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PENALTY: A MULTIFARIOUS LOOK AT CAPITAL PUNISHMENT: SYMPOSIUM
ARTICLE: The Future of the Federal Death Penalty

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SUMMARY:

... One of the many threads comprising the recent past and likely future of the federal death penalty is the story of Juan Raul Garza. ... Thus, an unusual convergence of diverse political camps may now combine to question the federal death penalty: an uneasy alliance between opponents of federal capital punishment and those opposed to the phenomena known as "federalization" of crime. ... Political and legislative avenues of attack are likely the most hopeful course for opponents of the federal death penalty because the Supreme Court implicitly approved the legality of the statutory structure in 1999, when it affirmed, albeit 5- 4, the death sentence in the first federal capital case to be argued before the Court in over fifty years, *Jones v. United States*. Although the Court was closely divided regarding Jones' death sentence in the face of case- specific issues, no Justice on either side questioned the general validity of the underlying federal death penalty framework. ... Persons familiar with stateside capital punishment regimes are often surprised to learn of the very different way in which the federal death penalty regime is structured. ... According to statistics maintained by the Federal Death Penalty Resource Counsel Project, 60% of white defendants authorized for federal capital prosecution have been permitted to plead to life sentences, as compared to only 41% of black defendants. ...

TEXT:

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The future is, of course, an unknowable, richly textured affair woven from many threads and shaped by unpredicted forces and events. Law professors have no special claim to predicting the future accurately, and are probably less successful at it than many others. While we occasionally get it right, professors' predictions are likely to be either courageously wrong or timidly worthless. This is because law

scholarship is essentially a retrospective venture, reviewing and organizing the past and suggesting, perhaps, improvements for the future but seldom capturing it. Moreover, any article pretending to assess "the future" in a developing area of law necessarily presents merely a snapshot in the flowing continuum of relevant legal and political events. These qualifiers noted, I plunge ahead, heedlessly, with the venture.

I. Overview: Many Threads

A. Garza: A Federal Defendant for State Crimes?

One of the many threads comprising the recent past and likely future of the federal death penalty is the story of Juan Raul Garza. Roughly a decade ago, Raul Garza was the leader of a huge marijuana importation and distribution conspiracy in southern Texas. 1 He executed one of his distributors who had been disloyal and ordered the successful executions of another disloyal distributor and the distributor's bodyguard—three murders total. 2 Of course, both marijuana distribution and murder are serious felonies in Texas. 3 However, because Garza's drug distribution operation was supplied internationally (from Mexico) and extended across three different states, federal authorities were deeply involved in the investigation. Thus, when Garza was finally arrested in Mexico where he had fled after a U.S. Customs raid, and returned to the United States, he was charged in federal, rather than state, court.

Five years earlier, this jurisdictional choice might have been viewed as a fortunate one for Garza, because Texas has been executing convicted murderers steadily since the Supreme Court upheld its revised capital punishment statute in 1976 4 but the federal government had not executed anyone since 1963, and had not adopted constitutional death penalty [*531] procedures after Furman invalidated existing statutes in 1972. 5 In 1988, however, Congress had enacted the first set of constitutionally sufficient federal death penalty procedures since Furman. 6 These new federal death penalty provisions were only available for one crime, a "continuing criminal enterprise" (CCE) involving large-scale narcotics dealing that leads to an intentional killing. 7 This relatively narrow provision fit Garcia's crimes to a "T." Thus the U.S. Attorney in Houston sought to charge Garza capitally, and then-Attorney General William Barr authorized that the death penalty be sought in Garza's case. 8 Tried, convicted, and sentenced to death by a federal jury, Garza became only the third successful federal death penalty prosecution in the ongoing modern era of the federal death penalty. 9

Garza's direct appeal and federal habeas corpus petition have been rejected at every level of the federal system; unlike state defendants, he does not have available to him a parallel set of stateside remedies. 10 Garza's only remaining remedial avenue would appear to be a clemency petition to the President, something no United States President has had to confront since President Kennedy in 1963. 11 Meanwhile, the appellate process is still [*532] ongoing in the first two successful federal death penalty prosecutions under the 1988 Act. 12 Thus, while the intricacies of the first executive clemency petition in two generations may yet provide some measure of delay, or even relief, for Garza, 13 he currently stands first in line for the first federal execution in almost forty years. 14

Of course, the ability to prosecute defendants federally for murder results from "federalization" of this traditionally local, common-law offense. 15 "Federalization" represents another thread in the federal death penalty's future. Whether Garza would have fared any better had the federal government decided to defer to a murder prosecution by the state of Texas, since Texas is by far this country's leader in capital punishment, is debatable. 16 Notably, however, of the twenty-six federal defendants that have [*533] been sentenced to death since 1988, all were convicted of criminal conduct duplicative of capital murder conduct as defined by the states in which the murders occurred. 17

Thus, an unusual convergence of diverse political camps may now combine to question the federal death penalty: an uneasy alliance between opponents of federal capital punishment and those opposed to the phenomena known as "federalization" of crime. Capital punishment opponents are generally thought to be "liberals," while one of the best known advocates for the anti-federalization cause is President Reagan's conservative Attorney General, Edwin Meese, Chair of the ABA's 1998 Task Force on the Federalization of Criminal Law. 18 I have not seen this unusual convergence previously noted, yet it is worth considering its implications. Repeal of the federal death penalty would produce no loss of substantive protection against murder (unless you believe the death penalty itself deters): the states are competent and willing to prosecute murder cases, and federal abolition would no doubt save federal resources because capital cases absorb far more court and prosecution resources than the average, noncapital criminal case. Thus, Congress' modern decision to "federalize" capital punishment raises some interesting issues for the future.

B. The Statutory Framework is Secure

Political and legislative avenues of attack are likely the most hopeful course for opponents of the federal death penalty because the Supreme Court implicitly approved the legality of the statutory structure in 1999, when it affirmed, albeit 5- 4, the death sentence in the first federal capital case to be argued before the Court in over fifty years, *Jones v. United States*. 19 Although [*534] the Court was closely divided regarding Jones' death sentence in the face of case- specific issues, no Justice on either side questioned the general validity of the underlying federal death penalty framework.

Now there is a good argument-at least I hope you will think it a good argument, as I briefly present it below-that the Court got it wrong in the Jones case on at least two grounds, one statutory and one prudential. But my critique of the Jones decision goes only to fact-dependent issues specific to that case. There is no basis for believing that the general federal death penalty structure is open to broad legal attack under current doctrine. I do believe it is unfortunate that the Supreme Court did not use Jones to send lower courts a message of greater care and attention to detail in federal death penalty cases. The Court could have done this without questioning the validity of the underlying federal statutory procedures, and they should have. Nevertheless, unless Congress repeals the statutory structure-and some interesting federal legislation, which I examine briefly below, has been introduced that would "tinker with," though not repeal, the federal machinery of death 20-the federal death penalty is here to stay.

C. Department of Justice Administration Has Become Routinized

Indeed, with thirty-seven cases authorized for federal capital prosecution last year and twenty-four in the first four months of Fiscal Year 2000, 21 it is not an overstatement to claim that federal death penalty prosecutions are becoming "routine," in the sense of (1) being not unexpected in factually appropriate cases, (2) being relatively widespread across the U.S., and (3) receiving routinized attention within the Department of Justice in Washington D.C. The formation, late in 1998, of a well-staffed Capital Case Unit within the Criminal Division of the Department of Justice demonstrates the institutionalization of the salutary Department of Justice internal capital case review process instituted by Attorney General Janet Reno in 1995. 22 In addition, the Attorney General has recently ordered that federal capital cases be filed over the reported objection of the U.S. Attorneys for the District of Columbia and the Southern District of New York. 23 Overruling the [*535] "Sovereign District" is so rare that it underlines the centralized and embedded nature of the capital case review function within Main Justice.

The Department of Justice's administration of the federal death penalty is another thread in the fabric of its future. Yet, with a Presidential election approaching, the precise contours of this fabric are particularly murky. The coming Presidential election obviously looms large regarding the executive branch's approach to capital punishment. 24 It ought not escape notice that a new President and his Attorney General could eliminate the salutary, but entirely discretionary, capital case review procedures that Attorney General Reno has established. 25

However, in an announcement that briefly grabbed national headlines in early 2000, President Clinton and Deputy Attorney General Eric Holder have announced that the Department of Justice is examining the disturbingly persistent racial and geographical disparity allegations that have arisen regarding federal, not to mention state and local, death penalty administration. 26 Other states have taken steps toward moratoriums on [*536] executions in light of "actual innocence" cases on death row, and the moratorium movement will necessarily seek extension in the federal forum, though it has not produced success thus far.

D. Federal Judicial Responses

Finally, the federal courts are continuing to issue somewhat surprising decisions as they confront death penalty issues for the first time in the current generation of the federal judiciary. For example, a district court recently vacated a federal death sentence because the Deputy Attorney General, rather than the Attorney General, acted as the authorizing decision-maker, contrary to the Department's internal protocols. 27 Giving such substantive force to internal prosecutorial regulations reverses a consistent trend. Another district court has ruled that there is a constitutional right to counsel in the Department's internal review process; and yet, another has declared that the federal death penalty may not be applied at all in Puerto Rico. 28 The recent Chandler case split the en banc Eleventh Circuit, 6-5. 29 The systolic

pressures of capital punishment on the federal judiciary are strong indeed, creating another thread necessary to consider.

These, then, are some of the threads that currently weave together to produce a rich tapestry of future development regarding federal death penalty issues. While some legislative adjustments could come to the federal structure, it seems unlikely that they will be sweeping or dramatically alter the steady approach toward routine administration of the federal death penalty in the United States. After Jones, court decisions are also unlikely to dramatically change this picture, and no current executive seems likely to take a broad stance against capital punishment. Absent some unexpected supervening event, therefore, one or more federal executions seem certain to occur within the next year. 30

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E. Significance of Federal Executions

I wish to close by attempting to articulate why this should be viewed as significant, even though some states have been executing steadily since 1977. That is, since states now routinely execute dozens of offenders each year, why does it matter if the federal government executes one or two? One answer lies, I think, with the prominent position that the national government occupies on the international, as well as domestic, stage. As is detailed elsewhere in this symposium, among "sophisticated" nations of the world, capital punishment in the twenty-first century is a distinctly American phenomenon, placing this country in stark isolation from much of the international community. 31 Yet, until now, federal authorities could plausibly demur, on the international stage, that the federal government does not execute, but rather merely tolerates executions by a few of its constituent states. Explaining that the unique federalist nature of the American system requires such tolerance-in fact, it is the genius of our now internationally revered system 32-American diplomats could maintain that such "local options" are the worthwhile cost of federalism, not its Achilles heel.

The advent of directly federal executions will remove this psychological "federalism defense" to international criticism. I believe it will also mark a deep change in the subconscious image that many U.S. citizens carry regarding the enlightened leadership role of their federal government. "Federalists" like me-I use the term advisedly, not to refer to political beliefs but rather to my largely federal orientation to the legal system-will now have to accommodate executions within their view of the federal government. We will soon see the first federal execution, not merely one more of the over 600 American stateside executions over the last twenty-three years. This move toward self-implemented federal executions-as opposed to merely not preventing some of the subsidiary states from so acting-has, I think, large symbolic significance for the United States, both here and abroad.

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II. A Brief Review of Federal Death Penalty History

I previously have published a more detailed account of the history of the federal death penalty; the following will simply help orient current readers and is drawn from that article. 33 There are basically four stages in this history: mandatory death penalty statutes (1790-1897), unguided discretion given to federal juries (1897-1972), Furman suspension of federal capital prosecutions (1972- 1988), and the current stage of "guided discretion." 34 In each stage the federal government has acted as a follower, not a leader, adopting practices already prevailing in all or most states. 35

Potential death penalties have been part of the federal statutory framework since the Union was founded. 36 Death penalties that were mandatory upon conviction, as was common under common law, were enacted by the First Congress in 1790, for treason, murder, piracy, forgery, and aiding the escape of any federal capital defendant, as well as for other federal crimes. 37 Moreover, the congressional debate regarding the appropriateness of the death penalty eerily echoed current capital punishment debates. 38

The mandatory nature of federal capital punishment led, however, to concern that juries were "nullifying" the perceived harshness of the penalty in some cases by acquitting; similarly, early Presidents often pardoned convicted federal capital defendants. 39 These concerns, combined with the nineteenth century's strong abolitionist movement, produced a federal bill "[t]o reduce the cases in which the penalty of death may be inflicted." 40 This legislation, finally enacted in 1897 after a number of attempts, repealed the death penalty for all but five federal offenses and made the death penalty an entirely discretionary decision for federal juries instead of a mandatory one. 41 Many states had already similarly revised their statutes to be discretionary. 42

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The "unguided discretion" of jury sentencing continued in federal capital cases (as it did in the states) from 1897 until Furman was decided in 1972. 43 Yet federal executions were relatively rare; only thirty-four federal defendants were executed during the thirty-six years from 1927 to 1963, and none since then. 44 After Furman, political disagreements among the states regarding capital punishment forestalled enactment of constitutional death penalty procedures at the federal level until 1988, when procedures were enacted for only one federal criminal offense, and 1994, when over forty federal offenses were made potentially death eligible. 45 While thirty-eight states have enacted capital punishment statutes since Furman, a quarter of the states still do not authorize the death penalty. 46 This division was sufficient to disable the states' representatives from successfully enacting national death penalty procedures for roughly two decades.

A. Who Is On Federal Death Row?

The federal death penalty has been used relatively sparingly since 1988. As of February 2000, the Attorney General had authorized federal capital prosecutions in only 199 (35%) of the 572 potential capital cases reviewed since 1988. 47 While fifty-four of those prosecutions were still pending in February, only twenty-six federal defendants (less than 4.5% of the potential cases) have actually been sentenced to death. 48 Moreover, in a somewhat surprising development that necessarily has significance for the future, six of the new federal death sentences have been vacated (although one of these was

recently reinstated), five of them in the past year; thus, the number of defendants actually on federal death row remains at twenty-one. 49

In fact, for roughly a year between mid-1999 and mid-2000, no federal defendant was sentenced to death. This temporary hiatus in federal death penalty verdicts seems to reflect nothing other than random accidents of [*540] timing and perhaps watchful waiting while the Supreme Court considered the Jones case, discussed below. I am aware of no executive or judicial branch policies that would produce an intentional slowdown of federal capital prosecutions. However, the vacation of six federal death penalties by federal courts suggests that federal judges are somewhat wary as they approach cases, which, for most of them, are the first capital cases of their professional lives. "Capital Punishment is qualitatively different," as one penalty-vacating federal judge has recently noted, 50 and despite the incautious message of Jones, we are likely to continue to see careful federal judicial scrutiny of federal death verdicts and appeals.

III. The Federalization of Death

A. Federal Death Eligibility is Significantly Different from Stateside Death- eligibility

Persons familiar with stateside capital punishment regimes are often surprised to learn of the very different way in which the federal death penalty regime is structured. In every stateside system, the only crime for which the death penalty is available is murder. 51 While different levels of homicide, reckless homicides as well as intentional ones, can be death eligible, 52 identification of stateside "death eligible" offenses is a simple enterprise: the crime of conviction must be homicide (non-negligent), and the jurisdiction must specify that death is a possible sentencing option. 53

The federal death penalty regime is entirely different, primarily because (1) the federal criminal code is not a common-law system and (2) the federal death penalty provisions are a statutory "overlay" on the previously-enacted substantive provisions of the federal criminal code. Although there are upwards of fifty different federal offenses for which death is a possible penalty, only a few of these are homicide offenses. Thus, for example, death [*541] is a possible penalty for federal car-jackings, bank robberies, conspiring to kill or kidnap members of Congress or other federal officials, and witness tampering. 54 Rather than being offense-triggered, federal death penalty eligibility turns on an identical statutory phrase added to each of these offenses and many others in the 1994 legislation: "if death results." 55

Thus, determining whether a particular federal offense is "death eligible" is not nearly as simple as in state systems because not all car-jackings or bank robberies-as opposed to all murders-are death eligible. The facts of each federal case must be examined, rather than just the statutory charge. Only if a non-negligent death "resulted" from the underlying offense is the federal death penalty possibly available. 56 The federal death penalty is fact-triggered, not offense triggered.

The significance of this very different federal structure is this: because it is impossible to identify death-eligible federal crimes without reference to the particular facts of each case, the comparison of death-eligible federal cases is a task even more difficult and subjective than on the state side. The potential universe of death-eligible federal cases is not just "all murders" but all eligible offenses in which worse-than-negligent death results. Comparing car-jackings to bank robberies to interstate murders-for-hire to witness-tampering is not just "apples and oranges," but rather the entire produce section. In addition, as previously explained, 57 a regulation requiring submission of all "death-eligible" federal offenses by U.S. Attorneys across the nation to Main Justice for centralized review and authorization becomes a highly subjective and somewhat manipulable process.

B. Virtually All Federal Death Cases Could Have Been Prosecuted by the States

Virtually every federal offense for which death is an available penalty is duplicative of some common state criminal offense. Murder is, of course, a [*542] crime in every American jurisdiction, whether by code or common-law. 58 Likewise, large-scale narcotics distribution, robbery (including of a car or of a bank), obstruction of justice, and various other offenses are crimes in every American jurisdiction. The only federal crimes for which federal jurisdiction is exclusive are treason against the federal government or offenses committed exclusively on federal territory, e.g. military bases, or entirely outside of the United States. Thus, for example, the federal death penalties being sought for the bombings of U.S. embassies in Kenya and Tanzania 59 could not be prosecuted by state authorities, at least not under current law. (Interestingly, early in our history, many federal crimes were specified as prosecutable in state as well as federal courts. 60 There would seem to be no constitutional prohibition of such a practice, and only Congress's decision, codified in 1874, to grant exclusive federal court jurisdiction over federal crimes 61 prevents federal crimes from being prosecutable by the states.) Thus, it is largely the "federalization" of crime that makes a federal death penalty possible. Indeed, as the next chart shows, all of the twenty-six federal defendants that have been sentenced to death committed crimes that could have been prosecuted by the states where the crimes were committed. 62 Moreover, the death penalty is available in each of the twelve states (Alabama, Arkansas, Georgia, Kansas, Illinois, Louisiana, Missouri, North Carolina, Oklahoma, Pennsylvania, Texas, Virginia) in which these twenty-six defendants allegedly killed or directed killings. 63 Therefore, not only could the conduct at issue in each case have been prosecuted under existing state statutes, but the same penalty could have been obtained.

[*543] [SEE TABLE IN ORIGINAL] [*544] [SEE TABLE IN ORIGINAL]

Only the fact that Congress has "federalized" the state criminal conduct at issue allows these cases to be prosecuted federally. The fact that federal officials or inmates are killed or that the bank robbed is federally insured does [*545] not preclude a stateside prosecution. Only a few of the twenty-one federal death row defendants is alleged to have committed the murder on exclusively federal property (for example, Paul, on federal park land one block from a city street) and, as previously noted, there is no theoretical reason that states could not be given authority to prosecute crimes committed on federal property within their borders.

I am not against federalization of all "local" crimes, and I have previously explained why some concerns about this issue are overblown. 65 There are legitimate and identifiable federal interests that can be served by the availability of federal prosecution for criminal conduct that also violates state laws, i.e., protecting federal officials, ensuring vigorous prosecution of those who infringe upon federal interests, national protection against parochial biases, and more effective federal investigation powers for interstate crimes. This is not the place to continue that debate. 66

Rather, I simply note the strange bedfellows that the federalization of crime and the federal death penalty creates. The proponents of the federal death penalty are largely the same conservative opponents of federalization of crime. Former Attorney General Edwin Meese, whose Justice Department during the Reagan presidency introduced vigorous federal death penalty legislation, 67 was more recently the Chair of the ABA task force that took a strong position against federalization of crimes. 68 Meanwhile, many persons normally opposed to such political interests are also opponents of the death penalty, federal or otherwise. The convergence of these two normally antagonistic groups could quite possibly lead to a rollback of some federal criminal jurisdiction- and thus a reduction in federal death penalty crimes- which has long been advocated but politically stymied up to now.

IV. What the Supreme Court Got Wrong in Jones

Major changes, if any, in the federal death penalty landscape will have to come from the legislative and executive branches because last year the U.S. Supreme Court implicitly approved the statutory structure. 69 In *Jones v. United States*, the Court addressed its first federal death penalty case in over [*546] half a century. 70 By affirming the sentence, the Court silently rejected broad challenges to the constitutionality of the 1994 Federal Death Penalty Act. As I will explain, the Supreme Court's decision in *Jones* was unfortunate, as well as in violation of the 1994 statute. But my concerns are case-specific, not systemic. Under our current death penalty jurisprudence, the 1994 Federal Death Penalty Act ("FDPA") is not open to broad attack.

In 1995, Louis Jones kidnaped a female army private from a military base in Texas and then sexually assaulted and brutally beat her to death on non-military property. 71 He was convicted of kidnaping with death resulting under 18 U.S.C. § 1201(a)(2) and sentenced to death by the jury. 72 On appeal, in light of Jones' well-corroborated confession, guilt was not at issue. 73 Broad attacks on the relatively new FDPA provisions were also rejected without difficulty. 74 However, in part because Jones' case was the first trial conducted under the 1994 FDPA, serious questions arose regarding the validity of his death sentence within the particular context of his trial.

First, the trial judge had repeatedly suggested to the sentencing jury that it had three options: life without parole, death, or some unspecified "lesser sentence." 75 This "lesser sentence" language was drawn from the FDPA's general sentencing provision, 18 U.S.C. § 3593(e). 76 However, the specific kidnaping statute under which Jones had been convicted clearly stated that only two options-death or life without parole-

were available. 77 Suggesting to the jury that some sentence "lesser" than life without parole was available was error. 78

Second, the trial court declined to instruct the jury that if they were "hung" as to sentence, Jones would automatically receive a life sentence [*547] without possibility of release. 79 This requested instruction was an accurate description of the law, 80 and because the court had erroneously suggested that some undefined "lesser sentence" was possible, a jury not so instructed might well wonder what would happen if it were "hung." Jones had undoubtedly committed an "atrocious" crime. 81 If the jurors were divided between death and life imprisonment, would the judge then give Jones some lesser sentence so that he might once again roam free on the streets? Because no clarifying instruction was given, such speculation remained unaddressed. 82

Thus Jones' sentencing jury entered its deliberations erroneously instructed and, possibly, substantively confused about the consequences of the possible verdicts. 83 If a "reasonable likelihood" existed that the jury was actually confused or actually misapplied the law, reversal was required, as the majority itself noted, under *Boyd v. California*. 84 However, while acknowledging the errors in the trial court's instructions and verdict forms, a 5-4 majority found it "doubtful" that the jury was confused and declined to consider the evidence in the record that the jury was actually confused. 85 In dissent, four members of the Court declined to discount the affidavits of the actually-confused, life-voting jurors and agreed that there was "at least, a [*548] reasonable likelihood" that the jury's deliberations had been "tainted" by the various instructional errors. 86

True, the instructional errors in Jones were specific to that case and are, in light of the Supreme Court's clarifying views, not likely to be repeated. 87 Moreover, a 5-4 disagreement regarding the "likelihood" of juror confusion from particular errors produces little precedential force: reasonable minds can easily differ from case to case on such issues, and each case will be contextually different. Thus, this portion of Jones represents merely a fact-specific application of *Boyd*- it set no new broad rules in this area.

While this lack of generalizability is of little solace to Louis Jones, it might save the case from celebrated opprobrium if the instructional errors were the only criticisms to be leveled. However, a far more serious and generalizable error appears in the Court's analysis of the aggravating factors used to sentence Jones to death and approved by a plurality in Jones. In fact, this aspect of the Jones decision appears to be in direct contravention of the statutory, and possibly constitutional, requirement that advance notice must be given of aggravating factors that could lead to death. 88

Getting to my point requires, unfortunately, some detailed statutory work. In order to be eligible for actual imposition of the death penalty under the federal statute, the jury must (1) unanimously agree that at least one "aggravating factor" has been proved beyond a reasonable doubt, and then (2) find that any proven aggravating factors "sufficiently outweigh" any mitigating factors which even one member of the jury finds by a preponderance of the evidence to be present. 89 The statute lists various aggravating and

mitigating factors, and at least one of the statutory aggravators must be found or a death sentence is precluded. 90

However, because legislation cannot capture in advance the varying facts in myriad cases that might appropriately suggest aggravation sufficient for death, the FDPA also permits the prosecution to prove "any other aggravating factor for which notice has been given[.]" 91 The unspecified nature of this "nonstatutory aggravating factors" concept obviously opens up a broad [*549] universe of variability in death penalty prosecutions. 92 However, the potential unfairness of such nonspecificity is hedged by two requirements, one constitutional and the other- vitally significant in the Jones case- statutory (and also likely constitutional).

First, constitutionally, an aggravating factor must be realistically specific and must "genuinely narrow" the class of death-eligible capital defendants. 93 Second, the FDPA expressly requires that notice of all aggravating factors, whether statutory or nonstatutory, must be given to the defendant within "a reasonable time before the trial." 94

The pre-trial notice requirement for aggravating factors in a capital case exists to ensure fairness in at least two ways. 95 A capital defendant needs reasonable notice in order to prepare evidence for a defense. 96 Moreover, and at least as significant, a defendant facing a possible death sentence needs to be able to intelligently evaluate plea negotiation options. If new factual allegations arguing for death can be sprung upon a capital defendant only after a decision to go to trial has been made, that defendant has been denied a fair opportunity to evaluate whether such facts might swing a jury toward death, such that pursuing a plea to life without parole is the more palatable option.

The pre-trial notice requirement for aggravating factors was plainly violated in Jones- and worse, the Court, both the majority and the dissenters, appears to have flatly missed the issue. In Jones, the government gave pre-trial notice of four statutory aggravating factors 97 and three nonstatutory aggravators. 98 The jury found that two of the nonstatutory aggravators were proven: (1) the victim's "young age, her slight stature, her background, and her unfamiliarity" with the place of the crime; and (2) the victim's "personal [*550] characteristics and the effect of the . . . offense" on her family. 99 However, and not surprisingly, the Fifth Circuit, a Circuit not noted for sympathy toward capital defendants, found that these separately listed nonstatutory factors were in fact impermissibly "duplicative:" "The plain meaning of the term 'personal characteristics' . . . necessarily includes 'young age, slight stature, background, and unfamiliarity[.]' " 100 The Fifth Circuit went on to rule, agreeing with a Tenth Circuit decision that had vacated one of the first federal CCE death penalties, 101 that "[s]uch double-counting of aggravating factors creates the risk of an arbitrary death sentence. If the jury has been asked to weigh the same aggravating factor twice, . . . [we] cannot assume that 'it would have made no difference if the thumb had been removed from death's side of the scale.'" 102

The Fifth Circuit's analysis of the nonstatutory aggravating factors was not rejected by a majority of the Supreme Court: another disturbing irony of the Jones decision is that, as to this part of the analysis, only

three Justices joined Justice Thomas' opinion, rendering it only a plurality. 103 Even Justice Thomas' plurality opinion appeared to recognize the "ambiguity" problem presented by the government's duplicative and vague phrasing of the two nonstatutory aggravating factors. However, the plurality endorsed their use, stating three times that "any ambiguity arising from how the factors were drafted" was adequately clarified by "the Government's argument to the jury" at the sentencing stage. 104

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This basis for affirming use of the nonstatutory factors in Jones' case seems flatly to contravene the statutory, possibly constitutional, pre-trial notice requirement. Allowing the government to proceed on vague, ambiguous, and duplicative aggravating factors right up to the moment of closing argument, after all evidence by both sides has been presented, and only then "ma[k]e . . . clear what each nonstatutory factor meant[,]" 105 violates both rationales for the pre-trial notice requirement: evidentiary preparation and fair evaluation of plea options. Oddly, however, although Justice Thomas noted the notice requirement in an early footnote, he did not mention it in his substantive discussion. 106 Justice Ginsburg's dissent did not note the point either. 107

Both the Fifth Circuit and the Supreme Court majority went on to hold that, in any case, any error in the nonstatutory aggravating factors was harmless beyond a reasonable doubt. 108 However, this analysis was conducted without any consideration of the prejudicial effect of the pre-trial notice violation on Jones' case, nor of the plainness of this statutory error. One might think that violation of a clear statutory direction would have greater prejudicial value than a nonstatutory error. 109 In any case, the Supreme Court should not appear to endorse such a violation.

Because the pre-trial notice violation was not noted, let alone resolved, by the Supreme Court, it remains open in Jones' habeas proceeding. The argument could not have been anticipated by Jones' counsel until the Jones plurality made it clear that it was "the Government's argument" at sentencing that apparently cured the error. 110 Thus, the apparent unfairness between Jones' death sentence and McCullah's life sentence 111 may yet be resolved.

Moreover, lower courts should not interpret the Supreme Court's apparent failure to see the issue as tacit approval of dispensing with clear advance notice of all aggravating factors. The pre-trial notice requirement for non-statutory aggravating factors in 18 U.S.C. § 3593 stands, despite any contrary suggestions in Jones.

The Jones decision, thus, leaves two lingering disappointments. First, the Court affirmed its first federal death sentence in over fifty years on a very [*552] unsatisfying theory: multiple errors, all adjudged to be harmless. Because the Court speaks infrequently on most issues, its pronouncements necessarily perform a "message-sending" function beyond the contours of any particular case. In Jones, the Court could have sent a message of care to appellate and district court judges: "Be alert for errors in federal capital cases and take pains to correct those that seem significant; err, if you must, on the side of remand for error-correction rather than death affirmances." Instead, an opposite message may be perceived in Jones by some courts: "Even when you find errors in federal capital cases, stretch hard to affirm and find

them harmless." 112 Not only does this send, in my view, an unfortunate message for federal capital defendants, but, ironically, it likely increases the Supreme Court's own workload. More affirmances of death sentences, despite detection of trial errors, leads inevitably to more and more serious certiorari petitions, requiring (one hopes) more careful review. A message of "remand where errors of any significance are found" would ultimately have had led to greater satisfaction with, or at least acceptance of, federal death sentences once finally presented to the Court for review.

The second, more specific, disappointment of Jones is its silent endorsement of statutory error regarding the pre-trial notice requirement for nonstatutory aggravating factors. 113 Let us hope that trial and appellate courts do not endorse the plurality's unanalyzed theory that the government's closing argument can "cure" vague or ambiguous aggravating factors. Due process, as well as the FDPA, requires specificity and clarity regarding the meaning of nonstatutory aggravating factors well in advance of trial.

The 1994 Federal Death Penalty Act was a creature of political compromise almost twenty years in gestation. 114 The statutory requirements regarding such a sensitive matter should carry great weight: there is no guarantee that the statute could have been passed without each of the various provisions that protect federal capital defendants, and there is large reason to doubt it. The requirement of pre-trial notice for aggravating factors in a capital case is essential for the parties' accurate evaluation of plea possibilities. The absence of this notice cannot be "cured" by post-trial [*553] argument, when it is too late for clarity to do the defendant any good. The Supreme Court plurality erred grievously in Jones when it said that post-evidentiary argument can cure otherwise vague aggravating factors. Because the error is an obvious one under the statute, one hopes that lower courts will simply not follow the Jones plurality in this regard. The Supreme Court has no license to rewrite such a hard and long battled-over statute.

V. Executive, Legislative, and Judicial Developments

A. The Department of Justice's Administration of Federal Death Penalty Prosecutions

Over the last two years, the Department of Justice has continued to regularize and centralize its administration of federal death penalty cases. A Capital Case Unit staffed by experienced homicide attorneys has been ensconced within the Criminal Division at Main Justice in Washington D.C., since January 1999; you can even find a description on the DOJ website. 115 Statistics updated by the Department as of February 14, 2000 (Valentines Day no doubt merely a macabre coincidence) indicate a number of interesting developments. Even more significantly, the Department is about to release its long-promised study of racial and geographic disparities in federal death penalty data. One hopes that, simultaneously, the Department will open its data bank on the over 600 federal potential capital cases that it has now reviewed so that scholars and other interested parties can further examine relevant issues.

Below are reprinted statistics recently provided by the Department of Justice, updating the same three tables provided in my March 1999 article. 116 Table I shows that the Attorney General had, as of February 14, 2000, authorized the filing of death penalty notices for 199 defendants- by now this [*554] number is surely over 200. The percentage of defendants authorized out of all potential cases submitted for review is still about one-third. 117

[SEE TABLE IN ORIGINAL] 118

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120 [*555]

The public data still does not report what the U.S. Attorney's recommendation was- death or not death- in any of these cases. However, as previously explained, the local U.S. Attorney's recommendation carries great weight and is usually followed, 121 and reported instances of the Attorney General directing that a death notice be filed over a U.S. Attorney's objection remain rare. 122 As far as I know, no such case has actually produced a death penalty; instead, all such cases have been resolved by plea bargains for life sentences. This is because of the anomalous wrinkle in the Department's capital case protocols, under which Attorney General approval for seeking a federal death penalty is required, but no such approval is required for individual U.S. Attorneys to "plead out" a death penalty case for a life sentence. 123 It is possible that this anomaly will be eliminated when the Department issues its disparity study because more centralized control over plea dispositions would presumably increase uniformity.

The last point to be drawn from Table I is that the number of cases submitted has increased, beginning in 1997, to fairly even annual levels (126, 126, 136, 155 124). This suggests that U.S. Attorneys' offices in the field are taking their submission obligations under the protocols more seriously, 125 and that, at least under current DOJ standards, an annual number of submissions between 126 and 160 can be anticipated with some regularity.

Table II shows what has happened in the 199 federal capital cases authorized by the Attorney General by February 2000. The largest difference from the 1998 data is the Department's creation of a new category, "AG

decision to withdraw seeking death penalty," encompassing twenty defendants. This is a significant number: 10% of authorized defendants were subsequently able to persuade the Department of Justice to "de-authorize" the death penalty. 126 This demonstrates that authorization is not the end of the process. Defense attorneys can seek revision of an authorization and should do so if any new information develops.

[*556] [SEE TABLE IN ORIGINAL] 127

Also significant in Table II, is that about a third (62 of 199) of the authorized defendants were subsequently permitted to plea-bargain the case to a no- death resolution. This again demonstrates the Department's openness, or that of U.S. Attorneys in the field, 128 to persuasion in the capital context. Moreover, when the sixty-two no-death pleas and the twenty withdrawn authorizations are added to the 373 not-authorized defendants in Table I 129 and the fifty-four pending cases are omitted, the result is that in over 87% of the reviewed cases (455 of 572), the Department did not pursue the death penalty to

trial. This suggests careful case selection and pursuit of only the most powerful or persuasive cases. 130 Such careful case selectivity and constant [*557] openness to persuasion should be applauded in the administration of the ultimate sanction.

Finally, Table III shows which of the ninety-four federal districts have submitted capital cases to Main Justice for review over the past six years, how many, and to what result.

[SEE TABLE IN ORIGINAL] 131 [*558] [SEE TABLE IN ORIGINAL] [*559] [SEE TABLE IN ORIGINAL] 132 [*560] The information in Table III suggests that little, overall, has changed since 1998. 133 Prosecutorial discretion and unexplained geographic differences still appear to have the largest consistent impact on where the federal death penalty is pursued. For example, five of the ninety-four federal jurisdictions (Puerto Rico, the Eastern District of Virginia, the Eastern District of New York, the Southern District of New York and the District of Maryland) submit by far the largest number of potential capital cases for DOJ review (267 of 633, over 30% of the national total). In terms of cases reviewed, the percentage is even higher: over 43% (229 of 524). Interestingly, however, only forty-five of the submitted cases from these districts have been authorized for actual capital prosecution. This means that less than 20% of the cases actually reviewed by the DOJ from these jurisdictions (229) 134 have been approved by the Attorney General as capital cases—a percentage significantly lower than the 35% approval rate for reviewed cases overall. 135 This suggests that the Attorney General and her review committee may, in some rough sense and even unconsciously, be "evening out" the apparent disparity in submission rates from the high-submission jurisdictions.

Meanwhile, as Table III indicates, twenty-five of the ninety-four federal districts still have not submitted a single case for potential capital penalty review in six years. While this figure is down from thirty-one districts in 1998, it is still "difficult to believe that not a single murder in those [districts] . . . since 1994 was a possible candidate for federal prosecution." 136

A different measure of disuniformity comes by comparing districts in the twelve states that do not allow capital punishment with those in the twelve states that permit capital punishment and most vigorously implement it. 137 As the data in footnote 138 indicates, since 1994 the federal districts in the "non-capital punishment states" have submitted seventy-four cases for review, of [*561] which eleven (15%) have been authorized. 138 Meanwhile, the districts in the "vigorous" capital punishment states have submitted 190 cases for review and have had sixty-seven (30%) authorized. Thus, the districts in states that most vigorously support capital punishment have both a submission rate and an authorization rate that are double the rates of the districts in states that do not support capital punishment. This supports both the idea that the submission "trigger" is manipulable enough to allow for significant differences in implementation, and that U.S. Attorney recommendations carry great weight in the authorization process. 139

Finally, as Table III lists, it is interesting to note some intra-state differences within states that have more than one federal district. Most dramatic is Virginia, in which the Eastern District has submitted sixty-two cases for review since 1994 while the Western District has submitted only five. Similarly, the Eastern and Southern Districts of New York have combined for ninety-eight submissions, while the Northern District

has submitted only six cases. Less dramatic but still interesting are, for example, the Central versus Southern Districts of California (fifteen versus zero submissions, respectively), the Eastern and Western Districts of North Carolina versus the Middle (fourteen combined submissions versus zero, respectively), and the Northern versus Southern Districts of Ohio (eleven versus zero submissions, respectively). The fact that the federal capital case review statistics can vary so greatly even among districts within the same state strongly suggests that individual prosecutorial discretion among U.S. [*562] Attorneys, rather than geographic location, still plays perhaps the largest role in federal capital case selection.

My point is not to condemn the existence or influence of prosecutorial discretion or geographic differences in this area, but merely to demonstrate that it exists. Once these factors are acknowledged, we should begin a debate about whether, and how, they should operate. There is a great deal that can be said in favor of accommodating both prosecutorial discretion and regional differences in a criminal punishment system. This may be particularly true in an area as sensitive and seemingly intractable as capital punishment. 140 Without candidly admitting the individual variability that the criminal justice system embraces, perhaps inevitably in this area, open debate is impossible.

B. The Department of Justice's Anticipated Disparity Study

By the time this article is published, the following discussion may well have been mooted by actual release of the Department of Justice's race and geographic disparity study, first promised in January of 2000. 141 I have absolutely no inside knowledge of its contents or conclusions, but allow me to risk true embarrassment by predicting why this study is unlikely to offer any large or systemic relief for federal capital defendants. The report is likely to make four general points, the last of which will be that no relief is available in the great bulk of existing federal capital cases.

First, the DOJ study will have to recognize that there is racial and geographic disparity in the administration of the federal death penalty. Even the small universe of facts that are publicly known demonstrate this, 142 and it is difficult to imagine that any non-public facts within the Department of Justice's province could alter this reality.

Second, however, statistical "disparity" is not the same as actionable bias. 143 Of course, the Department is certain to express grave concern about the disparities. Moreover, in an effort to reduce disparity, the Department will likely mandate that there be greater and earlier centralized control over potential federal capital prosecutions. The report will, or should, direct that all cases involving a killing must be submitted for DOJ review, and also that declinations of cases involving killings, if plausibly within federal [*563] jurisdiction, must be reported. The report may also, or should, announce uniform substantive guidelines that attempt to "equalize," nationally, certain factual issues that are relevant to capital prosecution, such as multiple victims and particularly bad motives like witness-elimination, federal identity of victim, etc., and attempt to specify their effect on evaluating the capital decision.

Third, the Department may also announce that in light of its concern regarding race and regional bias, it has carefully re-examined the facts and record of each authorized federal capital case. But one imagines this review will lead to a report that all, or virtually all, such cases reveal absolutely no impermissible bias or unfairness, but rather facts that appropriately deserve federal capital prosecution. Of course, in any case in which some impermissible bias or influence is found, one would expect that the Department would institute some form of relief.

Finally, in light of the newly-announced centralization procedures and the exhaustive review of existing cases, the Department is likely to announce that no action, beyond further study, is warranted, at least at this time. The report will assert confidence in existing federal death penalty prosecutions and recommend that the new centralized review procedures for future cases be permitted to operate for a few years to see if disparity is reduced or eliminated. Thus, despite all of the anticipation, it is difficult to imagine the Department's study leading even to a moratorium on federal death penalties or executions. The year 2001 will almost certainly see the first federal execution since 1963.

C. Legislative Developments

Nothing has happened legislatively since 1998 to change the federal death penalty framework. 144 Given that a lopsided 64% to 25% majority of the public still supports capital punishment, 145 as do both presidential candidates, a safe prediction is that no major legislative changes are likely in the near future at the federal level.

That said, however, some interesting legislation was introduced in early 2000 that, while not seeking to abolish federal capital punishment, would [*564] significantly alter its administration. 146 On February 10, 2000, Senator Patrick Leahy of Vermont, along with four other Democratic Senators, introduced Senate Bill 2073, the "Innocence Protection Act of 2000." 147 With regard to the federal death penalty, 148 this proposed legislation would

(1) permit defendants to request and obtain DNA testing "at any time after conviction," and require the government to preserve potential DNA evidence, and pay for DNA testing for indigent defendants; 149

(2) raise the potential damages from \$ 5,000 to up to \$ 100,000 per year of incarceration for any federal capital defendant proven to have been "unjustly condemned;" 150

(3) prohibit Department of Justice prosecutors from seeking a death penalty in federal courts situated in states that do not authorize state capital punishment, except in certain specific cases; 151

(4) expressly authorize federal capital juries to return a sentencing verdict of "life imprisonment without possibility of release" in "drug kingpin" prosecutions under the 1988 Act; 152 and

(5) require an annual report from the Attorney General to Congress "concerning the administration of capital punishment laws by the Federal Government and the States[;]" including data on the racial makeup of various specified categories. 153

The most interesting aspect of this proposed legislation is the third point, section 401, which would provide for "accommodation of state interests" by prohibiting federal death sentences in many cases if the federal district is [*565] located in a state that does not authorize capital punishment. 154 Section 401 would preclude seeking the federal death penalty within a no-death state unless the Attorney General certifies in writing that

(1) the State does not have jurisdiction or refuses to assume jurisdiction over the defendant . . .

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

(3) the offense charged is [one of a list of thirteen offenses that appear essentially "federal" or significant, such as treason, killing federal officials, terrorism, destruction of aircraft or trains, or hostage-taking]. 155

Although a hearing was held on Senate Bill 2073 in June 2000, concentrating on the DNA testing issues, 156 the legislation now seems certain to expire without action as the 106th Congress ends. Yet, it demonstrates a relatively high level of senatorial concern regarding federal death penalty issues and is likely to be reintroduced next year.

Senate Bill 2073 also indicates that Congress has finally recognized the fascinating federalism issues that arise under a federal death penalty statute that is applicable nationally but is founded on a premise about which the states are dramatically divided. For example, some U.S. jurisdictions prohibit imposition of the death penalty not just by absence of legislation but by affirmative direction in their constitutional charters. 157 Whether a federal criminal sentencing scheme should "accommodate" the interests of states that constitutionally express a view different from Congress is far from a settled question.

In fact, while such a provision rides under the currently popular banner of "federalism," it runs counter to the overwhelming number of federal criminal sentencing provisions, which are uniform in their application across the country. National "uniformity" has long been a goal of the federal sentencing scheme, and the premise of the federal sentencing guidelines system by which actual federal criminal sentences are determined is avoidance of "unwarranted" disparity based on geography alone. 158 With rare exception, [*566] the penalties specified for federal crimes are uniform throughout the nation. 159 For example, federal bank robbery is punishable under 18 U.S.C. § 2113 by up to twenty years imprisonment, or "if death results," by death, no matter where the bank is located. Similarly, possession with intent to distribute controlled substances is punishable by the same term of years in federal courts across the country, regardless of prevailing state or local views on drug law enforcement. 160 Some might even say that obtaining criminal punishment results different from those obtainable in some states is one of the goals of some federal criminal statutes, such as the civil rights offenses. 161

On the other hand, "death is different" in the minds of many. There is no other significant criminal justice issue on which the states disagree so starkly: three-quarters approve, while one-quarter forbid the death penalty. 162 On an issue so sensitive, so irrevocable, and so morally defined for many, perhaps recognition of state preferences is not unreasonable. On yet another hand, such accommodation would then have to confront the reality that a murderer in one federal district might get the death penalty for a crime that, had it been committed on the other side of the river or road, could not result in a federal death sentence. While this reality has been present among the states for many years, perhaps even since the founding of the Union, 163 the federal system has never embraced dramatically non-uniform sentencing for any significant federal offenses. This is an issue that must be confronted in the future.

Finally, very recent analysis (again by a talented journalist) suggests that there is race disparity not only in federal death penalty authorizations and sentences, 164 but in post-authorization plea disposition rates as well. 165 [*567] According to statistics maintained by the Federal Death Penalty Resource Counsel Project, 60% of white defendants authorized for federal capital prosecution have been permitted to plead to life sentences, as compared to only 41% of black defendants. 166 While the sample is small and capital cases are notoriously difficult to compare on their facts, this disparity likely places the race issue directly on the legislative agenda. The Department of Justice's soon-to-be-released own study will also further influence the race-disparity debate. One can expect congressional hearings, although most likely not actual legislation, on this and other issues in the near future.

D. Judicial Review of Federal Capital Cases

Aside from the Supreme Court's squandered opportunity (and error) in *Jones*, 167 the most interesting point about federal judicial review of federal capital cases over the past two years is that the death sentences of at least five defendants have been vacated or reversed. The case of Ronald Chandler is perhaps the most intriguing.

Because of the rigorous pre-trial screening of potential capital cases within the Department of Justice, 168 claims of "actual innocence" are less likely. Yet Chandler has raised just such a claim: that he was "actually innocent" of the allegation that made him death-eligible. 169 The allegation that Chandler ordered a murder rested entirely on the testimony of a criminal informer, the killer himself who testified in return for leniency 170 and then recanted after trial. As long as the Department of Justice allows capital cases to hinge on notoriously unreliable sources without a requirement of objective corroboration, such problems will continue to arise. 171

Moreover, because federal capital defendants must by law have at least two "learned counsel," including one experienced in capital cases, 172 claims of ineffective assistance of trial counsel should be dramatically reduced. Yet Chandler proved just such a claim, regarding his sentencing hearing, to the satisfaction of an appellate panel and five of eleven members of an en banc court. 173 Because Chandler's case was the first federal death penalty obtained [*568] since Furman, his ineffective assistance claims are significant for all federal death penalty cases, and the closeness of the en banc vote makes review by the Supreme Court a distinct possibility.

In brief, Chandler was convicted of running a large-scale narcotics gang in one of the first capital prosecutions under the 1998 CCE death penalty statute. 174 His federal death eligibility, however, hinged on the government's allegation that Chandler had ordered and paid one of his drug associates, Jarrell, to kill another drug associate, whom Chandler believed had become a police informant. 175 However, Jarrell, who testified to this at trial as part of a plea-bargain, 176 recanted after trial and said, as other evidence suggested, that he had killed the victim out of personal animosity. 177 If this were true, Chandler, while remaining a convicted large-scale drug dealer, would be ineligible for the federal death penalty.

After Chandler's conviction and sentence were affirmed on appeal, new counsel filed the one habeas petition to which federal offenders are entitled. 178 The district court denied relief, but on appeal, an Eleventh Circuit panel voted, 2- 1, to vacate his sentence, finding ineffective assistance of counsel because Chandler's trial counsel did not investigate or call dozens of mitigating witnesses. 179 The Eleventh Circuit immediately voted to rehear the case en banc, 180 however, in a recent opinion the Court ruled, 6-5, that Chandler's ineffective assistance claim was properly denied. 181

The Chandler court ruled, among other things, that "[n]o absolute duty exists to introduce mitigating or character evidence [in a capital case]." 182 The court also ruled that it could decide the issue of effectiveness despite the district court's assumption that Chandler's counsel had been ineffective. 183 Both of these issues have broad significance for federal death penalty administration in general. The importance of the issues, the closeness of the en banc vote, and the significance of Chandler as truly the first federal death penalty case since Furman all suggest that the Supreme Court will carefully consider Chandler's certiorari petition.

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Moreover, lingering doubts about Chandler's possible "innocence" of the death-eligibility allegation cannot help but color the case. Interestingly, at no point did the Eleventh Circuit mention his "penalty innocence" claim, but it is difficult to believe that such a serious concern did not at least sharpen the judges' analytical focus. Perhaps one lesson for federal capital counsel is that they should continue to push factually compelling issues like this, even after the moment for their legal significance appears to have passed. Such "atmospheric" elements of a capital case can have influence on decision-makers even if they do not provide an obvious legal "hook" on which to hang relief.

Also decided in the past year was *United States v. Causey*, 184 in which the Fifth Circuit vacated the federal death sentences of two defendants on jurisdictional grounds. Convicted under a provision of the federal witness tampering statute, 185 Len Davis, a New Orleans police officer, and Paul Hardy, a local drug dealer, conspired to kill (and did kill) another New Orleans police officer because she had filed an internal complaint against Davis with the New Orleans Police Department for his alleged police brutality. 186 While vile, this sounds particularly like a local dispute. Indeed, the Fifth Circuit found insufficient evidence that the victim's complaint, while certainly describing a possible federal crime, was intended or even likely to go to federal officials or that the defendants had interference with any federal proceeding in mind when they killed. 187 Thus, the § 1512 conviction count was vacated. 188 Although the defendants were also convicted on two other death-eligible counts, 189 their death sentences were vacated and the case remanded for re-sentencing because the jury's general death sentence recommendation could have been influenced by the invalid § 1512 conviction. 190

The Causey decision provides little substantive solace regarding the death penalty, but it does demonstrate the convergence of interests between the anti-federalizationists and death penalty opponents. Here, the "federalization" of a local witness-tampering offense went too far for the Fifth Circuit; the result is that two federal death penalties were overturned. 191

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More recently, in May 2000, the Fourth Circuit vacated Aquila Barnette's federal death sentence and remanded for re-sentencing, finding error in the exclusion of certain testimony from a defense psychiatrist. 192 The psychiatrist was permitted to testify for the defendant in the sentencing hearing, but the trial court did not allow him to be recalled in surrebuttal as to a particular point (whether the defendant fit the definition of a "psychopath") raised for the first time by the government in rebuttal. 193 Further details are unnecessary here, but the decision demonstrates two points.

First, federal courts, including those with "conservative, pro-government" reputations, appear to be examining federal death penalty cases and records carefully, despite the possibly contrary message of Jones previously discussed. Second, allegations of race bias do not fall on totally deaf ears in the federal courts. In Barnette's case, the defense alleged that a "Psychopathy Checklist" upon which the government's expert had relied was invalid or highly questionable as applied to African-Americans. 194 Barnette is African-American, and the court made a point of twice noting this allegation while reversing the sentence because the defense expert had not been allowed to testify about this (as well as other points). 195

Thus, the Tenth, Fourth, and Fifth Circuits have now each vacated a federal death sentence on appeal, as has a panel of the Eleventh Circuit, although Chandler's death sentence has been reinstated en banc. The district courts also have been active in this area, as described below. The judicial branch clearly stands ready to act in the federal death penalty arena.

In March 2000, an Arkansas district court vacated a jury's "recommendation" of a death sentence in an interstate racketeering and violence case. 196 As in *Barnette*, the issue in *Lee* involved expert testimony at the sentencing hearing; here, the court found that the government had exceeded proper boundaries in cross-examining the defense expert, as well as in offering its own mental health expert in rebuttal. 197 Significantly, the judge began the opinion by stating what is likely to become a standard recitation in [*571] federal death penalty cases: "Defendant *Lee*'s arguments are worthy of extremely careful scrutiny because this is a death penalty case." 198 The judge then found that, "[u]pon reflection" 199 and "[a]lthough it did not register to the Court at the time," 200 he should not have allowed government counsel to introduce certain evidence, and that "[t]he unfairness [was] patent." 201 This opinion evinces a healthy openness to correcting even those errors that the judge himself had approved in the heat of trial. The fairness of the federal forum is enhanced by such candid dispositions.

The disposition in *Lee*, however, was almost certainly influenced by the unusual facts underlying the jury's death sentence. 202 In brief, although *Lee* was convicted with a co-defendant, *Kehoe*, the court bifurcated the sentencing proceedings and *Kehoe*, going first, received a life sentence. The local U.S. Attorney then agreed to discontinue seeking death for the apparently equally culpable *Lee*. 203 However, as the U.S. Attorney reported to the judge later that afternoon, her decision to withdraw the death penalty had subsequently been overruled by Main Justice, so the parties proceeded to a death sentencing hearing, likely believing that the same jury that gave *Kehoe* life would similarly recommend for *Lee*. But the jury then returned a death verdict against *Lee*. 204

Later, the fact emerged that, although the DOJ protocol specifies that the Attorney General shall make any decision to withdraw a death penalty notice, 205 the mid-trial decision not to withdraw *Lee*'s death penalty had been made by the Deputy Attorney General because the Attorney General had been unavailable at the White House. 206 The district judge, likely displeased with the apparent interference with the local U.S. Attorneys by officials from Washington D.C., 207 ruled that *Lee* had a "right" to "force" the DOJ to follow [*572] its protocols, and that the Deputy Attorney General did not have authority to make the final withdrawal decision. 208 The court appeared to hold that the death sentence was invalid on this separate ground as well. 209

The ruling that the death penalty protocols create enforceable procedural rights is in conflict with the rulings of at least six other courts. 210 However, another federal district court troubled by the death penalty has ruled, harmoniously although not identically, that potential federal capital defendants have a constitutional right to counsel before the Attorney General's Capital Case Review Committee, in part because the protocols grant such a right. 211

The question of whether the Department's internal guidelines create enforceable rights with remedial consequences is an emerging issue, which will have to be settled by the Supreme Court. The Court has not ruled on the question of whether Department of Justice policies, as expressed in the U.S. Attorney's Manual, create enforceable rights, 212 but there are analogous, although relatively old, opinions giving force to published internal regulations in other contexts. 213 It is difficult to predict how the Supreme Court Justices might rule, since none, save Chief Justice Rehnquist, have had to answer a similar question.

However, the unfortunate pressures created by an "enforceable right" ruling cannot be ignored. "Internal guidelines" such as the capital case protocols and, more generally, the U.S. Attorney's Manual, are not required by law. Instead, they represent a creditable effort by a large prosecutorial agency to formulate predictable guidelines for largely unreviewable prosecutorial discretion. Their availability to the public is helpful and a mark of our open democratic society. However, if every published guideline is later held to create enforceable rights, then the pressure not to formulate, write down, and publish such discretionary guidelines will be huge. Quite likely, much of the U.S. Attorney's Manual would immediately be repealed or withdrawn by the Department of Justice. The losses to the public would be great: loss of regularity, loss of predictability, loss of internal disciplinary [*573] standards, and, perhaps most significantly, loss of extremely useful guidance based on a wealth of experience for the dozens of young lawyers who are hired as federal prosecutors each year.

For example, in the capital context there is no guarantee that a new Attorney General will want to keep in place the many procedural opportunities and protections that Janet Reno has, to her credit, provided for defendants in her capital case protocols. They are entirely discretionary. The pressure to repeal them will be particularly strong if each provision is now seen as providing a potential "hook" for reversal in otherwise fairly conducted federal criminal prosecutions.

On another interesting procedural point, the trial judge in Lee also decided that he had jurisdiction over a post-trial motion, despite the FDPA's statutory direction that if the jury returns a "recommendation" of death, then the judge "shall" impose the death sentence. 214 While one might quibble that the judge should have "imposed" the death sentence first, and then vacated it, the ruling that a district judge retains the general authority granted under the Federal Rules of Criminal Procedure to consider substantive post-trial motions, even in an FDPA case, seems correct.

Finally, perhaps the most intriguing FDPA judicial decision, albeit limited in scope, is the recent decision of Judge Salvador Casellas in the District of Puerto Rico to declare the federal death penalty entirely inapplicable in Puerto Rico. 215 The Puerto Rican constitution expressly provides that "the death penalty shall not exist" in the Commonwealth. 216 The FDPA does not expressly state that it applies in Puerto Rico. 217 The district court ruled that the FDPA was statutorily inapplicable in Puerto Rico under its authorizing statute and, more pointedly, would violate substantive due process if it did apply there. 218

It is difficult to imagine the Martinez ruling surviving on appeal, 219 though the statutory basis of the district court's decision speaks to issues outside normal federal supremacy grounds. As noted above, the federalism [*574] issues raised by applying a national death penalty law in states that do not accept that penalty raise vital questions that go deep into our theories of government as well as criminal punishment. As Judge Casellas noted, the FDPA expressly exempts from the death penalty persons subject to the jurisdiction of Native American tribal courts if they commit an otherwise eligible offense in Native American country, "unless the governing body of the tribe has elected" to allow the FDPA to operate. Thus, Congress gave local choice over capital punishment to Native American tribes but not to other jurisdictions that oppose the death penalty. Federal courts will initially have to confront these issues, but ultimately these questions raise political and legislative questions that cannot long be avoided. 220

Overall, the news from the judicial front is mixed. In Jones, the Supreme Court missed an opportunity to send a strong message of care and caution by affirming its first federal death sentence in fifty years based on a trial where errors concededly were made. 221 Nevertheless, lower federal courts have reversed some federal death penalties after Jones, based upon apparently careful parsing of records and arguments. 222 Some district judges have expressed the view that special care is appropriate in federal death penalty cases. There is no doubt that, in the future, federal courts will continue to play a large role in developing the law and filling statutory gaps in this area, no less than any other.

Moreover, the importance of the Department of Justice's pre-trial review process to determine whether a death penalty should be federally pursued is now clear. Judicial attention has been focused on that process, unsurprisingly given its significance. Pressure to find enforceable "rights" in this process is large and understandable. Yet other unfortunate consequences are produced, such as the pressure to dispense with such a discretionary process altogether. Pushing this issue may not be in the best interest of federal capital defendants as a class, but how can any one defendant avoid the attraction if it might lead to relief from the ultimate penalty? This question, perhaps more than any other single issue, may well lead to the development of entirely new laws regarding the exercise, exposure, and review of prosecutorial discretion.

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E. Other Sources of Pressure

Law is not created in a vacuum, and other sources of pressure on the administration of the federal death penalty cannot be ignored. In addition to the international pressures discussed below, cultural influences on the future of capital punishment in America cannot be ignored.

First, of course, is the recent decision of Illinois' governor, described as a "moderate Republican," to order a moratorium on all state executions until the cases of all Illinois death row residents can be reviewed. 223 This was premised on the fact that thirteen defendants sentenced to death in Illinois over the past twenty years had subsequently been released as innocent, 224 while only twelve defendants had been executed. 225 When error outruns executions, even those favoring capital punishment must pause. This

statistic is mirrored nationally: at least eighty-one capital defendants in twenty-one states have been released from death row based upon innocence claims. 226

The Illinois moratorium followed an attempt to enact a moratorium similar to the one enacted by the Nebraska state legislature in 1999; although that legislation was vetoed by the governor, the legislature partially overrode the veto to fund a two- year study of roughly 1,300 homicide cases in Nebraska since 1973, for issues such as racial disparity and proportionality. 227 By one count, moratorium legislation has been introduced in the legislatures of twelve states. 228 Likewise, similar legislation is being considered by a number of states, 229 despite the fact that the federal Congress rejected a proposed "Racial Justice Act" as part of the 1994 FDPA compromise. 230

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The current moratorium movement finds its roots in a February 1997 vote of the American Bar Association. At its mid-year meeting three years ago, the ABA adopted a resolution calling for a "moratorium" on all executions until "policies and procedures" are implemented to "(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed." 231 This resolution further specified four steps viewed as necessary to achieving the goals of the resolution:

-implementing policies to ensure competent defense counsel in all capital prosecutions;

-ensuring that courts can exercise "independent judgment on the merits" in post- conviction collateral proceedings;

-"striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant;" and

-prohibit execution of the mentally retarded or persons who were under 18 when they committed these offenses. 232

The resolution closed with the claim that "the [ABA] takes no position on the death penalty" per se. 233

Putting aside the dubiousness of the "no position" claim, an ABA report issued in January of this year, entitled "A Gathering Momentum," makes a persuasive case for the claim that a "grassroots" movement "questioning the fairness of the death penalty as implemented" is afoot in the United States. 234 Indeed, recent public opinion polls show a decline in public support for the death penalty (although support still

commands a substantial majority), as well as majority support to investigate claims of innocence. 235 These shifts in public opinion, if true, likely can be traced to all of the foregoing well-publicized developments. 236

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Nevertheless, it still seems unlikely that any "gathering momentum" will produce significant change at the federal level. Federal death penalties are fewer, better counselled, and better screened for "innocence" claims, than are stateside capital cases. After the Illinois moratorium was announced, President Clinton was asked whether he would impose a similar moratorium on federal executions. His response was, "[t]here are, I think, not those grounds [as in Illinois] for that kind of moratorium under the federal law . . . [So] in the federal cases I don't believe it's called for." 237 Democratic Presidential nominee Al Gore similarly has said that he has "not yet seen evidence that . . . would justify a nationwide moratorium[.]" 238 Meanwhile, although the DOJ study of race and geographic disparity issues in the federal death penalty will undoubtedly be a revealing and instructive enterprise, the study is unlikely to produce evidence of innocence or intentional bias that might lead to an Illinois-like reaction. 239

VI. The Significance of the Federal Death Penalty: International Implications

Last year, states within our federal union executed ninety-eight criminal defendants, the most not only since Furman but in any year since 1951. 240 Indeed, since the reinstatement of capital punishment regimes in 1977, states have executed over 500 death row inmates. 241 Why, then, is it significant that the federal government has added a relatively small number of defendants to death row over the past ten years or that it may execute one defendant in the year 2001? 242

I believe the major significance of a federal execution will be its international implications. 243 The national government, and not just a few of its "oddball" constituent states, is the entity that will now begin to execute. The world has not seen the United States, qua United States, execute anyone in two generations. The median age of this country's population is now [*578] reported to be 35. 244 Thus, the majority of Americans have never seen their federal government actually carry out an execution.

As frequently noted, the United States stands in almost virtual isolation internationally by permitting state executions. 245 According to Amnesty International, eight countries abolished their death penalties in 1999. 246 The European Union, an increasingly influential group, consistently criticizes the United States for allowing executions. 247

For almost 40 years, the United States has been able to psychologically distance itself from its international isolation on capital punishment by saying that "it's not us, it's just some of our (more backwards) states" that execute. 248 This will no longer be the case once the federal government, itself, begins to carry out criminal executions. For better or worse, representatives of the federal government in international meetings will have to confront the reality that it is "we" and not just "they" who execute.

Perhaps the United States' federal representatives will have no difficulty taking principled positions in favor of federal capital punishment; but they will no longer have a secret psychological safe harbor, denying active involvement in a governmental execution system.

I find additional significance in the advent of federal executions in the extinguishment of some subconscious feeling of "enlightened" federal government vis- a-vis the states. My generation was young in the Kennedy-Johnson era, when the federal government took the lead in national civil rights enforcement. Prior to that, our faith in the federal government was shaped by federal efforts to lead the country out of the Depression in the 1930's, and the federal armed forces taking the lead in making the world "safe for democracy" in two World Wars. The feeling (and it is just that, something that eludes my [*579] efforts at articulation) is that the federal government is somehow an enlightened leader, whose collective efforts and ideas are better, somehow, than any of its component states.

This feeling is, of course, historically naive and empirically conflicted. Our federal government also led the way in McCarthyism and Vietnam, two less than noble efforts for my generation. Conversely, individual state governments have frequently been enlightened leaders in social and political policy. 249 Nevertheless, I find myself disquieted by the prospect of the federal government re-embracing capital punishment after thirty-seven years. While I cannot say I am morally opposed to capital punishment in all cases-cases like the Oklahoma City bombing, California's Polly Klaas killing, or the racially charged truck-dragging murder last year in Texas represent emotionally powerful counter-arguments-I also have deep concerns regarding its administration. Federal executions somehow feel inconsistent with my personal, rose-colored image of the federal government (likely the product of years of federal experience, subconsciously internalized). For me, capital punishment represents a rational and, at times, justified state response to heinous, unredeemable crimes and criminals. Yet when the federal government actually executes a defendant, duly convicted and not innocent as the first to be executed surely shall be, it will be a significant and somber moment nonetheless.

VII. Conclusion

As the great philosopher Pogo used to intone, "the future lies ahead of us." 250 So what is the future of the federal death penalty? First, it is likely to go forward, with an actual execution occurring in the next twelve months. Second, concerns about it could well combine with "anti-federalization" forces to produce a reduction of federal criminal jurisdiction. Third, it will continue to be bound up with concerns about statistical race disparities and geographic non- uniformity, which will not disappear no matter how many procedural protections we erect. Fourth, it is certain to be the continued object of federal judicial, as well as legislative, attention. Fifth, it will continue to leave the United States isolated from the international community.

Absent an unexpectedly sweeping change in popular sentiment, the federal death penalty is not going to be repealed or suspended. When the first [*580] federal execution occurs, by painless lethal injection,

some victims may be cheered and some federal prosecutors will feel vindicated. But others of us will find it a significant occasion to pause and consider the justness and utility of the path we currently tread.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Criminal Offenses
Miscellaneous Offenses
Witness
Tampering
Penalties
Criminal Law & Procedure
Criminal Offenses
Crimes Against
Persons
Kidnapping
Penalties
Criminal Law & Procedure
Sentencing
Capital Punishment
General Overview

FOOTNOTES:

n1 See *United States v. Flores*, 63 F.3d 1342, 1351-52 (5th Cir. 1995), cert. denied, 519 U.S. 825 (1996).

n2 See *Flores*, 63 F.3d. at 1351-52.

n3 See Tex. Penal Code Ann. § 19.02, 19.03 & 12.31 (West 2000) (murder punishable by death); Tex. Health & Safety Code Ann. § 481.120 (West 2000) (marijuana distribution, punishable by up to life imprisonment).

n4 See *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (decided together with *Gregg v. Georgia*, 428 U.S. 153 (1976)).

n5 *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972); see generally, Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *Fordham Urb. L.J.* 347, 355, 369-81 (1999).

n6 See National Narcotics Leadership Act of 1988, Pub. L. No. 100-690, § 7001, 102 Stat. 4181, 4387-95 (codified at 21 U.S.C. § 848(e)-(r)). For an account of the 1988 CCE death penalty procedures, see Little, *supra* note 5, at 381-84 (1999).

n7 21 U.S.C. § 848(c), (e) (1994).

n8 Immediately upon passage of the 1988 CCE death penalty procedures, the U.S. Department of Justice added a provision to the U.S. Attorney's Manual requiring written approval by the Attorney General before any federal prosecutor may file a death penalty notice. U.S. Dep't of Justice, *United States Attorney's Manual* § 9-10.020 (1988) [hereinafter USAM]. This non-statutory requirement for AG approval is still in operation today. See U.S. Dep't of Justice, *U.S. Attorney's Manual* § 9-10.020 (1998).

n9 The first modern federal death sentence was returned in *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993) (affirming conviction and sentence), cert. denied, 512 U.S. 1227 (1994), death sentence vacated, 193 F.3d 1297 (11th Cir. 1999), death sentence aff'd en banc, 218 F.3d 1305 (11th Cir. 2000). The next three death sentences were all returned in the same prosecution, *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), cert. denied, 520 U.S. 1253 (1997), but their federal habeas corpus appeals are still pending. There were other federal death penalty trials between 1988 and Chandler's, but they did not result in death sentences. See, e.g., *United States v. Cooper*, 754 F. Supp. 617, 620 (N.D. Ill. 1990) (reportedly "the first case in the country" in which a federal death penalty was sought under the 1988 CCE Act).

n10 Stateside capital defendants have a state habeas track available as well as a federal habeas, while federal defendants are entitled to only a single federal habeas corpus litigation in addition to their direct appeal. See 28 U.S.C. § 2255 (1994).

n11 Cf. Little, *supra* note 5, at 356. On July 7, 2000, the President announced that he would postpone Garza's scheduled August 5 execution date, pending new clemency regulations and a promised Department of Justice report on race and geographic disparities. See Raymond Bonner & Marc Lacey, U.S. Plans Delay in First Execution in Four Decades, *N.Y. Times*, July 7, 2000, at A1. On August 2, 2000, the capital case clemency regulations were announced and the President set Garza's execution for December 12, 2000. See Raymond Hernandez, Clinton Delays an Execution in Reply to New Procedures, *N.Y. Times*, Aug. 3, 2000, at A16; see also President William J. Clinton, Executive Grant of Clemency (Aug. 2, 2000) (on file with author).

n12 See Chandler, 996 F.2d at 1073; Tipton, 90 F.3d at 861. The first federal defendant sentenced to death since Furman, Ronald Chandler, was on roughly the same time track as Garza until 1999, when he was granted a new sentencing hearing in his habeas appeal by a divided panel of the Eleventh Circuit. See Chandler, 193 F.3d at 1298. The en banc Circuit, however, immediately vacated that opinion and ordered that Chandler's appeal be reheard en banc. See *id.* at 1316. On July 21, 2000, Chandler's death sentence and denial of his habeas petition were affirmed by a closely-divided en banc Eleventh Circuit. See Chandler, 218 F.3d at 1309 (11th Cir. 2000). The 6-5 division and the importance of constitutional ineffective assistance standards for the future of the federal death penalty suggest that the Supreme Court will look carefully at Chandler's certiorari petition.

n13 For example, Garza's case was approved for federal death penalty prosecution without the benefit of internal Department of Justice capital case review protocols adopted in 1995. See USAM, *supra* note 8, at § 9-10.000; Little, *supra* note 5, at 407-19 (discussing the 1995 protocols). There were also other federal cases at about the same time as Garza's involving multiple murders and large-scale drug dealing in which no federal death penalty was pursued. See, e.g., *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995). Whether these facts could provide any legitimate reason for Executive branch delay or relief remains to be seen. See generally Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 *Fordham Urb. L.J.* 1483 (2000).

n14 For a full account of the last federal execution, of Victor Feguer in 1963, see Little, *supra* note 5, at 355-57. See also *Feguer v. United States*, 302 F.2d 214, 216-55 (8th Cir. 1962), cert. denied, 371 U.S. 872 (1962).

n15 See generally Rory K. Little, *Myths and Principles of Federalization*, 46 *Hastings L.J.* 1029, 1030 n.2 (1995) ("Federalization of crime" is a term of art used (generally with a derogatory scowl) to describe congressional legislation that provides for federal jurisdiction over criminal conduct that could also be prosecuted by state or local authorities.").

n16 From 1977 through 1999, Texas has executed 199 defendants. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment 1998*, at 10 tbl.10, 12 [hereinafter *Capital Punishment 1998*]. This is fully one-third of all state executions since Gregg (totaling 598, see *id.*). The next highest execution count is in Virginia, with 73 (1977-99). See *id.* In addition, Texas currently has 451 persons on its death row, second only to California's 512 (with Florida third at 372). See *id.* at 6 tbl.5. By contrast, however, California has executed only seven persons since Gregg. See *id.* at 10 tbl.10, 12. Some might argue that because Texas prosecutors are relatively inured to homicide cases, Garza might have received more lenient treatment from state authorities. This seems doubtful, however, in light of the multiple killings, one of which Garza allegedly committed directly, in connection with serious felony narcotics distribution.

n17 See *infra* notes 62-63 and accompanying text. Of the 26 persons sentenced to death federally since 1988, five have had their death sentences vacated in subsequent court proceedings (six if you count Chandler's now-vacated relief). See Death Penalty Information Center, Federal Death Row Prisoners, at <http://www.deathpenaltyinfo.org/fedprisoners.html> (last visited Aug. 7, 2000). Thus, there are currently 21 persons actively facing execution on federal death row. See *id.* Three of the defendants on federal death row (Battle, Paul, and Hammer) committed murders on federal property (two in federal prisons and one in a national park). See *id.* But this is merely a jurisdictional issue; their conduct plainly violated state murder statutes.

n18 See American Bar Association, *The Federalization of Criminal Law* (1998) (inside cover lists members).

n19 *Jones v. United States*, 527 U.S. 373 (1999). The most recent prior federal death penalty case heard on the merits by the Supreme Court was *Andres v. United States*, 333 U.S. 740 (1948) (requiring jury unanimity under the federal death penalty statutes then in force).

n20 For a discussion of this legislation, see *infra* notes 130-39 and accompanying text. The quoted reference is to Justice Blackmun's oft-quoted (if late-developed) dissent regarding death penalty cases as a general matter in *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) ("From this day forward, I no longer shall tinker with the machinery of death.").

n21 See *infra* Table I.

n22 See Little, *supra* note 5, at 406-28 (discussing the DOJ capital case review process).

n23 See *United States v. Kee*, No. S1 98 CR 778(DLC), 2000 WL 863119, at *5 (S.D.N.Y. June 27, 2000) (rejecting this as basis for dismissing capital charge); Mark Hamblett, *Death Penalty Law Survives Two Challenges*, N.Y.L.J., June 29, 2000, at 1; Bill Miller, *U.S. Attorney Overruled in Starbucks Slaying Case; Lewis Had Urged a Life Sentence*, Wash. Post, Feb. 10, 2000, at B1.

n24 Neither George W. Bush nor Al Gore is opposed to capital punishment. See, e.g., Bob Kemper, *Death- Penalty Foes Far from Forcing a Ban Like Most in U.S., Gore and Bush Back Executions*, Chi. Tri., July 9, 2000, at 4. However, Governor Bush presides over the state with the most pro-capital punishment views in the Union and has personally presided as governor over 138 executions. See *id.* In contrast, one might presume that Vice-President Gore, although not likely to say so during a political campaign, shares with moderate Democrats some more forgiving beliefs and suspicions regarding the administration and utility of capital punishment in America today. For example, Vice-President Gore recently supported President Clinton's postponement of Juan Garza's execution, although he does not presently support a nationwide moratorium. See *id.* More importantly, the persons that each candidate is likely to appoint to the 93 U.S. Attorney positions around the country- traditionally, local lawyers who are adherents in each jurisdiction to the party of the elected President-are likely to differ, dramatically in some cases, in their views on capital punishment, depending on which party obtains the appointment power in 2001.

n25 See Little, *supra* note 5, at 406-28; U.S. Dep't of Justice, U.S. Attorney's Manual § 9-10.000 (1999), available at <http://www.usdoj.gov/usao/eousa/foia reading room/usam> (last visited Mar. 18, 2000). Nothing in the federal death penalty statutes mandates that the Department maintain formal internal review policies. Indeed, nothing in the statutes requires centralized review or authorization of death penalty cases by the Attorney General at all.

n26 See Ricardo Alonso-Zaldivar & Tyler Marshall, *Clinton Backs Pre-Execution DNA Testing*, L.A. Times, Feb. 17, 2000, at A1 ("Clinton said that the Justice Department is also conducting a study to

deter-mine whether the death penalty is disproportionately applied to blacks, and is developing guidelines for clemency petitions."); Excerpts from Clinton's Comments at Wide-Ranging News Conference, N.Y. Times, Feb. 17, 2000, at A19 (report of Pres. Clinton news conference, "we have a . . . review going on here, a Justice Department review on the racial impact or whether there was one in the death penalty decisions under the federal law"); see U.S. Dept. of Justice, Weekly Media Briefing with Deputy Attorney General Eric Holder (F e b . 1 0 , 2 0 0 0) a v a i l a b l e a t <http://www.usdoj.gov/dag/speech/21000availdag.html> (DOJ is doing "a historical study of the federal [death penalty] system with an emphasis on finding out whether or not there are inappropriate race disparities. . . "); Jerry Seper & Clarence Williams, Probe Set of Race Bias in Death Penalty, Wash. Times, Feb. 11, 2000, at C1. In my March 1999 article on the federal death penalty, I suggested that the Department should study and address both geographic and racial disparities. See Little, *supra* note 5, at 472, 489.

n27 See *United States v. Lee*, 89 F. Supp. 2d 1017, 1032-41 (E.D. Ark. 2000); see *infra* text accompanying note 165- 74.

n28 See *United States v. Pena-Gonzalez*, 62 F. Supp. 2d 358, 362-63 (D.P.R. 1999) (right to counsel); *United States v. Martinez*, No. 99-044 (SEC), 2000 U.S. Dist. LEXIS 10370, at *47- 50 (D.P.R. July 17, 2000) (106 F. Supp. 2d 311).

n29 See *Chandler v. United States*, 218 F.3d 1305, 1309 (11th Cir. 2000).

n30 Of course, as this essay goes to press, interested parties are still awaiting the Department of Justice's promised disparity study. Meanwhile, at the July 10, 2000, national meeting of the American Bar Association, new ABA President Martha Barnett forcefully advocated the ABA's nationwide moratorium position. New ABA Chief Asks Moratorium on Death Penalty, *Chi. Trib.*, July 11, 2000, at 3. Finally, a new U.S. President will be in office on January 21, 2001. Attempting to predict the result of the confluence of these events seems fatuous.

n31 See, e.g., Peter Hodgkinson, *Europe-A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 *Ohio N.U. L. Rev.* 625 (2000); *America in Dubious Company*, *Hartford Courant*, July 9, 2000, at C2 ("Only four governments execute more people than the United States[,] . . . China, Iran, Saudi Arabia and Congo."); Amnesty Int'l, *The Death Penalty: List of Abolitionist and Retentionist Countries*, at <http://www.amnesty.org/ailib/aipub/2000/ACT/A5000400.htm> (visited Aug. 20, 2000). The United States is not entirely alone, however; Japan recently sentenced two subway gas killers to death. See *Two Sentenced to Death for 1995 Gas Attack on Tokyo Subways*, *N.Y. Times*, July 18, 2000, A10.

n32 Cf. *United States v. Lopez*, 514 U.S. 549, 575-77 (1995) (Kennedy, J., concurring).

n33 See Little, *supra* note 5, at 366-84.

n34 See *id.* at 360, 366-84. See also 21 U.S.C. § 848(e) and 18 U.S.C. § 3591-98 (1994).

n35 See Little, *supra* note 5, at 360.

n36 See generally *id.* at 360-84.

n37 See 1 Stat. 112-15, 117 (1790); Little, *supra* note 5, at 362-63 & nn.64-66.

n38 See Little, *supra* note 5, at 363-64 (stating how members of the First Congress argued about the cruelty, general and specific deterrence, and proportionality of the death penalty).

n39 See *Winston v. United States*, 172 U.S. 303, 310 (1899) (noting "the reluctance of jurors to concur in a capital conviction"); Little, *supra* note 5, at 368; H.R. Exec. Doc. No. 20-146 (1829), reprinted in H.R. Rep. No. 53-545, app. tbl.1, at 6 (1894) (reporting that of 118 convicted federal capital defendants from 1790-1826, forty-two defendants (30%) had been pardoned).

n40 Act of Jan. 15, 1897, ch. 29, 29 Stat. 487 (1897); see Little, *supra* note 5, at 366-67.

n41 See Little, *supra* note 5, at 367.

n42 See *id.* at 367-68. It is significant to note that antebellum racial prejudice likely also played a role in making death penalties discretionary rather than mandatory in the late Nineteenth century—juries were expected to dispense capital punishment "in the desired manner," imposing death on black but not white defendants. *Id.* at 366 & n.92. See also Hugo Adam Bedau, *The Death Penalty in America* 11 (3d. ed. 1982).

n43 See Little, *supra* note 5, at 369-70. Death was legislatively eliminated for federal rape offenses in 1948. See 18 U.S.C. § 2031 (1946 & Supp. V 1952); see also Little, *supra* note 5, at 369-70 & n.109.

n44 See Death Penalty Information Center, *Executions of Federal Prisoners 1927-1999*, at <http://www.deathpenaltyinfo.org/fedexec.html> (last visited Aug. 20, 2000).

n45 See Little, *supra* note 5, at 372-88 (describing political and legislative evolution leading to the Federal Death Penalty Act ("FDPA") of 1994).

n46 See *Capital Punishment 1998*, *supra* note 16, at 3 tbl.1.

n47 See *infra* Table I. But see Little, *supra* note 5, at 453-62 (explaining that not all potentially "death-eligible" federal prosecutions are submitted to main Justice for review).

n48 This 4 % is actually smaller, since the 26 number is as of August 2000, by which time the number of submissions was certainly higher than the 572 in February 2000.

n49 Because cases are generally on review by courts long after the sentence is initially imposed, keeping track of who, precisely, is on "federal death row" at any particular moment is not as simple as it seems. See Beverly Lumpkin, *Who's A c t u a l l y O n D e a t h R o w ?*, at <http://abcnews.go.com/sections/us/HallsOfJustice/hallsofjustice43.html> (visited Aug. 20, 2000).

n50 *United States v. Pena-Gonzalez*, 62 F. Supp.2d 358, 360 (D.P.R. 1999) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, Powell & Stevens, JJ.)).

n51 A few exceptions exist, at least in theory. Thus, Louisiana and Mississippi provide a possible death penalty for rape of a young minor (under 12). See *State v. Wilson*, 685 So. 2d 1063, 1073 (1996); *Leatherwood v. State*, 548 So. 2d 389, 390-95 (Miss. 1989) (reversed on other grounds). But see *Buford v. State*, 403 So. 2d 943 (Fla. 1981) (holding that the death penalty is disproportionately excessive for the rape of an 11-year old). However, in *Coker v. Georgia*, 433 U.S. 584, 591 (1977), the Supreme Court struck down the death penalty for adult rape as disproportionate and thus violative of the Eighth Amendment's prohibition of cruel and unusual punishment. Whether Louisiana's non-homicide death penalty would survive in light of *Coker* is an open question.

n52 See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (holding approves death penalty for non-intentional but recklessly indifferent homicides).

n53 E.g., Cal. Penal Code § 190 (West 2000); N.Y. Crim. Proc. Law § 400.27 (West 2000); Ohio Rev. Code Ann. § 2929.02 (Anderson 1996). See also Little, *supra* note 5, at 432 n.423.

n54 See 18 U.S.C. §§ 351(d), 1512, 2113, 2119 (1994) (conspiracy to kill or kidnap members of Congress or other federal officials, witness tampering, bank robbery, and car-jacking respectively).

n55 See, e.g., *id.*

n56 There are three federal offenses for which death is provided as a possible penalty but no death need result: treason, "super" drug-dealing, and super drug-kingpins who "attempt" to kill certain persons. See Little, *supra* note 5, at 388-89; 18 U.S.C. §§ 2381, 3591(b)(1) & (2) (1994); 21 U.S.C. § 848 (1994). Whether these non-homicide death penalties would survive a Coker analysis, see *supra* note 51, is unknown: no death penalty prosecution has been authorized under these statutes since Coker was decided.

n57 In my earlier article I explained how U.S. Attorneys who are opposed to or have misgivings about capital punishment could simply not send to Main Justice some federal cases for review. See Little, *supra* note 5, at 455-62. I suggested that the Department should amend the "trigger" for submission of cases for capital case review to require submission of "all cases . . . in which a killing has occurred." See Little, *supra* note 5, at 461.

n58 E.g., La. Rev. Stat. Ann. § 14:29 (West 2000); *People v. Kevorkian*, 527 N.W.2d 714, 735-36, 739 (Mich. 1994) (permitting assisted suicide prosecution based on common law doctrine, even though conduct was outside the legislative definition).

n59 See Benjamin Weiser, *Execution Sought in Embassy Blasts*, N.Y. Times, March 15, 2000, at A1.

n60 See Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 551-54 (1925).

n61 See 18 U.S.C. § 3231 (1994) ("The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.").

n62 By this I mean not just the murders, but also the underlying criminal conduct charged as the "death-eligible" federal offense. This chart has been developed with information from the reported decisions cited, the website of the Death Penalty Information Center in Washington D.C. (<http://www.deathpenaltyinfo.org/fedprisoners.html>), and memoranda prepared by the Federal Death Penalty Resource Counsel project (<http://www.capdefnet.org/fdprc-gateway.html>).

n63 Also notable is that, with the exception of Pennsylvania (Hammer), each of the states in which the federal death penalty has been obtained is a southern or "border" state. Thus, as I have earlier detailed, federal death penalty results so far reflect the same geographic disparity reflected in the distribution of state capital sentences—the southern and border states overwhelmingly dominate. See Little, *supra* note 5, at 450-55. See also Keith D. Harris & Derral Cheatwood, *The Geography of Execution: The Capital Punishment Quagmire in America* (1997).

n64 On remand, McCullah was finally sentenced to life imprisonment without parole. See Death Penalty Information Center, *Federal Death Row Prisoners*, *supra* note 17.

n65 See Little, *supra* note 15, at 1034-84.

n66 See Rory K. Little, *Why Not Abolish All Federal Crimes?* (forthcoming; manuscript on file with author).

n67 See, e.g., *Meese Survives Crisis, But He Appears Weakened*, *Atlanta J. & Const.*, Apr. 3, 1988, at A3.

n68 See American Bar Association, *supra* note 18 (inside front cover lists Task Force members); see also *id.* at 3 ("federalization" of crime that could be prosecuted by states is "misguided and ineffectual" and "has serious adverse consequences").

n69 See generally *Jones v. United States*, 527 U.S. 373, 375-76 (1999).

n70 See *id.* Fifty-one years earlier, in 1948, the Supreme Court ruled, under the different federal capital statutes then in force, that a federal jury's death penalty verdict must be unanimous. See *Andres v. United States*, 333 U.S. 740, 749 (1948).

n71 See *Jones*, 527 U.S. at 376; *United States v. Jones*, 132 F.3d 232, 237 (5th Cir. 1998).

n72 See *Jones*, 527 U.S. at 376-79.

n73 See *Jones*, 132 F.3d at 237.

n74 See *id.* at 239-42.

n75 Cf. *id.* at 242.

n76 18 U.S.C. § 3593(e) (1994) ("[T]he jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.") (emphasis added).

n77 See *id.* § 1201(a) ("Whoever . . . kidnaps . . . if the death of any person results, shall be punished by death or life imprisonment.").

n78 The Fifth Circuit, *United States v. Jones*, 132 F.3d 232, 248 (1998), and the Supreme Court, *Jones v. United States*, 527 U.S. 373, 388 n.8, 414-15 (1999), unanimously so ruled. The government also conceded the error, but not until the case arrived at the Supreme Court. See *Jones*, 132 F.3d at 248 (explaining that the government argued on appeal that some distinction between "'life'" and "'life without the possibility of release'" existed).

n79 See *Jones*, 132 F.3d at 244-45.

n80 See *Jones*, 527 U.S. at 379-81. The Fifth Circuit had asserted that a hung jury would have allowed the government to try again for a death verdict in a second sentencing hearing before a new jury. See *Jones*, 132 F.3d at 243. This position was rejected by the Supreme Court. See *Jones*, 527 U.S. at 380- 81. Under the 1994 Act (as well as the 1988 provisions, see *id.* at 419-20 (Ginsburg J., dissenting)), the government gets only one shot at a death sentence. See *id.* The fact that the Fifth Circuit could be so confused is simply another indication that *Jones'* case, the first ever tried under the 1994 statute, was virgin territory for all involved.

n81 See Jones, 527 U.S. at 408 (Ginsburg, J., dissenting).

n82 There is evidence that such erroneous speculation did indeed affect Jones' sentence. After Jones' trial, two jurors independently contacted two different members of the defense team and swore that, after initially voting against death, they had gone along with the death verdict based on this exact mistaken belief: "that if the jury could not reach a unanimous decision, then the court would impose a lesser sentence." Jones, 132 F.3d at 245 n.9. However, the Fifth Circuit ruled that evidence of these jurors' confusion was barred by Fed. R. Evid. 606(b), *id.* at 245-46, and the Supreme Court "decline[d] review of this ruling[.]" asserting that Jones' lawyers "did not raise [it] . . . in any of [their] . . . questions presented[.]" Jones, 527 U.S. at 394 n.11. This omission, now made significant by the Jones court, may be available in Jones' habeas proceeding, which has yet to be adjudicated.

n83 Indeed, the jury was given four possible verdict forms, one of which provided: "We the jury recommend some other lesser sentence." Jones, 527 U.S. at 387 n.7. Not only did this verdict form concretize the erroneous possibility of "some other lesser sentence," but it also was the only one of the four verdict forms omitting a proviso that any verdict had to be "by unanimous vote." *Id.* Thus, the idea that a non-unanimous-i.e. "hung"-verdict could lead to "some other lesser sentence" appeared to be further supported.

n84 494 U.S. 370, 380 (1990).

n85 Jones, 527 U.S. at 393-94 & n.11; see also *supra* note 82.

n86 Jones, 527 U.S. at 416 & n.19 (Ginsburg, J., dissenting, joined by Stevens, Souter and Breyer, JJ.)

n87 But see *United States v. Kee*, No. S1 98 CR 778 (DLC), 2000 WL 863119, *8 (S.D.N.Y. June 27, 2000) (appearing to make the same "lesser sentence" error as in Jones in the face of a specific statute, 18 U.S.C. § 1959, permitting a sentence only of "death or life imprisonment").

n88 See 18 U.S.C. § 3593(a) (1994); see *infra* note 94.

n89 This summarizes statutory requirements found in 18 U.S.C. § 3593(c), (d) & (e) (1994). See also Jones, 527 U.S. at 408 (Ginsburg, J., dissenting); Little, *supra* note 5, at 395- 99 (explaining the FDPA procedures and noting the "tilt" of this structure toward the defendant's favor).

n90 See 18 U.S.C. §§ 3592(b)-(d) & 3593(d) (1994).

n91 *Id.* § 3592(c) (end of section).

n92 See Little, *supra* note 5, at 490-500 (detailing problems that flow from "the inevitable manipulability of linguistic standards").

n93 *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The capital sentencing "process may be impermissibly skewed if the sentencing jury considers an invalid factor." Jones, 527 U.S. at 398.

n94 18 U.S.C. § 3593(a) (1994). It is now also possible that pretrial notice of an aggravating factor that raises the potential sentence to death is constitutionally required as well. See *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2354-63 (2000) (maintaining that facts that raise a statutory sentencing range must be treated as "element[s]" under the due process clause, including pretrial notice).

n95 See, e.g., *United States v. Pretlow*, 770 F. Supp. 239, 241-42 (D.N.J. 1991) (discussing "the defendant's and the public's interests in adequate notice" and the serious consequences that can flow from inadequate pretrial notice).

n96 See *id.* at 242.

n97 See *United States v. Jones*, 132 F.3d 232, 238 & n.1 (5th Cir. 1998). The jury found two of these: commission of the murder in the course of committing another listed felony (kidnapping), 18 U.S.C. § 3592(c)(1), and "especially heinous, cruel and depraved," 18 U.S.C. § 3592(c)(6). See *Jones*, 527 U.S. at 376-77. For a discussion of problems that arise in applying the latter factor, see *Little*, *supra* note 5, at 497-500.

n98 See *Jones*, 132 F.3d at 250.

n99 *Jones*, 527 U.S. at 378.

n100 *Jones*, 132 F.3d at 250.

n101 See *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996), cert. denied, 520 U.S. 1213 (1997). Earlier this year, on remand, *McCullah* was sentenced to life without parole rather than death. Thus, by the fortuity of the Supreme Court denying review of the *McCullah* decision-although a plurality subsequently appeared to reject its reasoning in *Jones*- two federal defendants who are similarly situated as to the aggravating factor situation-*Jones* and *McCullah*-have received markedly unequal sentences: life versus death.

n102 *Jones*, 132 F.3d at 251 (quoting *Stringer v. Black*, 503 U.S. 222, 232 (1992)). This may have been particularly true in *Jones*' case, since the jury in counterbalance listed eleven mitigating factors in *Jones*' favor, including one not even requested by the defense. See *id.* at 238 n.3

n103 Justice Scalia did not join part III (A) of Justice Thomas's opinion; similarly, Justice Breyer did not join the section of Justice Ginsburg's dissent that rejected the plurality's view. See *Jones*, 527 U.S. at 375 n.*, 405. Thus only a 4-3 analysis of the nonstatutory factors remains, not a particularly strong precedent on the issue. Neither Justice indicated the basis for his nonjoinder. However, because the Government had not cross-appealed as to the validity of *Jones*' aggravating factors, that was a strong argument that it had waived the issue. See *id.* at 396. In any case, it must be emphasized that *Jones*' discussion of the validity of the nonstatutory aggravating factors and its "duplicative" aggravating factor analysis did not command a majority. *Jones*, 132 F.3d at 250.

n104 *Jones*, 527 U.S. at 399. See also *id.* at 401 ("the Government's argument made absolutely clear what each nonstatutory factor meant"); *id.* at 401 n.14 ("In light of . . . the Government's argument . . .").

n105 *Id.* at 401.

n106 Compare *Jones*, 527 U.S. at 378 n.2, with *id.* at 398-402.

n107 See *id.* at 419-21 (Ginsburg, J., dissenting).

n108 See *Jones*, 132 F.3d at 252; *Jones*, 527 U.S. at 404. The dissenters disagreed, *id.* at 421-22. Justices Scalia and Breyer joined these portions of the relevant opinions, see *id.* at 375, 405, thereby providing a 5-4 majority for the harmless error discussion.

n109 The language of the FDPA, however, makes no such distinction in its harmless error section. See 18 U.S.C. § 3595(c) (1994).

n110 Jones, 527 U.S. at 399.

n111 See supra discussion at note 101.

n112 See, e.g., Chandler v. United States, 218 F.3d 1305, 1309 (11th Cir. 2000), in which the en banc Eleventh Circuit split 6-5 to affirm rather than remand to the district court for necessary fact-finding. Cf. id. (Tjoflat, J., concurring in part, dissenting in part) (court should remand rather than find no ineffectiveness, where district court did not rule on the issue).

n113 Not only did the Court err in its assessment of the vague "non-statutory" aggravating factors used in Jones, but it seemingly approved their use in future FDPA cases. But because the two factors in Jones' case were, unarguably, linguistically duplicative, the government ought not use them in the future. The Executive has an obligation to faithfully and fairly apply the law, even when the Supreme Court has ruled favorably but in error.

n114 See generally Little, supra note 5, at 372-88.

n115 Margaret P. Griffey, Capital Case Unit, at <http://www.usdoj.gov/criminal/ccu.html> (last visited Aug. 17, 2000).

n116 Compare Tables I, II, & III, infra, with Little, supra note 5, at 429, 431, 469 n.558. The data in the earlier tables was also provided by the Department of Justice. There are some discrepancies between the two sets of Tables, which the Department has not fully explained but which are understandable as the Department refines the relatively new data pool. Most significantly, the Department's 1999 data said that 166 potential federal capital defendants had been reviewed in 1998, whereas its data now says that only 126 were reviewed in 1998. Compare Table 1, infra, with Little, supra note 5, at 429. This is maybe explained in part by the calendar year versus fiscal year form of the data- the new Tables are apparently based on October 1 to September 30 fiscal years-and in part because the Department undertook a thorough reexamination to prepare its new report. More significantly, all this data is unfortunately likely to be eclipsed when the Department releases its new "disparity study" and, presumably, provides more extensive data that has been thoroughly reviewed and is more current.

n117 However, the stark difference between Attorney General Janet Reno and her Capital Case Review Committee, and prior Attorney Generals, cannot go unremarked. Prior to 1995 when Ms. Reno instituted the protocol procedures, only two out of 42 submitted cases were not authorized for death penalty prosecution. See infra note 135.

n118 Each defendant is counted only once per fiscal year. So, for example, if two decisions are made by the Attorney General within the same fiscal year as to the same defendant, but in regard to different victims, it is treated in this chart as just one decision.

n119 Attorney General deferred to State Prosecution for one defendant.

n120 Attorney General deferred to State Prosecution for two defendants.

n121 Little, supra note 5, at 422.

n122 See supra notes 23-24 and accompanying text.

n123 See USAM, supra note 8, at § 9-10.000 (1995 capital case review protocols); see Little, supra note 5, at 417- 18, 464 (explaining how this can contribute to nonuniform treatment of federal capital cases).

n124 155 is the projected number for all of FY 2000, given that 57 cases apparently were submitted from October 1 to February 14, which represents roughly 37.5% of the fiscal year.

n125 See Little, supra note 5, at 455-62 (discussing how ambiguity in the protocol submission "trigger " might permit U.S. Attorneys to not submit potential capital cases).

n126 See, e.g., United States v. Pena-Gonzalez, 62 F. Supp. 2d 358, 365 (D.P.R. 1999).

n127 The difference between this number and the 26 federal death sentences shown on the Chart, supra note 62, is due to the difference in times (February 2000 versus August 2000), and the apparent decision not to include in this category persons who had death sentences imposed but subsequently secured reversals or vacation. A new category ("sentence subsequently vacated or reversed") should perhaps be created by the Department.

n128 See supra notes 23-24 and accompanying text.

n129 See supra Table I.

n130 See Little, supra note 5, at 502-07 (describing how centralized DOJ review leads to salutary implementation of the "Stevens Solution," which utilizes the death penalty in only the most egregious cases). Only four of the cases taken to trial resulted in flat-out acquittals. The fact that, in 33 more cases, a jury recommended a no-death sentence does not detract from the Department's apparent care in case-selection. It is the Department's job, under the statute, to place before the jury cases in which a death sentence can be viewed as "justified." 18 U.S.C. § 3593(a) (1994). But it is the jury's proper role, as representatives of the community, to decide in which cases death should actually be imposed. Cf. id. § 3593(e). It is not surprising-indeed, it may be a healthy sign-that juries may ultimately decide, for whatever reasons, to grant life rather than death after a full-blown trial proceeding.

n131 This column does not include defendants deferred because they were fugitives.

n132 However, for nine of these defendants the AG subsequently made a decision not to pursue a capital penalty.

n133 See Little, supra note 5, at 469-70, 469 n.558 (discussion of the same data through the end of 1998).

n134 The large gap between "submitted" cases and "reviewed" cases (633 versus 524) can be explained by a number of factors. Of course review of some cases is always pending: the case is "submitted" but DOJ review is not yet final. Other cases are withdrawn after submission but before review is completed, for pleas or other changes in the case or the U.S. Attorney's view.

n135 Table III provides statistics only since January 1995 when the DOJ capital case protocols went into effect. Table I is all federal capital cases in the modern era (since 1988). But even adjusting the Table I figures to exclude FY 1990-1994, the overall authorization rate is about 31%, still significantly higher than the 20% rate for the high submission districts.

n136 Little, supra note 5, at 453.

n137 See *infra* note 138 for these states. The "most vigorously implement" description is based on the 12 states that have executed the most defendants since Gregg reauthorized capital punishment in 1976, derived from the information in *Capital Punishment 1998*, *supra* note 16, at 10 tbl.10, 12.

n138 States w/o Cap. Pun. States w/o Cap. Pun. "Vigorous" Cap. Pun. States "Vigorous" Cap. Pun. States Submissions Authorizations Submissions Authorizations Totals: 74 1 1 (15%) 190 67 (30%)

n139 It would be interesting to see a district-by- district breakdown of the data in Table II (dispositions of authorized cases) to see whether more of the cases authorized from "non-capital punishment" states are disposed of by non-death pleas, over which the local U.S. Attorney has complete control.

n140 Cf. *Miller v. California*, 413 U.S. 15, 23-24 (1973) (invoking "contemporary community standards" as part of the standard for evaluating obscenity, after reciting the repeated difficulty the Court had had in evaluating obscenity cases) (quoting *Roth v. United States*, 354 U.S. 476, 489 (1957)).

n141 See *supra* note 26.

n142 See, e.g., *supra* notes 133-39 and accompanying text (geographic disparity); Little, *supra* note 5, at 476-90 (racial disparity).

n143 See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 291-99 (1987) (maintaining that a statistical study of racial discrimination was not actionable because there was no proof it applied to the petitioner).

n144 On the state side, some significant events have occurred. In 1999, to huge publicity, the governor of Illinois declared a moratorium on all executions until a thorough review is conducted. See *infra* note 226. In May 2000, the New Hampshire voted to repeal its seldom used (no executions since 1939) death penalty, although the governor vetoed the measure. See John Kifner, *A State Votes to End Its Death Penalty*, *N.Y. Times*, May 19, 2000, at A16.

n145 See David A. Vise, *Clinton Delays Execution Under New Clemency Rules*, *Wash. Post*, Aug. 3, 2000, at A2 (64% approval is down from 75% in 1997, perhaps due to publicity regarding new DNA innocence results).

n146 In November, 1999, Senator Russell Feingold did in fact introduce legislation to abolish entirely the federal death penalty. See *Senator Urges End to Capital Punishment; Feingold Seeks to Halt Federal Executions*, *Chi. Trib.*, Nov. 11, 1999, at 23. But while demonstrative of a strongly felt position, this legislation seems certain to go nowhere in the near future.

n147 S. 2073, 106th Cong. (2000).

n148 A number of provisions of S. 2073, such as the significant DNA testing provisions, would apply to all federal defendants, not just capital defendants. See, e.g., *id.* § 102.

n149 *Id.* Section 103 would require states who receive certain federal funds to also preserve potential DNA Evidence and make testing available. See *id.* § 103. Title II would apply to State capital defendants, mandating that they be provided with effective counsel. See *id.* § 201.

n150 *Id.* § 301 (amending 28 U.S.C. § 2513) (1994). Section 302 would require damages for state death row inmates proven to have been innocent, in order to receive federal criminal justice construction funds. See *id.* § 302.

n151 See S. 2073, 106th Cong., § 401 (2000).

n152 Id. § 402. This provision is presumably intended to avoid the confusion showcased -yet found by the majority to be "doubtful" -in Jones. See supra notes 71-74 and accompanying text..

n153 S. 2073, 106th Cong., § 404.

n154 Id. § 401.

n155 Id. The listed offenses are 18 U.S.C. §§ 32, 229, 351, 794, 1091, 1114, 1118, 1203, 1751, 1992, 2340A, 2381 & ch. 113B (1994).

n156 See Marcia Coyle, 68% Error Found in Death Case Study, Nat'l L.J., June 19, 2000, at A1.

n157 E.g. Mich. Const. of 1963, art. IV, § 46; *United States v. Martinez*, 106 F. Supp. 2d 311 (D.P.R. 2000) (declaring the FDPA inapplicable in Puerto Rico due to its conflict with Puerto Rico's constitution); see Little, supra note 5, at 451, n.487.

n158 See, e.g., Sentencing Reform Act of 1984, 28 U.S.C. § 991(b)(1)(B) (1994) (noting that one goal of reform was to eliminate "unwarranted sentencing disparities" across the country); see Little, supra note 5, at 436 (discussing congressional desire for uniformity in federal criminal sentencing).

n159 The only exceptions of which I am aware are the Assimilative Crimes Act, 18 U.S.C. § 13 (1994) (adopting nearby States' criminal law, including penalties, for offenses committed on federal property for which there is no equivalent federal defense) and certain provisions related to Indian Country which are premised on a wholly different conception of independent sovereignty.

n160 See 21 U.S.C. § 841(b) (1994); cf. *United States v. Oakland Cannabis Buyers' Coop.*, 190 F.3d 1109, 1114 (9th Cir. 1999) (recognizing a "necessity defense" for medical marijuana in the wake of a California proposition endorsing medical marijuana use).

n161 See 18 U.S.C. §§ 241, 242, 245 (1994).

n162 In fact, the actual division among the States is even closer because many states that technically allow capital punishment have in fact executed almost no prisoners for 30 or more years, creating an almost 50-50 State division on the issue. See Little, supra note 5, at 451 & n.491.

n163 For a fascinating and disturbing revelation of such state differences, even within states but across county lines, see Richard Willing, *Geography of the Death Penalty*, USA Today, Dec. 20, 1999, at A1. Willing's work on capital punishment issues generally has been excellent, but is unfortunately masked from "scholarly" notice by its journalistic forum (although it likely reaches more Americans than any law review article).

n164 See Little, supra note 5, at 476-90 ("The Disturbing Persistence of Racial Disparity").

n165 See Mike Dorning, *Federal Death Sentences Show Race Gap-More Plea Deals for White Suspects*, Chi. Trib., July 24, 2000, at 1.

n166 See id.; see also supra note 62 (website for Federal Death Penalty Resource Counsel Project).

n167 See supra text accompanying notes 69-114.

n168 See Little, *supra* note 5, at 406-28.

n169 See *United States v. Chandler*, 996 F.2d 1073, 1082 (11th Cir. 1993).

n170 See *id.* at 1093-94.

n171 Cf. Letter from David Bruck, et al., to Janet Reno, United States Attorney General (Mar. 8, 2000) (asking the Attorney General to focus on a number of issues, including "federal prosecutors' heavy reliance on the bargained-for testimony of criminal accomplices").

n172 See 18 U.S.C. § 3005 (1994); 21 U.S.C. § 848(q) (1994).

n173 See *Chandler v. United States*, 193 F.3d 1297 (11th Cir. 1999) (vacating death sentence), vacated and sentence *aff'd en banc*, 218 F.3d 1305 (11th Cir. 2000).

n174 See *Chandler*, 996 F.2d at 1073 (affirming convictions and sentence).

n175 See *id.* at 1080-81.

n176 See *id.* at 1082.

n177 See Little, *supra* note 5, at 383 n.200; *Alabamian on Death Row Could Win a New Trial*, N.Y. Times, Oct. 29, 1998, at A17.

n178 *Chandler*, 193 F.3d at 1297.

n179 See *id.* at 1298.

n180 See *id.* at 1316.

n181 See *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000).

n182 *Id.* at 1319.

n183 See *id.* at 1325 & n.41; see *id.* at 1328 (Tjoflat, J., concurring in part and dissenting in part) ("The district court assumed that counsel's performance was . . . deficient," but went on to find any deficiency not prejudicial.).

n184 185 F.3d 407 (5th Cir. 1999).

n185 See 18 U.S.C. § 1512 (1994).

n186 See *Causey*, 185 F.3d at 411.

n187 See *id.* at 422-23. See 18 U.S.C. § 1512(a)(1)(C) (1994) (requires that the defendant act "with intent to . . . prevent the communication . . . to a law enforcement officer or judge of the United States") (emphasis added).

n188 See *Causey*, 185 F.3d at 421-23.

n189 See 18 U.S.C. §§ 241-42 (1994).

n190 Id. at 423. Because the remaining counts are death eligible, it is possible that Davis and Hardy could still be sentenced to death on remand.

n191 Causey also counsels that the government should request, in cases in which more than one death-eligible count is charged, that the jury return separate sentencing verdicts as to each count, as it was the undifferentiated nature of the jury's death recommendation that led the Fifth Circuit to vacate the entire sentence. See id. See also id. at 444-46 (Dennis, J. concurring).

n192 See *United States v. Barnette*, 211 F.3d 803, 821- 26 (4th Cir. 2000).

n193 See id. at 824.

n194 Id. at 823-24.

n195 See id. at 824.

n196 See *United States v. Lee*, 89 F. Supp. 2d 1017 (E.D. Ark. 2000). "Recommendation," while it is the term used in the statute, 18 U.S.C. § 3593(e), is a misnomer. Under the FDPA, "upon a recommendation" of death by the jury, "the court shall sentence the defendant accordingly." 18 U.S.C. § 3594. Thus, there is no discretion under the FDPA in following a jury's death sentence "recommendation." But see *infra* note 214 and accompanying text.

n197 *Lee*, 89 F. Supp. 2d at 1027-32.

n198 Id. at 1021. The judge went on to quote *United States v. Pena-Gonzalez*, which states "[c]apital punishment . . . demands a heightened need for reliability We must be, therefore, particularly sensitive to ensure that unique safeguards are in place" 62 F. Supp. 2d 358, 360 (CD. P.R. 1999) (citations omitted).

n199 *Lee*, 89 F. Supp. 2d at 1027.

n200 Id. at 1030.

n201 Id. at 1029.

n202 Id. at 1032-34.

n203 See id. at 1033. See 18 U.S.C. § 3592(a)(4) (one statutory mitigating factor is that "[a]nother defendant, or defendants equally culpable in the crime, will not be punished by death").

n204 *Lee*, 89 F. Supp. 2d at 1032-34.

n205 See *USAM*, *supra* note 8, § 9-10.000(H).

n206 See *Lee*, 89 F. Supp. 2d at 1033-34.

n207 However, any claim of "interference" with local prosecutorial prerogatives is a bit disingenuous, because if the local U.S. Attorney had truly desired a no-death resolution, there appears to be no reason she could not have exercised her unreviewable plea bargaining authority without Attorney General

approval. See USAM, *supra* note 8, § 9-10.000; Little, *supra* note 5, at 417-18. The district judge would not know this, however, unless he were very familiar with the intricacies of the protocol language.

n208 See Lee, 89 F. Supp. 2d at 1037, 1039.

n209 See *id.* at 1042 ("both of the Court's rulings . . . will require . . . a new penalty phase trial").

n210 See *id.* at 1038; see also Little, *supra* note 5, at 407 n.322.

n211 See *United States v. Pena-Gonzalez*, 62 F.Supp. 358, 361-64 (D.P.R. 1999). The Pena-Gonzalez court "struck" the government's death penalty notice despite the fact that the defendant could seek reconsideration of the death penalty decision with counsel once counsel was appointed. *Id.* at 365, 366. The soundness of this decision can be questioned on a number of levels, and the government's appeal is currently pending.

n212 See *In re United States*, 197 F.3d 310, 315-16 (8th Cir. 1999) (denying an interim mandamus petition by Lee).

n213 See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-68 (1954) (deportation context); see also *In re United States*, 197 F.3d at 315.

n214 18 U.S.C. § 3594 (1994).

n215 See *United States v. Martinez*, No. 99-044 (SEC), 2000 U.S. Dist. LEXIS 10370, at *49 (D.P.R. July 17, 2000) (106 F. Supp. 2d 311); see Ivan Roman, U.S. Judge Kills Death Penalty in Puerto Rico, *Orlando Sentinel*, July 19, 2000, at A6.

n216 P.R. Const. art. II, § 7.

n217 But cf. 18 U.S.C. §§ 2280(e) & 2281(d) (1994) (defining "United States" as encompassing Puerto Rico).

n218 See *Martinez*, 2000 U.S. Dist. LEXIS 10370, at *32 (explaining that the Act was "locally inapplicable" under the Puerto Rican Federal Relations Act, 64 Stat. 319 (1950)), and at *48 ("It shocks the conscience to impose the ultimate penalty, death, upon American citizens who are denied the right to participate directly or indirectly in the government. . . .").

n219 See *United States v. Quinones*, 758 F.2d 40, 43 (1st Cir. 1985) (holding that federal wiretapping law applies in Puerto Rico despite Puerto Rico's constitutional provision against wiretapping).

n220 See *supra* notes 145-56 and accompanying text (discussing S. 2073 which would give States choice over applicability of FDPA).

n221 See *supra* notes 69-114 and accompanying text.

n222 Of course, not all the judicial action has been to produce reversals-they are just more interesting. See, e.g., *United States v. Paul*, 217 F.3d 989 (8th Cir. 2000) (affirming FDPA death sentence in the face of numerous arguments).

n223 See Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, *NY Times*, Feb. 1, 2000, at A1.

n224 See *id.*

n225 See *Capital Punishment 1998*, *supra* note 16, at 10 tbl.10, 12.

n226 *New Looks at the Death Penalty*, *NY Times*, Feb. 19, 2000, at A14.

n227 See Robynn Tysver, *Death Penalty Study OK'd*, *Omaha World-Herald*, May 28, 1999, at 1.

n228 See *New Looks at the Death Penalty*, *supra* note 226, at A14.

n229 See ABA, *A Gathering Momentum: Continuing Impacts of the ABA Call for a Moratorium on Executions*, Jan. 2000, at 8 [hereinafter ABA Report]. Kentucky in fact enacted such legislation in 1998, after a special commission reported on race in capital punishment. *Id.* Kentucky Penal Code §532.300 now provides that no death sentence may be imposed if "race was a significant factor in decisions to seek the sentence of death," and the evidence relevant to such a finding "may include statistical evidence." *Id.* The Kentucky Act also places the burden of proving race as a significant factor on the defendant, by clear and convincing evidence. *Id.*

n230 Passage of the Federal Death Penalty Act in 1994 was a political compromise which was linked to rejection of a "Racial Justice Act" which would have endorsed statistical evidence as one means of demonstrating race bias in capital punishment administration, thereby "overruling" the Supreme Court's rejection of such evidence in *McCleskey v. Kemp*, 481 U.S. 279 (1987). See Little, *supra* note 5, at 386 n.218; Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need For the Racial Justice Act*, 35 *Santa Clara L. Rev.* 519 (1995). Instead of allowing statistical claims, the FDPA requires all federal capital jurors to sign a sworn statement that "consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation . . . no matter what the race . . . may be." 18 U.S.C. § 3593(f) (1994).

n231 See ABA Report, *supra* note 229, at 1.

n232 See *id.*

n233 See *id.*

n234 See *id.* at 2-3; see also Mark Hansen, *Death Knell for Death Row?*, *ABA J.*, June 2000, at 40; Toni M. Fine, *Comment, Moratorium 2000: An International Dialogue Toward a Ban on Capital Punishment*, 30 *Colum. Hum. Rts. L. Rev.* 421 (1999).

n235 See Death Penalty Information Center, *What's New*, at <http://www.deathpenaltyinfo.org/whatsnew.html> (last modified Aug. 15, 2000) (reporting NBC News, Wall Street Journal, and Harris polls).

n236 See, e.g., Fox Butterfield, *Execution Cases Fail to Pass Test Study Finds Two-Thirds of Convictions Reversed*, *N.Y. Times*, June 12, 2000, at A1 (reporting results of Columbia Law School study of all capital cases from 1973 to 1995); but see James Q. Wilson, *Do Errors in Capital Cases Mean Innocent are Killed?*, *Seattle Post-Intelligencer*, July 11, 2000, at B5 (maintaining that studies do "not say that any innocent person has been put to death").

n237 Excerpts from Clinton's Comments at Wide-Ranging News Conference, *N.Y. Times*, Feb. 17, 2000, at A19.

n238 Kemper, *supra* note 24, at 4.

n239 See *supra* notes 140-43 and accompanying text.

n240 See *Capital Punishment 1998*, *supra* note 16, at 12.

n241 See *id.* at 1, 12.

n242 Garza's execution is currently set for December 12, 2000, Hernandez, *supra* note 11, at A16, although I would give mild odds that it will not occur in this year.

n243 See *supra* notes 31-33 and accompanying text.

n244 See *Americans Getting Older, 19 Forecast 8* (June 1999) (U.S. Census Bureau says U.S. median age is 35.2, up from 32.8 in 1990).

n245 It is, of course, not totally isolated. Many other nations execute. See *supra* note 31; see also Sudden Spate of Executions is Sweeping Caribbean, *N.Y. Times*, June 9, 1999, at A7. Japan, which is at least economically similar to the United States, recently sentenced two killers to death. See *supra* note 31. See generally Mark Hansen, *Holdouts in the Global Village*, 86 *ABA J.* 47 (June 2000) (90 countries still have the death penalty).

n246 Amnesty International, *The Death Penalty Worldwide: Developments in 1999*, at <http://www.amnesty.org/ailib/aipub/2000/ACT/A5000400.html> (last visited Aug. 19, 2000).

n247 See European Union, *EU Policy & Action on the Death Penalty*, at <http://www.eurunion.org/legislat/DeathPenalty/deathpenhome.html> (last visited Aug. 7, 2000).

n248 Of course, I have made this quote up; so far as I know no U.S. diplomat has ever said anything like this. In fact, the U.S. consistently votes against international initiatives that condemn capital punishment. See e.g., *UN Panel Votes For Ban on Death Penalty*, *N.Y. Times*, Apr. 29, 1999, at A4 (UN Human Rights Commission voted 30-11 in favor of ban; U.S. voted against it); Hansen, *supra* note 234, at 40 (only the U.S. and Somalia have not ratified the UN convention banning the execution of juvenile offenders).

n249 In fact, it is difficult to name an area in which some state did not first lead, toward what later came to be viewed as the "enlightened" position. Regulatory efforts (securities, labor, antitrust), civil rights, criminal procedure- reforms were all led by states. Indeed, regarding capital punishment itself, it is states that have led the abolitionist movement. See *supra*, text at notes 33-42.

n250 "Pogo" was the nationally syndicated cartoon strip authored by Walt Kelly for many years in the 1950's-1970's.