AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 107–396

RACIAL AND GEOGRAPHIC DISPARITIES IN THE FEDERAL DEATH PENALTY SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM, AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

JUNE 13, 2001

Serial No. J–107–26

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
78–760 DTP WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois
MARIA CANTWELL, Washington

ORRIN G. HATCH, Utah
STROM THURMOND, South Carolina
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
SAM BROWNBACK, Kansas
MITCH MCCONNELL, Kentucky

BRUCE A. COHEN, *Majority Chief Counsel and Staff Director*
SHARON PROST, *Minority Chief Counsel*
MAKAN DELRAHIM, *Minority Staff Director*

SUBCOMMITTEE ON THE CONSTITUTION

RUSSELL D. FEINGOLD, Wisconsin, *Chairman*

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
RICHARD J. DURBIN, Illinois

STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah
JON KYL, Arizona
MITCH MCCONNELL, Kentucky

ROBERT SCHIFF, *Majority Chief Counsel*
GARRY MALPHRUS, *Minority Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois	76
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	1
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	8
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	6
Sessions, Hon. Jeff, a U.S. Senator from the State of Alabama	104
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina	4

WITNESSES

Bond, Julian, Chairman, NAACP National Board of Directors, National Association for the Advancement of Colored People, and Member, Citizens for a Moratorium on Federal Executions, Washington, D.C.	31
Bruck, David I., Federal Death Penalty Resource Counsel, Columbia, South Carolina	61
Fotis, James J., Executive Director, Law Enforcement Alliance of America, Falls Church, Virginia	57
Gross, Samuel R., Visiting Professor, Columbia University Law School, New York, New York	50
McBride, Andrew G., former Assistant United States Attorney for the Eastern District of Virginia and Partner, Wiley, Rein and Fielding, Washington, D.C.	46
Thompson, Hon. Larry, Deputy Attorney General, Department of Justice, Washington, D.C.	10

QUESTIONS AND ANSWERS

Responses of David Bruck to questions submitted by Senators Leahy, Feingold, Sessions and Thurmond	77
Responses of Andrew G. McBride to questions submitted by Senators Thurmond and Sessions	79
Responses of Samuel R. Gross to questions submitted by Senators Sessions, Thurmond and Feingold	80

SUBMISSIONS FOR THE RECORD

American Civil Liberties Union, Washington, DC	82
Associated Press, news article, June 14, 2001	82
Atlanta Journal-Constitution:	
editorial, June 8, 2001	83
Thomas Sowell, editorial, June 15, 2001	84
Baldus, David C., Joseph B. Tye Distinguished Professor of Law, College of Law, University of Iowa	85
Boston Globe, Jeff Jacoby, editorial, June 18, 2001	88
Boston Herald, Don Feder, article, June 20, 2001	89
Dallas Morning News, Michelle Mittelstadt, article, June 14, 2001	90
Drug Enforcement Administration, Donnie R. Marshall, Administrator, Washington, DC:	
letter	91
memorandum	92
Federal Bureau of Investigation, Ruben Garcia, Jr., Assistant Director, Criminal Investigative Division, Washington, DC, letter	93

Page

Federal Law Enforcement Officers Association, Richard J. Gallo, National President, Lewisberry, PA:
letter, June 12, 2001 94
letter, June 13, 2001 95
Fraternal Order of Police, Gilbert G. Gallegos, National President, Albuquerque, NM, letter, June 13, 2001 96
Hubbard, Joseph D., District Attorney, Calhoun County Courthouse, Anniston, AL, statement 96
Jackson, Lucy, Birmingham, AL, letter, June 11, 2001 97
Law Enforcement Alliance of America, Kenneth V.F. Blanchard, Director, Falls Church, VA, letter, June 13, 2001 98
National Association for the Advancement of Colored People, Julian Bond, Chairman, NAACP National Board of Directors, Baltimore, MD, letter, July 16, 2001 98
National Troopers Coalition, Johnny L. Hughes, Director of Government Relations, Albany, NY, letter, June 19, 2001 99
Newsday, Tom Brune, Washington Bureau, article, June 13, 2001 99
Offem, Monday and Elizabeth, members of Victims of Crime and Leniency, Montgomery, AL, letter, June 11, 2001 103
Rankins, Nell, Montgomery, AL, letter 103
Reuters, Sue Pleming, article, June 13, 2001 103
Strauss, Hon. Paul, a U.S. Senator from the District of Columbia (Shadow), Washington, DC, statement 108
Victims of Crime and Leniency, Miriam Shehane, Executive Director, Montgomery, AL, letter, June 11, 2001 109
Washington, Mr. and Mrs. F.N., Columbia, SC, letter, June 13, 2001 110
Watley, Viola, Montgomery, AL, letter, June 11, 2001 110

RACIAL AND GEOGRAPHIC DISPARITIES IN THE FEDERAL DEATH PENALTY SYSTEM

WEDNESDAY, JUNE 13, 2001

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:30 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senators Feingold, Leahy, Durbin, Thurmond, Hatch, and Sessions.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. The hearing will come to order, and good morning. Welcome to this hearing of the Senate Judiciary Committee's Subcommittee on the Constitution.

I want to thank everybody for their patience. We had a couple of votes already, and there could be more, but if we will have to, we will try to have just the shortest of breaks in the hearing if that happens.

The subject of the hearing is racial and geographic disparities in the Federal death penalty system. This is not the hearing that I would have preferred to call as my first hearing as Chairman of the subcommittee. But as often happens, external circumstances and events made it imperative that we schedule this hearing quickly today.

I sincerely thank all the witnesses for making themselves available to testify today on short notice and for their efforts to prepare written testimony. I also thank my colleagues for understanding the urgency of the hearing and cooperating with us. I hope that they agree that we have been fair in accommodating their requests for witnesses and in sharing information on our plans as soon as was possible.

I am pleased to see Senator Hatch arrive, who, in the 6 years that he was Chairman of the committee, could not have been easier to work with and could not have been more fair in terms of the procedure, and I thank him for all of that.

Senator HATCH. Thank you. I appreciate that.

Chairman FEINGOLD. Last fall, the Department of Justice released a preliminary report showing racial and regional disparities in the Federal Government's administration of the death penalty. The numbers are stark. After the execution of Timothy McVeigh on

Monday, there are now 19 individuals on Federal death row; 17 of them are racial or ethnic minorities. That is an extraordinary number.

There were a number of similarly disturbing findings in the initial report by the Justice Department. Attorney General Reno, Deputy Attorney General Holder, and President Clinton all said they were troubled by the results of the report.

Because the cases studied by the initial study included only those cases submitted to Main Justice for authorization to seek the death penalty, Attorney General Reno immediately ordered the collection of additional data from U.S. Attorneys' offices. She also directed that the National Institute of Justice conduct an in-depth examination of the issues raised in the preliminary study in cooperation with outside experts.

Let me take a moment to read exactly what Attorney General Reno said in September. She said, "There are important limitations on the scope of our survey. The survey only captures data currently available beginning when a U.S. Attorney submits a capital-eligible case to the review Committee and to me for further review. This survey, therefore, does not address a number of important issues that arise before the U.S. Attorney submits a case: Why did the defendant commit the murder? Why did the defendant get arrested and prosecuted by Federal authorities rather than by State authorities? Why did the U.S. Attorney submit the case for review rather than enter a plea bargain? ...More information is needed to better understand the many factors that affect how homicide cases make their way into the Federal system, and once in the Federal system, why they follow different paths. An even broader analysis must therefore be undertaken to determine if bias does, in fact, play any role in the Federal death penalty system."

She continued: "I have asked the National Institute of Justice to solicit research proposals from outside experts to study the reasons why, under existing standards, homicide cases are directed to the State or Federal systems, and charged either as capital cases or non-capital cases, as well as the factors accounting for the present geographic pattern of submissions by the U.S. Attorneys' offices. The Department will also welcome related research proposals that outside experts may suggest."

In December, citing this ongoing review by the Justice Department, President Clinton took the step of delaying the execution of Juan Raul Garza until June 19 of this year, next Tuesday. President Clinton ordered the Justice Department to report to the President by April of this year on the results of its further review.

Now, there is some debate over precisely what President Clinton expected could be done by April, but he seemed to contemplate that the next President, whoever that might be, should have time to review additional, more conclusive information before deciding whether to proceed with Mr. Garza's execution on June 19.

Significantly, in answer to my questions at his confirmation hearing, Attorney General Ashcroft said that he would continue the studies ordered by former Attorney General Reno. He said, "[T]he studies that are underway, I am grateful for them. When the material from those studies comes, I will examine them carefully and eagerly to see if there are ways for us to improve the administra-

tion of justice." He was asked if the studies would be terminated and he answered, "I have no intention of terminating those studies."

Last week, the Attorney General revealed that the Justice Department did not proceed with a study by the NIJ, as directed by former Attorney General Reno, and as he pledged it would in his confirmation hearing. Indeed, it appears that really nothing has been done on the NIJ study since a January 10 meeting with outside experts convened by Attorney General Reno.

The Department of Justice did release its own supplemental study based on additional information collected in response to Attorney General Reno's request. The Department concludes in the report that there is "no evidence of bias against racial or ethnic minorities." It even suggests that white defendants are treated more harshly than minority defendants.

The Attorney General did announce in testimony to the House Judiciary Committee last week that he was directing the NIJ to undertake a study of how death penalty cases are brought into the Federal system. His staff indicated in a meeting with my staff last Friday that, in fact, the study ordered by the Attorney General is the same in many respects as that ordered by Attorney General Reno.

I have asked the Attorney General to put in writing the purpose and parameters of the study so there will be no further misunderstanding. We have not yet received that in writing, but I am pleased that Mr. Thompson's prepared testimony this morning confirms that. It says, in part, in Mr. Thompson's testimony, "The primary purpose of this study is the same as that which was contemplated by the Clinton administration but which did not progress beyond the planning process."

I look forward to discussing the Department's plans with the Deputy Attorney General this morning. Notwithstanding the decision finally to allow the NIJ study to proceed, after a nearly 5-month delay, it appears that based on the Department's own internal analysis, the Attorney General will allow the execution of Juan Garza to proceed next Tuesday. Presumably, he will schedule the execution of other minority defendants when their appeals are exhausted.

So we have three issues to explore with our witnesses today. First, what happened to the NIJ study that was ordered by and begun under the previous administration? The Deputy Attorney General, I am sure, is prepared to address that question, as will two of our witnesses who participated in the initial meeting to plan that study convened on January 10.

Second, we will examine the Department's recent supplemental study and discuss whether it sufficiently answers questions about racial and geographic disparities to make it unnecessary to further delay the execution of Juan Garza and other minority defendants. I believe all of our witnesses will have comments on that question.

Finally, we will discuss the overall issue of racial and geographic bias in the administration of the Federal death penalty based on the evidence now available to us.

As we consider these questions, we must realize that this is not an academic discussion. The Federal Government is scheduled to

execute an Hispanic man from Texas in under a week's time. I am not satisfied that we adequately understand the reasons for the racial and geographic disparities in the number of people now on death row to be able to go forward with further executions.

We cannot in good conscience put people to death until we are confident in the fairness of the system that leads to those decisions. I do not yet have that confidence, and many in the country share my concerns. I believe that the execution of Juan Garza should again be postponed, and indeed there should be a moratorium on all Federal executions until a thorough and independent study by NIJ is completed and considered.

By the way, in fairness, I mentioned the fact that Mr. Garza is from Texas not because that is the President's home State, as was suggested in one news story this week. Obviously, President Bush had nothing to do with the cases of the inmates now on Federal death row.

It is because 6 of the 17 people awaiting execution on Federal death row are from that State. Another four are from Missouri. The concentration of death row inmates from particular regions of the country is troubling, and I don't think this issue has yet been adequately addressed by the Justice Department.

I do oppose the death penalty, but this is not about opposition to the death penalty. This is about equal and bias-free justice in America. I am certain that not one of my colleagues on the Committee or in the Senate, not a single one, no matter how strong a proponent of the death penalty, would defend racial discrimination in the administration of that ultimate punishment. The most fundamental guarantee of our Constitution is equal justice under law, equal protection of the laws. We must ensure that those protections are observed, particularly in the administration of the death penalty.

With that, I will now turn to our distinguished ranking member, Senator Thurmond, for his remarks. I understand that the Chairman of the committee, as well as the ranking member, would like to make statements as well.

Senator Thurmond?

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman.

Last week, the Attorney General issued a report finding no racial bias in the Federal death penalty. This is consistent with what Attorney General Reno found in her report last fall, when she refused to issue a moratorium on capital punishment.

There is absolutely no basis for ending the Federal death penalty. By ordering the death penalty in appropriate cases, the Attorney General is simply enforcing the laws he has the duty to uphold. The Federal criminals who are currently on death row are unquestionably guilty. It is clear that the death penalty was warranted against Mr. McVeigh, a man who ruthlessly killed 168 innocent men, women and children in Oklahoma City. It is equally clear that we should follow through next week with the death penalty against Mr. Garza, a vicious drug kingpin who brutally murdered three people and was involved in other drug-related deaths.

The men and women who prosecute the most dangerous, violent criminals in Federal court are dedicated public servants. I do not agree with those who question their motives and integrity. This hearing today is really about an endless political effort to discredit the death penalty by any possible means.

I welcome the Deputy Attorney General and appreciate his willingness to testify.

Thank you, Mr. Chairman.

[The prepared statement of Senator Thurmond follows:]

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman:

Last week, the Attorney General issued a report finding no racial bias in the federal death penalty. This is consistent with what Attorney General Reno found in her report last fall when she refused to issue a moratorium on capital punishment.

Defendants in the federal death penalty system must be and are treated fairly regardless of race. This is true both in the Department's capital review process and in the capital trial process.

The men and women who prosecute the most dangerous violent criminals in federal court are dedicated public servants. I do not agree with those who question their motives and integrity.

There are certain cases where it is only fair, it is only right, that the government seek the ultimate punishment. The death penalty can provide justice not only for society, but also for the family members of victims who have been murdered. Moreover, some studies, including an Emory University study from earlier this year, show that the death penalty may have a deterrent effect and actually save lives.

In the past few years, there has been a renewed attack on the death penalty from long-standing opponents in liberal activist groups, the criminal defense bar, academia, and the national media. Studies trying to find systemic flaws in the application of the death penalty, such as the well-publicized Columbia University study last year, have turned out to be misleading.

There is no proof that any innocent person has been put to death under the modern capital punishment system. We must make certain that this does not occur. Therefore, it is important for states to continue to expand the availability of DNA testing for certain defendants who were convicted before the mid-1990s when DNA evidence became a routine part of criminal investigations. In this regard, I was an original cosponsor of the Coverdell legislation that we passed last year to provide more federal funding for state and local crime labs that are on the front lines in using DNA and other scientific evidence to combat the most violent crime. Promoting absolute certainty of guilt makes the case for the death penalty stronger, not weaker.

There is no death penalty crisis, and there is absolutely no basis for ending the federal death penalty.

Starting in 1988, the Congress renewed the death penalty for certain drug-related and later other heinous crimes. By ordering the death penalty in appropriate cases, the Attorney General is simply enforcing the laws he has a duty to uphold. Monday was the first time it was carried out in 38 years.

The federal criminals who are currently on death row are unquestionably guilty. It is clear that the death penalty was warranted against Mr. McVeigh, a man who ruthlessly killed 168 innocent men, women and children in Oklahoma City. It is equally clear that we should follow through next week with the death penalty against Mr. Garza, a vicious drug kingpin who brutally murdered three people and was involved in other drugrelated deaths. In fact, when President Clinton first delayed Mr. Garza's execution last fall to give Mr. Garza more time to apply for clemency, the federal judge in the case called his decision "totally irresponsible."

This hearing in the Constitution Subcommittee is really not about the Eight Amendment, the Fourteen Amendment, or other Constitutional provisions. Those are legal questions for the courts that have been answered in the negative. This hearing today is really about an endless political effort to discredit the death penalty by any possible means.

I welcome the Deputy Attorney General and appreciate his willingness to testify. Thank you.

Chairman FEINGOLD. I thank the Senator for his comments, and also look forward to working with him in the future on the subcommittee.

Now, I would like to turn to the Chairman of the committee, whom I am grateful to for allowing this hearing and for his leadership.

Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Thank you, Mr. Chairman, and I appreciate you being here. You have obviously moved on a very important issue. I think that the hearing itself is one of the most important ones that we will see conducted in this committee. I am glad you were able to take the time to do this now.

As I have told Senator Hatch, as soon as reorganization is completed, we will then begin to hold a series of confirmation hearings on Federal judges and other nominees, something that we will be unable to do until we know just who is going to be on the committee.

But today's heairng is the type we can hold now, and I think it is timely. Last September the Justice Department released a report on the administration of the Federal death penalty. The report revealed very dramatic racial and geographic disparities in the Federal death penalty system.

There were 682 cases submitted to the Justice Department over the previous 5 years for approval to seek the death penalty. Eighty percent involved defendants who were black, Hispanic, or another racial minority. Five jurisdictions, out of 94 total, accounted for about 40 percent of the submissions.

Now, these raw figures do not prove whether implementation of the Federal death penalty is or is not racially biased, but they do raise very serious questions whether discrimination exists at early stages of the prosecutorial process.

We all know that in many ways the prosecutor has the most influence in the justice system. He or she can determine not only whether to go forward with a prosecution, but can decide at what level he will prosecute and even at what level he will seek penalties.

These figures also fueled concerns that our National laws are not being applied with nationwide uniformity. In some jurisdictions, the United States Attorney seeks the death penalty frequently; in others, hardly ever.

Those of us who closely follow and care about our criminal justice system were deeply troubled by the September report. The American people should have absolute confidence in the fairness of the criminal justice system. It has to be unbiased, especially when it seeks to impose the ultimate sanction of death.

I think Attorney General Ashcroft did the right thing a month ago when he delayed the execution of Timothy McVeigh because the FBI failed to follow a direct order to turn over all its material to McVeigh's counsel. I talked with Attorney General Ashcroft at that time. I know that he had no doubt about Mr. McVeigh's guilt, nor did I for that matter. But he felt that for the interests of the

criminal justice system in all cases, he should take that extra step, and I commend him for that. It increases confidence in the system.

I believe Attorney General Reno did the right thing last September on the day she released the report by initiating a broader analysis of the Federal death penalty system, to be conducted by outside experts. President Clinton also did the right thing by postponing the scheduled execution of Juan Raul Garza until the new, independent analysis was completed.

When Attorney General Ashcroft came before this committee, a number of us, and especially Senator Feingold, questioned him closely about whether he would continue the analytical process that his predecessor initiated. I found his answers reassuring. He expressed concern about the findings in the September report and he agreed on the need for further study. More specifically, he promised to continue and to support all efforts initiated by Attorney General Reno to undertake a thorough review and analysis of the Federal death penalty system. He made this promise to Senator Feingold and the full Committee.

So we are here today to check in on that promise. Last week, the Department of Justice issued an internal report that purports to complete the survey and assessment of the Federal death penalty begun by Attorney General Reno. I have read that report carefully and I regret to say that it falls far short of what this Committee was promised. More importantly, I believe it is far short of what the American people deserve, whether they are for the death penalty or opposed to the death penalty.

We should have a thorough, objective, empirical analysis. Instead, we are given a superficial and one-sided set of legal arguments. Instead of answers, are given a lot more questions, and that bothers me. I don't know if there is bias or prejudice in the application of the Federal death penalty. But as an American, I would like to know. There may be innocent explanations for the disparities identified in the September report. The latest report makes little effort to determine the reasons for the racial disparities, however, and dismisses the geographic disparities as though they did not exist.

Since the report issued last week, the Attorney General has indicated that he may yet follow through on his earlier commitment to this Committee by initiating a comprehensive study of fairness in the administration of the Federal death penalty. I hope that he does; I hope no more time is squandered.

That is why I want to thank Senator Feingold for holding this hearing today. I commend him for his principled involvement in this debate. This is an issue that should concern all Senators, whether they are for or against the death penalty.

I have certainly heard from a lot of my constituents, both those who strongly support the death penalty and those who oppose the death penalty, that they want to see the empirical results of these studies. I pass on their appreciation to you, Senator Feingold.

Chairman FEINGOLD. I thank the Committee chairman, and I certainly want to acknowledge his ground-breaking leadership on trying to make the death penalty, both at the Federal and State level, at least more fair. That leadership has been a critical part of this issue coming forward.

I would now like to turn to the Ranking Member of the Committee who, again, I want to reiterate, during the 6 years that I had a chance to serve in the minority on this committee, has made it a great pleasure to be a member of this committee.

Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate you allowing me to make some opening remarks and for convening this important hearing. This is an important hearing.

We welcome you, General Thompson, and all the other witnesses here today. We appreciate having all of you here on both sides of this issue.

The death penalty, of course, is on the minds of everybody since the Timothy McVeigh execution this week for the murder of 168 innocent people in the worst incident of domestic terrorism in our Nation's history. As we all know, the death penalty is the ultimate punishment society can impose, and it is appropriate that we scrutinize its use in our Federal criminal justice system.

While we may disagree about whether capital punishment should be permitted in our country, we all agree that it must be meted out fairly. In my view, the studies released by former Attorney General Reno and Attorney General Ashcroft show that there is no invidious racial discrimination in the application of the Federal death penalty.

Indeed, if anything, these studies show that the Federal Government has sought the death penalty for proportionately fewer minorities than whites. Put another way, if you were being prosecuted by the Federal Government for conduct that could be charged as a capital offense, your chances of facing the death penalty at trial are greater if you were white than if you were black or Hispanic.

In light of this evidence, as the editors of the Atlanta Constitution concluded, "No objective and fair-minded person can seriously argue that the Federal system used to determine which Federal cases merit death penalty prosecution is biased."

Nevertheless, I think we all share Attorney General Ashcroft's concern and my colleagues' concern that nearly 80 percent of defendants in Federal capital cases are minorities. We also must commit ourselves to identifying and solving the socio-economic factors that underlie these statistics.

Doing something about this, however, requires that we first have the courage to acknowledge a painful but undeniable fact: the offenses that may lead to homicides and capital charges in the Federal system are not evenly distributed across all population groups.

Moreover, while many complain about the racial disparity among death penalty defendants, there is hardly a mention of the disparity among murder victims. As former Deputy Attorney General Eric Holder pointed out last year, "Although young African-American men are only 1 percent of our Nation's population, they are fully 18 percent of our Nation's homicide victims. Although black people make up 12 to 15 percent of the Nation's population, they are about 50 percent of the Nation's homicide victims."

Sounding the call of racism makes for good political theater, but it unjustly defames our Federal law enforcement professionals, and more importantly does nothing to address the socio-economic factors that may have caused the problems to begin with.

In releasing this latest report, Attorney General Ashcroft continues to fulfill the commitments he made during his confirmation hearing. He has also completed one of the projects undertaken by former Attorney General Reno in the waning days of the Clinton administration. Given the deadlines imposed on this project by former President Clinton and the need to make as complete an analysis as possible prior to the previously scheduled executions, it was important for General Ashcroft to complete the internal review of the expanded data which was gathered for this supplemental report.

This does not mean that other studies have been or will be terminated. In fact, to the contrary, Attorney General Ashcroft has informed the Committee that studies, including studies utilizing outside experts, are continuing, as called for by the previous administration. Attorney General Ashcroft promised to continue those efforts. He has done so and he will continue to do so.

Predictably, some death penalty opponents still insist that there should be a moratorium on all pending executions until completion of these additional research projects. I respectfully submit that such action is simply not warranted on the facts before us. That was the conclusion of the prior administration, as made clear by the public statements of President Clinton, Attorney General Reno, and Deputy Attorney General Eric Holder. They agree with me on this. It is not surprising, therefore, that the current administration takes the same position as the prior administration.

As stated last year by Attorney General Reno, there simply is no question of the guilt of the current defendants on death row. While we can, and will, continue to see to better understand and improve the current system, there is no justifiable reason to fail to carry out the sentences properly imposed in those cases.

The case of Juan Garza, who is scheduled to be executed next week, illustrates why the call for a moratorium is misguided. No one seriously questions that he is guilty of murdering three members of his drug trafficking organization. The evidence also shows that he was responsible for five additional murders, and that while in custody pending trial Garza threatened prosecutors and jurors.

In addition to his certain guilt, no one can seriously argue that Garza was the victim of a racist system. All but one of Garza's victims were Hispanic. The judge hearing his case is Hispanic, and the Assistant U.S. Attorney who prosecuted him is Hispanic. Furthermore, the majority of the jurors who convicted and sentenced him to death had Hispanic surnames.

Nor is there any evidence that Mr. Garza was unfairly exposed to the death penalty because he is Hispanic. Statistics show that there was no large proportion of Federal capital cases involving Hispanic defendants in the period in which Mr. Garza's case arose. The Federal district in which he was prosecuted generated few cases involving charges of capital crimes at any time, and that particular district sought the death penalty in only one case, Garza's,

in the overall 1988–2000 period examined in the Department's study.

Like all of the defendants on Federal death row, Mr. Garza faces execution not because of his race, ethnicity, or place of residence, but because he is guilty of committing these heinous crimes. Attorney General Ashcroft, like Attorney General Reno before him, is right to reject calls for a moratorium.

I thank you again, Mr. Chairman, for your kindness and courtesy to us and to me, in particular, and I look forward to the rest of this hearing. I have to go to a meeting at Finance, but I will try and get back.

Chairman FEINGOLD. I thank the Ranking Member for his comments.

We will now begin the testimony. Our first witness will be Deputy Attorney General Larry Thompson.

Mr. Thompson, welcome. Thank you for being here today. I enjoyed getting to know you a bit and voting for you during the confirmation process. I would ask you to limit your remarks to 5 minutes and your full written statement will be included in the record.

STATEMENT OF HON. LARRY THOMPSON, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. THOMPSON. Good morning, Mr. Chairman, Senator Leahy, Senator Thurmond. I thank you for the opportunity to appear here today to consider this important issue.

In the brief time I have enjoyed serving as Deputy Attorney General, I have been involved in some matters involving the enforcement of the Federal death penalty, and I can assure you, Senator Feingold, that you and I fully appreciate the magnitude of the Department's responsibilities in this area.

I also appreciate and respect the devotion you bring to this issue, Senator Feingold. Though we may disagree over the appropriateness of the death penalty in certain circumstances, I believe we both share a deep commitment to the fair and impartial enforcement of the law.

As you know, Attorney General Ashcroft has set a clear direction for the Department. We intend to act in a manner consistent with the highest standards of integrity and with an abiding respect for the constitutional rights of all persons.

Of course, the mission of the Department of Justice is to enforce vigorously the laws passed by Congress, including dozens of criminal prohibitions carrying the possibility of capital punishment. These death-eligible offenses, nearly all of which were included in the 1994 crime bill, are the duly established laws of the land and they define the interests of the Federal Government. They reflect the will of the American public, as expressed through their elected representatives.

Just as former Attorney General Reno put aside her own views on capital punishment and approved all of the Federal capital cases we will be discussing here today, so too must the current administration fulfill its duty to enforce the law.

This commitment is especially important to the victims of violent crime. When the lives of family members and friends are shattered by deadly violence, their one simple hope is that the perpetrators

of the suffering might be caught and punished. We all witnessed the singular importance of this accountability 2 days ago when the victims of Timothy McVeigh's terrorist attack repeatedly explained how his execution brought some degree of closure to their long nightmare.

It is a fact that minorities are more likely to be victims of violent crime today than the majority. As Senator Hatch noted, my predecessor, former Deputy Attorney General Eric Holder, observed at the September press conference which you referred to, Senator Feingold, that African-Americans constitute about 50 percent of the Nation's homicide victims. I find that a horrific statistic. In fact, Senator Feingold, 63 percent of the victims murdered by those individuals sitting on death row in the Federal system are African-American.

All of America has been victimized by nearly two decades of drug trafficking violence. We have become accustomed to nightly news stories about drive-by shootings and execution-style killings by ruthless drug gangs. We have been worried by reports of stray bullets killing children who were simply standing in the wrong place at the wrong time.

The criminal justice system itself has been threatened by violent intimidation and witness retaliation. Many law enforcement officials have sacrificed their lives to rescue communities from the ravages of violent drug trafficking. This why the Attorney General has pledged to reinvigorate the battle against drug trafficking and Congress has provided powerful tools to law enforcement, including the death penalty, to stop these violent criminals.

But as I said, Mr. Chairman, the fulfillment of our law enforcement mission must strengthen and not weaken the public's confidence in the fair administration of justice. Even the appearance of ethnic or racial bias in the enforcement of capital punishment is a serious concern.

To address this problem, last week Attorney General Ashcroft announced three important steps, and we will briefly discuss those this morning, with your permission.

First, the Department released a report containing additional statistical data on potential capital cases prosecuted by the Department since 1995. The report also included an analysis of the Department's enforcement practices during the same period of time.

Secondly, the Department announced that the protocols for reviewing death-eligible charges have been slightly revised to increase uniformity in the system and ensure greater scrutiny of cases in which a U.S. Attorney is recommending capital punishment.

Third, the Attorney General announced that he is directing the National Institute of Justice to conduct a study of how capital cases are brought into the Federal system.

Please allow me to briefly explain each of these three developments.

With regard to the survey results and analysis, as you know last September Attorney General Reno released the results of a survey that included information on 700 capital cases since 1995 that had been submitted to the Department for review pursuant to the capital case review protocol.

I see that I have a yellow light, but I would like to proceed, if you will, a little bit longer.

Chairman FEINGOLD. Go ahead.

Mr. THOMPSON. Attorney General Reno directed the Department to collect additional data on cases that had not been submitted for review over the same period of time. The cases in this category were not submitted because, for example, U.S. Attorneys entered into plea agreements with defendants before indictment on a capital offense charge. She took this action to ensure that this additional information did not undermine the findings reached on the basis of the original data. The new data consists of nearly 300 cases. It is similar to the original data of the Reno report, in that it provides no evidence of favoritism toward white defendants in comparison with minority defendants.

All in all, the Reno study and our analysis found that the proportion of minority defendants in Federal capital cases did exceed the proportion of minority individuals in the general population. For example—and we need to discuss this statistic and that is the purpose of this hearing—in cases submitted to the Department's capital case review procedure, 20 percent of the defendants were white, 48 percent were African-American, 29 percent were Hispanic, and 4 percent were other.

Nevertheless, Mr. Chairman, our reports confirm that African-American and Hispanic defendants were less likely at each stage of the Department's review process to be subjected to the death penalty than white defendants. In other words, the United States Attorneys recommended the death penalty in smaller proportions of the submitted cases involving African-Americans or Hispanic defendants than in those involving white defendants.

The Attorney General's Capital Cases Review Committee likewise recommended the death penalty in smaller proportions of the submitted cases involving African-American or Hispanic defendants than in those involving white defendants. And when the Attorney General made a decision to seek the death penalty, it was made in smaller proportions of the cases submitted involving African-American or Hispanic defendants than in those involving white defendants.

Our study found abundant evidence that the statistical disparities observed in Federal capital cases resulted from non-invidious factors rather than from racial or ethnic bias. A factor of particular importance was the focus of Federal law enforcement efforts on drug trafficking enterprises and related criminal violence.

Senator Feingold, as Attorney General Reno noted in September, many of these cases resulted from the crack epidemic. During this crack epidemic, violence spread across our country as a result of the use of crack cocaine. This violence had a disparate impact on African-American neighborhoods, and African-American citizens called out to law enforcement, both State and Federal law enforcement authorities for help.

The active role of Federal law enforcement in investigating and prosecuting these kinds of cases possibly resulted in a higher proportion of minority defendants. This is particularly true where State laws were inadequate for effectively combating such crimes. This is not the result of any form of bias, but reflects the normal

factors that affect the division of labor, if you will, between Federal and State prosecutorial responsibility in both capital and non-capital cases.

If you will allow, I will turn to the revised protocols and discuss that briefly, and then the NIJ study, if that is OK.

Chairman FEINGOLD. If we could begin with the questioning shortly, take a couple of more minutes.

Mr. THOMPSON. Just briefly, sir, turning to the subject of the protocol revision, the Attorney General instituted a protocol, as you know, designed to ensure uniformity in the invocation of a capital crime. Attorney General Ashcroft and his Committee did slightly revise the capital crime protocol. That is detailed, I think, in detail in my prepared statement. If you have any further question on that, I will be happy to answer it.

Then turning to the NIJ study, the Attorney General has directed that the National Institute of Justice continue to go forward with a study to study the relationship between State and Federal criminal justice systems and the policies and practices that result in a capital case being prosecuted by the Federal Government.

Issues relating to the race and ethnicity of defendants and the location of prosecution will be included in the study. The National Institute of Justice will consider in the study the effectiveness of Federal, State and local law enforcement in the investigation and prosecution of murder in America. The primary purpose of this study, as you noted, Senator Feingold, is the same as that which was contemplated by the Clinton administration. We expect the solicitation for independent research to be released in the near future.

We need to continue to examine these issues, Senator Feingold, to ensure to the fullest extent that we can public confidence in the administration of justice. That is important, and I know, Senator Feingold, that you have been patiently waiting for a response to the letter that you wrote to the Attorney General several days ago. The Attorney General is anxious to respond in writing to you and will do so very shortly. As you have noted in your opening statement, you indicate that you understand that we intend to go forward with this important study in the way that you requested in your letter.

I am pleased to answer any questions that you may have.

[The prepared statement of Mr. Thompson follows:]

STATEMENT OF LARRY THOMPSON, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to appear here today to consider this important issue. In the brief time I have enjoyed the privilege of serving as Deputy Attorney General, I have been involved in a number of matters involving the enforcement of the federal death penalty. I can assure you that I fully appreciate the magnitude of the Department's responsibility in this area.

I also appreciate and respect the devotion you bring to this issue, Mr. Chairman. And though we may disagree over the appropriateness of the death penalty, we share a deep commitment to the fair and impartial enforcement of the law. As you know, Attorney General Ashcroft has set a clear direction for the Department. We intend to act in a manner consistent with the highest standards of integrity and with an abiding respect for the constitutional rights of all persons.

Of course the mission of the Department of Justice is to enforce vigorously the laws passed by the Congress, including dozens of criminal prohibitions carrying the

possibility of capital punishment. These death eligible offenses, nearly all of which were included in the 1994 crime bill, are the duly established laws of the land and they define the interests of the Federal Government. They reflect the unmistakable will of the American public as expressed through their elected representatives. Just as former Attorney General Reno put aside her own views on capital punishment and approved all of the federal capital cases we will be discussing here today, so too must the current Administration fulfill its duty to enforce the law.

This commitment is especially important to the victims of violent crime. When the lives of family members and friends are shattered by deadly violence, their one simple hope is that the perpetrators of their suffering might be caught and punished. We all witnessed the singular importance of such accountability two days ago when the victims of Timothy McVeigh's terrorist attack repeatedly explained how his execution brought closure to their long nightmare.

It is a fact that minorities are more likely to be victims of violent crime than the majority. My predecessor former Deputy Attorney General Eric Holder observed at a September press conference that African Americans are about 50 percent of the nation's homicide victims. In particular, all of America has been victimized for nearly two decades by drug trafficking violence. We have become accustomed to nightly news stories about drive-by shootings and execution style killings by ruthless drug gangs. We have been horrified by reports of stray bullets killing children who were simply standing in the wrong place at the wrong time. The criminal justice system itself has been threatened by violent intimidation and witness retaliation. Hundreds of law enforcement officers have sacrificed their very lives to rescue communities from the ravages of violent drug trafficking. This is why the Attorney General has pledged to reinvigorate the battle against drug trafficking and Congress has provided powerful tools to law enforcement, including the death penalty, to stop these violent criminals.

But as I said, Mr. Chairman, the fulfillment of our law enforcement mission must strengthen and not weaken the public's confidence in the fair administration of justice. Even the appearance of racial or ethnic bias in the enforcement of capital punishment is a serious concern.

To address this problem, last week Attorney General Ashcroft announced three important steps. First, we released a report containing additional statistical data on potential capital cases prosecuted by the Department since 1995. The report also included analysis of the Department's enforcement practices during this same period of time. Second, the Department announced that the protocols for reviewing death eligible charges have been revised to increase uniformity in the system and ensure greater scrutiny of cases in which a U.S. Attorney is recommending capital punishment. And third, the Attorney General announced that he is directing the National Institute of Justice to conduct a study of how capital cases are brought into the federal system.

Mr. Chairman, please allow me to briefly explain each of these three developments.

SURVEY RESULTS AND ANALYSIS

With regard to the survey results and analysis, as you know last September Attorney General Reno released the results of a survey that included information on nearly 700 capital cases since 1995 that had been submitted to the Department for review pursuant to the capital case review protocol. (I will have more to say about this protocol in a moment.) Attorney General Reno directed the Department to collect additional data on cases that had not been submitted for review over the same period of time. The cases in this category were not submitted because, for example, U.S. Attorneys entered into plea agreements with defendants before indictment on a capital offense charge. She took this action in order to ensure that this additional information did not undermine the findings reached on the basis of the original data.

The new data consists of nearly 300 cases. It is similar to the original data of the Reno report in that it provides no evidence of favoritism towards White defendants in comparison with minority defendants. Rather, potential capital cases involving African American or Hispanic defendants were less likely to result in capital charges and submission of the case to the review procedure. The new data, in combination with the previously available data on submitted cases, shows specifically that capital charges were brought and the cases were submitted for review for 81% of the White defendants, 79% of the African American defendants, and 56% of the Hispanic defendants, in potential capital cases. A further specific finding was that the various actions taken by the U.S. Attorney offices resulted in non-capital treat-

ment for 74% of the White defendants, 81% of the African American defendants, and 86% of the Hispanic defendants.

All in all, the Reno study and our analysis found that the proportion of minority defendants in federal capital cases exceeded the proportion of minority individuals in the general population. For example, in cases submitted to the Department's capital case review procedure, 20% of the defendants were White, 48% were African American, 29% were Hispanic, and 4% were "Other." Nevertheless, our reports confirmed that African American and Hispanic defendants were less likely at each stage of the Department's review process to be subjected to the death penalty than White defendants. In other words, United States Attorneys recommended the death penalty in smaller proportions of the submitted cases involving African American or Hispanic defendants than in those involving White defendants; the Attorney General's capital case review committee likewise recommended the death penalty in smaller proportions of the submitted cases involving African American or Hispanic defendants than in those involving White defendants; and the Attorney General made a decision to seek the death penalty in smaller proportions of the submitted cases involving African American or Hispanic defendants than in those involving White defendants.

In the cases considered by Attorney General Reno, she decided to seek the death penalty for 38% of the White defendants, 25% of the African American defendants, and 20% of the Hispanic defendants. The finding that the death penalty was sought at lower rates for African American and Hispanic defendants than for White defendants held true both in "intraracial" cases, involving defendants and victims of the same race and ethnicity, and in "interracial" cases, involving defendants and victims of different races or ethnicities.

Our study found abundant evidence that the statistical disparities observed in federal capital cases resulted from non-invidious factors rather than from racial or ethnic bias. A factor of particular importance was the focus of federal law enforcement efforts on drug trafficking enterprises and related criminal violence. In areas where large-scale, organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups, the active federal role in investigating and prosecuting these crimes results in a high proportion of minority defendants. This is particularly true where state laws are inadequate for effectively combating such crimes. This is not the result of any form of bias, but reflects the normal factors that affect the division of federal and state prosecutorial responsibility in both capital and non-capital cases.

In this connection, our analysis examines in detail several of the districts which generated the largest numbers of capital offense charges, accounting collectively for about half of the cases submitted to the Department's review procedure. For example, the Eastern District of Virginia submitted 66 cases, mostly involving African American defendants. The large number of cases involving charges of capital crimes, and the racial proportion in these cases, resulted mainly from the district's involvement in the investigation and prosecution of drug gangs carrying on large-scale trafficking activities in its geographic area, and from the district's jurisdiction over killings committed by inmates in the District of Columbia's prison in Lorton, Virginia. The district of Puerto Rico submitted 72 cases, all involving Hispanic defendants. This district had an unusually large number of homicide cases because of an agreement by the U.S. Attorney with local authorities to prosecute fatal carjacking cases, and the defendants in these cases were Hispanic because the population of Puerto Rico is generally Hispanic. The U.S. Attorney office in the District of Columbia submitted 23 cases, most involving drug-related killings by African American defendants. The racial composition of these cases reflected D.C.'s demographics and the decision to pursue federal charges (as opposed to charges under local D.C. law) reflected advantages of federal prosecution that were unrelated to the race of the defendants. Other districts with high numbers of capital case submissions were the District of Maryland (41 cases), the Eastern District of New York (58 cases), and the Southern District of New York (50 cases). These districts recommended against seeking the death penalty in the vast majority of their submitted cases involving minority defendants, contravening any notion that their exercise of federal jurisdiction in a large number of potential capital cases reflected an invidious desire to secure capital sentences against minority defendants.

THE REVISED PROTOCOLS

Turning to the subject of protocol revision, Attorney General Reno instituted a protocol designed to ensure consistency in decisions concerning capital punishment. Under this protocol, in all cases involving charges of crimes legally punishable by death, the responsible United States Attorney submits the case and makes a rec-

ommendation about whether to seek the death penalty to the Department. The case is then reviewed by a committee of senior attorneys, who receive input from both the U.S. Attorney and defense counsel. The Committee evaluates the facts of the case, the federal interest in the case, the likelihood of success, and the aggravating and mitigating factors that Congress has identified as relevant in such cases. The Committee then makes a recommendation to the Attorney General. The case is then reviewed by attorneys in my office, the Attorney General's office, and finally by the Attorney General. The advantage of this approach is that a uniform, equal process governs, and ultimately one person reviews all of the cases to ensure a consistent treatment based on the alleged conduct of the defendants.

Even though Ms. Reno's study and ours have found no evidence of racial or ethnic bias in the Department's treatment of minorities in the system, we did note some statistical disparity in the treatment of plea agreements following a decision by the Attorney General to seek the death penalty. This is the one component of the process that is not subject to subsequent review under the current protocols.

In order to have greater consistency in all aspects of the application of the federal death penalty, we are changing the protocol to require prior approval by the Attorney General before a death penalty prosecution may be dropped in the context of a plea agreement. Another requirement of the revised protocol is that U.S. Attorneys must report all potential capital cases to the Department so that our data will be more complete.

THE NATIONAL INSTITUTE OF JUSTICE STUDY

Finally, Mr. Chairman, the Attorney General has directed the National Institute of Justice to go forward with a study of the relationship between the state and federal criminal justice systems and the policies and practices that result in a capital case being prosecuted by the Federal Government. Issues relating to the race and ethnicity of defendants and the location of prosecution will be included in the study. NIJ will also consider in the study the effectiveness of federal, state and local law enforcement in the investigation and prosecution of murder in America. The primary purpose of this study is the same as that which was contemplated by the Clinton Administration but which did not progress beyond the planning process. We expect the solicitation for independent research to be released in the near future.

CONCLUSION

In conclusion, Mr. Chairman, while the Justice Department continues forward with vigorous enforcement of the law we will do so with an equally vigorous commitment to fairness and impartiality. We look forward to working with you to achieve these critical goals.

Senator THURMOND. Mr. Chairman?

Chairman FEINGOLD. Senator Thurmond?

Senator THURMOND. I would like to place into the record letters from the Fraternal Order of Police and the Federal Law Enforcement Officers Association in support of the death penalty and in opposition to a Federal moratorium.

Chairman FEINGOLD. Without objection.

I thank the witness for his testimony. I look forward to the written response, as well, with regard to the NIJ study.

I just want to remind everyone here that what we are trying to get at is a reality, which is that 90 percent of the people on Federal death row now are either black or Hispanic.

All the different statistics you suggested relate to certain aspects of the system and are part of the story. But I think we need to remember at some point there is a decision whether to defer to the State or to send it to the Federal level by a prosecutor. Then there is a decision whether to make it a capital case or a non-capital case. Then there is a review process by the Attorney General whether to do the death penalty or not. Then a jury takes up the matter whether to sentence to death or not to sentence to death.

All of these junctures are relevant to the question of how did we end up with 90 percent of the people on death row being minorities

in this country. Perhaps it is a legitimate, just result. But given the fact that I don't think we have carefully analyzed all those elements, I think there is a very serious question. I appreciate your respect for that concern.

We will do 5-minute rounds, and I will start off by asking you to explain what happened to the NIJ study that Attorney General Reno ordered and to say a little bit more about what your current plans are.

You did hear me say in the opening remarks that Attorney General Ashcroft pledged to me that he would not terminate the NIJ study. I understand that the Department convened a meeting on January 10 that we are all aware of. I understand, based on conversations between our staffs, that the Department actually did not take any further action on this study after President Bush was inaugurated until perhaps recent days.

In fact, a specific decision was made within a few weeks after the Attorney General was sworn in to put this study and a number of other Clinton administration initiatives on hold. Is that correct?

Mr. THOMPSON. It is not my understanding that a decision was made to put the study on hold, and I will qualify my comments as to my understanding of what happened.

As you know, Senator Feingold, I was just recently confirmed less than a month ago, but what I understand happened was that in January there was a meeting involving various individuals who would have input into the formulation of the study. There were minutes, if you will, or a report summarizing what was discussed. I have reviewed that report.

One of the things that was discussed, and it was a concern of all the participants, apparently, no matter which side of the issue they were on, was that the contemplated study would really not bring to bear a definitive answer as to the issues that we are discussing today, the issues that are the purpose of your hearing.

Given the other factors that you had a transition between administrations, there was not Presidentially appointed leadership in the Department except for Attorney General Ashcroft, and the concern that I just mentioned, there was a delay, if you will, in moving forward on the parameters of the study. But it was not an unreasonable delay, in my estimation.

One of the things that was done was to try to bring more focus on the answer as to the genesis, if you will, of some of the issues that we were hoping to get answered in the study. The Department asked a number of the prosecutors who were actually involved in these case submissions to come to the Department and discuss what happened, get anecdotal information as to what happened, so that could be transmitted, if you will, and brought to bear with respect to the work of the NIJ in formulating the study. That was done in April of this year.

Of course, on June 6, I think it was, Attorney General Ashcroft directed the Department to go forward with the study. The solicitation, as I understand it, is ready to go out. The study's parameters will be instituted by independent social scientists and criminologists. It will be reviewed by career people in the Department of Justice, and we are looking forward to the results of the study.

I do not believe there was any conscious decision, based upon what I have examined, to stop the study. It was more or less a decision to try to get at the answer to some of the problems. At the January meeting, there was sort of a consensus, as I understand it, that perhaps the study as contemplated would not give a definitive answer to the problem of these disparities.

Chairman FEINGOLD. Well, in my mind it is sort of a bad news/good news situation. The bad news is that it is certainly my sense that the study was going nowhere and that the delay was really a result of a decision not to move forward with it. That is my genuine interpretation of the events.

But on the good news side, that is not what I am hearing today. What I am hearing today is that there is an intention to move forward and we are going to explore that. The only regrettable part, of course, is that this was a time period prior to Mr. Garza's scheduled execution where perhaps this information could have had some bearing on the events that are likely to occur next Tuesday, and I find that regrettable.

Mr. THOMPSON. Senator, may I just make a point of clarification?

Chairman FEINGOLD. Please.

Mr. THOMPSON. As I understand it, the solicitation is not yet fully developed, but we anticipate that it will go out shortly.

Chairman FEINGOLD. Thank you for that and I am pleased to hear it.

Well, let us move on to your study. How does the study differ from that which the Attorney General ordered last year?

Mr. THOMPSON. Well, as you know, the study that the Department of Justice just recently instituted was really a supplement to the study that Attorney General Reno announced in September.

Senator, with respect to the questions that you raised in your opening statement and your questions to me, I have looked carefully at Attorney General Reno's analysis of this and, as you know—and this has been very important to me in my examination of where we are on this important issue based upon the numbers and the statistics—Attorney General Reno was absolutely confident that with respect to those individuals who are on death row now, there was no doubt in her mind, there was no question in her mind as to the guilt or innocence of those individuals. I think that is very important. Further, she was convinced, as was the Deputy Attorney General, my predecessor, Deputy Attorney General Holder, that the evidence in law with respect to those cases warranted the invocation of the death penalty.

Finally, the important statistic that I have asked for in terms of my staff is to further look at who is on death row now. Sixty-three percent of those individuals' victims were minorities, and I find that an equally troubling statistic.

Chairman FEINGOLD. Well, I think it is only fair to point out that Attorney General Reno and President Clinton chose to delay the execution of Mr. Garza for the reason that the studies suggested racial and geographic disparities in the death penalty. While the other statements may be true, there was a reason why that execution was delayed. Because of the need for further study, that is why the June 19th date was chosen.

Let me ask you directly, then; you have talked about it, but let me just put it on the record. Will a purpose of the study that is now ordered by Attorney General Ashcroft be to address and analyze the questions of racial and geographic disparities, as Attorney General Reno's directive contemplated?

Mr. THOMPSON. I certainly hope so, Senator. Public confidence in the administration of the criminal justice system is very important, and we have to have as full an understanding as possible. I don't know if we can get to a total and complete understanding, but we have to have as full an understanding as possible of these disparities.

Chairman FEINGOLD. Well, all I asked is will the purpose of the study be to study these issues?

Mr. THOMPSON. That will be one of the purposes, to study those issues.

Chairman FEINGOLD. As you know, in order for the NIJ to carry out a complex and extensive review like this, the AG must ensure that it has the resources to do it. Does the Justice Department commit to providing the NIJ with the resources and support it needs to conduct this study?

Mr. THOMPSON. I understand that sufficient resources are available, Senator. And with respect to support, I understand that that will be made available, including access to information that the scientists need to conduct the study; of course, reasonable access consistent with privacy issues, handling sensitive law enforcement issues, and grand jury secrecy.

Chairman FEINGOLD. Mr. Thompson, did you agree with President Clinton's decision to postpone the execution of Juan Garza because of the issues raised by the September 2000 survey?

Mr. THOMPSON. No, I didn't, Senator. As I have looked at the issue and have examined the issue, I was more persuaded by the response to Attorney General Reno and Deputy Attorney General Holder with respect to the individuals who are on Federal death row now, and that is that there really are no issues of guilt or innocence and that the evidence and the law in those cases warranted the invocation of the death penalty.

Chairman FEINGOLD. Thank you. I will conclude my round at this point and turn to the Senator from Alabama, Senator Sessions, and then return for more questions.

Mr. THOMPSON. Thank you, Senator.

Senator SESSIONS. Thank you, Mr. Chairman. It is an important issue.

Mr. Thompson, I think you are correct. Being open and making sure the public has confidence in the system is important.

With regard to how this death penalty is carried out, I think it would be instructive for the American people to understand just how serious the Department of Justice takes it. It is not handled like a routine case, is it?

Mr. THOMPSON. No, it isn't.

Senator SESSIONS. Former Attorney General Janet Reno, who, by the way, as I understand it, personally felt strongly that the death penalty was not appropriate, promised to enforce it as Attorney General.

She set up within the Department of Justice in the early 1990's, did she not, a comprehensive and detailed review process before any United States Attorney could charge a defendant with a capital crime or ask for the death penalty? Isn't that correct?

Mr. THOMPSON. That is correct, Senator.

Senator SESSIONS. In fact, she had a team that reviewed those cases and she personally had to sign off before any of the 94 United States Attorneys around the country could charge a defendant and ask for the death penalty?

Mr. THOMPSON. Correct.

Senator SESSIONS. And part of that was to deal with this very problem of disparity and equal rights and uniformity of punishment, right?

Mr. THOMPSON. And to deal with issues of fairness and guilt or innocence as well.

Senator SESSIONS. Yes, so they reviewed guilt or innocence. They reviewed all kinds of issues.

Mr. THOMPSON. That is correct.

Senator SESSIONS. And that remains in effect under this administration, is that correct?

Mr. THOMPSON. That is correct.

Senator SESSIONS. In fact, over the years I think it has been strengthened.

Now, during the appellate process, the trial prosecutors, the United States Attorneys—and you and I were both United States Attorneys in another life—The United States Attorney tries the case, but is the Department of Justice involved in the appellate work on the case, the Washington-based Department of Justice?

Mr. THOMPSON. Yes, it is.

Senator SESSIONS. And doesn't that give an additional protection that even if a United States Attorney acted wrongly or made some error? Like Attorney General Ashcroft did on this McVeigh case, the Department of Justice could step in and make changes or ask for a delay or stay of an execution?

Mr. THOMPSON. Absolutely.

Senator SESSIONS. And that would be an additional protection for a criminal defendant.

Mr. THOMPSON. That is right, Senator Sessions.

Senator SESSIONS. Well, I think that is important for us to understand. It is also important to remember that Attorney General Ashcroft in his testimony, to my knowledge, never said he would agree to a delay in the implementation of the death penalty beyond the delay that had been issued in the Garza case. Is that correct?

Mr. THOMPSON. That is my understanding.

Senator SESSIONS. He swore to us repeatedly that he would enforce the law. Mr. Thompson, whether or not you personally believe in the death penalty, does not Attorney General Ashcroft have a duty to enforce the law passed by this Senate and this Congress?

Mr. THOMPSON. Absolutely. That is my view of our responsibility.

Senator SESSIONS. To the best of his ability, and if the facts and the law call for the implementation of the death penalty, whether he believes in it or not, just like Janet Reno didn't believe in it—she carried it out and a number of individuals are on death row at this time.

Mr. THOMPSON. That is correct.

Senator SESSIONS. I think that is important because we are a Nation of laws. One of the greatest errors that could occur would be for governmental officials who have sworn to enforce the law somehow to receive political pressure and feel that they shouldn't carry out the law that we have passed, which as I recall was passed in 1988 before I became a Senator, but was a Federal prosecutor at that time. Congress voted overwhelmingly for it. I know President Clinton was in favor of the death penalty.

Mr. THOMPSON. And, Senator, you were asking me a question about the protocol and the procedures, and Senator Feingold mentioned that in his opening statement. Our study was really not designed to show whether or not whites were treated harshly. What we were really trying to do was to see whether or not there were any invidious factors, whether or not there was any bias and whether or not the statistics went to that.

One of the changes we have made in the protocol procedures is that—at every step of this protocol review process, our statistical analysis indicated that blacks were treated slightly more favorably than whites, in fact. However, one step in which whites did have a better treatment from the statistical analysis was whether or not after the death penalty had been warranted a plea was subsequently negotiated, and there was a little bit more favorable statistical analysis on that part. The procedures were revised so as to require a U.S. Attorney to obtain the approval of the Attorney General before a plea is entered into.

Senator SESSIONS. That was an Ashcroft-initiated decision?

Mr. THOMPSON. Yes, sir.

Senator SESSIONS. So the concern might be that a prosecutor would be more favorable in a plea bargain to a defendant based on race, and the Attorney General now has established a procedure by which if he or she is charged with a death penalty, before he can recommend something less than a death penalty under a plea bargain, that would also have to be reviewed by the Department of Justice?

Mr. THOMPSON. That is right, so as to assure greater uniformity in our review process.

Senator SESSIONS. And one more question. I guess my time is out. These prosecutorial memoranda from the field to the Department of Justice are not pro forma documents, are they? They typically are very detailed, including legal research and a large amount of facts and documents before the Department of Justice makes a decision on it?

Mr. THOMPSON. Yes, they are very detailed and are reviewed by a number of experienced prosecutors in the Department of Justice, including career prosecutors.

Senator SESSIONS. Thank you, Mr. Chairman. I want to thank you for your concern for justice in America and your high ideals in making sure that the law is carried out faithfully and that we have good laws.

Thank you.

Chairman FEINGOLD. Thank you, Senator Sessions.

Just on one point the Senator from Alabama raised, he indicated that the Attorney General has an obligation, of course, to follow

through with the law. That is a fair point, but I want to read what the Attorney General said on the day that he delayed the execution of Tim McVeigh, of all people.

He said, "Our system of justice requires basic fairness, evenhandedness, and dispassionate evaluation of the evidence and the facts. These fundamental requirements are essential to protecting the constitutional rights of every citizen and to sustaining public confidence in the administration of justice. It is my responsibility to promote the sanctity of the rule of law and justice, and it is my responsibility and duty to protect the integrity of our system of justice."

So I would suggest that just as it is possible and, in fact, occurred in the McVeigh case that a delay was appropriate, it is certainly possible, given the evidence before us, that the Attorney General could still be executing his responsibility of following the law if he were to take into account these factors.

One quick follow-up, Mr. Thompson, to our earlier discussion with regard to the supplemental report. When it was submitted it stated, "This report completes a survey and assessment of the Federal death penalty system." That is not what I am hearing today, and I am pleased about that.

What I am hearing today is that, in fact, the NIJ study has been ongoing and will continue. Is that right?

Mr. THOMPSON. That is correct.

Chairman FEINGOLD. So it would not be correct to say that the DOJ's assessment of the Federal death penalty system is complete?

Mr. THOMPSON. As I understand that phrase in the report, it was the completion of the statistical analysis of the available data that we had. Obviously, we need to examine the issues regarding the disparity, racial and geographic, further.

And I hope you understand, Senator, that I am in no way suggesting that we shouldn't do that. I don't know if we will ever have a full and complete understanding, but we certainly need to try to have as complete an understanding as possible for the public confidence that I think we all want in our criminal justice system.

Chairman FEINGOLD. Thank you for that statement.

Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Let me just put in the record, if I can, a letter from Ruben Garcia, Jr., the Assistant Director of the Criminal Investigative Division, written to you. I will just read a couple of paragraphs.

"We understand the deep concern that you and your colleagues have that the criminal justice system be administered without consideration of race. This principle is fundamental to the fairness of our system and one to which the FBI constantly dedicates itself in every aspect of enforcing the laws."

"Submitted for your hearing today is testimony of Professor Goss of Columbia University suggesting that the FBI and DEA determine which Federal drug investigations to undertake based upon the race of the drug dealers involved. While examination of the issue can be a healthy exercise to help address this postulation, reaching such a conclusion ignores the laws, guidelines, and Congressional and judicial scrutiny under which we operate. Just as in every type of violation addressed by the FBI, race is not and cannot

be a factor, let alone the dominant factor, in determining whether the threshold guidelines predicate has been reached for conducting an investigation."

I think that is important.

Mr. Thompson, Senator Sessions mentioned the extensive internal review process at DOJ prior to charging anyone with the death penalty. If you would, could you tell us a little bit about that process or describe that protocol for us?

Mr. THOMPSON. Well, as you noted, it is an extensive process. If a capital-eligible crime is contemplated by the U.S. Attorney, that is submitted to the Department of Justice for review. It is reviewed by a capital case review team which is comprised of senior Department lawyers, many career attorneys. They review the submission of information from the U.S. Attorney's office. Then attorneys in my office review the results of those findings, and then I personally review those findings and then they are submitted to the Attorney General for review.

Senator HATCH. So it isn't just the prosecutor making that decision by himself or herself?

Mr. THOMPSON. No, sir.

Senator HATCH. Why are drug trafficking cases such a large percentage of Federal death penalty cases?

Mr. THOMPSON. That is an interesting and complex question, Senator Hatch. As you know, the Federal interest in the 94 Federal judicial districts is operated, if you will, in a complementary and supplemental manner with respect to local law enforcement.

In many districts in which there is a great deal of drug trafficking activity, local law enforcement has the resources and the available legal tools to sufficiently and vigorously prosecute those crimes. In a number of districts, that is not available, and when that happens, especially in a situation involving the crack cocaine epidemic—for example, in the Eastern District of Virginia, which is a district that had a high number of case submissions, State prosecutors at some point in time in this process did not have available to them investigative grand juries. The Federal system did. State prosecutors, in the way that Federal prosecutors do, did not have the use of statutes like continuing criminal enterprise, RICO, and conspiracy statutes. The Federal system did.

So this disparity is the result of the complementary nature or the supplementary nature of the invocation of Federal law enforcement in those districts where the Federal Government needed to exercise the Federal interest. It is a complex question, but I think that is the way Federal law enforcement has operated for a number of years. And there is certainly nothing wrong with that; that is what Federal law enforcement is for.

Senator HATCH. In your judgment, is there any reason or justification for a moratorium on Federal executions at this time?

Mr. THOMPSON. No, sir, and I agree with the conclusion on that issue reached by Attorney General Reno and my predecessor, Deputy Attorney General Holder.

Senator HATCH. Is there any doubt in your mind that it is appropriate to go forward with the execution of Juan Raul Garza on June 18?

Mr. THOMPSON. The Department has received a petition for clemency in that case, Senator Hatch. I would feel uncomfortable, given the nature of where that is, commenting any further on that.

Senator HATCH. That is fine.

Thank you, Mr. Chairman. That is all I need to ask.

Chairman FEINGOLD. Thank you.

I will start another round at this point of 5 minutes. I would just make a quick comment within that time that given the fact that the Deputy Attorney General has indicated that the study with regard to racial and geographic potential bias is not completed, and the statement that was made earlier that there simply was no bias in the system, in the supplemental report, I think it really does raise a question of whether things should proceed with this execution.

You admit it. Your analysis is not done, and the execution, of course, would be irreversible if it suggests that there was a bias in the system. We don't know yet, but let me get into a little more of the detail at this point.

As I understand it, except for five espionage cases, which are almost always brought in the Eastern District of Virginia because it is home to the Pentagon and the CIA, each of the remaining 61 cases submitted for death penalty authorization in the Eastern District of Virginia involve black or Hispanic defendants.

In the supplemental report, most of the death penalty prosecutions in the Eastern District, as you suggested, are attributed to drug-related killings. The report concludes, and I am quoting here, "The defendants in these cases are not white because the members of the drug gangs that engage in large-scale trafficking in the Eastern District of Virginia are not white." It definitely states that. Now, that is a stunning statement.

How did you reach this conclusion that whites are not members of drug gangs or otherwise engaged in large-scale drug trafficking in Virginia?

Mr. THOMPSON. I don't think the statement could be read, Senator, to conclude that whites are not members of drug gangs. What I stated and what Attorney General Reno stated in her September testimony is that in districts like the Eastern District of Virginia where Federal law enforcement is focusing on violent drug trafficking gangs, many of which result from the crack cocaine epidemic, the violence associated with that activity has a disparate impact on minority communities. That is something that Federal law enforcement needed to address.

As I mentioned in my opening statement, and as Attorney General Reno stated, many African-American citizens were calling out to the Federal Government, and to State government as well, to assist the communities in checking the violence associated with these violent gangs.

I don't think the statement was meant in any way to mean that whites are not members of violent drug trafficking gangs. But in many of these drug trafficking gangs that involve the crack cocaine epidemic, these gangs had a disparate impact upon minority communities, and the Federal Government had an obligation to address this crime problem for its African-American citizens.

Chairman FEINGOLD. Well, I appreciate your attempt to moderate the actual words, but the words were pretty clear, and the words were quite stunning in light of the, I believe, lack of evidence that this is so exclusively the province of one group of people.

What I would like to do is ask you if you are familiar with a Virginia law enforcement operation called the Brotherhood.

Mr. THOMPSON. I am not familiar with it.

Chairman FEINGOLD. Let me go into some detail on it with you. I have a February 26, 1999, press release from the U.S. Attorney's office in Norfolk announcing the arrest of 29 individuals with the Renegades Motorcycle Club on charges of conspiracy to distribute methamphetamine. The indictment charges them with money laundering, possession with intent to distribute cocaine and marijuana, and various firearms violations.

All of the individuals named in the indictment are white, and this was a huge investigation. It shows that the statement in the supplemental report that "members of the drug gangs that engage in large-scale trafficking in the Eastern District of Virginia are not white" is false.

Do you agree that the supplemental report is inaccurate on that point?

Mr. THOMPSON. Well, as I said, I don't think a fair reading of the report was that white citizens are not members of drug gangs or violent gangs. We know about the bike gangs that seem to comprise white citizens who are members of those gangs.

As I indicated, as I understood what was going on in the Eastern District of Virginia, many of these drug trafficking gangs that were prosecuted by the Federal Government there—and this is what Attorney General Reno indicated—were a result of the crack cocaine epidemic, and certainly that was something that Federal law enforcement should address. But I don't think the report in any way meant to suggest, and I certainly don't suggest, Senator, that whites are not members of violent gangs or that we shouldn't go after them.

Chairman FEINGOLD. Do you happen to know how many murders have been committed by members of these meth gangs?

Mr. THOMPSON. No, sir, I do not.

Chairman FEINGOLD. Did the Department do any investigation to find out?

Mr. THOMPSON. I am sure it did. I am just not aware of the results of—

Chairman FEINGOLD. Well, the reason I ask it is the report we were given last week says that it was based on common experience that they came to the conclusions they did about who is doing the drug trafficking. It almost smacks a little bit, in the language of it, of the type of profiling that we are so very concerned about in this Congress. So if you do have any information on it, I would appreciate receiving it subsequently.

Mr. THOMPSON. I can look at that and get back to you. As I understand it, the reference to the Eastern District of Virginia was the reference because of the number of case submissions that involved minority defendants. It wasn't a representation that there are no violent gangs in the Eastern District of Virginia that are not comprised of white individuals. It was a reference to the number

of minority defendants whose criminal conduct was submitted to the Department of Justice for capital case review.

Chairman FEINGOLD. Well, the report attempts to justify the absence of white death penalty defendants by saying that whites aren't part of these gangs. And that is false, and that gets to my fundamental point. How do we end up with 90 percent of the people on death row being black or Hispanic? This might be part of the answer, but you may respond.

Mr. THOMPSON. Senator, we do not disagree with that, but I think from my standpoint my own personal viewpoint is to look at the nature of the individuals who are on death row now. I agree with Attorney General Reno and Deputy Attorney General Holder, and that is—and I have looked at a number of these cases—there is no evidence of the guilt or innocence of these individuals, and that in each of these cases the law and the evidence warranted the invocation of the death penalty. Again, getting back to my statistic on the victims, 63 percent of the victims were minorities. I think that is important.

Chairman FEINGOLD. Thank you. My time on this round is over, and I will turn to Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

I thank you, Mr. Thompson, and I am glad we have someone of your decency and broad experience both as a prosecutor and most of your career as a top-flight litigator with one of America's great law firms. So I think the perspective you bring there and the commitment you have to equal justice under law is important for all of us.

You mentioned that former Deputy Attorney General Eric Holder supported the conclusion that there was no racial bias here. I think it would be important also to note that he is an African-American, a former Federal judge here in Washington.

Let me ask you briefly a couple of things. The review by Reno and Ashcroft, those studies that were done, the prosecutors who carried out those cases, who employed them? Who was the person who employed and was responsible for those prosecutors?

Mr. THOMPSON. It was the Department of Justice.

Senator SESSIONS. It would be Janet Reno during her term in office?

Mr. THOMPSON. Oh, certainly.

Senator SESSIONS. And who appointed the United States Attorneys who were making decisions to prosecute these cases that you have been reviewing?

Mr. THOMPSON. They were appointed by President Clinton.

Senator SESSIONS. So I guess you have only been in office a few months, and the same for Attorney General Ashcroft.

Mr. THOMPSON. It seems like 2 years sometimes.

Senator SESSIONS. You are being asked to answer for a policy that took place under a previous administration. Frankly, from what I have seen, your analysis and the Reno analysis are fair and just.

You know, Mr. Chairman, there are tendencies in life, and it is an important matter. For some reason, crack cocaine has been a more serious problem in the African-American community.

Would you not agree, Mr. Thompson?

Mr. THOMPSON. Yes, that is my understanding.

Senator SESSIONS. Indeed, our Sentencing Guidelines that are so tough on crack have been criticized as in a way targeting the African-American community. And I think I have told you, Mr. Thompson, that I am a little bit troubled by that. I think maybe there is too much disparity between the crack sentences for crack cocaine and the powder cocaine, which is more typical of a white community as opposed to the African-American community. That is a fact.

There has been a good bit of violence, in my experience, within the crack cocaine gangs. You were United States Attorney in Atlanta and you were there, I guess, during at least part of the crack epidemic. It unfortunately did have an unusual amount of violence connected with it, did it not?

Mr. THOMPSON. That is correct, and that was Attorney General Reno's read on some of the data and statistics, Senator.

Senator SESSIONS. I think about the United States Attorney's burden, and you have an organized crime drug enforcement task force that you were the first head of for the Southeast Region. That focused on large cocaine rings for the most part, did it not?

Mr. THOMPSON. That is correct.

Senator SESSIONS. Many of those were Colombians, and those would qualify as Hispanics and there was a lot of violence among those cocaine gangs and rings, was there not?

Mr. THOMPSON. That is correct.

Senator SESSIONS. And so the Federal Congress decided that under certain circumstances major drug dealers of that kind would be subjected to the death penalty if they murdered people in the course of their activities and those would be prosecuted in Federal court.

Mr. THOMPSON. That is correct.

Senator SESSIONS. You remember the terrible violence that happened, the cocaine wars in Miami, and people were afraid that would spread around the country. Those had a lot of involvement with Colombians, did they not?

Mr. THOMPSON. That is right, Senator.

Senator SESSIONS. Mr. Chairman, I don't know how these numbers come out the way they do. I would say only 21 defendants now facing execution in the Federal system is a rather small number to get a statistical trend from, No. 1.

And with regard to the Garza case, he allegedly murdered three individuals personally and ordered the execution of three more.

Mr. THOMPSON. I believe five more.

Senator SESSIONS. Do you know the racial identity of those who were murdered by Mr. Garza?

Mr. THOMPSON. I believe they all were Hispanic, with the exception of one.

Senator SESSIONS. So I think that is a factor here that we ought to consider.

I would offer for the record a series of letters from African-American women in Alabama who have had loved ones lost, children particularly, by murder who do believe the death penalty is an appropriate penalty.

Thank you, Mr. Chairman, and I would like to offer those.

Chairman FEINGOLD. Without objection.

I am going to start another round, and perhaps I won't use the whole time here because I do want to go to the next panel.

Let me just briefly comment and say that the very comments that Senator Sessions was making about the emphasis on crack cocaine and connecting it to African-Americans is exactly the reason why we are concerned and need this study.

And then to suggest that there is no reason not to have a moratorium on the death penalty when we don't have these answers, to me, really does get into the direction of what it says over the United States Supreme Court, "Equal Justice Under Law."

Just because somebody may be guilty and many people would feel they should be executed, if one person is executed for essentially the same crime and another person isn't, that does raise questions of equal justice under law. So I would suggest that is a reason.

And I want to take another angle on this because we have been talking about the drug aspect. It appears that there is some undercurrent to the supplemental report, and I know you have indicated that you did not want it read that way, that minorities are more likely to commit these death-eligible crimes.

But I think we need to look not only at who is committing the crime, but also how crimes are prosecuted at the Federal level. I would like to turn your attention to an article by Tom Brune that appeared in Newsday today.

I will submit a copy of it for the record, without objection.

It is intriguing and it presents another perspective on the issue of racial and geographic disparities in the Federal Government's administration of the death penalty.

Brune compares Federal prosecution of street gangs to Federal prosecution of the Mafia. He found that the Federal Government is more likely to seek the death penalty against members of street drug gangs than members of the Mafia.

Now, one reason for this disparate treatment is the focus of Federal law enforcement. Individuals who might be involved with the Mafia are investigated through the FBI's Organized Crime Unit, which was created after the enactment of the RICO statute in 1970. It follows the so-called enterprise theory of investigation. In other words, the Federal Government is more interested in wrecking a criminal organization than just focusing on individuals.

In contrast, in 1992, the Federal Government for the first time took on investigation and prosecution of street drug gangs, as Senator Sessions indicated. Through enactment of the drug kingpin statute in 1988, Congress equipped Federal law enforcement with the death penalty as a tool. Now, rather than focusing on the gang organization, law enforcement is focused on the individual.

Introduction of the death penalty as a tool, combined with our Nation's war on drugs, appears to have influenced who does and does not get charged with a death-eligible offense at the Federal level. I believe the article illustrates that the Justice Department cannot robotically, in your words, enforce vigorously the laws passed by Congress, but must also look at how the laws are applied.

Since 1996, according to Brune, an FBI crackdown has led to the conviction of 1,500 organized crime defendants, but not a single

death penalty case, not a single one. I am concerned that these two starkly different approaches to prosecuting criminal organizations by Federal law enforcement could be a reflection of our societal attitudes. Does our society somehow view mob figures as more sympathetic than black or Hispanic drug kingpins?

Wouldn't you agree that this street drug gang versus mobster prosecution comparison deserves exploration and perhaps even some empirical research?

Mr. THOMPSON. Well, Senator, I would agree that we need to understand fully and, as I said, to the fullest extent that we can the issue of the racial disparity of the number of individuals who are on Federal death row. As an African-American, that is something I am concerned about and I don't think we should ignore it.

I do not think we should turn a blind eye toward this issue. I think sometimes that is perhaps some of the problem that we have in our country with respect to racial issues that we do not want to discuss them, we do not want to look at them. So I am in favor of us examining this important issue.

But with respect to the question that you posed to me with respect to violent crime, I would submit, Senator, that it is very important for the Federal Government to be involved in those kinds of cases. As I indicated and as Deputy Attorney General Holder indicated, African-Americans constitute 50 percent of the homicide victims in our country. And it is even worse; it affects the quality of life of the individuals who live in some of these communities who are ravaged by these crack cocaine gangs. People are afraid to go out of their homes. They are locked up in their homes as prisoners.

If the local law enforcement authorities do not have sufficient tools or resources to address this issue, I think it is very important for the Federal Government to be involved in this so as to bring these individuals to justice and to protect the vast majority of law-abiding citizens who live in these communities.

Chairman FEINGOLD. Well, I appreciate the tone of those remarks, and I hope in the letter that I will receive concerning the NIJ study that you are going to do that there will be some assurance that the study will include not only the general matters we have talked about on racial and geographic disparity, but also some of these issues relating to drug gangs and the difference in treatment between the organized crime type of cases involving, say, mob type issues versus the street gangs are included in the analysis.

Mr. THOMPSON. Yes, sir, and I will get back to you on the question that you posed.

Chairman FEINGOLD. I thank you.

Let's see if Senator Sessions has anything further of this witness.

Senator SESSIONS. Mr. Chairman, I would just note, as we talk about the statistical numbers being small, I have a report here that 29 out of 35 Federal executions since 1927 have been white. I think you are correct to look at the numbers we are looking at today, but in the long run those numbers are somewhat comforting, I think, in terms of racial bias.

I would also note that I think you raised a good question about meth cases, which tend to be more white. Sometimes, motorcycle members are violent. Ecstasy is a growing problem, and I think the Department of Justice will need to monitor those gangs and crimi-

nal enterprises and ensure that it is as vigorous in prosecuting murders that may occur during those enterprises as they are in the ones that are ongoing now.

And the Mafia question is a good one. I know it is often very difficult to penetrate their code of silence and maybe the proof is difficult. But it has appeared that a number of Mafia people have been convicted involving murders. Of course, if those murders occurred before 1988, they wouldn't be subject to the death penalty. Is that correct?

Mr. THOMPSON. That is correct.

Senator SESSIONS. But if they have occurred since then, then I think the Department has a high burden to make sure that death penalties are sought in appropriate cases there.

Thank you, Mr. Chairman.

Chairman FEINGOLD. Well, I thank the Senator, and I must say I appreciate working with him. He is a great ally and a very formidable opponent on many issues. But I just have to say that not only did I take no comfort from the statistics you gave, they appall me because what they are are based on is the Federal death penalty that stopped basically in 1963.

The modern death penalty, a statistic that you call not significant, involves, out of 19 people, 17 minorities; 14 are black. That is the face of the modern death penalty at the Federal level, something that I believe never was true in American history. So I would take a different read, rather than comfort, on those numbers.

Senator SESSIONS. Maybe it is just a short-term statistical anomaly.

Chairman FEINGOLD. Let us hope.

Senator SESSIONS. Let us hope.

Chairman FEINGOLD. Thank you, Senator Sessions.

If there are no further questions for this witness, we will ask the second panel to come forward. But before you go, Mr. Thompson, I thank you. Let me state that the record for this hearing will remain open for a week's time. So if there is anything further you would like to submit for the record, you may do so.

In addition, I will ask that members of the Committee submit any written follow-up questions by the close of business on Friday, and I am sure you will answer those promptly.

I thank you for all the time you have spent with us here today.

Mr. THOMPSON. Thank you for your courtesy, Senator.

Chairman FEINGOLD. I will ask the next panel to come forward.

Our next panel consists of Julian Bond, Andrew McBride, Sam Gross, James Fotis, and David Bruck. We will start with Mr. Bond and then move down the table. I will ask again, if you please could, given the hour, limit your opening statements to 5 minutes so that we will have time to ask questions. Your entire written statements will, of course, be included in the record.

Let me begin with Mr. Bond. Julian Bond is Chairman of the Board of the NAACP. He is frankly somebody whom I have admired and followed throughout my entire life. He is a former State legislator in Georgia and one of our country's greatest civil rights activists. He is also currently a professor of history at the University of Virginia.

Mr. Bond, it is an honor to have you here and you may proceed.

STATEMENT OF JULIAN BOND, CHAIRMAN, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND MEMBER, CITIZENS FOR A MORATORIUM ON FEDERAL EXECUTIONS, WASHINGTON, D.C.

Mr. BOND. Thank you, Mr. Chairman. Thank you for inviting me to offer my perspective as Chair of the Board of the NAACP and a member of Citizens for a Moratorium on Federal Executions.

The NAACP is the Nation's oldest and largest civil rights organization. We have long been opposed to the death penalty. We are horrified by its all too frequent and easily documented racially discriminatory application. We do not believe it deters crime. It targets and victimizes those who cannot afford decent legal representation. It is used against the mentally incompetent. It tragically sends the innocent to death.

It serves as a shield for attitudes on race. It is used most often in States with the largest African-American populations, and disproportionately used when the accused is black and the victim is white. In addition to being bad domestic policy, it increasingly alienates the United States from our allies and lessens our voice in the international human rights arena.

I am also here as a member of Citizens for a Moratorium on Federal Executions. We are a coalition of dozens of American public figures who joined together last fall when Juan Garza was scheduled to be the first individual executed by the United States in nearly 40 years. Some members of this group support the death penalty in specific circumstances; others are inalterably opposed. Nonetheless, we spoke with one voice in urging President Clinton to declare a moratorium on Federal executions.

There can be no question that we were able to assemble a broad cross-section of prominent U.S. citizens to call for a moratorium because the public is prepared to carefully reexamine the use of capital punishment in this Nation. At no time since the death penalty was reinstated by the Supreme Court in 1976 have Americans voiced such grave doubts about the fairness and reliability of capital punishment.

At the State level, those doubts are reflected in the unprecedented moratorium put in place by Governor Ryan of Illinois and death penalty moratorium bills introduced in State legislatures and in studies commissioned by Governors in other States.

At the national level, Mr. Chairman, you have introduced a bill calling for a moratorium, and Senator Leahy has introduced legislation that would require greater protections for those prosecuted for capital crimes at the State and Federal levels.

Professional community and civil rights organizations, including the League of United Latin American Citizens, the National Urban League, the NAACP, the Black Leadership Forum, the Leadership Conference on Civil Rights, and the American Bar Association all have called on the executive branch to suspend Federal executions. And religious organizations have intensified their longstanding calls for a death penalty moratorium.

When CMFE addressed President Clinton on November 20, we were responding to the September 12 release of the DOJ survey that documented racial, ethnic, and geographical disparities in the charging of Federal capital cases. We wrote to the President, "Un-

less you take action, executions will begin at a time when your own Attorney General has expressed concern about racial and other disparities in the Federal death penalty process. Such a result would be an intolerable affront to the goals of justice and equality for which you have worked during your presidency. Consequently, we urge you to put in place a moratorium until the Department completes its review of the Federal death penalty process."

As I speak to you today, of course, the first Federal execution in almost 40 years has been carried out. The man put to death was not Mr. Garza, who now faces execution in less than a week's time, on June 19. He did not precede Timothy McVeigh to the death chamber in Terre Haute because on December 7, 2000, President Clinton stayed his execution for 6 months.

While the President announced he was not prepared to halt all Federal executions, he nonetheless told the Nation that further examination of possible bias in the Federal death penalty system "...should be completed before the United States goes forward with an execution in a case that may implicate the very questions raised by the Department's continuing study." "In this area," he said, "there is no room for error."

Nothing has transpired since President Clinton's December 7 statement and grant of reprieve that warrants going forward with Mr. Garza's execution, nor with carrying out the death sentence of any of the other 19 individuals on Federal death row.

We reject any suggestion that the report released by Mr. Ashcroft on June 6 constitutes a reliable or thorough study of possible racial and regional bias in the Federal death penalty system. Nor does it answer the troubling questions raised by the Department's September 12 survey.

On December 8, the day following the President's decision to stay Mr. Garza's execution, I was one of several CMFE representatives who, with Congressman John Conyers, met with former Attorney General Reno, former Deputy Attorney General Holder, and other Justice Department attorneys to discuss the President's announcement and plans for a more comprehensive investigation of the death penalty, which would include the participation of outside experts.

Members of the Department acknowledged this critical task could not be accomplished by the end of April of this year, the timetable set by the President when he announced the December reprieve for Mr. Garza. The result of that discussion with Attorney General Reno and Deputy Holder was memorialized in our letter to President Clinton dated January 4 of this year.

We next learned that on January 10 the National Institute of Justice assembled a group of experts from within and without the Department of Justice to discuss the parameters of the investigation that the Attorney General, Deputy, and President had announced was needed.

At his confirmation hearing, then Attorney General-designate John Ashcroft stated that evidence of racial disparities in the application of the death penalty "troubles me deeply." Acknowledging he was unsure why more than half the Federal capital prosecutions were initiated in less than one-third of the States, he said he was also "troubled" by this evidence. He expressed his approval of a

"thorough study of the system," and proclaimed, "Nor should race play any role in determining whether someone is subject to capital punishment."

On June 4, CMFE wrote to President Bush, repeating our call for a moratorium. We raised the concerns that the Attorney General's actions and statements subsequent to his confirmation hearing "cast doubt" on "the administration's commitment to the principles he set forth at his confirmation hearing."

We noted, "There has been no indication that the Department intends to continue the necessary independent investigation of racial and geographic bias in the death penalty, which was to have been administered by the National Institute of Justice. Moreover, General Ashcroft's statements to Members of Congress, including his testimony before the House Appropriations Committee in early May, suggest that even the internal inquiry that the Department embarked upon will consist of little more than a re-analysis of the same data already examined and found to demonstrate 'troubling' racial and geographic disparities."

Just 2 days later, on June 6, the Department released a flawed study purporting to demonstrate that Federal administration of the death penalty was bias-free. Now, General Ashcroft claims "there is no evidence of favoritism toward white defendants in comparison with minority defendants." But such evidence does exist, and its existence raises serious doubts about fairness in our criminal justice system.

Without guarantees of fairness, there can be no public confidence in the administration of justice. That lack of confidence is heightened and the guarantees of fairness are lessened by the Department's recent report on the Federal death penalty system.

Evidence of race-of-victim discrimination was ignored. Differences among geographical regions in which the penalty is sought by United States Attorneys, approved by the Attorney General, and imposed by juries were ignored. Stark racial differences in death penalty avoidance by whites and minorities who enter a plea to a non-capital charge were not fully examined or explained. The entrance of racial disparities that discreet stages in decisionmaking was evaded. Arguments for further study by researchers assembled by the Department of Justice were ignored.

Before Tuesday, the United States had not executed anyone for nearly 40 years. What is the hurry, when life and liberty are at stake?

When asked at his confirmation hearing, "Do you agree with President Clinton that there is a need for 'continuing study' of 'possible racial and regional bias' because 'in this area there is no room for error,'" the Attorney General unequivocally answered, "Yes."

Attorney General Ashcroft has broken his pledge to the U.S. Senate. There has been no thorough study of this system. It has fallen to you to assure Americans that at least when it comes to the ultimate penalty in our Federal system, justice is blind to race and ethnicity. You cannot fix everything that is wrong in our system, but you can fix this.

Thank you, Mr. Chairman.

[The prepared statement and attachments of Mr. Bond follow:]

STATEMENT OF JULIAN BOND,* CHAIRMAN, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)

Chairman Feingold, as this Subcommittee examines the administration of the federal death penalty, thank you for inviting me to offer my perspective as Chairman of the Board of the National Association for the Advancement of Colored People (NAACP) and as a member of Citizens for a Moratorium on Federal Executions (CMFE).

The NAACP is the nation's oldest and largest civil rights organization. We have long been opposed to the death penalty and are horrified by its all too frequent and easily documented racially discriminatory application.

We do not believe it deters crime. It targets and victimizes those who cannot afford decent legal representation. It is used against the mentally incompetent. It tragically sends the innocent to death.

The death penalty serves as a shield for attitudes on race. It is used most often in states with the largest African-American populations and disproportionately used when the accused is black and the victim is white.

In addition to being bad domestic policy, it increasingly alienates the United States from our allies and lessens our voice in the international human rights arena.

I am also a member of Citizens for a Moratorium on Federal Executions (CMFE). CMFE is a coalition of dozens of American public figures who joined together last fall when Juan Raul Garza was scheduled to be the first individual executed by the United States Government in nearly 40 years. Some members of CMFE support the death penalty in specific circumstances; others are unalterably opposed. Nonetheless, we spoke with one voice in urging President Clinton to declare a moratorium on federal executions.

Among the 40 people who signed CMFE's first letter to President Clinton, delivered on November 20, 2000, were former high-ranking members of the Justice Department, former Clinton administration officials, the Dean of the Yale Law School, a Nobel Laureate, Congressional Gold Medal and Presidential Medal of Freedom recipients, civil rights, religious and civic leaders, former U.S. Senators, and prominent individuals in the world of arts and entertainment.[1] Since last November, CMFE's roster has expanded to include an even broader spectrum of civil rights and religious leaders, the Founder and President of the Rutherford Institute, the Editor of the American Spectator, and a former United States Ambassador.[2]

There can be no question that CMFE was able to assemble this cross-section of prominent U.S. citizens to call for a moratorium on federal executions because the public is prepared to carefully re-examine the use of capital punishment in this nation. At no time since the death penalty was reinstated by the Supreme Court in 1976 have Americans voiced such grave doubts about the fairness and reliability of capital punishment. At the state level, those doubts are reflected in the unprecedented moratorium on executions put into place by Governor Ryan of Illinois, in death penalty moratorium bills introduced and enacted in state legislatures, and in studies commissioned by Governors in other states. At the national level, Senator Feingold has introduced a bill calling for a moratorium on federal executions and Senator Leahy has introduced legislation that would require greater protections for those prosecuted for capital crimes at the state and federal levels. Professional, community and civil rights organizations, including the League of United Latin American Citizens (LULAC), the National Urban League, the NAACP, the Black Leadership Forum, the Leadership Conference on Civil Rights and the American Bar Association, have called on the Executive Branch to suspend federal executions, and religious organizations have intensified their long-standing calls for a death penalty moratorium.

When CMFE addressed President Clinton on November 20, we were responding to the September 12 release of the Department of Justice survey that documented

---

*Julian Bond has been an active participant in the movements for civil rights, economic justice, and peace for more than three decades. He was a founder, in 1960, while a student at Morehouse College, of the Atlanta student sit-in and anti-segregation organization, and of the Student Nonviolent Coordinating Committee (SNCC). Mr. Bond is a veteran of more than 20 years of service in the Georgia state legislature. He is currently a Professor of History at the University of Virginia and a Distinguished Professor-in-Residence at the American University in Washington, D.C.

[1] Letter of Citizens for a Moratorium on Federal Executions (CMFE), November 20, 2000, attached hereto as Exhibit A. Information about CMFE is available at http:ll www.federalmoratorium.org. The website also posts the written statements of other organizations that joined with CMFE in calling for a moratorium on federal executions.

[2] Letters of CMFE, January 4, 2001 and June 4, 2001, attached hereto as Exhibits B and C.

racial, ethnic and geographic disparities in the charging of federal capital cases. The CMFE wrote: "Unless you take action, executions will begin at a time when your own Attorney General has expressed concern about racial and other disparities in the federal death penalty process. Such a result would be an intolerable affront to the goals of justice and equality for which you have worked during your Presidency. Consequently, we urge you to put in place a moratorium until the Department of Justice completes its review of the federal death penalty process."[3]

As I speak to you today, of course, the first federal execution in almost 40 years has been carried out. The man put to death was not Mr. Garza, who now faces execution in less than a week's time, on June 19.

Mr. Garza did not precede Timothy McVeigh to the death chamber in Terre Haute because, on December 7, 2000, President Clinton stayed Mr. Garza's execution for six months. While the President announced that he was not prepared to halt all federal executions, he nonetheless told the nation that further examination of possible racial and regional bias in the federal death penalty system ". . . should be completed before the United States goes forward with an execution in a case that may implicate the very questions raised by the Justice Department's continuing study. In this area there is no room for error."[4]

Nothing has transpired since President Clinton's December 7 statement and grant of reprieve that warrants going forward with Mr. Garza's execution nor with carrying out the death sentence of any of the other 19 individuals on federal death row. We reject any suggestion that the report released by Mr. Ashcroft on June 6 constitutes a reliable or thorough study of possible racial and regional bias in the federal death penalty system. Nor does it answer the troubling questions raised by the Justice Department's September 12 survey.

On December 8, the day following the President's decision to stay Mr. Garza's execution, I was one of a several CMFE representatives, who, along with Congressman John Conyers, met with former Attorney General Reno, former Deputy Attorney General Holder and other Justice Department attorneys to discuss President Clinton's announcement and plans for a more comprehensive investigation of the federal death penalty, which would include the participation of outside experts. Members of the Department of Justice acknowledged that this critical task could not be accomplished by the end of April of this year, the timetable set by President Clinton when he announced the December reprieve for Mr. Garza.

The result of that discussion with Attorney General Reno and Deputy Attorney General Holder was memorialized in the CMFE's letter to President Clinton, dated January 4, 2001."[5]

We next learned that on January 10, 2001, the National Institute of Justice assembled a group of experts from within and without the Department of Justice to discuss the parameters of the comprehensive investigation that the Attorney General, Deputy Attorney General and the President had announced was needed.

At his confirmation hearing, then-Attorney General-designate John Ashcroft stated that evidence of racial disparities in the application of the federal death penalty "troubles me deeply." Acknowledging he was "unsure" why more than half the federal capital prosecutions were initiated in less than one-third of the states, the Attorney General asserted that he was also "troubled" by this evidence.

He expressed his approval of a "thorough study of the system," and proclaimed, "Nor should race play any role in determining whether someone is subject to capital punishment."

On June 4, 2001, CMFE wrote to President Bush, reiterating our call for a moratorium on federal executions. We raised the concern that the Attorney General's actions and statements subsequent to his confirmation hearing "cast doubt" on "the Administration's commitment to the principles he set forth at his confirmation hearing." We noted that "[t]here has been no indication that the Department intends to continue the necessary independent investigation of racial and geographic bias in the death penalty, which was to have been administered by the National Institute of Justice. Moreover, Attorney General Ashcroft's statements to members of Congress, including his testimony before the House Appropriations Committee in early May, suggest that even the internal inquiry that the Department of Justice em-

[3] Citizens for a Moratorium on Federal Executions, Letter to President Clinton, November 20, 2000, Exhibit A.

[4] The White House, Office of the Press Secretary, Statement by the President, December 7, 2000.

[5] CMFE letter to President Clinton, January 4, 2001, Exhibit B.

barked upon will consist of little more than a re-analysis of the same data already examined and found to demonstrate "troubling" racial and geographic disparities."[6]

Just two days later, on June 6 2001, the Department of Justice released a flawed study purporting to demonstrate that federal administration of the death penalty was bias-free.

Now, Attorney General Ashcroft claims that "there is no evidence of favoritism towards white defendants in comparison with minority defendants." But such evidence does exist, and its existence raises serious doubts about fairness in our criminal justice system.

Without guarantees of fairness, there can be no public confidence in the administration of justice.

That lack of confidence is heightened and the guarantees of fairness are lessened by the Department of Justice's recent report on the Federal Death Penalty System.

Evidence of race-of-victim discrimination was ignored. Differences among geographical regions in which the penalty is sought by United States' Attorneys, approved by the Attorney General, and imposed by juries were ignored. Stark racial differences in death-penalty avoidance by whites and minorities who enter a plea to a non-capital charge were not fully examined or explained. The entrance of racial disparities at discrete stages in decision-making was evaded. Arguments for further study by researchers assembled by the Department of Justice were ignored.

Before Tuesday, the United States had not executed anyone for nearly 40 years. What is the hurry, especially when life and liberty are at stake?

When asked at his confirmation hearing, "Do you agree with President Clinton that there is a need for 'continuing study' of 'possible racial and regional bias' because 'in this area there is no room for error?'" the Attorney General unequivocally answered, "Yes!"

Attorney General Ashcroft has broken his pledge to the United States Senate.

There has been no "thorough study of the system."

It has fallen to you to assure Americans that, at least when it comes to the ultimate penalty in our federal system, justice is blind to race and ethnicity.

You cannot fix everything that is wrong in our justice system, but you can do this.

EXHIBIT A

CITIZENS FOR A MORATORIUM ON FEDERAL EXECUTIONS

Dear President Clinton:

As you know, the federal government is preparing to carry out the first federal execution in nearly forty years. The first of twenty-one individuals on death row, Juan Garza, is scheduled for execution on December 12, 2000. Unless you take action, executions will begin at a time when your own Attorney General has expressed concern about racial and other disparities in the federal death penalty process. Such a result would be an intolerable affront to the goals of justice and equality for which you have worked during your Presidency. Consequently, we urge you to put in place a moratorium until the Department of Justice completes its review of the federal death penalty process.

There is a compelling need for you to intervene: a recent Department of Justice survey documents racial, ethnic and geographic disparity in the charging of federal capital cases.

The survey of the death penalty authorization process by the Department of Justice reveals that, among all the federal capital defendants against whom the Attorney General has authorized seeking the death penalty, 69% have been Hispanic and African American (18% and 51% respectively), while only 25% have been white. The Department of Justice has no data concerning the potential pool of persons against whom federal capital cases might be filed and authorized. However, analogous data does exist concerning state prisoners. Only 12% of all persons entering the state prisons after being convicted of homicide are Hispanic. Using similar data, 40% of all persons entering the state prisons after being convicted of homicide are white. As the Attorney General has recognized, these data indicate that minorities are over-represented in the federal death penalty system.

These disparities persist when the Department's data is examined from other perspectives. For example, 47% of all white defendants for whom the Attorney General authorized seeking the death penalty subsequently entered into a plea bargain in exchange for a non-death sentence, as compared to only 27% of Hispanic defendants whose cases were authorized for death. And on death row itself, as of the time of

[6] CMFE letter to President Bush, June 4, 2001, Exhibit C.

the Department's survey, 17 of the 21 persons on federal death row—81 % were racial or ethnic minorities.

The Justice Department survey also reveals inexplicable geographic disparities in the administration of the federal death penalty. In 16 states, prosecutors seek and obtain death penalty authorization in at least 50 % of the federal capital cases that are submitted for review by the Attorney General. On the other hand, there are eight states in which that rate is much lower, ranging from 8—30 %. And there are 21 states in which U.S. Attorneys have either never requested or never obtained authorization to seek the death penalty. These disparities in death penalty authorization rates are striking even among the states with the highest number of cases submitted for consideration. Among the eight states where U.S. Attorneys have submitted 20 or more cases for consideration, the death penalty authorization rate exceeds 50% in only one state—Texas—and ranges from 15—38% in the rest.

When the survey was made public by the Department of Justice on September 12, 2000, the Attorney General acknowledged that the survey shows "minorities are over-represented in the federal death penalty system." She also noted that the Department could not explain the disparities and because of this, "[a]n even broader analysis must therefore be undertaken to determine if bias does in fact play any role in the federal death penalty system."

The Deputy Attorney General added at the press conference on September 12 that "no one reading this report can help but be disturbed, troubled, by this disparity." He then urged that the problem of race bias in the criminal justice system be confronted openly:

Ours is still a race-conscious society, and yet people are afraid to talk about race. At times, this issue seems to be one of the last remaining ... topics of conversation that is taboo, but it is imperative, moral and legally, that we confront this problem. Promoting an honest dialogue is essential to achieving a criminal justice system where race is never a factor.

When asked whether, in light of the disparities revealed by the survey, the federal death penalty system was fair, the Deputy Attorney General acknowledged some uncertainty:

I am a little surprised. I thought that, seven months ago, when we got to this point we would have substantially greater numbers of answers than we now have, and one of the things that I've been struck by is the number of questions that these numbers have raised in my mind, and I think that's one of the chief reasons why the attorney general has asked for further studies to be done. . . .

The explanation for these extremely troubling disparities is unclear, but, as the Attorney General and the Deputy Attorney General recognized, the possibility of discrimination and bias cannot be ruled out. The Department of Justice is taking the responsible course and studying the matter further to see if the causes of disparity can be identified and, if appropriate, remedied. But, in the face of these unexplained findings, the Attorney General and the Deputy Attorney General have also suggested that the proper response, in relation to persons already sentenced to death, is to take this information into account in the clemency process. We fail to see how you as President can make an informed and just decision to deny clemency in a particular case without understanding the reasons for these extremely troubling disparities. When the Attorney General and the Deputy Attorney General cannot say with confidence that race and ethnic bias have not played a role in the application of the death penalty, and that they must have further studies to answer this question, there can be no question: No federal death sentence can be carried out until the studies and the "honest dialogue" that must follow from them have been completed.

Mr. Garza's case reflects precisely the concerns over racial, ethnic and geographic disparities in capital cases that the Justice Department itself has raised. Mr. Garza is Hispanic and from Texas—two factors that appear to increase substantially the chances that the government will seek the death penalty in a potential capital case. What if, after further study, the Department itself determines that race or the arbitrary factor of geography does in fact influence who is prosecuted for death and who is not? We cannot bring Mr. Garza or others back if we decide that they were the victims of a death penalty system distorted by bias and arbitrariness.

We have heard voices from various quarters of society taking comfort from the lack of evidence that death row inmates are actually innocent. We recognize the moral difference between executing an innocent person and executing someone who is guilty of a horrible offense but is sentenced to death because of his racial or ethnic background or the happenstance of where he is tried. But we believe it would be wrong and unconscionable for society to make actual innocence the final test for who should live or die. This view would sanction the executions of defendants who, but for their race or ethnicity, might never have been sentenced to death, and it

demeans human life by implying that, for defendants who cannot prove their innocence, there is no legal or moral distinction between executing them or imprisoning them. We reject that view.

Our plea to you comes at an historic moment. At no time since the death penalty was reinstated by the Supreme Court in 1976 have Americans voiced such grave doubts about the fairness and reliability of capital punishment. At the state level, those doubts are reflected in the unprecedented moratorium on executions put into place by Governor Ryan of Illinois, in death penalty moratorium bills introduced and enacted in state legislatures, and in studies commissioned by Governors in other states. At the national level, several bills have been introduced in the United States Congress calling for a moratorium for state and federal executions, or for greater protections for those prosecuted for capital crimes; diverse community and civil rights organizations from the National Urban League, to the NAACP, to the American Bar Association, have called on the Executive Branch to suspend federal executions; and religious organizations have intensified their long-standing calls for a death penalty moratorium. The international community echoes these concerns, as does public opinion, with recent polls suggesting that a majority of the American public supports a moratorium on executions until issues of fairness in capital punishment can be resolved.

The problems that we have highlighted here are problems that resonate profoundly with our nation's historic struggle to secure equal justice under law for all our citizens. These problems are like the ones that have rumbled beneath the surface of state death penalty systems for years, which have finally erupted into the public consciousness and conscience and fueled the growing call for a moratorium.

Some of those who have signed this letter agree with you that capital punishment is appropriate in principle, provided that it is administered in a fair caseby-case manner. However, all of us agree that a moratorium should be adopted while these fairness issues are being resolved.

We believe that the step we ask you to take is squarely consistent with the power to grant reprieves that is given to you by Article II of the Constitution. We are aware of your support for the death penalty under some circumstances and we are not asking that you change your long-held position. We are asking only that you prevent an unconscionable event in American history—executing individuals while the government is still determining whether gross unfairness has led to their death sentences. Granting this delay would not only avoid the specter of fundamental injustice in individual cases, it would address the legitimate reservations about capital punishment that burden the hearts and minds of so many citizens.

Respectfully,

Dr. Mary Frances Berry
Chair, U.S. Commission on Civil Rights

Julian Bond
Chairman of the Board, National Association for the Advancement of Colored People (NAACP)

Senator Alan Cranston
U.S. Senate 1969–1993; President, Global Security Institute

Kerry Kennedy Cuomo
Human Rights Activist; Founder and Former Executive Director of the RFK Center for Human Rights

Lloyd Cutler
Former Counsel to President Clinton and to President Carter

Tom Eagleton
U.S. Senate, 1968–1987

Most Reverend Joseph A. Fiorenza
Bishop of Galveston-Houston; President, National Conference of Catholic Bishops

Dr. John Hope Franklin
Chair, Advisory Board One America: The President's Initiative on Race

Bishop Thomas Gumbleton
Auxiliary Bishop, Archdiocese of Detroit

Wade Henderson
Executive Director, Leadership Council on Civil

Rights (LCCR)

Antonia Hernandez
President and General Counsel, Mexican-America
Legal Defense and Education Fund (1VIALDEF)

Rev. Theodore M. Hesburgh, C.S.C.
President Emeritus, University of Notre Dame

Reverend Jesse Jackson
Civic and Political Leader; President and Founder
Rainbow Coalition/PUSH

Fred Korematsu
Japanese American Civil Rights Leader

Dean Anthony Kronman
Dean of Yale Law School

Reverend James Lawson, Jr.
Pastor Emeritus, Holman United Methodist
Church, Los Angeles

Norman Lear
Director and Founding Member of People for the
American Way; Chairman, ACT III Communications

Jack Lemmon
Actor; President, Jalem Productions, Inc.

Robert Litt
Former Principal Associate Deputy Attorney
General in the U.S. Department of Justic
(DOJ)

Reverend Dr. Joseph E. Lowery
Co-Founder and President Emeritus, Southern
Christian Leadership Conference (SCLC)

Cardinal Roger Mahony
Archbishop of the Roman Catholic Archdiocese of
Los Angeles

Irvin Nathan
Former Principal Associate Deputy Attorney
General in the U.S. Department of Justice (DOJ)

Angela E. Oh
Member, Advisory Board One America: The
President's Initiative on Race

Mario G. Obledo
President, National Coalition of Hispanic
Organizations

Professor Robert Reich
Former U.S. Secretary of Labor

Arturo Rodriguez
President, United Farm Workers of America,
AFL–CIO

Michael Rosier
President-elect,
National Bar Association

Rabbi David Saperstein
Director, Religious Action Center of Reform
Judaism

The Honorable H. Lee Sarokin
Retired Judge, U.S. Court of Appeals for the Third
Circuit

Stanley Sheinbaum
Economist; Founding Publisher,
New Perspectives Quarterly

Sidney Sheinberg
Former President and Chief Operating Officer of
MCA, Inc./Universal Pictures

Senator Paul Simon
U.S. Senate, 1984–1997, U.S. House of

Representatives, 1974–1984

George Soros
Philanthropist; President and Chairman
of Soros Fund Management LLC.

Barbra Streisand
President, The Streisand Foundation

John Van de Kamp
California Attorney General, 1983–1991

Arturo Vargas
National Latino Leader

Reverend C.T. Vivian
Founder and Board Chair, Center for Democratic
Renewal (formerly the National Anti-Klan
Network); President, Black Action Strategies and
Information Center (B.A.S.I.C.)

Reverend Jim Wallis
Editor-in-Chief/Executiue Director,
Sojourners magazine

Bud Welch
Board Member, Murder Victims Family for
Reconciliation

Professor Elie Wiesel
Nobel Peace Laureate; Founder, The Elie Wiesel
Foundation for Humanity

EXHIBIT B

CITIZENS FOR A MORATORIUM ON FEDERAL EXECUTIONS

Dear President Clinton:

We are writing to make an impassioned plea that you do all you can before you leave office to ensure that the federal death penalty will not become a civil rights disaster during the next four years.

We are grateful for the first step you took in relation to this crisis: your intervention in the case of Juan Raul Garza on December 7, 2000. The reprieve of Mr. Garza's execution until June 19, 2001, was particularly significant because of your acknowledgment of the unexplained racial and geographic disparities that beset the federal government's decisions to seek the death penalty. Your willingness to address the troubling direction that the federal death penalty has taken, and your recognition that executions would be intolerable until the disparities are better understood and necessary remedies considered, are predicates for the steps that must be taken before you leave office.

On December 7, you stated that "the gravity and finality of the [death] penalty demand that we be certain that when it is imposed, it is imposed fairly." You explained the need for "continuing study" of "possible racial and regional bias" by declaring that "[i]n this area there is no room for error." When you addressed the nation on December 7, the result of the presidential election was uncertain. The outcome is now final. Your immediate and decisive action will help assure that the leadership in the next Administration carries out your stated objective to thoroughly examine and address racial and geographic disparities in the federal death penalty system before the United States "goes forward with an execution in a case that may implicate the very questions raised by the Justice Department's continuing study." To this end, we ask you to take several additional steps before January 20, 2001.

First, a reliable, credible and comprehensive study of these disparities must be undertaken. Such a study cannot possibly be concluded by April, 2001. Attorney General Reno, Deputy Attorney General Holder, and Acting Director of the National Institute of Justice Julie Samuels agree that April is not a realistic deadline for completion of the thorough examination and evaluation to which you committed in your December 7 statement. The timetable for a reliable, credible and comprehensive investigation cannot be set arbitrarily. It is dependent upon the design of the study. A blueprint for such a study can and must be developed before you leave office. A realistic timetable will emerge from that blueprint and the date for completion can then be rescheduled. To assure its viability and integrity, the study must be undertaken under the supervision and authority of a citizens' advisory committee. This committee can be established and given appropriate responsibilities

and authority under the Federal Advisory Committee Act before the end of your term in office.

Second, the blueprint for the study, the timetable for its completion, and the citizens' advisory committee must be embodied in appropriate executive actions, to emphasize the importance of these matters to the nation and to help ensure that the next Administration completes these critical tasks. An executive order addressing these issues and directing the Attorney General to establish a citizens' advisory committee is imperative. Moreover, the citizens' advisory committee must be established before January 20, 2001, with the duty to report to Congress and the Library of Congress at the conclusion of its responsibilities.

Third, a moratorium on federal executions must be ordered, with appropriate reprieves, before you leave office. Without this, there is no assurance that those who are affected by the disparities will not be executed before the necessary process of study and remediation has been completed.

The substance of your remarks on December 7 led the nation to believe that you acted with full appreciation of the significance of the task that lies ahead. The steps that we have outlined will solidify this belief and strengthen the nation's commitment to equal justice under law. They will also help assure that any consideration of this issue in the new Administration takes place in the open, with full debate illuminating all sides of this important issue.

Because time is of the essence, we reiterate our request for a meeting with you. Some of our representatives are already working with members of Deputy Attorney General Holder's staff to consider the DOJ study design and the need for a citizens' advisory committee. We believe that a discussion with you is essential if the three measures we have outlined are to be adopted before January 20.

We look forward to meeting with you at the earliest opportunity.

Respectfully,

Dr. Mary Frances Berry
Chair, U.S. Commission on Civil Rights

Julian Bond
Chairman of the Board, National Association for the Advancement of Colored People (NAACP)

Kerry Kennedy Cuomo
Human Rights Activist; Founder and Former Executive Director of the RFK Center for Human Rights

Most Reverend Joseph A. Fiorenza
Bishop of Galveston-Houston; President, National Conference of Catholic Bishops

Dr. John Hope Franklin
Chair, Advisory Board One America: The President's Initiative on Race

Bishop Thomas Gumbleton
Auxiliary Bishop, Archdiocese of Detroit

Wade Henderson
Executive Director, Leadership Council on Civil Rights (LCCR)

Antonia Hernandez
President and General Counsel, Mexican-America Legal Defense and Education Fund (1VIALDEF)

Rev. Theodore M. Hesburgh, C.S.C.
President Emeritus, University of Notre Dame

Reverend Jesse Jackson
Civic and Political Leader; President and Founder Rainbow Coalition/PUSH

Fred Korematsu
Japanese American Civil Rights Leader

Dean Anthony Kronman
Dean of Yale Law School

Reverend James Lawson, Jr.
Pastor Emeritus, Holman United Methodist Church, Los Angeles

Robert Litt
Former Principal Associate Deputy Attorney

General in the United States Department of Justic (DOJ)

Reverend Dr. Joseph E. Lowery
Co-Founder and President Emeritus, Southern Christian Leadership Conference (SCLC)

Cardinal Roger Mahony
Archbishop of the Roman Catholic Archdiocese of Los Angeles

Kweisi Mfume
President and CEO, National Association for the Advancement of Colored People (NAACP)

Irvin Nathan
Former Principal Associate Deputy Attorney General in the U.S. Department of Justice (DOJ)

Angela E. Oh
Member, Advisory Board One America: The President's Initiative on Race

Michael Rosier
President-elect, National Bar Association

Rabbi David Saperstein
Director, Religious Action Center of Reform Judaism

The Honorable H. Lee Sarokin
Retired Judge, U.S. Court of Appeals for the Third Circuit

Stanley Sheinbaum
Economist; Founding Publisher, New Perspectives Quarterly

Sidney Sheinberg
Former President and Chief Operating Officer of MCA, Inc./Universal Pictures

Senator Paul Simon
U.S. Senate, 1984–1997, U.S. House of Representatives, 1974–1984

Dr. Yvonne Scruggs-Leftwich
Executive Director, Black Leadership Forum

John Van de Kamp
California Attorney General, 1983–1991

Arturo Vargas
National Latino Leader

Ray Velarde
National Legal Advisor, League of Latin American Citizens (LULAC)

Reverend C.T. Vivian
Founder and Board Chair, Center for Democratic Renewal (formerly the National Anti-Klan Network); President, Black Action Strategies and Information Center (B.A.S.I.C.)

Reverend Jim Wallis
Editor-in-Chief/Executiue Director, Sojourners magazine

Bud Welch
Board Member, Murder Victims Family for Reconciliation

Ambassador Andrew Young
President, GoodWorks International; Former UN Ambassador

EXHIBIT C

CITIZENS FOR A MORATORIUM ON FEDERAL EXECUTIONS

June 4, 2001

The Honorable George W. Bush
President of the United States
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Bush:

As you know from our previous correspondence to you and to President Clinton, Citizens for a Moratorium on Federal Executions (CMFE) is a growing coalition of individuals with differing views on the authority of government to impose the death penalty. Some who have signed letters to you and to President Clinton agree that capital punishment is appropriate in principle, provided that it can be carried out fairly, equitably and reliably. However, all of us agree that current information about the administration of the federal death penalty calls for an immediate executive moratorium on federal executions.

Citizens for a Moratorium on Federal Executions originally came together to urge President Clinton to declare a moratorium when Juan Raul Garza was scheduled to be the first individual executed by the federal government system since 1963. Results of the Department of Justice survey of the administration of the federal death penalty released in September of last year revealed disturbing evidence of geographic and racial disparities. The outcome of the DOJ review and concerns expressed by the former Attorney General and the former Deputy Attorney General were focal points of the CMFE's letters to President Clinton in November and January. In those letters, we urged that "no federal execution should be carried out at a time when the nation questions the reliability and fairness of capital punishment and no person should be executed until it is certain that the process does not discriminate. The very reason for a moratorium is to allow a period for careful study about the administration of the federal death penalty. Whatever one's views on the appropriateness of the death penalty, it is unconscionable to carry it out while questions remain about the fairness of its application."

On December 7, 2000, President Clinton announced that he had granted a reprieve to Mr. Garza because of his conclusion that "the examination of possible racial and regional bias should be completed before the United States goes forward with an execution in a case that may implicate the very questions raised by the Justice Department's continuing study." The President called upon the Department of Justice to conclude a further examination of the federal death penalty system by the end of April of this year in advance of June 19, the execution date now scheduled for Juan Raul Garza. Then-Deputy Attorney General Holder followed up by expanding the internal Department of Justice inquiry to include gathering internal data that had been missing from the September 2000 survey.

Ultimately, Attorney General Reno, Deputy Attorney General Holder, and Acting Director of the National Institute of Justice Julie Samuels concluded that April of this year was not a realistic deadline for completion of a thorough examination of the system. The Department determined that a credible evaluation of the federal death penalty could not be conducted without studies by independent experts. It recognized that a reliable study required that data be collected and analyzed that had not been maintained by the United States Attorneys in the 94 federal districts. The Department authorized the National Institute of Justice to commence this process. In January, representatives of the NIJ met with experts to begin discussions essential to designing and carrying out independent studies.

Your Administration's early statements and actions indicated its concurrence with this course of action. Responding to questions during the confirmation process, the nation's new Attorney General, John Ashcroft, stated that evidence of racial disparities in the application of the federal death penalty "troubles me deeply." Acknowledging that he was "unsure" why more than half the federal capital prosecutions were initiated in less than one-third of the states, the Attorney General agreed that he was also "troubled" by this evidence. He expressed his approval of a "thorough study of the system," and also stated, "Nor should race play any role in determining whether someone is subject to capital punishment." While declaring that he "personally" did not believe a moratorium on federal executions was warranted, the Attorney General answered with an unequivocal "yes" when asked: "Do you agree with President Clinton that there is a need for 'continuing study' of 'possible racial and regional bias' because '[i]n this area there is no room for error?'"

Unfortunately, the Attorney General's more recent actions and statements cast doubt on your Administration's commitment to the principles he set forth at his confirmation hearing. There has been no indication that the Department intends to continue the necessary independent investigation of racial and geographic bias in the death penalty, which was to have been administered by the National Institute of Justice. Moreover, Attorney General Ashcroft's statements to members of Congress, including his testimony before the House Appropriations Committee in early May, suggest that even the internal inquiry that the Department of Justice embarked upon will consist of little more than a reanalysis of the same data already examined and found to demonstrate "troubling" racial and geographic disparities. While Attorney General Ashcroft and Department of Justice press advisories indicated that the supplemental study would be made public before May 16, it was not. This sequence of events is far from the "thorough study of the system" that the Attorney General promised.

Finally, revelations just days before May 16 that the FBI had failed to provide defense counsel for Timothy McVeigh with thousands of documents to which they were entitled have further shaken confidence in the reliability and fairness of the administration of the federal death penalty. In announcing a delay in Mr. McVeigh's execution, the Attorney General declared that "if any questions or doubts remain about this case, it would cast a permanent cloud over justice, diminishing its value and questioning its integrity." In expressing your support for the Attorney General's decision, Mr. President, you stated that '[t]oday is an example of the system being fair." You emphasized that the Attorney General's action was appropriate because "we live in a country that protects certain rights."

Mr. President, the doubts and questions that were raised about the fairness and reliability of the federal death penalty system remain. In your own words, they call into question precisely whether the "system [is] fair" and whether "we live in a country that protects certain rights." We await action by this Administration which will assure the American public that if we are to have a federal death penalty, reliability, fairness and equality will be guaranteed. Those assurances cannot be given today because, as Attorney General Ashcroft has recognized, there is need for a "thorough study." We again urge you to declare an immediate moratorium on all federal executions.

Sincerely,

Barbara Arnwine
Executive Director, Lawyers' Committee
for Civil Rights Under Law

Elizabeth Frawley Bagley
Former US. Ambassador to Portugal

Dr. Mary Frances Berry
Chair, U.S. Commission on Civil Rights

Harry Belafonte
Artist/Activist

Julian Bond
Chairman of the Board, National Association
for the Advancement of Colored People (NAACP)

Kerry Kennedy Cuomo
Human Rights Activist; Founder and Former
Executive Director, RFK Center for Human Rights

Bishop Thomas J. Gumbleton
Auxiliary Bishop, Archdiocese of Detroit

Wade Henderson
Executive Director, Leadership Conference
on Civil Rights (LCCR)

Reverend Jesse Jackson
Civic and Political Leader; President
and Founder, Rainbow Coalition/PUSH

Fred Korematsu
Japanese American Civil Rights Leader

Dean Anthony Kronman
Dean, Yale Law School

Reverend James Lawson, Jr.
Pastor Emeritus, Holman United Methodist Church,
Los Angeles

Norman Lear
Director and Founding Member, People for the American Way; Chairman, ACT III Communications

Robert S. Litt
Former Principal Associate Deputy Attorney General, U.S. Department of Justice

Reverend Dr. Joseph E. Lowery
Co-Founder and President Emeritus, Southern Christian Leadership Conference (SCLC)

Cardinal Roger Mahony
Archbishop, Roman Catholic Archdiocese of Los Angeles

Karen K. Narasaki
President, National Asian Pacific American Legal Consortium

Mario G. Obledo
President, National Coalition of Hispanic Organizations

Angela E. Oh
Member, Advisory Board One America: The President's Initiative on Race

George M. Ong
National President, Organization of Chinese Americans

Sister Helen Prejean
Author, Dead Man Walking; Chair, The Moratorium Campaign

Hugh B. Price
President, National Urban League

Arturo S. Rodriguez
President, United Farm Workers ofAmerica, AFL–CIO

Michael S. Rosier
President-Elect, National Bar Association

Dr. Yvonne Scruggs-Leftwich
Executive Director/Chief Operating Officer, Black Leadership Forum, Inc.

Stanley Sheinbaum
Economist; Founding Publisher, New Perspectives Quarterly

Sidney Sheinberg
Former President and Chief Operating Officer, MCA, Inc./Universal Pictures

Senator Paul Simon
U.S. Senate, 1984–1997;
U.S. House of Representatives, 1974–1984

Tavis Smiley
Commentator, Author, Civil Rights Leader

R. Emmett Tyrrell, Jr.
Editor in Chief The American Spectator

John Van de Kamp
California Attorney General, 1983–1991

Reverend C.T. Vivian
Founder and Board Chair, Center for Democratic Renewal (formerly the National Anti-Klan Network); President. Black Action Strategies and Information Center (B.A.S.LC)

Bud Welch
Board Member, Murder Victims' Families For Reconciliation

John W. Whitehead
Founder and President, The Rutherford Institute

Chairman FEINGOLD. Thank you, Mr. Bond.

I would like to ask to place in the record statements from Professor David Baldus and the ACLU, without objection.

Now, we will turn to Mr. McBride. He is a partner at the firm of Wiley, Rein and Fielding, here in Washington, D.C. He served as an Assistant U.S. Attorney in the Eastern District of Virginia from 1992 to 1999. He also served in the Department of Justice in a variety of posts from 1989 to 1992, and is a former law clerk to Supreme Court Justice Sandra Day O'Connor and to former D.C. Circuit Judge Robert Bork.

Mr. McBride, I thank you for being here and you may proceed.

Senator SESSIONS. Mr. Chairman, I would like to offer for the record on behalf of Senator Hatch a letter from the DEA on this subject dated June 13.

Chairman FEINGOLD. Without objection.

Mr. McBride?

STATEMENT OF ANDREW G. MCBRIDE, FORMER ASSISTANT UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF VIRGINIA, AND PARTNER, WILEY, REIN AND FIELDING, WASHINGTON, D.C.

Mr. MCBRIDE. Chairman Feingold, thank you for having me here today. As a former Federal prosecutor who has charged death penalty offenses and tried death penalty cases, I commend the Chairman and the Committee for their oversight on this issue. I think it is critically important. I know the Committee is studying this issue very carefully and is deeply concerned about, and I think the changes in the protocol that were explained by the Deputy Attorney General today are positive changes and the Committee has played a role in that.

I would like to make three points from my testimony that I hope the Committee will keep in mind. There has been discussion, of course, of cases in the Eastern District of Virginia. I would like to make myself available to the members of the Committee to discuss specifically the charging practices in the Eastern District of Virginia in which I played a role during those 7 years.

The first point from my testimony that I would like to emphasize is that I would ask the Committee members to be particularly careful in using regression analysis or statistical analysis to draw conclusions about death penalty prosecutions.

Regression analysis depends upon controlling for all the legitimate factors to expose the influence of illegitimate factors. In my opinion, there are too many variables that prosecutors, judges and juries correctly consider in assessing moral culpability to identify them and weigh them all in a computer model.

Trying to statistically assess the deathworthiness of Timothy McVeigh or the embassy bombers who did not receive the death penalty, as we know, today and then compare them with the deathworthiness of other Federal offenders who may be eligible for the death penalty, in my view as a former prosecutor, is a fool's errand.

The problem is particularly difficult at the Federal level, where any statistical model must account for the additional factors that affect State versus Federal prosecution. And statistical conclusions

must be drawn, as Senator Sessions mentioned, from a very limited pool of unique Federal cases. We wouldn't want computers to make capital sentencing decisions and we shouldn't pretend that computers are capable of perfectly emulating them after the fact.

Second, having found that the very limited numbers that we do have do not support any inference of discrimination against minorities within the procedures that the Attorney General has laid out—in other words, crimes that are submitted to the Department of Justice by the U.S. Attorneys' offices, there is no evidence of discrimination there. And as the Deputy Attorney General stated, in fact, white capital-eligible defendants are slightly more likely to actually be charged, noticed up with the death penalty and have the death penalty sought than are minority defendants.

Opponents now make the claim that these same prosecutors must be motivated by racism when they make the initial decision to take the case to Federal court. I believe this charge is unfair, and it is leveled by individuals who do not have experience with our criminal justice system.

The decision whether or not to take a case from the State to the Federal level is generally made at the supervisory level in the United States Attorney's office. It is not made by an individual Assistant United States Attorney, nor could it ever be made by an individual Federal law enforcement officer. The decision is often made where the U.S. Attorney's office will have certain protocols or guidelines already in place.

For instance, in Prince William County, Virginia, they prosecute no armed bank robberies. They allow the FBI to investigate and prosecute all those cases. So if there is an armed bank robbery that results in a homicide, it will be a Federal case. It has nothing to do with the individual discretion of any particular person, Federal agent or prosecutor. That is a protocol we have in place. There are other similar protocols that result in cases becoming Federal cases.

I believe that the charge that the Federalization of cases is infected with race, from my personal experience, is wrong. I also believe that it implies bad faith on the part of State officials in their decisions to seek Federal assistance. In fact, I think State officials, in my experience, seek the assistance of Federal authorities most often when crimes remain unsolved and they are multijurisdictional in nature. In my view, that is a proper role for the Federal U.S. Attorney's office when a State or local official comes to them and says, we have unsolved homicides, they appear to stretch outside our jurisdiction, we would like your intervention. My experience in the Eastern District of Virginia was we answered calls; we did not make calls.

Finally, as has been discussed, and as the Chairman noted, we have in place a Federal system that I believe is designed to ensure fair and even-handed enforcement of the death penalty. The Attorney General's review process, which as a prosecutor I twice participated in, is a rigorous process. The documents that are filed by the Assistant U.S. Attorneys include a draft indictment and a long memo that discusses all the possibilities of the case.

It is unique in the sense that defense attorneys are allowed to make a presentation at the charging stage before the committee. I think that is an important protection, and we know from the small

number of statistics that we have that that process in and of itself is fair. And if that process is fair, I think the burden is then on those who would charge that the process of taking cases from State court to Federal court, which involves the same individuals, the same prosecutors, the same people at the Department of Justice, is how somehow radically unfair or infected with race. The burden is on those who would make that charge to prove it, and my personal experience suggests that it is not so.

Again, I commend the Chairman for his interest in this issue. I think it is a very important issue. I think the committee's oversight has already assisted the Department in revising the protocol, and I would be happy to discuss my experience with the protocol or with prosecutions in the Eastern District of Virginia with the Chair and the committee.

Thank you.

[The prepared statement of Mr. McBride follows:]

STATEMENT OF ANDREW G. MCBRIDE

I. INTRODUCTION

Chairman Feingold, Senator Thurmond, distinguished Members of the Subcommittee, and learned colleagues. I am honored to appear before the Subcommittee today on the important subject of the fair and even-handed enforcement of the federal death penalty. By way of background, I am a former law clerk to Justice Sandra Day O'Connor. I served as an Associate Deputy Attorney General in the first Bush Administration, where I helped draft then-President Bush's crime control bill. I have testified several times before Congress regarding the federal death penalty and habeas corpus reform. I also served as a federal prosecutor for almost seven years in the United States Attorney's Office for the Eastern District of Virginia. As a prosecutor, I appeared twice before the Attorney General's capital case review committee, and I tried a fourdefendant capital case in federal district court in Richmond, Virginia in 1997.

I believe that the death penalty serves an important role in the spectrum of penalties that the federal criminal justice system has available. Recent studies indicate the death penalty does in fact play a role in the general deterrence of capital crimes. See, e.g., Dezhbackhsh, Rubin & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoritorium Panel Data, Department of Economics, Emory University (January 2001). We know the death penalty accomplishes specific deterrence, for it eliminates the possibility that a known-killer will kill again in prison or upon eventual release. The death penalty offers an additional measure of protection for our federal law enforcement officers—who are often faced with the prospect of arresting violent felons who are already facing life imprisonment. Most importantly, the death penalty sends a message of society's outrage and resolve to defend itself against the most heinous of crimes. As we have seen most recently in the McVeigh case, it gives survivors a sense of justice and closure that even life imprisonment without parole cannot accord.

As a former prosecutor who has tried capital cases, and as a citizen, I share the concern of the Chairman and the entire Subcommittee that the death penalty be enforced in a fair, even-handed, and race-neutral manner. At the same time, I am wary of the misuse of race and racial statistics as a "stalking horse" for those who are opposed to the death penalty in all circumstances. Honest opposition to capital punishment on moral grounds is one thing, throwing charges of racism at federal law enforcement officers and federal prosecutors in order to block enforcement of a penalty the Congress has authorized and the American people clearly support, is another. I fear that some of my fellow panelists today have let vehement opposition to all capital punishment blind them to some simple facts about enforcement of the federal death penalty.

II. THERE IS NO CREDIBLE STATISTICAL EVIDENCE OF RACIAL BIAS IN THE ENFORCEMENT OF THE FEDERAL DEATH PENALTY

The dangers of statistical analyses are perhaps best captured in the old saying "Figures never lie but liars often figure." The Subcommittee should be very wary

of the results of regression analysis or other statistical devices applied to capital punishment. No two capital defendants are the same. No two capital crimes are the same. Federal law and the Eighth Amendment require that juries be allowed to consider every aspect of the crime, the background and competence of the defendant, and even impact evidence regarding the victim, in arriving at the correct punishment. Regression analysis posits that each factor relevant to the imposition of the death penalty can be identified and then given an assigned weight, such that very different cases can be meaningfully compared. This premise is simply false. There are literally millions of legitimate variables that a prosecutor or jury could consider in seeking or imposing capital punishment. If we truly believed that they could all be identified and weighted, we would allow computers to deliberate and impose penalty. Instead, we quite properly rely upon human judgment, the judgment of the prosecutor, the death penalty committee in the Department of Justice, the Attorney General, the district court judge, and a fairly-selected jury from the venue where the crime occurred. In my opinion, and in my experience for seven years as a federal prosecutor, I saw no evidence that the race of defendants or victims had any overt or covert influence on this process. I believe the charge is fabricated by those who wish to block enforcement of the federal death penalty for other reasons.

I would ask the Subcommittee to keep four points in mind as it evaluates these very serious, but, in my opinion, wholly unsupported charges. First, pointing to statistical disparities between racial percentages of capital defendants and racial percentages in the population at large is utterly specious. The population at large does not commit violent felonies—only a small percentage of both the white and nonwhite communities are ever involved in violent crime. The sad fact is that nonwhites are statistically much more likely to commit certain crimes of violence that might lead to death penalty prosecutions. African Americans make up approximately 13 percent of the nation's population. Yet, according to the FBI's 1999 uniform crime reports, there were 14,112 murder offenders in the United States in 1999, and of those offenders for whom race was known, 50 percent were black. Given that most murders are intraracial, it is not surprising that of the 12,658 murder victims in 1999, 47 percent were black.

Capital crimes also are more likely to occur in urban areas that are more densely populated and tend to have higher minority populations. According to the FBI data, 43 percent of murders in 1999 were recorded in the South, the most heavily populated area of the country. The same data shows that the Nation's metropolitan areas reported a 1999 murder rate of 6 victims per 100,000 inhabitants, compared to rates of 4 per 100,000 for rural counties and cities outside metropolitan areas.

One cannot simply ignore these facts in evaluating the performance of our criminal justice system. Indeed, if the numbers of federal capital defendants of each race precisely mirrored their representation in society as a whole, that would be truly a cause for alarm. It would suggest real "racial profiling" in the death penalty.

Second, the federal government does not have general jurisdiction over all violent crimes committed within its jurisdiction. From 1988 to 1994, the only federal death available was for murder in relation to certain drug-trafficking crimes. See 26 U.S.C. § 848(e). This period coincided with the worst drug epidemic in our Nation's history—the spread of crack cocaine from New York and Los Angeles to all our major urban centers. Most of the participants in the drug organizations that distributed crack cocaine were black, and most of the homicides connected with this drug trade were black-on-black homicides. Approximately half of the defendants presently on federal death row were convicted of a drug-related homicide.

The Department of Justice study released last week indicates that the Eastern District of Virginia is a prime example of an area where the type of crime at issue and the needs of state and federal law enforcement have shaped the statistics. I was a prosecutor in that district for a period of seven years, and I can assure the Subcommittee that I never saw any racial bias in the investigation or charging stages by federal agents or prosecutors during my tenure there. Drugrelated homicide was a major problem in the urban areas of Richmond, Norfolk, and Virginia Beach. Many of these homicides were unsolved and had in fact been committed by interstate drug gangs with roots as far away as New York, Los Angeles, and even Jamaica. Joint task forces, composed of federal agents, state police, and local detectives investigated these cases under the supervision of federal prosecutors. Local leaders and politicians, including leaders of the African American community, welcomed this effort to focus federal resources on inner-city crimes and the unsolved murders of African-American citizens. These prosecutions were a classic example of the federal government lending support where support was needed and requested and the crimes had a significant interstate element. The results of aggressive federal prosecutions have included cutting the murder rate in Richmond, Virginia in half from its high in the early 1990's.

Third, the available statistical evidence indicates that whites who enter the federal capital system (both pre- and post-1994) are significantly more likely to face the death penalty than minority defendants. Thus, even opponents of the federal death penalty seem to concede that there is no racial bias in the Department of Justice procedures for determining whether or not to seek the death penalty. Instead, they posit racial bias in the decision to take a case federal in the first place. It is obvious that these critics have never served as a state or federal prosecutor. The same federal prosecutors who make the initial intake decision regarding state or federal prosecution also make the initial decision on the death penalty and prepare the recommendation memorandum to the Attorney General's standing committee. The proposition that they are severely racially biased in the former (the intake decision when capital status is unsure) but are not biased in the latter (when the decision to seek the death penalty is actually made) is absurd. Intake decisions are made by supervisors in the United States Attorney's Offices, who often have fixed protocols with their state counterparts regarding certain crimes. The fact that a group of bank robbers is multi-jurisdictional, or that an organization's trafficking level of cocaine has gone above 10 kilograms of crack are factors likely to result in federal prosecution. Race is never a factor and the notion that federal law enforcement agents are making "racist" intake decisions (by themselves) is a baseless charge that displays a shocking lack of knowledge of how our federal/state criminal justice system actually works.

Fourth, the Subcommittee should not place any stock in statistical patterns or comparisons. A "pool" of approximately 700 federal capital cases is too small a cohort for any serious statistician to produce any reliable conclusions. Moreover, all such studies suffer from the flaw noted above—they assume that all the factors that influence capital punishment can be quantified. It is clear that they cannot be. Rather than focus on largely meaningless statistical games, we should focus on continuing and improving the procedures in place at the Department of Justice to ensure that every capital eligible crime is submitted and reviewed, and that every decision to seek the death penalty is fully justified by the facts and circumstances of the case.

CONCLUSION

In my opinion as a former federal prosecutor, there is no racial bias in the federal capital system. The decision to seek federal prosecution itself is made by federal prosecutors based on largely fixed criteria regarding the interstate nature of the crime or other objective, non-racial factors. The decision to actually seek the death penalty for a capital eligible crime has several layers of review and includes a standing committee that ensures fairness and continuity. Statistical evidence is of little or no probative value in this area and is, in my opinion, being manipulated by those who simply oppose the federal death penalty for any crime. The American people overwhelmingly support capital punishment and Congress has made it available for a limited set of federal crimes. I believe that the Department of Justice has enforced these laws in an unbiased manner to date and that it will continue to do so under the leadership of Attorney General Ashcroft. I will be happy to answer any questions that the Members of the Subcommittee might have.

Chairman FEINGOLD. Thank you, Mr. McBride.

Now, we will hear from Professor Samuel Gross. Professor Gross is currently a visiting professor at Columbia University Law School. He is a professor of law at the University of Michigan Law School and he has written widely on the subject of the death penalty over nearly two decades.

Professor Gross, thank you for coming this morning.

STATEMENT OF SAMUEL R. GROSS, VISITING PROFESSOR, COLUMBIA UNIVERSITY LAW SCHOOL, NEW YORK, NEW YORK

Mr. GROSS. Thank you for having me, Mr. Chairman, Senator Sessions. I will try to be brief.

The starting point of this problem, as you have mentioned, Mr. Chairman, is that Federal death row is now approximately 90 percent minorities. Federal capital cases are overwhelmingly minorities, 75 or 80 percent. It is, of course, true that minorities are over-

represented on death rows across the Nation, but not to that extent. Whites are a majority of death row inmates in the States, but not in the Federal system.

The question is, is this caused in whole or in part by discrimination? The answer is that we don't know, and the problem with the report that was submitted by the Attorney General last week is that it reaches a conclusion, the report and his testimony before the House Judiciary Committee, in which he said that he concluded that there is no racial bias in the way we are administering the Federal system. That conclusion is premature and not based on facts.

Why? The big issue is the creation of the pool of cases that are tried in Federal court on charges that could be subject to the death penalty, what is colloquially known as "making a Federal case out of it." As we know, few cases are made into Federal cases; most are left to the State authorities. At that point, in the creation of that initial pool, large disparities are injected into the system, for reasons that have not been explained.

How does this report respond to that? Well, they respond by examining only the cases that the Department of Justice did take on. If I can offer an analogy, Mr. Chairman, think of a firm that is charged with gender discrimination because they hire a workforce that is 90 percent men and they say, well, let's look at the people we hired. There is Mr. Smith; he got excellent evaluations from his previous employer, did a wonderful job. That is why we hired him, not because he is a man. And Mr. Jones had 10 years of experience; that is why we hired him, not because he is a man.

We would immediately say, wait a second, we don't know about the female applicants that you didn't hire. They might have been just as qualified. That is what we have here, I am afraid. We don't know anything about the cases that the Department of Justice didn't take, and therefore we can't reach any conclusion about the cause of the disparities at that stage.

What about what happens after that stage in the processing within the Department of Justice? Attorney General Ashcroft and Deputy Attorney General Thompson talked about this at some length.

Let's talk about that same company. Let's say they now say, well, look at the female employees that we have hired. On average, they are paid more than the men. So, that shows that we are not discriminating. Well, we would say, wait a second, first we were talking about hiring discrimination, and it is perfectly possible to discriminate in hiring and then not discriminate in compensation.

Second, that doesn't tell us that you are not discriminating in compensation. The few women that you hired may all be superstars; they may be much more qualified or more experienced than the men. Unless we know about these individuals and unless we know about the cases, we can't make a judgment on that. But that is all we have here.

The report does offer some attempt to explain this basically on what is described as common experience. Deputy Attorney General Thompson in his remarks suggested repeatedly that some of the aspects of that common experience are not well known to us. But the basic explanation is that the Federal Government is focusing on

drug trafficking and violence associated with drug trafficking which is carried on predominantly by minority gangs. But no evidence is offered to support this, except the say-so of the Department of Justice.

As you have pointed out, Mr. Chairman, in the Eastern District where they make this statement in very strong terms, it appears to be, in fact, obviously false. Does that mean that there is discrimination? We don't know, but we need to learn by studying it.

If I can draw an analogy, in 1991 here is what we knew about traffic stops on the New Jersey Turnpike. We knew that minorities were much more likely than whites to be stopped and searched by the New Jersey State Police. And the New Jersey State Police said that is not discrimination; that is based on appropriate law enforcement considerations. The New Jersey Attorney General said that.

Now, 10 years later, we are in a different world. Now, the Governor of New Jersey, the Attorney General and the State Police themselves all agree that this was a program of discrimination, what we now call racial profiling and, incidentally, not one based on racism or some belief in white supremacy, but one put into place by law enforcement agents acting in good faith because they believed that that intentional focus on minorities was effective law enforcement.

The reason we know that now is because the problem was studied over a period of years. Studies were conducted of how drives on that highway, how many people speed, what the policies of the New Jersey State Police are, how they decide who to stop and who to search. And after those studies, it is possible to reach this evaluation.

Here, I am afraid the Attorney General has put the cart before the horse. He has concluded that there is no discrimination without the evidence, and the issues are, if anything, more important than they were with racial profiling on the highway.

Thank you.

[The prepared statement of Mr. Gross follows:]

STATEMENT OF SAMUEL R. GROSS, VISITING PROFESSOR, COLUMBIA UNIVERSITY LAW SCHOOL*

Chairman Feingold, Senator Thurmond, Honorable members of the Subcommittee, thank you for inviting me to testify before you this morning. I have been asked to speak about race and the federal death penalty generally, and in particular about a recent report on this topic from the Department of Justice.

I. SUMMARY

On June 6, 2001 the Department of Justice released a report entitled The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review (the "Ashcroft Report "). This report follows a detailed study of the federal death penalty system that was released in September of last year, by former Attorney General Janet Reno. That earlier study found stark racial and geographic disparities in federal capital prosecutions. The most important was that the vast majority of federal capital defendants since 1988 have been African American or Hispanic.

Announcing the release of the new report, Attorney General John Ashcroft said in testimony before the House Judiciary Committee: "Our conclusion is, as the Reno study concluded, that there is no evidence of racial bias in the administration of the federal death penalty." In fact, the June 6 report provides no basis to conclude that the administration of the federal death penalty is free of racial discrimination. What's more, former Attorney General Reno did not reach that conclusion. On the contrary, she expressed deep concern about the racial patterns revealed in the

DOJ's self examination, and she called for more detailed study by academic experts from outside the Department.

Attorney General Ashcroft seems to have concluded that an external, professional study of race and the federal death penalty is unnecessary. That is a serious mistake. Based on the evidence reported last September, there was every reason to be worried that racial discrimination might play a role in the use of the federal death penalty. The new report does nothing to change that.

II. The Reno Study

On September 12, 2000 former Attorney General Janet Reno released a study entitled Survey of the Federal Death Penalty System (1988–2000) (the "Reno Study ").[1] Among others, the Reno Study reported the following findings:

- The Department of Justice sought the death penalty against 206 defendants from 1988 through 2000. Of these 75% (155) were minorities (and 51% (105) were African Americans); only 25% (51) were white. Reno Study pp. 23–24, Table ("T") –245, T–266.
- Of 19 defendants under a federal sentence of death as of July 20, 2000, 79% (15) were minorities and 68% (13) were African American; only 21% (4) were white. Reno Study p. 36. By contrast, as the study points out, 55% of state death row inmates across the country at the end of 1998 were white, and 63% of the 505 inmates executed in the United States from 1988 through 1999 were white. Id. at p. 36 n.28.[2]
- These racial disparities are generated primarily at the early stages of federal capital cases. Thus, among the 235 defendants for whom United States Attorneys recommended seeking the death penalty from 1988 through July, 2000, 77% (180) were minorities (and 51% (120) were African American), while only 23% (55) were white. Reno Study, T–5, T–6. For the death penalty "protocol" period separately (1995–2000) the pattern is nearly the same: United States Attorneys recommended capital charges for 183 defendants, of whom 26% (48) were white and 74% (135) were minorities, including 44% (81) African Americans. Id. p.12. In fact, the major problem seems to occur in the initial selection of cases for federal prosecution on capital-eligible charges. Of 682 such cases across the country from 1995 through July, 2000, 80% (548) involved minority defendants (and 48% (324) involved African American defendants), while only 20% (134) involved white defendants. Id. at T–6.

The DOJ report also contains many other troubling items. For example, since 1995 only 49 of the 94 United States Attorney offices have recommended any capital prosecutions (Reno Study, p. 12); 21 districts did not even file charges in a single capital-eligible case. Id. At the other end of the spectrum, the Eastern District of Virginia sought the death penalty against 21 of 66 defendants in potentially capital cases filed from 1995 through 2000. Id. at T–41. At the end of the judicial process, 12 of the 19 men on federal death row as of July, 2000, were sentenced in the South, including 6 from Texas and 4 from Virginia. Id. at T–307–T–309. There were also pronounced disparities by race of victim. For example, United States Attorneys were twice as likely to recommend capital punishment for black defendants charged with killing white victims (22 out of 55, or 40%) as for black defendants charged with killing black victims (46 out of 227, or 20%). Id. T–67.

When the Reno Study was released, Attorney General Reno and Deputy Attorney General Holder conducted a press conference. The Attorney General summarized the key findings of the study, expressed her concern about them, and described some of the study's limitations, including the absence of information on why the defendant was "arrested and prosecuted by federal authorities rather than state authorities," and why "the U.S. attorney submitt[ed] the case for review rather than enter a plea bargain." She added that:

---

*Samuel R. Gross is Thomas & Mabel Professor of Law at the University of Michigan Law School. He is an expert on criminal procedure, evidence, and the use of social science in legal proceedings. He has written extensively about the death penalty, including a book on racial discrimination in capital punishment (Death and Discrimination, Northeastern University Press, 1989, with Robert Mauro), and about the use of expert evidence in litigation.

[1] See http://Www.usdoj.govldaglpubdocldpsurvey.htmil.

[2] That disproportion has since become even more extreme, as a few new defendants have joined federal death row, and a few others have been removed by the courts, or, in the case of Mr. McVeigh, by execution. As of today, 18 of 20 of Federal capital defendants–90%—are minorities.

> "More information is needed to better understand ... how homicides make their way into the federal system, and once in the federal system, why they follow different paths. An even broader analysis must be undertaken to determine if bias does, in fact, play any role in the federal death penalty system."

She called for studies by experts outside the Department. Later, in response to a question, Attorney General Reno amplified this point: "[W]e want to continue to do everything we can to expose any bias if it exists. But at this point, we are troubled by the figures, but we have not found the bias."

Deputy Attorney General Holder was equally explicit:

> "I am a career law-enforcement officer. . .I have approved the death penalty in several cases. But I can't help but be both personally and professionally disturbed by the numbers that we discuss today. . . .[N]o one reading this report can help but be disturbed, troubled by this disparity. We have to be honest with ourselves. Ours is still a race-conscious society, and yet people are afraid to talk about race."

The present Attorney General, John D. Ashcroft, in response to written questions submitted to him as part of his confirmation hearing before the U.S. Senate Judiciary Committee, echoed the sentiments of Ms. Reno and Mr. Holder. For example, Senator Russel D. Feingold asked: "Are you troubled by the fact that about 75% of those against whom the Department of Justice seeks the death penalty are people of color or ethnic minorities, even though far less than 75% of the people who commit federal capital crimes are people of color and ethnic minorities?" and Attorney General Designate Ashcroft answered: "Yes, it troubles me deeply." Asked to comment on Ms. Reno's statement that further studies are needed "to determine if bias does in fact play a role in the federal death penalty system," Mr. Ashcroft said: "I fully agree that the Department of Justice should do everything necessary to eliminate any racial bias from the federal death penalty system, including undertaking all reasonable and appropriate research necessary to understand the nature of the problem." Attorney General Ashcroft also stated that "federal law should be applied uniformly across the country," and promised to help ensure that, if confirmed.[3]

III. The National Institute of Justice

On January 10 of this year the National Institute of Justice convened a meeting of practitioners, researchers and government representatives, to discuss the federal death penalty. The main purpose of the meeting was to discuss how best to proceed to conduct the study that Attorney General Reno requested. I attended that meeting.

The Ashcroft Report (p.12) says that the discussion at that meeting "indicated" that such a study "could not be expected to yield definitive answers concerning the reason for disparities in federal death penalty cases." This description is puzzling. The researchers at the meeting did not talk in these terms, which have a peculiar lawyerly ring.[4] (What is a "definitive" answer? Do we have "definitive" evidence that nicotine is addictive?) In fact, the clear consensus at the meeting was that a thorough and highly informative study of the federal death penalty could be done, given the resources and the will.

The Ashcroft Report correctly states that the researchers present saw this study as a "multi-year" project. The general estimate was two years. The main requirement that was discussed, in addition to funding, was cooperation from the Department of Justice. As I recall, the representatives of the Department who were present were strongly opposed to the notion of providing information on federal capital charging for such a study, regardless of any guarantees of confidentiality that were discussed by the researchers and that are available by statute under the authority of the NIJ. Excellent studies of capital charging and sentencing have been completed in several states, using data from a wide range of state agencies. With DOJ cooperation, the same could be done for the federal system.

The NIJ representatives present on January 10 said that they were committed to going ahead with this study, and promised to keep the participants at the meeting informed of their plans. Since then, I have heard nothing from the NIJ on the matter. In his testimony before the House Judiciary Committee, Attorney General Ashcroft said that he had already concluded "that there is no racial bias in the way we are administering the death penalty in the federal system." I believe this conclu-

---

[3] z http://www.senate.gov/-Ieahy/press/200I01/ashcroft.html

[4] The report lists no author(s), so it is unclear who provided the information on which this description is based.

sion is unsupported, as I will explain. Given that conclusion, Mr. Ashcroft seems to have decided that there is no need to proceed with the study that Ms. Reno requested in order "to determine if bias does, in fact, play any role in the federal death penalty system." Instead, he announced that:

> "[IJn order to assure public confidence and guarantee that our future efforts in the enforcement of the federal death penalty are consistent with the high standards of fairness that are required in charging, trying and sentencing those accused of federal death-eligible murders, I am directing today that the National Institute of Justice initiate a study of how death penalty cases are brought into the federal system." (Emphasis added.)

To summarize: Former Attorney General Reno requested a study by outside experts to determine whether there is racial bias in the system; a meeting was convened by the NIJ, the study was discussed, and we were assured that it would take place; no action was taken on the proposed study; despite the absence of the planned study, Attorney General Ashcroft concluded that there is no racial discrimination; he then proposed a similar sounding study, on a problem that he has already stated does not exist, for the explicit purpose of generating "public confidence". I know no independent researcher who would agree to conduct a study under these circumstances.

IV. The Ashcroft Report

The most striking thing about the Ashcroft Report is how little new material it contains. The new information in this report consists of two things:

> (1) Information on 291 additional potentially capital federal cases that were not included in the Reno Study. Unlike the Reno Study, the Ashcroft Report provides few details on these new cases. It seems, however, that the great majority of these new cases are comparatively low severity crimes that were initially omitted because the defendants had pled guilty to non-capital offenses before capital charges were ever filed. Ashcroft Report, n. 10.
>
> (2) The DOJ's own explanations for the racial disparities in federal capital prosecutions, in general and in four selected federal districts.

These items add nothing of substance to the Reno Study. As a result, the Ashcroft Report does not support any new conclusions about the administration of the federal death penalty.

1. INITIAL FEDERAL CHARGING AND LATER STAGES OF THE PROSECUTION

Federal prosecutors occupy an unusual position in our system. For state prosecutors, charging in most homicide cases is automatic. If someone has been killed and there is good evidence against a known suspect, they almost always file charges (although not necessarily first degree murder). But nearly all federal crimes can also be prosecuted locally, so the Department of Justice can pick and choose a small number of cases and leave the rest to state authorities. The most conspicuous racial disparities in the use of the Federal death penalty are generated at this initial step. The pool of potentially capital cases that are selected for federal prosecution consists overwhelmingly of minority defendants, and nothing that happens later does much to change that stark disparity. That is why Attorney General Reno asked for additional information on "how homicides make their way into the federal system."

The Ashcroft Report purports to study this issue without looking at the much larger universe of cases in which federal capital charges could have been filed, but were not. It cannot be done. Whatever this report may be, it is not the sort of factual research that any scholar would ever rely on.

Imagine a company that is charged with gender discrimination for hiring a workforce that is 90% male. What if they responded by talking only about the men they did hire: "Mr. Smith had ten years of experience, so that's why we hired him, not because he's a man; Mr. Jones did an outstanding job for his previous employer;" and so forth. The immediate reaction would be: "That's no good. You have to tell me about the female applicants that you didn't hire. For all we know they were just as qualified." But that is just what the Department of Justice did not do. For all we know there were many white defendants with cases just as suitable for Federal prosecution as the minority defendants who were charged, or more so.

The Ashcroft Report emphasizes that among cases that are charged as federal capital crimes, the death penalty is sought more frequently for white defendants than for minority defendants. In his testimony on June 6, Attorney General Ashcroft relied on this finding repeatedly as evidence of lack of discrimination. This finding is not new—the same pattern was reported last September—and it does not show lack of discrimination.

What if the same company we discussed before said: "Look, we pay our female employees just as much as our male employees. Clearly we don't discriminate by gender." Nobody would believe it. We'd answer: "Wait a second. Maybe that shows that you don't discriminate in pay; but you were charged with discrimination in hiring." And yet this is the substance of the argument on this point in the Ashcroft Report and in the Attorney General's testimony.

It is, of course perfectly possible that the DOJ does discriminate by race in the initial intake decision on who to prosecute on capital charges, and then does not further discriminate among those who are chosen for federal prosecution. In fact, it would not be surprising. The Ashcroft Report focuses on the professionalism of Assistant United States Attorneys, the lawyers who make the legal decisions once a case has been taken on. But the initial decision to undertake a federal investigation is often made by law enforcement agents rather than prosecutors, by the FBI or the DEA rather than the United States Attorneys. Perhaps these two sets of DOJ employees have different patterns of behavior.

In general, it is impossible to conclude anything about discrimination from the proportions of cases that are treated in a particular manner without detailed information on those cases. The imaginary firm I mentioned could discriminate against its female employees in compensation, even if they are paid more on average than the men, if the few women it hires are far more skilled and experienced than most of the men. This report provides essentially no information about the characteristics of the cases that were prosecuted federally. As a result, we cannot know why DOJ lawyers asked for the death penalty in some but not others.

The new data that are included in the Ashcroft Report illustrate how little can be learned from aggregate numbers like these. The Reno Study reported that among those charged with federal capital offenses from 1995 through 2000, the death penalty was sought for 38% of the white defendants, 25% of the black defendants, and 20% of the Hispanic defendants. Reno Study, p. 7. In the Ashcroft Report, the corresponding percentages are 27% for whites, 17% for blacks, and 9% for Hispanics. Do these new figures—which show that Hispanics are only ⅓ as likely as whites to face the death penalty—provide new evidence of absence of discrimination against Hispanics, or even of discrimination in their favor? Not at all.

As I mentioned, it appears that most of the 291 new cases that are added in the Ashcroft Report are comparatively low seriousness cases in which the defendant was allowed to plead guilty to non-capital charges. We also know that 53% of all the 291 new cases involve Hispanic defendants. See pie chart attached to Ashcroft Report. As result, the proportion of Hispanic federal defendants in capital eligible cases increased from 29% in the Reno Study (p.6) to37% in the Ashcroft Report (n.10), mostly by adding low aggravation cases. Inevitably, the proportion of death charges went down.

Does this decrease in the percentage of death charges for Hispanics mean there has been a decrease in discrimination against them? Consider a police department that is charged with racial profiling because 70% of the tickets it issued were given to minorities. What if they said: "But wait. There's another batch of cases where we just gave warnings, and those drivers were 90% minorities. So, overall, among all the drivers we stopped, minorities were less likely than whites to get tickets rather than warnings." Would anyone take this defense seriously? Unfortunately, the Ashcroft Report's use of numbers is no more convincing.

2. EXPLANATIONS FOR THE RACIAL DISPARITIES IN FEDERAL CHARGING

The Ashcroft Report does offer some explanations for the racial disparities in federal death cases, but they are unsupported by data. The main one is that federal prosecutors target crimes associated with drugs, and that in the districts where they do so most actively "organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups." Ashcroft Report, p.3. No evidence is offered for this sweeping assertion.

The report goes into some detail about federal capital prosecutions in the Eastern District of Virginia. Ashcroft Report, pp. 16–18. This is a natural choice. Overall, 26 of the 206 federal cases in which the death penalty was requested from 1988 through July 2000 were from this one district, 13% of the national total. Reno Study, T–203 and T–207. All of these 26 death penalty defendants were African American.

Most of the potentially capital federal cases in the Eastern District of Virginia are homicides in the course of drug trafficking. The Ashcroft Report explains why there are no whites among the 34 federal defendants charged with capital murder for drug-related killings in that district:

"[T]he members of the drug gangs that engage in large-scale trafficking in the Eastern District of Virginia are not white." Ashcroft Report, p.17.

How does the Department of Justice know that all major drug traffickers in that entire district from Arlington to Norfolk to Richmond—are minorities? The report does not say. Are we supposed to accept this extraordinary statement on faith?

Worse, this explanation has a depressingly familiar ring. Police departments that are charged with racial profiling sometimes respond: "It's not discrimination. We're stopping and searching mostly black and Hispanic drivers because we're looking for major drug traffickers, and they're all black and Hispanic." Is something similar going on here? Are Federal law enforcement agencies, the FBI and the Drug Enforcement Administration, searching for African American and Hispanic drug dealers because they think they know that the worst drug traffickers are all black or Latin American? Are the racial disparities in Federal capital prosecutions a manifestation of race-specific drug investigations? We don't know, and this report does nothing to allay our fears.

Chairman FEINGOLD. Thank you, Professor Gross.

Our next witness is James Fotis. Mr. Fotis is the Executive Director of the Law Enforcement Alliance of America. The LEAA is a non-profit advocacy organization with more than 65,000 members, representing law enforcement professionals, crime victims and concerned citizens.

Mr. Fotis, we are pleased you could be here today and you may proceed.

STATEMENT OF JAMES J. FOTIS, EXECUTIVE DIRECTOR, LAW ENFORCEMENT ALLIANCE OF AMERICA, FALLS CHURCH, VIRGINIA

Mr. FOTIS. Good afternoon, Mr. Chairman. I would like to thank you and the members of the Committee for having me here today on behalf of the more than 65,000 members and supporters of the Law Enforcement Alliance of America. I respectfully submit the following testimony as the position of the Law Enforcement Alliance of America with respect to capital punishment in the United States and questions as to the possible racial disparities in such sentencing.

However, before I go forward with my formal testimony, I have a letter directed to you, Mr. Chairman, from one of our Federal law enforcement officers.

It says, "Dear Mr. Chairman, as a former Federal law enforcement officer, I have seen the need for appropriate punishment in our criminal justice system. On those rare occasions when we are confronted by the most horrible criminals and their murderous deeds, it is extremely important to have a punishment that fits the crime—capital punishment. Death penalty opponents have made all sorts of attacks on the death penalty in order to see it abolished. One such attack is based on claims of racial bias. I am an African-American, a law enforcement officer, but most importantly an American citizen. It is my utmost concern that we have a fair and effective justice system, and capital punishment is part of that system. I urge you not to let those who cry 'wolf' over race and capital punishment convince you to support a moratorium on the death penalty. Their concerns are not for racial justice, as they would oppose the death penalty with any excuse they can find. One of the most fundamental principles of our justice system is that the application must be color-blind. So should the preservation of justice. Those violent criminals facing the death penalty should not be

judged, counted or queried based on the color of their skin, but on their guilt or innocence. I urge you not to let unproven allegations revoke the justly given sentences of those whose crimes are proven." And it is signed Kenneth F. Blanchard.

The Law Enforcement Alliance of America has long been a firm believer in the importance of capital punishment as a critical part of America's criminal justice system. This sentence is held out for those extremely horrific and rare cases that warrant such profound punishment.

Capital punishment in America is a rarely exercised discretion, saved for the most heinous of crimes. Those guilty of such crimes and sentenced to capital punishment have the greatest protections of due process and appeal. Our justice system is second to none in protections afforded the accused.

The right to remain silent, the right to have counsel provided by the state, the right to a jury of one's peers, and the right to extensive appeal are just some of the careful measures that make our system the most sensitive and protective in the world. No nation does more to protect the rights of the accused.

Capital punishment is defined by statute to be reserved for only the most extreme and horrible crimes. In fact, for our most serious crime of murder, less than 1 percent result in the killer receiving a sentence of capital punishment.

In addition to full discretion in sentencing, every possible measure of appellate protection is afforded to those sentenced to capital punishment. Evidence of the overwhelming appellate protections granted to convicted murderers under sentence of death since the U.S. Supreme Court reinstated capital punishment in 1976 is shown by the fact that only 90 percent of those sentenced to death have had their sentences carried out. The average time on death row is more than 10 years.

Contrary to the claims of those who wish to abolish the death penalty, the majority of prisoners on death row are white males. In a report to President Clinton in September of 2000, then Attorney General Janet Reno noted that with regard to capital punishment in the Federal system, in cases eligible for capital punishment, the Government sought the death penalty at a higher rate for whites than minorities.

Anti-death penalty advocates; only response to these facts are baseless and shameful racist accusations that law enforcement officers are somehow selectively apprehending criminals based on the color of their skin. These claims are an insult to the men and women of all colors who serve their communities as law enforcement officers.

The only statistical indications available to make the claim of racial bias with regard to the death penalty are those that show minorities are represented on death row in higher proportions than their representation in the general population. These findings are mirrored in minority representation among the general prison population and show that these figures have nothing to do with capital punishment.

Conversely, the same method of statistical analysis of the death penalty that opponents use to make claims of racial bias is far more suited to assert a claim of gender bias, as males make up a

far greater proportion of our death row inmates than they do of the general population. Anti-death penalty activists do not make claims that the death penalty is sexist because they know there is no willingness among the public to believe such nonsense, even though the numbers are far more favorable than the arguments of a racist death penalty.

Finally, I would like to specifically address the idea of a moratorium on the death penalty and the threat of withholding Federal prison grants to enforce such a demand. As I have stated earlier, the average time for a death row inmate awaiting sentence is approximately 10 years. This is ample time to exhaust all manner of legal protections on a case-by-case basis.

We are adamantly opposed to granting a universal reprieve to all those justly convicted and properly sentenced to death for the purpose of conducting even more studies in the area of racial bias and death penalty. Every person under the sentence of death in this country should have their case judged on an individual basis and not granted the opportunity to escape their sentence based on obscure, overly broad or racist accusations against the death penalty.

Each of these individuals has been found guilty and sentenced in accordance with the law. Any effort to avoid that sentence must come from the facts of their own individual case and be conducted in our court system, a court system, I might add, which grants that anyone under the sentence of death who can make a showing that the prosecutor or other decisionmaker in the case acted on the basis of racial or ethnic bias is entitled to relief from a capital sentence.

Further, for the Federal Government to put prison funding in jeopardy by holding Federal prison grants hostage to demands over the death penalty threatens not only the legal rights of each individual State to set forth and carry out their own system of capital punishment, but endangers the operation of prisons that house criminals convicted of other types of crimes.

Thank you.

[The prepared statement of Mr. Fotis follows:]

STATEMENT OF JAMES J. FOTIS, LAW ENFORCEMENT ALLIANCE OF AMERICA EXECUTIVE DIRECTOR

Chairman Feingold, Members of the Senate Committee on the Judiciary Subcommittee on Constitution, Federalism end Property Rights;

On behalf of the more than 65,000 members arid supporters of the Law Enforcement Alliance of America. I respectfully submit the following testimony as the position of the Law Enforcement Alliance of America (LEAA) with respect to capital punishment in the United States and questions as to possible racial disparities in such sentencing.

The Law Enforcement Alliance of America has long been a firm believer in the importance of capital punishment as a critical pan of America's criminal justice system. This sentence is held out for those extremely hortifie and rare cases that warrant such profound punishment

Capital punishment in America is a rarely exercised discretion saved for the most heinous of crimes. Those guilty of such crimes sod sentenced to capital punishment have the greatest protections of due process and appeal.

Our justice system is second to none in protections afforded the accused. The right to remain silent, the right of counsel provided by the state and the right to a jury of one's pecans with sentences subject to extensive appeal are just some of the careful measures that make our justice system the most sensitive and protective in the world. No nation doves more to protect the rights of the accused.

Capital, punishment is defined by statute to be reserved for only the most extreme and horrible crimes. ht Fact, for our most serious crime of murder, less than 1 % result in the fcillor receiving a sentenet of capita punishments.[1]

In addition to the careful discretion in sentencing, every possible measure of appellate protection is afforded to those scntencod to capital punishment. Evidenrx of the overwhelming appellate protections granted to convicted murderers under sentence of death is the fact that since the U.S, Supreme Court reinstated capital punishment in 1976, only 9% of those sentenced to death have had their sentences carried out.[2] The average time on death row before a sentence is carried out is over ten years.[3]

Contrary to the claims of those who wish to abolish the death penalty, the majority of prisoners on death roar are white males.[4] In a report to President Clinton in September of 2000, then-Attorney General Janet Rcno noted that with regard to capital punishment in the fcdcral system, in cases eligible for capital punishment, the government sought the death penalty at a higher rate for whites than for minorities.[5] Anti-death penalty advocates' only response to those facts are basclcss and shmreful racist accusations that law enforcement offlcers are somehow selectively apprehending criminals based on the color of their skin. These claims are an insult to the men and women of all colors who serve their communities as law enforcement officers.

The only statistical indications available to make a claim of racial bias with regard to the death penalty are those that show minorities represented on death row in higher proportions than their representation in the general population. These findings are mirrored in minority representation among the general prison population and show that these figures have nothing to do with capital punishment.

Conversely. the same method of statistical analysis of the death penalty that opponents use to make claims of racial bias is far more suited to asset a claim of gender bias. As males make up a far greater proportion of death row inmates than they do the general population. Anti-death penalty activists do not make claims that the death penalty is sexist because they know there is no willingness among the public to believe such nonsense, even thought the nurnbors are more favorable than the arguments of a racist death penalty.

Finally, I would like to specifically address the idea of a "moratorium' on the death penalty and the threat of withholding fcdcral prison grdnts to enforce such a demand. As I have stated earlier, the average time on death row for an inmate awaiting sentence is approximately ten years. This is ample time to exhaust all manner of legal protections on a case by case basis. We are adamantly opposed to granting a univwsdl reprieve to all those justly convicted and properly sentenced to death for the purposes of conducting even more studies in the area of racial bias and the death penalty.

Every person under sentence of death in this country should have their case judged on an individual basis and not be granted the opportunity to escape their sentence based on obscure, overly broad or racist accusations against the death penalty process. Each of these individuals has been found guilty and sentenced in accordance with the law. Any effort to avoid that sentence must come firm the facts of their own individual cases and be conducted in our court system. A court system I might add which grants that anyone under sentence of death who can make a showing that chc prosecutor or other decision makers in the case acted an the basis of racial or ethnic bias is entitled to Tchef from a capital sentence.[6]

Further. for the Federal Government to put state prison Rending in jeopardy by holding federal prison grants hostage to demands over the death penalty threatens not only the legal tights of each individual state to set forth and carry out their own system of capital punishment but endangers the operation of prisons that house criminals convicted of all other types of crimes.

Chairman FEINGOLD. Thank you, Mr. Fotis. I just need to clarify something here. You talk about the withholding of Federal prison grants to enforce a moratorium on executions. For the record, the moratorium bill I have introduced doesn't do that and we have no intention of doing that.

---

[1] FBI Uniform Crime Reports, 1999
[2] USDOJ, OJP–BJS "Capitol Punishment 1999" December 2000 NCJ 184795
[3] USDOJ, OJP–13 JS "Capitol Punishment 1999" December 2000 NCJ 184795
[4] USDOJ, OJP–BJS "Prisoners in 1999" August 2000 NCJ 193476
[5] USDOJ, "Fedcral Death Penalty System Review" September 12, 2000
[6] *McCesKey* v. *Kemp*, 481 U.S. 279, 309 do x30 (1987).

Mr. FOTIS. We understood that the bill was leaning toward that direction to withhold.

Chairman FEINGOLD. It is not in the bill, and I think I have done the only moratorium bill in the Senate, just to clarify that.

Mr. FOTIS. OK.

Chairman FEINGOLD. There is not a whole lot of them. Thank you, though, sir.

Our last witness is David Bruck. Mr. Bruck is a defense attorney in private practice, in Columbia, South Carolina, specializing in capital cases. He serves as one of the three Federal Death Penalty Resource Counsel to the Federal Defender System nationwide. He has represented capital defendants in more than 15 trials, has handled more than 60 capital appeals in State and Federal courts, and has argued 6 death penalty cases in the United States Supreme Court.

Mr. Bruck, I thank you for coming as well and for your patience.

STATEMENT OF DAVID I. BRUCK, FEDERAL DEATH PENALTY RESOURCE COUNSEL, COLUMBIA, SOUTH CAROLINA

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

As one of the three Federal Death Penalty Resource Counsel, I have been involved in greater or lesser extent in virtually every Federal death penalty prosecution in the last 10 years in the entire country, from the Virgin Islands to Alaska, to Hawaii, to Boston, and everywhere in between. So I suppose I am something like Mr. McBride's counterpart, and I want to for a couple of minutes talk to you about what this problem looks like from the ground level, where the cases are being tried.

Part of the work we do in trying to assist on the defense side is to monitor the cases, see where they are being brought. Early on, in 1992, 1993, 1994, we noticed something very strange, which was that the Federal death penalty system that was just then coming into being seemed to only involve minority defendants, black and Hispanic, and only a tiny handful of white defendants, and that that was different than the State systems. It was more all-minority than Alabama, than Mississippi, than South Carolina, where I have most of my experience. It was something new and quite odd.

Before long, we discovered that the Justice Department had been tracking these numbers, as we had, and that they had the same numbers that we did. Because of the McCleskey decision, it has proven extremely difficult to challenge or even to get discovery of this issue in the courts. But in September 2000, the Attorney General did something very unusual, which was that she and the Government faced up to the situation and said there was going to be a reckoning.

Now, we hear that while the research might go on, there is no unfairness in the system. Yes, it appears to be an all-minority system, but that is just because that is who commits the crimes, or at least that is who happens to commit the crimes that we as the Federal Government think are worth prosecuting in Federal court. Now, that may be true, but we don't know.

It is familiar to me. A little while before I undertook this 10-year project, I made a trip to South Africa in 1986 and studied and researched how South Africa at that time used the death penalty, be-

cause they were the only country with a Western judicial system that used the death penalty as a routine part of its criminal justice system and I thought we might learn something from their experience.

That was during the days of the apartheid regime. The South African system at that time executed 120, 140, 160 people a year. Ninety-eight percent of the people they hanged in South Africa every year were non-whites. But everybody you talked to in the system, including some very liberal judges whom I would talk to, stoutly denied there was any racial discrimination going on. What they said was that is just who commits the crimes. This isn't discrimination. What do you want us to do, hang people by a quota system so that it won't look so bad?

Now, that also may have been largely true. There was much more crime in the black townships under the apartheid regime, and still today, than in the rich white suburbs in South Africa. But would anyone have taken the word of the South African regime without looking in great detail at how the system actually processed the cases? Of course not.

Probably, if there had ever been a study in South Africa, it would turn out that that was partly true. There was some discrimination and there was also some actual disparity in the rates of crime, and both sides had a point. But certainly there was discrimination in the system that produced these remarkably racially one-sided results.

I have the feeling that when the day comes when finally a thorough and adequate and reliable study of the Federal death penalty system is done, we will find that there is some merit on both sides. But what that will mean is that, yes, there is discrimination in the system, perhaps not as much as the raw numbers would suggest, but nevertheless. My point is that we don't know and we had better find out, and we had better find out before we press ahead with executions of people that have been put there in this way.

Now, that is for the 20 people who are on death row already. What about the future? You are charged not only with making sure that we don't execute people unfairly, but also how are we going to get out of this mess in the future. There is a reason why the death penalty 30 and 40 years ago in the Federal system involved predominantly white defendants and why it involves, I think, predominantly black and Hispanic defendants now, and it has to do with some non-racial reasons.

The Federal death penalty now overlaps with the State system in a way that it didn't used to. It used to be that there was a Federal interest for bringing each of those cases. It was a narrow death penalty. Now, it is very broad.

I would suggest that for the future, if the Department of Justice adopts a stringent Federal interest standard and only seeks the death penalty in cases that are truly attacks on the Federal Government—and the Oklahoma City bombing is a pretty good example of such a crime—you will find that we will have a smaller Federal death penalty like we used to have, but that it also will not be characterized by these stark racial disparities. Now, I can't prove that either, but that is a proper subject for the National Institute of Justice to analyze and try to figure out.

In the end, the South African regime declared a moratorium by President DeClerc. Because of the fact that it was costing that country terribly in the court of world opinion to have a death penalty like that. He did it on the very same day that he announced the freeing of Nelson Mandela and recognized the African National Congress. It was part of the process of democratization.

We must in this country also have a reckoning, and I hope it will come soon because this is costing us a great deal. We cannot afford to divide our people when we are in the face of violent crime.

Thank you.

[The prepared statement of Mr. Bruck follows:]

STATEMENT OF DAVID I. BRUCK, FEDERAL DEATH PENALTY RESOURCE COUNSEL, COLUMBIA, SOUTH CAROLINA

ADMINISTRATION OF THE FEDERAL DEATH PENALTY

Chairman Feingold, Senator Thurmond, I would first like to thank you for the opportunity to appear before the Subcommittee today as you consider the grave questions surrounding how the federal government has been implementing the death penalty statutes passed by Congress since 1988.

1. HOW THE PROBLEMS OF RACIAL DISPARITY AND ARBITRARINESS EMERGED

I have been a criminal defense attorney in Columbia, South Carolina, for the past 25 years, and have been a close observer of the federal death penalty for almost a decade, beginning in 1992. In January of that year, the federal defender system contracted with me and Kevin McNally, a colleague in Frankfort, Kentucky, to provide expert assistance on as "as-needed" basis to federal defenders and courtappointed counsel in federal capital cases brought under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e). Over the nine-and-a-half years since then, Mr. McNally and I (joined in 1997 by a third lawyer, Richard Burr of Houston, Texas), have worked roughly half-time in assisting counsel who have been appointed to defend the increasing numbers of federal death penalty prosecutions brought under § 848(e) and later under the Federal Death Penalty Act of 1994 (18 U.S.C. § 3591 et sea.). In addition to working with individual courtappointed lawyers, our responsibilities as Resource Counsel include:

- identification and recruitment of qualified, experienced defense counsel for possible appointment by the federal courts in death penalty cases,
- monitoring and data-collection concerning the implementation of the federal death penalty throughout the nation's 94 federal districts,
- development of training programs and publications, including a web site, www.calpdefnet.org, to assist federal defenders and court-appointed private counsel in death penalty cases;
- responding to Congressional inquiries addressed to the federal defender system concerning proposed capital punishment legislation, and
- maintaining a liaison between the federal public defender system and the Department of Justice regarding the administration of federal death penalty statutes.

This effort has led to our involvement, to a greater or lesser extent, in virtually every federal death penalty case brought by the federal government since the beginning of 1992.

It wasn't long before we noticed something strange about the federal cases that we were tracking and helping to defend. As lawyers whose working lives have been spent representing clients facing the death penalty in Southern state courts, we were accustomed to seeing large proportions of minority defendants facing capital charges. But none of us had ever seen anything like this. Within a year or two, it began to appear that almost all the defendants in the federal death penalty cases were African-American or Hispanic, and most of the cases were originating in the "Death Belt" states of the Old Confederacy that were already producing most of the state courts' death sentences.

This pattern began to attract attention in Congress' and in the press,[1] and was apparently a large part of the motivation for Attorney General Reno's promulgation of regulations, in January, 1995, that created a multi-tiered system for reviewing and systematizing the exercise of prosecutorial discretion in death-eligible cases. U.S.A.M. 910.010 et sea. But while the charging system became more complex as a result of the 1995 protocols, the overall picture did not change: whether one looked at the death-eligible defendants considered for death penalty authorization, at the defendants actually authorized for capital prosecution by the Attorney General, or at those ultimately sentenced to death,[2] roughly threequarters were members of racial and ethnic minority groups, while only 20–30 percent were white.

Legal challenges based on this largely "minorities-only" record of federal prosecution went nowhere. In one 1994 case, *United States* v. *Bradley*, 880 F.Supp. 271 (M.D. Pa. 1994), a federal court in Pennsylvania did order the Justice Department to produce files on other cases that were rejected or approved for federal prosecution. However, after reviewing the files and discovering that up to that point the Attorney General had approved almost every death penalty prosecution request received from U.S. Attorneys, the court declared that its inquiry was at an end, because the Department's "rubber stamp" approach was certainly non-discriminatory: as for the decision by the local prosecutor, the particular U.S. Attorney involved in Bradlev had never handled any other potential death penalty case, and so could not possibly be guilty of disparate treatment. (As far the argument that discrimination might have been occurring in the 93 other districts, the court read *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), as rendering any such discrimination irrelevant, since the other U.S. Attorneys were not involved in the defendant's own case, and thus could not have discriminated against him.). *United States* v. *Bradley*, No CR–92–200–01, slip op. at 5–6 (M.D.Pa. May 27, 1994). Other federal courts went no further than Bradley in responding to claims of racial discrimination, and the racially-lopsided roster of federal death penalty prosecutions continued unabated throughout the 1990s.

2. THE GOVERNMENT RESPONDS

There things stood until September 12, 2000, when something quite unusual occurred: the government itself, unprompted by an adverse court decision, acknowledged the problem on its own. On that day Attorney General Reno released the Department's preliminary analysis of its death penalty prosecution record, and acknowledged that the persistence of an overwhelming majority of AfricanAmerican and Hispanic defendants on the roster of federal capital prosecutions raised disturbing questions that could not be answered on the basis of then-available information. Attorney General Reno recognized that a much deeper examination of the federal system of homicide prosecution would be needed to answer the fundamental question—was the prevalence of minority defendants simply reflect that such defendants committed most of the death-eligible federal crimes, or were black and Hispanic defendants being singled out in some way? Ms. Reno directed the National Institute of Justice to enlist the expertise of researchers outside the government in answering this and related questions. And because the answers were still pending in early December of last year, President Clinton stayed the first scheduled federal execution—that of Juan Garza—for another six months.

On January 10, 2001, the National Institute of Justice convened a one-day meeting of social scientists and lawyers representing both prosecution and defense to discuss how to respond to the Attorney General's directive. Since a new Administration was only 10 days away, the issue of whether this directive would actually be implemented was on the minds of many at the meeting. However, we were assured several times by NIJ officials, including the Acting Director, that although NIJ is an agency of the Department of Justice, its research is conducted independently and would go forward regardless of political changes. Thus reassured, we spent the day in what seemed a very useful exchange of ideas, and participants identified a series of research questions that might finally clarify why the federal death penalty seems to have been almost totally reserved for members of racial and ethnic minorities. These questions included:

---

[1] "Racial Disparities in Federal Capital Prosecutions, 19881994," Staff Report by the House Judiciary Subcommittee on Civil and Constitutional Rights, March 15, 1994; "Jury asked to condemn 3 blacks while lawmakers assail legal bias," (Norfolk) Virginia Pilot-Ledger (March 16, 1994) (reporting statements by Norfolk-area Congressman Robert C. Scott).

[2] *New York Times*, "Another Biased Death Penalty" March 17, 1994; Carl Rowan, "Judgment day for race and the death penalty," *Sunday Star-Ledger*, May 15, 1994.

1. Identifying the entire universe of homicides that could have been indicted as federal (and deatheligible) offenses—either nationwide, or within given districts or states—including in states that have already undertaken careful studies of homicide prosecution practices such as New Jersey and New York.

2. Researching offense characteristics of authorized and nonauthorized cases already within the federal system.

3. Evaluating processes by which homicides are (a) referred and (b) accepted or rejected for federal prosecution.

4. Examining offense characteristics of all negotiated (i.e. plea-bargained) death-eligible cases, both before and after capital authorization.

5. Re-analyzing authorized and non-authorized cases using a model designed to measure the extent of "federal interest" in each case.

6. studying the effect of federalization on the racial composition of the decision-makers—prosecutors, judges and juries.

No one at the January 10 meeting underestimated the challenges inherent in such a national research initiative. But it is simply not true, as the Department of Justice asserted in its June 6, 2001 statement, that the January 10 session produced any consensus to the effect that "that even if such a study were carried out, it could not be expected to yield definitive answers concerning the reasons for disparities in federal death penalty cases." On the contrary, the majority of those in attendance concluded (as had Attorney General Reno) that such studies were needed precisely to obtain such answers, and that no such answers would ever be forthcoming absent much more probing investigation than had taken place so far.

Then, so far as we know, nothing more occurred at NIJ. The Department did gather data on some 291 additional cases that had been omitted from the 2000 study (and, reportedly, from the DOJ death penalty itself), but the addition of these new cases only proved that the pool of death-eligible cases indicted in the federal courts was even more overwhelmingly comprised of minority defendants than had been previously reported (83 percent, as compared to the 80 percent figure in the September, 2000 report). Once again, the Department released no identifying case information, so no qualitative analysis of the Department's decision-making record can be undertaken. And most important, the question posed by President Clinton when he stayed the execution of Juan Garza last December appears no closer to an answer now than then.

3. THE GOVERNMENT'S CURRENT POSITION

Under these circumstances, the Attorney General's announcement, just thirteen days before Mr. Garza's scheduled execution, that the questions raised by Attorney General Reno and President Clinton can't be answered (or should be answered on the basis of speculation by Department of Justice lawyers rather than facts and evidence) is simply not good enough. It is hard to avoid the suspicion that the Attorney General's apparent short-circuiting of the inquiry begun by his predecessor reflects concern for what an independent and truly through probe might reveal, rather than confidence in the fairness of the federal death penalty system. Perhaps further study will confirm the Department's premature conclusion that the racial and ethnic patterns in capital indictments simply reflect the race and ethnicity of the entire pool of people who commit federal capital crimes. If so, nothing will have been lost—and a great deal gained—by having taken the time to do the work.

Until that research has been commissioned and completed, there is little point in debating competing theories about what might explain the current racial and ethnic makeup of the federal death row. The government now claims vindication; critics point to the currentlyavailable racial statistics as clear evidence of discrimination. In truth, both sides ought to admit that whiled there is cause for concern, we just don't know. What matters is that every effort be made to gather the evidence, and to withhold judgment till then.[3]

[3] One issue that bears serious study in this process is the significance, if any, of the fact that removing a murder case from state to federal court can mean the virtual exclusion of nonwhite decision-makers from the process. In many urban jurisdictions-Atlanta, Richmond, Baltimore, to name three—African-American defendants charged in state courts are likely to be tried by majority-black juries. However, prosecutors can draw an allwhite or almost all-white jury by the simple expedient of indicting the case in federal court instead. The gravity of this problem, and the risk of race-based prosecutorial decision-making it creates, is perceptively described by Senior U.S. District Judge Richard L. Williams, in *United States* v. *Claiborne*, 92 F.Supp.2d 503 (E.D.Va. 2000). If conscious racial considerations do enter federal death penalty decision-making at all, they are much more likely to appear in such ways as these, rather than as the straw

Continued

Gathering the evidence will mean taking the time to commission independent research, and to allow the work to be done. It will also mean disclosing-under appropriate safeguards—relevant data now held by government prosecutors, for only by taking into account many factual variables about each case can anyone tell whether truly similar cases involving defendants and victims of different races are being treated alike.

Although he has already expressed his conviction that the federal death penalty system is operating in a color-blind manner, the Attorney General still seems to recognize the need for further study. I hope and trust that he will ensure that qualified researchers are given both the time and the information needed to complete this important assignment.

4. THE NEED TO HALT EXECUTIONS

Which brings up the question of what should be done with the handful of federal death row inmates who face execution in the meantime. Of these only one, Mr. Garza, currently has an execution date, and only 9 others have even begun the process of post-conviction review (after the initial or "direct" round of appeal). This makes it very unlikely that any other federal death row inmate beside Juan Garza will have an execution date set during 2001. In fact, it is entirely possible that no other federal prisoner will be scheduled for execution during 2002. Given the tiny numbers of cases that are at or near the end of the appellate process, halting executions until a thorough review of the selection process by which the 20 prisoners now on the federal death row in Terre Haute came to be there would affect almost no cases at all.

But ignoring the issues of racial and regional disparity that led President Clinton to stay Juan Garza's execution, and continuing to execute in the face of grave questions about the integrity of the process, would have serious consequences indeed. The death penalty's practical impact is minute, but its symbolic meaning is enormous. The United States Government has generated a death row population more overwhelmingly populated by minority defendants than that of any state. For our Government to insist on executing one, two or three of those prisoners without taking the time—and without disclosing the information—that is necessary to determine whether racial bias helped put them there, would be terribly corrosive of public confidence in our government. Government's response to the worst of crimes should be designed to knit our society back together, not tear it further apart.

5. RACE, GEOGRAPHIC DISPARITY, AND THE CASE FOR A FEDERALISM-BASED APPROACH.

In addition to achieving a reliable understanding of how the federal death penalty system came to concentrate so exclusively on minority defendants in a relative handful of (primarily Southern) states, we should also think constructively about how to avoid recreating this situation in the future. The first step is to understand that the federal death penalty is fundamentally different today than it was during most of the first 200 years of our nation's existence.

From the first federal "crime bill" in 1790 until quite recently, federal jurisdiction over violent crime was limited to offenses committed on federal land or that could not be prosecuted in state court. Now, with the Anti-Drug Abuse Act of 1988, and especially the Federal Death Penalty Act of 1994, the federal government has concurrent jurisdiction with state courts over many hundreds and even thousands of murders each year. What we do not yet have is a principled method of determining which murder cases should be prosecuted capitally by the federal government, and which should be left to the states.

My own belief, based on experience with hundreds of actual and potential federal death penalty cases over the past nine-and-a-half years, is that the current controversy over racial and geographic disparity would never have arisen had the Department of Justice embraced federalism as its guiding principle in the exercise of prosecutorial discretion in capital cases. So long as the federal death penalty is misconceived as a sort of parallel death penalty structure that duplicates the states' systems, considerations of fairness will mandate reasonable uniformity in application throughout the country, and among various groups of defendants. The experience of the 1990s suggests that such uniformity will never be attained, and so the federal death penalty will remain a divisive distraction within the federal criminal justice system.

However, if the federal death penalty is returned to its historic role—as a penalty to be invoked only where state homicide jurisdiction is substantially lacking, or

---

man of explicit racial "favoritism" that the Department of Justice seeks to dispel in its June 6 release.

where the homicide involved is self-evidently one against the federal government or the nation as a whole, rather than against the people of a particular state—the penalty will be understood as one that is by its nature infrequent and somewhat random, simply because the crimes that trigger it are infrequent and random.[4] Terrorist attacks on federal buildings, murders of federal law enforcement personnel, assassinations of federal officials, murders in the course of large scale international or nationwide drug trafficking operations—these are the truly federal capital crimes where the justification for federal prosecution and federally-authorized punishment is selfevident, and where race and geography simply do not matter. If the federal death penalty was limited to cases such as these—as it has been for most of our nation's history-the current controversy over the application of the federal death penalty would resolve itself.

The alternative is what we have now, and it isn't working. In the absence of a rigorously-enforced "federal interest" requirement, the application of the federal death penalty will continue to follow local fashion: as has already occurred, it will be invoked frequently in states where death sentences and executions are routine, and almost never in states where they are rare or unknown.[5] It is beyond the power of the federal government to override local opposition to the death penalty in any substantial number of cases: the current experience of Puerto Rico, where 15 death penalty authorizations by the Attorney General have produced intense and mounting public protest but not a single capital trial (let alone any death sentences), provides an especially clear example.[6] Narrowing the scope of the federal death penalty may not do much good either, but it can be expected to do a lot less harm. And it will also solve, in a colorblind way, the seemingly intractable problems of racial and regional disparity that afflict the system today.

In the meantime, let's call a halt. Juan Garza isn't going anywhere, and no one seriously believes that marijuanarelated murders in the Rio Grande Valley (or any other crimes anywhere else) are going to increase if he is not executed on schedule next week. But the cost of going forward, in the face of such grave doubts about the fairness of our system, may be large indeed.

6. CONCLUSION

I am reminded today of a trip I made to South Africa 15 years ago. In 1986, South Africa was the only major country besides ours that attempted to use the death penalty as an instrument of crime-control within a western-style judicial system. I spent several weeks there, watching capital trials, interviewing judges and lawyers, and researching the South African system of capital punishment to learn how the death penalty works within such a judicial system once it has become "routine."±[7]

In 1986, Nelson Mandela was still in prison, and the apartheid regime was still firmly in power. The nonwhite majority of the population was wholly excluded from the political system. In court, the defendants were usually black, while whites did all the prosecuting and all the judging. Not surprisingly, black and "mixed-race" defendants made up almost all of South Africa's death row, and some 98 percent of the scores of prisoners hanged every year.

Given such stark racial disparities, it seemed selfevident that the gallows, like almost every other facet of South African life, was organized by race. But the South Africa judicial system had a ready response. "We're not discriminating, it's just that the people who commit the capital crimes happen to be nonwhite. So what do you want us to do? Institute quotas?"

---

[4] To be sure, the Justice Department's current death penalty protocol advises that where concurrent state-federal jurisdiction exists,"a Federal indictment for an offense subject to the death penalty will be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities." U.S.A.M. 9 10.070. But this guideline has failed to produce any sort of uniform application of federal death penalty statutes throughout the country, and we know of only a tiny handful of cases that have been rejected for federal capital prosecution for lack of a sufficient federal interest. A bill now pending in the Senate, S. 486 ("The Innocence Protection Act of 2001 ") would codify the existing "federal interest" requirement. Id. Sec. 303. While such codification is desirable, the standard remains vague, and must be stringently applied if any change is to result.

[5] As the Committee is aware, the Justice Department's September, 2000 report reveals that between 1995 and mid-2000, 40 of the nation's 94 federal districts did not request authorization to seek the death penalty in even a single case. Survey of the Federal Death Penalty System at 21. At the other end of the spectrum, 14 of the 20 prisoners now on the federal death row were prosecuted in the three states whose state courts have generated the nation's highest execution rates—Texas (6 federal death row inmates), Missouri (4), and Virginia (4).

[6] See Jim Oliphant, "An Island's Holy War Against the Death Penalty," Legal Times (Dec. 14, 2000).

[7] See David Bruck, "On Death Row in Pretoria Central," The New Republic, July 13–20, 1987.

And unpleasant as it was to admit it, the South African regime had a point. Violent crime tends to be found amidst poverty and hopelessness, and those conditions were certainly not evenly distributed by race. Even so, it seemed unlikely that an all-white judicial system operated on a powerless black population in an impartial and race-neutral manner. At a minimum, any objective person would want to see some convincing evidence of the system's fairness before accepting its verdict on itself.

I personally believe that our country will eventually abolish capital punishment—as South Africa has now done—and that until we do, we will continue to isolate ourselves among the world's democracies, while dividing our own people here at home. But whether one supports or opposes capital punishment as a general matter, it should be apparent that we must not implement the federal death penalty under a cloud of suspicion and resentment. We now know that the great majority of those targeted for federal capital prosecution have been black or Hispanic Americans. We still do not know whether this troubling fact simply reflects the demographics of federal crime, or the inclinations and assumptions of those charged with prosecuting it, or some of both. It is time to do whatever is necessary to find out, and then to be governed by what we learn.

I would be happy to answer any questions that the Committee may have.

Chairman FEINGOLD. I certainly thank you for that.

We will now go to 5-minute rounds of questions, and my colleagues have been very patient. I am going to begin with Senator Durbin and then Senator Sessions, and then I will do some questions.

I want to thank Senator Durbin for being here. It is his State, the State of Illinois, that really took notice of this issue and gave us a wake-up call, and I really appreciate his attendance.

Senator DURBIN. I want to thank Senator Feingold for this hearing. It takes some courage to even schedule this hearing and I am glad he did it. It is time that we faced this issue head-on, as painful as it is.

The credit in my State does not go to me. It goes to Governor George Ryan, a Republican Governor who in January of the year 2000 declared a moratorium on all executions in my home State of Illinois. When he imposed this moratorium, Governor Ryan cited, "the shameful record of convicting innocent people and putting them on death row."

I support Governor Ryan's decision. I have, as he has in the past, supported the death penalty, but I believe he has taken the only morally coherent position for those of us who support the death penalty. During the past 14 years, the State of Illinois has released 13 people from death row. These people were convicted of the most heinous crimes our criminal justice system could find and they were facing the most serious punishment any society can exact, a death penalty. Yet, none of them were apparently guilty of the crimes they were charged with. Eight of the 13 were black.

I have listened to a lot of conversations by people in both Democratic and Republican administrations about racial profiling. It appears that we are all ready to concede the fact that this occurs, and we should. Certainly, people that I have spoken to who have been victimized by this can cite chapter and verse and their own personal experience.

I wonder why it is so obvious when a State trooper pulls someone over and they happen to be black or brown that that is racial profiling, but that when we look at the population in our prisons or the people on death row, that isn't racial profiling. It strikes me that it is all part of the same continuum; it is part of the justice

process. If the process is wrong from the investigation forward, it could ultimately result in someone sitting on death row, a helpless victim of racial profiling.

Mr. Fotis, you made a point that I just have to go to for a moment. To use as a defense that the number of minorities on death row reflects the number of minorities in prison, I think is to miss the point. I think you have to start at the beginning of the process and ask whether or not the process is fair to minorities from the beginning.

Roughly 12 percent of Americans are African-American. Thirteen percent, according to our drug statistics, commit drug crimes. Thirty-five percent are arrested. Over 50 percent are convicted, and over 65 percent of the drug incarcerations are African-Americans.

Now, if I am sitting at this table as an African-American, I have to think this system is not really treating my race fairly. If we committed as many crimes to warrant this type of incarceration, that makes sense. But if we don't, if we are only 13 or 13 percent of the actual crimes and represent so much of the incarceration, you can understand the feelings of many toward this system that it isn't fair, that the statue of justice is not blind.

And the same thing is true, sadly, when it comes to meting out the death penalty. The statistics we have been given here suggest that some 75 percent of those against whom the Department of Justice seeks the death penalty are people of color or ethnic minorities, even though far less than 75 percent of the people who commit Federal capital crimes are people of color and ethnic minorities.

My question to the panel is this, and I will open it to any who want to answer it. How can we preserve a jury system in America, a system that is open to all Americans, and expect justice to come from it if the minorities in America feel that the system is stacked against them, if they see racial profiling from investigation through arrest and conviction and incarceration, and even the death penalty?

Mr. BRUCK. Senator, if I can make a comment about that, your comment about juries, I think, sheds some light on what really may be happening with these numbers on the Federal death penalty.

Mr. McBride said those who raise the question are accusing prosecutors of intentional racism. Let me suggest on the ground, in reality, another thing that actually happens. It isn't intentional racism.

I have cited in my written submission an opinion by Judge Richard Williams of the Eastern District of Virginia, in United States v. Claiborne, in which Judge Williams agonizes over a case in which a defendant in a drug murder case was acquitted in State court by a jury of six to eight African-Americans, a majority-black jury, in Richmond, Virginia, and then was re-prosecuted by the Federal Government in the Eastern District in Federal court under circumstances where simply because the case was moved from Richmond State court into Federal court, the expectation was that the jury would probably be all white.

That typically is what happens when you Federalize a case that arises from inner-city Baltimore, from inner-city Atlanta, from inner-city Richmond, all through the country. Now, that, on the ground, at the level of reality, is the sort of thing that actually hap-

pens when drug trafficking murders are targeted by the Federal Government and cases are taken out of State court.

That doesn't mean we shouldn't do it, but let's think a little bit on the competitive pressures. Think of the Claiborne case. They couldn't get a conviction with a majority-black jury. Is there no temptation—and this is what Judge Williams struggled with—is there no temptation to say we can fix this? There is no double jeopardy. We can take the case into Federal court, and think of the white suburban jury we will have for the next go-around.

That may be part of the story of what explains these numbers, and it is a very sobering issue. I am not saying it is. That is one of the topics that was put on the table at the NIJ meeting on January 10, the suggestion being made of let's look at that. That is the sort of thing that we must look at. Has that been happening and how can we make sure it doesn't happen in the future?

Senator DURBIN. I think the jury system is the bedrock of our system of justice, and if we find ourselves reaching the point where we cannot trust the jury system, then I don't know where we are going to turn for justice in this society.

Chairman FEINGOLD. Mr. McBride, did you want to respond?

Mr. MCBRIDE. Yes, Mr. Chairman. I just wanted to say that I have probably tried 30 to 40 criminal cases in the Eastern District of Virginia, in Alexandria and Richmond. In the Richmond Division, I don't believe I ever tried a criminal case before an all-white jury, and the capital cases that I tried were before racially mixed juries.

It is true that when you expand the pool to the district, the division, the Richmond Division, it encompasses some of the suburbs, but it also continues to encompass the city of Richmond. And the idea that these are all white juries or that prosecutors are manipulating the process to get juries of a certain racial composition, I don't believe that to be the case.

I appreciate the Senator's concern, and I share the concern as a former Federal prosecutor. I don't think a death penalty that is infected by overt or covert racism serves any function for us. It doesn't help the victims of crime, it doesn't help us deter crime, and I appreciate the committee's efforts to try and root out any bias that is there.

As I said in my opening statement, my experience was that we as Federal prosecutors were called to the scene. We weren't making selections. The State would say we need help with this.

What you see, Senator Durbin, I think, on Federal death row now is a reflection of what the priorities were from 1988 to 1994, and the tools that you, the Congress, gave us. All we had then was the death penalty for large-scale drug-dealing, and what we set out to do was to prosecute crack cocaine offenders in the inner cities, in our case in Richmond and Norfolk and Virginia Beach, unsolved homicides largely of African-American citizens. And we were called by the local authorities to assist, and that may explain some of the statistical disparities.

The Chairman mentioned the motorcycle gangs and organized crime, and I think it is a fair point. On the other hand, we did not receive authority to impose the death penalty under the RICO Act for racketeering, aside from drug-dealing, until 1994. So you really

can't judge our performance as a prosecutorial body until you gave us all the death penalties in 1994. And you do notice in the statistics that the number of white capital-eligible defendants going into the Federal system increases after 1994.

Senator DURBIN. Mr. Chairman, I will conclude because my time is up here, but I hope to get back and ask a question related to the areas where you do have prosecutorial discretion. In the September 2000 report from the Attorney General, where they have approved a capital prosecution, 48 percent of white defendants avoid the risk of a death penalty by entering a plea agreement to a non-capital charge. Rates that blacks and Hispanics enter such agreements are 25 percent and 28 percent, respectively.

So where there was prosecutorial discretion, we find that white defendants facing capital charges on an almost two-to-one basis were then allowed to enter a plea agreement to a non-capital charge.

Mr. MCBRIDE. Senator, if I may, I think that is an issue that the Deputy Attorney General addressed. He agreed, No. 1, that the Department needs to keep statistics on this issue. There is not a full range of statistics.

No. 2, at least in my experience, I interpreted the protocol to mean that if I charged a capital offense and sought the death penalty, I had to go back to the review Committee in order to take a plea to life without parole. Now, my understanding is that, in fact, the protocol as it existed did not call for that. It has been amended to do so.

But I agree with the Senator that plea agreements are an area that the Department needs to monitor under the protocol or the protocol can be bypassed.

Mr. GROSS. Senator, may I correct a misstatement, no doubt unintentional, by Mr. McBride?

Chairman FEINGOLD. Yes.

Mr. GROSS. I don't remember the exact numbers. I am sure Mr. Bruck does, but the great majority of Federal prosecutions since 1988 have been brought since 1995 under the new, expanded Federal death penalty law that was passed in 1994 and under the Department of Justice's 1995 death penalty protocols.

I am sure Mr. McBride didn't intend to mislead the committee, but I think he gave the impression that most of what we are seeing is based on the first Federal death penalty, when, of course, that is not true.

Chairman FEINGOLD. Thank you.

Senator Sessions?

Senator SESSIONS. Thank you.

Professor Gross and Mr. Bruck, I first would like to point out that this is indeed an administration who has been in office only a few months, and the cases we are referring to overwhelmingly were either prosecuted by or the appeals were handled by the Clinton-Reno Department of Justice.

You would agree that Attorney General Reno, after a review of all these cases on death row, did conclude there were none that were innocent or there was a factor of guilt question there?

Mr. BRUCK. No, actually I don't. She said that, and then 4 months later she sent a letter to President Clinton asking him to

commute the sentence of Ronald David Chandler because of grave doubts concerning his guilt. And solely on the basis of the Department of Justice's recommendation made through her President Clinton did commute that sentence to life without parole because of the risk of executing an innocent man.

So, actually, that really illustrates how things seem to be OK, and 3 months later with a closer look it turns out that they are not OK. I think there is a lesson to be learned there.

Senator SESSIONS. Chandler was white, if I recall, was he not?

Mr. BRUCK. He was white, and he was probably innocent.

Senator SESSIONS. Well, I don't know about that, but he was not released from prison, was he?

Mr. BRUCK. No. He is serving life without parole.

Senator SESSIONS. The death penalty was pulled back.

Mr. BRUCK. That is correct.

Senator SESSIONS. Well, I think that is the way the system should work. If the Attorney General ever has a doubt about whether or not a person is guilty, a commutation recommendation to the President would be appropriate. That is the way the system ought to work.

I guess what I would be interested in pursuing would be the question of what can we do. Now, we know that for people who are deeply opposed to the death penalty, there will always be objections to that death penalty. There will never be a system that will satisfy them.

Senator Durbin raised the numbers on the plea bargains. Having looked at all the statistical data that I have seen, the only thing that seems a bit aberrational would be those plea bargain numbers, and Attorney General Ashcroft has committed to reviewing those carefully to make sure that plea bargains are also reviewed carefully.

I guess I would first ask do any of you see anything in the death penalty statute itself that is racially biased?

[No response.]

Senator SESSIONS. Do any of you see anything within the detailed guidelines that the Reno Justice Department declared to review every death penalty case before charges were made and all the way to its conclusion—do you see anything in those guidelines that is in itself racially biased?

Mr. BRUCK. Nothing in the statute and nothing in the guidelines. They are susceptible to racial bias, but clearly there is no statute in the whole country that is itself racially biased.

Senator SESSIONS. Mr. McBride, do you want to comment?

Mr. MCBRIDE. Senator, I think Mr. Bruck would agree that the procedures that we now have in place in the Federal system—he would probably like to see them in every State that has capital punishment. I think that Attorney General Reno is to be commended for the protocol that she adopted.

I think it is unique in the criminal justice system to allow defense attorneys to make a presentation to prosecutors at the charging phase when you decide whether or not to seek the death penalty. The defense can actually make a presentation to avoid the death penalty being charged, and that is a very unique right that has been granted in the Federal death penalty system.

As someone who has participated in it as a prosecutor, the review is extremely rigorous and the materials that an Assistant United States Attorney, as you know, as a former United States Attorney, must submit, including a draft indictment and an analysis of aggravating and mitigating factors in each of the individual cases that might be charged as a capital case—it is a very rigorous review and I think Attorney General Reno and her staff and the changes that Attorney General Ashcroft has proposed can be very proud of that system. I think it is one that works very well.

Senator SESSIONS. I appreciate that. Oftentimes, there is a lot more likelihood, in my experience, of an individual district attorney, Mr. Bruck, in a county who maybe only had one death penalty case in his career—with the kind of universal review by experienced prosecutors dealing with all these cases, you probably have got a more coherent picture in the Federal system than in most State-charging situations, do you not?

Mr. BRUCK. Yes, I think that is right. Once the case enters the Federal system, I think that is true.

Senator SESSIONS. Then it strikes me that what we have got to be careful about and what we are asking of the Federal law enforcement officers—I am sure it is galling to Mr. Fotis, as a man who has committed his life to the rule of law and doing what is fair and just, and every Federal FBI agent and DEA agent who work these cases, and every prosecutor, to have it suggested repeatedly that they are somehow biased in what they have done, when all they have done is enforce the law that the Congress of the United States has passed, and complied with the greatly detailed guidelines that the Attorney General of the United States has required of them.

So, first of all, I want to defend those officers and their integrity and their commitment to doing the right thing. I don't know anybody involved in a death penalty case who does not take that seriously. It is really an awesome thing to have that matter fall in your lap.

I won't take any more time, Mr. Chairman. I just would say that I think it is significant that we don't have a complaint about the way the law is written or the guidelines are established.

Chairman FEINGOLD. Thank you, Senator Sessions.

Let me be clear. I have listened carefully today and I have also followed this debate. No one has accused anyone in the system of being intentionally racist or biased. In fact, every witness has been modest and careful in their remarks to suggest that if there is a problem—and we are not certain that there is—it is more likely to be on the basis of institutional concerns about discrimination rather than any intentional conduct.

I think this issue has to be discussed in that way, and that is my intent and I think it is the intent of every Senator involved and everybody on this panel on both sides. This is not about accusing people of racism. The question is whether the system, however it is constituted, ends up operating in a discriminatory manner. That is a very different thing. Of course, I join with you in praising the law enforcement people throughout our country who do a very good job.

My first question is for Mr. Bruck and Mr. Gross. You have heard Mr. McBride say that the Subcommittee should not place any stock in statistical patterns or comparisons, or focus on largely meaningless statistical games. What is your response to what he said, Professor Gross?

Mr. GROSS. I am sorry. That was a comment by Mr. McBride?

Chairman FEINGOLD. Yes.

Mr. GROSS. I did hear Mr. McBride's comments on that, and also saying that you shouldn't rely on regression analysis. I was puzzled by them because I wasn't sure to whom they were addressed.

The only statistics that we have here are those that have been provided by the Department of Justice, and on the basis of the statistics provided by the Department of Justice the Attorney General was willing to reach a conclusion that there is no discrimination in the administration of the Federal death penalty. I don't think Mr. McBride was saying that that was an inappropriate conclusion, but that is the only set of statistics and the only conclusion based on statistics that we are dealing with today.

If he means, on the other hand, that we will never be able to do a study that will shed light on this issue because it is not a question that is studyable, that no matter what we do it will never be good enough, I think that is an extremely pessimistic view, and that, in fact, we can learn a lot. Whether we will know for sure at the end of the day, I can't say. But if we don't look, we will never know.

Chairman FEINGOLD. Mr. Bruck?

Mr. BRUCK. I really have very little to add to that. It is true that no matter how sophisticated and thorough and exhaustive a study is done, one can always say, well, it could have been better. But I think we can learn a lot.

I would like to say that perhaps the most crucial moment for the NIJ study came when you, Mr. Chairman, asked Mr. Thompson in a very brief exchange about whether the Department of Justice would be willing to turn over the data. And Attorney General Thompson said, yes, we will, subject to various restrictions.

Now, the size of those restrictions will decide whether this topic can be studied because all of the data is in files at the Department of Justice. The one, I have to say, rather discordant note at the January 10 meeting was some very strong expressions by prosecutors of reluctance or refusal—a prediction that the Department of Justice would refuse to turn over the very, very exhaustive files in which the answers to these questions are contained.

There obviously have to be safeguards, but it will be crucial for the Department of Justice to be forthcoming with the data, and I know that the Committee will ensure that that happens.

Chairman FEINGOLD. Let me follow up with one more for you, Mr. Bruck. The supplemental report's discussion of geographic disparities is pretty skimpy. It says that there is nothing illegitimate about a district focusing on the actual needs of the geographic area for which it is responsible in decisions about the exercise of Federal jurisdiction. It further says the geographic disparities are neither avoidable or undesirable.

What is your reaction to those conclusions?

Mr. BRUCK. You know, that is one thing as far as it goes that I agree with. There will never be a uniform application geographically of the Federal death penalty, and I think it is a hopeless effort—this country is too different—any more than there could be a uniform application of the Fugitive Slave Act 150 years ago.

The culture of various parts of this country are different and some parts of the country simply will not tolerate the level of capital prosecutions that are commonplace and routine in other parts of the country. It is useless to try to make Vermont like Texas; it is never going to happen.

What can be done is that the disparity geographically ought to be informed not by the culture of Texas or the culture of Vermont, but whether the crime is really a Federal crime. We have been spinning our wheels down in Puerto Rico, where 15 death penalty cases have been authorized by the Attorney General in the last 5 years. Not one of them has ever gone to trial. It is the most divisive issue in Puerto Rico, except for the shelling of the island of Vieques. There is never going to be a trial. We are spending hundreds of thousands and millions of dollars chasing our tail there. It is time to call a halt.

If there is truly a Federal capital crime in Puerto Rico, God forbid, the attack on a Federal building or the murder of a Federal agent, that will be one thing. But simply to try to have some sort of uniformity based on the happenstance of whether there happens to be a Federal program against violent crime in this or that district, or whether States don't provide for grand juries and the Federal system somewhere does, that is no basis for deciding how the Federal death penalty should be distributed. It should be distributed based on where there are capital crimes that are attacks against the country.

Chairman FEINGOLD. Thank you. I have just one more question and then I think Senator Durbin has another question.

Mr. Bond, as a longtime leader in the civil rights movement, could you please place the death penalty issue in the context of the struggle for civil rights, equal rights, and equal protection of the laws?

Mr. BOND. Well, it has long been true that in parts of the United States in our past, there was ample evidence of discriminatory application of the death penalty, with African-Americans being the usual victims, selective prosecutions, discriminatory prosecutions, prosecutions for crimes which in another context the death penalty would not have been sought.

Luckily, to some extent we have moved away from that, but it has long been troublesome for those in the civil rights community, and I think for Americans generally, that there at least appears to be discriminatory application of a wide variety of our laws.

A study done in the fall of a year ago, I believe, in conjunction with the Department of Justice demonstrated a high level of discretion where race entered from the moment of arrest through the sentencing phase, and spoke, I believe, if memory serves, about two young men, a white young man involved in some minor scrape, patted on the back—go home, see your parents, make sure this doesn't happen again—and the black young man sent into the criminal justice system. A record attaches to him. If he falls afoul of the law

later on, that record is a part of the system and he receives an even heavier punishment. So on and on and on and on.

Equally as troubling are these statistics from the newspaper report that you referenced a moment ago. Those are troublesome, they are bothersome, and they create in African-Americans and racial minorities, and I believe in the larger public, too, serious questions about justice and fairness.

All of us want to believe we live in a country dedicated to equal justice under the law. All of us want to believe that if we run afoul of the law, we are going to be treated fairly and decently. All of us want to believe that if a relative or a friend is the victim of some crime, the perpetrator is going to be punished strongly and strictly and severely. But none of us wants to believe that this process is going to be unfair, and large numbers of Americans, I think, believe sincerely that this process is awfully unfair.

Chairman FEINGOLD. Thank you so much.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman.

Very briefly, I would just like to make one point here. I am glad that we are having this hearing and it relates to the death penalty, but I think that I would like to put it in this perspective: I think we focus on the death penalty because the universe involved is relatively small and the people can be identified and their cases carefully analyzed.

Those who are interested in this issue on either side can look at them ever so carefully, scrutinize them, and decide whether there was competent counsel, whether a DNA test might have some impact on the outcome, while we ignore the mass of humanity sitting in prisons for crimes, short of a death penalty, who may have been subject to the same imperfect system of justice that brought them to their end. They may never made the headlines and they may never become a university project.

But the fact is we are filling our prisons at the Federal and State level at record numbers, and this hearing, although it focuses on the death penalty, raises a larger question. If we recognize, acknowledge and condemn racial profiling, it shouldn't end with a discussion of the death penalty. It has to go back through every step of the process.

African American men end up in Illinois prisons on drug convictions at a rate 57 times greater than white men, the most striking gap of any State in the Union. Ninety percent of drug offenders admitted to State prisons in Illinois are African-Americans, the highest percentage in the country. This troubles me, representing this great State.

I will acknowledge what Senator Sessions and Senator Feingold said. The men and women on the front line who put their badges on everyday and put their lives on the line to protect us deserve our respect and admiration, as to the prosecutors in every part of the system. But there is something imperfect, there is something broken in the system. We see it at its worst on death row, but I

am afraid it permeates the entire system. Will we have the courage to face it? I hope we will.

Chairman FEINGOLD. Well, I couldn't agree with the Senator from Illinois more. The only reason that this was the first hearing was the urgency relating to the execution next week. But as Senator Durbin knows, this Subcommittee will have the opportunity to take up the racial profiling bill which I introduced and Senator Durbin cosponsored last week with Representative Conyers, and also the issue of disproportionate minority incarceration. All of these have to be central to the work of this Subcommittee and the committee, and I am so pleased that, his help, we are finally moving in that direction.

After hearing the testimony this morning, it seems to me that we have surprisingly a lot of agreement here. The experts on the panel all said we don't know whether bias is responsible for the racial disparities on Federal death row. The Deputy Attorney General has told us that the Department of Justice, through the NIJ, will continue its study of this issue. Of course, I am pleased to hear that because it seemed that just the opposite was the case a few days ago.

The difference is quite clear, though. The Attorney General of the United States is prepared to execute an Hispanic man before that study is completed. I believe that is a tragic mistake and an unnecessary mistake. Mr. Garza is not going anywhere. He is in a high-security prison in Indiana. Whether he is executed next week or next year makes in the long run very little difference. But if the study that the Deputy Attorney General said today will continue reveals bias in the system, the confidence of the public in our system of justice in this country will be forever undermined.

Let me sincerely thank all of our witnesses for their testimony and what I thought was a very thoughtful discussion. We appreciate your taking all this time to be here on short notice. We thank you for your insights.

As I told the Deputy Attorney General, the record will remain open for a week, if you wish to submit additional materials for the record. In addition, any individual or organization that wishes to submit a statement for the record may do so within that time.

Written questions from members of the Committee are due by the close of business Friday, and we will ask that the witnesses provide answers promptly.

Thank you, Senator Durbin, and thank you all for coming. The hearing is adjourned.

[Whereupon, at 1 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of David Bruck to questions submitted by Senators Leahy, Feingold, Sessions, and Thurmond

QUESTION FROM SENATOR LEAHY

Question: Do you have any suggestions for strengthening (the "federal interest") provision of S. 486?

Answer: Upon reflection, I doubt that any greater clarity can be achieved in this necessarily imprecise question. However, the certification requirement of subsection (b) could usefully be made slightly more explicit, by requiring that

(a) certification under sub-section (a) shall state the basis on which the certification was made, including the federal and state interests identified, and the reasons for the certification.

Subsection (b) as currently drafted requires an articulation of the federal interest only, and this might produce only an unenlightening boilerplate recitation of the federal interest in combating whatever federal crime might be involved. A requirement that the state interest also be articulated might well encourage a genuine federalism-based analysis in each case, based on traditional notions of caution and restraint in federalizing a difficult and divisive area of criminal justice policy that has heretofore been consigned to the states. Such an analysis, in turn, offers the best hope of ameliorating the racially and geographically lopsided patterns that have characterized the federal death penalty to date.

QUESTION FROM SENATOR FEINGOLD

I have conferred with Professor Gross concerning the issues to be addressed and the data to be gathered by the National Institute of Justice, and request that his follow-up answer to this question be considered as having been submitted by me as well.

QUESTION FROM SENATOR SESSIONS

Question: Do you oppose the imposition of the death penalty in all cases whatsoever, regardless of guilt, including Timothy McVeigh's murder of numerous children, women, and women in Oklahoma City, Oklahoma?

Answer: A. Yes.

QUESTIONS FROM SENATOR THURMOND

Question (1): Is there any criminal conduct that you personally believe warrants the death penalty?

Answer: Yes, I do. However, this does not answer the more difficult question of whether we should maintain a system for inflicting capital punishment. I do not think we should, because experience has shown that as fallible human beings, we will never find a way to determine reliably and fairly, without ever making mistakes, which defendants warrant the death penalty.

Question (2): Given (that Justice Department decision-makers generally are not told the race of the defendants whose cases they consider) how could there reasonably be racial bias in the capital review process at Main Justice?

Answer: I do not contend that there is racial bias infecting the system, either at Main Justice or at earlier or later stages of the federal deathselection process. I suggest only that the question arises from the data that have been released so far, and much more probing inquiry is warranted. The most important point to keep in mind is that if such bias does exist, it probably has the greatest impact at the "intake" stages when the decision to prosecute death-eligible crimes in federal court is being made. If bias played any part in bringing about the fact that three-quarters of the cases reaching DOJ involve minority defendants, concealing the racial composition of this mostly-minority pool once it arrives at DOJ would do little to remove the effect of such bias. Moreover, much more careful review is needed to determine whether racial and ethnic stereotyping infects the way that information is received by local federal prosecutors and transmitted to DOJ officials (who must, of course, rely on the information they receive). Finally, the "color blind" procedures to which you refer are hardly impenetrable: a decision-maker who knows that the defendant has a Hispanic or Asian surname, or is a 22-year-old crack cocaine dealer from inner-city Richmond, Virginia or a member of a Jamaica-based criminal syndicate, does not need a checked box on a form to intuit the defendant's race or ethnicity.

*Question (3):*Do you see socio-economic problems to be a more realistic and fundamental explanation for disparity in the death penalty rather than the choices of federal authorities?

Answer: The hypothesis that minority citizens commit a greatly disproportionate share of federal death-eligible crimes, and that this is attributable to poverty, social isolation and marginalization, is a plausible one. However, at this point that's all it is—a hypothesisand it cannot be accepted as the entire explanation for the racial lopsidedness of the federal death penalty system without much more evidence than the Department of Justice has produced to date. You may recall that in my testimony, I cited this hypothesis as the defense offered by South African officials of the apartheid era for the nonwhites-only death penalty system that operated in that country through the 1980s. That explanation may have been true there too. Or it

may have been wholly false- Or (and this seems most likely) it may have accounted for some, but not all, of the racial disparity reflected in South Africa's execution statistics. If this last possibility were correct, then the system would was infected by bias, even though an unbiased system would still have produced a higher execution late among nonwhites that among whites (and among killers of white, as opposed to nonwhite, victims).

The only way to know whether bias explains any of the observed disparity is to identify all of the death-eligible cases that were or could have been considered in the death-selection process, and then to carefully compare how they were treated, taking into account the myriad non-racial factors present in each case. The South African regime refused to conduct such a painstaking selfexamination. We should choose a different course.

Question (4): The Attorney General will simplify the procedure for reviewing cases in which the U.S. Attorney is not recommending the death penalty. . . . Do you believe this change is beneficial?

Answer: Yes. As one of the part-time resource counsel who have been helping the federal defender system address the need for adequate indigent defense services in capital cases, I have been urging such a "fast-track" procedure ever since the Department of Justice instituted its death penalty protocol in 1995. I hope that this change will reduce somewhat the cost and delay that the unprecedented expansion of the federal death penalty has brought to the federal criminal justice system since 1994.

Responses of Andrew G. McBride to questions submitted by Senators Thurmond and Sessions

QUESTION FROM SENATOR THURMOND

Question: Mr. McBride, based upon your experience as a federal prosecutor, did you ever have any reason to think that prosecutors and investigators sought the death penalty for any invidious reasons?

Answer: The answer to Senator Thurmond's question is that I did not, I served as an Assistant United States Attorney in the Eastern District of Virginia from 1992 to 1999, in both the Alexandria and Richmond offices. During that time period, I sought the death penalty against four criminal defendants and prosecuted numerous other murder cases in which the decision was made not to seek the death penalty. I never observed any evidence that prosecutors or investigators were influenced by race or any ocher invidious factor in their; 1) decision to proceed with federal prosecution of a particular case; or 2) decision to seek or not to seek the death penalty.

Both intake decisions and capital punishment decisions were subject to multiple layers of supervisory review. No individual prosecutor or investigator could make the decision to undertake federal prosecution or to seek the ultimate penalty. During my tenure, those decisions were made by the United States Attorney, in consultation with the first assistant, the chief of the criminal division and other prosecutors. Intake decisions were based on a number of factors, including the federal interest in the crimes and the local need or desire for federal assistance. Death penalty decisions were made in the United States Attorney's Office after rigorous review of the facts of the case—often requiring several lengthy meetings between the line prosecutors and supervisors. Of course, after the United States Attorney made the decision to recommend the death penalty, the case was subject to another layer of review before the Attorney General's capital punishment committee. At none of these stages of the process did I observe any evidence of overt or subtle racial bias entering the proeess——

QUESTIONS FROM SENATOR SESSIONS

Question: Do you oppose imposition of the death penalty in X11 cased whatsoever, regardless of guilt, including Timothy McVeigh's murder of numerous children, women, and men In Oklahoma City, Oklahoma?

Answer: The answer to Senator Sessions' question is that I am in favor of the death penalty for a limited number of particularly heinous crimes. I believe that the death penalty does defer murder—particularly in the felony murder situation where a rapist or murderer may have a strong incentive to kill a victim or police officer to avoid apprehension. Only a punishment more severe than life imprisonment can provide any general deterrence in these situations. The death penalty also provides

specific deterrence—it ensures society that a particular individual who has already taken the life of another human being will not do so again. l also believe that the death penalty properly expresses society's moral outrage at the taking of innocent human life, such as that involved in the McVeigh case. The survivors of McVeigh's victims almost uniformly indicated chat his execution brought them a sense of closure and a sense of justice.

Question: In your experience as as Associate Deputy Attorney General under President Bush and as an Assistant United Stags Attorney under President Clinton, did you ever see a federal employee engage in racial bias is the performance of his profossional duties with respect to a federal capital case.

Answer: The answer to Senator Session's question is no I did not. As to my tenure as an Assistant United States Attorney, I have indicated in my answer to Senator Thurmond's question that I saw no evidence of overt or covert bias in the selection of federal cases or the decision to seek or forego the death penalty. In addition, from 1990 to 1992, I was employed in the Department of Justice as an Associate Deputy Attorney General (1990–91) and as an Assistant to the Attorney General (1991–92). In both those capacities, I was involved in reviewing the applications to seek the death penalty from the United States Attorney's Offices and making recommendations to the Attorney General. While serving in this capacity, T newer saw any evidence of federal investigators, prosecutors, or Department of Justice personnel considering race or ether improper factors in assessing whether a case was worthy of capital punishment. In fact, neither the race of the victim nor the defendant is disclosed to Department of Justice personnel who review death penalty applications.

I hope these responses assist the subcommittee and its Members in addressing these issues. Thank you again for the opportunity to address the subcommittee regarding this important criminal justice issue.

Responses of Samuel R. Gross to questions submitted by Senators Sessions, Thurmond, and Feingold

QUESTIONS FROM SENATOR SESSIONS

Question 1. Do you oppose the imposition of the death penalty in all cases whatsoever, regardless of guilt, including Timothy McVeigh's murder of numerous children, women, and men in Oklahoma City, Oklahoma?

Answer: Yes, I do. I believe that the death penalty is unnecessary, even for the worst crimes, and that its use produces many bad effects and no significant benefits. That is why most democratic countries in the world, including our closest allies—Canada, Great Britain, Germany, France, among others—have abolished capital punishment and so suffered no ill effects. On the contrary, they have benefitted. The same is true of my home state of Michigan.

Question 2. On page 7 of your written testimony, you state:

The Ashcroft Report focuses on the professionalism of Assistant United States Attorneys, the lawyers who make the legal decisions once a case has been taken on. But the initial decision to undertake a federal investigation is often made by law enforcement agents rather than prosecutors, by the FBI or the DEA rather than United States Attorneys. Perhaps these two sets of DOJ employees have different patterns of behavior.

Further, on page 9 of your written testimony, you state:

Are Federal law enforcement agencies, the FBI and the Drug Enforcement Administration, searching for African-American and Hispanic drug dealers because they think they know that the worst drug traffickers are all black or Latin American? Are the racial disparities in Federal capital prosecutions a manifestation of race-specific drug investigations? We don't know, and this report does not allay our fears.

Answer: Apparently, the actual question was lost in the facsimile transmission. Unfortunately, I only just returned from a two-week trip abroad. I would be happy to answer the question that Senator Sessions intended to ask as soon as possible, if it is re-sent to me.

QUESTIONS FROM SENATOR THURMOND

Question 1: Mr. Gross, is there any criminal conduct that you personally believe warrants the death penalty?

Answer: I'm unsure how to understand the term "warrants," but I take the question to be whether I personally oppose the death penalty in all circumstances. On that assumption, the answer is that I do, for the reasons given in response to a question by Senator Sessions: I believe that the death penalty is unnecessary, even for the worst crimes, and that its use produces many bad effects and no significant benefits. That is why most democratic countries in the world, including our closest allies—Canada, Great Britain, Germany, France, among others—have abolished capital punishment and so suffered no ill effects. On the contrary, they have benefitted. The same is true of my home state of Michigan.

Question 2: Mr. Gross, I understand that when a death eligible case is forwarded to the death penalty review committee at the Justice Department, the committee members are told the race of the defendant, unless the defense attorney chooses to disclose it. Given this, how could there reasonably be racial bias in the capital review process at Main Justice?

Answer: I agree that to the extent that the committee members are unaware of the race of the defendants and the victims, they cannot engage in intentional racial discrimination.

QUESTION FROM SENATOR FEINGOLD

Question 1: What are the questions that need to be answered and data that needs to he gathered in the study to be conducted by the National Institute of Justice?

Answer 1: The basic questions that need to be answered in the study to be conducted by the National Institute of Justice are:

(1) How are potentially capital cases chosen for Federal rather than state prosecution? What factors effect that decision? Is it influenced by race, or by geography, or by other illegitimate or arbitrary factors?

(2) Among those potentially capital cases that are prosecuted federally, how does the DOJ decide when to seek the death penalty? What factors affect that decision? Is it influenced by race, or by geography, or by other illegitimate or arbitrary factors?

(3) How does the DOJ decide when to offer or agree to plea bargains in capital cases, and when not to do so? What factors affect that decision? Is it influenced by race, or by geography, or by other illegitimate or arbitrary factors?

(4) What general prosecutorial policies, if any, affect the DOJ's decisions to prosecute potentially capital cases, to seek the death penalty, and to engage in plea bargaining in capital cases? If such policies exist, how are they determined and how do they affect the racial composition of the cases in which the DOJ seeks the death penalty, and of the cases in which it is imposed? (for example, a recent news article describes a difference in practice between the DOJ units that investigate and prosecute mostly white "organized-crime" defendants, and those that deal with mostly minority "street-crime" defendants: the street-crime unit is far more likely to seek the death penalty. See Tom Brune, "The Two Faces of the Death Penalty; Minority Gangs Face It, White Mobsters Do Not." Newsday, 6/13/01, P.A6.)

It is impossible to describe specifically the data that will be needed to answer these questions until we find out what data are maintained by the DOJ, and what data will be made available for this study. To the extent that the data that need to be gathered can be described in advance, they include:

(1) Data on the entire universe of homicides that could be prosecuted as death-eligible federal offenses, including, to the extent possible, information on the nature of the alleged crimes; the evidence available to prove them; the criminal histories of the defendants and the victims; and the age, sex and race of the defendants and the victims.

(2) Data on potentially capital federal cases that are prosecuted by the DOJ, including, to the extent possible, information on: the nature of the alleged crimes; the evidence available to prove them; the criminal histories of the defendants and the victims; and the age, sex and race of the defendants and the victims.

(3) Data on the decision-making process in potentially capital federal prosecutions, including, to the extent possible, data on: the actions taken and the information considered in deciding whether to prosecute a case federally, whether to seek the death penalty, and whether to offer or to agree to a plea bargain.

(4) Data on any prosecutorial policies that affect the DOJ's decisions to prosecute potentially capital federal crimes or to decline to do so, to seek or not to seek the death penalty, and to engage in plea bargaining or not to do so.

SUBMISSIONS FOR THE RECORD

Statement of American Civil Liberties Union, Washington, DC

NEWS RELEASE

ACLU CALLS ASHCROFT DEATH PENALTY POSITION SWITCH, REMARKABLE AND UNBELIEVABLE

WASHINGTON—In light of last week's remarkable—and frankly unbelievable—switch of positions by Attorney General Ashcroft on the federal death penalty, the American Civil Liberties Union continued its call today for the Justice Department to fulfill its pledge to conclusively investigate the extent of racial and geographic disparity in the imposition of the death penalty by the federal government.

"It appears that Mr. Ashcroft has decided to turn his bailiwick into the Department of Injustice," said Rachel King, ACLU Legislative Counsel. "The Administration is obviously playing politics with people's lives."

In a preliminary report issued in September of last year, the Justice Department found very significant disparities that led President Clinton, a death penalty supporter, to impose a six-month delay in what was scheduled to be the first federal execution in almost 40 years. During that six-month period, Clinton ordered the Justice Department to finish its preliminary report.

The preliminary report had found that in 75 percent of the cases in which a federal prosecutor sought the death penalty in the last five years, the defendant had been a member of a minority group, and that in more than half of the cases, the defendant was an African American.

But the report that came out last week from the new Bush Administration Justice Department found no significant disparity.

The preliminary report found that 85 percent—or 17 out of 20—of those on federal death row are people of color. And in 80 percent—or 548 out of 684—of the cases submitted to the Attorney General as a possible federal death penalty case, the defendant was not white.

In addition to concerns about race and ethnic bias, the survey revealed geographic disparities in the federal capital prosecutions sought. For example, most death penalty prosecutions were pursued by only a handful of federal prosecutors—42 percent or 287 out of 682 of the federal cases submitted to the Attorney General for review came from just 5 of the 94 federal districts.

"This Administration is seeking political cover for its desire to execute Juan Garza," King said. "Worse, they're willing to get it at the expense of the truth. It's that simple."

The ACLU is releasing a report detailing the problems with the Justice Department's current analysis, and will be placing an ad in Friday's *Washington Times* criticizing the findings.

News Article from Associated Press, June 14, 2001

DEATH PENALTY SYSTEM RACISM DISPUTED

Washington (AP)—Days before a Hispanic drug dealer is to be executed in the same chamber as Oklahoma City bomber Timothy McVeigh, death penalty advocates told members of Congress that racism doesn't exist in the federal death penalty system.

"In my experience for seven years as a federal prosecutor, I saw no evidence that the race of defendants or victims had any overt or covert influence on this process," said Andrew BcBride, former Virginia federal prosecutor who testified before a Senate Judiciary subcommittee on Wednesday. "I believe the charge is fabricated by those who wish to block enforcement of the federal death penalty for other reasons."

Juan Raul Garza, 44, is a convicted drug runner who killed one many and ordered the deaths of two others he thought were informers. His lawyers argue that he should be spared because there are more Hispanics and blacks on federal death row than whites.

Sen. Russ Feingold, D–Wis., a death penalty opponent, said Wednesday that 17 of the remaining 19 federal death row inmates are minorities, 14 of whom are black.

Besides Garza, no other death row inmates have executions scheduled. Monday's execution of McVeigh was the first time the federal death penalty has been carried out in 38 years.

Attorney General John Ashocroft issued a report last week that said there is not evidence of racial bias in federal death penalty cases.

"The case of Juan Garza illustrates why the call for a moratorium is misguided," said Sen. Orrin Hatch, R–Utah. He said Garza is facing the death penalty because he is guilty of committing heinous crimes, not because he is Hispanic.

Ashcroft's report differed from a report former Attorney General Janet Reno issued in September that led former President Clinton to delay Garza's execution for six months, until June 19. Reno's report said the Justice Department found significant racial and geographic disparities in the system.

Feingold said nothing had been done on Reno's limited study since early January, despite Ashcroft's pledge to continue looking into the issue.

"I believe that the execution of Juan Garza should again be postponed, and indeed, there should be a moratorium on all federal executions until a thorough and independent study by (the National Institute of Justice) is completed and considered," Feingold said.

Julian Bond, chairman of the National Association for the Advancement of Colored People, said, "At no time since the death penalty was reinstated by the Supreme Court in 1976 have Americans voiced such grave doubts about the fairness and reliability of capital punishment."

Editorial from the Atlanta Journal-Constitution, June 8, 2001

THE EVIDENCE IS CLEAR

Opponents of the death penalty should quit ignoring facts that refute claims of racial bias and work instead to determine why minorities are overrepresented in the commission of crimes.

When the U.S. Justice Department issued a report proving that racial prejudice doesn't play any significant role in imposition of the death penalty in federal cases, the reaction from staunch opponents to capital punishment was predictable: Don't confuse us with the facts, our minds are made up.

As we noted in an editorial last month, no objective and fair-minded person can seriously argue that the system used to determine which federal cases merit death-penalty prosecution is biased.

All cases in which capital punishment is a possibility are sent by U.S. attorneys to a special review panel and eventually to the attorney general; information about the ethnic background of the defendants is concealed during this process. The result is that capital punishment is recommended at a higher rate for white defendants than for minorities.

The fact that more blacks and Hispanics end up on federal death row is the result, then, of the reality that more minorities are convicted of crimes that carry the potential of capital punishment.

As we wrote earlier, even if there is no bias at the end of the process, it would be useful to exmine earlier stages for signs of questionable practices.

The Justice Department report issued this week does just that, and produces a wholly satisfactory explanation. It turns out that there are several special circumstances in various locations that have resulted in a larger number of minority defendants being tried in the federal court system for crimes that carry the death penalty.

In Puerto Rico, for instance, local authorities and the U.S. attorney have an agreement that fatal carjacking cases should be handled as federal, not local crimes. That resulted in 72 murder cases being submitted for review during the past five years, all of them involving Hispanic defendants.

In Virginia, federal prosecutors handled the cases of 66 defendants charged with multiple murders committed by a non-white drug gang; in California, prosecution of members of a "Mexican Mafia" prison gang skewed the proportion of Hispanics sent up for death-penalty review; and in the District of Columbia, where the U.S. attorney has jurisdiction over local as well as federal crimes, 22 of 23 cases involved minorities because the district's population is predominatly black.

No amount of evidence, of course, will ever satisfy those who simply oppose capital punishment altogether and seize on supposed racial bias as a tool to use against the death penalty itself. But for people to whom facts are important, this study of-

fers considerable reassurance that the federal criminal justice system is not driven by racism, but in fact bends over backward to be certain that each stage of the process is fair.

No institution created and operated by human beings can be perfect, but this one appears to be as nearly above reproach as any we've seen. If the critics really want to be useful, why don't they turn their efforts to determining why minorities are overrepresented in the commission of crimes, and see if they can find a cure for that?

Editorial from the Atlanta Journal-Constitution, Thomas Sowell, June 15, 2001

JOURNAL: OPPONENTS GETTING DESPERATE:

EXAMINING THE DEATH PENALTY DEBATE

Palo Alto, Calif.—The execution of Timothy McVeigh has again raised the issue of capital punishment. Much of the case against capital punishment does not rise above the level of opaque pronouncements that it is "barbaric," by which those who say this presumably mean that it makes them unhappy to think of killing another human being. It should. But we do many things we don't like to do because the alternative is to have things that make us even more unhappy.

As Adam Smith said, two centuries ago, "Mercy to the guilty is cruelty to the innocent." Those who lost loved ones in the Oklahoma City bombing do not need to spend the rest of their lives having their deep emotional wounds rubbed raw, again and again, by seeing Timothy McVeigh and his lawyers spouting off in the media. McVeigh inflicted more than enough cruelty on them already and they need to begin to heal.

Sometimes those who oppose capital punishment talk of "the sanctity of human life." Ironically, many of these same people have no such reluctance to kill innocent unborn babies as they have to execute a mass murderer. But the issue of capital punishment comes up only because the murderer already violated the sanctity of human life. Does his life have more sanctity than the life or lives he has taken?

Shabby logic often tries to equate the murderer's act of taking a life with the law's later taking of his life. But physical parallels are not moral parallels. Otherwise, after a bank robber seizes money at gunpoint, the police would be just as wrong to take the money back from him at gunpoint. A woman who used force to fight off a would-be rapist would be just as guilty as he was for using force against her.

It is a sign of how desperate the opponents of capital punishment are that they have to resort to such "reasoning." Since these are not all stupid people, by any means, it is very doubtful if these are the real reasons for their opposition to executions. A writer for the liberal New Republic magazine may have been closer to the reason when he painfully spoke on TV about how terrible he felt to watch someone close to him die.

Nothing is more universal than the pain of having someone dear to you die, whether or not you witness it. Nor should anyone rejoice at inflicting such pain on someone else. But one fatal weakness of the political left is its unwillingness to weigh one thing against another. Criminals are not executed for the fun of it. They are executed to deter them from repeating their crime, among other reasons.

Squeamishness is not higher morality, even though the crusade against capital punishment attracts many who cannot resist anything that allows them to feel morally one-up on others.

It is dogma on the political left that capital punishment does not deter. But it is indisputable that execution deters the murderer who is executed. Nor is this any less significant because it is obvious. There are people who would be alive today if the convicted murderers who killed them had been executed for previous murders they had committed.

Glib phrases about instead having "life in prison without the possibility of parole" are just talk. Murderers kill again in prison. They escape from prison and kill. They are furloughed and kill while on furlough. And there is no such thing as life in prison without the possibility of a liberal governor coming along to pardon them or commute their sentence. That, too, has happened.

The great fear of people on both sides of the capital punishment debate is making an irretrievable mistake by executing an innocent person. Even the best legal system cannot eliminate human error 100 percent. If there were an option that would

prevent any innocent person from dying as a result of our legal system, that option should be taken. But there is no such option.

Letting murderers live has cost, and will continue to cost, the lives of innocent people. The only real question is whether more innocent lives will be lost this way than by executing the murderers, even with the rare mistake—which we should make as rare as possible—of executing an innocent person.

Thomas Sowell is a senior fellow at Stanford University's Hoover Institution. His column appears occasionally.

Statement of David C. Baldus, Joseph B. Tye Distinguished Professor of Law, College of Law, University of Iowa

I have read U.S. Department of Justice, *The Federal Death Penalty System: Supplementary Data Analysis and Revised Protocols for Capital Case Review* (June 6, 2001) ("the report"), which supplements the DOJ report of September 12, 2000. The following comments explain why in the face of the findings and data in the DOJ September 2000 report, the latest DOJ report utterly fails to convince me that there is no significant risk of racial unfairness and geographic arbitrariness in the administration of the federal death penalty. I believe there is still the just as much reason to be concerned about these issues as there was when the September 2000 report was issued.

1. THE REPORT COMPLETELY OVERLOOKS THE EVIDENCE OF RACE-OF-VICTIM DISCRIMINATION DOCUMENTED IN THE SEPTEMBER 12, 2000 REPORT.

A main theme of the latest report (p. 10) is that the death penalty authorization rate is higher for whites (.38) than it is for blacks (.25) and Hispanics (.20). These are the same figures that appeared in the September 2000 report. The latest report's emphasis on these statistics appears to suggest that white defendants are actually treated more punitively than minority defendants.

A more plausible explanation for the higher authorization rates for the white defendants is plainly documented in the September report—(1) white defendants are more likely to have killed whites [1] and (2) the U.S. Attorney charging and DOJ authorization rates are much higher in white-victim cases than they are in minority-victim cases. For example, data in the September 2000 report indicate that the Attorney General (AG) authorization rate for capital prosecutions is .37 (61/167) in whitevictim cases and .21(81/383) in minority-victim cases—a 16 percentage point difference that is statistically significant at the .001 level. The more punitive treatment of white-victim cases is a plausible alternative explanation for the higher authorization rates in white-defendant cases that the new DOJ report does not even recognize, let alone dispel.

The September 2000 report also documents race-of-victim disparities in the actual imposition of death sentences in the federal system. Among all death-eligible offenders, those data indicate that the death-sentencing rate from 1995 to 2000 is twice as high in white victim cases as it is in minority victim cases. Nationwide, the rates are .05 (10/198) for the white-victim cases versus .02 (10/446) for the minority-victim cases; in the eleven states in which death sentences were actually imposed, the rate in the white-victim cases was .17 (10/59) versus .08 (10/119) in the minority-victim cases—a nine percentage-point difference.[2]

These are the same kinds of race-of-victim disparities documented in *McCleskey* v. *Kemp*.[3] The latest report simply ignores the data on race-of-victim disparities in

---

[1] For the cases for which both race-of-defendant and race-of-victim data are available, 92% (109/119) of the white defendant cases involved a white victim.

[2] The race-of-victim disparity nationwide is significant at the .06 level while the disparity in the states in which death sentences have been imposed is significant at the .09 level. The states in which death sentences were imposed between 1995 and 2000 are Arkansas, Georgia, Illinois, Kansas, Louisiana, Missouri, North Carolina, Oklahoma, Pennsylvania, Texas, and Virginia.

Of particular relevance are the race-of-victim disparities in case involving black defendants. Nationwide, in black defendant/white victim cases, the death-sentencing rate was .11 (6/55) while in the black defendant/minority victim cases, the rate was .03 (7/253), an 8 percentage-point difference significant at the .O1 level. In the eleven death-sentencing states, the death-sentencing rate in the black defendant/white victim cases was .24 (6/25) while in the black defendantlminority victim cases, the rate was .07 (7/95), a 17 percentage-point difference significant at the .02 level.

[3] 481 U.S. 279 (1987).

the charging and authorization process, and in the actual imposition of federal death sentences.

2. THE REPORT CONFOUNDS THE ISSUE OF "REGIONAL DISPARITIES" IN THE ADMINISTRATION OF THE FEDERAL DEATH PENALTY WITH THE ISSUE OF RACIAL DISPARITIES IN THE DISTRIBUTION OF DEATH ELIGIBLE CASES.

The report argues that we should not expect the proportions of black, white, and Hispanic offenders among death-eligible cases that are accepted for federal prosecution to correspond to "the racial and ethnic proportions in the general population." (p.13) Perhaps, but that is not the question. The real issue in this regard is the racial composition of the pool of death-eligible cases that are not accepted for federal prosecution. The report offers no data on that question. As a result, we do not know to what extent the death-eligible cases that were prosecuted in federal court are representative of all homicides that could have been charged as federal capital crimes, in the districts that are discussed in the report (pp.14–18) and in the country as a whole.

More importantly, the report seeks to equate its arguments concerning geographic disparities in the racial distribution of death-eligible cases with an explanation for clearly documented geographic and regional disparities in the administration of the death penalty. (Pp. 17–18) This is extremely misleading. The patterns that need to be studied are differences between regions in the rates at which death sentences are (a) sought by United State's Attorneys, (b) approved by the Attorney General, and (c) imposed by juries.

The September 2000 report clearly shows that in practice the federal death sentencing system is largely a Southern program. Twelve of the 19 men on federal death row as of September were sentenced in the South, including 6 from Texas and 4 from Virginia. The new report focuses on regional differences in the racial composition of the pools of potential capital cases that the districts have generated (p. 17). This has nothing to do with regional disparities in the rates at which death eligible defendants in the system are capitally charged and sentenced to death.

3. THE REPORT PRESENTS NO DATA OR OTHER COMPELLING REASONS TO DISPEL CONCERNS ABOUT THE EXERCISE OF DISCRETION BY U.S. ATTORNEYS IN THE POST-AUTHORIZATION STAGE OF THE PROCESS.

One the most striking findings of the September 2000 report is that in the period after the AG has approved a capital prosecution, 48% of white defendants avoid the risk of a death penalty by entering a plea agreement to a non-capital charge, while the rates that blacks and Hispanics enter such agreements are 25% and 28% respectively. (p.19) The department is obviously concerned about this issue because it plans to limit the power of U.S. Attorneys to enter such agreements without AG approval. (p. 22)

The report seeks to dispel concerns created by these data by pointing out first that it "takes two to make a plea agreement" and the data do not reflect racial differences in the rates at which the government offered post-authorization plea agreements. This argument raises an empirical question about the 62 cases (as of the September 2000 report) in which a postauthorization plea agreement was not reached. Was a plea bargain offered by the prosecution in these cases and rejected by the defense, or was none offered? It would have been easy for the DOJ to ask its own prosecutors whether they offered plea agreements in these cases. Apparently, it was not done.

The report further argues that even if differential acceptance rates by white and minority defendants did not explain the race disparities in the post-authorization guilty pleas, the September 2000 report's findings on this issue "would not be suggestive of bias by the U.S. Attorney's offices." (p. 20) The argument is that the detection of discrimination by U.S. Attorneys must rest on an analysis of "what happens in the process as a whole" and that decisions taken "at the final plea stage are uninformative as possible indications of bias by the U.S. Attorney offices." (p.20) Certainly it is important to view the system as a whole, but prior research demonstrates that race disparities may operate at discrete stages in a decision making process that overall appears to be evenhanded. There is serious cause for worry here, and the report makes no attempt to address it.[4]

[4] The report's argument also overlooks the fact that many of the post-authorization plea agreements are made in cases in which the U.S. Attorney's initial recommendation to waive the death penalty was overruled by the AG, a circumstance that needs to be factored into any analysis of the post-authorization decisions.

The claim that no differential treatment exists in the post-authorization plea stage is a mere assertion with no evidence whatever to support it. Without data on the comparative culpability of the offenders (and the race of the victims) in the cases affected by these postauthorization pleas bargaining decisions, one has no idea the extent to which similarly situated defendants were in fact treated comparably.

4. THE REPORT PROVIDES NO COMPELLIN REASON FOR THE DOJ'S FAILURE TO AUTHORIZE A COMPREHENSIVE STATE OF THE ART STUDY OF FAIRNESS IN THE ADMINISTRATION OF THE FEDERAL DEATH PENALTY SYSTEM.

The report notes a meeting of "researchers and practitioners on January 10, 2001" in Washington D.C. to consider the feasibility of conducting a comprehensive empirical study and evaluation of fairness in the administration of the federal system. (p.11) 1 was one of the researchers at that meeting.

The report correctly states that there was general agreement at the January meeting that the conduct of such a study would entail a "multi-year research initiative." Two years would be the likely time line. In the meantime, half a year has passed since that meeting, and nine months since the release of the initial report, and neither the NIJ nor any other agency of the Department of Justice has taken any visible step to begin to make such a study possible. Quite the opposite. Attorney General Ashcroft's testimony last week suggested that he believes that the idea should be abandoned.

The report also states that "discussion" at the January 10 meeting "indicated," that such a study "could not be expected to yield definitive answers concerning the reasons for disparities in federal death penalty cases." This was certainly not the consensus of the researchers at the January 10 meeting. On the contrary, the consensus was that such a study would provide the best possible evidence on the question. Certainly the results of such a study would yield far more definitive answers to the issue of racial fairness in the system than the arguments presented in the department's latest report.

The new report offers no reason at all why such a study should not be conducted even if it would require up to two years to complete. It also offers no reason why the DOJ appears unwilling to identify by defendant name and docket number the more than 700 death-eligible cases that make up the database for its latest study. With this information independent researchers could collect data on the cases in the DOJ database and conduct the kind of study that would provide the best evidence available on the question of fairness in the federal death sentencing system.

5. THE REPORT MISCONCEIVES THE NATURE OF RACE DISCRIMINATION IN THE ADMINISTRATION OF THE FEDERAL DEATH PENALTY.

A main theme of the report is that the core issue of racial fairness is whether U.S. Attorneys are consciously engaged in "favoritism towards White defendants." (p. 11) In other words, are their decisions based on "invidious" racial reasons (p.12) or motivated by "bias" (p. 20) or a "particular desire to secure the death penalty for minority defendants." (p. 17) This states the issue far too crudely. No one with an understanding of the system suggests that it is driven by such a conscious and blatant animus against minority defendants or defendants whose victims are white.

The concern about racial unfairness in the system is whether defendants with similar levels of criminal culpability and deathworthiness are treated comparably or differently because of their race or the race of their victims. The reasons for differential treatment by U.S. Attorneys—and by agents of the FBI, the DEA and other are federal law enforcement agencies—are almost certainly nonconscious. More importantly, the reasons for the differential treatment of similarly situated offenders on the basis of their race or the race of the victim are irrelevant. It is the fact that differential treatment cannot be explained by legitimate case characteristics that makes it morally and legally objectionable, when it exists. Without a systematic study based on full information concerning the criminal culpability and the race of the victims of all of the death eligible offenders, we will remain in the dark about whether unexplained differential treatment based on the race of the defendant and victim exists in the federal death penalty system, and if so, what causes it.

Editorial from the Boston Globe, Jeff Jacoby, June 18, 2001

DEATH PENALTY 'ARGUMENTS'

TWO DAYS after Timothy McVeigh's execution, The New York Times published eight letters to the editor discussing the event and expressing an opinion on the death penalty. Six of the eight were against executing murderers, one was in favor, and one was in favor in a case of mass atrocity like McVeigh's.

Four days earlier, the Times had published a letter from a death-penalty supporter. The day before that there had been three letters on the subject, all opposed. A few days earlier, three more letters; again, all opposed. And four letters opposing capital punishment had appeared in May, around the time McVeigh was originally supposed to die.

By my count, then, over the past six weeks the Times has run 19 letters remarking in some fashion on the death penalty, of which 16–84—percent were anti-execution.

Now, letters to the editor, even in the nation's unofficial "paper of record," are no gauge of public opinion. It is common knowledge that Americans support capital punishment—in McVeigh's case, overwhelmingly.

But even if letters published in the Times are no reflection of society at large, they do tell us one thing: what sort of letters the Times, with its global readership and famously high standards, deems worthy of publication.

So it is striking that the collective case made by the Times's recent blizzard of anti-death penalty letters was so feeble.

With McVeigh's death, wrote Rob Ham of California, "What has changed? The victims are still dead. Do the families now have closure? Can anyone ever have closure after losing a child, a husband, a wife, or a parent?"

This is an appeal to emotion, not reason. Of course the victims are still dead. They would still be dead if McVeigh had gotten life in prison, too. Or 20 years. Or probation. No one thinks the purpose of punishment is to undo the crime, yet death penalty abolitionists routinely remind us that killing a murderer won't bring his victims back to life. If that is a reason to ban executions, it is a reason to ban all punishment.

Ham's "closure" argument, meanwhile, is simply uninformed. The families of murder victims do not stop mourning when the killer dies, but for many, there is indeed a measure of solace in knowing that the monster who destroyed their loved one will never hurt anyone again. Abolishing executions certainly won't bring "closure" to grieving relatives. On the contrary, it will deepen their torment, mocking them each time they remember that the person they their torment, mocking them each time they remember that the person they loved is in the grave, while his killer continues to breathe.

From Michigan, Dawne Adam wrote that she wept at the news of McVeigh's execution. "It is barbaric for any country to murder its citizens, despite the damage they may do."

The barbarism of the death penalty is taken for granted by anti-execution fundamentalists. They believe fervently that when the state kills, it commits a great evil. This is not something they can prove logically or explain rationally—it is, for them, simply an article of faith.

Why is it barbaric to require that one who violently steals the life of an innocent (or 168 innocents) not be allowed to keep his own? Where is the moral tradition that prescribes life for mass-murderers? How can it be civilizing to tell the world's worst people that no matter how many victims they butcher, no matter what cruelty they inflict on others, the worst that will happen to them is that they will go to prison? Those are questions that abolitionists never answer.

"The loss of freedom for the remainder of one's life is no mild punishment," James Bernstein of New York wrote to the Times. "We do not need the death penalty to express society's utter repudiation of those who would take the lives of others."

Bernstein has it exactly wrong. A society that bans the death penalty outright Buy a Globe photo is confirming that it does not utterly repudiate its worst murderers. The United States last week made clear just how seriously it regards McVeigh's monstrous crime. Change the law so that no future McVeigh can be put to death, and the United States will be sending a different message: Mass murder isn't that bad.

Other letters made even weaker arguments. McVeigh should have been kept alive, in one Oklahoma writer's view, so scientists could study him and "try to determine

the cause of these acts of violence." A Michigan psychologist wanted him spared so we could analyze "the psychopathy that creates people Search the Globe: like him."

And then there were those who hated to see McVeigh miss out on the finer things in life.

"Would we not all have been better off it Mr. McVeigh had lived a long, secluded life in prison?" asked Michael Pressman of New York. "He could have read history and literature. He could have painted and sculpted and listened to great music. His new-found knowledge and maturity could have obliterated his warped views. He could have lived in profound regret."

Those of us who favor death for murderers rely on history, on common sense, and on a moral tradition stretching back to Sinai. But in our time as in all times, there are those who would rather let evildoers get away with murder. The debate goes on.

Article from the Boston Herald, Don Feder, June 20, 2001

Timothy McVeigh was a test of faith for anti-death penalty die-hards. With Juan Raul Garza, executed yesterday in Terre Haute, Ind., they were on more familiar ground.

The drug dealer and convicted murdered of three became the second federal prisoner executed since 1963. Late last year, then-President Bill Clinton issued a stay of execution after a Justice Department study disclosed that between 1995 and 2000, where U.S. attorneys sought the death sentence, 80 percent of defendants were minorities.

This led NAACP Chairman Julian Bond to sermonize, "I don't believe that anyone, ever the strongest supporter of the death penalty, wants anyone to die unfairly," Note that Bond isn't specking of the innocent dying, but violation of some mythical standard of absolute fairness.The possibility that a disproportionate number of minorities may be committing capital crimes under federal law never penetrates their mindset.

A more recent study showed that where the feds could have sought the death penalty, they did so 58 percent of the time when the defendant was Hispanic, in 79 percent of cases where he was black and in 81 percent of cases where the accused was white.

Two of Garza's victims were Hispanic, as was the judge who tried this case and the assistant U.S. attorney who prosecuted him. Bias here exists only in the eyes those who see everything through race-colored glasses.

Sadly for them, the race card couldn't be played with McVeigh. "We're executing too many white, militia types," just doesn't cut it. The mad bomber admitted to his horrific crimes, for which—to his dying breath—he showed no remorse.

According to a Gallup poll, 81 percent of the American people wanted McVeigh put down. Among them were 58 percent of those who say they're against capital punishment.

Death penalty opponents were reduced to stamping their feet like petulant children. "We're giving him exactly what he wants"—a media menagerie followed by a quick end—they pouted.

Quite the contrary. After his conviction, McVeigh decided not to prolong the inevitable. When there seemed to be a chance that his sentence might be overturned—based on FBI files not initially turned over to the defense—he instructed his attorneys to petition for a stay of execution.

When it became clear that this was futile (after the 10th U.S. Circuit Court of Appeals turned him down), he accepted his fate. McVeigh wanted to live but knew his course was hopeless.

Yes, but whether clear that this was futile (after the 10th U.S. Circuit Court of Appeals turned him down). he accepted his fate. McVeigh wanted to live but knew his cause was hopeless.

Yes, but whether or not a murderer wants to die, life in prison is a much better punishment, opponents urge. Let him rot in a cell.

If Timothy McVeigh had lived another 60 years behind bars, he would have spent that time using his screwball philosophy to justify his atrocities—mocking his victims and their families in the prcess.

What exactly did those who opposed his execution have in mind for the mass murder? That he be kept in solitary confinement, shackled and blindfolded, denied diversions and all human contact?

Hardly. Wile McVeigh's life in prison would been circumscribed, Still he would have visits from family and friends, letters from deranged admirers, and access to books, music and television.

Opponents think themselves especially clever when the observe that an execution won't resurrect the murderer's victims. But punishing a rapist won't undo his crime either. There are very few cases, mostly restitution for property crimes, where the victim is returned to his original condition.

For death-penalty foes, the argument doesn't turn on racism, innocents dying or any of the other facile arguments advanced.

Exhibit A is Michael Radelet, a University of Florida professor who candidly argues, "The death penalty debate is not about the McVeighs and Bundys," but "the poor, victims of child abuse, people who had bad attorneys." (Ted Bundy was a notorious serial Killer of the 1970's.)

In other word, if the murderer was impoverished, aroused, a victim of discrimination, denied the services of a Johnnie Cochran Jr.—if he was emotionally deprived, confused—he doesn't deserve to die.

Given enough time, Radelet and Co. could find extenuating circumstances for any killer, even a McVeigh or a Bundy.

Article from the Dallas Morning News, Michelle Mittelstadt, June 14, 2001

SOME URGE MORE STUDY OF DEATH PENALTY, BIAS

Washington—A week after Attorney General John Ashocroft declared there is no evidence of racial or ethnic bias in the use of the federal death penalty, his remarks are continuing to provoke consternation on Capitol Hill.

Senate Democrats and several witnesses at a congressional hearing hastily called in advance of next week's execution of a Hispanic murderer from Texas said Wednesday that it's far too early to make such a sweeping pronouncement.

"That conclusion is premature and not based in fact," said Columbia university law school professor Samuel Gross, a death penalty expert.

He and others contend that further analysis is required to explain the cause of persistent racial and geographic disparities that are most graphically manifested by the composition of federal death row—where 17 of the 19 convicts are minorities, more than half of them dispatched there by just two states: Texas and Virginia.

"We cannot in good conscience put people to death until we are confident in the fairness of the system that leads to those decisions," said Sen. Russell Feingold, D–Wis., chairman of the Senate Judiciary subcommittee that held Wednesday's hearing. "I do not yet have that confidence, and many in the country share my concerns."

TRAFFICKER'S CASE

Mr. Feingold, who is pressing for a moratorium on federal executions until questions about the treatment of minorities are fully answered, renewed his call for the government to halt the impending execution of Brownsville marijuana trafficker Juan Raul Garza.

The 44-year-old, who was sentenced to death for the murders of three associates, faces lethal injection Tuesday at the federal execution facility in Terre Haute, Ind., where Oklahoma City bomber Timothy McVeigh met his death Monday. Mr. Garza's lawyers are asking President Bush to commute his sentence to life imprisonment without possibility of parole, contending that the capital punishment system is "grossly" discriminatory.

The attorney general has said he knows of no reason to defer Mr. Garza's death date. He also opposes a moratorium on executions.

Mr. Ashcroft said last week that a Justice Department review of nearly 1,000 cases in which defendants were charged with federal crimes punishable by death turned up "no indication" of any racial or ethnic bias.

The study "provides no evidence of favoritism towards white defendants in comparison with minority defendants," Deputy Attorney General Larry Thompson reiterated Wednesday. While the study found that more minorities are charged with crimes punishable by death, he said white defendants were statistically more likely to be recommended for capital prosecution at every level of the process.

SUBJECT OF CRITICISM

That study, which is a follow-up to a Justice Department study last year that found pronounced racial and geographic disparities, was roundly denounced by critics.

"We reject any suggestion that the report released by Mr. Ashcroft on June 6 constitutes a reliable or thorough study of possible racial and regional bias in the federal death penalty system," NAACP Chairman Julian Bond told the subcommittee.

He and others say there cannot be a definitive answer about whether the system is biased until researchers examine prosecutors' decisions on which criminal charges to file; which plea bargains to grant; or whether to file in state or federal court.

Some of those questions could be answered by a study that Mr. Ashcroft is directing the National Institute of Justice to undertake, using independent experts to examine the prosecution of murder cases at the state and federal levels. That review first was suggested by Mr. Ashcroft's predecessor, Janet Reno, but never got off the ground.

Mr. Feingold, who was critical Wednesday of the delay in starting the National Institute of Justice study, said it would be a "tragic mistake and an unnecessary mistake" to execute Mr. Garza while the latest study is in progress.

There was little sympathy for that view—or for a moratorium—from subcommittee Republicans, who noted that Mr. Garza's guilt is not in doubt. The prisoner has acknowledged responsibility for the crimes.

"Like all of the defendants on federal death row, Mr. Garza faces execution not because of his race, ethnicity or place of residence, but because he is guilty of committing heinous crimes," said Sen. Orrin Hatch, R–Utah.

The hearing, said Sen. Strom Thurmond, R–S.C., is "really about an endless political effort to discredit the death penalty by any possible means."

James Fotis, executive director of the Law Enforcement Alliance of America, a lobbying group, bristled at what he called "baseless and shameful racist accusations that law enforcement officers are somehow selectively apprehending criminals based on the color of their skin."

But, Mr. Feingold replied, "No one has accused anyone in the system of being intentionally racist or biased."

COCAINE QUESTION

Sen. Jeff Sessions, R–Ala., questioned whether some of the racial disparity in the system might be due to federal sentencing guidelines that order far harsher penalties for crack cocaine than powder cocaine.

The federal government's focus on drug trafficking does play a role, said Mr. Thompson, the deputy attorney general "In areas where large-scale, organized drug trafficking is largely carried out by gangs whose membership is drawn from minority groups, the active federal role in investigating and prosecuting these crimes results in a high proportion of minority defendants," he said.

DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
Washington, D.C. 20537

The Honorable Russ Feingold
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

After reviewing the testimony of Samuel R. Gross before the United States Senate Judiciary Subcommittee on Constitution, Federalism, and Property Rights on June 13, 2001, I feel compelled to respond to some of his points which I believe acre erroneous. Mr. Gross suggests that the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) discriminate by race in the initial decision to undertake a federal investigation.

Mr. Gross states that "The Ashcroft Report focuses on the professionalism of Assistant United States Attorneys, the lawyers who make the legal decisions once a case has been taken on. But the initial decision to undertake a federal investigation is often made by law enforcement agents rather than prosecutors, by the FBI or the DEA, rather than United States Attorneys. Perhaps these two sets of DOJ employees have different patterns of behavior." Mr. Gross continues by asking "Are Federal

law enforcement agencies, the FBI and the Drug Enforcement Administration searching for African American and Hispanic drug dealers because they think they know that the worst drug traffickers are all black or Latin American- Are the racial disparities is Federal capital prosecutions a manifestation of race-specific drug investigations?"

For the record, I would like to inform the committee that the men and women of the Drug Enforcement Administration (DEA) do not engage in racial profiling, nor do they engage in discriminatory practices on the basis of ethnicity—More specifically, DEA does not adopt a blanket assumption that individuals engage in criminal activity simply because they are minorities. To the contrary, crime is universal, and DEA investigates illegal activity wherever it may occur. Furthermore, DEA does not selectively enforce the law based upon race or ethnicity as a basis for law enforcement action. Drug enforcement based on race or ethnicity is not only ineffective, but it is illegal.

The DEA does not use race, national origin, or religion as part of a "profile" to target individuals. Rather, in making investigative decisions, DEA relies on other factors which, in the totality of the circumstances, create reasonable suspicion that an individual is involved in criminal activity.

Mr. Chairman, attached is a memo from me to the men and women of the DEA articulating my unwavering opposition to the unlawful use of race or ethnicity in the discharge of our law enforcement duties. I respectfully request that this letter, and the attached memo be entered into the hearing's official record.

I would like to assure the Committee that DEA will continue to uphold its longstanding opposition to racial profiling and that I, as the Agency head, will not tolerate any form of racial or ethnic profiling in the discharge of DEA's mission.

Sincerely,

DONNIE R. MARSHALL
Administrator

Memorandum of Donnie R. Marshall, Acting Administrator, Drug Enforcement Administration, Washington, DC

EXECUTIVE ORDER: FAIRNESS IN LAW ENFORCEMENT (FFS: 601–Q2.1)

ALL DEA EMPLOYEES

Over the last two years, there has been increased national attention given to racial profiling—the unlawful use of race or ethnicity is the discharge of law enforcement duties. At ever opportunity, while working with the Department of Justice, DEA has always articulated its unwavering opposition to this unlawful and unethical technique.

AS ever, I continue to state emphatically that DEA has not and will not investigate or collect intelligence against any one or say group based on their racial or ethnic makeup. DEA investigates individuals and criminal organizations-regardless of their origin or base of operation-that manufacture and traffic illicit drugs throughout the United States.

Crime is universal. Race sad ethnicity, therefore, are never a basis for law enforcement to suspect an individual of wrongdoing. In both DEA policy and case law, it is well established that a law enforcement officer may not rely on race or ethnicity as the sole basis for law enforcement action, such as a traffic or pedestrian stop or a request for consent to search.

On June 9, 1999, the President issued an Executive Order entitled, Fairness in Law Enforcement. Collection of Data. This Order directs the Departments of Interior, Justice, and Treasury to; (1) begin collection of Federal law enforcement data is as attempt to track the truce, ethnicity, and gender of persons stopped or searched by law enforcement; and (2) prepare a report on training programs, Policies, bad practices regarding the rue of rare, ethnicity, and gender in Federal law enforcement activities, along with recommendations far improving those programs, policies and practices. In compliance with the Order, and at the request of the Attorney General, DEA nominated Operation Jetway for inclusion in the pilot study. The pilot study is underway in several Jetway sites around the nation. The Attorney General will report to the President it the end of the first year field test. According to the Order, the Attorney General's report shall include:

> (i) an evaluation of the first year of the field test; (1) an implementation plan to expand the data collection and reporting system to other compo-

nents and locations within the agency and to make such system permanent; and (iii) recommendations to improve the fair administration of law enforcement activities.

I will continue to uphold DEA's longstanding position and, as the Agency head, will not tolerate any form of racial or ethnic profiling in the discharge of DEA's mission. Supervisors end managers and will continue to be, held accountable for the quality, outcomes, and constitutionality of encounter, with the public.

Proactive narcotics law enforcement is an effective way to protect the public from drug-related crime and violence. Drug enforcement based on race or city is not only ineffective, but is unethical and illegal. Such methods have no place in DEA, nor in law enforcement in general.

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535
June 13, 2001

Hon. Russ Feingold, Chairman
Subcommittee on the Constitution,
Federalism and Property Rights
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

We understand the deep concern that you and your colleagues have that the criminal justice system be administered without consideration of race. This principle is fundamental to the fairness of our system and one to which the FBI constantly dedicates itself in every aspect of enforcing the laws.

Submitted for your hearing today is testimony of Professor Goss of Columbia University suggesting that the FBI and DEA determine which federal drug investigations to undertake based upon the race of the drug dealers involved. While examination of the issue can be a healthy exercise to help address this postulation, reaching such a conclusion ignores the laws, guidelines, and congressional and judicial scrutiny under which we operate. Just as in every type of violation addressed by the FBI, race is not and cannot be a factor, let alone the dominant factor, in determining whether the threshold guidelines predicate has been reached for conducting an investigation.

Our commitment and our practice is to expend our valuable investigative resources in a manner that is color blind, regardless of the program or violation. Consistent with our strategic plan, resources dedicated to fighting violent crimes and major drug organizations are deployed based on analysis of factors such as crime patterns, complexity, levels of available local resources, levels of violence, degree of organized gang enterprises, and the likely impact our efforts will have on the overall safety of the community. There is no place in the equation for any factors that are not color blind in their application. This is true for these programs and every other, whether it be cybercrime, terrorism or any other of our major investigative programs.

Finally, I might add that the FBI devotes considerable resources to vigorously enforce the civil rights laws. No law enforcement officer is immune from investigation and prosecution for violating these laws. There is no alternative if we are to ensure fairness in the application of criminal justice.

Sincerely yours,

RUBEN GARCIA, JR.
Assistant Director
Criminal Investigative Division

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION
LEWISBERRY, PA 17339
June 12, 2001

Hon. Russ Feingold, Chairman
Subcommittee on Criminal Justice,
Senate Judiciary Committee
United States Senate
Hart Building, Room 506
Washington, DC 20510

Honorable Strom Thurmond
Ranking Member
Subcommittee on Criminal Justice,
Senate Judiciary Committee
United States Senate
Russell Building, Room 217
Washington, DC 20510

Dear Mr. Chairman and Ranking Member:

On behalf of the more than 19,500 members of the Federal Law Enforcement Officers Association (FLEOA), I wish to express our strong opposition to any national moratorium on the death penalty. FLEOA believes the option of imposing the death penalty should be available in certain extreme cases—In each of the pending cases in the federal system there is no doubt whatsoever of the person's guilt, nor is there any question that they haven't been afforded complete and competent counsel.

FLEOA is a volunteer, non partisan, professional association, exclusively representing federal agents, with members from the agencies listed on our left masthead. We recognize and understand the concerns expressed by individuals who want to ensure that any one convicted of heinous crimes is afforded all rights and privileges accorded under our Constitution. However, once these rights are afforded and a person is convicted and a jury determines this person should forfeit his right to live—than this option should be available. This would even include any federal agent (Philip Hassen) why would sell our country's most valuable secrets to our enemies.

On a personal note, in my Basic Criminal Investigators Class at the Federal Law Enforcement Training Center was Paul Broxterman. On April 19, 1995, he was sitting in his office in the Murrah Building in Oklahoma City, OK. He died that day along with 7 other federal agents, 19 children and 141 other people. It is our belief, any one perpetrating a crime such as this forfeits his right to exist in our society.

If you have any questions, or need further information please feel free to contact me directly at (212) 264–8406, or through FLEOA's Administrative offices at the numbers listed above. Thank you for your attention to this matter.

RICHARD J. GALLO

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION
LEWISBERRY, PA 17339
June 13, 2001

Hon. Russ Feingold, Chairman
Subcommittee on Criminal Justice,
Senate Judiciary Committee
United States Senate
Hart Building, Room 506
Washington, DC 20510

Honorable Strom Thurmond
Ranking Member
Subcommittee on Criminal Justice,
Senate Judiciary Committee
United States Senate
Russell Building, Room 217
Washington, DC 20510

Dear Mr. Chairman and Ranking Member:

On behalf of the more than 19,500 members of the Federal Law Enforcement Officer Association (FLEOA), I wish to address an false accusation of racism by federal law enforcement officers being made by Samuel R. Gross who is testifying before you Subcommittee today. Page seven of Gross' testimony, in substance, insinuates the FBI and DEA make decisions to initiate investigations based on a discriminatory racial basis. FLEOA believes nothing can be further from the truth.

FLEOA is a volunteer, non partisan, professional association, exclusively representing federal agents, with members from the agencies listed on our left masthead. We appreciate someone who has passion for his point of view, since we believe law enforcement is a calling, not just a job. However, when someone's passion is so great he manipulated the truth and thus becomes less than credible we feel it is our responsibility to bring this to your attention.

Federal law enforcement has many levels of oversight. We take a moment to remind everyone that each department has its own Internal Affairs unit as well as an Inspector General's Office. In addition, there is the Office of Professional Responsibility, the Civil Rights Division of the DOJ, tile FBI and many individual U.S. Attorney's offices. Historically, state and local prosecutors investigate the actions of Federal officers involved in shootings, or high profile cases of alleged wrongdoing. Federal Agents are subject to civil suits in Federal, state and local courts.

Finally, there is Congress itself, which is the ultimate oversight authority, since they control the purse strings of each agency. I challenge anyone to name a state or local law enforcement group that has as many layers of oversight as the Federal law enforcement community. If Gross has ever seen, heard or dreamed about any such decision that he implies the FBI and DEA are making, why has he never spoken out before this? Is he shy? Doesn't he know whom to call? Or is it. possible his passion over an issue tie feels so strongly about has blinded him to a higher set of ethics? FLEOA hopes you can get the answer since his statement may start as misguided accusations but then mutate into the media exclaiming this "theory" as the given truth. Thus, Gross will do more harm to our society and the law enforcement officers within it then he may realize.

If you have any questions, or need further information please feel free to contact me directly at (212) 264-8406, or through FLEOA's Administrative offices at the numbers listed above. Thank you for your attention to this matter.

RICHARD J. GALLO
National President

FRATERNAL ORDER OF POLICE
ALBUQUERQUE, NEW MEXICO 87109
JUNE 13, 2001

The Hon. Strom Thurmond Ranking Member,
Subcommittee on the Constitution,
Federalism and Property Rights
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

I am writing on behalf of the more than 294,000 members of the Fraternal Order of Police to express our views at the hearing being held today on the application of the death penalty as examined through the lens of race, It is my hope that the hearing will affirm the results of a review initiated by former Attorney General Janet Reno—the death penalty is meted out to our nation's worst criminals, regardless of their race.

The FOP supports the use of the death penalty at the state and federal level. This week, for the first time in almost forty years, a federal execution was carried out. Timothy McVeigh's horrific cringe precluded any real debate about whether the death penalty was appropriate in his case. Clearly, it was. However, X remind you and the Subcommittee that there are twenty-one (21) other criminals on death row whose crimes may lack the scope of this terrorist, but are deserving of the death penalty nonetheless.

We urge the Subcommittee to reject any suggestion or legislation that would end, curtail or delay the use of the death penalty at the federal level. If the death penalty is to be effective justice, federal executions must continue. It is our hope that Juan Raul Garza will be executed as scheduled on June 19. A moratorium on the death penalty is a moratorium on justice for the victims of the most heinous of crimes.

There is no evidence that a moratorium is necessary and to delay the application of justice in capital crimes thwarts the aims of justice and the will of the people and the Congress that put these laws in place. We do not want the administration of justice to become a political football.

In fact, we would ask that you consider joining with us to correct a loophole in federal law that makes the death penalty applicable to any person who murders a state or local law enforcement officer only if that officer is assisting a federal law enforcement officer or a federal investigation. We believe that anyone who murders a law enforcement officer—local, state or federal—should face the death penalty.

I thank you for your attention to the views of our nation's police officers, if I can be of any further help on this or any other issue, please do not hesitate to contact me or Executive Director Jim Pasco through my Washington on office.

Sincerely,

GILBERT G. GALLEGOS
National President

Statement of Joseph D. Hubbard, District Attorney, Calhoun County Courthouse, State of Alabama

Dear Senator Sessions:

On his last day in office, President Clinton commuted the death sentence of David Ronald Chandler who had been convicted ire United States District Court for the Northern District of Alabama in 1991 for murder in the furtherance of a continuing criminal enterprise. The Supreme Court of the United States was soon due to consider this case further when the commutation was granted. I implored the President not to intervene. While Chandler's attorneys and supporters, many in the media, have viciously attacked the integrity of those investigators and prosecutors who diligently pursued Chandler, the truth is that the President commuted a death sentence that was appropriate and fair under the circumstances of the case. My understanding is that the former Attorney General concurred, at least tacitly, in the President's actions. It is disheartening that both of these officials saw tit to turn their backs on their line personnel who had done nothing except vigorously enforce the law as written.

The evidence at trial showed that Chandler was the controlling partner in a large marijuana growing, transporting and trafficking operation between 1957 and 1990. He and his partners cultivated and harvested thousands of marijuana plants in eastern Alabama and western Georgia, and bought and sold large quantities of marijuana fair distribution. Testimony showed Chandler had attempted to use deadly physical force against a Georgia Bureau of Investigation officer upon a previous arrest, and that Chandler had said that "if he got set up again, he'd have to kill somebody."

Persons with intimate knowledge of Chandler's operation testified that Chandler had solicited them to kill an informant and the local police chief who had been instrumental in bringing Chandler's activities to the knowledge of state and federal law enforcement officials, according to these witnesses, Chandler offered money to secure these deaths, even providing a weapon for such use Martin Shuler, the deceased victim of Chandler's crime, informed local law enforcement in March 7, 1990 that Chandler was having marijuana distributed from the home of Shuler's ex-wife, Donna Shiner. A search warrant revealed Shiner's allegations true and Ms. Shuler was arrested for her possession of one kilogram of marijuana. The evidence at trial, indicated Chandler learned of Martin Shuler's informant activities during the legal proceedings concerning Ms. Shuler's arrest, Chandler, according to one witness, solicited him, to kill Shuler and the local police chief because of their intruding into his marijuana distribution process.

Charles Ray Jarrell, Chandler's brother-in-law who worked with Chandler in the growing and distribution, of the marijuana, testified Chandler offered him money on several occasions to "take care" of Martin Shuler Jarrell further testified that on the day of Shuler's death, Chandler told him Shuler was "going to cause us a lot of trouble" and that Jarrell "better go on and get rid of him." Chandler told him he still had the money available to pay Jarrell if he would do as he was asked, Jarrell testified that, using a gun given to him by Chandler, he shot Shuler while they visited a local lake, that he and Chandler buried the body in a remote mountain area, and hid Shuler's car Jarrell later led authorities to the gravesite. An autopsy was performed that revealed Shuler died from a gunshot wound to the back of the head.

Later, in August and September, 1990, Chandler made threats with respect to two other individuals who, according to testimony, he believed were stealing his marijuana from where it was being grown or stored. Neither of those individuals have been seen after early September 1990. Their families have never been allowed to bury their loved ones, yet Chandler has been able to sway the President of the United States that his fife should be spared.

Chandler's attorneys have painted their client as a "Robin Hood" type character and his prosecutors has suborners of perjury and liars themselves, They offer Jarrell's recantation of his trial testimony as incontrovertible evidence of Chandler's innocence when, in actuality, it is only one brother-in-law doing his best to have anorher removed from a death row cell he helped build. After 23 years of prosecuting criminals, I know there are no winners or losers in cases such as these only—justice should win. In this case, justice is mysteriously absent.

BIRMINGHAM, ALABAMA
June 11, 2001

Chairman Russell Feingold,
Ranking Member Strom Thurmond
Senate Judiciary Committee
Washington, DC

Dear Chairman Feingold and Committee Members

It is my understanding that the judiciary committee wants to somehow derail the federal death penalty. I am one who has witnessed first hand what violent crime can do to devastate a family. My only son, Dewayne was violently beat to death. There is no way the defendant could ever feel the pain or injustice that me and my family has felt. Justice truly is only served when the convicted murderer is given his just sentence. Being an African-American, some of my brethren might disagree. But, until you live through what we have lived through, you cannot possibly make that decision. I implore you all to not water down or try to place a moratorium on the death penalty. If you do, there will be more acts performed by cowards like Tim-

othy McVeigh and there only punishment will be life. Thank you for your time in reading my letter.

Sincerely,

LUCY JACKSON

THE LAW ENFORCEMENT
ALLIANCE OF AMERICA
FALLS CHURCH, VA
June 13, 2001

Hon. Russell D. Feingold, Chairman
Committee on the Judiciary
Subcommittee on Constitution, Federalism
and Property Rights
United States Senate
Washington DC 20510

Dear Mr. Chairman,

As a former federal law enforcement officer, I have seen the need for appropriate punishment in our criminal justice system. On those rare occasions when we are confronted by the most horrible criminals and their murderous deeds, it is extremely important to have a punishment that fits the crime—capital punishment.

Death penalty opponents have made all sorts of attacks on the death penalty in order to see it abolished. One such attack is based on claims of racial bias. I am an. African American, a law enforcement officer, but most importantly, an American citizen. It is my utmost concern that we have a fair and effective justice system and capital punishment is part of that system.

I urge you not to let those who cry wolf over race and capital punishment convince you to support a "moratorium" on the death penalty. Their concerns are not for racial justice, as they would oppose the death penalty with any excuse they can find.

One of the most fundamental principles of our justice system is that the application must be colorblind. So should the preservation of justice. Those violent criminals facing the death penalty should not be judged, counted or queried based on the color of their skin, but on their guilt or innocence. I urge you not to let unproven allegations revoke the justly given sentences of those whose crimes are proven.

Sincerely,

KENNETH V.F. BLANCHARD
Director

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
BALTIMORE, MD 21215–3297
July 16, 2001

The Hon. Patrick J. Leahy
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

In response to Senator Sessions' follow-up questions regarding the federal death penalty, I do oppose the death penalty in all cases.

So does the NAACP.

My testimony does not state or imply that Attorney General designee Ashcroft testified that he "would delay all federal executions until any or all studies were complete."

My statement that he "has broken his pledge" is explained in my written testimony.

Sincerely,

JULIAN BOND
Chairman
NAACP National Board of Directors

NATIONAL TROOPERS COALITION
ALBANY, N.Y. 12207
June 19, 2001

Hon. Strom Thurmond
Ranking Member
Subcommittee on Criminal Justice
Senate Judiciary Committee
Russell Building, Room 217
Washington, DC 20510

Dear Senator Thurmond:

On behalf of our Chairman, Scott Reinacher, and the National Troopers Coalition Membership, which represents this Nations' State Police and Highway Patrol sworn law enforcement personnel I am writing to affirm our support of the death penalty. The National Troopers Coalition supports the death penalty at both the State and Federal levels of government.

The death penalty is meted out in extreme conditions. When criminals such as Timothy McVeigh commit unspeakable heinous crimes that are even difficult to talk about the death penalty is the appropriate remedy. The death penalty has an important role to play in deterring and punishing the most heinous violent criminal offenders. The death penalty serves to permanently incapacitate extremely violent offenders. The death penalty serves as the important societal goal of just retribution. The death penalty also reaffirms society's moral outrage at the wanton destruction of innocent human life and assures the family and other survivors of murder victims that society take their loss seriously.

We urge the Subcommittee Members to reject any legislation that would place a national moratorium on delay of the use of the death penalty. The death penalty must continue to be an effective form of justice in this country. There is no evidence that a moratorium is necessary and to deny the will of the people and previously passed legislation would be an injustice to society and our former lawmakers.

Many of our nation's law enforcement officers are killed in the performance of their duties and we respectfully request that you remedy a loophole in current federal law that makes the death penalty applicable to any person who murders a state or local law enforcement officer only if that officer is assisting a federal law enforcement officer or a federal investigation. We believe that anyone who murders a law enforcement officer—local, state, and federal—should have the death penalty imposed.

Thank you for your continued support of this Nation's law enforcement officers.

Sincerely,

JOHNNY L. HUGHES
Director of Government Relations

Article in Newsday, Tom Brune, Washington Bureau, June 13, 2001

THE TWO FACES OF DEATH PENALTY

MINORITY GANGS FACE IT, WHITE MOBSTERS DO NOT

Washington—In September 1997, an aspiring organized crime associate named John Pappa was arrested on charges he had carried out several mob-war hits on orders of Colombo family members.

Two months later, an ambitious member of the Latin Kings street gang in Yonkers named Jose Santiago was arrested on charges he was the triggerman in a killing ordered by his leader to settle a personal dispute.

Although indicted for separate, unconnected murders, Pappa and Santiago, both 19 at the time of the crimes, each were charged with a federal offense—murder in aid of racketeering—that made them eligible for a capital trial and a sentence of death by lethal injection.

But after reviewing the cases, the federal government decided it would not seek the death penalty for Pappa, a white mob hitman charged in four murders, but that it would for Santiago, a Hispanic gang member accused of a single slaying.

These two cases reflect the racial and geographic disparity that clouds the federal death penalty, but they also highlight a little noticed fact overlooked in the Justice Department analysis of capital cases released last week. Scores of black and Hispanic street and drug gang members have faced death-sentence prosecutions, but white mob figures have been virtually exempt from the federal death penalty since it was restored in 1988.

Since then, more than 700 defendants have been charged with death-eligible federal offenses. The attorney general, who has the final say, has authorized death penalty prosecutions of 211 of them, according to court records and lists of cases compiled by the Federal Death Penalty Resource Counsel Project. At least 40 of those facing capital prosecutions were gang members but only one was a mob figure, the records and project's lists show.

Those numbers arise from a criminal justice system that has created two separate law enforcement strategies, one to pursue organized crime, another to pursue street gangs, a review of cases and interviews found.

Prosecutors and the Justice Department might have considered any number of undisclosed factors in making death-penalty decisions in the cases of Pappa and Santiago, a department official said.

But the public record of the two cases show the difficult and subjective choices the government must make in deciding which murders are such a threat to national interests that the criminal responsible deserves to die.

The decision to seek the death penalty in a case raises the stakes so high that many defendants plead guilty to avoid a possible execution, as Santiago did, rather than gamble on proving their innocence.

"Why are the white Mafia guys any less of a national threat than the black guys and Hispanic guys prosecuted for drug killings?" asked Elisabeth Semel, director of the American Bar Association's Death Penalty Representation Project.

"These figures make a very compelling case that the decisions at each stage of the process may very well contribute to the racial bias that we see in the federal death penalty," said Marc Mauer, executive director of the Sentencing Project.

Last week, however, Attorney General John Ashcroft said a Justice Department report found no racial bias in the administration of the federal death penalty. It blamed the fact that minorities are 90 percent of those on federal death row on factors such as regional demographics and relationships between local and federal prosecutors.

The report also cited Congress' war on drugs—and its targeting of high-volume, violent drug traffickers for death sentences.

Ashcroft stressed that Justice Department capital cases are based on the offenses that Congress decided were worthy of death when it passed death penalty laws in 1988, 1994 and 1996.

A Justice Department official, speaking on the condition of anonymity, acknowledged the near absence of La Cosa Nostra death-penalty cases. "It think it's a real issue that we have to look at," the official said. "I don't know that we have."

Zachary Carter, who was the U.S. attorney based in Brooklyn from 1993 until 1999, charged more than a dozen mob figures, including Pappa, with death eligible offenses but did not recommend seeking the death penalty against any of them.

"The statistics won't tell the whole story," he said. "It's complicated. You've got to look at individual cases."

Carter listed two guiding principles: whether an innocent victim was murdered and the strength of the evidence. If the case was based on accomplice testimony, he said he had doubts the evidence was strong enough to sustain a death penalty case.

As a prosecutor considers a case, he or she must weigh many factors, Carter said. "There is a level of subjectivity that makes me wonder if we should be making those decisions," he said.

Mauer said one factor could be the glorification of white mob families as likeable, if criminal, in shows like the "Sopranos," while depicting minority drug traffickers as cruel and intimidating in movies like "Traffic."

"The idea of executing the 'Sopranos' is not a welcome one to most people," he said.

Such attitudes may have been evident in the only death-penalty trial of an organized crime figure, conducted by the U.S. attorney's office in Brooklyn in 1992.

A jury convicted hitman Tommy Pitera on charges he tortured and killed six victims, dismembering and burying the remains of five in suitcases in a Staten Island marsh. But three jury members couldn't bring themselves to vote to give Pitera a sentence of death.

The government itself views the mob and street gangs as "different folks involved in the two different industries," said criminologist Alfred Blumstein of Carnegie Mellon University.

In 1970, when federal capital punishment was on hold, Congress took aim at organized crime with a package of tough laws that included the Racketeer Influenced and Corrupt Organizations Act, known as RICO.

The FBI organized crime unit adopted the "enterprise theory of investigation," a long-term strategy to dismantle organizations—not to target individual criminals—that relies on wiretaps, informants and cooperating witnesses, said Tom Fuentes, chief of the FBI's Organized Crime section.

Many of the best-known mob figures, including John Gotti, were convicted before the federal death penalty resumed. But since 1996, an FBI crackdown has led to the convictions of 1,500 organized crime defendants, Fuentes said, but not a single death-penalty case.

"It's not our strategy, let us say, to go after them with the death penalty," Fuentes said. "We have used life without parole."

In 1988, after violent street crime fueled by crack cocaine soared, Congress restored federal capital punishment to target drug kingpins and in 1994 expanded the death penalty to about 60 offenses aimed at criminal enterprises and a variety of murders.

In 1992, the federal government for the first time took on street gangs, employing drug laws and RICO but, unlike the organized crime section, also using the death penalty.

"It's just one of the tools," said, Ken Neu, the FBI's assistant section chief of violent crimes.

"Traditional organized crime has preyed on its own," Neu explained. "In the gang arena, a lot of innocent people have been killed because they happened to be there when the shooting started."

In the cases of John Pappa and Jose Santiago, the government had to weigh separately whether to seek the death of a Colombo family associate charged with four murders and accused of as many as six more—all of them connected to organized crime—and a Latin King member charged only with a single slaying of a man not connected to the gang.

Court records and interviews with defense attorneys show how different Pappa and Santiago's criminal careers were, and how prosecutors had to make difficult, and subjective, decisions on their cases.

In September 1997, based largely on the FBI's confidential informants, Pappa was arrested as he arrived at a Staten Island church for the wedding rehearsal of the brother of John Sparacino, one of Pappa's victims.

Pappa, prosecutors say, aspired to become a Colombo family hitman like his slain father, and even got his back tattooed with a slogan in Italian that said "death before dishonor."

To prove himself Pappa committed the 12th and final killing in the bloody wars between rival factions of the Colombo family in the early 1990s, prosecutors said.

Pappa began a killing spree that would take four lives two weeks after he turned 19 in October 1993, according to charges filed against him.

On Colombo family orders, prosecutors said, Pappa helped gun down Joseph Scopo, a rival faction's acting underboss, as he drove up to his Queens home.

A few months later, charges say, Pappa shot and dumped associate Rolando Rivera on the side of the Staten Island Expressway.

Several weeks after that Pappa and an associate shot Sparacino in the back of the head, sliced off his genitals and tried to cut off his face, then left him in a burning car on Staten Island, prosecutors said.

Three days before his 20th birthday, Pappa fired a dozen bullets into Eric Curcio in a Brooklyn auto body shop—for taking credit for Scopo's murder -and then called a friend the next day to brag about it, prosecutors said.

A grand jury indicted Pappa on charges of drug trafficking, racketeering and murder. It included a death-penalty count for only Curcio's murder, because the others had occurred before the capital law cited in the case had gone into effect in 1994.

Carter recommended against seeking a death sentence for Pappa, and the Justice Department's death-penalty review panel and Attorney General Janet Reno agreed.

Prosecutors and Justice officials refuse to discuss the decision, but Pappa's attorney, Michael Bachner, said a variety of factors came into play.

"He was 19 years old at the time, and the evidence against him was primarily based on statements he was said to have made," Bachner said. "His father was a hitman for the mob. I think there was some thought there might be psychological issues at work."

But Bachner added, "I think a lot of it was the victims were all quote unquote people in the business. I think there were no quote unquote innocent victims."

Besides, Bachner said he believes prosecutors bought his argument that what could be worse for a young man, death or being locked up for the rest of his life?

Pappa pleaded not guilty and went to trial. In May 1999, a jury convicted Pappa for all four murders, and a judge sentenced him to two life terms plus 65 years and sent him to a maximum-security prison.

In November 1997, based on reports from informants and a wiretapped conversation of Latin King members, Santiago was arrested on a murder warrant for the shooting death of Efraim Torres.

Prosecutors charged that Santiago, who took the name King Monkey, had sought to rise in the gang by volunteering to be the triggerman.

On March 17, 1995, Yonkers Latin King leader Hector Colon got into a fight over a girlfriend with Torres. Torres stabbed and injured Colon, court records show. Torres, known as Peewee, was not connected to the Latin Kings.

Two weeks later, Colon learned where Torres was hiding and told Santiago—who, like Pappa, had just turned 19—to go and kill Torres. He did.

Prosecutors said informants and Torres family members told authorities that Santiago had forced the wife and two children of Torres to stay in the room to watch him shoot and kill him. "Jose always from the first denied that was what happened," said Loren Glassman, Santiago's attorney.

Santiago was indicted in 1998 by the office of Manhattan U.S. Attorney Mary Jo White, on two counts of murder, including murder in aid of racketeering, that made him eligible for the death penalty.

Soon after the indictment, Santiago talked to prosecutors about testifying against Colon, who also was charged but had evaded arrest, Glassman said.

But that option was eliminated. FBI agents found Colon in Connecticut in 1999. When they confronted him, Colon reached for his cell phone and agents, thinking he was reaching for a weapon, shot and killed him, according to a Justice Department investigation of the incident.

Glassman argued against a capital prosecution in presentations to the government's capital review panels. He said Santiago was only 19 at the time of the murder, had committed no other major violent crimes and regretted what he had done.

"He was the most remorseful client I ever had," Glassman said. "If he were given the choice he would spend the rest of his life trying to atone for what he had done."

As Carter had done in the Pappa case, White recommended against seeking a death sentence for Santiago. But this time the Justice Department review panel and Reno disagreed.

"What I heard was that Mary Jo White and Janet Reno spent the better part of three days arguing about this case," said Glassman. "And in the end, Janet Reno prevailed and required Mary Jo White to file a death penalty case."

A spokesman for White declined to discuss internal discussions.

The government said the aggravating factor that justified a death sentence was the presence of Torres' wife and two children: they were endangered by the shooting and suffered when forced to watch the death of a husband and a father.

Two months later, in April of last year, Santiago pleaded guilty to the murder to avoid a death-penalty trial.

But he refused to admit in court in his plea agreement that he had forced the family of Torres to watch the shooting. A judge sentenced Santiago to 50 years in prison.

June 11, 2001

Chairman Russell Feingold and
Ranking Member Strom Thurmond
Senate Judiciary Committee
Washington D. C.

Chairman Feingold,

Losing a loved one under natural circumstances is hard enough to deal with but imagine losing one under the most heinous circumstances. No one wants to see another person's life ended but if someone thinks nothing of another person's life and takes it, especially under the most brutal circumstances, then he or she should pay with their lies.

Before we lost our son Komommo Offem to gun violence In March of 1998, we believed in the death penalty and we believe strongly in it now. We are also strongly opposed to any moratorium for the death penalty. We are not playing God, but if someone has no regard for human life, why should we have regard for theirs?

MONDAY OFFEM AND ELIZABETH OFFEM
Members of V.O.C.A.L. (Victims of Crime and Leniency)

Dear Chairman Feingold:

I am an African-American crime victim advocate who strongly supports the death penalty. In May 1999 my only child was found brutally murdered in her apartment. The person who committed this heinous crime has so far shown no remorse. He is now free on bond after being incarcerated only one month. These types of criminals are a threat to all of society and do not deserve to live among decent men and women. I feel that the punishment should fit the crime and the death penalty is certainly appropriate for those who are cold, calculated murderers.

In my opinion, without the death penalty there is no hope in curbing the escalating violence in our society. Most criminals today have been in arid out of penal institutions all of their lives and have no fear of being incarcerated for long periods of time. Some of them even boast about their criminal activities during incarceration. However, when it comes to their own lives being abruptly ended they do have a substantial amount of fear.

I am urging you to please support death penalty legislation because it is greatly needed. In a lot of instances criminals are not punished to the fullest extent of the law because of parole board hearings, appeals, etc., etc. The death penalty is needed now more than ever to send a message to murderers that when you take someone's life be prepared to give up your own.

NELL RANKINS
(MOTHER OF THE LATE KATRINA JENELLE RANKINS)
MONTGOMERY, AL

Article from Reuters, Sue Pleming, June 13, 2001

U.S. SENATORS URGE EXECUTIONS HALT AMID BIAS FEARS

Washington, June 13 (Reuters)—With just six days until the execution of drug kingpin Juan Raul Garza, several U.S. Democratic senators on Wednesday called for a halt to federal executions until a government study has been completed into possible racial and geographies bias on death row.

Democratic Sen. Russ Feingold of Wisconsin told a Senate subcommittee hearing the United States could not in "good conscience" put people to death while questions remained over the fairness of the system.

The death of Garza, a Hispanic convicted of one murder and of ordering two others, would be the second federal execution this month following the lethal injection given to Oklahoma city bomber Timothy McVeigh on Monday.

While state executions are more common, McVeigh's was the first federal execution for 38 years and sparked condemnation abroad—especially in europe—of the U.S. death penalty.

"I believe that the execution of Juan Garza should again be postponed and indeed there should be a moratorium on all federal executions until a thorough and independent study by the NIJ is completed and considered," said Feingold.

Feingold, who chaired the Senate Judiciary sub-committee hearing on "racial and geographic disparities" in the federal death penalty system," was referring to a study to be done by the Justice Department National Institute of Justice.

That study follows an analysis by the Justice Department last year into racial and geographic disparities on death row and another review released by Attorney General John Ashcroft last week in which he said there was no evidence of racial bias in the U.S. death penalty system.

"STATISTICAL DISPARITIES"

Feingold noted that of the 19 people currently on federal death row, 17 were racial or ethnic minorities and that six of those were from the president's home state of Texas and another four were from Virginia.

"The concentration of death row inmates from particular regions of the country is troubling and I don't think this issue has yet been adequately addressed by the Department of Justice," Feingold said.

Garza is due to die by lethal injection in Terre Haute, Indiana, in the special death row unit where McVeigh died.

Convicted in Texas, Garza, 44, has admitted to the drug-linked killings but says he does not deserve death.

His lawyers filed a clemency petition on Tuesday in which they said, among other arguments, he should not executed because it was still an open question whether his sentence resulted from bias against minorities in federal cases.

Deputy Attorney General Larry Thompson rejected suggestions of racial and geographic bias in imposing the death penalty but said an appearance of such a practice was cause for concern.

In fact, said Thompson, the death penalty was more likely to be recommended by United States Attorneys for white defendants than for blacks and Hispanics.

"Our study found abundant evidence that the statistical disparities observed in federal capital cases resulted from non-invidious factors rather than from racial or ethnic bias," Thompson told the subcommittee.

Asked whether he supported former President Bill Clinton's decision last year to postpone Garza's execution to allow for a review of the death penalty, Thompson said he had not and that there was no question about Garza's guilt.

Democratic Sen. Patrick Leahy from Vermont said the report released by the Justice Department last week fee far short of what the American people deserved.

"Instead of a thorough and objective empirical analysis we are given a superficial and one-sided set of legal answers. Instead of Answers we are given more questions," said Leahy.

Republican Sen. Strom Thurmond of South Carolina, a ranking member on the judiciary subcommittee, countered a demand for a moratorium and called the hearing an "endless political effort to discredit the death penalty by all possible means."

"There is no death penalty crisis and there is absolutely no basis for ending the federal death penalty," he said.

After the death penalty was struck down in 1972, the federal death penalty was not reinstated until 1988 and then expanded in 1994 to cover certain crimes, including major drug trafficking, terrorism, and espionage.

In contrast, the states have executed more than 700 inmates since the Supreme Court reinstated the death penalty in 1976.

by Sue Pleming

Statement of Hon. Jeff Sessions, a U.S. Senator from the State of Alabama

I am glad that Senator Feingold called this hearing. The death penalty is a serious issue, and the Senate should give it serious consideration.

As a federal prosecutor for 15 years and as Attorney General of my State, I have a different perspective on criminal justice issues than many in the political arena. I have seen first hand how violent crime devastates victims, families, and communities. And I have seen the importance of demonstrating with words and deeds fairness and due process of law to every segment of the community. Ultimately, the

truth, justice, and the certain rule of law are more important than partisan political speeches. I hope this hearing will shed important and constructive light on how our federal criminal justice system is doing in its application of the death penalty.

CONSTITUTIONAL RECOGNITION OF THE DEATH PENALTY

The Constitution expressly recognizes that the federal and state governments will impose the death penalty. The 5th Amendment, which limits the power of the federal government, provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." The 5th Amendment's Double Jeopardy Clause provides that "No person shall. . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." Further, the 5th Amendment's Due Process Clause provides that "No person shall . . . be deprived of life . . . without due process of law." Finally, the 14tn Amendment, which limits the powers of State governments, provides that "No State shall . . . deprive any person of life . . . without due process of law."

The simultaneous passage of the provisions recognizing the death penalty in the 5th Amendment and the subsequent passage of such a provision in the 14" Amendment demonstrate the illegitimacy of arguments that capital punishment is per se prohibited as cruel and unusual under the 8th Amendment. Indeed, the same body that proposed the 8th Amendment also provided, in the first Crimes Act of 1790, for the death penalty for a number of offenses.[1]

FURMAN V. GEORGIA

Almost two centuries later, in 1972, however, a bare 5–4 majority of the Supreme Court, in *Furman* v. *Georgia*,[2] held that the death penalty was cruel and unusual as applied by the States at that time. The talisman of unconstitutionality was the unbridled discretion of juries to mete out the death penalty for a wide range of crimes. Justice Thurgood Marshall pointed out that this discretion resulted in significant racial disparities. Of all the prisoners executed from 1930 to 1968, 54% were black and only 46% were white.[3] He also pointed out that over the same time period, 89% of prisoners executed for rape were black.

POST-FURMAN DEVELOPMENTS

Later, in 1976, in *Gregg* v. *Georgia*,[4] the Supreme Court approved a new death penalty statute that provided guidelines to control the discretion of the jury and make application of the penalty less subject to the passions of the jurors. To pass constitutional muster, a statute had to ensure that only heinous crimes in which one of a list of certain specified aggravating circumstances was found were punishable by death. Further, the statute had to provide that the jurors would hear mitigating evidence.

In 1977, in *Coker* v. *Georgia*,[5] the Supreme Court held that capital punishment could not be imposed for rape without a murder. Thus, the plainly disproportionate and unjustified execution of black prisoners for committing rape ended.

In 1986, the Supreme Court's decision in *Batson* v. *Kentucky*[6] prohibited the use of race in selecting a jury. Thus, ending the practice of striking a potential juror just because of his race.

Further, as the years went by, there were more black, Hispanic, and women, law enforcement officers, jurors, prosecutors, and judges. The entire criminal justice system looked more like America.

And the results showed up in the death penalty system. Since the death penalty was reinstated by *Gregg* v. *Georgia* in 1976, the percentage of blacks executed has dropped from 54% to 36%.[7] While the percentage of whites executed has climbed from 45% to 62%.[8] And today, 53% of the inmates on Alabama's death row are white

---

[1] 1 Stat. 112.
[2] 408 U.S. 238 (1972).
[3] Id. at 316 (Marshall, J. dissenting).
[4] 428 U.S. 153 (1976).
[5] 433 U.S. 584 (1977).
[6] 476 U.S. 79 (1986).
[7] Bureau of Justice Statistics <http://www ojp.usdoj.gov/bjs/glance/exe.txt> (visited June 11, 2001).
[8] Id.

and 47% black.[9] And not one innocent person has been executed since the death penalty was reinstated in 1976.[10]

THE STATISTICS ARGUMENT

In 1987, in *McCleskey* v. *Kemp*,[11] the Supreme Court rejected a challenge to the death penalty based on a 1983 statistical study showing that in Georgia, a prisoner was 4.3 times more likely to face the death penalty for killing a white victim than for killing a black victim.[12] The Court held that to prevail on a race-based equal protection challenge, a defendant must show that the state legislature or the decision makers in his particular case acted with a racially discriminatory purpose. Although the author of the majority opinion in McCleskey, Justice Lewis Powell, left the Court in 1987, McCleskey's focus on the individual trial, as opposed to group statistics, was reaffirmed by the Supreme Court in the 1994 case of *Romano* v. *Oklahoma*.[13]

THE DOJ STUDIES

Since McCleskey's rejection of the statistical study, the Department of Justice has completed 2 additional studies on how it administers the death penalty: the September 12, 2000 study completed by Democrat Attorney General, Janet Reno, and the June 6, 2001 study completed by Republican Attorney General, John Ashcroft. These studies provide even less evidence of racial discrimination than the 1983 study that failed to win the day in the *McCleskey* case.

Both of these studies show that approximately 90% of the prisoners currently on federal death row are minorities. The question then becomes why is there an over representation, compared to the general population, of minorities on federal death row? To find the answer, we must examine two areas: (1) how defendants get into the criminal justice system; and (2) how the federal criminal justice system operates. With respect to how federal criminal justice system operates, the question is whether racial bias played a role?

The Reno study and the Ashcroft study both found no racial bias in the Department's administration of the death penalty. The high proportion of black and Hispanic death row defendants results, in part, from the population that the federal death penalty draws from: a significant number of carj acking murders from Puerto Rico; a significant number of murders at the Lorton Prison for District of Columbia offenders; and a significant number of drug kingpin murders in border states and inner cities.[14]

Once in the federal criminal justice system, the Ashcroft Report shows that the attorney general's office, which reviews all death penalty cases in the federal system, agreed to capital charges for 27% of the eligible whites, 17% of the eligible blacks, and 9% of the eligible Hispanics.[15] Thus, the Justice Department is 59% more likely to seek the death penalty for white murderers than black murderers; and 200% more likely to seek the death penalty for white murderers than for Hispanic murderers.

The study does not answer all the questions because all the data is not yet available. Nor could this data have physically been gathered before the April 1, 2001 deadline for this study set by President Clinton. For the data that is available, however, no racial bias was found. Further, Attorney General Ashcroft has directed that more information be gathered from U.S. Attorney offices regarding conduct by defendants that could result in a death penalty whether the U.S. Attorney wants to pursue the death penalty or not. Further, more information will be gathered about plea agreements. This will help provide a more complete picture as to the application of the death penalty.

Finally, Attorney General Ashcroft has ordered the National Institute of Justice to complete a broad, multiyear study on the death penalty. This will provide more

---

[9] Death Penalty Information Center, Alabama Death Row Inmates <http://www.deathpenaltyinfo.org/Alabama.html> (visited June 13, 2001).

[10] Paul G. Cassell & Stephen J. Markman, Protecting the Innocent: A Resonse to the Bedau-Radelet Study, 41 STAN. L. Rev. 121 (1988).

[11] 481 U.S. 279 (1987).

[12] Baldus, Pulaski, & Woodworth, Comparative Review of Death Sentences An Empirical Study of the Georgia Experience, 74 J.CRIM.L. & C. 661 (1983).

[13] 512 U.S. 1 (1994).

[14] The Federal Death Penalty System Supplementary Data, Analysis and Revised Protocols for Capital Case Review 3, 15–16 (June 6, 2001) [The Ashcroft Report].

[15] The Federal Death Penal System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review 12 (June 6, 2001) [The Ashcroft Report].

information on the fairness of the application of the death penalty across the country.

It is also important to note that Attorney General Ashcroft at his confirmation hearing committed to finish ongoing death penalty studies, but did not commit to a moratorium on the death penalty until all studies were completed, or at any other time. Indeed, to delay executions of clearly guilty murders to conduct a future study would be a dereliction of the duty to faithfully enforce the law. Attorney General Reno did not support such a delay and neither does Attorney General Ashcroft. Instead, Attorney General Ashcroft has completed the Reno study, ordered the NIJ study to continue, and he has carried out the execution of Timothy McVeigh—the worst mass murderer in the history of our country. He kept his word. He did his duty.

NO NEED FOR A MORATORIUM

I cannot favor a moratorium on the death penalty for several reasons. First, as Attorney General Reno concluded in her September 12, 2000 report, all the prisoners now on federal death row are guilty.[16] Second, not one innocent person has been executed since the death penalty was reinstated in 1976.[17] Third, DNA is now used up front to prevent innocent persons from being tried, much less convicted, and put on death row. Fourth, studies showing large error rates in capital trials have been debunked by more accurate studies showing that many reversal "errors" were caused by newly announced procedural rules that applied retroactively and that upon retrial, an overwhelming majority of defendants were reconvicted.[18] Fifth, the death penalty deters murder as studies as recent as this year have found.[19] And finally, the procedural protections and multiple levels of appellate review ensure that we, in fact, have a very accurate and very fair death penalty system.

Indeed, the increased fairness in the application is also reflected in the increased support for the death penalty by the American people. When Furman was decided, only 51 % of the public supported the death penalty.[20] Today, that number has climbed to between 63% and 71%.[21] And in the last election, the presidential candidates for both parties said that they supported the death penalty.

CONCLUSION

The death penalty is a serious subject and deserves serious attention. It should be studied to ensure that it is fair to all people of all races. It should be remembered, however, that the victims of these vicious killers are largely minorities. As Attorney General Reno's report showed, 70% of the victims of those charged with federal capital crimes were minorities.[22] The death penalty protects our poorest and most defenseless citizens against the most vicious murders.

As Lucy Jackson from Birmingham, Alabama stated:

---

[16] Statement of Attorney General, Janet Reno, Press Conference with Attorney General Janet Reno and Deputy Attorney General Eric Holder on the Federal Death Penalty (Sept. 12, 2000). On January 20, 2001, President Clinton commuted David Ronald Chandler's capital sentence to life without parole. Chandler was a white prisoner on federal death row who was convicted of running a large drug enterprise and of ordering the murder of an associate-turned-informer. Chandler's clemency application presented evidence that a major witness against Chandler had recanted his testimony. The application, however, was strongly challenged by the prosecutor in the case who submitted the attached letter. Chandler's case has been denied certiorari by the United States Supreme Court and his conviction was upheld by an en banc opinion of the Eleventh Circuit last year. The vigilance of the Department of Justice's attorneys in administering the clemency review process reaffirms the efficacy of the federal death penalty system's safeguards for giving the defendant every reasonable opportunity to establish his underlying innocence.

[17] Paul G. Cassell & Stephen J. Markman, Protecting the Innocent: A Resonse to the Bedau-Radelet Study, 41 Stan. L. Rev. 121 (1988).

[18] See, e.g., Barry Latzen & James N.G. Cauthen, Another Recount: Apepals in Capital Cases, THE PROSECUTOR 25, 26 (Jan./Feb. 2001); Bennet A. Barlyn, A Res[ponse to Professor Liebman's "A Broken System," (Nov. 2000) <htip://www.prodeathpenalty.com/Liebman/LIEBNAB2.htm>; Statement of Attorney General Bill Pryor to the Alabama State Bar Commissioners Regarding the Death Penalty Moratorium (Oct. 27, 2000).

[19] See, e.g., Hashem Dezhbakhsh, et al., Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data, Emory Univ. Dep't of Economics Report (2001) (concluding that each execution results in an average of 18 fewer murders).

[20] See *Furman* v. *Georgia*, 408 U.S. 238, 330 n.9 (Burger, C.J., dissenting).

[21] See, g.g., ABC News/Washington Post Poll <http://nationaljournal.com/members/polltrack/2001/issues/Oldeathpenalty.ht m#4> (63%); Associated Press Poll <http://nationaljournal.com/members/polltrack/2001/issues/01 deathpenalty.ht m#4> (71 %).

[22] U.S. Dep't of Justice, Survey of the Federal Death Penalty System 22 (Sept. 12, 2001).

> "I am one who has witnessed first hand what violent crime can do to devastate a family. My only son, Dewayne, was violently beat[en] to death. There is no way the defendant could ever feel the pain or injustice that me and my family [have] felt. Justice truly is only served when the convicted murderer is given his just sentence. Being an African-American, some of my brethren might disagree. But, until you live through what we have lived through, you cannot possibly make that decision. I implore you all to not water down or try to place a moratorium on the death penalty. If you do, there will be more acts performed by cowards like Timothy McVeigh and the[ir] only punishment will be Life."

Similarly, the Fraternal Oder of Police, the Federal Law Enforcement Officers Association, and the Law Enforcement Alliance of America all support the death penalty and oppose a moratorium because their members, white, black, Hispanic, Asian, and Native Americans face vicious criminals every day. They correctly believe that the death penalty protects them as well. Violent criminals live by force. It is often the only thing that they understand.

We have a profound duty to ensure that racial bias has no place in the application of the death penalty. The death penalty, however, has a place in protecting all citizens, especially minorities and police officers. It is the responsibility of the Department of Justice to ensure both. Under Attorney General Ashcroft, I am confident that every defendant will receive due process of law and that every guilty criminal will receive the penalty that he justly deserves.

Statement of Hon. Paul Strauss, a U.S. Senator from the District of Columbia (Shadow), Washington, DC

Chairman Feingold, and members of the Senate Subcommittee on the Constitution, federalism, and property rights, I am Senator Paul Strauss, the United States Senator elected by the voters of the District of Columbia, and an attorney who practices in our local courts.

I appreciate the opportunity to provide this statement on behalf of my constituents, the citizens of Washington, D.C. I am testifying in order to raise my voice in favor of a moratorium on the federal death penalty, until a full investigation into racial disparities in the system can be conducted. I commend the leadership for bringing this issue the attention that it deserves.

It is especially disturbing that seventeen of the nineteen people on federal death row are minorities. One of the issues that was brought up is that the racial disparities on federal death row, which seem to be greater than those in the state system might be due to the federal prosecution of local crimes. It has been noted that, in fact, many of the federal death penalty cases are for crimes related to federal crackcocaine prosecutions.

One of the witnesses, Mr. McBride, a former Federal prosecutor from the eastern district of Virginia who has tried federal capital cases, has stated that the federal government only steps into local cases when there is a request for such action from state prosecutors. In the District of Columbia, it appears that a different rule applies.

The residents of Washington, D.C. have consistently raised their voices in opposition to the death penalty. First, in 1992, they voted against it in a referendum, with a margin of two to one.[1] Then, in 2000, the city council passed a resolution once again reaffirming opposition to capital punishment. The city has certainly not asked for federal intervention in order to have the death penalty imposed on its residents.

Recently, however, the Federal Government has seen fit to prosecute Tommy Edelin, a District of Columbia resident, on charges of capital murder, for crimes committed within the District of Columbia. Many see his case as a test case for federal involvement in prosecuting crimes committed within Washington, D.C. This case is not an issue of a crime committed against the Federal Government, or on federal property, but is an issue of a crime committed against the people of the District of Columbia.

While I recognize that national sentiment seems to be in favor of the death penalty, if local residents do not wish to see capital prosecution for local crimes, then the death penalty should not be forced upon them, whatever the national sentiment is. In light of recent information showing possible racial disparities in implementa-

[1] On November 3, 1992, 66,303 voted in favor of the death penalty, while 135,465 voted against it.

tion of the federal death penalty, it seems that by prosecuting residents of the District of Columbia, which has a large minority community, these disparities will only increase.

Although my main concern is with the representation of the ideas held by my constituency, I recognize the larger issue as well. The debate about the death penalty as a whole is perhaps one of the most divisive in our society today. Many people are adamantly opposed to its continued use, and see it as cruel and unusual punishment, while even more see it as a useful tool in the spectrum of punishments for crimes. It is obvious that the debate on that issue will not end anytime soon.

The death penalty is the obviously most permanent form of punishment that we have in this country. There should be no room for error in its implementation, and not even an appearance of bias in its prosecution. To continue to have a perception of bias would cause further doubts in an institution that many Americans already see as flawed.

Those who see the federal death penalty as fair and unbiased would be wise to listen to the testimony of David Bruck. When he spoke about the situation in South Africa during apartheid, he spoke of Judges who said much of what many Americans are saying now: "Blacks commit more crime." in hindsight, and to many at the time, that statement seems to be farcical. While I am not saying that we live under apartheid in this country, long term prejudices against African-Americans and the other minorities cannot be declared "cured" just because we wish that to be the case. The exact opposite must be assumed.

While we are loathe to admit it, many Americans still harbor prejudice against those that they see as "other," that prejudice has an effect on the decisions of Federal juries, which are more likely to consist of people who have had vastly different life experiences from those being charged, especially in drug cases.

In light of the execution of Juan Raul Garza, a man of hispanic heritage, on June nineteenth—the second federal execution in one month—I strongly urge the Federal Government to call an immediate moratorium on all federal executions. We should not let another person be executed before a review of the uncertainty surrounding the even-handedness of the federal death penalty. In addition, as an advocate for the residents of the District of Columbia, I raise the additional concern of the federalization of what, rightfully, should be seen as a local decision against capital punishment. On behalf of my constituents, I thank you for bringing this issue to national attention, and for allowing me the opportunity to make these comments.

VICTIMS OF CRIME AND LENIENCY
MONTGOMERY, ALABAMA 36103
June 11, 2001

Chairman Russell Feingold and
Ranking Member Strom Thurmond
Senate Judiciary Committee
Washington, D.C.

Dear Chairman Feingold and Committee Members:

It has been brought to my attention that efforts are being made to weaken the death penalty. The families of the homicide victims and the public In general vehemently oppose this action.

I lost a daughter In 1976 by a vicious act of rape and murder by 3 srarnger5. One of the offenders has been executed but the fact that 2 others have not leaves my family with the realization that justice cry never be served.

I did not ask to become a victim of the system, but having become one, it has certainly changed my perspective on the entire judicial process. I have been In the Victims' Movement for almost 25 years and the battle for just the basic rights for the victim has been one of the most grueling and snail-paced ventures I have ever endured. We have made strides in the Victims' Movement for which I am eternally grateful, but the tenuous efforts to eliminate the few accomplishments we have been successful in getting Is disheartening.

I was honored to be selected as one of ten recipients of the National Crime Victim Service Award presented in the Oval Office by President Clinton In 1994. These awards indicate to me that the heads of sate were concerned about the lifelong devastation for innocent crime victims.

I do not know of anyone who advocates executing an innocent person, however, Attorney General Ashcrofts report on the death penalty Is 10096 accurate. Those

states that feel they have problems should most assuredly address their problems. Alabama does not have a problem and an effort too prolong an already lengthy process is so unjust. Alabama has inmates that have been sitting on death row for 20 to 25 years and still have riot exhausted their appeals. "This Is NOT justice by any of the Imagination. A provision to prove one's innocence Is already in the system. The fact that the courts are finding some cases of innocence only gives more credence that the present system is working efficiently.

I have followed this effort to delay executions for some time and I am convinced that the movement Is not about proving Innocence—It Is rather to abolish-the death penalty. Having the knowledge that the death penalty Is favored by the majority, this is the only tactic opponents feel they tan be successful In using to accomplish their goal.

Crime victims are counting on your support for justice. Please do not succumb to false rhetoric and tilt the scales of justice even more favorably for the perpedrator.

Respectfully yours,

MIRIAM SHEHANE
Executive Director

COLUMBIA, SC 29203
June 13, 2001

Sen. Strom Thurmond
U.S. Senate Judiciary Comm.
Washington,D.C. 20510

Greetings:

We are the black parents of a murdered son and we are favor of the death penalty.

Our son,Federal Corrections Officer, D'Antonio Washington was murdered by Mr. Anthony Battles on December 22, 1994. D'Antonio was 31 years old and on duty at USP. Atlanta when Mr. Battles killed him , for no reason. Mr. Battles was already serving time in Federal Prison for killing his wife and inborn baby.

We sat through the trial in Atlanta and watched Mr. Battles admitt killing our son, and he showed no remorse. He had his life spared after the first killings. He does not deserve a chance to kill again. The death penalty fits this case. The fact that Mr. Battles is black and our son is black does not change our feelings.

Sincerely,

MR. & MRS. F.N. WASHINGTON

MONTGOMERY, ALABAMA
June 11, 2001

Chairman Russell Feingold and
Ranking Member Strom Thurmond
Senate Judiciary Committee
Washington, D.C.

Dear Chairman Feingold and Committee Members

It is my understanding the Senate Judiciary Committee is making an attempt to deplete the death penalty in Its current status. I would like for you to know I am fervently against this movement.

In 1989, my brother Robert Mays, was brutally murdered by his girlfriend. It was a cold and calculated murder. This murderer was so callous, she shot him and stood over his body to make sure he was dead. All the wile her children were begging her not to do it. Every year, our family has to go to the Board of Pardons and Parole and beg them to keep this murderer locked up. This case should have been a Capital offense. Only until the convicted murderer receives the same sentence that was Imposed on the victim, there will be no justice.

I am an African American woman and know full well the ramifications being wrongly accused and punished. I for one am not advocating that course of action. But, when there is no doubt and the case has went through the courts and the ap-

peals process the convicted murderer should get what he or she so justly deserves. The death penalty will not bring back the loved that was murdered but it will give the family a sense of justification.

Sincerely,

VIOLA WATLEY

○