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TERRORIST PENALTIES ENHANCEMENT ACT OF 2003

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON

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TERRORIST PENALTIES ENHANCEMENT ACT OF 2003

WEDNESDAY, APRIL 21, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIME, TERRORISM,
AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2 p.m., in Room 2141, Rayburn House Office Building, Hon. Howard Coble (Chair of the Subcommittee) presiding.

Mr. COBLE. Good afternoon, ladies and gentlemen. The hearing will come to order. Good to have all of you with us. Monday, April 19, 2004 marked the 9-year anniversary of the Oklahoma City bombing. 168 people were killed in that bombing which shocked the American public and was then called perhaps the greatest act of terrorism in United States history. Oklahoma City was a horrific act that showed us the evilness of these criminals and the links they are willing to go. Sadly, however, we have now seen that terrorists have the capability and the desire to sink to even lower depths and cause even greater loss of human life. Oklahoma City, it turned out, was simply the tip of the iceberg. We are now fighting terrorism on a much larger scale and we need to utilize every possible weapon in our arsenal to protect our American citizens from experiencing this type of tragedy again.

Today, the Subcommittee on Crime, Terrorism, and Homeland Security is conducting a hearing and a markup on legislation that will give us one more weapon, H.R. 2934, the Terrorist Penalties Enforcement Act of 2003. This hearing will examine this legislation as which provides enhanced penalties for terrorist offenses that result in the death of another person and the denial of Federal benefits to anyone who has committed a "Federal crime of terrorism." Federal and State officials continue to diligently attempt to prevent further terrorist attacks on U.S. soil. However, despite some changes to the law to increase penalties after the deadly terrorist attacks, the jury is still denied the ability to consider a sentence of death or life imprisonment for terrorists in many cases, even when the attack results in death and the court believes it is necessary to prevent further harm to our citizens.

For example, in a case in which a terrorist caused massive loss of life by sabotaging a nuclear power plant or a national defense installation, there would be no possibility of imposing the death penalty under the statutes defining those offenses because they contain no death penalty authorizations. In contrast, dozens of

other Federal violent crime provisions authorize up to life imprisonment or the death penalty in cases where victims were killed.

Because the potential tragedy here is so obvious in cases—strike that. Because the potential tragedy is so obvious, we must hope that changing this law to allow a sentence of death or life imprisonment will serve at least as a deterrent to would-be terrorists. It is one more tool, it seems to me, for the arsenal. In addition, current law allows Federal courts to deny Federal benefits to persons who have been convicted of drug-related crimes. As a result, these convicts can be prohibited for periods up to life from receiving grants, contracts, loans, professional licenses or commercial licenses that are provided by a Federal agency.

Yet, despite the fact that terrorism is at least as dangerous to the U.S. National security as drug offenses, there is no present legal authority to deny Federal benefits to those convicted of terrorism. It doesn't make sense, at least it seems to me that it doesn't make sense, that someone who would harm the American taxpayers should be allowed, on the other hand, to benefit from them in the end result. Unfortunately, terrorism has been thrust upon us, upon our Nation's consciousness and upon us generally, and we must respond with new ways to combat it.

Today, we will discuss the additional steps that need to be taken to continue this fight. I thank the witnesses for being here today. Look forward to your testimony. And I am now pleased to recognize the distinguished gentleman from Virginia, the Ranking Member, Mr. Bobby Scott.

Mr. SCOTT. Thank you very much, Mr. Chairman, for scheduling the hearing on the Terrorist Penalties Enhancement Act. This bill provides for massive expansion of the Federal death penalty both for crimes that supporters of the death penalty might think warrant the death penalty as well as many crimes which one would not expect to be associated with the death penalty. The bill not only creates 23 new death penalties by making all 43 Federal crimes of terror under 18 U.S.C. 2332 B(g)(5) now death penalty eligible, but it also adds a sweeping provision that makes any felony that meets the broad definition of either domestic terrorism or "international terrorism" under the code section a death penalty eligible, crime should death occur in the conduct of such a crime.

Moreover, the bill makes attempts and conspiracies to commit such crimes death penalty eligible. In addition to deaths that occur as a result of an attempt, intent or conspiracy to murder, maim, kidnap or destroy a nuclear facility or other such heinous crimes, crimes such as material support of terrorism organizations, injury, not just destruction, injury to Federal buildings or property, blocking access to abortion clinics and other acts of civil disobedience are also included. And anyone who participates in such crimes or conspires or attempts to do so could receive the death penalty under this bill if death results, even if it was not specifically an intended result. This is tantamount to a Federal felony murder rule which presents constitutional issues as well as the appropriateness of the death penalty under these circumstances.

And the provision of the bill will be duplicative of many State jurisdictional provisions in many instances and actually conflicting in some. One such conflict would be when residents of a particular

State have chosen not to institute capital punishment and the Federal Government imposes it as a consequence of a State seeking or having imposed upon it Federal involvement in the conduct of an investigation and prosecution of a terrorist crime that occurs within its jurisdiction.

Another area of conflict and difficulty will arise in our efforts to further international cooperation in pursuing suspected terrorists. We are already experiencing difficulties in securing the cooperation of the rest of the civilized world in bringing terrorists to justice due to our existing proliferation of death penalty offenses. When these difficulties over controversial issues such as whether someone who supports an organization's social or humanitarian program knows it has been designated as a terrorist organization, moreover crimes connected to protest or issues of conscience, can only exacerbate such difficulties and further undermine U.S. Efforts.

It is interesting to note that even countries that have experienced decades of deaths at the hands of terrorists have not seen fit to apply the death penalty to capture terrorists. While we already have death penalties for a large number of terrorist-related as well as other crimes, the wholesale expansion of the death penalty offenses only diminishes our posture as a leader of the civilized world.

Another concern with our expansion of the death penalty is our frequent error rate in applying it in this country. A 23-year study conducted by Professor James Sliven of Columbia University involving over 4,500 capital cases in 34 States reveal that the courts found serious reversible error in 68 percent of the capital cases. In the last 10 years more than 100 people on death row have been found factually innocent of the crime for which they had actually received the death penalty.

With this kind of record in administering the death penalty that we have, we should fix the system to diminish the prospect of innocent people being sentenced to death before adding new death penalties. A bill to do so has passed the House and is pending in the Senate. And yet another concern is the clear connection between race, ethnicity and poverty in determining who receives the death penalty, including connections established by a study of the Subcommittee of this Judiciary Committee.

Despite my criticisms and concerns about the bill, it does strike me that some will see it as actually protecting abortion clinic access because it seems to apply to such crimes as illegally blocking access to an abortion clinic.

Since we have seen deaths in abortion clinics in connection with illegal protests, I will be curious to see whether or not the threat of the death penalty for those who participate in such protests or conspire or attempt to do so will deter them from blocking or protesting access for fear that someone will go too far and death will result. I am also curious to see how far the conspiracy application will go; for example, will the Web master who develops information on the organization's Web site targeting the clinic and encouraging participation in the protest be subject to the death penalty as a co-conspirator? These things are not clear to me from the bill.

Mr. Chairman, I look forward to the testimony of our witnesses for clarification on some of these issues and on whether such a

wholesale expansion of the death penalty is helpful or harmful to our anti-terrorism efforts.

Mr. COBLE. I thank the gentleman. And we have been joined by the distinguished gentleman from Florida. Mr. Keller, good to have you with us.

Mr. KELLER. Thank you, Mr. Chairman.

Mr. COBLE. Let me advise the uninformed in case there are uninformed in the audience about the credentials that our witnesses bring to the table today. Today we have four distinguished witnesses. Our first one to introduce, Representative John Carter, who is a Member of the full Committee, not a Member of this Subcommittee. Mr. Carter was elected to the 108th Congress in 2002. He was chosen by his fellow freshmen to represent them on the House Republican Steering Committee, which is responsible for the placement of Republican Members on Committees. He has since been appointed to serve on the Judiciary, Government Reform and the Educational Workforce Committees.

Prior to becoming a congressional candidate, Mr. Carter was appointed judge of the 277 district court of Williamson County where he served in that capacity for 20 years. Mr. Carter began his career with a successful law practice and continued to practice law while serving as a municipal judge in Round Rock until 1980. Mr. Carter graduated from the University of Texas School of Law in 1969 after earning a degree in history from Texas Tech University.

Our second witness is Mr. Johnny Sutton. In 2001, Mr. Sutton was nominated by President Bush to—and confirmed by the United States Senate to serve as the United States attorney for the western district of Texas. As such, Mr. Sutton represents the United States in criminal and civil matters within that district. Prior to becoming United States attorney, Mr. Sutton served as an associate deputy Attorney General at the U.S. Department of Justice in Washington and as a policy coordinator for the Bush-Cheney transition team assigned to the Department of Justice. Mr. Sutton also served as the criminal justice policy director for then-Governor George W. Bush from 95 to 2000, advising the Governor on all criminal justice issues with specific oversight in the areas of criminal law, prison capacity and management, parole operation and legislative initiatives.

Prior to his service in the governor's office, Mr. Sutton worked as a criminal trial prosecutor in the Harris County district attorney's office for 8 years. Mr. Sutton graduated from the University of Texas at Austin where he earned a bachelor's degree in international business in 1983 and the University of Texas School of Law where he earned his JD degree in 1987.

Our third witness today is Dr. Joanna Shepherd. Dr. Shepherd has recently joined the faculty at the Emory School of Law. Prior to going to Emory, Dr. Shepherd was an assistant professor of economics at Clemson University, John E. Walker, Department of Economics, where she had done numerous papers and presentations on the subject of capital punishment and its deterrent effects. Her research includes econometric studies with a focus on law and economics, industrial organization and the economics of crime.

Prior to joining the Clemson University faculty, Dr. Shepherd served as a visiting assistant professor at Georgia State university

and as an instructor at Emory University. She earned her Ph.D. in economics from Emory University and was graduated Summa Cum Laude from Baylor University with a BA in economics and international business.

Our final witness today is Mr. Timothy Edgar, who is joining us from the American Civil Liberties Union where he serves as a legislative counsel in the Washington national office. He is responsible for defending and promoting civil liberties in the areas of national security, terrorism and immigration. Mr. Edgar is a Harvard law school graduate where he served as an editor of the Harvard Law Review and former clerk with Judge Sandra Lynch of the U.S. Circuit Court of Appeals for the First Circuit. Prior to joining the ACLU, Mr. Edgar worked at the law firm of Shay & Gardner. He has also worked pro bono for a small nonprofit organization. And in 2003, Mr. Edgar was named pro bono attorney of the year by the American Arab anti-discrimination committee for his work defending civil liberties after September 11.

It is good to have all of you with us. We have your written statements and they have been examined and will be reexamined. And I ask unanimous consent to submit them into the record in their entirety. As we have requested of you all prior to your appearance here today, folks, we operate on the 5-minute rule. When the red light appears on your panel in front of you, that means Mr. Scott and I may come after you if you don't wind down fairly quickly. I say that, of course, with tongue in cheek. But in the interest of time, the amber light will come on first to let you know that the red light is forthcoming. So keep your eye, judge, on that panel in front of you and we will start with Mr. Carter.

STATEMENT OF THE HONORABLE JOHN R. CARTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. CARTER. Thank you, Chairman Coble, Ranking Member Scott for holding this important hearing. I am honored to be here to discuss a bill I introduced, H.R. 2934, the "Terrorist Penalties Enhancement Act of 2003," which will provide new and expanded penalties for those who commit fatal acts of terrorism. I am pleased that 83 of my colleagues have agreed to cosponsor H.R. 2934, and I would like to share my interest in this matter. As a former State district judge for over 20 years, I presided over five capital murder trials, three of which have resulted in the death penalty. I have a unique perspective on the criminal system, and I understand the importance of safety and the need for America to be tough on criminals. We must protect our neighborhoods from the threat of violent crimes which unfortunately, in today's world, includes the threat of terrorist attacks.

Congress must act to protect U.S. citizens from such attacks and to bring justice to those who threaten our freedom. It is unimaginable to think that a convicted terrorist responsible for American deaths could serve his sentence and be released back into the American streets free to act as he chooses. My straightforward legislation will make any terrorist who kills eligible for the Federal death penalty. This legislation will also deny the same terrorists any Federal benefits they otherwise may have been eligible to receive. In my experience as a judge, I have witnessed the death pen-

alty used as an important tool for deterring crime and saving lives. I believe it is a tool that can deter acts of terrorism and serve as a tool for the prosecutors when negotiating sentences. I am pleased that President George W. Bush has expressed his support for this legislation.

In a speech at the FBI Academy, President Bush said for the sake of the American people, Congress should change the law and give law enforcement officials the same tools they have to fight terror or that they have to fight other crimes.

This past Monday in Hershey, Pennsylvania, President Bush again emphasized the inequity in current law. I agree with President Bush. We ought to be sending a strong signal. If you sabotage a defense installation or a nuclear facility in a way that takes an innocent life, you ought to get the Federal death penalty. I decided to run for Congress in response to the greatest domestic terrorist attack on September 11, 2001. I am sponsoring this legislation today to put all would-be terrorists on notice that they will receive the ultimate justice, should they decide to plan and execute a future attack.

Mr. Chairman, I thank you for the interest in this legislation. I look forward to continuing to work together on this very important issue. Thank you.

[The prepared statement of Mr. Carter follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN R. CARTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Thank you Chairman Coble and Ranking Member Scott for holding this important hearing. I am honored to be here today to discuss a bill I have introduced, H.R. 2934, The Terrorist Penalties Enhancement Act of 2003, which will provide new and expanded penalties to those who commit fatal acts of terrorism. I am pleased that 83 of my colleagues have agreed to cosponsor H.R. 2934, and I would like to share my interest in this matter.

As a former State District Judge for over 20 years, I have a unique perspective on the criminal system. I understand the importance of safety and the need for America to be tough on its criminals. We must protect our neighborhoods from the threat of violent crimes which, unfortunately in today's world, includes the threat of terrorist attacks. Congress must act to protect U.S. citizens from such attacks and to bring justice to those who threaten our freedom.

It is unimaginable to think that a convicted terrorist responsible for American deaths could serve his sentence and be released back onto the American streets, free to act as he chooses. My straight-forward legislation will make any terrorist who kills eligible for the federal death penalty. This legislation will also deny these same terrorists any federal benefits they otherwise may have been eligible to receive. In my experience as a Judge, I have witnessed the death penalty used as an important tool in deterring crime and saving lives. I believe it is also a tool that can deter acts of terrorism. It protects witnesses in capital punishment cases, and it serves as a tool for prosecutors when negotiating sentences.

I am pleased that President George W. Bush has leant his support towards my legislation. In a speech to the FBI Academy, President Bush said, "For the sake of the American people, Congress should change the law, and give law enforcement officials the same tools they have to fight terror that they have to fight other crime." This past Monday in Hershey, Pennsylvania, President Bush again emphasized the inequity in current law. I agree with President Bush, "We ought to be sending a strong signal: If you sabotage a defense installation or nuclear facility in a way that takes an innocent life, you ought to get the death penalty, the federal death penalty."

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Mr. Chairman, thank you for your interest in this legislation. I look forward to continuing to work together on this important issue.

Mr. COBLE. You must have taken my admonition.

Mr. CARTER. I am scared to death of you, Mr. Chairman.

Mr. COBLE. Mr. Sutton.

STATEMENT OF THE HONORABLE JOHNNY SUTTON, U.S. ATTORNEY, WESTERN DISTRICT OF TEXAS, U.S. DEPARTMENT OF JUSTICE

Mr. SUTTON. Mr. Chairman, Ranking Member Scott, Members of the Subcommittee, thank you for the opportunity to appear before you today to discuss H.R. 2934 and the importance of the death penalty in terrorism prosecutions. Judge Carter, on behalf of the Department of Justice, I especially want to thank you for your leadership on this issue and for introducing this important piece of legislation. In the war on terrorism, prosecutors must be equipped with every possible weapon that can help to prevent and deter terrorist conduct before it occurs. We need to be able to severely punish terrorism when it does happen and help victims whose lives have been affected by this crime find justice.

Following the tragedy of September 11, Congress wisely acted to improve and enhance the capabilities of Federal law enforcement to fight terrorism by overwhelmingly passing the USA PATRIOT Act. On a variety of fronts, the PATRIOT Act has provided tremendous tools for preventing terrorist acts and prosecuting terrorists. The PATRIOT Act has effectively removed obstacles that prevented crucial information sharing between intelligence and law enforcement officers. It has brought Federal law enforcement, Federal criminal law to date with new technology, thus leveling the playing field for investigators and prosecutors. And it has increased the maximum sentences for a number of terrorist-related offenses.

Despite these positive developments, more can and should be done, including the passage of this bill. H.R. 2934 is important because it will ensure that all terrorists who cause death in the course of their terroristic acts will be eligible for the death penalty if the facts warrant such a punishment. Under current law, some terrorist offenses that could result in the death of American citizens do not provide for the death penalty or even for a sentence of life in prison as an available punishment.

For example, a terrorist who is convicted of attacking a nation defense installation, sabotaging a nuclear facility or destroying a power plant cannot receive the death penalty even if his crime results in mass casualties. H.R. 2934 would change the law to make the perpetrator of all terrorist acts resulting in death, including the ones I just mentioned, eligible for the death penalty. Increasing the potential penalties for all crimes of terrorism will send a clear message to would-be terrorists that the murder of innocent Americans will be punished to the full extent allowed under our Constitution.

Because the consequences of these cases are so serious and the stakes are so high, lawmakers must always approach any expansion of the death penalty with caution and careful deliberation. As an experienced prosecutor, both at the State and Federal level in my home State of Texas, I have had significant experience in dealing with death penalty cases. As a local prosecutor, I personally

tried 3 capital murder cases in which the death penalty was imposed. Also during those years, I considered a number of cases in which the State decided not to seek the death penalty. I have personally witnessed an execution. I understand the gravity of the ultimate punishment on the perpetrator and victims of these crimes. During my time as U.S. Attorney in the western district of Texas, my office has considered 25 defendants charged with crimes eligible for the death penalty. My office has sought the death penalty in only one of those cases. In that case, the defendant was convicted and the jury imposed a sentence of death.

Seeking and applying the death penalty is serious and sobering business. There is a great responsibility in the exercise of prosecutorial discretion in this area. The Department of Justice has taken this responsibility seriously. Through its formal review process, the Department carefully reviews the applicability of the death penalty in every possible case all the way up to the Attorney General himself.

H.R. 2934 will not change this. I do not favor liberally expanding the number or the types of crimes that may be punished by death. But in the fight against terrorism where there are real dangers of mass casualties, we should have every appropriate tool at our disposal for dealing with those who commit or would commit such horrible crimes of violence against our Nation and our citizens. H.R. 2934 is an important contribution to that end.

Mr. Chairman, thank you again for inviting me to appear before the Subcommittee today. On behalf of the Department of Justice, I cannot thank you and your colleagues enough for your leadership and support that you all have provided on the war on terror. It is my pleasure to support House bill 2934 and I look forward to the opportunity to respond to any questions you may have.

Mr. COBLE. Thank you, Mr. Sutton.

[The prepared statement of Mr. Sutton follows:]

PREPARED STATEMENT OF JOHNNY SUTTON

Mr. Chairman, Ranking Member Scott, members of the subcommittee, thank you for the opportunity to appear before you today to discuss H.R. 2934, the "Terrorist Penalties Enhancement Act of 2003," and the importance of the death penalty in terrorism prosecutions. Mr. Carter, on behalf of the Department of Justice, I especially want to thank you for your leadership on this issue and for introducing this important piece of legislation.

In the war on terrorism, prosecutors must be equipped with every possible weapon that can help to prevent and deter terrorist conduct before it occurs, severely punish such conduct when it does occur, and help find justice for those whose lives have been affected by crimes of terror.

Following the tragedy of 9/11, Congress wisely acted to improve and enhance federal law enforcement's terrorism fighting capabilities by overwhelmingly passing the USA PATRIOT Act. On a variety of fronts, the PATRIOT Act has provided tremendous tools for preventing terrorist acts and prosecuting terrorists. Among other things, the PATRIOT Act has effectively removed obstacles to crucial information-sharing between intelligence and law enforcement professionals, it has brought federal criminal law up-to-date with new technology, thus leveling the playing field for investigators and prosecutors, and it has increased the maximum sentences for a number of terrorism-related offenses. Despite these positive developments, more can and should be done, including the passage of H.R. 2934.

H.R. 2934 is important, because it will ensure that all terrorists who cause death in the course of their terroristic acts will be eligible for the death penalty if the facts warrant such a punishment. Under current law, some terrorist offenses that result in the death of American citizens do not provide for the death penalty or even for a sentence of life in prison as an available punishment. For example, a terrorist who

is convicted of attacking a national defense installation, sabotaging a nuclear facility, or destroying a power plant cannot receive the death penalty, even if his crime results in mass casualties. As the President stated just two days ago, on April 19, 2004, this "makes no sense to me. We ought to be sending a strong signal: if you sabotage a defense installation or nuclear facility in a way that takes an innocent life, you ought to get the death penalty, the federal death penalty."

H.R. 2934 would change the law to make the perpetrators of all terrorist acts resulting in death, including these, eligible for the death penalty. Increasing the potential penalties for all crimes of terrorism will serve as a reminder to would-be terrorists that the murder of innocent Americans will be punished to the fullest extent allowed under our Constitution.

As an experienced prosecutor at both the state and federal levels in my home state of Texas, I have had significant experience with death penalty cases. As a local prosecutor, I have personally tried three cases in which the death penalty was imposed, and considered a number of cases in which the State decided not to seek the death penalty. I have personally witnessed an execution, and understand the gravity of the ultimate punishment on both the perpetrator and victims of crime. During my tenure as the U.S. Attorney for the Western District of Texas, my office has considered 25 defendants charged with crimes eligible for the death penalty. My office has sought the death penalty in only one of those cases. In that case, the defendant was convicted, and the jury imposed the death penalty. Seeking and applying the death penalty is serious and sobering business. There is great responsibility in the exercise of prosecutorial discretion in this area. The Department of Justice has taken this responsibility seriously. Through its formal review process, the Department carefully reviews the applicability of the death penalty in every possible case, all the way up to the Attorney General. H.R. 2934 would not change this. I do not favor liberally expanding the number and types of crimes that may be punished by death. But in the fight against terrorism, we should have every tool at our disposal for dealing with those who commit or would commit such horrendous crimes of violence against our nation and our citizens. H.R. 2934 is an important contribution to that end.

Mr. Chairman, again, thank you for inviting me to appear before your Subcommittee today. On behalf of the Department of Justice, I cannot thank you and your colleagues enough for the leadership and support you have provided in the war on terror. It is my pleasure to support H.R. 2934, and I look forward to the opportunity to respond to any questions that you might have.

Mr. COBLE. Dr. Shepherd.

STATEMENT OF JOANNA SHEPHERD, PhD., VISITING ASSISTANT PROFESSOR, EMORY LAW SCHOOL

Ms. SHEPHERD. Chairman Coble, Ranking Member Scott and Members of the Subcommittee, thank you for having me here today to discuss the issues relating to H.R. 2934. As a Ph.D. Economist, the primary focus of my research has been the empirical analysis of crime. I have studied the deterrent effect of capital punishment extensively. I have three published studies on the topic and I am currently working on another study and a book.

Today I am going to briefly speak about three things: First I will speak on the early studies on whether capital punishment had a deterrent effect. The studies produced mixed results. Some found deterrence and others did not. Second, I will describe the modern studies from the past decade including my own studies. There have been 13 modern economic studies on the deterrent effect of capital punishment. All find that executions significantly deter murders. Finally, I will discuss what existing studies might be able to tell us about whether capital punishment could deter terrorism. Let me add that this testimony will only address deterrence. It will not consider any of the other possible issues of capital punishment such as moral problems, the socioeconomic patterns of who is executed or the dangers of executing innocent people.

First the early studies: The debate and the economics literature began with Isaac Ehrlich's two papers in the 1970's. Ehrlich was the first to study capital punishment's deterrent effect using multivariate regression analysis. Multivariate regression analysis allowed Ehrlich to separate the effects on murder of many different factors such as the racial and age composition of the population, average income, unemployment, and the execution rate. Ehrlich's first paper used time series analysis, 36 years of overall U.S. data from 1933 to 1969. His second paper used cross-section analysis, 1 year of data from all 50 States.

Both of Ehrlich's studies found significant deterrent effects. In fact, he estimated each execution resulted in about 8 fewer murders. Ehrlich's finding was controversial and loosed a flood of interest in statistical analysis of capital punishment. The papers that immediately followed Ehrlich used his original data or slight extensions and slightly different statistical methods. Many found that executions deter murder but others did not. The results were mixed. However, almost all of the early studies suffered from major flaws because they either used time series data or cross-section data. For technical reasons that economists agree on, these types of data are imperfect for measuring deterrence. The techniques have been become obsolete in situations where better panel data are available.

Panel data are data from several units like the 50 States or all U.S. counties over several years. Panel data techniques fix many of the problems associated with the data that early studies used. Now let's talk about the modern studies. 13 economic studies on capital punishment's deterrent effect have been conducted in the past decade. Most use new improved panel data and modern statistical techniques. They all use multivariate regression analysis to separate the effect on murder, of executions, demographics, economic factors, et cetera.

The studies are unanimous. All 13 of them find a deterrent effect. I have conducted three of these studies. My first study used 20 years of data from all U.S. counties to measure the effect of county differences on murder. My second paper used monthly data from all U.S. States for 22 years to measure the short-term effect of capital punishment. This paper also looks at different categories of murder to determine which kinds of murder are deterred by executions. The third study looks at the effect on murders of the 1970's Supreme Court moratorium on executions. All of my papers find a deterrent effect.

Moreover, I find that all categories of murder are deterred by the death penalty, even so-called crimes of passion. My results predict that each execution deters somewhere between 3 and 18 murders. The other 10 modern economics papers used different methods and different data than my own, but all find a significant deterrent effect.

Finally, let's talk about what if anything the studies might be able to tell us about whether capital punishment deters terrorism. Unfortunately, there is not yet any empirical research specifically on capital punishment and terrorism. Some people might think that all terrorists are undeterrable fanatics. In fact, it might even be suggested that capital punishment could increase terrorism if

potential terrorists view executions as their ticket to holy martyrdom.

However, the indirect evidence from the other studies suggest that this may not be the case for three reasons: First, research shows that capital punishment deters every kind of murder that has been studied. This includes many kinds of murderers like terrorists who might not seem to be deterrable. My own paper found the death penalty has a deterrent effect on all categories of murder including crimes of passion and intimate murders that many people think are undeterrable. Second, capital punishment could have an overall deterrent effect on terrorism even if many terrorists are not influenced by capital punishment. To give a deterrent effect, all that is necessary is that a small fraction of terrorists are deterred. Obviously, the death penalty does not deter all murders, but it does deter a small important fraction of them. Third, although there are exceptions, news accounts——

Mr. COBLE. Dr. Shepherd, if you could wrap up.

Ms. SHEPHERD. News accounts are replete with accounts of alleged terrorists who fight strenuously in court to get life imprisonment instead of the death penalty. These terrorists obviously view executions as a worse penalty than life in prison. If executions are a harsher penalty, then some terrorists should be deterred by them. Thanks again for having me, and I look forward to answering any questions you may have.

[The prepared statement of Ms. Shepherd follows:]

PREPARED STATEMENT OF JOANNA M. SHEPHERD

I. INTRODUCTION AND SUMMARY

Recent research on the relationship between capital punishment and crime has created a strong consensus among economists that capital punishment deters crime. Early studies from the 1970s and 1980s reached conflicting results. However, recent studies have exploited better data and more sophisticated statistical techniques. The modern studies have consistently shown that capital punishment has a strong deterrent effect, with each execution deterring between 3 and 18 murders. This is true even for crimes that might seem not to be deterrable, such as crimes of passion.

No research has yet focused specifically on whether capital punishment deters terrorism. It is conceivable that some terrorists are undeterrable, as are some who commit other murders. Indeed, the application of the death penalty might conceivably induce some terrorist acts, as terrorists seek martyrdom. However, the pervasive consistency of capital punishment's deterrence of other kinds of murder suggests that capital punishment would deter at least some terrorist murders.

One caution: that capital punishment deters murder does not necessarily demonstrate that imposing capital punishment is good policy. In addition to the benefits from deterrence, other factors must also be considered, such as capital punishment's morality, the socio-economic patterns with which executions are imposed, and the dangers of executing the innocent. These other factors are beyond this testimony's scope.

I proceed as follows. After Part II explains my qualifications, Part III discusses early research on whether capital punishment deters crime. Part IV describes modern studies, and Part V discusses the degree to which current research can be applied to terrorism.

II. MY BACKGROUND AND QUALIFICATIONS.

I received my Ph.D. in Economics from Emory University in 2002, with fields of specialization in Law & Economics and Econometrics. Since then, I have been on the faculty at the John E. Walker Department of Economics at Clemson University, in Clemson, South Carolina. I am currently beginning an appointment at the Emory University School of Law, in Atlanta, Georgia. I will also teach in Emory's economics department. I have frequently published articles in peer-reviewed journals, and I have published a book.

The primary focus of my research has been the empirical analysis of crime. One of my research interests has been on whether capital punishment deters crime. I have published three articles on the topic in peer-reviewed journals, and I have another working paper underway. I am also in the process of creating a related book. I have presented this research widely around the country at seminars and professional meetings. I have also discussed the work frequently in the popular media, including internationally on BBC radio. My research on capital punishment and deterrence places me among the leading experts on the issue.

III. EARLY LITERATURE ON CAPITAL PUNISHMENT AND DETERRENCE.

In the U.S., the deterrence issue has been a topic of hot debate for decades. The initial participants in the debate were psychologists and criminologists. Their research was either theoretical or based on comparisons of crime patterns in states with and without capital punishment. However, because they did not use multiple-regression statistical techniques, the analyses were unable to distinguish the effect on murder of capital punishment from the effects of other factors. [1]

The debate in the economics literature began with Isaac Ehrlich's two papers in 1975 and 1977.[2] Ehrlich was the first to study capital punishment's deterrent effect using multivariate regression analysis. In contrast to earlier methods, this approach allowed Ehrlich to separate the effects of many different factors on murder.

Ehrlich's 1975 paper examined U.S time-series data for the period 1933–1969. Time-series data are data for one unit (for Ehrlich, for the entire U.S.) over several time periods. He tested the effect on national murder rates of deterrent variables (the probabilities of arrest, conviction, and execution), demographic variables (population, fraction of nonwhites, fraction of people age 14–24), economic variables (labor force participation, unemployment rate, real per capita permanent income, per capita government expenditures, and per capita expenditures on police), and a time variable. He found a statistically significant negative relationship between the murder rate and execution rate, indicating a deterrent effect. Specifically, he estimated that each execution resulted in approximately seven or eight fewer murders.

Ehrlich's 1977 paper studied cross-sectional data from the fifty states in 1940 and 1950. That is, instead of his first paper's approach testing how the total U.S. murder rate changed across time as the execution rate changed, Ehrlich now explored the relationship during a single year between each of the states' execution rates and their murder rates. Cross-sectional data are data from several units (here, the fifty states) for one time period (1940 or 1950).

Again, Ehrlich used multivariate regression analysis to separate the effect on murder of different factors. He included deterrent variables (probabilities of conviction and execution, median time spent in prison, and a dummy variable distinguishing executing states from non-executing states), demographic variables (state population, urban population, percent of nonwhites, and percent of people age 15–24 and 25–34), and economic variables (median family income and percent of families with income below half of the median income). Again, his findings indicated a substantial deterrent effect of capital punishment on murder.

Ehrlich's finding loosed a flood of interest in econometric analysis of capital punishment and deterrence. The papers that immediately followed Ehrlich used his original data (1933–1969 national time-series or 1940 and 1950 state level cross section) and variants of his econometric model. Many found a deterrent effect of capital punishment, but others did not. For example, using Ehrlich's data, all of the following found a deterrent effect: Yunker, Cloninger, and Ehrlich and Gibbons.[3] In contrast, Bowers and Pierce; Passel and Taylor; and Hoenack and Weiler find no deterrence when they use the same data with alternative specifications.[4] Similarly, McAleer and Veall, Leamer, and McManus, find no deterrent effect when different

[1] For example, J.T. Sellin, J. T., The Death Penalty (1959); H. Eysenck, Crime and Personality (1970).

[2] Isaac Ehrlich, The Deterrent Effect of Capital Punishment: A Question of Life and Death, 65 Am. Econ. Rev. 397 (1975); Isaac Ehrlich, Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence, 85 J. Pol. Econ. 741 (1977)

[3] James A. Yunker, Is the Death Penalty a Deterrent to Homicide? Some Time Series Evidence, 5 Journal of Behavioral Economics 45 (1976); Dale O. Cloninger, Deterrence and the Death Penalty: A Cross-Sectional Analysis, 6 Journal of Behavioral Economics 87 (1977); Isaac Ehrlich & Joel Gibbons, On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence, 6 Journal of Legal Studies 35 (1977).

[4] W. J. Bowers & J.L. Pierce, The Illusion of Deterrence in Isaac Ehrlich's work on Capital Punishment, 85 Yale Law Journal 187 (1975); Peter Passell & John B. Taylor, The Deterrent Effect of Capital Punishment: Another View, 67 American Economic Review 445 (1977); Stephen A. Hoenack & William C. Weiler, A Structural Model of Murder Behavior and the Criminal Justice System, 70 American Economic Review 327 (1980).

variables are included over the same sample period.[5] Finally, Black and Orsagh find mixed results depending on the cross-section year they use.[6]

In the late 1980s and 1990s, a second-generation of econometric studies extended Ehrlich's national time-series data or used more recent cross-sectional data. As before, some papers found deterrence while others did not. For example, Layson and Cover and Thistle use an extension of Ehrlich's national time-series data, covering up to 1977.[7] Although Layson finds a significant deterrent effect of executions, Cover and Thistle correct for data flaws—nonstationarity—and find no deterrent effect. Chressanthis employs national time-series data covering 1966 through 1985 and finds a deterrent effect.[8] In contrast, Grogger uses daily data for California during 1960–1963 and finds no deterrent effect.[9]

However, most of the early studies—both the first wave and the second generation—suffered from fundamental flaws: they suffered important data limitations because they used either national time-series or cross-section data. Using national time-series data created a serious aggregation problem. Any deterrence from an execution should affect the crime rate only in the executing state; one state's high execution rate would not be expected to change the rate in nearby states, where the first state's laws and courts lack criminal jurisdiction.

Aggregation dilutes such distinct effects, creating "aggregation bias." For example, suppose that the following happens concurrently: the murder rate in a state with no executions randomly increases at the same time that the murder rate drops in a state with many executions. Aggregate data might incorrectly lead to an inference of no deterrence; the aggregate data, with the two states lumped together, would show an increase in executions leading to no change in the murder rate.

Cross-sectional studies also suffer serious problems. Most importantly, they preclude any consideration of what happens to crime, law enforcement, and judicial processes over time. Cross-section data also prevent researchers from controlling for jurisdiction-specific characteristics that could be related to murder, such as a violent culture in southern states.[10]

Several authors expressed similar data concerns with time-series and cross-section data and called for new research using panel data, as I now discuss.[11]

IV. MODERN STUDIES OF CAPITAL PUNISHMENT'S DETERRENT EFFECT.

Most recent studies have overcome the fundamental problems associated with national time-series and cross-section data by using panel-data techniques. Panel data are data from several units (the fifty states or all U.S. counties) over several different time periods; that is, panel data follow a cross-section over time. For example, a panel dataset might include data on each of the fifty states, or even on each U.S. county, for a series of years.

These improved data allow researchers to capture the demographic, economic, and jurisdictional differences among U.S. states or counties, while avoiding aggregation bias. Furthermore, panel data produce many more observations than cross-section or time-series data, enabling researchers to estimate any deterrent effect more precisely. In addition to enjoying the benefits of panel data, recent studies have access to more recent data that make conclusions more relevant for the current environment.

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[5] Michael McAleer & Michael R. Veall, How Fragile are Fragile Inferences? A Re-Evaluation of the Deterrent Effect of Capital Punishment, 71 Review of Economics and Statistics 99 (1989); Edward E. Leamer, Let's Take the Con out of Econometrics, 73 American Economic Review 31 (1983); Walter S. McManus, Estimates of the Deterrent Effect of Capital Punishment: The Importance of the Researcher's Prior Beliefs, 93 Journal of Political Economy 417 (1985).

[6] T. Black & T. Orsagh, New Evidence on the Efficacy of Sanctions as a Deterrent to Homicide, 58 Social Science Quarterly 616 (1978).

[7] Stephen A. Layson, Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence, 52 Southern Economic Journal 68 (1985); James P. Cover & Paul D. Thistle, Time Series, Homicide, and the Deterrent Effect of Capital Punishment, 54 Southern Economic Journal 615 (1988).

[8] George A. Chressanthis, Capital Punishment and the Deterrent Effect Revisited: Recent Time-Series Econometric Evidence, 18 Journal of Behavioral Economics 81 (1989).

[9] Jeffrey Grogger, The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts, 85 J. of the American Statistical Association 295 (1990).

[10] Technically, cross-sectional studies are affected by unobserved heterogeneity that cannot be controlled for in the absence of time variation. The heterogeneity is caused by jurisdiction-specific characteristics that may correlate with other variables of the model, resulting in biased, incorrect estimates.

[11] See, e.g., Samuel Cameron, A Review of the Econometric Evidence on the Effects of Capital Punishment, 23 Journal of Socio-Economics 197 (1994) and K.L. Avio, Capital Punishment, in The New Palgrave Dictionary of Economics and the Law *(Peter Newman, ed. 1998).*

Using improved data and more sophisticated regression techniques, thirteen papers have been written in the economics literature in the past decade. Their conclusion is unanimous: all of the modern papers find a significant deterrent effect.

I now briefly discuss the modern research in the economics literature from the past decade, beginning with the studies in which I have been involved. I group the papers into those that use panel-data techniques and those using other techniques.

A. Modern Papers using Panel-Data Techniques.

1. Hashem Dezhbakhsh, Paul H. Rubin, and I examine whether deterrence exists using county-level panel data from 3,054 U.S. counties over the period 1977 to 1996.[12] This is the only study to use county-level data, allowing us to estimate better the demographic, economic, and jurisdictional differences among U.S. counties that can affect murder rates. Moreover, the large number of county-level observations extends the empirical tests' reliability.[13]

We find a substantial deterrent effect; both death row sentences and executions result in decreases in the murder rate. A conservative estimate is that each execution results in, on average, 18 fewer murders. Our main finding, that capital punishment has a deterrent effect, is robust to many different ways of performing the statistical analysis.[14]

2. In another paper, I use state-level, monthly panel data from 1977–1999 to examine two important questions in the capital punishment literature.[15] First, I investigate the types of murders deterred by capital punishment. Some people in the debate on capital punishment's deterrent effect believe that certain types of murder are not deterrable. They claim that murders committed during interpersonal disputes, murders by intimates, or noncontemplated crimes of passion are not intentionally committed and are therefore nondeterrable. Others argue that the brutality of executions incites criminals and increases the rates of stranger murders.

To the contrary, I find that the combination of death row sentences and executions deters all types of murders: murders between intimates, acquaintances, and strangers, crime-of-passion murders and murders committed during other felonies, and murders of African-American and white people.[16] I estimate that each death row sentence deters approximately 4.5 murders and that each execution deters approximately 3 murders.

The second important issue that I address is the impact on deterrence of execution delays. In 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 that limits federal habeas review in capital cases. If criminals prefer lengthy death row waits to short ones, as their numerous appeals and requests for stays suggest, then shortening the time until execution could increase the death penalty's deterrent impact.

I find that shorter waits on death row increase deterrence. Specifically, one extra murder is deterred for every 2.75-years reduction in the death-row wait before each execution.

3. Hashem Dezhbakhsh and I use state-level panel data from 1960–2000 to examine capital punishment's deterrent effect.[17] This is the only study to use data from before, during, and after the 1972–1976 Supreme Court moratorium on executions. Our study advances the deterrence literature by exploiting an important characteristic that other studies overlooked: the experimental nature of the Supreme Court moratorium.

First, we perform before-and-after moratorium comparisons by comparing the murder rate for each state immediately before and after it suspended or reinstated the death penalty. These before-and-after comparisons are informative because many factors that affect crime—e.g., law enforcement, judicial, demographic, and economic variables—change only slightly over a short period of time. In addition,

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[12] Hashem Dezhbakhsh, Paul Rubin, and Joanna M. Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 American Law and Economics Review 344 (2003).

[13] Technically, it extends the analysis' degrees of freedom, increases variability, and reduces colinearity among variables.

[14] The deterrent effect remains with different choices of functional form (double-log, semi-log, or linear), state-level vs. county-level analysis, sampling period, endogenous vs. exogenous probabilities, and level vs. ratio specification of the main variables.

[15] Joanna M. Shepherd, Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment, 33 Journal of Legal Studies (forthcoming 2004).

[16] Intimates are defined as spouses, common-law spouses, parents, children, siblings, in-laws, step-relations, and other family. Crime-of-passion murders include lovers' triangles, murders by babysitters, brawls under alcohol, brawls under drugs, arguments over money, other arguments, and abortion-murders (abortions performed during the murder of the mother).

[17] Hashem Dezhbakhsh and Joanna M. Shepherd, The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment," (Emory University Working Paper, 2003).

the moratorium began and ended in different years in different states. Considering the different start and end dates, the duration of the moratorium varied considerably across states, ranging from four to thirty years. Observing similar changes in murder rates immediately after the same legal change in different years and in various states provides compelling evidence of the moratorium's effect on murder.

The before-and-after comparisons reveal that as many as 91 percent of states experienced an increase in murder rates after they suspended the death penalty. In about 70 percent of the cases, the murder rate dropped after the state reinstated the death penalty.

We supplement the before-and-after comparisons with time-series and panel-data regression analyses that, unlike many existing studies, uses both pre- and postmoratorium data. The regressions disentangle the impact of the moratorium itself on murder from the effect of actual executions on murder; we find that the moratorium has a significant positive effect on murder and that executions have significant negative effects on murder. These estimates suggest that both adopting a capital statute and exercising it have strong deterrent effects.[18]

4. John R. Lott, Jr. and William M. Landes use state-level panel data from 1977 to 1995 to examine whether right-to-carry concealed handgun laws deter multiple-victim public shootings.[19] Included in their analysis are tests of the deterrent effect of executions on murder. The authors find that right-to-carry concealed handgun laws do result in fewer multiple victim public shootings. They also find that executions have a significant deterrent effect on the overall murder rate. Specifically, a one percent increase in the execution rate is associated with a seven percent decline in the overall murder rate.

5 and 6. Two papers by FCC economist Paul Zimmerman find a deterrent effect.[20] Zimmerman uses state-level panel data from 1978 to 1997 to examine the relationship between state execution rates and murder rates. In a second paper, he employs state-level panel data from 1978–2000 to examine which execution methods have the strongest deterrent effects. In both papers, Zimmerman finds a significant deterrent effect of capital punishment. He estimates that each execution deters an average of 14 murders and that executions by electrocution have the strongest impact.

7. H. Naci Mocan and R. Kaj Gittings use state-level panel data from 1977 to 1997 to examine the relationship between executions, commutations, and murder.[21] Again, the authors find a significant deterrent effect; they estimate that each execution deters an average of 5 murders. Their results also indicate that both commuting death-row prisoners' sentences and removing them from death row cause increases in murder. Specifically, each commutation results in approximately five extra murders and each removal from death row generates one additional murder.

8. Another recent paper by Lawrence Katz, Steven D. Levitt, and Ellen Shustorovich uses state-level panel data covering the period 1950 to 1990 to measure the relationship between prison conditions, capital punishment, and crime rates.[22] They find that the death rate among prisoners (a proxy for prison conditions) has a significant, negative relationship with overall violent crime rates and property crime rates. As expected, the execution rate has no statistically significant relationship with overall violent crime rates (which consist mainly of robbery and aggravated assault rates) and property crime rates; that is, executions have no effect on non-capital crimes. In several estimations, both the prison death rate and the execution rate are found to have significant, negative relationships with murder

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[18] We also confirm that our results hold up to changes in our choice of regressors, estimation method, and functional form. The deterrent variables' coefficients are remarkably consistent in sign and significance across 84 different regression models. In addition, we verify that the negative relationship between the death penalty and murder is not a spurious finding. Before-and-after moratorium comparisons and regressions reveal that the death penalty does not cause a decrease in property crimes, suggesting that the deterrent effect is not reflecting general trends in crime.

[19] John R. Lott, Jr. & William M. Landes, Multiple Victim Public Shootings, Bombings, and Right-to-Carry Concealed Handgun Laws: Contrasting Private and Public Law Enforcement, (John M. Olin Law & Economics Working paper No. 73, University of Chicago Law School, 2000)

[20] Paul R. Zimmerman, Estimates of the Deterrent Effect of Alternative Execution Methods in the United States: 1978–2000, American Journal of Economics and Sociology (forthcoming); Paul R. Zimmerman, State Executions, Deterrence, and the Incidence of Murder, Journal of Applied Economics (forthcoming).

[21] H. Naci Mocan and R. Kaj Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 Journal of Law and Economics 453 (2003).

[22] Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, Prison Conditions, Capital Punishment, and Deterrence, 5 American Law and Economics Review 318 (2003).

rates. The deterrent effect of executions is especially strong in the estimations that control for the economic and demographic differences among states.[23]

B. Modern Papers Using Other Techniques

9. Instead of a panel-data study, Dale O. Cloninger and Roberto Marchesini conduct a portfolio analysis in a type of controlled group experiment: the Texas unofficial moratorium on executions during most of 1996.[24] They find that the moratorium appears to have caused additional homicides and that murder rates significantly decreased after the moratorium was lifted.

10. Harold J. Brumm and Dale O. Cloninger use cross-sectional data covering 58 cities in 1985 to distinguish between criminals' perceived risk of punishment and the ex-post risk of punishment measured by arrest rates, conviction rates, or execution rates.[25] They find that the perceived risk of punishment, including the probability of execution, is negatively and significantly correlated with the homicide commission rate.

11. James A. Yunker tests the deterrence hypothesis using two sets of post-moratorium data: state cross-section data from 1976 and 1997 and national time-series data from 1930–1997.[26] He finds a strong deterrent effect in the time-series data that disappears when the data are limited to the 1930–1976 period. Therefore, he concludes that postmoratorium data is critical in testing of the deterrence hypothesis.

12 and 13. Two other papers, one by Isaac Ehrlich and Zhiqiang Liu and the other by Zhiqiang Liu, use Ehrlich's original state-level, cross-section data.[27] The study by Ehrlich and Liu offers a theory-based sensitivity analysis of estimated deterrent effects and finds that executions have a significant deterrent effect. Liu's study uses switching regression techniques in estimations that take into account the endogenous nature of the status of the death penalty. He also finds a strong deterrent effect.

V. APPLICATION OF THE RESEARCH TO TERRORISM.

To predict perfectly whether the Terrorist Penalties Enhancement Act of 2003 (H.R. 2934) will decrease terrorist acts, we would need research that focuses specifically on the application of capital punishment to terrorists. Unfortunately, this research does not yet exist. However, it is still worth discussing indirect evidence about whether terrorists, like other potential murderers, can be deterred.

It is probable that capital punishment cannot deter some terrorists. For example, the death penalty would not have deterred the September 11 terrorists or suicide bombers. Similarly, the death penalty does not deter all potential perpetrators of any type of murder; in states with the death penalty for first-degree murder, people still commit many murders in the first degree.

Even if the death penalty does not deter all terrorists, it can still have an overall deterrent effect if it deters some terrorists. Although some fanatics may not be deterrable, the death penalty will decrease terrorism as long as there are a few potential terrorists who prefer imprisonment to death.

Similarly, many people who commit crimes of passion may well be undeterrable. The emotion of the moment may overcome their self-control. However, my research, discussed above, shows that the death penalty has a deterrent effect on crimes of passion, taken as a group.[28] Although the death penalty may not deter all, or even most, crimes of passion, it deters some of them.

However, there may be no reduction in terrorism if the death penalty induces as much terrorism as it deters. Indeed, the application of the death penalty might conceivably induce a net increase in terrorism if many terrorists view the death penalty as a means to glorious martyrdom.

However, both research and current examples suggest that, although some terrorists are undeterrable fanatics, a substantial number do respond to incentives in the

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[23] The authors' accompanying commentary focuses on other aspects of their results.

[24] Dale O. Cloninger & Roberto Marchesini, Execution and Deterrence: A Quasi-Controlled Group Experiment, 35 Applied Economics 569 (2001).

[25] Harold J. Brumm and Dale O. Cloninger, Perceived Risk of Punishment and the Commission of Homicides: A Covariance Structure Analysis, 31 Journal of Economic Behavior and Organization 1 (1996).

[26] James A. Yunker, A New Statistical Analysis of Capital Punishment Incorporating U.S. Postmoratorium Data, 82 Social Science Quarterly 297 (2002).

[27] Isaac Ehrlich & Zhiqiang Liu, Sensitivity Analysis of the Deterrence Hypothesis: Lets Keep the Econ in Econometrics, 42 Journal of Law and Economics 455 (1999); Zhiqiang Liu, Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence, Eastern Economic J. (forthcoming)

[28] Shepherd, supra note 15.

way that other potential murderers do. For example, Lott and Landes showed that potential perpetrators of multiple-victim mass shootings are deterred in states that permit citizens to carry concealed weapons; in such states, a greater chance exists that the perpetrators will be shot.[29] Likewise, many terrorists, such as Osama bin Laden and alleged bomber Eric Rudolph, attempt strenuously to avoid capture and punishment. It is possible to be a selfish, calculating terrorist.

Moreover, each instance in which an alleged terrorist or other accused murderer asks his lawyer to attempt to gain a sentence of life in prison, rather than death, is evidence that is consistent with deterrence. Many accused perpetrators fight strenuously to avoid execution; few volunteer for it. That many potential perpetrators view execution as worse than life imprisonment confirms why the existence of the death penalty would deter at least a few from committing murder.

Finally, the pervasive consistency of capital punishment's deterrence of other kinds of murder suggests that capital punishment would deter at least some terrorist murders.

Mr. COBLE. Mr. Carter, I don't think Dr. Shepherd was intimidated by my admonition as you were, but she didn't violate it very badly. Mr. Edgar, good to have you with us.

STATEMENT OF TIMOTHY H. EDGAR, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. EDGAR. Thank you very much Mr. Chairman. I am pleased to appear before you today on behalf of the ACLU to discuss H.R. 2934. The bill expands the death penalty to terrorism as defined by the PATRIOT Act where death results. The bill is the first of three separate bills that the Administration is pushing to expand the PATRIOT Act. Congress should reject the Administration's invitation to pass this part of PATRIOT Act II. The American Conservative Union, Free Congress Foundation and the Gun Owners of America, have joined with the ACLU and many others in taking strong issue with the PATRIOT Act's definition of domestic terrorism.

More than 291 local resolutions in 39 States, including four statewide resolutions, have rejected some provisions of the PATRIOT Act, including the terrorism definition, saying that it infringes on basic rights and freedoms. All together, these communities represent close to 50 million Americans. Because the PATRIOT Act's terrorism definition is so broad, it might ensnare both conservative and liberal activists. Leaders on the left and the right have agreed that it must be amended. Conservative Republicans Butch Otter of Idaho and Jeff Flake or Arizona have introduced H.R. 3352, the Security and Freedom Ensured or SAFE Act which would more narrowly focus the definition of domestic terrorism on serious terrorism crimes.

The House Judiciary Committee is just beginning its oversight of the Justice Department's use of the PATRIOT Act and other powers. Congress should not consider a major expansion of the PATRIOT Act's terrorism definition or any other very controversial part of the PATRIOT Act before it has completed this process. Most important, the bill is not needed to make the death penalty available for very serious crimes. The Government already has 20 Federal death penalty terrorism offenses not to mention other Federal and State death penalties at its disposal. Rather, the bill will likely sweep in more peripheral cases of politically motivated crime, even potentially including some acts of civil disobedience if death re-

[29] Lott & Landes, supra note 19.

sults. Whether prosecutors seek the death penalty in such cases may depend on the politics of the defendants or of the Administration. The bill makes two major changes to the Federal death penalty. It enacts a sweeping catch all death penalty for any Federal felony and even attempts and conspiracies that is any Federal crime whose maximum punishment is over a year into a potentially capital offense if it meets the PATRIOT Act's definition of domestic terrorism. What that means is that it must involve a criminal act and appear to be intended to influence Government policy or a civilian population and must involve dangerous acts. These definitions of terrorism are so broad that they could cover criminal felony violations of the freedom of access to clinic entrances act or other types of Federal laws that might be violated by certain types of protest groups.

Finally, the other thing that it does is it expands the list of Federal crimes of terrorism which is currently 43 Federal crimes to add 23 new death penalties. We heard from the other witnesses about two of these 23 new death penalties, that is, damage to a defense installation, a nuclear or power plant. I would like to point out, as I provided in the chart that is attached to my written statement, there are at least two or perhaps three or more other Federal offenses that could be charged in such a case that do carry the death penalty. For example, arson or bombing of a property used in interstate commerce, which is section 844–I of the Federal Code; arson or bombing of a Federal bombing which is 844 F–2 of title 18 or acts of terrorism transcending national boundaries, which is very broad and covers virtually any murder where there is a Federal predicate for jurisdiction.

So I think that those examples are really not realistic in that the Federal prosecutor is very unlikely to limit himself to only charging one crime. The Federal prosecutor is almost certainly going to charge whatever crimes are available. And in any serious case of terrorism, there is almost certainly going to be a death penalty crime available. We do not believe the bill will make America safer. Instead, it will undermine the fight against terrorism by making international cooperation even more difficult.

Already, many nations are unwilling to extradite or provide evidence in terrorism cases if the death penalty might result from their cooperation. Finally, whatever the evidence regarding the deterrent effect of the death penalty for ordinary crimes, there is no reliable scholarly evidence on the deterrent effect of the death penalty for terrorism.

Jessica Stern, a former member of the National Security Council staff and many other terrorism experts, warns that there could be a reversed deterrent effect. They note that terrorism is designed to produce publicity, and publicity is designed to produce new followers and that executing terrorists could simply play into their hands.

Certainly, other countries such as the United Kingdom, Spain and others have agreed that the death penalty is not an effective strategy even though they have had decades old terrorism problems.

To sum up, H.R. 2934 is a drastic and unwise expansion of the Government's most sobering power, the power to take a life. It cre-

ates literally an uncountable number of new Federal death penalties because it would apply to any Federal crime that is classified as a felony. It is not needed to charge terrorists with death sentences because of the 20 existing Federal death penalties and other death penalties in the Federal and State law and it is a classic example of a solution in search of a problem. Thank you very much.

[The prepared statement of Mr. Edgar follows:]

PREPARED STATEMENT OF TIMOTHY H. EDGAR

Chairman Coble, Ranking Member Scott and Members of the Subcommittee:

I am pleased to appear before you today on behalf of the American Civil Liberties Union and its more than 400,000 members, dedicated to preserving the principles of the Constitution and Bill of Rights, to explain the ACLU's views on H.R. 2934, the "Terrorist Penalties Enhancement Act of 2003."

The proposed legislation, which expands the death penalty to acts defined by the USA PATRIOT Act as "terrorism" that are federal crimes punishable by more than one year in prison,[1] is one part of a planned sequel to the USA PATRIOT Act commonly known as "Patriot Act 2." Congress should not consider such an expansion of the USA PATRIOT Act until it has undertaken comprehensive oversight of the federal government's use of the Act and its other law enforcement powers.

The bill's expansion of the federal death penalty would be drastic. In addition to creating twenty-three separate new death penalties in one stroke, the bill also creates an unprecedented "catch-all" death penalty for any federal crime, or any attempt or conspiracy to commit such a crime, that meets the PATRIOT Act's overbroad definition of terrorism and is punishable by more than one year in prison.

Such a drastic expansion of the death penalty will not make America safer from terrorism. Rather, it will undermine international cooperation against terrorism by further complicating efforts to obtain the cooperation of governments that have abolished the death penalty.

Adding even more death penalties will not deter suicidal, religiously motivated terrorists who have not been deterred by the twenty federal death penalties for crimes of terrorism already on the books (not to mention other federal and state death penalties that may be available) and may instead simply attract new followers to the cause.

The death penalty is in need of reform, not expansion. According to the Death Penalty Information Center, one hundred thirteen prisoners on death row have now been exonerated. Chronic problems, including inadequate defense counsel and racial disparities, plague the death penalty system in the United States. With twenty death penalties for federal crimes of terrorism already on the books, prosecutors have ample opportunity to seek the death penalty in serious terrorism cases. The expansion of the death penalty potentially to any federal felony creates an opportunity for more arbitrary application of the death penalty.

CONGRESS SHOULD NOT EXPAND THE USA PATRIOT ACT WITHOUT THOROUGH REVIEW OF ITS IMPACT ON CIVIL LIBERTIES

Continued grassroots controversy among Americans of all political persuasions about the impact of post 9/11 government policies on basic civil liberties has slowed the seemingly inexorable momentum of new federal government powers. Conservative organizations, including the American Conservative Union, Free Congress Foundation and the Gun Owners of America, have joined with the ACLU, the American Library Association and many others to argue that America should not sacrifice its liberties in the name of security. More than 291 local resolutions in thirty-nine states, including four state-wide resolutions, have rejected some provisions of the USA PATRIOT Act and other post 9/11 polices that infringe on basic rights and freedoms. Altogether, these communities represent close to 50 million Americans.

As a result, President Bush and Attorney General Ashcroft have not gone forward with a comprehensive sequel to the USA PATRIOT Act—a "Patriot Act 2" that many expected would be introduced last year. Instead, the Administration has en-

[1] H.R. 2934 as introduced would have applied to any state or federal crime, but Chairman Coble is sponsoring a substitute amendment that would apply the new death penalty to federal felonies, which are defined as any federal crime punishable by more than one year in prison. 18 U.S.C. δ 1.

dorsed three separate bills expanding federal powers, including this legislation dramatically expanding the federal death penalty.[2]

Congress should firmly reject any effort by the Administration to add new powers to the USA PATRIOT Act until it has received the cooperation of the Department of Justice in comprehensive oversight of its existing federal anti-terrorism powers. For this reason alone, Congress should reject this legislation.

THE BILL'S SWEEPING "CATCH-ALL" DEATH PENALTY WOULD GREATLY EXACERBATE THE CHILLING IMPACT OF AN ALREADY OVERBROAD USA PATRIOT ACT DEFINITION OF "TERRORISM"

H.R. 2934 seeks to expand the USA PATRIOT Act to create new death penalties for any federal offense punishable by more than one year, if death results. The bill's expansion of the federal death penalty would be drastic and unwise.

First, the bill makes all of the forty-three "Federal crimes of terrorism" listed at 18 U.S.C. § 2332b(g)(5) death-eligible offenses; currently, twenty of these crimes are potentially capital offenses. Second, the bill adds a sweeping "catch-all" death penalty that makes a federal felony a potential capital offense if it meets the broad definitions of "international terrorism" or "domestic terrorism" contained at 18 U.S.C. § 2331. The number of new federal death penalties created by this provision is limited only by the ever-expanding number of federal felonies.

The proposed legislation creates a unique and sweeping "catch-all" death penalty for any federal felony that meets the federal code's overbroad definitions of terrorism. The "catch-all" death penalty provision would not only dramatically increase the number of federal capital offenses, but would seriously exacerbate the already considerable chilling effect of the USA PATRIOT Act's "domestic terrorism" definition on political protest groups that use tactics of civil disobedience. This provision would exacerbate the already serious civil liberties problems of the definition of international terrorism and of the similar definition of domestic terrorism enacted by the USA PATRIOT Act.

The USA PATRIOT Act, at section 802, provides that any actions, occurring primarily within the United States, are "domestic terrorism" if they (1) "involve" a violation of state or federal criminal law, (2) "appear to be intended" to influence government policy or a civilian population by "intimidation or coercion" and (3) "involve acts dangerous to human life." 18 U.S.C. § 2331(5). The federal code's definition of "international terrorism" is similar, except that the actions must occur primarily outside the United States or "transcend national boundaries" and may involve "violent acts" instead of (or in addition to) "acts dangerous to human life." 18 U.S.C. § 2331(1).

These definitions of "terrorism" are so broad that many legitimately fear they could cover the civil disobedience activities of diverse protest organizations, including Operation Rescue, Greenpeace, and the anti-globalization movement. Blocking entrances to abortion clinics, for example, could "involve" violations of federal law punishable by more than one year in prison and may certainly "appear to be intended" to influence government policy or a civilian population by "intimidation or coercion." Blocking clinics under some circumstances involves "acts dangerous to human life" in that such actions could threaten the lives of the protesters (if protesters block traffic, for example) or interfere with the ability of women to get needed medical treatment. The anti-globalization movement is also known for civil disobedience tactics, such as chaining protestors together to block traffic, that could meet the USA PATRIOT Act's overbroad definition of terrorism.

Because of the chilling effect of this definition on ideologically diverse protest groups, section 802 is one of the provisions of the USA PATRIOT Act that organizations on the left and the right have agreed must be amended to protect civil liberties. Conservative Republican Reps. Butch Otter (ID) and Jeff Flake (AZ) have joined independent Rep. Bernie Sanders (VT) and Democrats such as Rep. John Conyers, Jr. (MI) and Rep. Barney Frank (MA) to introduce H.R. 3352, the Security and Freedom Enhanced (SAFE) Act of 2003. The SAFE Act now has fifty-five cosponsors and is pending before this Subcommittee.

Section 6 of the SAFE Act reforms the definition of "domestic terrorism" so that it applies only to actions that constitute a "Federal crime of terrorism" under 18

[2] The Administration's "Patriot Act 2" agenda also includes efforts to remove altogether judicial oversight of records searches and a "no-bail" presumption for terror suspects. Patriot Act 2 was not introduced in its original form because of strong bipartisan opposition. However, the Bush Administration has pressed forward with efforts to enact parts of their sequel to the Patriot Act in separate legislation. *See* Timothy H. Edgar, ACLU Interested Persons Memo Updating the Status of "Pieces of Patriot II" Proposals, Oct. 8, 2003, available at *http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=14000&c=206.*

U.S.C. § 2332b(g)(5). The SAFE Act would thus limit "domestic terrorism" to serious federal crimes, going a long way towards reassuring Americans of all political persuasions that the federal government will not treat them as terrorists because they may be involved in civil disobedience. This narrower definition is strongly supported by groups from the right and left, including the American Conservative Union, Free Congress Foundation, Gun Owners of America and the ACLU.

The proposed legislation goes in exactly the opposite direction—not only leaving in place the USA PATRIOT Act's definition of terrorism but broadening the definition by adding a potential death sentence. Protest organizations have already been significantly chilled by the USA PATRIOT Act's definition of some civil disobedience tactics as forms of terrorism. A death penalty based on that definition would multiply the chilling effect dramatically.

A few examples help illustrate why such a "catch-all" death penalty would be so inappropriate:

> *Example 1.* A diverse group of American and foreign protestors at an international population control conference chain themselves together in a parking lot entrance to block access to a local reproductive services clinic in violation of the Freedom of Access to Clinic Entrances (FACE) Act of 1994, 18 U.S.C. § 248. A woman seeking treatment because of complications from her abortion cannot gain access and the delay in treatment results in her death from those complications. Under this proposal, a federal prosecutor could seek the death penalty against the protesters for "international terrorism," because their violations of FACE Act were felonies[3] that "transcend[ed] national boundaries" through the involvement of international opponents of abortion, involved "acts dangerous to human life," appeared to be intended to influence government policy or a civilian population by "intimidation or coercion," and resulted in death.
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> *Example 2.* An organization of gun rights supporters gather at a convention hall to demonstrate against a new federal gun control law that requires all sellers of firearms to be federally licensed dealers and conduct background checks. Some of the demonstrators, saying they want to "send a message to those gun-grabbers in Washington," hold an illegal "gun show" of the kind the law was enacted to prohibit, committing felony violations of the federal gun control regime at 18 U.S.C. § 922. A mentally unbalanced man purchases one of the firearms and uses it to kill a man. Under this proposal, a federal prosecutor could seek the death penalty for "domestic terrorism" against those who participated in the illegal gun show because their violations of the 18 U.S.C. § 922 involved "acts dangerous to human life" and appeared to intended to influence government policy by "intimidation or coercion."

AN DRASTIC AND UNWISE EXPANSION OF THE FEDERAL DEATH PENALTY WOULD ERASE DISTINCTIONS AMONG TERRORISM OFFENSES

Federal law already provides a lengthy and growing list of crimes of terrorism. Forty-three "Federal crimes of terrorism" are listed at 18 U.S.C. § 2332b(g)(5). Twenty of these crimes currently carry a death penalty if death results in the course of the crime. The proposed legislation would provide a death penalty for every crime on the terrorism list, adding twenty-three new death penalties to the federal criminal code in one stroke. The attached chart shows lays out current penalties for all of these crimes, showing which federal crimes would be made death-eligible by this provision of the bill.

Congress should not simply adopt, without examination, the list of "Federal crimes of terrorism" as a proxy for crimes that are serious enough to warrant the death penalty. In listing "Federal crimes of terrorism," Congress did not choose only the most serious terrorism offenses for which it considered the death penalty to be an appropriate punishment, but also included other crimes that Congress created for the goal of preventing and deterring terrorism, including terrorism financing, material support, and computer-related offenses. Some of these crimes have been defined very broadly to enable the government to prosecute persons whose actions may have some relationship to terrorism but whose involvement is more peripheral than those who commit bombings, hijackings, murders or other terrorist acts that already carry the death penalty.

For example, one crime that currently does not carry the death penalty is the offense of providing "material support" to a designated foreign terrorist organization. This offense was created in 1996 with a maximum sentence of ten years in prison.

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[3] A first-time violation of the FACE Act that does not result in bodily injury is a misdemeanor; all other violations are felonies because they carry a maximum sentence of more than one year in prison. 18 U.S.C. δ 248(b).

The USA PATRIOT Act increased the maximum sentence to fifteen years in prison, with a possibility of a life sentence if death results.

There remains substantial controversy about the breadth of the "material support" offense because a conviction requires only that the government show the individual "knowingly" gave assistance to an organization designated as a terrorist organization, even if the assistance was only for the organization's lawful activities. The government argues that a defendant may be convicted even if he did not know of the designation, believed the assistance would support only charitable activities, and even if the assistance in fact only benefited charitable activities.

One federal appeals court has now ruled the material support statute, as amended by the USA PATRIOT Act, must be construed to require knowledge of the designation or of the organization's unlawful activities, and that its prohibitions on providing "training" and "personnel" are void for vagueness.[4] Adding a death sentence to such a broad statute will only contribute to its constitutional flaws.

Congress was certainly aware that creating the crime of material support of the lawful activities of an organization designated as "terrorist" by the government could be vulnerable to challenge under the First Amendment and the Due Process Clause. While Congress chose to pass the material support statute despite these concerns, by providing a maximum sentence of fifteen years (or a life sentence if death results), Congress indicated it did not believe this crime was as serious as direct participation in terrorist acts for which it provided the death penalty.

While the bill would only permit the death penalty for material support if death results, a prosecutor could be expected to argue that any financial or other contribution to a designated foreign terrorist organization—even for humanitarian activities—is fungible and therefore assisted the organization in committing terrorist acts that resulted in death.

The following examples help illustrate why it is so wildly inappropriate to make the crime of material support a death-eligible offense:

> *Example 3.* Joshua attends a function at a local community center in which he views a graphic film about suicide bombings in Israel. The film praises unofficial "armed resistance" by Jewish militants to Islamic terrorist groups. At the function, Joshua gives money for the "Kahane Chai Relief Fund" for widows of Palestinian attacks. Joshua suspects the charity may be a front, but is angry enough after seeing the film that he does not care. Joshua does not know that Kahane Chai has been designated by the State Department as a foreign terrorist organization.[5] Under this legislation, Joshua's actions are not only a crime, but he could now be facing the death penalty.
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> *Example 4.* Sean is upset about that some Irish leaders have abandoned the goal of a united Ireland and wants to "send a message" by providing technical assistance to an anti-British website. The website features articles and comments that are strongly nationalist in tone, and Sean has been told the website is run by the Real IRA, a designated foreign terrorist organization. Under this legislation, Sean would not only face criminal changes, but could face the death penalty.

Supporters of the bill may argue that prosecutors can be expected to exercise discretion and will not seek the death penalty except in very egregious cases. While prosecutorial discretion is an important element of the criminal justice system, prosecutors should not have unlimited discretion. The federal criminal code already contains twenty terrorism crimes—and many other crimes not specifically listed as terrorism crimes—that carry the death penalty and cover a broad range of terrorist acts, including bombings, kidnappings, arson, aircraft hijackings and many others. In very serious terrorism cases, federal prosecutors are likely to have at least one, and probably more than one, death-eligible crime with which to charge a defendant. The bill's expansion of the death penalty is likely to affect only the more peripheral cases in which prosecutors would not normally seek the death penalty—but where there may be political pressure to do so because the defendants belong to an unpopular religious, ethnic or political group.

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[4] *Humanitarian Law Project* v. *United States Dep't of Justice,* 352 F.3d 382 (9th Cir. 2003).

[5] The list of foreign terrorist organizations currently numbers 37 and is maintained on the State Department's website at *http://www.state.gov/s/ct/rls/fs/2003/17067.htm. See also* Jerry Seper, *4 Jewish Web Sites Deemed "Terrorist,"* Wash. Times, Oct. 11, 2003.

DRAMATIC EXPANSION OF THE DEATH PENALTY WILL HINDER INTERNATIONAL COOPERATION VITAL TO CATCHING AND IMPRISONING TERRORISTS

The radical expansion of the death penalty provided in H.R. 2934 would not aid in preventing terrorism or making America safer. Instead, the legislation is likely to significantly impede international cooperation in combating terrorism by creating new barriers to international legal assistance. Already, many nations that have abolished the death penalty are unwilling to extradite or provide evidence in federal terrorism cases if the death penalty might result from their cooperation.

Other nations have become increasingly critical of the United States for its continued and even expanding use of the death penalty when the international trend has been towards abolition. The exoneration of more than one hundred former inmates of America's death row has not gone unnoticed abroad. Diplomacy concerning the issue of the death penalty has become increasingly tense and complex. The rift between the United States and many of its closest allies is likely to grow even wider as a result of a recent decision of the International Court of Justice concerning the death penalty. The decision strongly rebuked the United States for its disregard of the rights of 51 Mexican nationals on death row to timely consular notification under the Vienna Convention on Consular Relations.[6]

The European Union prohibits the extradition of any criminal suspect facing the death penalty. After the bombing of United States embassies in Africa by Al Qaeda terrorists, Germany only extradited an alleged conspirator to face trial in the United States after negotiating assurances the suspect would not face the death penalty. Many European nations, including the United Kingdom, have restated their opposition to the death penalty after September 11, 2001 and conditioned any extraditions in connection with the global fight against terrorism on similar assurances.[7]

By dramatically expanding the number of death-eligible offenses, the bill would dramatically multiply the number of cases in which prosecutors will have to negotiate special agreements with foreign governments to obtain needed cooperation in obtaining evidence or extraditing suspects.

A dramatic expansion of the death penalty would, according to foreign policy experts, be likely to further impede the cooperation between nations that is absolutely critical to impeding terrorist organizations by arresting and prosecuting their members. Milt Bearden, a former CIA station chief in Pakistan and Sudan, warns, "If the U.S. routinely applies the death penalty to cases of international terrorism targeting American citizens, it may limit continued cooperation from the majority of countries most closely involved in combating terrorism."[8]

Continuing and pronounced racial disparities in the imposition of the death sentence for serious street crimes has contributed to the harsh international criticism of the United States. A dramatic expansion of the death penalty for crimes said to be terror-related—making death-eligible many crimes that would not normally carry a death sentence—would confirm the suspicions of many in the Arab and Muslim world that the United States is creating a separate, and unequal, system of justice for mainly Arab and Muslim defendants.

MAJOR EXPANSION OF FEDERAL DEATH PENALTY COULD HAVE "REVERSE DETERRENT EFFECT," GIVING TERRORIST GROUPS NEW "MARTYRS" FOR THE CAUSE

Finally, the addition of new death penalty offenses to the federal government's already considerable arsenal of twenty death-eligible terrorism crimes will almost certainly have no deterrent effect on suicidal, religiously-motivated terrorists such as members of Al Qaeda. Well-publicized executions are far more likely to have a perverse "reverse deterrent effect." Terrorist groups will use the executions as propaganda to attract new followers who will be asked to emulate the "courage" of the "martyr."

The United States government should not go out of its way to provide terrorists with the gift of publicity—often the most important tactical goal of any terrorist action. Jessica Stern, a terrorism expert and former member of the National Security Council, warns that executions of terrorists can "turn criminals into martyrs, invite retaliatory strikes, and enhance the public relations and fund-raising strategies of our enemies."[9]

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[6] *Avena and Other Mexican Nationals (Mexico* v. *United States),* No. 128 (ICJ Mar. 31, 2004).

[7] *See* Andrea Gerlin, *United States May Have to Give Up Death Penalty to Extradite Suspects*, Phila. Inquirer, Oct. 1, 2001.

[8] Milt Bearden, *Death Penalty Would Hinder Anti-Terrorism*, Op-Ed, Wall Street J., June 4, 2001.

[9] Jessica Stern, *Execute Terrorists at Our Own Risk*, Op-Ed, N.Y. Times, Feb. 28, 2001.

Put simply, the most dangerous terrorists do not fear death—they seek it. Even for those who do not participate in suicide attacks, the risks inherent in terrorist activity are far more significant than the possibility that a death sentence would be imposed on any given terrorist suspect.

While some may argue the death penalty can be used to obtain cooperation of suspects, other countries with more experience in countering terrorist organizations have specifically rejected the death penalty for terrorists. While imprisoning terrorists also carries risks, these nations have determined that the risks of executions are greater, outweighing any potential benefits. For example, the United Kingdom voted to repeal the death penalty for terrorism in Northern Ireland on the basis that executing terrorists only increases violence and puts soldiers and police at greater risk.

Spain similarly rejected the death penalty as counterproductive in its decades-long campaign against the Basque terrorist group ETA. Even as the Israeli government continues its controversial tactic of targeted killings of terrorist suspects, its judges do not impose the death penalty on terrorists in Israeli custody.

CONCLUSION

H.R. 2934 is an drastic and unwise expansion of the government's most sobering power—the power to take a life. The federal government already has twenty separate death penalties for crimes of terrorism. Terrorists might also face other federal death penalties, or state crimes that carry the death penalty. While the government has not always obtained a death sentence in every terrorism case where it was sought, the reason was because it could not charge or convict the defendant of a capital offense. For example, in the cases involving the 1998 bombings of United States embassies in Africa, the jury found two defendants guilty of death-eligible crimes, but chose not to impose a death sentence. The bill is thus a classic example of a solution in search of a problem.

H.R. 2934 severely exacerbates the USA PATRIOT Act's definition of "domestic terrorism"—one of the most controversial provisions of the Act. The bill would provide for a possible capital offense for any federal crime that carries more than a year in prison, if the crime "appears to be intended" to influence government policy or a civilian population.

Passage of H.R. 2934 would be seen by many organizations of the right and left—including anti-abortion and gun rights advocates—as a major and troubling expansion of federal power. Congress should not move a major part of the Administration's agenda to expand the USA PATRIOT Act without far more detailed review of the effect of the Act, and other post-9/11 policies, on civil liberties.

H.R. 2934 will rightly be seen, both in the United States and abroad, as another federal infringement on civil liberties that will not make America safer. It will, as a result, increase mistrust, both at home and abroad, even of legitimate anti-terrorism efforts, dividing many Americans from their government and further isolating America in the world. It should be rejected.

Mr. COBLE. Thank you, Mr. Edgar, and thanks to all of our witnesses. Folks, we impose the 5-minute rule against ourselves as well, so if you could keep your answers brief, we would be appreciative to you.

Dr. Shepherd, it has been said in this town you can take a position on any issue and prove it with polling numbers. Now your testimony pretty clearly reflects the deterrent effect of capital punishment. Are you surprised when you examine findings of anti-death penaltyadvocates that are 180 degrees from your conclusion? Does that surprise you or do you agree that anybody can support anything with certain numbers?

Ms. SHEPHERD. In the economics literature in the past decade, as I said, there is a very strong consensus. There have been 13 studies and all find there is a deterrent effect. There may be people on the other side that rely on older papers and studies that use outdated statistical techniques or older data, but all of the modern economic studies in the past decades have found a deterrent effect. So I am not sure what the other people are relying on.

Mr. COBLE. What do you say about some of these terrorists who appear to be willing to die because they will become martyrs or Timothy McVeigh, the guy who was involved in the Oklahoma City bombing? He didn't die. The terrorist who attacked the World Trade Center on 9/11, they didn't die. Do you think that might have a reverse effect?

Ms. SHEPHERD. Obviously, people who are willing to die and plan to die in a terrorist attack won't be deterred by applying capital punishment because they are going to die anyway. Timothy McVeigh did not fight capital punishment as many terrorists do, but there are numerous examples, and I think the majority of terrorists do try and fight the death penalty and would prefer life in prison. Obviously, they consider the death penalty to be a harsher penalty.

Mr. COBLE. Mr. Edgar, in your opinion, are there any crimes that warrant death penalty?

Mr. EDGAR. In my opinion, no. But I think we are going to agree to disagree with many of the panelists here and the Subcommittee about that. I have tried to focus my testimony on what I consider to be the overbroad nature of the bill and to show that even from the point of view of those who might agree that there should be a death penalty for serious terrorism crimes, that the bill still goes too far because of the existing 20 Federal death penalties there on the books.

Mr. COBLE. Senator Feinstein, Mr. Edgar, at a recent oversight hearing indicated that the ACLU could not provide her with one instance of abuse of the PATRIOT Act provisions. Could you elaborate on that?

Mr. EDGAR. I am happy you asked me that question because Senator Feinstein really mischaracterized an e-mail that I sent to her staff before that hearing in which we pointed out that although there had been many documented abuses of Federal power including involving immigration and other detainees, that most of the PATRIOT Act provisions that people were most concerned about involved secret Government surveillance, surveillance that is classified and that people are forbidden by law from informing anyone what is going on. So it would be ironic for us to have information about the use of those powers which are classified, that a Member of the Senate select Committee on Intelligence didn't have.

Mr. COBLE. Mr. Sutton, walk us through logistically the internal procedures that are involved when you are making a decision about seeking the death penalty.

Mr. SUTTON. It begins with a crime. Someone has to investigate it and there has to be evidence that someone committed a crime for a prosecutor to even begin with a charging decision. It begins that way. If it is determined that it is a crime that carries the death penalty, there is a very elaborate procedure set in place going all the way up to the Attorney General making the final decision himself on each case. Each United States attorney's office does a very thorough review, elaborate memo. The Prosecution memo is written listing all the mitigating and aggravating factors, the criminal history of the defendant, the opinion of the victim's family, what kind of punishment they want to see and then oftentimes the United States attorney's office will make a decision to make rec-

ommendation and then up to Washington. Once that recommendation is made, the case is sent up to Washington, D.C., where the capital case committee, a group of experienced prosecutors, will then review the case to see whether they agree or disagree with the recommendation of the United States attorney.

If there is a decision to seek the death penalty, at that point, the defense attorneys representing the defendant—obviously he has a right to counsel that will be appointed for him if he doesn't have any money. And then they are given input. Whatever they want to say to the U.S. attorney, they are allowed to say. Whatever they want to say to the capital case committee, they are allowed to say, including a personal hearing.

Then the case committee makes a recommendation to the Attorney General. That goes through the Deputy Attorney General Office to review, then finally to the Attorney General with recommendations all the way up the line as to whether there should be death or not death sought and the Attorney General makes the decision.

Mr. COBLE. One more quick question. Mr. Edgar, let me revisit that question by Senator Feinstein. In your testimony, you indicate the fear or the concern that the Department of Justice will abuse the ability to charge the death penalty. Comment a little more in detail.

Mr. EDGAR. I think the problem is, you know, obviously the prosecutors here will argue that because of prosecutorial discretion that the examples I gave in my written statement might be unrealistic. My point is to say that it is going to depend a great deal on the politics of that Administration, of that Justice Department. We have seen politicized Justice Departments, or at least allegations under both Democratic and Republican administrations and that with the broad availability of the Federal death penalty in serious crimes where this is really going to matter is in the kinds of examples that I was giving and that Congress has a responsibility as well as prosecutors to narrow the focus of the death penalty as much as it can.

One of the things about the Federal death penalty that is very different from some State death penalties is that lawyers are actually careful to try to craft a death penalty that would withstand challenge by narrowing it to only very serious crimes, and I think that is something this bill would really undo in any case involving any politically motivated crime.

Mr. COBLE. Thank you, sir. My red light has appeared, but I am going to disagree agreeably with you. I don't believe our Justice Department would be abusive. Before I recognize my friend from Florida, let me indicate that we have been joined by the distinguished gentleman from California, Mr. Schiff. The other distinguished gentleman from Florida Mr. Feeney has joined us along with Mr. Keller. I am now pleased to recognize Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Dr. Shepherd, you cited John Lott in your testimony. Is he the one that has the theory that if there were more guns out on the street, the crime rate would go down?

Ms. SHEPHERD. Among others, yes.

Mr. SCOTT. On page 13 of your testimony, you say that to predict perfectly whether the terrorist penalties enhancement of 2003, that is what is before us, will decrease terrorists acts, we would need research that focuses specifically on the application of capital punishment to terrorists. Unfortunately, this research does not yet exist, is that right?

Ms. SHEPHERD. Absolutely. In order to definitively say what will happen, we need specific research. Our best guess, is the indirect evidence as provided by these other studies.

Mr. SCOTT. And that research does not now exist. That is your testimony in your submitted testimony?

Ms. SHEPHERD. No research on terrorism and capital punishment.

Mr. SCOTT. Mr. Sutton, the bill includes the denial of Federal benefits as part of the punishment. Can you explain to me what those benefits are and how that will help fight against terrorism?

Mr. SUTTON. Thank you, Ranking Member. As the Chairman indicated, my expertise is as a prosecutor, eight years as a State prosecutor and seven years as a Federal prosecutor, so my expertise is now in proving up cases, proving them in court and making sure we have convictions that stand. I would probably refer you to the Department of Justice with regard to Federal benefits. I would simply say that those convicted of terrorist crimes probably should not enjoy the benefits of the Federal Government. To what degree that is, I would leave that to other members of my department.

Mr. SCOTT. You are not suggesting the effect that you might not be able to get a student loan is going to deter someone from committing a capital offense. You are not making that suggestion?

Mr. SUTTON. It comes from more the sticking in the crawl of an American citizen that after someone tries to destroy our country and is convicted and put in prison——

Mr. SCOTT. You are not suggesting that is going to help the fight against terrorism to have that provision in there one way or the other?

Mr. SUTTON. I doubt that would help. We are interested certainly——

Mr. SCOTT. Going back and forth across these cross references is a little confusing. You mentioned mass casualties and terrorism on many different occasions. Is this bill limited to mass casualties?

Mr. SUTTON. No, sir.

Mr. SCOTT. So a single death would trigger the application of the bill?

Mr. SUTTON. Depending on the circumstances. Obviously it would have to be a terrorism event or an intentional killing during a terrorist event or some very, very reckless act, or some violent act that contemplated that a death would occur.

Mr. SCOTT. What is a terrorism event? What makes it a terrorism crime rather than a regular crime?

Mr. SUTTON. We have definitions in the bill. Some of those definitions might be to coerce a government to change a position in some way.

Mr. SCOTT. Let's talk about Timothy McVeigh. Was that a terrorist crime?

Mr. SUTTON. I believe that was a terrorist crime.

Mr. SCOTT. How would you as a prosecutor go about proving the elements to make it a terrorist crime?

Mr. SUTTON. It is very common in the Federal law and State law as well that one criminal event may be prosecuted under a variety of different——

Mr. SCOTT. Is Timothy McVeigh's case a terrorism crime?

Mr. SUTTON. I am not sure what theory of prosecution they did in that case. I know it carried a death sentence.

Mr. SCOTT. It was a mass murder. We keep talking about terrorism and mass casualties. And Timothy McVeigh, you can't cite in the Timothy McVeigh case what made that a terrorist event.

Mr. SUTTON. We may be confused over the technical definition of terrorism or whether someone says I hate the United States Government and therefore I am going to blow up the Federal building and kill 168 people inside it. In that case, when you blow up a Federal building, that is currently against the law. What this bill is saying, is trying to do is to say if you are a terrorist and you commit a terrorist offense.

Mr. SCOTT. If Timothy McVeigh blew up the building in Oklahoma City, how would you go about making that a terrorist crime rather than just a regular crime.

Mr. SUTTON. You have to look at the evidence and see what his theories were, what other evidence you had with regard to him protesting against the Government and wanting to attack the Government. There was quite a bit of information in that case. We are not saying we want to exclude other theories of liability or theories of prosecution. What this simply does is give prosecutors a tool to go after terrorists who kill people, to make sure that the death penalty will be available in every case. Doesn't mean they are going to get it, but certainly they have the death penalty available.

Mr. SCOTT. Mr. Chairman, are you going to have a second round? What separates the regular, run-of-the-mill mass casualty crime from a terrorism crime? And what you would have to do in the Timothy McVeigh case or the 9/11 case how you would go about proving that it was a terrorist crime, not that they just hate America, but it was a terrorist crime pursuant to the statute? And I think it is easier to prove quite frankly an abortion clinic protester terrorism because they are actually—the evidence is that they are trying to change policy is clear. We can go the abortion protestors a lot easier. We will get back to that.

Mr. COBLE. We likely will have a second round. In the order of appearance, I recognize the distinguished gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman. I haven't been at this political thing too long. I have been here long enough to know that nothing you could say or I could say or Judge Carter could say is ever going to convince Bobby Scott or Mr. Edgar that the death penalty is a great idea. I am not going to walk through the big debate and try to persuade you. But just to walk through your criticism, Mr. Edgar, you personally oppose the death penalty?

Mr. EDGAR. That is right.

Mr. KELLER. And the ACLU opposes the death penalty?

Mr. EDGAR. Absolutely.

Mr. KELLER. And your criticism in part is that this bill is overly broad?

Mr. EDGAR. That is right. What I am trying to do is point out flaws in the bill that even if you agree that there should be a death penalty for serious crimes or serious terrorism crimes, you might find troubling.

Mr. KELLER. Isn't it fair to say that if in the course of this markup, theoretically we decide to make this a very narrowly drawn piece of legislation, that we say the death penalty will only apply to those specific terrorist acts which are intentional, premeditated and result in the deaths of at least 50,000 innocent civilians, you would still be in opposition to the bill?

Mr. EDGAR. Congressman, that would dramatically scale back current Federal death penalty law and so we very well might be in favor of it.

Mr. KELLER. There are no crimes in which you would be——

Mr. EDGAR. I understand that. And we are trying to improve and narrow the law. And the description you gave of saying you could only get the death penalty for 50,000 deaths would be an extraordinary narrowing of current law where there are already 20 Federal death penalties that don't require such a dramatic showing.

Mr. KELLER. I suspect if we narrow that, you would still be in opposition just for your own moral reasons, or whatever and that you would have a different reason as to why we shouldn't support this probably worrying about innocent people.

Mr. EDGAR. With 113 people having been cleared from death row, I think it is a very serious concern that however you craft the statute, you may create mistakes and you may execute innocent people.

Mr. KELLER. It is a serious concern. You are aware in the last legislative session, we passed a law to increase the funding for DNA testing and make that allowed in death penalty cases in the Federal Government.

Mr. EDGAR. That is certainly a good step. We support that increased DNA testing.

Mr. KELLER. Let me switch to another topic, and I am going to ask Judge Carter to give his side of it. One of your concerns also is that this may have a chilling effect on political protests. How often does death result from a political protest?

Mr. EDGAR. Well, it doesn't, thank goodness, result very often, but I think the concern is that the decision to seek the death penalty in a case that is very highly politically charged is going to depend a lot on the politics of the Administration and the politics of the protesters and that this definition is already far too broad and we should be trying to narrow and fix it so that it really applies to what we would all agree are terrorists, al Qaeda and other serious terrorist groups and wouldn't even arguably apply to any kind of civil disobedience. And I think that is the first thing we should be doing before we start expanding that definition.

Mr. KELLER. Judge Carter, Mr. Edgar and maybe others has criticized this legislation saying it would have a chilling effect on political protest. You are the author of this legislation so let me give you a chance to respond to that criticism.

Mr. CARTER. I read Mr. Edgar's testimony and the example he gave was a protest by, I believe, a pro-abortion group and someone

died in the process or maybe it was an antiabortion group and someone died in the process of this. She was seeking treatment and because there was a protest going on, she was not able to have that treatment and she died and he gave that as an example of potential capital murder.

I don't think it meets the parameters of the statute nor do I think it meets the parameters of Federal procedure. In order to impose death penalty as a result of a Federal crime, there are three provisions and I can't cite them verbatim, although they are right here, which—all of which require intent as a part of the beginning process of seeking the death penalty. Mitigating factors are also included. And that makes a difference as you view this thing.

Mr. KELLER. I will make one comment. So much criticism lately on the PATRIOT Act and some of it was reflected by Mr. Edgar's testimony and I certainly can accept honest and constructive criticism and difference of opinions, but I have to remind you we sit on the single most polarized Committee in the United States Congress, Judiciary Committee, the most left of the left and the right of the right, and this is a bill that passed 37-zip unanimous, and we had hearings on it up and down. When I hear of all the newfounded criticism that this was just some wild-eye thing, I have to wonder why all the liberal Democrats and the conservatives voted on it back then.

Mr. COBLE. The gentleman from California is recognized for 5 minutes.

Mr. SCHIFF. Thank you, Mr. Chairman and I apologize if some of this ground has been covered already. But I wanted to go into the definition of terrorism offenses and also ask a couple of questions about it. I support the death penalty and certainly in some of the circumstances we have discussed, someone is going to blow up a nuclear power plant, does so, kills people. That ought to qualify for the death penalty. But I am concerned about the breadth of the definitions we are using and I want to ask, one of the illustrations that has been discussed here today is the discussion about the shooting at an abortion clinic. As I read the statute, whoever in the course of committing a terrorist offense engages in conduct that results in death would qualify for the death penalty. And terrorist offense is defined in several ways including as defined in section 2331. 2331 says under subsection 5, the term domestic terrorism means activities that A, involves acts dangerous to human life that are violation of criminal laws.

So shooting at a doctor who performs an abortion would satisfy that subsection. And B, appear to be intended, number one, to intimidate a civilian population. That may or may not apply, but number 2, to influence the policy of a Government by intimidation or coercion. Now wouldn't shooting an abortion doctor be intended to intimidate or coerce the population that is performing abortions or influence Government policy on choice? And as I read it, then someone who shoots an abortion doctor would be subject to the death penalty for an act of terrorism? Is that not a fair reading, Mr. Sutton?

Mr. SUTTON. It certainly could be depending on the circumstances. One thing that is missing from the discussion is that in order to get a death sentence, you still have to meet all the re-

quirements of 3591. And basically what those are is it is an intentional killing or you intended to cause serious bodily injury or you did an act that was so egregious and so violent that you knew somebody was going to die or you intentionally or specifically engaged in an act of violence that was so reckless that you knew somebody was going to die.

So I guess in the context of a protest, especially in the ACLU examples, none of those examples would be eligible for the death penalty because none of them meet that standard. It is reserved only for intentional or violent acts.

Mr. SCHIFF. Someone taking pop shots at people going in and out of an abortion clinic would meet all of those standards, right?

Mr. SUTTON. I guess the question would be there are different—like we were discussing with Congressman Scott earlier, there are different statutes on the books that you can go under. Sometimes there may be two or three. Sometimes there may be zero.

Mr. SCHIFF. Mr. Sutton, I had the same job you have now some years ago, so I know that. But what I am getting at is it may be appropriate to seek the death penalty for somebody who shoots a doctor at an abortion clinic, independent of what we are looking at today. It may be perfectly appropriate to seek the death penalty.

But that is one policy decision, whether we want to enumerate that kind of a crime subject to the death penalty. It is another if what we are trying to do is define what are commonly viewed as terrorist crimes as subject to the death penalty, both to deter people from committing terrorism so they will know that they face the ultimate sanction, but also as a matter of efficacy, because one of the legal challenges—if the statute passes in its current form, one of the challenges you are going to get on appeal, on the invariable appeal from any death penalty case, is that the statute was overbroad, ill defined, that the special circumstance that is called for here was so ill defined that it would be unconstitutional to provide the death penalty under these circumstances.

So there is a risk here without—if we don't define it clearly enough, narrowly enough, that it won't be upheld on appeal.

So I would just encourage, you know, further discussion and analysis of this between now and the full Committee so that the bill really goes after what it is intended to go after and that it is more likely to survive appeal.

Would the gentleman yield?

Mr. COBLE. I thank the gentleman.

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman.

And thanks to all of our panelists, especially our colleague, Judge Carter, for bringing this very important response to a new threat, really, that we have seen.

And some of the testimony has suggested that while there seems to be near unanimity that the death penalty is deterring for certain violent crimes including murder—somewhere between three and 18 murders are basically deterred on average for every death sentence and execution—but the criticism is that there is no proof that it will work for terrorists.

The truth of the matter is the biggest attack that has prompted your response didn't occur until 9/11, and we have yet to put any of these perpetrators on trial.

And so I would ask above and beyond the fact that we have proven that the death penalty is a deterrent, Judge Carter in your experience as a judge and as a policymaker here in Washington, does society, in your view, also have an additional interest, beyond deterrence, in getting the public a certain satisfaction in response to horrific incidents, horribly vicious people that attack innocent citizens, that rather than being paralyzed and frustrated by the inability to respond, that society may have a reasonable expectation that there can be some satisfaction that cannot end the grief but that can at least bring some finality and some justice and that you believe that the death penalty, in addition, can be supported and especially in the terrorism area based on the fact that we have a right to expect some sort of retribution and satisfaction?

Mr. CARTER. I agree. In fact, most States, if not all the States, the prosecutors, as Mr. Sutton pointed out, which I believe is actually confined in the Federal law, talked to the victims about whether or not this will give them—the various ranges of punishment—would give them adequate satisfaction as part of the overall view that the prosecutor takes a look at as he starts the process.

I think generally it is clear that it would give satisfaction to a great deal of the surviving victims from their loved ones who were killed.

I also remember that it will deter others from doing it, and it will certainly deter the person who is convicted from doing it again. And remember that we are dealing—it seems we are dealing with some pretty radical people in many of the areas, where if they served a 10-year sentence or 15-year sentence, they could get out and do it again.

The IRA in Ireland gives us a good example to look to. People who are released from prison would be back out blowing things up in a short period of time.

Mr. FEENEY. Thank you, Judge, and the point is, the reason that we can't prove it is a deterrent to terrorism is it hasn't been tried yet. It just works in other cases where we know.

Dr. Shepherd, along those lines, are you familiar with some of the writings—it is not mentioned in your testimony—of Professor Vanderhaar on the issue of the death penalty and some of the moral justifications that society has a reasonable right to have expectations? Or is your expertise limited to the econometrics studies you——

Ms. SHEPHERD. I would say my expertise is limited to deterrence issues and empirical studies, yes.

Mr. FEENEY. It is a very wise person that knows their limitations. We have very little of that going around in the halls of Congress.

Mr. Edgar, can you tell me, under what conditions and for what crimes the ACLU supports a Federal death penalty?

Mr. EDGAR. This is about the third time I have been asked that question, and the answer is that, of course, it is well-known, we oppose the death penalty, and we think that it is unconstitutional in all circumstances.

But what I try to do in this hearing and in my written statement is to lay out flaws in the bill that even from the point-of-view of a supporter of the death penalty would seem to be of serious concern.

One thing that I wanted to respond to is that——

Mr. FEENEY. If I can, because I have got limited time, and I don't mean to be impolite, but, you know, you mentioned that there are—there is this interesting coalition of people concerned about the PATRIOT Act. But probably some of these criticisms concerning the death penalty proposal by Judge Carter might be given some more credibility if they were being argued by death penalty supporters.

I mean, the truth of the matter is that the ACLU's opinion, right or wrong, flies in the face of 50 States' historic policies, of the fact that the first death sentence in America came in 1609, that the founding fathers, when Madison and friends drafted the Constitution, were very familiar. As a matter of fact, article V actually mentions capital cases.

And then, finally, now we have Dr. Shepherd's overwhelming evidence that death penalties actually deter and save civil liberties for between three and 18 victims, according to her expert testimony.

So the bottom line is the ACLU's position, while I respect them in this case, is both anti-historic and anti-empirical, and to the extent that we are trying to decide what to do on terrorism, you know, I find it a little bit less credible than your legitimate concerns about the PATRIOT Act itself.

Mr. EDGAR. Congressman, just to respond very briefly——

Mr. COBLE. The gentleman's time has expired, but I will allow you to answer that, Mr. Edgar.

Mr. EDGAR. Just to say that the real definition is around the definition of terrorism, and this definitely is linked to that definition. So even if you agreed with the death penalty, it doesn't necessarily mean you think the death penalty should be linked to that definition, and that is where we share common ground with these other conservative organizations.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman from Florida.

The gentlelady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

I will not use this forum to debate my views on the death penalty. I think Mr. Edgar is right. We all fall on different sides of that issue for a number of reasons.

I think what we are attempting to do here in this Committee is to do justice and to appropriately apply laws that are fair and as well meet the constitutional standards, I believe, of due process.

Dr. Shepherd, have you done studies that would provide you with enlightenment on the disparate treatment of African-Americans in the judicial system and the large numbers of those individuals on death row?

Ms. SHEPHERD. I haven't myself, but I have read studies that have, yes.

Ms. JACKSON LEE. Are you aware of the number of cases resulting in conviction of African-Americans and the death penalty juxtaposed to white Americans?

Ms. SHEPHERD. Again, I have read the studies. I don't know those numbers off the top of my head, but I do think that most of the studies do show that there is an unequal treatment.

Ms. JACKSON LEE. And so you think that is a realistic concern in America to be able to assess the judicial system as relates to different communities and races of people?

Ms. SHEPHERD. Absolutely. It is an issue that should be looked into, yes.

Ms. JACKSON LEE. Let me, Mr. Edgar, speak to you, and would you please give us, very quickly since my time is limited as well, some of the severe flaws? And why don't you respond—or why don't you begin with your assessment of the definition, if you would, in this particular legislation.

Mr. EDGAR. Sure. Absolutely. I think the problem is that any Federal crime that is punishable by a maximum sentence of over 1 year in prison, which is all that a felony is, could trigger the death penalty if it is motivated—if there is a political motivation and if death results. That is what this bill does.

The definition of terrorism simply says that if you commit a criminal act and you do so for the intent and purpose—or the apparent intent and purpose of influencing Government policy or intimidating a civilian population and if it involves dangerous acts, which certainly would if death results, then that is an act of domestic international terrorism. And what this bill does is it says that if that involves a Federal crime punishable by more than 1 year in prison, then that becomes a death-eligible offense. That is a sweeping proposition.

I was considering counting the number of new death penalties this bill creates, but then I realized that it creates a death penalty for every Federal felony. So it really is just however many Federal felonies are on the books, that is the number of death penalties it creates.

Ms. JACKSON LEE. And you know, in now putting on the position—or taking the position of being the devil's advocate in this discourse or discussion with you that what is deeply embedded in our hearts and minds beyond the terrible tragedy of Oklahoma and the incident of Waco, which this Committee had jurisdiction in both cases, is the enormous tragedy of 9/11 and the particular desire of this country and of our responsibilities to secure the homeland. And obviously, legislation like this certainly gives the suggestion.

And my good friend from Texas, I respect his legal ability and certainly the years he has been a jurist, and I know that he has encountered many occasions where the judicial system warrants—or the jury system has convicted someone in the State of Texas and given them death. And I know that he adheres to the jury system.

But we know that the backdrop of this discussion is 9/11. So engage me from the perspective that people are frightened, we have an obligation to protect them, and go back again to this discussion of the language that is broad and wide-sweeping, if you will.

Do you believe that that kind of broadness provides the security and safety for the United States that we are now here trying to secure?

Mr. EDGAR. Well, no, I don't. In addition to the reasons why I think that the death penalty generally for terrorism may not be

productive, the international cooperation, the issue of providing publicity, there is also the issue of, you know, we have the death penalty for these serious crimes. I think we want to make that clear. We have 20 Federal death penalties for crimes of terrorism, and of course, many States also carry the death penalty.

So the real issue here is whether the definition sweeps so broadly that it is going to divide us. You know, that is one of the problems.

You know, one of the earlier Members mentioned that the Judiciary Committee passed the PATRIOT Act by 37 to 0, but that wasn't the version of the PATRIOT Act that went into law. That was one of the reasons it was so controversial, is that you all in the House Judiciary Committee created what was a much better bill than what passed into law. And so, you know, we have to be careful, I think, about broadening the law beyond what already exists, when we already have the ability, not only from 9/11 but for many other serious crimes.

Ms. JACKSON LEE. What I am concerned about, if I may, is combined with, I think, the very honest assessment of Dr. Shepherd and recognizing that terrorism comes in all colors—and I am not necessarily trying to compare the two, which is the question of terrorist acts and the disparate treatment of African-Americans. But we have very large issues to address in this country.

What I would be concerned with, Mr. Chairman, as I finish my comment and recognize, as I said to Mr. Edgar, we all may agree and disagree, but the broadness of the language—and I think as we proceed and mark up and as this goes to full Committee, I hope that we can engage and that we make sure that this legislation focuses where we desire it to focus, and that is to protect the homeland and ensure the fact that we would have the kind of legislation that goes right to the jugular vein or to the heart of it, Mr. Chairman, and that is to get terrorists who are engaged in horrible terrorist acts and not someone who has perpetrated a felony that may result in a death, and it may be for political reasons. And I yield back at this time.

Mr. COBLE. The gentlelady's time is expired.

The gentleman from Wisconsin Mr. Green is recognized for 5 minutes.

Mr. GREEN. Mr. Chairman, I have no questions.

Mr. COBLE. The gentleman from Virginia Mr. Goodlatte is recognized for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman, and thank you for holding this hearing.

I would like to follow up on the questions of the gentlewoman from Texas and Mr. Edgar's response and ask Mr. Sutton or Congressman Carter or Dr. Shepherd if you would like to respond to some of his assertions. In particular, I want to know how a trial and conviction of a defendant in a death penalty case differs from a case where a prosecutor is seeking life imprisonment. Can you describe the procedure necessary to obtain a recommendation for the death penalty?

Mr. SUTTON. Sure. The procedure is much more elaborate, much more complex, and obviously, it is probably the most important and sober thing that we do in Federal criminal law. So there is a very elaborate procedure set from the very beginning where it starts

with local law enforcement, or a Federal agency, going all the way up to the Attorney General, having recommendations from the U.S. Attorney—from the Capital Case Committee, the deputy Attorney General's office and input from all areas and all facts to decide whether it is appropriate, the death penalty in that case.

With regard to what Mr. Edgar is saying, he seems to imply that there is all of these cases where if you have a year in prison, you are going to get the—the punishment is you are in prison, you are going to get the death penalty. What we need to keep reminding ourselves of is that you cannot get the death penalty unless you murder someone, unless you kill someone, either intentionally or by some violent act, that you knew they were going to die, and the purpose of this bill is in the context of a terrorist scenario where we can prove that someone is a terrorist and they intentionally kill someone or do some terribly reckless act that they knew would result in death, it makes sense that the death penalty would be appropriate and that is what we are saying today.

Mr. CARTER. Also remember, Congressman, that the State has the burden of proof, and part of that burden of proof is going to be to meet the definition of terrorist act. And part of the definition of a terrorist act is you have to be trying to change public policy by your felony crime that you are committing which resulted in the death of a person.

So that—there is a burden—there is a series of burdens that are going to have to be met, and you can't just say every Federal crime, that you are just going to reach out there and get a jury to agree that they did it to change public policy. They have to meet that burden, and that is a fairly heavy burden involving culpability, what they were thinking about when they committed this crime.

And it is a burden that, believe me, the prosecutors look at, because if they don't think they can reach that far, they are not about to take that out there, because they don't want to get it poured back in their face.

We have got to remember the State has the burden of proof, and it is all the elements of the offense.

Mr. SUTTON. And one other thing I might add is, beyond culpability, everyone agrees a person is guilty. All it takes is one juror who finds that there is some mitigating evidence that would warrant not giving a sentence of death. That is all it takes is one person saying, "This just ain't right, the mitigation outweighs what this guy did, so I am not going to give the death penalty."

Where the other side of the coin is you have to prove beyond a reasonable doubt to 12 jurors, they have to all agree on, first, he did it, then all the aggrevating factors outweigh the mitigating factors, before you can even get to a death sentence.

Mr. GOODLATTE. Is there a way to write this legislation so that we don't get totally random Federal felonies going through that process in the first place?

Mr. CARTER. As you look at this, okay, you have to decide how creative can you, as you sit up, in the evening and—let me think of some act I can do to hurt the United States of America. I thought of one sitting in Committee today anticipating this case. What if a terrorist is able to go in and wipe out all the treatment records in a hospital, resulting in the death of hundreds of patients

that night because all treatment is fouled up and they give everybody the wrong medicine and everybody dies in a hospital as a result of a terrorist act?

Now, it has to be broad enough—you would have to really sit down and think of every weird scenario that intentionally might cause the death of an individual, and that is why to some extent you have to be—it has to be broad.

But the broadness being argued is forgetting that you still have the burden of proof to prove a terrorist act, which means they were intending to change policy by their action. Just because a guy sticks up a liquor store and shoots somebody is not any proof he is trying to change—commit, you know, a terrorist act.

Mr. GOODLATTE. Let me get one more question before my time runs out.

Mr. Sutton, would you specifically outline the death penalty procedure and the jury trial procedure?

Mr. SUTTON. Sure. Thank you.

It begins with the selection of a jury. All those jurors would have to be qualified to sit on the jury. If someone had a bias or some kind of prejudice against the defendant in any way, they couldn't be on there.

The first part of the trial is similar to any other trial. The big distinction in a death case is, one, the Government has to give notice well in advance that they will be seeking the death penalty, so it doesn't come as any surprise to the defendant. And they also have to give notice of any aggravating factors that they will be proving up, so that the defense early on knows what is coming.

The big difference is at the punishment phase. If the person is convicted of a death-eligible offense, there is a separate hearing, usually with that same jury, where both sides get to present all the evidence, the aggravating evidence. And the defendant gets to put on any evidence that he wants that might mitigate—bad background, abusive childhood, relatives, people in the community that would speak in favor of him. And then the jury would have to weigh those aggravating and mitigating factors to determine whether the death penalty is appropriate.

And what I was saying before is all it takes is one juror who says, "You know what? I think the fact this boy had a bad childhood is enough to say no death penalty." There are many more ways to veer off the road to go to a life sentence or something lesser than there are to get to the fact of a death sentence.

Mr. GOODLATTE. Thank you. I find Judge Carter's comments very helpful. Thank you.

Mr. COBLE. The gentleman's time has expired.

Folks, we have a working quorum for a markup. I hope we can keep this, but I know Mr. Scott has another question to put to the witnesses.

Mr. SCOTT. Thank you, Mr. Chairman. Let me follow up on that, Mr. Sutton.

As I understand it, a lot of crimes that under this statute would be converted to a 1-year crime up to a death-eligible crime. Is that right?

Mr. SUTTON. I don't think that is a very good characterization.

What you would have to have is a terrorist murder during the course of some kind of felony that you could prove.

Mr. SCOTT. And just the felony, and it converts—some of these are 1-year felonies. Is that right?

Mr. SUTTON. Under current law, that is correct.

Well, I guess the difference here is you would take those crimes if somebody was intentionally murdered as a part of that, and it was a terrorist. Again, this is all about terrorists. If you could prove the terrorism angle, then it would make——

Mr. SCOTT. Well, let me just make my point. After the defendant does a song and dance and talks them out of the death penalty, what is the penalty that is imposed?

Mr. SUTTON. Oftentimes, it is life. If you are seeking the death penalty, it is life. It is automatic——

Mr. SCOTT. It is not often life. It is life without parole.

Mr. SUTTON. What I am saying is it is automatic life. Again, the prosecutor has discretion at the——

Mr. SCOTT. If he goes through a song and dance and convinces them after the conviction not to impose the death penalty, the penalty that is imposed is life without parole.

Mr. SUTTON. If the Government is trying to seek the death penalty, that is correct.

Mr. SCOTT. Mr. Carter, you talked about intent. Where is it in here that you have to intend to kill a lot of people?

Mr. CARTER. You don't have to intend to kill a lot of people, Congressman Scott. You have to intend to kill anybody.

Mr. SCOTT. Where is it in here——

Mr. CARTER. It is in the Federal procedures.

Mr. SCOTT. If you are part of the conspiracy, you can be part of the protest——

Mr. CARTER. That's right, but for there to be a punishment of death, there has to be intent.

Mr. EDGAR. Congressman?

Mr. SCOTT. Where is that?

I'm sorry.

Mr. Edgar.

Mr. EDGAR. We have this. I looked this up, because I think it is very helpful to look at it and to see. It is not the law in the Federal criminal death penalty that you have to intend to kill the victim.

It is the law instead that you have to intentionally and specifically engage in an act of violence, knowing the act creates grave risk of death. It is such that participation in the act constitutes reckless disregard for human life. That is a much lower standard, at least a lower standard than intentionally killing——

Mr. CARTER. And it is one of the four standards.

Mr. SCOTT. Well, if you were part of a conspiracy for which somebody else is reckless but which you are part of the protest and you are giving support for that protest and the protest gets out of hand, then you are on the hook for the death penalty.

Mr. EDGAR. I certainly think a prosecutor may argue that.

Mr. SCOTT. Now, one of the things, Mr. Sutton, I have been a little concerned about is you keep talking about terrorists like we are going to have the people for who they are, not for what they did. And I think we have to be a little careful about this.

Let's go back to the Operation Rescue Abortion Clinic situation, Timothy McVeigh and the 9/11, September 11 hijackers. Now, the hijackers all died. Anybody that gave them aid or comfort or support would now be on the hook for the death penalty. Is that right?

Mr. SUTTON. No, sir. That's right.

Mr. SCOTT. No, sir? Yes, sir?

Mr. SUTTON. I don't think it is. Again, just as what Mr. Edgar read, there are two things you have to do here. One is you have to meet one of the definitions of terrorist offense that are in the bill.

Mr. SCOTT. So you would have to prove that the 9/11 hijackers are trying to do something about trying to change Government policy?

Mr. SUTTON. Well, yeah.

Mr. SCOTT. If all they did was just hijack the plane and went into the World Trade Center, and you didn't know why they did it or couldn't prove why they did it, that is just a mass murder. It is not terrorism.

Mr. SUTTON. You would have to be able to prove some terrorism link, some——

Mr. SCOTT. But Operation Rescue where you know it is an anti-abortion protest and somebody dies, that is a slam dunk on terrorism.

Mr. SUTTON. No, sir. Again, you would have to look at the—two things you have to look at. First, you have to look at the definition of terrorism, which means it would have to be—you would have to personally do some act that is dangerous to human life, a violation of the——

Mr. SCOTT. But the doctor got shot. Okay? So you have a murder, and you have the abortion protest. Now, the people—you have the Webmaster who put up there the doctor's address. So you know where to go shoot him. Now, is that support or conspiracy?

Mr. SUTTON. With regard to the person who actually did the act, you would have a much better case. With regard to anybody protesting, you would not. Again, the death penalty——

Mr. SCOTT. Well, what is this about conspiracy, attempt? That is in the bill. Right?

Mr. SUTTON. Right. You would have to show—you would have to show that they did some act, some part of—they participated and did some affirmative act to facilitate the murder of that doctor.

Mr. SCOTT. But they put the doctor's address up so that the shooter—and let me tell you, they have—a lot of these people have gone after doctors, looked at the Web site and then gone and shot the doctor.

Mr. SUTTON. I can tell you my opinion is it would not—the——

Mr. SCOTT. Is that because the individuals are not, quote, terrorists?

Mr. SUTTON. You would have to—that would be a proof question.

Mr. SCOTT. And are we convicting people for who they are or for what they did?

Mr. SUTTON. For what they do.

Mr. SCOTT. Now, they have conspired, and part of the conspiracy ended up in somebody's death. They didn't think the person was

going to die. They didn't think the person was going to shoot somebody. The thing just got out of hand.

Mr. SUTTON. They would not meet the criteria, and they would not be eligible for the death penalty.

Mr. SCOTT. If they are part of the conspiracy?

Mr. SUTTON. Again, to get the death sentence, you have to intentionally kill someone or be a party to that or intentionally have participated in a—specifically and intentionally engage in an act of violence knowing that the act created grave risk of death to the person——

Mr. SCOTT. You put the address up there and don't think it is a grave risk to that doctor?

Mr. SUTTON. That would be a proof question down the road——

Mr. SCOTT. If you can prove it, you have got the death penalty.

Mr. SUTTON. Well, you may have the death penalty under other scenarios, but I can't tell you. But my opinion is it probably would be difficult.

Mr. SCOTT. And if you can't prove that they were trying to change Government policy, like all they did was hijack an airplane and went upside the World Trade Center, you can't prove they were trying to change Government policy—they just belonged to a terrorist organization, and they were bad people—you thought they were bad people, but you can't prove that the act had anything to do with changing Government policy, that wouldn't be a terrorist act. But the abortion protest, you know that is trying to change Government policy, so that would be easier to prove under this legislation.

Mr. SUTTON. I disagree with the——

Mr. SCOTT. Because of who they are or because of what they did?

Mr. SUTTON. You would have to look at the facts of each one of those cases and determine under the current definitions of what we have in the bill to see if it meets there. You would also have to evaluate other options as well.

Mr. SCOTT. Do you think you would have problems proving the terrorist act on behalf of the 19 hijackers?

Mr. SUTTON. I don't think so.

Mr. SCOTT. Why? What did they do to change Government policy, other than who they are?

Mr. SUTTON. I can't tell you other—all the intimate details of that case. It certainly was not a case from our district, but I think that in that case the FBI and other intelligence agencies would be able to show evidence of a clear terrorist link in that case.

Mr. SCOTT. To terrorists, not the act, and so we are going after people for who they are.

Mr. COBLE. The gentleman's time has expired.

Now the gentleman from Florida wants to be heard for a second time as well, so folks, I hope you hang around here for this markup.

Mr. FEENEY. Thank you. I will try to be brief. Actually, Mr. Scott's question sufficiently confused me. I just want to be clear here, so we will take his example.

He is suggesting that we are going to put to death people for who they are, not what they did.

Mr. Sutton, I just want to ask you very directly, using the anti-Carter bill hypothesis, supposing I want to engage in a First Amendment protest against an abortion clinic or an abortion doctor, supposing I am the guy that does the Web site, that tells people where they can show up to tell the doctor we don't like what he is doing and I put up the Web site address. Am I punishable by death under the Carter bill?

Mr. SUTTON. No.

Mr. FEENEY. Supposing I sell a sandwich to somebody I know that is on the way to exercise their First Amendment rights, and they go there. And some other person shoots the doctor. Am I liable as aiding and abetting the conspiracy for the death penalty under the Carter bill?

Mr. SUTTON. No, sir.

Mr. FEENEY. Supposing I personally go exercise my First Amendment rights, and some other nut in the crowd decides to shoot the doctor. Am I liable under the Carter bill for the death penalty?

Mr. SUTTON. No, you are not.

Mr. FEENEY. So the act I have to be engaged in a conspiracy to do is to kill the doctor, not to go protest under the First Amendment. So it is not who I am or what I believe, but it is what I do that is punishable under the Carter proposal?

Mr. SUTTON. That's right.

Mr. FEENEY. Thank you.

Mr. COBLE. I thank the witnesses for their testimony. This will be continued to another day before the full Committee, I am sure, but we appreciate your contribution today.

This concludes our hearing on H.R. 2934, the "Terrorist Penalties Enhancement Act of 2003." The record will remain open for 1 week.

Again, thank you all for being here, for your cooperation, and the Subcommittee stands—we will go into markup.

[Whereupon, at 3:35 p.m., the Subcommittee proceeded to other business.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

POST-HEARING QUESTIONS AND RESPONSES FROM THE HONORABLE JOHNNY SUTTON

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 25, 2004

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism
and Homeland Security
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions posed to Mr. Johnny Sutton, United States Attorney for the Western District of Texas, following Mr. Sutton's appearance before the Subcommittee on April 21, 2004. The subject of the Subcommittee's hearing was H.R. 2934, the "Terrorist Penalties Enhancement Act of 2003."

We hope that this information is helpful to you. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Bobby Scott
Ranking Minority Member

Post-Hearing Questions for Johnny Sutton,
United States Attorney for the Western District of Texas
Subcommittee on Crime, Terrorism and Homeland Security
Committee on the Judiciary
United States House of Representatives

April 21, 2004

1. **One of the criticisms of this legislation is that it is too broad and will chill the ability of people to engage in political protests. How do you respond to this criticism?**

Answer: The Department does not believe that H.R. 2934 is too broad or would chill the ability of Americans to engage in political protests. The Department understands that some opponents of H.R. 2934 have expressed concerns over the provision in the legislation providing that a person who, in the course of committing a federal felony that constitutes an act of international or domestic terrorism as defined in 18 U.S.C. § 2331, engages in conduct that results in the death of a person could be eligible for the death penalty. Opponents of this legislation have expressed the concern, in particular, that the definition of domestic terrorism in 18 U.S.C. § 2331 is too broad and that H.R. 2934 therefore could somehow be interpreted to make those engaging in peaceful political protests eligible for the death penalty. The Department believes, however, that these concerns are fundamentally mistaken.

The definition of "domestic terrorism" set forth in 18 U.S.C. § 2331 is extremely narrow – indeed, it is narrower than the definition of "international terrorism" found in 18 U.S.C. § 2331. The definition of "domestic terrorism" is limited to conduct that (1) violates federal or state criminal law *and* (2) is dangerous to human life. Moreover, under H.R. 2934, an individual would not be eligible for the death penalty under this provision unless he or she committed acts dangerous to human life that constituted a federal felony. Deadly conduct – behavior that can kill – neither constitutes peaceful political protest nor civil disobedience.

Moreover, under H.R. 2934, no individual would be eligible for the death penalty pursuant to 18 U.S.C. § 3591 unless he or she: (1) intentionally killed the victim; (2) intentionally inflicted serious bodily injury that resulted in the death of the victim; (3) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with that person, and the victim died as a direct result of the act; or (4) intentionally and specifically engaged in an act of violence knowing that the act created a grave risk of death to a person such that participation in the act constituted a reckless disregard for human life. Given these standards, the Department believes that the concerns that H.R. 2934 would somehow make peaceful political protesters eligible for the death penalty are entirely misplaced.

That having been said, however, the Department understands that the Committee has removed the provision in question from H.R. 2934. The Department has not taken a position on the Committee's decision.

2. **How does the trial and conviction of a defendant in a death penalty case differ from a case where a prosecutor is seeking life imprisonment? Can you describe the procedure necessary to obtain a recommendation for the death penalty?**

Answer: Although the trial, or "guilt phase," of a federal death penalty case is conducted according to essentially the same rules and procedures that apply in non-death-penalty cases, Congress has enacted a number of specific procedures pertaining to both pretrial proceedings and the post-trial "sentencing phase" of a federal death penalty case to ensure that the death penalty is sought and imposed in full compliance with the Eighth Amendment strictures. These constitutional mandates, as implemented by the existing federal death penalty procedures, ensure that the death penalty is reserved for the most deserving cases while preserving appropriate procedural protections for the defendant, including the defendant's Eighth Amendment right to present relevant mitigating evidence on his behalf.

A federal case charging a homicide offense potentially punishable by death becomes a death penalty case only after the government files a notice of intention to seek the death penalty in accordance with 18 U.S.C. § 3593(a). Under U.S. Department of Justice guidelines known as the death penalty "Protocol," this will occur only if the Attorney General has authorized seeking the death penalty after receiving submissions from defense counsel and recommendations from the U.S. Attorney and the Attorney General's Review Committee on Capital Cases. United States Attorneys' Manual, Title 9-10.000 et seq. If a death penalty notice is filed, the defendant is entitled to an additional defense attorney with death penalty expertise, 18 U.S.C. § 3005, and he has an increased right to disclosure of the names of prospective prosecution witnesses and prospective jurors, 18 U.S.C. § 3432. Both the defense and the government have the right to voir dire of prospective jurors to determine whether the jury will fairly and impartially decide the defendant's sentence according to the law and the evidence. Unlike in non-death-penalty cases, the defendant has the right to have his jury decide his sentence.

In the "guilt phase," the jury must decide unanimously whether the prosecution proved beyond a reasonable doubt that the defendant has committed the underlying death-eligible offense. If the jury finds the defendant guilty, the case proceeds to the "sentencing phase." At the sentencing phase, in order to meet legal requirements for the imposition of the death penalty, the prosecution must prove beyond a reasonable doubt that the defendant committed the capital offense with a certain level of intent, which ensures that the defendant either intended to kill or inflict serious bodily injury or acted with reckless disregard for human life, directly resulting in the death of the victim. 18 U.S.C. § 3591(a)(2). In addition, the prosecution must prove any aggravating factors beyond a reasonable doubt, and must prove at least one from a list of specific factors set out in the applicable statute. 18 U.S.C. § 3592(c). In recommending a sentence, the jury may only consider aggravating factors that it unanimously finds to have been proven beyond a reasonable doubt. 18 U.S.C. § 3593(c), (d). Mitigating factors can include any of several specific factors listed in the statute, as well as anything else "in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." § 3592(a)(8). Mitigating factors need only be proven by a preponderance of

the evidence, and each juror can make an individual decision as to which factors have been proven to his or her satisfaction. § 3593(c), (d). Both the prosecution and defense may, in the judge's discretion, present information that might not be admissible as evidence in the guilt phase of the trial, and they may also rely on all of the evidence submitted during the guilt phase without having to present it anew during the penalty phase. § 3593(c).

At the end of the sentencing phase, the federal judge instructs the jurors that they must each weigh the aggravating and mitigating factors and decide upon a sentence. 18 U.S.C. § 3593(d), (e). The judge also instructs the jury that they may not in any way consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching a verdict. § 3593(f). Jurors are then given at least two sentencing options: death or life in prison without any possibility of release. § 3593(e). With respect to certain offenses, jurors are also given a third option – to have the judge impose a lesser sentence authorized by statute. See id. In reaching a verdict, which must be unanimous, each juror must certify that he or she did not, in fact, consider the race, national origin, sex, or religious beliefs of the defendant or the victim in reaching his or her determination and that his or her determination would have been the same regardless of those factors. § 3593(f). In all cases, the jury's decision is binding on the judge. 18 U.S.C. § 3594.

3. **One of the concerns expressed here today is that prosecutors will abuse the ability to seek the death penalty; however, in your testimony, you indicate that your office has only sought the death penalty in one case out of 25 death penalty eligible cases. In your experience, do prosecutors seek the death penalty whenever it is possible? What factors do you generally look at in determining whether or not to seek the death penalty?**

ANSWER: The Department of Justice policy requires that all decisions respecting the death penalty, whether to seek or not seek, are made finally by the Attorney General. We do not seek the death penalty in all cases to which it may apply. We look to a number of factors in deciding whether to request the Attorney General for authority to seek the death penalty, including the following:

1. **18 U.S.C. § 3591 ("sentence of death").**

This statute makes the death penalty available only in cases involving an intentional killing, an intentional infliction of serious bodily injury resulting in death, intentional participation in an act contemplating that the life of a person would be taken or that lethal force would be used, or intentionally engaging in violence with the knowledge that it creates a grave risk of death. There are a number of offenses that carry the death penalty, but as a practical matter, the death penalty will rarely apply because the commission of the offense, while resulting in death, does not involve the circumstances enumerated in section 3591.

2. **Aggravating factors.**

The circumstances of the commission of the murder often are significant. The more cruel, heinous, and deliberate the killer's conduct, the more appropriate it may be to seek the death penalty.

3. **The defendant's criminal record.**

A lengthy criminal record involving multiple crimes of violence against persons weighs more heavily in favor of seeking the death penalty than a less serious record.

4. **The views of the victim's family.**

The family's views are not controlling or determinative, but we take them into account.

5. **Mitigating factors, including statutory and non-statutory mitigating factors.**

These can include no or minor criminal history, circumstances suggesting minimal deliberation or premeditation, or the defendant's relation to the victim.

4. **The inclusion of Federal felonies that meet the definition under 2331 in this legislation has been criticized. Why do you believe this provision should be included?**

Answer: The Department supported the provision in H.R. 2934 providing that a person who, in the course of committing a federal felony that constitutes an act of international or domestic terrorism as defined in 18 U.S.C. § 2331, engages in conduct that results in the death of a person could be eligible for the death penalty. The Department maintained this position for two reasons. First, the list of federal crimes of terrorism set forth in 18 U.S.C. § 2332b(g)(5) does not include all crimes that terrorists may commit resulting in death, and the Department believes that the death penalty should be an option whenever a terrorist takes innocent human life. And second, the definition of "federal crimes of terrorism" set forth in 18 U.S.C. § 2332b(g)(5) does not include those situations where an offense is designed solely to intimidate or coerce a civilian population, such as members of a religious minority, and the Department believes that the death penalty should be an option when terrorists take innocent life in a bid to intimidate or coerce civilians.

That having been said, however, the Department understands that the Committee has removed the provision in question from H.R. 2934. The Department has not taken a position on the Committee's decision.

6. **Some have criticized the inclusion of certain crimes such as providing material support to terrorists or hacking in to protected computers in this bill. Can you**

describe a scenario where these offenses could be committed by a terrorist to result in loss of life?

Answer: Yes, the provision of material support to terrorists and the violation of those statutes protecting computers that are listed as federal crimes of terrorism in 18 U.S.C. § 2332b(g)(5) may result in the loss of life.

With respect to material support, consider the following scenario: Person X purchases, at the request of a terrorist, five sticks of dynamite using his ATF explosives license. He then provides this dynamite to that terrorist, knowing that the terrorist intends to use it to blow up the Independence Avenue entrance to the Rayburn House Office Building. The terrorist then carries out this attack, killing numerous individuals. Under this scenario, Person X has provided material support to terrorists in violation of 18 U.S.C. § 2339A, and his offense has resulted in the loss of life.

Violations of 18 U.S.C. § 2339B, which prohibits the provision of material support to designated foreign terrorist organizations, may also result in death. Person X, for example, may travel to North Africa and train members of a designated foreign terrorist organization in how to use pipe bombs to attack buses, knowing that his students plan to travel to America and bomb buses. One of Person X's students then may travel to America and bomb a bus in Washington, DC, killing numerous passengers. Under this scenario, Person X has provided material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B, and his offense has resulted in the loss of life.

The violation of those computer crimes listed as federal crimes of terrorism under 18 U.S.C. § 2332b(g)(5) may also result in the loss of life. With respect to 18 U.S.C. § 1030(a)(1), consider a scenario where Terrorist X hacks into a CIA computer and gains access to a list of undercover agents. He then transmits this information to fellow members of his terrorist group, who proceed to kill many of these undercover agents. Under this scenario, Terrorist X has unlawfully accessed and transmitted information in violation of 18 U.S.C. § 1030(a)(1), and his offense has resulted in the loss of life.

With respect to 18 U.S.C. § 1030(a)(5)(A)(i), consider a scenario where Terrorist X intentionally transmits a virus to the computer system of a hospital. This virus severely damages the hospital's computer system and alters the medical records of hundreds of patients. Numerous patients then die after receiving inappropriate treatment as a result of the altered medical records. Under this scenario, Terrorist X has intentionally caused damage to a computer in violation of 18 U.S.C. § 1030(a)(5)(A)(i), and his offense has resulted in the loss of life.

7. **Are there other crimes under Title 18 where the death penalty may be sought for an attempt or conspiracy to commit them? Can you give some examples?**

Answer: Yes, there are many other crimes under Title 18 where the death penalty may be sought for an attempt or conspiracy to commit them. A few examples of such criminal offenses are: 18 U.S.C. § 1203 (Hostage taking); 18 U.S.C. § 2280 (Violence against maritime navigation); 18 U.S.C. § 2281 (Violence against maritime fixed platforms); and 18 U.S.C. § 2332a (Use of certain weapons of mass destruction).

8. **Can you please provide the Department's understanding of whether it is beneficial to deny federal benefits to convicted terrorists, as stated in Section 2339e?**

Answer: The Department believes that it would be beneficial and appropriate to deny federal benefits to convicted terrorists as provided in section 3 of H.R. 2934. Current law allows federal courts to deny federal benefits to persons who have been convicted of drug-trafficking or drug-possession crimes. As a result, these convicts can be prohibited, for periods of up to life, from receiving grants, contracts, loans, professional licenses, or commercial licenses that are provided by a federal agency or out of appropriated funds. Despite the fact that terrorists pose at least as much of a threat to the national security of the United States as drug dealers, however, there presently is no legal authority to deny federal benefits to persons who have been convicted of terrorism crimes. The Department believes that this inconsistency should be eliminated, and that the same disincentives that the law creates with respect to drug crimes should be available in the terrorism context as well. If an individual engages in terrorism, he or she should not be rewarded with various federal benefits.

LETTER FROM PROFESSORS IN THE DEPARTMENT OF CRIMINOLOGY AND CRIMINAL JUSTICE AT THE UNIVERSITY OF MEMPHIS

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April 27, 2004

RE: HR-2834

The Honorable Howard Coble
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
2468 RHOB
United State House of Representatives
Washington, D.C. 20515

The undersigned faculty of the Department of Criminology and Criminal Justice at the University of Memphis ask that the Subcommittee on Crime, Homeland Security, and Terrorism consider the following facts concerning the death penalty and deterrence.

- The effect of executions on homicide rates has been exhaustively researched by criminologists. Overwhelmingly, this research fails to support the conclusion that executions are a greater deterrent to murder than are long prison sentences.
- The American Society of Criminology, the leading professional organization of criminologists, has noted in its policy position on capital punishment that "social science research has found no consistent evidence of crime deterrence through execution."[1]
- Recent research, using sophisticated statistical techniques and disaggregated homicide data, has failed to find evidence that executions have a deterrent effect greater than that of imprisonment; several of these studies find an **increase** in homicides after highly publicized executions.[2]
- A recent exhaustive review of the research literature, written by the lead researchers in the area, concluded that "a significant general deterrent effect for capital punishment has not been observed, and in all probability does not exist."[3]
- No criminologists have studied the deterrent effect of executions on potential terrorists. Criminological theory and experience, however, indicate that it is extraordinarily unlikely that the threat of executions could deter terrorists.

W. Richard Janikowski, J.D., Chair
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David J. Giacopassi, Ph.D., Professor
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K.B. Turner, Ph.D., Assistant Professor
Margaret Vandiver, Ph.D., Professor

cc: The Honorable Robert C. "Bobby" Scott

[1] http://www.asc41.com/deathpenalty.html

[2] Cochran, J.K., M.B. Chamblin and M. Seth (1994) "Deterrence or brutalization? An impact assessment of Oklahoma's return to capital punishment" *Criminology* 32:107-134; Sorensen, J., R. Wrinkle, V. Brewer, and J. Marquart (1999) "Capital punishment and deterrence: Examining the effect of executions on murder in Texas" *Crime & Delinquency* 45: 481-493; Thomson, E. (1997) "Deterrence versus brutalization: The case of Arizona" *Homicide Studies* 1: 110- 128; Thomson, E. (1999) "Effects of an execution on homicides in California" *Homicide Studies* 3: 129-150.

[3] Bailey, W.C. and R.D. Peterson (1997) "Murder, capital punishment and deterrence: A review of the literature." In H.A. Bedau (ed.), *The Death Penalty in America: Current Controversies* (pp. 135-161). New York and Oxford: Oxford University Press, p. 155.

LETTER FROM MICHAEL ISRAEL, EDITOR, CRIMINAL JUSTICE WASHINGTON LETTER

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April 28, 2004

The Honorable Howard Coble
Chair, Subcommittee of Crime, Terrorism, and Homeland Security
2468 RHOB
United States House of Representatives
Washington, D.C. 20515

Dear Rep. Coble,

I write for the record in opposition to HR 2934, The Terrorist Penalties Enhancement Act of 2003, for I am concerned that the Congress might take action on this bill thinking that the research community has found that the death penalty has a deterrent effect, and will improve public safety. Your subcommittee has heard from a group of economists who claim their analysis finds a cause and effect of publicizing the death penalty and reduction of all murders. I might remind you that their spokesperson, Joanna Shepherd, says she is only reporting their research, not recommending that policy.

I find it curious, and want your committee to know, that this economists group is virtually the only researchers who make such a finding. The overwhelming majority of social science research, including criminologists, psychologists, sociologists, and legal researchers find the opposite. They not only find no deterrent effect for the death penalty, but the same finding for severe punishment in general, including mandatory minimum sentencing. Tough sentencing may well satisfy retribution, but has no utilitarian effect of diverting offenders themselves away from crime, or dissuading others. What works as punishment is certainty, not severity, and only if it is accompanied by social disgrace.

The death penalty for terrorist acts can deliver on neither, and not only does it carry no disgrace, but martyrdom. The spectacle of a domestic terrorist going through the death penalty procedures in America would be giving publicity for a recruitment drive.

How then can we explain the full weight of social science research contradicting the economists' findings using multiple regression statistics? Their flaw is the same today as it was in the 1970's when the work of Isaac Ehrlich was refuted, and refining their statistics does not remove that flaw. They have no social controls. Statistical significance, without controls, explains nothing. They have no baseline comparisons with which to explain their findings. Without that, their work can not be called science.

Succinctly, it means nothing to chart murder rates going up or down and correlating them with executions unless executions is the only variable affecting those murders. Other things are happening in American society. Crime rates go up and down for many reasons, no single intervention can take credit or blame without controlling for all else. During the moratorium, crime was on the rise, and in the 90's crime was declining.

Shepherd cites 13 recent papers in the economics literature that find a deterrent effect. In all of social science there are virtually no papers that confirm that. I can only believe that economics research, without social controls, is unable to explain a complicated behavior like murder. Economists assume rational behavior. That assumption can not explain irrational behavior like murder, and especially suicidal terrorist behavior. Shepherd says that there is a strong consensus among economists that capital punishment deters crime. They are alone among researchers.

As for me, after a 36 year academic career as a criminologist, I now edit an online newsletter on crime policy in Washington, the "Criminal Justice Washington Letter." The website is www.crimeletter.net. With my experience and wide contacts in the criminology profession, I am comfortable that I am in touch with the mainstream research on crime policy issues.

Very truly yours,

Michael Israel

Michael Israel
Editor, Criminal Justice Washington Letter

Cc: The Honorable Robert C. "Bobby" Scott

LETTER FROM ROBERT M. SANGER, CERTIFIED CRIMINAL LAW SPECIALIST, SANGER & SWYSEN

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*CERTIFIED SPECIALIST, CRIMINAL LAW
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BOARD OF LEGAL SPECIALIZATION

April 27, 2004

The Honorable Howard Coble
Chair, Subcommittee on Crime, Terrorism, and Homeland Security
2468 RHOB
United State House of Representatives
Washington, D.C. 20515

To The Honorable Howard Coble:

I oppose HR-2934, The Terrorist Penalties Enhancement Act of 2003. I do not believe that the death penalty deters crime or terrorist actions. The statement given by Joanna M. Shepherd in support of HR-2934 is not factually accurate. For instance, three of the studies she cites have been called into question.

The **Cloninger and Marchesini** study compares relatively brief and arbitrary time periods in Texas. They claim that there were more homicides during a court imposed stay on executions than during the prior period when executions were conducted and the first couple of months after they were resumed. They also adjust their data to fit their hypothesis. They conclude from this limited sample that executions deter homicides. However, their own research is belied by the fact that the homicide rate in Texas continued to climb after executions were reinstated. They simply did not look at other data because it refutes their hypothesis.

The **H. Naci Mocan and R. Kaj Gittings** study uses the term "commutations" incorrectly. There is also the more fundamental issue that the "news" of "commutations" was unlikely to reach the people who were committing, or likely to commit, homicidas. This would be even more significant, one would think, in considering whether or not there was any deterrent effect regarding terrorist acts since terrorist acts are often undertaken as an act of martyrdom.

Finally, the study by **Dezhbakhsh and Rubin** is also suspect. First, they do a county by county analysis based on what appears to be incomplete data. Second, this paper has been around for years and just now was updated and accepted for publication yet they have not released their data to others for study. Third, they do a regression analysis which controls for a number of variables, some of which are straw persons, being set up to knock down. For instance, they posit that Republican voter registration is correlated with tough on crime policies and NRA membership reflects the number of guns in the community. But, fourth, and most importantly, their figures do not make sense -- if they were right that each execution saves 18 lives (with a margin of error of 10, so 8 to 28) the death states would have had a

234 more homicides in 2000 than 1999 (or between 104 to 364) since executions dropped from 98 to 85. And, in the years 1977 to 1981 (where executions averaged one per year, there would have been 1746 more homicides per year or a total of 8730 more homicides for that 5 year period than in 1999. This is not the case. However, their paper provides only conclusions not underlying data.

While they take on some criticisms of other studies, often by using proxies (e.g., NRA membership for gun ownership), there have been other criticisms of their work. For instance, the murder rate is affected by the fact that there is now far superior trauma care and not as many people die who are wounded. The prevalence of cell phones has thwarted some homicides and has caused medical care to be summoned earlier. Hence, whatever the data shows since the resumption of executions in 1977, it is not possible to attribute fluctuations in the murder rate to the presence or absence of executions.

All of three these "studies" fly in the face of long term and broad based research which shows that there is no deterrent effect to the death penalty and that there may be a brutalizing effect which causes an increase in homicides. In other words, long term longitudinal studies and studies comparing murder rates in jurisdictions with and without the death penalty have all concluded that a society does not deter by killing prisoners.

However, even Dezhbakhsh and Rubin say, "Finally, a cautionary note is in order: deterrence reflects social benefits associated with the death penalty, but one should also weigh in the corresponding social costs. These include the regret associated with the irreversible decision to execute an innocent person. Moreover, issues such as the possible unfairness of the justice system and discrimination must be considered when society makes a social decision regarding capital punishment."

We know that these underlying problems are real. The death penalty system in America is not adequate to the task of imposing the "final punishment" in a just and non-discriminatory fashion. Innocent people have been sentenced to death. The marginalized of society get death – the poor, people of color, mentally disabled and those abused as children. It is not the worst of the worst; it is primarily the poorest of the poor and those who cannot defend themselves. The rest of the Western world has abandoned the killing of prisoners and we too should abandon this anachronism.

Therefore, I urge you to vote against HR-2934, The Terrorist Penalties Enhancement Act of 2003.

Respectfully submitted,

Robert M. Sanger
Certified Criminal Law Specialist

Cc: The Honorable Robert C. "Bobby" Scott

LETTER FROM WANDA D. FOGLIA, J.D., PH.D., PROFESSOR OF LAW AND JUSTICE STUDIES, ROWAN UNIVERSITY

Law and Justice Studies

April 28, 2004

The Honorable Howard Coble
Chair, Subcommittee on Crime, Terrorism, and
Homeland Security
2468 RHOB
United States House of Representatives
Washington, D.C. 20515

Re: HR-2934, The Terrorist Penalties Enhancement Act of 2003

Dear Rep. Coble:

This letter is to express my concern, as a criminologist who has been conducting empirical research on crime since 1985, that Congress will be considering the above referenced bill with the mistaken impression that research evidence supports the assumption that the death penalty deters. I received my J.D. from University of Pennsylvania Law School in 1982 and, my Ph.D. in Criminology from University of Pennsylvania in 1986. I have published numerous articles in peer-reviewed journals, regularly taught undergraduate and graduate courses relating to crime causation and corrections, testified as an expert witness, and been doing research relating to the death penalty since 1996. Currently, I am a Full Professor of Law and Justice Studies at Rowan University. As a former prosecutor and police academy and in-service instructor I appreciate the importance of effective law enforcement, but as a social scientist I cannot ignore the overwhelming research evidence demonstrating that the death penalty does not deter.

There has been some research, such as the well known study by Ehrlich, that claimed to find a deterrent effect; but a panel of the National Academy of Sciences reanalyzed Ehrlich's data and found no deterrent effect, and the vast majority of the studies have failed to show that capital punishment deters. Studies by criminologists have compared murder rates before and after an execution, compared rates in states and countries with and without the death penalty, and used time series approaches that look at the long-term association between the death penalty and murder. Many of these studies utilize multiple regression techniques that control for some of the multitude of other factors that might affect murder and all crime rates, including, but not limited to, demographics, economics, public attitudes, and effectiveness of criminal justice programs. The results of course will vary depending on which factors a researcher chooses to include in his or her statistical model. This is why social scientists look to see what the weight of the evidence reveals. Over 200 studies have looked for a deterrent effect and most of these studies have failed to find it. Some have actually found that murders increase after an execution, which has been called a brutalization effect. The counter intuitive finding in a study that claims crimes of passion are deterred by the remote possibility of the death penalty raises questions about whether the statistical model adequately controlled for all the factors that influence murder rates. It also should be noted that at the same time executions were increasing during the 1990s, all crimes were decreasing, and there is no reason to think other crimes would be influenced by the death penalty for capital murder. Similarly, many murders would not even qualify as capital murders, so that any analysis that is not limited to capital offenses is suspect.

Leaving aside the fact that terrorists, many of whom seek martyrdom, are extremely unlikely to be deterred, the research evidence simply does not support expanding the use of the death penalty on the grounds that it deters. Thank you for your consideration.

Respectfully,

Wanda D. Foglia, J.D., Ph.D.
Professor of Law and Justice Studies

C: The Honorable Robert C. Scott

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