(b) Section 5041 is repealed.

(c) Section 5042 is amended by—

(1) striking out “parole or” each place it appears in the caption and text; and

(2) striking out “parolee or”.

(d) The sectional analysis is amended by striking out the items relating to sections 5041 and 5042 and inserting in lieu thereof the following:

“5041. Repealed.

“5042. Revocation of Probation.”.

18 USC app.

SEC. 215. The Federal Rules of Criminal Procedure are amended as follows:

(a) Rule 32 is amended—

(1) by deleting subdivision (a)(1) and inserting in lieu thereof the following:

“(1) IMPOSITION OF SENTENCE.—Sentence shall be imposed without unnecessary delay, but the court may, upon a motion that is jointly filed by the defendant and by the attorney for the Government and that asserts a factor important to the sentencing determination is not capable of being resolved at that time, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. Prior to the sentencing hearing, the court shall provide the counsel for the defendant and the attorney for the Government with notice of the probation officer’s determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney for the Government an opportunity to comment upon the probation officer’s determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also—

“(A) determine that the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report made available pursuant to subdivision (c)(3)(A) or summary thereof made available pursuant to subdivision (c)(3)(B);

“(B) afford counsel for the defendant an opportunity to speak on behalf of the defendant; and

“(C) address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of the sentence.

The attorney for the Government shall have an equivalent opportunity to speak to the court. Upon a motion that is jointly filed by the defendant and by the attorney for the Government, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney for the Government.”;

(2) in subdivision (a)(2), by adding “, including any right to appeal the sentence,” after “right to appeal” in the first sentence;

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Oct. 12 CONT. APPROP.—CRIME CONTROL ACT

P.L. 98-473
Sec. 215

(3) in subdivision (a)(2), by adding “, except that the court shall advise the defendant of any right to appeal his sentence” after “nolo contendere” in the second sentence;

(4) by amending the first sentence of subdivision (c)(1) to read as follows:

“A probation officer shall make a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. 3553, and the court explains this finding on the record.”;

(5) by amending subdivision (c)(2) to read as follows:

“(2) REPORT.—The report of the presentence investigation shall contain—

“(A) information about the history and characteristics of the defendant, including his prior criminal record, if any, his financial condition, and any circumstances affecting his behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

“(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission pursuant to section 994(a) of title 28, that the probation officer believes to be applicable to the defendant’s case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1); and an explanation by the probation officer of any factors that may indicate that a sentence of a different kind or of a different length than one within the applicable guideline would be more appropriate under all the circumstances;

“(C) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2);

“(D) verified information stated in a nonargumentative style containing an assessment of the financial, social, psychological, and medical impact upon, and cost to, any individual against whom the offense has been committed;

“(E) unless the court orders otherwise, information concerning the nature and extent of nonprison programs and resources available for the defendant; and

“(F) such other information as may be required by the court.”;

(6) in subdivision (c)(3)(A), by deleting “exclusive of any recommendations as to sentence” and inserting in lieu thereof “, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence,”;

(7) in subdivision (c)(3)(D), delete “or the Parole Commission”;

(8) in subdivision (c)(3)(F), delete “or the Parole Commission pursuant to 18 U.S.C. §§ 4205(c), 4252, 5010(e), or 5037(c)” and substitute “pursuant to 18 U.S.C. § 3552(b)”;

(9) by deleting “imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c),” in subdivision (d).

(b) Rule 35 is amended to read as follows:

“Rule 35. Correction of Sentence

“(a) CORRECTION OF A SENTENCE ON REMAND.—The court shall correct a sentence that is determined on appeal under 18 U.S.C. 3742 to have been imposed in violation of law, to have been imposed as a

Post, p. 2019.

18 USC app.

Ante, p. 2011.

result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court—

“(1) for imposition of a sentence in accord with the findings of the court of appeals; or

“(2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

“(b) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES.—The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).”

Post, p. 2019.
18 USC app.

(c) Rule 38 is amended—

(1) by amending the caption to read: “Stay of Execution” and deleting “(a) Stay of Execution.”;

(2) by deleting subdivisions (b) and (c);

(3) by redesignating subdivisions (a)(1) through (a)(4) as subdivisions (a) through (d), respectively;

(4) in subdivision (a), by adding “from the conviction or sentence” after “is taken”;

(5) in the first sentence of subdivision (b), by adding “from the conviction or sentence” after “is taken”;

(6) by amending subdivision (d) to read as follows:

“(d) PROBATION.—A sentence of probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.”; and

(7) by adding new subdivisions (e) and (f) as follows:

“(e) CRIMINAL FORFEITURE, NOTICE TO VICTIMS, AND RESTITUTION.—A sanction imposed as part of the sentence pursuant to 18 U.S.C. 3554, 3555, or 3556 may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

“(f) DISABILITIES.—A civil or employment disability arising under a Federal statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may enter a restraining order or an injunction, or take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.”

18 USC app.

(d) Rule 40 is amended by deleting “3653” in subdivision (d)(1) and inserting in lieu thereof “3605”.

18 USC app.

(e) Rule 54 is amended by amending the definition of “Petty offense” in subdivision (c) to read as follows: “ ‘Petty offense’ means a class B or C misdemeanor or an infraction.”

18 USC app.

(f) Rule 6(e)(3)(C) is amended by adding the following subdivision:

“(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an

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appropriate official of a state or subdivision of a state for the purpose of enforcing such law.”.

- (g) The Table of Rules that precedes Rule 1 is amended as follows:
(1) The item relating to Rule 35 is amended to read as follows:

“35. Correction of Sentence.

- “(a) Correction of a sentence on remand.
“(b) Correction of a sentence for changed circumstances.”.

- (2) The item relating to Rule 38 is amended to read as follows:

“38. Stay of Execution.

- “(a) Death.
“(b) Imprisonment.
“(c) Fine.
“(d) Probation.
“(e) Criminal forfeiture, notice to victims, and restitution.
“(f) Disabilities.”.

SEC. 216. (a) The Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates are amended by adding the following new rule at the end thereof:

“Rule 9. Definition

“As used in these rules, ‘petty offense’ means a Class B or C misdemeanor or an infraction.”.

- (b) The Table of Rules that precedes Rule 1 is amended by adding at the end thereof the following new item:

“9. Definition.”.

SEC. 217. (a) Title 28 of the United States Code is amended by adding the following new chapter after chapter 57:

“CHAPTER 58—UNITED STATES SENTENCING
COMMISSION

“Sec.

- “991. United States Sentencing Commission; establishment and purposes.
“992. Terms of office; compensation.
“993. Powers and duties of Chairman.
“994. Duties of the Commission.
“995. Powers of the Commission.
“996. Director and staff.
“997. Annual report.
“998. Definitions.

“§ 991. United States Sentencing Commission; establishment and purposes

28 USC 991.

“(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges in regular active service selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four

of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

"(b) The purposes of the United States Sentencing Commission are to—

"(1) establish sentencing policies and practices for the Federal criminal justice system that—

"(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

"(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

"(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

"(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Ante, p. 1989.

28 USC 992.

"§ 992. Terms of office; compensation

"(a) The voting members of the United States Sentencing Commission shall be appointed for six-year terms, except that the initial terms of the first members of the Commission shall be staggered so that—

"(1) two members, including the Chairman, serve terms of six years;

"(2) three members serve terms of four years; and

"(3) two members serve terms of two years.

"(b) No voting member may serve more than two full terms. A voting member appointed to fill a vacancy that occurs before the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term.

"(c) The Chairman of the Commission shall hold a full-time position and shall be compensated during the term of office at the annual rate at which judges of the United States courts of appeals are compensated. The voting members of the Commission, other than the Chairman, shall hold full-time positions until the end of the first six years after the sentencing guidelines go into effect pursuant to section 225(a)(1)(B)(ii) of the Sentencing Reform Act of 1983, and shall be compensated at the annual rate at which judges of the United States courts of appeals are compensated. Thereafter, the voting members of the Commission, other than the Chairman, shall hold part-time positions and shall be paid at the daily rate at which judges of the United States courts of appeals are compensated. A Federal judge may serve as a member of the Commission without resigning his appointment as a Federal judge.

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“§ 993. Powers and duties of Chairman

28 USC 993.

“The Chairman shall—

“(a) call and preside at meetings of the Commission, which shall be held for at least two weeks in each quarter after the members of the Commission hold part-time positions; and

“(b) direct—

“(1) the preparation of requests for appropriations for the Commission; and

“(2) the use of funds made available to the Commission.

“§ 994. Duties of the Commission

28 USC 994.

“(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

“(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

“(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

“(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

“(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term; and

“(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively;

“(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

“(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

“(B) the conditions of probation and supervised release set forth in sections 3563(b) and 3583(d) of title 18;

“(C) the sentence modification provisions set forth in sections 3563(c), 3573, and 3582(c) of title 18;

“(D) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e)(1); and

“(E) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624(c) of title 18; and

“(3) guidelines or general policy statements regarding the appropriate use of the probation revocation provisions set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of probation or supervised release set forth in sections 3563(c), 3564(d), and 3583(e) of title 18.

“(b) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each

Ante, p. 1989.

Ante, pp. 1990, 1991.

Ante, pp. 1993, 1999.

Ante, pp. 1997, 1998.
18 USC app.

Ante, p. 2007.

Ante, p. 2008.

Ante, p. 1995.

Ante, pp. 1993, 1994, 1999.

category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than 25 per centum.

"(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) the grade of the offense;

"(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

"(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

"(4) the community view of the gravity of the offense;

"(5) the public concern generated by the offense;

"(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

"(7) the current incidence of the offense in the community and in the Nation as a whole.

"(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

"(1) age;

"(2) education;

"(3) vocational skills;

"(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

"(5) physical condition, including drug dependence;

"(6) previous employment record;

"(7) family ties and responsibilities;

"(8) community ties;

"(9) role in the offense;

"(10) criminal history; and

"(11) degree of dependence upon criminal activity for a livelihood.

Nondiscrimination.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

"(e) The Commission shall consider the statements, term of imprisonment, and other factors, including the ties and responsibilities and re-

"(f) The Commission shall consider the subsection (c) of section 991(b)(1), with respect to the 991(b)(1)(B) of the guidelines, reducing un-

"(g) The Commission shall consider the subsection (c) of section 3553 of the guidelines, account the facilities and resources available concerning such facilities and resources of the guidelines chapter. The Commission shall be for prison population determined

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"(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

"(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

"(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

Ante, p. 1987.

"(h) The Commission shall assure that the guidelines will specify a sentence to a term of imprisonment at or near the maximum term authorized by section 3581(b) of title 18, United States Code, for categories of defendants in which the defendant is eighteen years old or older and—

Ante, p. 1998.

"(1) has been convicted of a felony that is—

"(A) a crime of violence; or

"(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); and

"(2) has previously been convicted of two or more prior felonies, each of which is—

"(A) a crime of violence; or

"(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and section 1 of the Act of September 15, 1980 (21 U.S.C. 955a).

"(i) The Commission shall assure that the guidelines will specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

"(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

"(2) committed the offense as part of a pattern of criminal conduct from which he derived a substantial portion of his income;

"(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

"(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a

Federal, State, or local felony for which he was ultimately convicted; or

"(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

"(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

"(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

"(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

"(1) the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—

"(A) multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and

"(B) multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

"(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

"(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

"(n) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any

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Ante, p. 1989.

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observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

"(o) The Commission, at or after the beginning of a regular session of Congress but not later than the first day of May, shall report to the Congress any amendments of the guidelines promulgated pursuant to subsection (a)(1), and a report of the reasons therefor, and the amended guidelines shall take effect one hundred and eighty days after the Commission reports them, except to the extent the effective date is enlarged or the guidelines are disapproved or modified by Act of Congress.

Report.

"(p) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

Report.

"(1) modernization of existing facilities;

"(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

"(3) use of existing Federal facilities, such as those currently within military jurisdiction.

"(q) The Commission, within three years of the date of enactment of the Sentencing Reform Act of 1983, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

"(r) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

Petition.

"(1) the community view of the gravity of the offense;

"(2) the public concern generated by the offense; and

"(3) the deterrent effect particular sentences may have on the commission of the offense by others.

Within one hundred and eighty days of the filing of such petition the Commission shall provide written notice to the defendant whether or not it has approved the petition. If the petition is disapproved the written notice shall contain the reasons for such disapproval. The Commission shall submit to the Congress at least annually an analysis of such written notices.

"(s) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

Ante, p. 1998.

"(t) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify by what amount the sentences of prisoners serving terms of imprisonment that are outside the applicable guideline ranges for the offense may be reduced.

Report.

5 USC 553.

28 USC 995.

5 USC 8101 et
seq.

"(u) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense involving a violation of a specific prohibition encompassed within the general prohibition.

"(v) The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

"(w) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

"§ 995. Powers of the Commission

"(a) The Commission, by vote of a majority of the members present and voting, shall have the power to—

"(1) establish general policies and promulgate such rules and regulations for the Commission as are necessary to carry out the purposes of this chapter;

"(2) appoint and fix the salary and duties of the Staff Director of the Sentencing Commission, who shall serve at the discretion of the Commission and who shall be compensated at a rate not to exceed the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates (5 U.S.C. 5332);

"(3) deny, revise, or ratify any request for regular, supplemental, or deficiency appropriations prior to any submission of such request to the Office of Management and Budget by the Chairman;

"(4) procure for the Commission temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code;

"(5) utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefor;

"(6) without regard to 31 U.S.C. 3324, enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary in the conduct of the functions of the Commission, with any public agency, or with any person, firm, association, corporation, educational institution, or non-profit organization;

"(7) accept and employ, in carrying out the provisions of this title, voluntary and uncompensated services, notwithstanding the provisions of 31 U.S.C. 1342, however, individuals providing such services shall not be considered Federal employees except for purposes of chapter 81 of title 5, United States Code, with respect to job-incurred disability and title 28, United States Code, with respect to tort claims;

"(8) request such information, data, and reports from any Federal agency or judicial officer as the Commission may from

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time to time require and as may be produced consistent with other law;

"(9) monitor the performance of probation officers with regard to sentencing recommendations, including application of the Sentencing Commission guidelines and policy statements;

"(10) issue instructions to probation officers concerning the application of Commission guidelines and policy statements;

"(11) arrange with the head of any other Federal agency for the performance by such agency of any function of the Commission, with or without reimbursement;

"(12) establish a research and development program within the Commission for the purpose of—

"(A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

"(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;

"(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;

"(14) publish data concerning the sentencing process;

"(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;

"(16) collect systematically and disseminate information regarding effectiveness of sentences imposed;

"(17) devise and conduct, in various geographical locations, seminars and workshops providing continuing studies for persons engaged in the sentencing field;

"(18) devise and conduct periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process;

"(19) study the feasibility of developing guidelines for the disposition of juvenile delinquents;

"(20) make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane and rational sentencing policy;

"(21) hold hearings and call witnesses that might assist the Commission in the exercise of its powers or duties; and

"(22) perform such other functions as are required to permit Federal courts to meet their responsibilities under section 3553(a) of title 18, United States Code, and to permit others involved in the Federal criminal justice system to meet their related responsibilities.

"(b) The Commission shall have such other powers and duties and shall perform such other functions as may be necessary to carry out the purposes of this chapter, and may delegate to any member or designated person such powers as may be appropriate other than the power to establish general policy statements and guidelines pursuant to section 994(a) (1) and (2), the issuance of general policies and promulgation of rules and regulations pursuant to subsection (a)(1)

Ante, p. 1989.

of this section, and the decisions as to the factors to be considered in establishment of categories of offenses and offenders pursuant to section 994(b). The Commission shall, with respect to its activities under subsections (a)(9), (a)(10), (a)(11), (a)(12), (a)(13), (a)(14), (a)(15), (a)(16), (a)(17), and (a)(18), to the extent practicable, utilize existing resources of the Administrative Office of the United States Courts and the Federal Judicial Center for the purpose of avoiding unnecessary duplication.

"(c) Upon the request of the Commission, each Federal agency is authorized and directed to make its services, equipment, personnel, facilities, and information available to the greatest practicable extent to the Commission in the execution of its functions.

"(d) A simple majority of the membership then serving shall constitute a quorum for the conduct of business. Other than for the promulgation of guidelines and policy statements pursuant to section 994, the Commission may exercise its powers and fulfill its duties by the vote of a simple majority of the members present.

"(e) Except as otherwise provided by law, the Commission shall maintain and make available for public inspection a record of the final vote of each member on any action taken by it.

28 USC 996.

"§ 996. Director and staff

"(a) The Staff Director shall supervise the activities of persons employed by the Commission and perform other duties assigned to him by the Commission.

"(b) The Staff Director shall, subject to the approval of the Commission, appoint such officers and employees as are necessary in the execution of the functions of the Commission. The officers and employees of the Commission shall be exempt from the provisions of part III of title 5, United States Code, except the following chapters: 81 (Compensation for Work Injuries), 83 (Retirement), 85 (Unemployment Compensation), 87 (Life Insurance), 89 (Health Insurance), and 91 (Conflicts of Interest).

5 USC 2101.
5 USC 8101 et
seq., 8301 et seq.,
8501 et seq., 8701
et seq., 8901 et
seq.
28 USC 997.

"§ 997. Annual report

"The Commission shall report annually to the Judicial Conference of the United States, the Congress, and the President of the United States on the activities of the Commission.

28 USC 998.

"§ 998. Definitions

"As used in this chapter—

"(a) 'Commission' means the United States Sentencing Commission;

"(b) 'Commissioner' means a member of the United States Sentencing Commission;

"(c) 'guidelines' means the guidelines promulgated by the Commission pursuant to section 994(a) of this title; and

"(d) 'rules and regulations' means rules and regulations promulgated by the Commission pursuant to section 995 of this title."

(b) The chapter analysis of part III of title 28, United States Code, is amended by adding after the item relating to chapter 57 the following new item:

"58. United States Sentencing Commission 991".

SEC. 21
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REPEALERS

SEC. 218. (a) The following provisions of title 18, United States Code, are repealed:

- (1) section 1;
- (2) section 3012;
- (3) sections 4082(a), 4082(b), 4082(c), 4082(e), 4084, and 4085;
- (4) chapter 309;
- (5) chapter 311;
- (6) chapter 314;
- (7) sections 4281, 4283, and 4284; and
- (8) chapter 402.

18 USC 4161 *et*
seq.
18 USC 4201 *et*
seq.
18 USC 4251 *et*
seq.
18 USC 5005 *et*
seq.

Redesignate subsections in section 4082 accordingly.

(b) The item relating to section 1 in the sectional analysis of chapter 1 of title 18, United States Code, is amended to read:
"1. Repealed."

(c) The item relating to section 3012 in the sectional analysis of chapter 201 of title 18, United States Code, is amended to read:
"3012. Repealed."

(d) The chapter analysis of Part III of title 18, United States Code, is amended by amending the items relating to—

(1) chapters 309 and 311 to read as follows:

"309. Repealed."

"311. Repealed."

and

(2) chapter 314 to read as follows:

"314. Repealed."

(e) The items relating to sections 4084 and 4085 in the sectional analysis of chapter 305 of title 18, United States Code, are amended to read as follows:

"4084. Repealed."

"4085. Repealed."

(f) The sectional analysis of chapter 315 of title 18, United States Code, is amended by amending the items relating to—

(1) section 4281 to read:

"4281. Repealed.";

and

(2) sections 4283 and 4284 to read as follows:

"4283. Repealed."

"4284. Repealed."

(g) The item relating to chapter 402 in the chapter analysis of Part IV of title 18, United States Code, is amended to read as follows:

"402. Repealed."

SEC. 219. (a) Sections 404(b) and 409 of the Controlled Substances Act (21 U.S.C. 844(b) and 849) are repealed.

(b) Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by deleting the designation "(a)" at the beginning of the subsection.

TECHNICAL AND CONFORMING AMENDMENTS

SEC. 220. The Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) is amended as follows:

Aliens.

(a) The second sentence of section 212(a)(9) (8 U.S.C. 1182(a)(9)) is amended to read: "An alien who would be excludable because of the conviction of an offense for which the sentence actually imposed did not exceed a term of imprisonment in excess of six months, or who would be excludable as one who admits the commission of an offense for which a sentence not to exceed one year's imprisonment might have been imposed on him, may be granted a visa and admitted to the United States if otherwise admissible: *Provided*, That the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense."

(b) Section 242(h) (8 U.S.C. 1252(h)) is amended by adding "supervised release," after "parole,".

Sec. 221. Section 4 of the Act of September 28, 1962 (16 U.S.C. 460k-3) is amended by deleting "petty offense (18 U.S.C. 1)" and substituting "misdemeanor".

Sec. 222. Section 9 of the Act of October 8, 1964 (16 U.S.C. 460n-8) is amended—

(a) in the first paragraph, by deleting "commissioner" each place it appears and substituting "magistrate"; and

(b) in the second paragraph, by amending the first sentence to read: "The functions of the magistrate shall include the trial and sentencing of persons charged with the commission of misdemeanors and infractions as defined in section 3581 of title 18, United States Code."

Sec. 223. Title 18 of the United States Code is amended as follows:

(a) Section 924(a) is amended by deleting ", and shall become eligible for parole as the Board of Parole shall determine".

(b) Section 1161 is amended by deleting "3618" and substituting "3669".

(c) Section 1761(a) is amended by adding ", supervised release," after "parole".

(d) Section 2114 is amended by adding "not more than" after "imprisoned".

(e) Section 3006A is amended—

(1) in subsections (a)(1) and (b), by deleting "misdemeanor (other than a petty offense as defined in section 1 of this title)" each place it appears and substituting "Class A misdemeanor"; and

(2) in subsections (a)(3) and (g), deleting "subject to revocation of parole," each place it appears.

(f) Section 3143, as amended by this Act, is amended—

(1) in subsection (a), by adding "other than a person for whom the applicable guideline promulgated pursuant to 28 U.S.C. 994 does not recommend a term of imprisonment," after "sentence,"; and

(2) in subsection (c), by adding the following at the end thereof: "The judge shall treat a defendant in a case in which an appeal has been taken by the United States pursuant to the provisions of section 3742 in accordance with the provisions of—

"(1) subsection (a) if the person has been sentenced to a term of imprisonment; or

"(2) section 3142 if the person has not been sentenced to a term of imprisonment."

(g) Section 3147, as amended by this Act, is amended—

(1) in paragraph (1), by deleting "not less than two years and"; and

Ante, p. 1981.

Ante, p. 2011.

Ante, p. 1976.

Ante, p. 1983.

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- (2) in paragraph (2), by deleting "not less than ninety days and".
- (h) Section 3156(b)(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction". 18 USC 3156.
- (i) Section 3172(2) is amended by deleting "petty offense as defined in section 1(3) of this title" and substituting "Class B or C misdemeanor or an infraction". 18 USC 3172.
- (j) Section 3401 is amended— 18 USC 3401.
- (1) by repealing subsection (g) and redesignating (h) to (g); and
- (2) in subsection (h), by deleting "petty offense case" and substituting "Class B or C misdemeanor case, or infraction case,".
- (k) Section 3670 (formerly section 3619) is amended by deleting "3617" and "3618" and substituting "3668" and "3669", respectively. *Ante*, p. 1987.
- (l) Section 4004 is amended by deleting "record clerks, and parole officers" and substituting "and record clerks". 18 USC 4004.
- (m) Chapter 306 is amended as follows: 18 USC 4101.
- (1) Section 4101 is amended—
- (A) in subsection (f), by adding ", including a term of supervised release pursuant to section 3583" after "supervision"; and
- (B) in subsection (g), by deleting "to a penalty of imprisonment the execution of which is suspended and" and substituting "under which", and by deleting "the suspended" and substituting "a".
- (2) Section 4105(c) is amended— 18 USC 4105.
- (A) in paragraph (1), by deleting "for good time" the second place it appears and substituting "toward service of sentence for satisfactory behavior";
- (B) in paragraphs (1) and (2), by deleting "section 4161" and substituting "section 3624(b)";
- (C) in paragraph (1), by deleting "section 4164" and substituting "section 3624(a)";
- (D) by repealing paragraph (3);
- (E) by amending paragraph (4) to read as follows:
- "(3) Credit toward service of sentence may be withheld as provided in section 3624(b) of this title."; and
- (F) by redesignating paragraphs accordingly.
- (3) Section 4106 is amended— 18 USC 4106.
- (A) in subsection (a), by deleting "Parole Commission" and substituting "Probation System";
- (B) by amending subsection (b) to read as follows:
- "(b) An offender transferred to the United States to serve a sentence of imprisonment shall be released pursuant to section 3624(a) of this title after serving the period of time specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1). He shall be released to serve a term of supervised release for any term specified in the applicable guideline. The provisions of section 3742 of this title apply to a sentence to a term of imprisonment under this subsection, and the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States has jurisdiction to review the period of imprisonment as though it had been imposed by the United States district court."; and
- (C) by repealing subsection (c).

18 USC 4108.

Ante, p. 2019.

(4) Section 4108(a) is amended by adding “, including any term of imprisonment or term of supervised release specified in the applicable sentencing guideline promulgated pursuant to 28 U.S.C. 994(a)(1),” after “consequences thereof”.

(n) Section 4321 is amended by deleting “parole or”.

(o) Section 4351(b) is amended by deleting “Parole Board” and substituting “Sentencing Commission”.

(p) Section 5002 is amended by deleting “Board of Parole, the Chairman of the Youth Division,” and substituting “United States Sentencing Commission.”

SEC. 224. The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended as follows:

(a) Section 401 (21 U.S.C. 841) is amended—

(1) in subsection (b)(1)(A), by deleting the last sentence;

(2) in subsection (b)(1)(B), by deleting the last sentence;

(3) in subsection (b)(2), by deleting the last sentence;

(4) in subsection (b)(4), by deleting “subsections (a) and (b) of,” and by adding “and section 3607 of title 18, United States Code” after “404”;

(5) in subsection (b)(5), by deleting the last sentence; and

(6) by repealing subsection (c).

(b) Section 405 (21 U.S.C. 845) is amended—

(1) in subsection (a), by deleting “(1)” the second place it appears, and by deleting “, and (2) at least twice any special parole term authorized by section 401(b), for a first offense involving the same controlled substance and schedule”; and

(2) in subsection (b), by deleting “(1)” the second place it appears, and by deleting “, and (2) at least three times any special parole term authorized by section 401(b), for a second or subsequent offense involving the same controlled substance and schedule”.

(c) Section 408(c) (21 U.S.C. 848(c)) is amended by deleting “and section 4202 of title 18 of the United States Code”.

SEC. 225. The Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) is amended as follows:

(a) Section 1010 (21 U.S.C. 960) is amended—

(1) in subsection (b)(1), by deleting the last sentence;

(2) in subsection (b)(2), by deleting the last sentence; and

(3) by repealing subsection (c).

(b) Section 1012(a) (21 U.S.C. 962(a)) is amended by deleting the last sentence.

SEC. 226. Section 114(b) of title 23, United States Code, is amended by adding “, supervised release,” after “parole”.

SEC. 227. Section 5871 of the Internal Revenue Code of 1954 (26 U.S.C. 5871) is amended by deleting “, and shall become eligible for parole as the Board of Parole shall determine”.

SEC. 228. Title 28 of the United States Code is amended as follows:

(a) Section 509 is amended—

(1) by adding “and” after paragraph (2) and, in paragraph (3), by deleting “; and” and substituting a period; and

(2) by repealing paragraph (4).

(b) Section 591(a) is amended by deleting “petty offense” and substituting “Class B or C misdemeanor or an infraction”.

(c) Section 2901 is amended—

(1) in subsection (e), by deleting “section 1” and substituting “section 3581”; and

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Sec. 235

(2) in subsection (g)(3), by adding “, supervised release,” after “parole”, and by adding “supervised release,” after “parole”.
SEC. 229. Section 504(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. 504(a)) and section 411(a) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(a)) are amended—

Post, p. 2131.

(a) by deleting “the Board of Parole of the United States Department of Justice” and substituting “if the offense is a Federal offense, the sentencing judge or, if the offense is a State or local offense, on motion of the United States Department of Justice, the district court of the United States for the district in which the offense was committed, pursuant to sentencing guidelines and policy statements issued pursuant to 28 U.S.C. 994(a);”;

Ante, p. 2019.

(b) by deleting “Board” and “Board’s” and substituting “court” and “court’s”, respectively; and

(c) by deleting “an administrative” and substituting “a”.
SEC. 230. Section 411(c)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(c)(3)) is amended by adding “or supervised release” after “parole”.

29 USC 1695.

SEC. 231. Section 425(b) of the Job Training and Partnership Act is amended by deleting “or parole” the first place it appears and substituting “, parole, or supervised release”.

SEC. 232. The Public Health Service Act (42 U.S.C. 201 et seq.) is amended as follows:

(a) Section 341(a) (42 U.S.C. 257(a)) is amended by deleting “or convicted of offenses against the United States and sentenced to treatment” and “addicts who are committed to the custody of the Attorney General pursuant to provisions of the Federal Youth Corrections Act (chapter 402 of title 18 of the United States Code);”.

(b) Section 343(d) (42 U.S.C. 259(d)) is amended by adding “or supervised release” after “parole”.

SEC. 232A. Section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) is amended by inserting “notwithstanding the provisions of 18 U.S.C. 3559(b),” before the term “if” in paragraphs (i)(1)(B) and (n)(1)(B).

49 USC app.
1472.

SEC. 233. Section 11507 of title 49, United States Code, is amended by adding “, supervised release,” after “parole”.

SEC. 234. Section 10(b)(7) of the Military Selective Service Act (50 U.S.C. App. 460(b)(7)) is amended by deleting “parole” and substituting “release”.

EFFECTIVE DATE

SEC. 235. (a)(1) This chapter shall take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment, except that—

18 USC 3551
note.

(A) the repeal of chapter 402 of title 18, United States Code, shall take effect on the date of enactment;

18 USC 5005 et
seq.
Guidelines.
Ante, p. 2017.

(B)(i) chapter 58 of title 28, United States Code, shall take effect on the date of enactment of this Act or October 1, 1983, whichever occurs later, and the United States Sentencing Commission shall submit the initial sentencing guidelines promulgated to section 994(a)(1) of title 28 to the Congress within eighteen months of the effective date of the chapter; and

Ante, p. 2019.

(ii) the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of

Ante, pp. 1998,
1999, 2008.
Report..

title 18, United States Code, shall not go into effect until the day after—

(I) the United States Sentencing Commission has submitted the initial set of sentencing guidelines to the Congress pursuant to subparagraph (B)(i), along with a report stating the reasons for the Commission's recommendations;

(II) the General Accounting Office has undertaken a study of the guidelines, and their potential impact in comparison with the operation of the existing sentencing and parole release system, and has, within one hundred and fifty days of submission of the guidelines, reported to the Congress the results of its study; and

(III) the Congress has had six months after the date described in subclause (I) in which to examine the guidelines and consider the reports; and

(IV) the provisions of sections 227 and 228 shall take effect on the date of enactment.

(2) For the purposes of section 992(a) of title 28, the terms of the first members of the United States Sentencing Commission shall not begin to run until the sentencing guidelines go into effect pursuant to paragraph (1)(B)(ii).

(b)(1) The following provisions of law in effect on the day before the effective date of this Act shall remain in effect for five years after the effective date as to an individual convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B):

(A) Chapter 311 of title 18, United States Code.

(B) Chapter 309 of title 18, United States Code.

(C) Sections 4251 through 4255 of title 18, United States Code.

(D) Sections 5041 and 5042 of title 18, United States Code.

(E) Sections 5017 through 5020 of title 18, United States Code, as to a sentence imposed before the date of enactment.

(F) The maximum term of imprisonment in effect on the effective date for an offense committed before the effective date.

(G) Any other law relating to a violation of a condition of release or to arrest authority with regard to a person who violates a condition of release.

(2) Notwithstanding the provisions of section 4202 of title 18, United States Code, as in effect on the day before the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.

(3) The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

(4) Notwithstanding the other provisions of this subsection, all laws in effect on the day before the effective date of this Act pertaining to an individual who is—

(A) released pursuant to a provision listed in paragraph (1); and

Ante, p. 2030.

Ante, p. 2018.

18 USC 4201 et
seq.
18 USC 4161 et
seq.

Release date.

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Oct. 12 CONT. APPROP.—CRIME CONTROL ACT

P.L. 98-473

Sec. 237

(B)(i) subject to supervision on the day before the expiration of the five-year period following the effective date of this Act; or
(ii) released on a date set pursuant to paragraph (3);
including laws pertaining to terms and conditions of release, revocation of release, provision of counsel, and payment of transportation costs, shall remain in effect as to the individual until the expiration of his sentence, except that the district court shall determine, in accord with the Federal Rules of Criminal Procedure, whether release should be revoked or the conditions of release amended for violation of a condition of release.

18 USC app.

(5) Notwithstanding the provisions of section 991 of title 28, United States Code, and sections 4351 and 5002 of title 18, United States Code, the Chairman of the United States Parole Commission or his designee shall be a member of the National Institute of Corrections, and the Chairman of the United States Parole Commission shall be a member of the Advisory Corrections Council and a nonvoting member of the United States Sentencing Commission, ex officio, until the expiration of the five-year period following the effective date of this Act. Notwithstanding the provisions of section 4351 of title 18, during the five-year period the National Institute of Corrections shall have seventeen members, including seven ex officio members. Notwithstanding the provisions of section 991 of title 28, during the five-year period the United States Sentencing Commission shall consist of nine members, including two ex officio, nonvoting members.

U.S. Parole
Commission,
Chairman.
Ante, p. 2017.

National
Institute of
Corrections,
members.
U.S. Sentencing
Commission,
members.

SEC. 236. (a)(1) Four years after the sentencing guidelines promulgated pursuant to section 994(a)(1), and the provisions of sections 3581, 3583, and 3624 of title 18, United States Code, go into effect, the General Accounting Office shall undertake a study of the guidelines in order to determine their impact and compare the guidelines system with the operation of the previous sentencing and parole release system, and, within six months of the undertaking of such study, report to the Congress the results of its study.

Study.
Report.
28 USC 994 note.
Ante, p. 2019.
Ante, pp. 1998,
1999, 2008.

(2) Within one month of the start of the study required under subsection (a), the United States Sentencing Commission shall submit a report to the General Accounting Office, all appropriate courts, the Department of Justice, and the Congress detailing the operation of the sentencing guideline system and discussing any problems with the system or reforms needed. The report shall include an evaluation of the impact of the sentencing guidelines on prosecutorial discretion, plea bargaining, disparities in sentencing, and the use of incarceration, and shall be issued by affirmative vote of a majority of the voting members of the Commission.

Report.

(b) The Congress shall review the study submitted pursuant to subsection (a) in order to determine—

Review.

(1) whether the sentencing guideline system has been effective;

(2) whether any changes should be made in the sentencing guideline system; and

(3) whether the parole system should be reinstated in some form and the life of the Parole Commission extended.

SEC. 237. (a)(1) Except as provided in paragraph (2), for each criminal fine for which the unpaid balance exceeds \$100 as of the effective date of this Act, the Attorney General shall, within one hundred and twenty days, notify the person by certified mail of his obligation, within thirty days after notification, to—

Penalties.
18 USC 3612
note.

(A) pay the fine in full;

(B) specify, and demonstrate compliance with, an installment schedule established by a court before enactment of the amendments made by this Act, specifying the dates on which designated partial payments will be made; or

(C) establish with the concurrence of the Attorney General, a new installment schedule of a duration not exceeding two years, except in special circumstances, and specifying the dates on which designated partial payments will be made.

(2) This subsection shall not apply in cases in which—

(A) the Attorney General believes the likelihood of collection is remote; or

(B) criminal fines have been stayed pending appeal.

(b) The Attorney General shall, within one hundred and eighty days after the effective date of this Act, declare all fines for which this obligation is unfulfilled to be in criminal default, subject to the civil and criminal remedies established by amendments made by this Act. No interest or monetary penalties shall be charged on any fines subject to this section.

(c) Not later than one year following the effective date of this Act, the Attorney General shall include in the annual crime report steps taken to implement this Act and the progress achieved in criminal fine collection, including collection data for each judicial district.

SEC. 238. (a) Title 18 of the United States Code is amended by adding the following new chapter after chapter 227:

Post, p. 3139.

“CHAPTER 228—IMPOSITION, PAYMENT, AND COLLECTION OF FINES

“Sec.

“3591. Imposition of a fine.

“3592. Payment of a fine, delinquency and default.

“3593. Modification or remission of fine.

“3594. Certification and notification.

“3595. Interest, monetary penalties for delinquency, and default.

“3596. Civil remedies for satisfaction of an unpaid fine.

“3597. Resentencing upon failure to pay a fine.

“3598. Statute of limitations.

“3599. Criminal default.

18 USC 3591.

“§ 3591. Imposition of a fine

“(a) FACTORS TO BE CONSIDERED IN IMPOSING A FINE.—The court, in determining whether to impose a fine, the amount of any fine, the time for payment, and the method of payment, shall consider—

“(1) the ability of the defendant to pay the fine in view of the income of the defendant, earning capacity and financial resources, and, if the defendant is an organization, the size of the organization;

“(2) the nature of the burden that payment of the fine will impose on the defendant, and on any person who is financially dependent on the defendant, relative to the burden which alternative punishments would impose;

“(3) any restitution or reparation made by the defendant in connection with the offense and any obligation imposed upon the defendant to make such restitution or reparation;

“(4) if the defendant is an organization, any measure taken by the organization to discipline its employees or agents responsible for the offense or to ensure against a recurrence of such an offense; and

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Oct. 12 CONT. APPROP.—CRIME CONTROL ACT

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Sec. 238

"(5) any other pertinent consideration.

"(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

"(1) modified or remitted pursuant to the provisions of section 3592;

"(2) corrected pursuant to the provisions of rule 35; or

"(3) appealed;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

Ante, p. 2015.

"§ 3592. Payment of a fine, delinquency and default

18 USC 3592.

"(a) TIME AND METHOD OF PAYMENT.—Payment of a fine is due immediately unless the court, at the time of sentencing—

"(1) requires payment by a date certain; or

"(2) establishes an installment schedule, the specific terms of which shall be fixed by the court.

"(b) INDIVIDUAL RESPONSIBILITIES FOR PAYMENT.—If a fine is imposed on an organization, it is the duty of each individual authorized to make disbursement of the assets of the organization to pay the fine from assets of the organization. If a fine is imposed on an agent or shareholder of an organization, the fine shall not be paid, directly or indirectly, out of the assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

"(c) RESPONSIBILITY TO PROVIDE CURRENT ADDRESS.—At the time of imposition of the fine, the court shall order the person fined to provide the Attorney General with a current mailing address for the entire period that any part of the fine remains unpaid. Failure to provide the Attorney General with a current address or a change in address shall be punishable as a contempt of court.

"(d) STAY OF FINE PENDING APPEAL.—Unless exceptional circumstances exist, if a sentence to pay a fine is stayed pending appeal, the court granting the stay shall include in such stay—

"(1) a requirement that the defendant, pending appeal, deposit the entire fine amount, or the amount due under an installment schedule, during the pendency of an appeal, in an escrow account in the registry of the district court, or to give bond for the payment thereof; or

"(2) an order restraining the defendant from transferring or dissipating assets found to be sufficient, if sold, to meet the defendant's fine obligation.

"(e) DELINQUENT FINE.—A fine is delinquent if any portion of such fine is not paid within thirty days of when it is due, including any fines to be paid pursuant to an installment schedule.

"(f) DEFAULT.—A fine is in default if any portion of such fine is more than ninety days delinquent. When a criminal fine is in default, the entire amount is due within thirty days of notification of the default, notwithstanding any installment schedule.

"§ 3593. Modification or remission of fine

18 USC 3593.

"(a) PETITION FOR MODIFICATION OR REMISSION.—A person who has been sentenced to pay a fine, and who—

"(1) can show a good faith effort to comply with the terms of the sentence and concerning whom the circumstances no longer exist that warranted the imposition of the fine in the amount imposed or payment by the installment schedule, may at any time petition the court for—

"(A) an extension of the installment schedule, not to exceed two years except in case of incarceration or special circumstances; or

"(B) a remission of all or part of the unpaid portion including interest and penalties; or

"(2) has voluntarily made restitution or reparation to the victim of the offense, may at any time petition the court for a remission of the unpaid portion of the fine in an amount not exceeding the amount of such restitution or reparation.

Any petition filed pursuant to this subsection shall be filed in the court in which sentence was originally imposed, unless that court transfers jurisdiction to another court. The petitioner shall notify the Attorney General that the petition has been filed within ten working days after filing. For the purposes of clause (1), unless exceptional circumstances exist, a person may be considered to have made a good faith effort to comply with the terms of the sentence only after payment of a reasonable portion of the fine.

"(b) ORDER OF MODIFICATION OR REMISSION.—If, after the filing of a petition as provided in subsection (a), the court finds that the circumstances warrant relief, the court may enter an appropriate order, in which case it shall provide the Attorney General with a copy of such order.

18 USC 3594.

"§ 3594. Certification and notification

"(a) DISPOSITION OF PAYMENT.—The clerk shall forward each fine payment to the United States Treasury and shall notify the Attorney General of its receipt within ten working days.

"(b) CERTIFICATION OF IMPOSITION.—If a fine exceeding \$100 is imposed, modified, or remitted, the sentencing court shall incorporate in the order imposing, remitting, and modifying such fine, and promptly certify to the Attorney General—

"(1) the name of the person fined;

"(2) his current address;

"(3) the docket number of the case;

"(4) the amount of the fine imposed;

"(5) any installment schedule;

"(6) the nature of any modification or remission of the fine or installment schedule; and

"(7) the amount of the fine that is due and unpaid.

"(c) RESPONSIBILITY FOR COLLECTION.—The Attorney General shall be responsible for collection of an unpaid fine concerning which a certification has been issued as provided in subsection (a).

"(d) NOTIFICATION OF DELINQUENCY.—Within ten working days after a fine is determined to be delinquent as provided in section 3592(e), the Attorney General shall notify the person whose fine is delinquent, by certified mail, to inform him that the fine is delinquent.

"(e) NOTIFICATION OF DEFAULT.—Within ten working days after a fine is determined to be in default as provided in section 3592(f), the Attorney General shall notify the person defaulting, by certified mail, to inform him that the fine is in default and the entire unpaid balance, including interest and penalties, is due within thirty days.

18 USC 3595.

"§ 3595. Interest, monetary penalties for delinquency, and default

"Upon a determination of willful nonpayment, the court may impose the following interest and monetary penalties:

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"(1) INTEREST.—Notwithstanding any other provision of law, interest at the rate of 1 per centum per month, or 12 per centum per year, shall be charged, beginning the thirty-first day after sentencing on the first day of each month during which any fine balance remains unpaid, including sums to be paid pursuant to an installment schedule.

"(2) MONETARY PENALTIES FOR DELINQUENT FINES.—Notwithstanding any other provision of law, a penalty sum equal to 10 per centum shall be charged for any portion of a criminal fine which has become delinquent. The Attorney General may waive all or part of the penalty for good cause.

Waiver.

"§ 3596. Civil remedies for satisfaction of an unpaid fine

18 USC 3596.

"(a) LIEN.—A fine imposed as a sentence is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

26 USC 6325.

"(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

"(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine.

"(b) EXPIRATION OF LIEN.—A lien becomes unenforceable at the time liability to pay a fine expires as provided in section 3598.

"(c) APPLICATION OF OTHER LIEN PROVISIONS.—The provisions of sections 6323, 6331, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940 (54 Stat. 1190), apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to 'the Secretary' shall be construed to mean 'the Attorney General,' and references in those sections to 'tax' shall be construed to mean 'fine.'

50 USC app. 573.

"(d) EFFECT ON NOTICE OF LIEN.—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1662, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A)) and by subsection (c).

26 USC 1 et seq.

"(e) ALTERNATIVE ENFORCEMENT.—Notwithstanding any other provision of this section, a judgment imposing a fine may be

enforced by execution against the property of the person fined in like manner as judgments in civil cases.

"(f) DISCHARGE OF DEBTS INAPPLICABLE.—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.

18 USC 3597.

"§ 3597. Resentencing upon failure to pay a fine

"(a) RESENTENCING.—Subject to the provisions of subsection (b), if a person knowingly fails to pay a delinquent fine the court may resentence the person to any sentence which might originally have been imposed.

"(b) IMPRISONMENT.—The defendant may be sentenced to a term of imprisonment under subsection (a) only if the court determines that—

"(1) the person willfully refused to pay the delinquent fine or had failed to make sufficient bona fide efforts to pay the fine; or

"(2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

18 USC 3598.

"§ 3598. Statute of limitations

"(a) LIABILITY TO PAY A FINE EXPIRES.—

"(1) twenty years after the entry of the judgment;

"(2) upon the death of the person fined.

"(b) The period set forth in subsection (a) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in subsection (a) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I)), or section 513 of the Act of October 17, 1940 (54 Stat. 1190).

50 USC app. 573.

18 USC 3599.

"§ 3599. Criminal default

"Whoever, having been sentenced to pay a fine, willfully fails to pay the fine, shall be fined not more than twice the amount of the unpaid balance of the fine or \$10,000, whichever is greater, imprisoned not more than one year, or both."

(b) Section 3651 of title 18, United States Code, is amended by inserting after "May be required to provide for the support of any persons, for whose support he is legally responsible." the following new paragraph:

"If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation."

(c) Section 3651 of title 18, United States Code, is amended by striking out the last paragraph and inserting in lieu thereof the following:

"The defendant's liability for any unexecuted fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation."

(d) The second paragraph of section 3655 of title 18, United States Code, is amended to read as follows:

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"He shall keep informed concerning the conduct, condition, and compliance with any condition of probation, including the payment of a fine or restitution of each probationer under his supervision, and shall report thereon to the court placing such person on probation. He shall report to the court any failure of a probationer under his supervision to pay a fine in default within thirty days after notification that it is in default so that the court may determine whether probation should be revoked."

(e) Section 4209 of title 18, United States Code, is amended in subsection (a) by striking out the period at the end of the first sentence and inserting in lieu thereof "and, in a case involving a criminal fine that has not already been paid, that the parolee pay or agree to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense."

Ante, p. 2027.

(f) Subsection (b)(1) of section 4214 of title 18, United States Code, is amended by adding after "parole" the following: "or a failure to pay a fine in default within thirty days after notification that it is in default"

Ante, p. 2027.

(g)(1) Section 3565 of title 18, United States Code, is repealed.

Repeal.

(2) The table of sections for chapter 227 of title 18, United States Code, is amended by striking out the item for section 3565 and inserting in lieu thereof the following:

Ante, p. 1995.

"3565. Repealed."

(h) Section 3569 of title 18, United States Code, is amended by—

(1) striking out "(a)"; and

(2) striking out subsection (b).

(i) This section shall be repealed on the first day of the first calendar month beginning twenty-four months after the date of enactment of this Act.

Repeal; effective

date.

18 USC 3565

note.

18 USC 3551

note.

SEC. 239. Since, due to an impending crisis in prison overcrowding, available Federal prison space must be treated as a scarce resource in the sentencing of criminal defendants;

Since, sentencing decisions should be designed to ensure that prison resources are, first and foremost, reserved for those violent and serious criminal offenders who pose the most dangerous threat to society;

Since, in cases of nonviolent and nonserious offenders, the interests of society as a whole as well as individual victims of crime can continue to be served through the imposition of alternative sentences, such as restitution and community service;

Since, in the two years preceding the enactment of sentencing guidelines, Federal sentencing practice should ensure that scarce prison resources are available to house violent and serious criminal offenders by the increased use of restitution, community service, and other alternative sentences in cases of nonviolent and nonserious offenders: Now, therefore, be it

Declared, That it is the sense of the Senate that in the two years preceding the enactment of the sentencing guidelines, Federal judges, in determining the particular sentence to be imposed, consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant has not

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LAWS OF 98th CONG.—2nd SESS.

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been convicted of a crime of violence or otherwise serious offense; and

(3) the general appropriateness of imposing a sentence of imprisonment in cases in which the defendant has been convicted of a crime of violence or otherwise serious offense.

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Public Law 99-217
99th Congress

An Act

Dec. 26, 1985
[H.R. 3837]Sentencing
Reform
Amendments
Act of 1985.
18 USC 3551
note.98 Stat. 2031.
18 USC 3551
note.

98 Stat. 2023.

98 Stat. 2031.
18 USC 3551
note.

To extend the deadline for the submission of the initial set of sentencing guidelines by the United States Sentencing Commission, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sentencing Reform Amendments Act of 1985".

SEC. 2. DEADLINE FOR INITIAL SET OF SENTENCING GUIDELINES.

(a) EXTENSION.—Section 235(a)(1)(B)(i) of the Comprehensive Crime Control Act of 1984 is amended by striking out "eighteen" and inserting "30" in lieu thereof.

(b) TECHNICAL AMENDMENT.—Section 235(a)(1)(B)(i) of the Comprehensive Crime Control Act of 1984 is amended by striking out "to section" and inserting "under section" in lieu thereof.

SEC. 3. CONFORMING CHANGE IN TITLE 28, UNITED STATES CODE.

Section 994(q) of title 28, United States Code, is amended by striking out "within three years" and all that follows through "Act of 1983" and inserting in lieu thereof "not later than one year after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect".

SEC. 4. CONFORMING CHANGE IN COMPREHENSIVE CRIME CONTROL ACT OF 1984.

Section 235(a)(1) of the Comprehensive Crime Control Act of 1984 is amended by striking out "twenty-four" and inserting "36" in lieu thereof.

Approved December 26, 1985.

LEGISLATIVE HISTORY—H.R. 3837:

CONGRESSIONAL RECORD, Vol. 131 (1985):
Dec. 16, considered and passed House.
Dec. 18, considered and passed Senate.

PUBLIC LAW 99-363 [H.R. 4801]; July 11, 1986

SENTENCING GUIDELINES ACT OF 1986

*For Legislative History of Act see Report for P.L. 99-363
in Legislative History Section, post.*

An Act to amend section 994 of title 28, United States Code, to clarify certain duties of the United States Sentencing Commission.

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled,*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sentencing Guidelines Act of 1986".

SEC. 2. GUIDELINES AND POLICY STATEMENTS.

Section 994 of title 28, United States Code, is amended—

(1) in subsection (a)(2)—

(A) by redesignating subparagraphs (D) and (E) as subparagraphs (E) and (F), respectively;

(B) so that subparagraph (C) reads as follows:

"(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;" and

(C) by adding after subparagraph (C) the following:

"(D) the fine imposition provisions set forth in section 3572 of title 18;"

(2) so that paragraph (3) of subsection (a) reads as follows:

"(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18, and the provisions for modification of the term or conditions of supervised release set forth in section 3583(e) of title 18." and

(3) in subsection (b)—

(A) by inserting "(1)" after "(b)";

(B) by designating the second sentence as paragraph (2); and

(C) in that second sentence as so redesignated, by striking out "25 per centum" and inserting in lieu thereof "the greater of 25 percent or 6 months, except that, if the maximum term of the range is 30 years or more, the maximum may be life imprisonment".

Approved July 11, 1986.

LEGISLATIVE HISTORY—H.R. 4801:

HOUSE REPORT No. 99-614 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 132 (1986):

June 3, considered and passed House.

June 26, considered and passed Senate.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 22, No. 28 (1986):

July 11, Presidential statement.

100 STAT. 770

Sentencing
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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

BAIL (CHAPTER I)

SECTION 1. (a) Subparagraph (D) of section 3142(f)(1) of title 18 of the United States Code is amended by—

(1) striking out the words "any felony committed after the person had been convicted of two or more prior offenses" and inserting in lieu thereof "any felony if the U.S. person has been convicted of two or more offenses"; and

(2) inserting before the semicolon ", or a combination of such offenses".

(b) Subparagraph (A) of section 3142(f)(2) of title 18 of the United States Code is amended by inserting the word "or" after the semicolon.

(c) Subsection (f) of section 3142 of title 18 of the United States Code is amended by adding at the end thereof the following: "The hearing may be reopened, before or after a determination by the judicial officer, at any time prior to trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community."

OTHER SENTENCING AMENDMENTS

SEC. 2. (a) Section 4216 of title 18 of the United States Code is repealed.

(b) The item relating to section 4216 in the sectional analysis of chapter 311 of title 18 of the United States Code is amended to read as follows:

"4216. Repealed."

SEC. 3. Section 992 of title 28 of the United States Code is amended—

(1) in subsection (c) by striking out "section 225(a)(1)(B)(ii) of the Sentencing Reform Act of 1983" and inserting in lieu thereof "section 235(a)(1)(B)(ii) of the Sentencing Reform Act of 1984"; and

(2) by adding at the end thereof the following new subsection:

"(d) The provisions of sections 44(c) and 134(b) of this title, regarding the residence of judges, shall not apply to any judge holding a full-time position on the Commission pursuant to subsection (c) of this section."

SEC. 4. Section 994 of title 28 of the United States Code is amended—

(1) in subsection (a)(2) by—

(A) redesignating subparagraphs (D) and (E) as subparagraphs (E) and (F), respectively;

(B) amending subparagraph (C) to read as follows:

"(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, 3582(c), and 3583(e) of title 18;"; and

(C) adding after subparagraph (C) the following new subparagraph:

"(D) the fine imposition provision set forth in section 3572 of title 18;";

(2) in subsection (a)(3) by making it read as follows:

"(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation and supervised release set forth in sections 3565 and 3583(e) of title 18, and the provisions for modification of the term or conditions of probation and supervised release set forth in sections 3563(c), 3564, and 3583(e) of title 18;";

(3) in subsection (b) by—

(A) inserting "(1)" after "(b)"; and

(B) designating the second sentence as paragraph (2) and inserting before the period in such paragraph (2) the following: "except that—

"(A) if the maximum term of the range is life imprisonment, the minimum shall not be less than 25-years imprisonment; or

"(B) if the maximum term of the range is one year or less, the maximum shall not exceed the minimum of that range by more than 50 per centum or 60 days, whichever is greater.";

(4) in subsection (h) by striking out "by section 3581(b) of title 18, United States Code,"; and

(5) in subsection (t) by inserting the words "in what circumstances and" after the word "specify" and by deleting the words "that are outside the applicable guideline ranges".

SEC. 5. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended—

(1) in subsection (b) of section 3552 of title 18 of the United States Code by striking out the word "take" in the third sentence and inserting in lieu thereof the word "be";

(2) in subsection (b) of section 3552 of title 18 of the United States Code by inserting the words ", if the defendant is in custody," after the words "the United States Marshal shall" in the eighth sentence; and

(3) in subsection (c) of section 3552 of title 18 of the United States Code by striking out "4247" and inserting in lieu thereof "4244".

SEC. 6. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended—

(1) in subsection (a) section 3553 of title 18 of the United States Code by striking out the words "of this subsection" in the first sentence; and

(2) in subsection (b) of section 3553 of title 18 of the United States Code by adding the following sentence at the end thereof: "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for its relationship to sentences prescribed by guidelines applicable to similar offenses and offenders and the purposes of sentencing set forth in subsection (a)(2)."

Sec. 7. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in subsection (c) of section 3553 of title 18 of the United States Code by inserting "or if it includes an order of only partial restitution," after "If the sentence does not include an order of restitution."

Sec. 8. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in subsection (a) of section 3561 of title 18 of the United States Code by striking out the second sentence.

Sec. 9. Subsection (a) section 212 of the Comprehensive Crime Control Act of 1984 is amended in paragraph (11) of section 3563(b) of title 18 of the United States Code by striking out "in section 3581(b)".

Sec. 10. (a) Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in subsection (c) of section 3563 of title 18 of the United States Code by—

(1) striking out the phrase ", after a hearing,"; and

(2) inserting the phrase "the provisions of Rule 32.1 of the Federal Rules of Criminal Procedure and" after the words "pursuant to".

(b) Subdivision (b) of Rule 32.1 of the Federal Rules of Criminal Procedure is amended by—

(1) inserting the words "to be" after the word "relief"; and

(2) striking out the period at the end and inserting in lieu thereof ", and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected."

Sec. 11. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in subsection (b) of section 3564 of title 18 of the United States Code by striking out the second sentence and inserting in lieu thereof the following: "A term of probation runs concurrently with any Federal, State, or local term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation. A term of probation does not run while the defendant is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than thirty consecutive days."

Sec. 12. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in subsection (f) of section 3603 of title 18 of the United States Code by striking out the word "supervise" and inserting in lieu thereof "assist in the supervision of," and by inserting a comma after the word "about".

Sec. 13. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in subsection (b) of section 3624 of title 18 of the United States Code by striking out "beginning after the first year of the term" in the first sentence and inserting in lieu thereof "beginning at the end of the first year of the term".

Sec. 14. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in subsection (e) of section 3624 of title 18 of the United States Code by striking out the third sentence and inserting in lieu thereof the following: "The term runs concurrently with any Federal, State, or local term of probation, supervised release, or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run while the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than thirty consecutive days."

Sec. 15. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in section 3663 (formerly section 3579) of title 18 of the United States Code by—

(1) striking out "or in lieu of" in subsection (a)(1); and

(2) striking out "sections 3812 and 3813" in subsection (h) and inserting in lieu thereof "sections 3612 and 3613".

Sec. 16. Subsection (a) of section 212 of the Comprehensive Crime Control Act of 1984 is amended in section 3672 (formerly section 3656) of title 18 of the United States Code by adding at the end thereof:

"He shall have the authority to contract, subject to appropriations, with any appropriate public or private agency or person for the detection of and care in the community of an offender who is an addict or a drug-dependent person within the meaning of section 2 of the Public Health Service Act (42 U.S.C. 201). This authority shall include, but not be limited to, providing equipment and supplies; testing; medical, educational, social, psychological, and vocational services; corrective and preventive guidance and training; and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence and his susceptibility to addiction. He may negotiate and award such contracts without regard to section 3709 of the Revised Statutes (41 U.S.C. 5).

"He shall pay for presentence studies and reports by qualified consultants and presentence examinations and reports by psychiatric or psychological examiners ordered by the court under section 3552 (b) or (c) except for studies conducted by the Bureau of Prisons."

Sec. 16A. Section 213 of the Comprehensive Crime Control Act of 1984 is amended in section 3742 of title 18, United States Code—

(1) in subsections (a)(2), (b)(2), (d)(2), and (e)(1) by striking out "an incorrect" and inserting in lieu thereof "a clearly erroneous construction or"; and

(2) in subsection (e) by—

(A) striking out subparagraph (B) of paragraph (1) and inserting in lieu thereof the following:

"(B) designate the appropriate guideline category and remand the case for imposition of a sentence consistent with its decision"; and

(B) striking out subparagraphs (A) and (B) of paragraph (2) and inserting in lieu thereof the following:

"(A) If it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for imposition of a sentence consistent with its decision;

"(B) If it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for imposition of a sentence consistent with its decision; or"

Sec. 17. Section 214 of the Comprehensive Crime Control Act of 1984 is amended—

(1) in subsection (a) of section 5037 of title 18 of the United States Code by striking out "(e)" and inserting in lieu thereof "(d)";

(2) in subparagraph (B) of section 5037(c)(1) of title 18 of the United States Code by striking out "by section 3581(b)";

(3) in subparagraph (B) of section 5037(c)(2) of title 18 of the United States Code by striking out "by section 3581(b)"; and

(4) in subsection (c) of section 5037 of title 18 of the United States Code by adding the following new paragraph at the end thereof:

"The provisions of section 3624 are applicable to an order placing a juvenile under detention."

Sec. 18. Section 215(a)(5) of the Comprehensive Crime Control Act of 1984 is amended in subdivision (c)(2)(B) of Rule 32 of the Federal Rules of Criminal Procedure by striking out the word "than" and inserting in lieu thereof the word "from".

Sec. 19. Section 215(f) of the Comprehensive Crime Control Act of 1984 is amended in Rule 6 of the Federal Rules of Criminal Procedure by—

(1) striking out the word "or" in subdivision (e)(3)(C)(ii); and

(2) striking out the period at the end of subdivision (e)(3)(C)(iii) and inserting in lieu thereof "; or".

Sec. 20. (a) Subsection (a) of section 224 of the Comprehensive Crime Control Act of 1984 is amended—

(1) in paragraph (1) to read, "in subsection (b)(1)(A), by deleting the sentence which begins 'Any sentence imposing a term of imprisonment under this paragraph'";

(2) in paragraph (2) to read, "in subsection (b)(1)(B), by deleting the sentence which begins 'Any sentence imposing a term of imprisonment under this paragraph'";

(3) by inserting the following new paragraph after paragraph (2):

"(3) in subsection (b)(1)(C), by deleting the sentence which begins 'Any sentence imposing a term of imprisonment under this paragraph'";

(4) by adding the word "and" at the end of paragraph (4);

(5) by deleting paragraph (5); and

(6) by redesignating paragraphs (3) and (4) as (4) and (5), respectively.

(b) Section 224 of the Comprehensive Crime Control Act of 1984 is amended by redesignating subsection (c) as subsection (d) and by inserting after subsection (b) the following:

"(c) Section 405A (21 U.S.C. 845A) is amended—

"(1) in subsection (a) by deleting '(1)' after the word 'punishable', and by deleting the semicolon and all that follows and inserting in lieu thereof a period;

"(2) in subsection (b) by deleting '(1)' after the word 'punishable', and by deleting 'and (2) at least three times any special parole term' and all that follows and by inserting in lieu thereof a period; and

"(3) in subsection (c) by deleting the second sentence."

Sec. 21. Subsection (a) of section 225 of the Comprehensive Crime Control Act of 1984 is amended—

(1) in paragraph (1) to read, "in subsection (b)(1), by deleting the sentence which begins 'If a sentence under this paragraph provides for imprisonment'";

(2) in paragraph (2) to read, "in subsection (b)(2), by deleting the sentence which begins 'If a sentence under this paragraph provides for imprisonment'";

(3) by redesignating paragraph (3) as (4); and

(4) by inserting the following new paragraph after paragraph (2):

"(3) in subsection (b)(3), by deleting the sentence which begins 'If a sentence under this paragraph provides for imprisonment'; and"

Sec. 22. Subsection (a) of section 232 of the Comprehensive Crime Control Act of 1984 is amended by—

(1) striking out the word "and" the second time it appears and inserting in lieu thereof a comma; and

(2) inserting before the period ", and who are not sentenced to treatment under the Narcotic Addict Rehabilitation Act of 1966".

Sec. 23. (a) Section 235(a)(1)(B)(i) of the Comprehensive Crime Control Act of 1984 is amended by striking out "eighteen" and inserting "thirty" in lieu thereof.

(b) TECHNICAL AMENDMENT.—Section 235(a)(1)(B)(i) of the Comprehensive Crime Control Act of 1984 is amended by striking out "to section" and inserting "under section" in lieu thereof.

(c) Section 994(q) of title 28, United States Code, is amended by striking out "within three years" and all that follows through "Act of 1983" and inserting in lieu thereof "not later than one year after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect."

(d) Section 235(a)(1) of the Comprehensive Crime Control Act of 1984 is amended by striking out "twenty-four" and inserting "thirty-six" in lieu thereof.

FORFEITURE (CHAPTERS III AND XXIII)

Sec. 24. Section 1963 of title 18 of the United States Code is amended—

(1) in subsection (c) by striking out "(m)" and inserting in lieu thereof "(l)";

(2) in subsection (j) by striking out "(m)" and inserting in lieu thereof "(l)"; and

(3) by redesignating subsections (e), (f), (g), (h), (i), (j), (k), (l), and (m), as subsections (d), (e), (f), (g), (h), (i), (j), (k), and (l), respectively.

Sec. 25. Section 608 of the Tariff Act of 1930 (19 U.S.C. 1608) is amended in the sentence beginning "Upon the filing", by striking out "\$2,500" and inserting in lieu thereof "\$5,000".

Sec. 26. (a) Subsection (c) of section 616 of the Tariff Act of 1930 (19 U.S.C. 1616(c)) as enacted by Public Law 98-573 is amended by inserting "any other Federal agency or to" after "property forfeited under this Act to".

(b) Section 616 of the Tariff Act of 1930 (19 U.S.C. 1616) as enacted by Public Law 98-473 is repealed.

Sec. 27. Section 413 of title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853) is amended—

(1) in subsection (c) by striking out "(o)" and inserting in lieu thereof "(n)";

(2) in subsection (f) by striking out "subsection (f)" and inserting in lieu thereof "subsection (e)"; and

(3) in subsection (k) by striking out "(o)" and inserting in lieu thereof "(n)".

Sec. 28. (a) Subsection (b) of section 511 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(b)) is amended—

(1) by striking out "or criminal" after "Any property subject to civil";

(2) in paragraph (4) by striking out "or criminal" after "is subject to civil"; and

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

"The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure."

(b) Subsection (i) of section 511 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 881(i)) is amended by inserting ", or a violation of State or local law that could have been charged under this title or title III," after "title III".

Sec. 29. (a) Subparagraph (E) of section 524(c)(1) of title 28 of the United States Code is amended by inserting "the Federal Bureau of Investigation, the United States Marshals Service," after the words "for official use by", and by inserting a comma before the word "or".

(b) Paragraph (4) of section 524(c) of title 28 of the United States Code is amended by striking out "remaining after the payment

of expenses for forfeiture and sale authorized by law" and inserting in lieu thereof ", except all proceeds of forfeitures available for use by the Secretary of the Treasury or the Secretary of the Interior pursuant to section 11(d) of the Endangered Species Act (16 U.S.C. 1540(d)) or section 6(d) of the Lacey Act Amendments of 1981 (16 U.S.C. 3375(d))".

OFFENDERS WITH MENTAL DISEASE OR DEFECT (CHAPTER IV)

Sec. 30. Subdivision (c) of Rule 12.2 of the Federal Rules of Criminal Procedure is amended by inserting "4241 or" before "4242".

DRUG ENFORCEMENT AMENDMENTS (CHAPTER V)

Sec. 31. Paragraph (14) of section 102 of the Controlled Substances Act (21 U.S.C. 802(14)) is amended in the second and third sentences by striking out the word "the" after the words "the term 'isomer' means" and inserting in lieu thereof "any".

Sec. 32. Paragraph (4) of subsection (a) of schedule II of the Controlled Substances Act (21 U.S.C. 812) is amended to read as follows:

"(4) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph."

Sec. 33. (a) Subparagraph (A) of section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) is amended—

(1) in clause (i) to read as follows:

"(i) 100 grams or more of a mixture or substance containing a detectable amount of a narcotic drug in schedule I or II other than a narcotic drug consisting of—

"(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

"(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

"(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

"(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III)";

(2) in clause (ii) by adding "a mixture or substance containing a detectable amount of" after "a kilogram or more of";

(3) in clause (iii) by adding "a mixture or substance containing a detectable amount of" after "500 grams or more of";

(4) in clause (iv) by adding "a mixture or substance containing a detectable amount of" after "5 grams or more of"; and

(5) by adding at the end thereof, "Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 8 years in addition to such term of imprisonment."

(b) Paragraph (5) of section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b)(5)) is amended by adding the words "the fines provided in" after the word "Notwithstanding".

Sec. 34. Subsection (b) of section 405A of the Controlled Substances Act (21 U.S.C. 845a(b)) is amended by inserting "parole" after "(2) at least three times any special".

Sec. 35. Section 503(a) of the Controlled Substances Act (21 U.S.C. 873(a)) is amended by—

(1) striking out "and" at the end of paragraph (5);

(2) striking out the period at the end of paragraph (6) and inserting in lieu thereof "; and"; and

(3) adding at the end thereof the following:

"(7) notwithstanding any other provision of law, enter into contractual agreements with State and local law enforcement agencies to provide for cooperative enforcement and regulatory activities under this Act."

Sec. 36. Section 508 of the Controlled Substances Act (21 U.S.C. 878) is amended by—

(1) inserting "(a)" before "Any officer or employee";

(2) inserting after "Drug Enforcement Administration" the following: "or any State or local law enforcement officer"; and

(3) adding at the end thereof the following new subsection:

"(b) State and local law enforcement officers performing functions under this section shall not be deemed Federal employees and shall not be subject to provisions of law relating to Federal employees, except that such officers shall be subject to section 3374(c) of title 5, United States Code."

Sec. 37. (a) Paragraph (1) of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)) is amended—

(1) in subparagraph (A) by striking out clauses (i), (ii), and (iii) and inserting in lieu thereof the following:

"(i) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

"(ii) cocaine, its salts, optical and geometric isomers, and salts of isomers;

"(iii) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

"(iv) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in clauses (i) through (iii)";

(2) in subparagraph (B) by inserting "a mixture or substance containing a detectable amount of" after "a kilogram or more of";

(3) in subparagraph (C) by inserting "a mixture or substance containing a detectable amount of" after "500 grams or more of";

(4) in subparagraph (D) by inserting "a mixture or substance containing a detectable amount of" after "5 grams or more of"; and

(5) by adding at the end thereof, "If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than four years in addition to such term of imprisonment."

(b) Paragraph (3) of section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(3)) is amended by striking out ", except as provided in paragraph (4)".

LABOR RACKETEERING AMENDMENT (CHAPTER VIII)

Sec. 38. Paragraph (2) of section 411(a) of title I of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1111(a)(2)) is amended by striking out "entity" and inserting in lieu thereof "person".

CURRENCY AND FOREIGN TRANSACTIONS REPORTING ACT AMENDMENTS (CHAPTER IX)

Sec. 39. Paragraph (2) of section 5316(a) of title 31 of the United States Code is amended by striking out "\$5,000" and inserting in lieu thereof "\$10,000".

MISCELLANEOUS VIOLENT CRIME AMENDMENTS
(CHAPTER XI)

Sec. 40. Subsection (a) of section 373 of title 18 of the United States Code is amended by—

- (1) inserting after the words "the person or property of another" the words ", or against such person's own property,"; and
- (2) inserting before the word "death" the words "life imprisonment or".

Sec. 41. Subsection (c) of section 924 of title 18 of the United States Code is amended by—

- (1) adding after the words "during and in relation to any" the words "felony described in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a) or any";
- (2) adding after the words "in addition to the punishment provided for such" the words "felony or"; and
- (3) adding after the words "term of imprisonment including that imposed for the" the words "felony or".

Sec. 42. Subsection (a) of section 929 of title 18 of the United States Code is amended by—

- (1) adding after the words "during and in relation to the commission of a" the words "felony described in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or a";
- (2) adding after the words "in addition to the punishment provided for the commission of such" the words "felony or"; and
- (3) adding after the words "term of imprisonment including that imposed for the felony" the words "or crime of violence".

Sec. 43. (a) Subsection (d) of section 1201 of title 18 of the United States Code is amended by adding the words "or (a)(5)" after the words "subsection (a)(4)".

(b) Paragraph (2) of section 115(b) of title 18 of the United States Code is amended to read as follows:

"(2) A kidnapping or attempted kidnapping in violation of this section shall be punished as provided in section 1201 of this title for the kidnapping or attempted kidnapping of a person described in section 1201(a)(5) of this title."

Sec. 44. (a) Chapter 65 of title 18 of the United States Code is amended by redesignating section 1365 as enacted by Public Law 98-473 as section 1366.

(b) The analysis at the beginning of chapter 65 of title 18 of the United States Code is amended by striking out "1365" the second time it appears and inserting in lieu thereof "1366".

SERIOUS NONVIOLENT OFFENSES (CHAPTER XII)

Sec. 45. Section 215 of title 18 of the United States Code is amended—

- (1) in subsections (a) and (b) by inserting the words ", bank holding company, or savings and loan holding company" after the words "financial institution" the second and third place in which they appear;
- (2) in subsection (c)(1)(D) by striking out "Administrator of the"; and
- (3) in subsection (d) by inserting the words ", bank holding company, or savings and loan holding company" after the words "financial institution" each place in which they appear.

Sec. 46. Section 219 of title 18 of the United States Code is amended—

- (1) in the first paragraph to read:
"Whoever, being a public official, or acts as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938, as amended, shall

be fined not more than \$10,000 or imprisoned for not more than two years, or both," and

(2) in the last paragraph by striking out "the Delegate from the District of Columbia" and inserting in lieu thereof "Delegate", and by striking out ", or a juror".

Sec. 47. (a) Chapter 25 of title 18 of the United States Code is amended by redesignating section 510 as enacted by Public Law 98-473 as section 512.

(b) The analysis at the beginning of chapter 25 of title 18 of the United States Code is amended by striking out

"510. Securities of the State and private entities," and by adding at the end thereof

"513. Securities of the States and private entities."

Sec. 48. (a) Sections 1791 and 1792 of title 18 of the United States Code are amended by striking out the phrase "Federal penal or correctional facility" each time it appears and inserting in lieu thereof "Federal penal, detention, or correctional facility".

(b) Section 1791 of title 18 of the United States Code is further amended—

- (1) in subparagraph (a)(1)(B) by adding the words "ammunition or" before "any other weapon";
- (2) in subparagraph (a)(1)(C) by adding before the semicolon the words ", lysergic acid diethylamide, or phencyclidine";
- (3) in subparagraph (a)(1)(D) by striking out "other than a narcotic drug, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)" and inserting in lieu thereof "other than a controlled substance described in subparagraph (C)"; and
- (4) by making subsection (c) read as follows:

"(c) DEFINITIONS.—As used in this section, 'ammunition', 'firearm', and 'destructive device' have the meaning given those terms, respectively, in section 921 of title 18 of the United States Code."

PROCEDURAL AMENDMENTS (CHAPTER XIII)

Sec. 49. Subsection (e) of section 1028 of title 18 of the United States Code is amended by striking out "title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481)" and inserting in lieu thereof "chapter 224 of this title".

Sec. 50. Subsection (f) of section 1029 of title 18 of the United States Code is amended by striking out "title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481)" and inserting in lieu thereof "chapter 224 of this title".

Sec. 51. Section 3076 of title 18 of the United States Code is amended by striking out "title V of the Organized Crime Control Act of 1970" and inserting in lieu thereof "chapter 224 of this title".

Sec. 52. Section 3522 of title 18 of the United States Code is amended—

- (1) in subsection (a) by striking out the word "parolees" in the second sentence and inserting in lieu thereof "probationers or parolees, as the case may be";
- (2) in subsection (b)—
(A) by striking out "subsection (a)" and inserting in lieu thereof "probation or parole"; and
(B) by striking out the word "shall" and inserting in lieu thereof "may";
- (3) by striking out subsection (c); and
- (4) by redesignating subsection (d) as subsection (c).

Sec. 53. Section 1921 of title 28 of the United States Code is amended by adding the following new paragraph at the end thereof:

"Notwithstanding the provisions of section 3302 of title 31, the United States Mar-

shals Service is authorized, to the extent provided in appropriations Acts, to credit to its appropriation account all fees, commissions, and expenses collected for—

"(1) the service of civil process, including complaints, summonses, subpoenas, and similar process; and

"(2) seizures, levies, and sales associated with judicial orders of execution.

by the United States Marshals Service and to use such credited amounts for the purpose of carrying out such activities."

VICTIM COMPENSATION AND ASSISTANCE
(CHAPTER XIV)

Sec. 54. Section 3013 of title 18 of the United States Code is amended by adding the following new subsection at the end thereof:

"(c) No assessment shall be imposed on any person convicted of an offense for which local rules of the district court, or other Federal law, establishes that collateral may be posted in lieu of appearance in court."

Sec. 55. Subsection (a) of section 3671 of title 18 of the United States Code, as enacted by section 1406(a) of the Comprehensive Crime Control Act of 1984, is amended by striking out "chapter 227 or 231 of" after the words "an order of restitution under".

Sec. 56. (a) Sections 3671 and 3672 of title 18 of the United States Code, as enacted by section 1406(a) of the Comprehensive Crime Control Act of 1984, are redesignated as sections 3681 and 3682, respectively.

(b) The sectional analysis of chapter 232 of title 18 of the United States Code, as added by section 1406(a) of the Comprehensive Crime Control Act of 1984, is amended by striking out "3671" and "3672" and inserting in lieu thereof "3681" and "3682", respectively.

Sec. 57. (a) Chapter 232 of title 18 of the United States Code, as enacted by section 1406(a) of the Comprehensive Crime Control Act of 1984, is redesignated as chapter 232A.

(b) The chapter analysis of part II of title 18 of the United States Code is amended by striking out the item relating to chapter 232, as added by section 1406(b) of the Comprehensive Crime Control Act of 1984, and inserting in lieu thereof the following:

"232A. Special forfeiture of collateral profits of crime..... 3681".

Sec. 58. Subsection (e) of section 1402 of the Comprehensive Crime Control Act of 1984 is amended by—

- (1) striking out "the next succeeding fiscal year" and inserting in lieu thereof "the next two succeeding fiscal years"; and
- (2) striking out "year" after "at the end of which".

Sec. 59. Section 1407 of the Comprehensive Crime Control Act of 1984 is amended—

- (1) in subsection (h) by striking out "1362" and inserting in lieu thereof "1402"; and
- (2) by redesignating subsection (h) as subsection (g).

Sec. 60. Chapter XIV of the Comprehensive Crime Control Act of 1984 is amended by striking out section 1410.

TRADEMARK COUNTERFEITING (CHAPTER XV)

Sec. 61. (a) Chapter 113 of the title 18 of the United States Code is amended by redesignating section 2320 as enacted by Public Law 98-473 as section 2321.

(b) The analysis at the beginning of chapter 113 of title 18 of the United States Code is amended by striking out

"2320. Trafficking in counterfeit goods or services." and by adding at the end thereof

"2321. Trafficking in counterfeit goods or services."

ACCESS DEVICES AND COMPUTER (CHAPTER XXI)

Sec. 62. (a) Section 1030 of title 18 of the United States Code is amended by adding the following new paragraph at the end hereof:

"(f) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States."

(b) Delete paragraph (3) of subsection (a) of section 1030 of title 18 of the United States Code.

(c) Delete "or" after the semicolon at the end of paragraph (2) of subsection (a) of section 1030 of title 18 of the United States Code, and insert "or" after the semicolon at the end of paragraph (1) of subsection (a) of section 1030 of title 18 of the United States Code.

MISCELLANEOUS AMENDMENTS

Sec. 63. Section 3 of title 18 of the United States Code is amended by inserting before the word "death" the words "life imprisonment or".

Sec. 64. (a) Chapter 1 of title 18 of the United States Code is amended by adding a new section 17 as follows:

"§ 17. Organization defined

"For purposes of this title, the term 'organization' means a person other than an individual."

(b) The sectional analysis for chapter 1 of title 18 of the United States Code is amended by adding after the item relating to section 16 the following:

"17. Organization defined."

Sec. 65. Subsection (a) of section 201 of title 18 of the United States Code is amended by striking out "the Delegate from the District of Columbia" and inserting in lieu thereof "Delegate".

Sec. 66. Paragraph (1) of section 203(a) of title 18 of the United States Code is amended by striking out "Delegate from the District of Columbia, Delegate Elect from the District of Columbia" and inserting in lieu thereof "Delegate, Delegate Elect".

Sec. 67. Subsection (h) of section 844 of title 18 of the United States Code is amended to read as follows:

"(h) Whoever uses fire or an explosive to commit, or carries an explosive during the commission of, any felony which may be prosecuted in a court of the United States, including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the fire or explosive was used or the explosive was carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein."

Sec. 68. Section 1561(a) of title 18 of the United States Code is amended by adding, after the words "section 1511 (relating to obstruction of State or local law enforcement)," the words "section 1512 (relating to tampering with a witness, victim, or

an informant), section 1513 (relating to retaliating against a witness, victim, or an informant)."

Sec. 69. The first and second paragraphs of section 2315 of title 18 of the United States Code are amended by—

(1) inserting "possesses," after "receives," and

(2) striking out "moving as, or which are a part of, or which constitute interstate or foreign commerce," and inserting in lieu thereof "which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken,".

Sec. 70. Subsection (m) of section 223 of the Comprehensive Crime Control Act of 1984 is amended in paragraph (3)(B) to read as follows:

"(B) by amending subsection (b) to read as follows:

"(b) An offender transferred to the United States to serve a sentence of imprisonment that is longer than the maximum period of time specified in the applicable sentencing guideline promulgated pursuant to section 994(a)(1) of title 28, United States Code, as determined by the Bureau of Prisons, shall serve in an official detention facility the maximum period of time specified in the applicable sentencing guideline and shall serve the remainder of the term imposed as a term of supervised release. To the extent permitted by the applicable treaty, a determination by the Bureau of Prisons as to whether the transferred offender shall serve a term of supervised release and the length of such term to be served may be appealed to the United States court of appeals for the district in which the offender is imprisoned after transfer to the United States, and the court of appeals shall decide and dispose of the appeal in accordance with section 3742 as though the determination appealed had been imposed by the United States district court. A determination by the Bureau of Prisons shall be made only after affording the transferred offender an opportunity (1) to submit evidence or information as the applicable sentencing guideline, and (2) for an appeal within the Bureau of Prisons of such determination by a reviewing authority established by the Director pursuant to regulations," and".

Sec. 71. Section 3142(c)(2)(J) of title 18 of the United States Code is amended by inserting ", psychological," after "medical".

Sec. 72. Paragraphs (3) of subsections (d), (g), and (h) of section 922 of title 18 of the United States Code are amended by deleting the words "marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954)" and inserting in lieu thereof the words "marihuana or any depressant or stimulant substance or narcotic drug (as those terms are defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802)".

Sec. 73. Section 875 of title 18 of the United States Code is amended by striking the phrase "transmits in interstate commerce" each place where it appears and inserting in lieu thereof the words, "transmits in interstate or foreign commerce".

Sec. 74. Section 351 of title 18 of the United States Code is amended—

(a) in subsection (a) by adding after "Deputy Director of Central Intelligence," the words "a major candidate for the office of President or Vice-President, as defined in subsection (a)(7) of section 3056 of this title", and

(b) in subsection (h) by deleting the words "an official" and inserting in lieu thereof "a person".