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The Death Penalty: Capital Punishment Legislation in the 110th Congress

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Summary

Most capital offenses are state crimes. In 1994, however, Congress revived the death penalty as a federal sentencing option. More than a few federal statutes now proscribe offenses punishable by death. A number of bills have been offered during the 110th Congress to modify federal law in the area. One, S. 447 (Sen. Feingold), would abolish the federal death penalty. Others would increase the number of capital offenses to include one or more newly created offenses or existing non-capital offenses newly designated as capital offenses, *e.g.*, H.R. 855 (Rep. Lungren), H.R. 880 (Rep. Forbes), H.R. 1118 (Rep. Keller), H.R. 1645 (Rep. Gutierrez), H.R. 2376 (Rep. Franks), H.R. 3147 (Rep. Wilson), H.R. 3150 (Rep. Keller), H.R. 3156 (Rep. Lamar Smith), S. 330 (Sen. Isakson), S. 607 (Sen. Vitter), S. 1320 (Sen. Kyl), S. 1348 (Sen. Reid), and S. 1860 (Sen. Cornyn).

Numbered among the new capital offenses and newly designated capital offenses are murder related to street gang offenses or Travel Act violations, murder committed during and in relation to drug trafficking, murder committed in the course of evading border inspection, murder of disaster assistance workers, and various terrorism-related murders.

A third category of proposals would adjust in one way or another the procedures used to try and sentence capital defendants, including those relating to where a capital offense may be tried, the appointment of counsel in capital cases, the pre-trial notification which the parties must exchange in capital cases, the procedures that apply when the defendant claims to be mentally retarded, adjustments in the statutory aggravating and mitigating circumstances, jury matters, and the site of federal executions. Among the bills offering one or more of these proposals are: H.R. 851 (Rep. Gohmert), H.R. 880 (Rep. Forbes), H.R. 1645 (Rep. Gutierrez), H.R. 1914 (Rep. Carter), H.R. 3150 (Rep. Keller), H.R. 3153 (Rep. Gerlach), H.R. 3156 (Rep. Lamar Smith), S. 1320 (Sen. Kyl), and S. 1860 (Sen. Cornyn).

An abridged version of this report – without footnotes, appendices, and most citations, is available as CRS Report RS22719, *Capital Punishment Legislation in the 110th Congress: A Sketch*, by Charles Doyle.

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Introduction

Most capital punishment cases are state cases.[1] There are several federal crimes, however, for which the death penalty is a sentencing option.[2] The 110th Congress has seen proposals to abolish the federal death penalty, to increase the number of federal capital offenses, and to adjust the procedure under which capital cases are tried and sentencing determinations are made. This is an overview of some of those proposals.

Current Procedure

Existing federal law treats capital cases differently. There is no statute of limitations for capital offenses.[3] There is a preference for the trial of capital cases in the county in which they occur.[4] Defendants in capital cases are entitled to two attorneys, one of whom "shall be learned in the law applicable to capital cases."[5] The Attorney General must ultimately approve the decision to seek the death penalty in any given case.[6] Defendants are entitled to notice when the prosecution intends to seek the death penalty,[7] and at least three days before the trial, to a copy of the indictment as well as a list of the government's witnesses and names in the jury pool.[8] Defendants have twice as many peremptory jury challenges in capital cases as in other felony cases and prosecutors more than three times as many.[9] Should the defendant be found guilty of a capital offense the sentencing hearing procedures set forth in chapter 228 of title 18 of the United States Code come into play.

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[1] As of January 1, 2007, there were 3350 prisoners on death row throughout the United States; 44 of them were there because of a violation of federal law, NAACP Legal Defense Fund, *Death Row USA* 30-1 (Winter, 2007), available on August 31, 2007 at [www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter 2007.pdf].

[2] *See generally* Bazan, *Capital Punishment: An Overview of Federal Death Penalty Statutes*, CRS Rep. RL30962. A list of federal capital offenses is appended.

[3] 18 U.S.C. 3281.

[4] 18 U.S.C. 3235.

[5] 18 U.S.C. 3005.

[6] U.S. Department of Justice, *United States Attorneys Manual*, §§9-10.010 to 9-10.190, available on August 13, 2007 at [www.usdoj.gov/usao/eousa/foia_reading_room/usam].

[7] 18 U.S.C. 3593(a).

[8] 18 U.S.C. 3432.

[9] F.R.Crim.P. 24(b).

The chapter divides federal capital offenses into three categories for purposes of determining whether the death penalty should be imposed in light of the aggravating and mitigating facts presented in the case.[10] The first group consists of espionage and treason;[11] the second, of homicide offenses;[12] and the third, of drug offenses.[13]

In homicide cases, the sentencing hearing involves two determinations: whether the defendant acted with the intent required in section 3591(a)(2) of the chapter and whether the weighing of the pertinent aggravating and mitigating circumstances warrant imposition of the death penalty in section 3592(c). In order to keep the two

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[10] 18 U.S.C. 3591-3593.

[11] 18 U.S.C. 3591(a)(1)("A defendant who has been found guilty of – (1) an offense described in section 794 or section 2381 . . . shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense").

[12] 18 U.S.C. 3591(a)(2)("any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593 – (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) 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 a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense").

[13] 18 U.S.C. 3591(b)("(b) A defendant who has been found guilty of – (1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or (2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense").

inquiries distinct and to avoid confusion and unfair prejudice, federal courts will generally permit the inquiries to be conduct sequentially.[14]

The same list of mitigating factors applies to each of the three categories of capital offenses. The list consists of seven specific statutory factors – impaired capacity, minor participation, disparate treatment of codefendants, no prior criminal record, mental or emotional disturbance, and victim consent – but also includes a catch-all, open-ended factor.[15]

Each of the three categories has its own list of statutory aggravating factors. They share a catch-all, open-ended aggravating factor available for each of the three categories of capital offenses which the jury may weigh,[16] but the death penalty may only be imposed after first finding at least one of the more specific, designated aggravating factors.[17]

The list of designated aggravating factors relating to espionage and treason is the shortest of the three: prior espionage or treason conviction, grave risk to national security, and grave risk of death.[18] The list of the designated homicide aggravating factors contains sixteen entries, including the fact that the murder was committed during the course of one of group of other federal offenses.[19] The drug aggravating

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[14] *United States v. Henderson*, 485 F.Supp.2d 831, 871-72 (S.D. Ohio 2007); *United States v. Mayhew*, 380 F.Supp.2d 936, 955-57(S.D. Ohio 2005); *United States v. Johnson*, 362 F.Supp.2d 1043, 1099-111 (N.D. Iowa 2005); *United States v. Jordan*, 357 F.Supp.2d 889, 903-904 (E.D. Va. 2005).

[15] 18 U.S.C. 3592(a)("In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following: (1) Impaired capacity.– The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge. (2) Duress.– The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge. (3) Minor participation.– The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge. (4) Equally culpable defendants.– Another defendant or defendants, equally culpable in the crime, will not be punished by death. (5) No prior criminal record.– The defendant did not have a significant prior history of other criminal conduct. (6) Disturbance.– The defendant committed the offense under severe mental or emotional disturbance. (7) Victim's consent.– The victim consented to the criminal conduct that resulted in the victim's death. (8) Other factors.– Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence").

[16] 18 U.S.C. 3592(b), (c), (d) ("The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists").

[17] 18 U.S.C. 3593(e).

[18] 18 U.S.C. 3592(b).

[19] 18 U.S.C. 3592(c).

factors focus on prior convictions, the risk to children, the use of firearms, and lethal adulteration.[20]

The jury must unanimously agree that an aggravating factor has been established before the factor may be weighed in determining whether to impose the death penalty; on the other hand the finding of a single juror is sufficient for consideration of a mitigating factor.[21] The death penalty may only be imposed if the jury unanimously finds that the aggravating factors outweigh the mitigating factors; or if the court so finds in the absence of a jury.[22]

Procedural Changes

During the 110th Congress, proposals have been offered that would modify existing law relating to:

- where a capital offense may be tried,
- the appointment of counsel in capital cases,
- the pre-trial notification which the parties must exchange in capital cases,
- the procedures that apply when the defendant claims to be mentally retarded,
- adjustments in the statutory aggravating and mitigating circumstances,
- jury matters, and
- the site of federal executions.

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[20] 18 U.S.C. 3592(d).

[21] 18 U.S.C. 3593(d)("The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law").

[22] 18 U.S.C. 3593(e)("If, in the case of – (1) an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist; (2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or (3) an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist, the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence").

Venue and Vicinage.

Generally. The Constitution provides that "the trial of all crimes . . . shall be held in the state where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed,"[23] and that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[24] From the beginning,[25] Congress has provided in language that now appears in 18 U.S.C. 3235, that where possible capital cases should be tried in the county in which they occur.[26] It has also long specifically provided that murder and manslaughter cases shall be tried where the death-inflicting injury occurs regardless of where the victim dies,[27] as 18 U.S.C. 3236 now states.[28] Furthermore, for some time[29] it has provided in the words of 18 U.S.C. 3237 that multi-district crimes may be tried where they are begun, continued, or completed and that offenses involving the use of the mails, transportation in interstate or foreign commerce, or importation into the United States may be tried in any district from, through, or into which commerce, mail, or imports travel.[30]

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[23] U.S. Const. Art. III, §2, cl. 3.

[24] U.S. Const. Amend. VI.

[25] 1 Stat. 88 (1789).

[26] "The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience," 18 U.S.C. 3235.

[27] 35 Stat. 1152 (1909).

[28] "In all cases of murder or manslaughter, the offense shall be deemed to have been committed at the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs," 18 U.S.C. 3236.

[29] 14 Stat. 484 (1867).

[30] "(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed. Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves," 18 U.S.C. 3237(a).

At least one federal appellate court has held that the specific murder-manslaughter instruction of section 3236 overrides the general instructions of section 3237(a) only with regard to "unitary" murder offenses, such as murder by a federal prisoner, *United States v. Barnette*, 211 F.3d 803, 814 (4th Cir. 2000). Section 3236 does not apply, the court held, to "death resulting" cases, cases where murder is a sentencing element rather than a substantive element of the offense, such as in cases of a violation of 18 U.S.C. 924(c)(use of a firearm during and relating to the commission of crime of violence), the sentence for which is determined in part by whether death resulted from the commission of the offense, *Id.*

Although some of the venue proposals offered in the 110th Congress deal primarily with venue for newly created or newly amended federal capital offenses, H.R. 3156 (Rep. Lamar Smith) and S. 1860 (Sen. Cornyn) address venue in capital cases generally. They strike the language of section 3235 that calls for the trial of capital cases in the county in which they occur if possible. In its place, they install two subsections whose precise scope is somewhat uncertain.[31]

The proposed amendment appears intended to repeal both the "county trial in capital cases" feature of section 3235 and, by indirection, the murder portion of the "murder-manslaughter trial" feature of section 3236.[32] It seems to replicate the continuing offense language of section 3237 with one significant addition; it permits trial where commerce-related conduct occurs. The scope of the proposed amendment is likely to depend in part on the application of constitutional constraints.

The proposed amendment must operate within constitutional venue and vicinage limitations, that is that: "The trial of all crimes . . . shall be held in the state where the said crimes shall have been committed," and that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."[33]

The Supreme Court in *United States v. Cabrales* held that in light of these provisions the crime of money laundering committed in Florida could not be tried in Missouri where the laundered funds had been criminally generated – absent other circumstances.[34] Shortly thereafter, the Court held in *United States v. Rodriguez-Moreno*, that the crime of using a firearm during and in relation to the crime of kidnaping could be tried in New Jersey into which the victim had been carried, notwithstanding the fact that the firearm was acquired and used in Maryland after the victim had been moved there from New Jersey.

Cabrales is not as restrictive as it might seem at first; nor is *Rodriguez-Moreno* as permissive. Cabrales laundered the Missouri drug money in Florida, but there was no evidence that she was a member of the Missouri drug trafficking conspiracy or

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[31] "(a) The trial of any offense punishable by death shall be held in the district where the offense was committed or in any district in which the offense began, continued, or was completed. (b) If the offense, or related conduct, under subsection (a) involves activities which affect interstate or foreign commerce, or the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred," proposed 18 U.S.C. 3235.

[32] The manslaughter features of 3236 presumably continue in place since they are not capital cases and thus by definition are beyond the reach of the proposed capital venue provisions of the amended section 3235.

[33] U.S. Const. Art. III, §2, cl.3; U.S. Const. Amend. VI.

[34] 524 U.S. 1, 7-10 (1998)("The money laundering counts included no act committed by Cabrales in Missouri. . . nor did the government charge that Cabrales transported the money from Missouri to Florida. . . . [T]he counts at issue do not charge Cabrales with conspiracy; they do not link her to, or assert her responsibility for, acts done by others. . . . In the counts at issue, the government indicted Cabrales for transactions which began, continued, and were completed only in Florida").

that she had transported the money from Missouri to Florida. The Court acknowledged that she might have been tried in Missouri had either been the case.[35]

Rodriguez-Moreno and his confederates kidnapped a drug trafficking associate and transported him over the course of time from Texas to New Jersey and then to Maryland. Rodriguez-Moreno acquired the firearm with which he threatened the kidnap victim in Maryland but was tried in New Jersey for using a firearm "during and in relation to a crime of violence [kidnaping]" in violation of 18 U.S.C. 924(c)(1). Section 924(c)(1) in the eyes of the Court has "two distinct *conduct elements* . . . using and carrying of a gun and the commission of a kidnaping."[36] A crime with distinct conduct elements may be tried wherever any of those elements occurred; kidnaping is a continuous offense that in this case began in Texas and continued through New Jersey to Maryland; venue over the kidnaping, a conduct element of the section 924(c)(1), was proper in Texas, New Jersey or Maryland; consequently venue over the violation of section 924(c)(1) was proper in either Texas, New Jersey or Maryland.[37]

The Court was quick to distinguish *Cabrales* from *Rodriguez-Moreno*: "The existence of criminally generated proceeds [in *Cabrales*] was a circumstance element of the offense but the proscribed conduct – defendant's money laundering activity – occurred after the fact of the offense begun and completed by others." In *Rodriguez-Moreno*, "given the 'during and in relation to' language, the underlying crime of violence is a critical part of the §924(c)(1) offense."[38] Subsequent lower federal appellate courts have read *Cabrales* and *Rodriguez-Moreno* to require that a crime be tried where at least one of its elements occurs.[39]

It is not clear how the proposed venue amendment would fare in light of *Cabrales* and *Rodriguez-Moreno*. It states that "(a) The trial for any offense punishable by death shall be held in the district where the offense was committed or

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[35] 524 U.S. at 8, 10.

[36] 526 U.S. at 280 (emphasis added).

[37] 526 U.S. at 280-82.

[38] 526 U.S. at 280-81 n.4. The Court declined to address, however, the so-called "effects" test used by the some of the lower federal courts in obstruction of justice and Hobbs Act ("effect") cases to determine the presence of proper venue, 526 U.S. at 279 n.2.

[39] *United States v. Smith*, 452 F.3d 323, 335 (4th Cir. 2006)("venue on a count is proper only in a district in which an essential conduct element of the offense takes place"); *United States v. Clenney*, 434 F.3d 780, 782 (5th Cir. 2005); *United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005); *United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004); *United States v. Morgan*, 393 F.3d 192, 196 (D.C.Cir. 2004)(internal citations and quotation marks omitted) ("When the statute proscribing the offense does not contain an express venue provision, the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it"); *United States v. Wood*, 364 F.3d 704, 711 (6th Cir. 2004); *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004). Congress may not bring into effect an express statutory provision in contravention of constitutional demands, but it may limit the choice of venue where the Constitution permits trial in more than one place, and it may define the place of trial from crimes committed outside any of the states, U.S.Const. Art. III, §2, cl.3.

in any district in which the offense began, continued, or was completed. (b) If the offense, or related conduct, under subsection (a) involves activities which affect interstate or foreign commerce, or the importation of an object or person into the United States, such offense may be prosecuted in any district in which those activities occurred."[40] The amendment appears to permit trial of an offense in a district in which related conduct affecting interstate or foreign commerce occurs even if the offense itself and each of its elements is committed entirely in another district.

The *Cabrales*' money generating drug trafficking in Missouri would seem to qualify as "conduct related" to the laundering in Florida for purposes of the proposal, and yet in *Cabrales* that was not enough. Nor would the proposal always appear to meet *Rodriguez-Moreno*'s "conduct element" standard. There is nothing in the proposal that requires that the "related conduct affecting interstate commerce" be an element of the offense to be tried. In fact, the alternative wording – "if the offense, or related conduct . . . involves activities which affect interstate commerce" – seems to contemplate situations in which affecting commerce is not an element, conduct or otherwise, of the offense. Such applications may appear to a reviewing court to be more than the Constitution permits.

Specific offenses. In the case of proposed venue provisions for new or existing federal capital offenses, one common proposal builds upon the scheme approved in *Rodriguez-Moreno*. The statute before the Court there, 18 U.S.C. 924(c)(1), outlaws the use of a firearm "during and in relation" to a crime of violence or serious drug offense. Several bills – *e.g.*, H.R. 880 (Rep. Forbes), H.R. 3150 (Rep. Keller), H.R. 3156 (Rep. Lamar Smith), and S. 1860 (Sen. Cornyn) – would create a new federal crime, one that prohibits the commission of a crime of violence "during and in relation" to a drug trafficking offense, proposed 21 U.S.C. 865. They permit prosecution for such an offense "in (1) the judicial district in which the murder or other crime of violence occurred; or (2) any judicial district in which the drug trafficking crime may be prosecuted," proposed 21 U.S.C. 865(b).

This analogy to *Rodriguez-Moreno* seems likely to work. The new crime, like section 924(c) in *Rodriguez-Moreno*, has two elements, a crime of violence and a simultaneous, related drug trafficking offense. *Rodriguez-Moreno* involved a continuing offense. Many drug trafficking offenses are likely to be considered continuing offenses for venue purposes,[41] but some may not be. It should not matter. *Rodriguez-Moreno* insists only that the crime may be tried where one of its conduct elements (crime of violence or drug trafficking crime) occur.

The several of the same bills – *e.g.*, H.R. 880 (Rep. Forbes), H.R. 3150 (Rep. Keller), H.R. 3156 (Rep. Lamar Smith), and S. 1860 (Sen. Cornyn) – would add, to the existing federal capital offense of committing a crime of violence in aid of a

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[40] Proposed 18 U.S.C. 3235.

[41] *E.g.*, *United States v. Zidell*, 323 F.3d 412, 422 (6th Cir. 2003)(possession with intent to distribute); *United States v. Brown*, 400 F.3d 1242, 1250 (10th Cir. 2005)(manufacturing methamphetamine).

racketeering (RICO) offense, an explicit venue provision.[42] The addition states that prosecution for a violation of section 1959 may be brought where the crime of violence occurs or where the racketeering activity of the enterprise occurs.[43] Even without the explicit addition, the Second Circuit has held that since a RICO violation is an element of a section 1959 offense, venue for trial of a violation of section 1959 is proper wherever the underlying RICO might be tried, i.e., wherever an element of a RICO violation occurs.[44]

Appointment of counsel.

Capital defendants are entitled to the assignment of two attorneys for their defense.[45] There is some uncertainty over whether they are to be appointed immediately following indictment for a capital offense or whether they need only be appointed "promptly" sometime prior to trial;[46] and whether the right expires with the decision of the government not to seek the death penalty.[47]

The Justice Department expressed concern that under existing law the Fourth Circuit has held that the right to appoint counsel does not expire with the government's decision not to seek the death penalty. The Department also noted the inefficiencies experienced in other circuits in cases where it is clear the death penalty

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[42] "Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished – . . ." 18 U.S.C. 1959(a).

[43] Proposed 18 U.S.C. 1959(c).

[44] *United States v. Saaverdra*, 223 F.3d 85, 91-2 (2d Cir. 2000); *see also United States v. Williams*, 181 F.Supp.2d 267, 290-92 (S.D.N.Y. 2001).

[45] 18 U.S.C. 3005.

[46] *Id.* ("Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel . . . "); *In re Sterling-Suarez*, 306 F.3d 1170, 1173 (1st Cir. 2002)(". . . counsel is to be appointed reasonably soon after the indictment and prior to the time that submissions are to be made to persuade the Attorney General not to seek the death penalty").

[47] *United States v. Boone*, 245 F.3d 352, 359-61(4th Cir. 2001)(right exists regardless of whether the government decides to seek the death penalty); *contra, United States v. Waggoner*, 339 F.3d 915, 917 (9th Cir. 2003)("the district court properly concluded that the defendant was not entitled to be represented by two attorneys after the government filed formal notice that it did not intend to seek the death penalty"); *cf., United States v. Casseus*, 282 F.3d 253, 256 (3d Cir. 2002)("the purpose of 18 U.S.C. 3005 is to allow a capital defendant to 'make his full defense by counsel.' This, they were fully able to do. Moreover, after the government declared that it would not seek the death penalty, the appellants were no longer capital defendants").

will not be sought but where a second attorney must be retained until the formal decision is announced.[48]

H.R. 851(Rep. Gohmert) would amend section 3005 so that prosecutor's notice of an intent to seek the death penalty, rather than indictment for a capital offense, triggers the right to the appointment of second counsel.[49] Critics have suggested that both the interests of the defendant and the interests of the government are best served by early appointment of counsel, expert in defense of capital cases.[50]

Pre-trial notice of intent to seek the death penalty.

Section 3593 obligates the prosecutor to advise the defendant and the court, "a reasonable time before trial" or before the acceptance of a plea, of the government's intention to seek the death penalty.[51] The Fourth and Eleventh Circuits have held that a failure to provide timely notice may preclude the effort of a prosecutor to seek the death penalty. More exactly, they have held (1) that a death notice filed unreasonably

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[48] Hearing at 14-5 ("Because there is no procedural difference between the trial of a non-capital offense and the non-death penalty trial of a capital offense, it is clear that the appointment of learned capital counsel was intended to provide a defendant with the assistance of a second counsel in a death penalty prosecution. Despite the clear intent to provide additional assistance to defendants in death penalty prosecutions, the Fourth Circuit has construed the existing provisions of section 3005 in such a way as to require a trial court to retain capital counsel through the conclusion of the trial – even in those cases in which the Attorney General decides not to seek the death penalty. . . Second, the courts have not infrequently complained about the expenditure of resources in providing expert capital counsel in cases in which, in a court's view, a death penalty prosecution is unlikely. Currently, the right to second, learned capital counsel adheres upon indictment for a capital offense. Courts outside the Fourth Circuit have construed this to require the assistance of expert counsel only until there is as decision not to seek the death penalty")(Griffey statement).

[49] Proposed 18 U.S.C. 3005(a).

[50] *Death Penalty Reform Act of 2006: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 109th Cong., 2d Sess. (Hearing), 44 (prepared statement of David L. Bruck, Federal Death Penalty Resource Counsel, Clinical Professor of Law & Director, Virginia Capital Case Clearinghouse, Washington & Lee School of Law)(Bruck statement), quoting in *In re Sterling-Suarez*, 306 F.3d at 1175 ("In some cases the early appointment of learned counsel . . . may well make the difference as to whether the Attorney General seeks the death penalty. . . where the opposition succeeds in persuading the Attorney General not to seek the death penalty, a substantial additional expenditure on the trial and sentencing phase of the as capital case is like to be avoided").

[51] 18 U.S.C. 3593(a)("If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice – (1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death").

close to the date set for trial is properly subject to a motion to strike the government's death notice, without which the government may not seek the death penalty, and (2) that an interlocutory appeal may be taken from the denial of such a motion.[52] The Second Circuit, on the other hand, concluded that section 3593(a) does not create a right to avoid the death penalty because of the government's untimely death notice and that consequently a refusal to strike the death notice is not a matter from which an interlocutory appeal may be taken.[53]

Prosecutors will sometimes provide a "protective death notice" in order to preserve the option to seek the death penalty before a final decision is made. The notice is withdrawn should the Attorney General decide not to seek the death penalty. The arrangement is not one which the Justice Department prefers.[54] On the other hand, both the right to a speedy trial and the fact that the defendant in a capital case is not likely to be free on bail prior to trial may argue for such incentives for expeditious prosecutorial determinations.

H.R. 851 (Rep. Gohmert), H.R. 3156 (Rep. Lamar Smith), and S. 1860 (Sen. Cornyn) amend section 3593(a) to authorize a continuance in the face of a delayed notification of an intent to seek the death penalty. They also make it clear that a defendant may not foreclose the government's option by pleading guilty before

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[52] *United States v. Ferebe*, 332 F.3d 722 (4th Cir. 2003); *United States v. Wilk*, 452 F.3d 1208 (11th Cir. 2006); *see also United States v. Ayala-Loopez*, 457 F.3d 107, 108 (1st Cir. 2006)(assuming with some reservations that interlocutory appeal was available, but concluding that the defendant had been given timely notice).

[53] *United States v. Robinson*, 473 F.3d 487, 491-92 (2d Cir. 2007).

[54] Hearing at 12-3 ("All agree that the defendant must be put on notice in a timely manner of the government's intention to seek the death penalty. Unfortunately, in *United States v. Ferebe*, 332 F.3d 722 (4th Cir. 2003), the Fourth Circuit concluded that the determination of whether a notice of intent has been filed in a timely manner must be made with respect the trial date in effect at the time the notice is filed and without regard to the additional preparation and issues resulting from a death penalty prosecution. In other words in the Fourth Circuit, an actual trial date cannot be continued to allow the defense adequate time to prepare for the capital punishment hearing. Particularly in those courts with what is know[n] as a 'rocket docket,' the *Ferebe* rule could result in the dismissal of a death notice. In some instances, in order not to forfeit the ability to seek a death sentence, the Department has been forced to file a 'protective death notice.' A 'protective death notice' is one that is filed in a case before the case has been fully reviewed and the Attorney General has made a final decision whether or not to seek the death penalty. In cases in which the Attorney General decides not to seek the death penalty, the protective notice is then withdrawn. The Department of Justice is committed to the goal of the consistent, fair and even-handed application of the death penalty, regardless of geography and local sentiment. The decision whether it is appropriate to seek the death penalty involves awesome responsibilities and consequences. The *Ferebe* court's understanding of the existing section 3593(a) provisions favors expedience over considered decision-making, and when a considered decision cannot be reached in a limited amount of time, it forces the government to choose between filing a protective death notice or abandoning the goal of consistency and evenhandedness in the application of the death penalty")(Griffey statement).

prosecutors have had time to seek the Attorney General's approval to seek the death penalty.[55]

Pre-trial notice of mitigating factors.

H.R. 851 (Rep. Gohmert), H.R. 3156 (Rep. Lamar Smith), and S. 1860 (Sen. Cornyn) also balance the prosecution's obligation to disclose any aggravating factors upon which it intends to rely with a similar defense obligation to notify the prosecution of mitigating factors upon which it intends to rely when the prosecution seeks the death penalty.[56] Elsewhere once the government has announced its intention to seek the death penalty, the bills afford defendants the advantage of a continuance when necessary to address the additional issues raised.[57] Here, it affords the prosecution a similar benefit.[58] Critics may question the symmetry.[59]

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[55] "(a) Notice by the government.– If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, ~~a reasonable time before the trial or before acceptance by the court of a plea of guilty~~, sign and file with the court, and serve on the defendant, a notice –

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The notice must be filed a reasonable time before trial or before acceptance by the court of a plea of guilty. The court shall, where necessary to ensure adequate preparation time for the defense, grant a reasonable continuance of the trial. If the government has not filed a notice of intent to seek the death penalty or informed the court that a notice of intent to seek the death penalty will not be filed, the court shall not accept a plea of guilty to an offense described in section 3591 without the concurrence of the government. . . " Proposed 18 U.S.C. 3593 with deleted language struck out and additional language in italics.

[56] Proposed 18 U.S.C. 3593(b)(1)("*(1) If, as required under subsection (a), the government has filed notice seeking a sentence of death, the defendant shall, a reasonable time before the trial, sign and file with the court and serve on the attorney for the government, notice setting forth the mitigating factor or factors that the defendant proposes to prove mitigate against imposition of a sentence of death. . .*").

[57] Proposed 18 U.S.C. 3593(a).

[58] Proposed 18 U.S.C. 3593(b)(3)("*Following the filing of a defendant's notice under this subsection, the court shall, where necessary to ensure adequate preparation time for the government, grant a reasonable continuance of the trial*").

[59] Hearing at 42 ("While this proposal has a superficially attractive symmetry to the government's obligation to provide pre-trial notice of aggravating factors, it overlooks the real differences between aggravation and mitigation. Most importantly, an across-the-board notice requirement for defendants would effectively require many defendants to acknowledge factual guilt before trial, and would thus be unconstitutional. A defendant cannot personally 'sign' and file notice of intent to provide a mitigating factor (such as having committed the offense under duress, or under the influence of extreme emotional disturbance) without admitting guilt of the underlying offense. That is why, to my knowledge, no state death penalty statute requires this kind of broad pre-trial notice of

(continued...)

Mental Retardation.

Neither the insanity defense nor the prohibitions against trial of the mentally incompetent necessarily preclude prosecution and conviction of the mentally retarded.[60] Nevertheless, section 3592(a) seems to permit evidence of mental retardation as a mitigating factor under section 3592(a)(1) (impaired capacity), 3592(a)(6)(disturbance), or 3592(a)(8)(mitigation generally).[61] Moreover, neither the Constitution nor federal statutory provisions allow the execution of a federal capital defendant suffering from mental retardation.[62]

The limited available case law suggests – with some exception – that the determination of the issue may be assigned to the court (rather than the jury) to be established by the defendant under preponderance of the evidence standard prior to trial.[63] As for the definition of mental retardation, the Court in *Atkins* cites two clinical definitions of mental retardation,[64] which it encapsulates with the observation

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[59] (...continued)
mitigating factors, and why this provision would be unenforceable under the Fifth Amendment")(Bruck statement).

[60] *Atkins v. Virginia*, 536 U.S. 304, 318 (2002)("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial").

[61] 18 U.S.C. 3592(a)("In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following: (1) Impaired capacity.– The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge. . . (6) Disturbance.– The defendant committed the offense under severe mental or emotional disturbance. . .(8) Other factors.– Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence"); *United States v. Cisneros*, 385 F.Supp.2d 567 (E.D.Va. 2005).

[62] *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); 18 U.S.C. 3596(c).

[63] *United States v. Nelson*, 419 F.Supp.2d 891, 892-94 (E.D.La. 2006); *United States v. Sablan*, 461 F.Supp.2d 1239, 1240-243 (D.Colo. 2006); *but see United States v. Cisneros*, 385 F.Supp.2d 567, 571 (E.D.Va. 2005)(agreeing with the preponderance standard but concluding that the question should be handled by the jury following conviction with the understanding that if unanimous the death penalty might not be imposed and if found by fewer than twelve of the jurors considered as mitigation).

[64] "The American Association on Mental Retardation (AAMR) defines mental retardation as follows: '*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18' Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992). The American Psychiatric Association's definition is similar: 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/ interpersonal skills, use of community resources, self-direction, functional academic skills,
(continued...)

that, "As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18," 536 U.S. at 318.

H.R. 851 (Rep. Gohmert), H.R. 3156 (Rep. Lamar Smith), and S. 1860 (Sen. Cornyn) would make several procedural adjustments to accommodate claims of mental retardation in federal capital cases. First, as noted earlier they establish a reciprocal pre-trial notification requirement. After the prosecution notifies the defendant of its intention to seek the death penalty and of the aggravating factors upon which it intends to rely, the defendant must notify the government of the mitigating factors, including mental retardation, upon which he intends to rely.[65] Second, they call for comparable notice when the defendant intends to claim mental retardation as a bar to execution.[66] Third, they afford the prosecution the right to an independent mental health examination of any defendant claiming retardation and to a continuance to prepare for trial and sentencing if necessary.[67] Fourth, they condition the defendant's presentation of evidence and argument relating to mental

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[64] (...continued)
work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.' Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed.2000). 'Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43," 536 U.S. at 308 n.3.

[65] Proposed 18 U.S.C. 3593(b)(1)("*(1) If, as required under subsection (a), the government has filed notice seeking a sentence of death, the defendant shall, a reasonable time before the trial, sign and file with the court and serve on the attorney for the government, notice setting forth the mitigating factor or factors that the defendant proposes to prove mitigate against imposition of a sentence of death. . .*").

[66] Proposed 18 U.S.C. 3593(b)(1)("(1) . . . *In any case in which the defendant intends to raise the issue of mental retardation as precluding a sentence of death, the defendant shall, a reasonable time before trial, sign and file with the court, and serve on the attorney for the government, notice of such intent*)."

[67] Proposed 18 U.S.C. 3593(b)(2), (3) ("*(2) When a defendant makes a claim of mental retardation or intends to rely on evidence of mental impairment, or other mental defect or disease as a mitigating factor under this section, the government shall have the right to an independent mental health examination of the defendant. A mental health examination ordered under this subsection shall be conducted by a licensed and certified psychiatrist, psychologist, neurologist, psychopharamacologist, or other allied mental health professional. If the court finds it appropriate, more than one such professional shall perform the examination. To facilitate the examination, the court may commit the person to be examined for a reasonable period, not to exceed 30 days to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in a suitable facility reasonably close to the court. The director of the facility may apply for a reasonable extension, but not to exceed 15 days upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant. (3) Following the filing of a defendant's notice under this subsection, the court shall, where necessary to ensure adequate preparation time for the government, grant a reasonable continuance of the trial*").

retardation, at least for mitigation purposes, to instances where the defendant has provided the required prior notification.[68] Fifth, they state that the defendant bears the burden of establishing mental retardation by a preponderance of the evidence.[69] Sixth, they instruct the trier of fact, be it judge or jury, to consider the issue of mental retardation only if an aggravating factor has been found and if so to consider the issue of mental retardation first among the mitigating factors.[70] Seventh, they provide that a capital defendant found to be mental retarded is be sentenced to imprisonment for a term of years or to life imprisonment without the possibility of release.[71] Eighth, they supply a statutory definition of mental retardation with three components: that the defendant have an IQ of 70 or less, that he have had continuously since under 18 years of age, and that it has continuously impaired mental functions including the ability to learn, reason, and control impulses.[72] The Justice Department endorsed similar legislative proposals in the 109th Congress as a means of introducing consistency into federal practice in the area.[73]

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[68] Proposed 18 U.S.C. 3593(d)("(*d*) Proof of mitigating and aggravating factors. – . . . The defendant may present any information relevant to a mitigating factor *for which notice has been provided under subsection (b). If the defendant has raised the issue of mental retardation as required under subsection (b), the defendant may introduce information relevant to mental retardation.. . "*). The caption ("proof of mitigating and aggravating factors") could be read to mean that the provisions are not intended to apply to the statutory and constitutional bars to execution. The articulation of separate burden of proof provisions for first mitigating factors and then mental retardation issues, quoted below, renders such an interpretation more uncertain.

[69] Proposed 18 U.S.C. 3593(d)("(*d*). . .The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information. *The defendant shall have the burden of proving mental retardation by the preponderance of the information*").

[70] Proposed 18 U.S.C. 3593(e)("(*e*) Return of special findings.– . . . *In any case in which the defendant has raised the issue of mental retardation as required under subsection (b), the jury, or if there is no jury, the court, shall determine the issue of mental retardation only if any aggravating factor set forth in section 3592 is found to exist. Such determination shall occur prior to the consideration of any mitigating factor. . .*").

[71] Proposed 18 U.S.C. 3593(e)("(*e*) Return of special findings.– . . . If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law. *If the jury, or if there is no jury, the court, determines that the defendant is mentally retarded, the court shall sentence the defendant to life imprisonment without the possibility of release, or some other lesser sentence authorized by law.*

[72] Proposed 18 U.S.C. 3593(b)(4)("(*b)(4) For purposes of this section, a defendant is mentally retarded if, since some point in time prior to age 18, he or she has continuously had an intelligence quotient of 70 or lower and, as a result of that significant subaverage mental functioning, has since that point in time continuously had a diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, control impulses, and understand others' reactions*").

[73] Hearing at 12 (Griffey statement).

There may be objections, however. The definition of mental retardation might be thought too narrow to embrace all those constitutionally protected.[74] Resolution of mental retardation issues, some would contend, should occur prior to trial as a matter of fairness and judicial economy if nothing else.[75] The proposal may also be

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[74] Hearing at 39-40 ("The procedures proposed. . . fall well short of *Atkins* constitutional minimum , and would thus contravene the Eight Amendment." The language of proposed 18 U.S.C. 3593(b)(4) "is not a definition at all, but rather a listing of many of the characteristics of people with mental retardation that the *Atkins* Court regarded as justifying a categorical bar against the infliction of death upon such defendants. In effect, this provision would require the jury to redetermine anew in each case whether the Supreme Court was correct in *Atkins* when it found that these characteristics of mental retardation justified a categorical exemption. Note that the provision requires the jury to find *all* of the listed characteristics (and that all these characteristics have manifested themselves 'continuously' since some point prior to age 18) in order to exempt a defendant on grounds of mental retardation. Thus, a defendant with an IQ of 70 or below who established, for example, that he had 'diminished capacity to understand and process information, abstract from mistakes and learn from experience, engage in logical reasoning, [and] control impulses,' but who did *not* establish that he also had diminished capacity to 'understand others' reactions' would have failed to establish mental retardation, and could therefore be executed. It can readily be seen that this approach fails to protect the entire class of persons with mental retardation, and enactment would therefore place the federal government in violation of the Eighth Amendment rule of *Atkins*. Indeed, the whole point of the Supreme Court's decision in *Atkins* was that each of the acts of moral culpability was too difficult to determine reliable on a case-by-case basis, and the severity of the disability suffered by all persons with mental retardation (whose intellectual functioning places them, by definition, in the bottom 2-3 percent of the population) justifies a categorical ban")(Bruck statement).

[75] *Id*. at 41 ("The procedures to be employed are also undesirable. Rather than a pretrial judicial determination (as occurs with competency to stand trial, for example, *see* 18 U.S.C. 4241)," the bills "would wastefully require a defendant with mental retardation to go through the entire elaborate structure of a capital trial(with special jury selection procedures, bifurcated jury sentencing, special counsel provisions, and so forth), only to establish at the end of the process that he suffered all along from a life-long disability that rendered moot the entire death-penalty aspect of the proceedings – and that could have been determined at the start. Because mental retardation (unlike mental illness) is an essentially fixed condition that must have existed prior to age 18 and that does not resolve or dissipate over time, it is obviously more efficient and more logical to determine this issue before trial rather than at the end of the proceedings. Almost all state statutes implementing mental retardation bars in death penalty proceedings adopt this approach. . . Delaying the jury's mental retardation verdict until *after* the presentation of aggravation evidence is also unfair, because it ensures that the jury will not address the relatively straightforward issues of whether the defendant meets the clinical definition of mental retardation until it has been overwhelmed with inflammatory information about the defendant's prior record and bad character and with emotionally powerful victim impact evidence. Just as it has long been thought unfair to present sentencing evidence (including evidence of prior offenses and bad character) to a jury before the defendant's *guilt* or innocent has been determined, so too is it unfair to delay a determination of whether the defendant has the immutable disability of mental retardation until all of the evidence that might make the jury wish to impose the death penalty – retardation or no retardation – has been presented")(Bruck statement).

criticized for its failure to mirror the procedure governing the prosecution's right to an independent mental health examination in the case of insanity defense claims.[76]

Aggravating and mitigating factors.

Furman v. Georgia, 408 U.S. 238 (1972), condemn state capital punishment procedures, and by implication federal procedures, for failure to reserve the death penalty to the most egregious capital cases. The procedures have been adjusted to provide juries with aggravating and mitigating factors to guide the exercise of their discretion and ensure that the death penalty is only imposed in the most serious cases.

Unequal codefendant treatment. Several bills suggest adjustments in the designated aggravating and mitigating circumstances described in section 3592. For instance, some proposals amend the mitigating circumstance that now applies when "another defendant or defendants, equally culpable in the crime, will not be punished by death," H.R. 851 (Rep. Gohmert), H.R. 1914 (Rep. Carter).[77] The amendment limits the factor to instances where the prosecution has elected not to seek the death penalty for a codefendant. In doing so it eliminates from coverage of instances where the defendant's codefendant is under 18 years of age, or mentally retarded, or extradited with an agreement not to execute, or where an earlier jury has declined to sentence a codefendant to death for the same offense.

The amendment might be thought to have largely symbolic impact. Section 3592(a)(8) allows a defendant to offer evidence of "any circumstance of the offense that mitigate[s] against imposition of the death penalty." Thus, it seems that any circumstances removed from a specific statutory mitigating factor might be claimed under the catch-all provisions of section 3592(a)(8). Some commentators have suggested, however, the courts might construe removal as a limitation on the catch-all provision as well.[78]

Substantial planning. Another proposal adds an aggravating factor to the espionage and treason category to cover offenses involving substantial planning, H.R.

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[76] *Id*. at 42 ("[T]he proposed 18 U.S.C. 3593(b)(1) and (2) set up a partial new procedure for pre-trial rebuttal mental heath evaluations in capital cases without taking into account the detailed set of procedures that only recently went into effect with the December 2002 amendments to rule 12.2, Fed. R.Crim.P. Rule 12.2 already requires written pre-trial notice of expert mental health mitigation testimony, and authorizes government rebuttal evaluations following such notice. Adding on a statutory provision that is much less detailed than Rule 12.2 is likely to cause confusion, while adding little or nothing to the government's valid entitlement to a fair opportunity to rebut the defendant's mitigation"). (Bruck statement). The text of Rule 12.2 is appended.

[77] Proposed 18 U.S.C. 3592(a)(4).

[78] Hearing at 46 ("To be sure, a strong argument can be made that the hypothetical defendant described here might still cite the disparate punishments in their cases as a non-statutory mitigating factor. In all likelihood, however, some federal courts would construe Congress's enactment of this amendment as intended to preclude reliance on such mitigating factors, while other courts would allow it")(Bruck statement).

1914 (Rep. Carter).[79] Espionage and treason, by their nature, would involve substantial planning in most instances. The proposal would permit imposition of the death penalty even in the absence of any of the other aggravating factors: prior espionage or treason conviction, grave risk to national security, grave risk of death. Treason has been a capital crime almost since the founding of the Republic,[80] but it is not clear that the death penalty may be imposed for any crime that does not involve the taking of a human life.[81] The Constitution may limit the circumstances under which the death penalty may be imposed upon a first time offender, convicted of espionage in a case where there is neither a grave risk to national security nor a grave risk of death.

Murder Plus Felonies. Most federal capital punishment statutes do not proscribe murder as such. They outlaw murder under particular circumstances, circumstances that themselves might be considered aggravating, such as the murder of a Member of Congress or a murder committed in conjunction with the rape of the victim. Section 3592(c)(1) recognizes as an aggravating factor that murder was during the course of one of a list of designated federal crimes.

Several bills place other offenses on the list. H.R. 851 (Rep. Gohmert) would add receipt of military training from a foreign terrorist organization (18 U.S.C. 2332D) to section 3592(c)(1).[82] H.R. 851 and other bills would insert additional offenses including:

- 18 U.S.C. 241 (conspiracy against civil rights),
- 18 U.S.C. 245 (federal protected rights),
- 18 U.S.C. 247 (interference with religious exercise),
- 18 U.S.C. 37 (violence at international airports),
- 18 U.S.C. 1512 (witness tampering), and

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[79] Proposed 18 U.S.C. 3592(b)(4)("In determining whether a sentence of death is justified for an offense described in section 3591(a)(1)[espionage and treason], the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: . . (4) Substantial planning – The defendant committed the offense after substantial planning").

[80] 1 Stat. 112 (1796).

[81] *See*, *Coker v. Georgia*, 433 U.S. 584, 598 (1977)("We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life")(holding that the death penalty may not be imposed for the rape of an adult woman even when committed by a defendant previously sentenced to three consecutive life terms for an earlier murder and two earlier rapes).

[82] Proposed 18 U.S.C. 3592(c)(1)("In determining whether a sentence of death is justified for an offense described in section 3591(a)(2)[homicide], the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: (1) Death during commission of another crime.– The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section . . .2339D (terrorist offenses resulting in death) . . . ").

- 18 U.S.C. 1513 (retaliating against a witness), H.R. 851 (Rep. Gohmert), H.R. 3156 (Rep. Lamar Smith), S. 1860 (S. Cronyn).[83]

The rationale for expansion appears to be that (1) capital punishment should be reserved for the "worst of the worst;" (2) murders committed in the course of the most serious federal crimes fit that description; and (3) one or more such most serious federal crimes are not now listed in section 3592(c)(1).[84] The rationale of opponents seems to be two-fold. First, as with mitigating circumstances, specific designation is less significant when the catch-all provision would allow presentation to the jury in any event. In the case of aggravating circumstances, however, expressly adding new crimes to the "murder plus" factor status is significant because the existence of a specifically designated aggravating factor is a sine qua non for imposition of the penalty; the mere presence of a catch-all aggravating factor is insufficient. Second, the list of death-qualifying, specifically designated aggravating factors is now so close to all-encompassing that some special justification may be in order before the list is expanded.[85]

Obstruction of justice. The creation of a new obstruction of justice aggravating factor is a common proposal, H.R. 851 (Rep. Gohmert); H.R. 1914 (Rep. Carter), H.R. 3156 (Rep. Lamar Smith), S. 1860 (Sen. Cornyn).[86] The proposal rests

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[83] Proposed 18 U.S.C. 3592(c)(1). H.R. 1914 (Rep. Carter) inserts section 2339E offenses into section 3592(c)(1). There is no section under 2339E in existing law and H.R. 1914 does not create one. S. 1860 (Sen. Cornyn) and H.R. 3156 (Rep. Lamar Smith) do create a section 2339E (terrorist offenses resulting in death), but neither bill adds the new section to section 3592(c)(1).

[84] Hearing at 16-7 ("The death penalty is and should be reserved for appropriate circumstances and the 'worst of the worst' offenders. Examples of appropriate circumstances include those in which individuals put multiple lives at risk or threaten the integrity of our judicial system. Currently, however, these circumstances are not always death-penalty-eligible")(prepared statement of Margaret P. Griffey, Chief, Capital Case Unit, United States Department of Justice)(Griffey statement).

[85] Hearing at 33-34 ("The jury can already consider all relevant sentencing factors as non-statutory aggravation. . . Rather, the point of creating a new statutory aggravating factor is to authorize the jury to impose the death penalty *on that basis alone*, when no other statutory aggravating factor is present. Since the FDPA's existing list of statutory aggravating factors already includes some 35 separate bases for death eligibility, some of them extremely broad (such as that the murder was committed after 'substantial planning and premeditation'), the only practical effect of adding still more factors is to make the death penalty available in that small category of cases where the murder was not otherwise aggravated. . . . Once the effect of such new death-eligibility factors is properly understood, one might expect some actual showing of a need to further expand the list of death-eligible federal murders before adding more death-eligibility factors to this already long list")(emphasis in the original)(Bruck statement).

[86] Proposed 18 U.S.C. 3592(c)(17)("In determining whether a sentence of death is justified for an offense described in section 3591(a)(2)[homicide], the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: . . . (17) Obstruction of Justice – The defendant engaged in any conduct resulting in the death of another person in order to obstruct the

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on the premise that killing witnesses and other participants in the judicial process "strikes at the heart of the system of justice itself."[87] Critics suggest that its breadth threatens to push the federal system to a point where it has made all murders capital, where the exceptions to the "narrowing" use of aggravating factors have eliminated any narrowing impact.[88]

Previous firearm conviction. Section 3592(c)(2) now recognizes as a statutory aggravating factor the fact that:

> *For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c),* the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person. [Emphasis added.]

Section 924(c) provides additional penalties when a defendant uses or possesses a firearm during and in relation to the commission of a federal crime of violence or drug trafficking. Violation is a capital offense when in the course of the crime the firearm is used to commit a murder.[89] The italicized portion of section 3593(c)(2) is open to interpretation,[90] and several proposals strike the language. H.R. 851 (Rep.

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[86] (...continued)
investigation or prosecution of any offense").

[87] Hearing at 22 (prepared statement of Robert Steinbuch, Professor of Law, University of Arkansas); 19 ("The Department further supports the addition of new statutory aggravator related to obstruction of justice. Protecting the integrity of te justice system is a paramount goal for the Department")(Griffiey statement).

[88] Hearing at 36-7 ("Moreover, even if language were added to make clear that the proposed 'obstruction of justice' factor requires some nexus to the capital homicide offense at issue, the new factor would still be susceptible of very broad application, because it could be construed to apply to any murder committed to avoid arrest. If so construed, such a relatively uncontroversial-seeming expansion of the federal death penalty could eliminate almost every remaining murder under federal jurisdiction that is not currently subject to the death penalty. That is, this provision could remove the last bit of legislative 'narrowing' from the FDPA, leaving the decision to inflict or withhold death to the unfettered discretion of the jury in every case. Eventually the Supreme Court may take up the question of whether a given capital punishment statute has become so all-inclusive that it fails the basic requirement of *Furman* and *Gregg* that the sentencer's discretion be legislatively narrowed and guided")(Bruck statement).

[89] 18 U.S.C. 924(j).

[90] Hearing at 18 ("As currently worded, the factor is susceptible to two interpretations, which could undermine the clear and consistent application of the factor. Under one interpretation, a prior conviction for an offense involving a firearm could constitute an aggravating factor for all capital offenses except those involving firearms, an illogical interpretation considering that a defendant's prior firearm conviction may be relevant when the same defendant's later use of a firearm has resulted in death. The other interpretation would only prohibit basing the aggravating factor on the immediately-prior section 924(j) conviction for which the defendant faces the death penalty"). This second interpretation seems to be the more faithful reading of the statute. Nevertheless. a third interpretation
(continued...)

Gohmert), H.R. 3156 (Rep. Lamar Smith), S. 1860 (Sen. Cornyn). One of the bills, H.R. 851 (Rep. Gohmert), amends section 3592(c)(2) further to make it clear that the new provision does not cover the conviction that has resulted in the capital sentencing hearing at issue, but only prior adjudications resulting in firearms conviction.[91]

One critic has argued that in view of the breadth of section 924(c) the amendment would make an aggravating factor out of the possession of a firearm during any federal crime of violence or drug trafficking that ended in murder.[92]

Pecuniary gain. Section 3592(c)(8) is what might be taken for a murder-for-hire aggravating factor: "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value." A casual reading might suggest that the factor covers murder for hire when the murder is paid either before or after the murder. Instead, the courts have concluded that the phrase "as consideration for" covers the for-hire murders, and the phrase "in expectation of the receipt" covers murders from which there is a more general anticipated gain.[93]

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[90] (...continued)
possible: An earlier firearms conviction under any law other than section 924(c) may be considered as an aggravating factor, but a section 924(c) conviction may not be used as an aggravating factor regardless whether the conviction is the occasion of the current sentencing proceeding or occurred sometime previously.

[91] Proposed 18 U.S.C. 3592(c)(2)("~~For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c)~~, The defendant has ~~previously~~ *in a prior adjudication* been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person").

[92] Hearing at 35-6 ("The reason Congress enacted the 924(c) exclusion in the firearms aggravator, 18 U.S.C. 3592(c)(2), was to avoid making every firearm killing automatically death-eligible. This would otherwise have occurred because the firearms violation that serves as the predicate for the 924(j) conviction would do double-duty as a 'prior conviction' of a 'prior' qualifying firearms offense. By removing this exemption now, Congress would seemingly be making every federal firearms killing death-eligible, whether or not it would be otherwise warranted. In other words, there would be no requirement that the defendant have any genuinely prior record, and without requiring evidence of any other aggravating factor (such as substantial planning and premeditation, risk to additional persons, multiple victims, cruelty or torture, etc. . .The enactment of 18 U.S.C. 924(j) in 1994 represented a potentially enormous expansion in federal jurisdiction over homicide offenses, which from the founding of the nation have been primarily a matter for state law enforcement. The §924(c) exclusion at least represented an effort to keep this huge change under some sort of commonsense check by ensuring that every 924(j) offense would not automatically become punishable by death in the unfettered discretion of the jury. Removing this restraint is unwise, unnecessary (because any truly aggravated 924(j) killing is already death-eligible under existing law), and open to constitutional challenge as impermissibly all-inclusive under the two seminal Supreme Court cases governing capital punishment law, *Furman v. Georgia* and *Gregg v. Georgia*")(Bruck statement).

[93] *Cf., United States v. Walker*, 901 F.Supp. 837, 848-49 (N.D.N.Y. 1995)(interpreting comparable language then found in the drug capital punishment provisions of 21 U.S.C. (continued...)

Yet the factor only applies when the murder was motivated by monetary gain. It is not enough that the gain was incidental to or a consequence of the murder.[94]

The Justice Department has suggested that as now worded the factor is susceptible to uneven application since it does not include instances where the murder is committed to preserve a defendant's ill-gotten treasure.[95] There are proposed amendments that address the issue by altering the section to read: The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, *or in order to retain illegal possession* of anything of pecuniary value, H.R. 851 (Rep. Gohmert), H.R. 3156 (Rep. Lamar Smith), S. 1860 (Sen. Cornyn).

The amendment would like bring most murders committed incidental to a robbery within the factor's purview. The objections voiced over other aggravating factor amendments may be heard again: "Run of the mill" murders are being made capital. The death penalty is no longer reserved for the worst of the worst murderers. This is the situation the Court found unacceptable in *Furman*. Or so the argument may run.

Murder of a law enforcement officer. H.R. 3153 (Rep. Gerlach) would make an aggravating factor of the fact that the murder victim was a law enforcement

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[93] (...continued)
848)(Section "848(n)(7) [has] two separate prongs: the first 'as consideration for' language contemplates only murder-for-hire, but the 'in expectation of' language identifies a separate ground").

[94] *United States v. Barnette*, 390 F.3d 775, 805-807 (4th Cir. 2004), *vac'd and remanded on other grounds*, 546 U.S. 803 (2005)("Both the Fifth Circuit and Tenth Circuit have limited the application of the pecuniary gain aggravating factor 'to situations where the murder itself was committed as consideration for, or in the expectation of, anything of pecuniary value.' *United States v. Bernard*, 299 F.3d 467, 483 (5th Cir. 2002)(quoting *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir. 2000)) . . . The defendants in *Bernard* carjacked a vehicle and robbed the owners. . . drove the vehicle for several hours with the couple in the truck, and [then] murdered the couple. . . .[T]he Fifth Circuit concluded that the motivation for the murders was not pecuniary gain but was instead to prevent the couple from reporting the crime to the police. . . Chanthadara argued that §3592(c)(8) was inapplicable because all of the valuable property in the restaurant had been [stolen] by the defendant and his accomplices prior to the killing. The Tenth Circuit agreed. . .Unlike *Bernard*, the evidence in the instant case was sufficient for the jury to conclude that Barnette killed Allen in the expectation of the receipt of something of pecuniary value, namely Allen's vehicle"); *United States v. Roman*, 371 F.Supp.2d 36, 46 (D.P.R. 2005)("Under these facts, a finding of pecuniary gain would not involve an extension of existing law. A jury could properly infer that the murder was committed for the express reason to effect the robbery, rather than being incident to, or as an afterthought to the robbery").

[95] Hearing at 18-9 ("As now interpreted by the courts, the pecuniary-gain aggravating factor applies when the murder, as viewed by the defendant, is necessary to initially secure the security gain, but does not apply when committed to maintain possession of a stolen gain. Thus, for example, courts have held the factor to be applicable when a carjacking victim is killed at a dark intersection before the vehicle is taken but not applicable if the carjacking occurs in a public setting and the victim is taken a few miles away before he is killed") (Griffey statement).

officer.[96] Murder of a federal law enforcement officer during or on account of the performance of his or her duties is already an aggravating factor.[97] The amendment would expand the factor to include state law enforcement officers, federal law enforcement officer murdered other than during or on account of the performance of their official duties, and attempts to kill either state or federal law enforcement officers.

Sympathy, Prejudice and Other Arbitrary Factors. In *California v. Brown*, the Supreme Court upheld a state court instruction which informed a capital jury that "they must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."[98] H.R. 851 (Rep. Gohmert) introduces a similar directive into the federal process in capital cases.[99] H.R. 3156 (Rep. Lamar Smith) and S. 1860 (Sen. Cornyn) would use the same language but drop references to "sentiment" and "sympathy,"[100] perhaps in response to criticism of an earlier version of the proposal.[101]

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[96] Proposed 18 U.S.C. 3592(c)(17)("In determining whether a sentence of death is justified for an offense described in section 3591(a)(2)[homicide], the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist: . . . (17) Killing of law enforcement officer – The defendant killed or attempted to kill a person who is authorized by law to engage in or supervise the prevention, detention, investigation, or prosecution of any criminal violation of law; or to arrest or prosecute an individual for any such violation").

[97] 18 U.S.C. 3592(c)(14)(D)("The defendant committed the offense against . ..(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution – (i) while he or she is engaged in the performance of his or her official duties; (ii) because of the performance of his or her official duties; or (iii) because of his or her status as a public servant. For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions").

[98] 479 U.S. 538, 539-43 (1987).

[99] Proposed 18 U.S.C. 3593(f)("(*f*) . . . *In assessing the appropriateness of a sentence of death, the jury, or if there is no jury, the court must base the decision on the facts of the offense and the aggravating and mitigating factors and avoid any influence of sympathy sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. . .* ").

[100] Proposed 18 U.S.C. 3593(e)(". . . . *In assessing the appropriateness of a sentence of death, the jury, or if there is no jury, the court must base the decision on the facts of the offense and the aggravating and mitigating factors and avoid any influence of passion, prejudice, or other arbitrary factor when imposing sentence. . . .*").

[101] Hearing at 43 ("The evident purpose of this provision would be to allow the government to seek a jury instruction using this verbiage. However, instructing a capital sentencing jury to avoid 'any influence' of sympathy when choosing between life and death runs a grave risk of violating the constitutional requirement of *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that the sentencer consider all relevant mitigating evidence before imposing death as [a] punishment. I realize that in *California v. Brown*, 479 U.S. 538 (1987), the Supreme Court narrowly upheld a rather different instruction not to be swayed by 'mere sentiment, conjecture, sympathy, or sympathy. . .'

(continued...)

Elimination of the term-of-years option. Many federal capital punishment statutes offer but two sentencing alternatives, death or life imprisonment.[102] Several others, however, offer a third option: imprisonment for any term of years.[103] In recognition of this fact, existing law states that if no aggravating factors are found to exist "the court shall impose a sentence other than death authorized by law."[104] And if the trier of fact finds that the death penalty should not be imposed in spite of the presence of one or more aggravating factors, existing law calls for "life imprisonment without possibility of release or *some other lesser sentence*."[105] Several proposals, H.R. 3156 (Rep. Lamar Smith), S. 1860 (Sen. Cornyn), and H.R. 851 (Rep. Gohmert) among them, would eliminate the possibility of a sentence for a term of years, if one of the aggravating factors is found.[106]

Capital Juries.

A number of proposals in the 110th Congress address problems associated with selecting and maintaining a panel of qualified jurors in capital cases. Existing law states the jury at the sentencing phase of a capital case "shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court, that it shall consist of a lesser number."[107] H.R.851 (Rep. Gohmert) and H.R. 1914 (Rep. Carter) would amend the provision to permit the court to approve a lesser number for good cause, without requiring the approval of the defendant or the prosecutor.[108] Imposition of the death penalty upon the recommendation of a jury of less than twelve members over the objection of the

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[101] (...continued)
However, the language proposed here is much more sweeping. It is simply impossible to reconcile a prohibition of 'any influence of sympathy' with the constitutional directive to consider the kinds of mitigating evidence – including horrific childhood abuse, or severe mental and physical disabilities – which tend to elicit sympathy by their very nature. There is no reason to push the constitutional envelope in order to help the government persuade jurors to stifle their own sympathetic responses to those 'compassionate or mitigating factors stemming from the diverse frailties of humankind' which must be considered 'as a constitutionally indispensable part of the process of inflicting the penalty of death.' *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)(opinion of Stewart, Powell, and Stevens, JJ.). This amendment is unnecessary, unwise, and unconstitutional")(Bruck statement).

[102] *E.g.*, 18 U.S.C. 1111(b)(murder in the special maritime and territorial jurisdiction of the United States).

[103] *E.g.*, 18 U.S.C. 844(h)(use of fire or explosives in the commission of a federal offense); 924(j)(use of a firearm during and in relation to a crime of violence or drug trafficking crime).

[104] 18 U.S.C. 3592(d).

[105] 18 U.S.C. 3592(e).

[106] Proposed 18 U.S.C. 3592(f), 3594.

[107] 18 U.S.C. 3593(b).

[108] Proposed 18 U.S.C. 3593(c).

defendant is likely to draw criticism.[109] Perhaps to ensure that recourse to juries of less than twelve will only be necessary in extreme cases, the two bills increase the number of permissible alternate jurors from six to nine and afford each side four addition peremptory challenges in the cases where more than six alternates are impaneled.[110] H.R. 851 (Gohmert) also amends section 3592 to discourage the dismissal of alternate jurors in capital cases until sentencing has been completed.[111] Other proposals, notably H.R. 3156 (Rep. Lamar Smith) and S. 1860 (Sen. Cornyn), leave the number of jurors and alternates as is and merely direct the court to retain alternates until sentencing has been completed.[112]

Existing law permits a capital jury to unanimously recommend a sentence of death or life imprisonment without the possibility of release;[113] if they do not, the court is to sentence the defendant to any lesser sentence authorized by law, *i.e.*, imprisonment for life or for a term of years.[114] H.R. 1914 (Rep. Carter) provides that

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[109] Hearing at 47 ("Fed.R.Crim.P. 23(b) currently authorizes an 11-member jury to return a verdict where one juror is dismissed for good cause, even without the defendant's consent or stipulation. This provision presumably already applies to capital as well as non-capital cases." The proposed amendment "would apply this to re-sentencing juries in capital cases, but in so doing would remove the 11-juror minimum , thus allowing for even smaller juries – of virtually any size – so long as the judge finds good cause for dismissing two or more jurors. Even more significantly, this provision clearly authorizes judges to empanel re-sentencing juries of less than 12 members – with no apparent minimum number – so long as undefined 'good cause' is found to exist. I am not aware of any justification for so radical a potential departure from the centuries-old practice of requiring 12-member juries in capital cases, and do not think that Congress should enact it without a very powerful justification being shown")(Bruck statement).

[110] Proposed F.R.Crim.P. 24(c)(1), (4).

[111] Proposed 18 U.S.C. 3593(c)("(*c*) ... *The court shall not dismiss alternate jurors impaneled during the guilt phase unless for good cause as to individual alternates or upon a finding, under this subsection, that the sentencing hearing will be heard by the court alone. The court shall retain such alternate jurors to hear the sentencing trial until the completion of the hearing. If at any time, whether before or after the final submission of the sentencing case to the jury, a sitting juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty in a timely manner, or if a juror requests a discharge and good cause appears therefor, the court shall order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors. If deliberations have begun when the substitution is made, the court shall instruct the newly constituted jury to recommence deliberations as if none had previously taken place. The panel, in all other respects, shall be considered unaltered by the substitution of a duly seated alternate*").

[112] Proposed 18 U.S.C. 3593(b)("The court shall retain alternate jurors until the completion of the sentencing hearing, unless the sentencing is before the court alone under paragraph (3). The replacement of jurors with alternate jurors during the sentencing hearing will be conducted in accordance with Rule 24 of the Rules of Criminal Procedure").

[113] 18 U.S.C. 3593(e).

[114] 18 U.S.C. 3594.

if the jury cannot agree on a capital recommendation, a new sentencing hearing must be impaneled and new sentencing hearing conducted.[115]

Site of Execution.

Existing law provides that the states are to execute federal death sentences.[116] H.R. 851 (Rep. Gohmert), H.R. 3156 (Rep. Lamar Smith), and S. 1860 (Sen. Cornyn) would authorize execution in federal facilities as well, pursuant to regulations promulgated by the Attorney General.[117] The change reflects the availability of federal facilities.[118] They also add a confidentiality clause under which the identity of executors and witnesses at the execution may not be publicly disclosed without their consent.[119]

New Federal Capital Offenses

S. 607 (Sen. Vitter) would outlaw interference with federal disaster relief efforts; when death results from a violation of the proscription, the defendant may be sentenced to death or life imprisonment.[120]

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[115] Proposed 18 U.S.C. 3593(b)((2)(E).

[116] 18 U.S.C. 3597, 3596.

[117] Proposed 18 U.S.C. 3597, 3596.

[118] Hearing at 16 ("Prior to the establishment of the federal death row in Terre Haute, and the building of an execution facility there, it was necessary for federal death-sentenced inmates to be housed in state facilities and, it was anticipated executed under state procedures. Existing statutes reflect this practice and expectation. As it turns out, the federal facility was in place prior to the first federal execution. There is therefore no reason to continue to provide courts with the option of designating a state facility or method of execution ass applicable in a particular case, particularly as this state of affairs can create uncertainty")(Griffey statement)

[119] Proposed 18 U.S.C. 3597(c).

[120] "(a) Whoever, during a presidentially-declared major disaster or emergency – (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services while such officer or employee is engaged in or on account of the performance of official duties relating to, or in support of recovery from, the presidentially-declared disaster or emergency, or any person assisting such an officer or employee in the performance of such duties, or on account of that assistance; or (2) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person providing services in support of disaster relief efforts and working in coordination with a federal coordinating officer appointed pursuant to section 302, Public Law 98-288 (42 U.S.C. 5143, shall except in subsection(b) of this section, be fined under this title or imprisoned not more than 2 years, or both.

"(b) Whoever, in the commission of and in relation to any act described in subsection(a) of this section, carries, possesses or uses a deadly or dangerous weapon or inflicts serious bodily injury, shall be fined under this title or imprisoned not more than 15 years or both, or, if the death of any person results, shall be punished by death or life imprisonment," proposed 18 U.S.C. 1370 (H.R. 3150; the wording of H.R. 880 is

(continued...)

The bills drafted to counter gang violence – *e.g.*, H.R. 3150 (Rep. Keller), H.R. 880 (Rep. Forbes) – frequently include two new federal death penalty offenses. One proscribes the use of interstate facilities with the intent to commit multiple murders and is a capital offense where death results.[121] The second, modeled after the provision that condemned the use of a firearm during or in relation to a crime of violence or a drug offense, outlaws crimes of violence committed during or in relation to a drug trafficking offense and would have made the offense punishable by death if a death results.[122] The murder committed during and in relation to a drug trafficking offense appears as a capital offense in other bills as well (H.R. 1118 (Rep. Keller); H.R. 3156 (Rep. Lamar Smith); S. 1860 (Sen. Cornyn)); as does the new capital multiple murder proposal (H.R. 3156 (Rep. Lamar Smith); S. 1860 (Sen. Cornyn)). In addition, H.R. 3150 condemns murder along with other violent crimes in furtherance or in aid of a criminal street gang, an offense it makes punishable by death.[123]

Existing law proscribes overseas murder and assault committed against Americans by terrorists, 18 U.S.C. 2332. H.R. 2376 (Rep. Franks), H.R. 3147 (Rep. Wilson), H.R. 3156 (Rep. Lamar Smith), S. 1320 (Sen. Kyl), and S. 1860 (Sen. Cornyn) would proscribe overseas kidnaping of Americans by terrorists and propose the death penalty as a sentencing option when a death results.

Several of the immigration bills – *e.g.*, H.R. 1645 (Rep. Gutierrez), S. 330 (Sen. Isakson), S. 1348 (Sen. Reid) – would proscribe evasion of border inspection and make the offenses punishable by death, imprisonment for any term of years, or for life if death results from a violation, proposed 18 U.S.C. 556.

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[120] (...continued)
comparable).

[121] "Any person who travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that 2 or more murders be committed in violation of the laws of any state or the United States, or who conspires to do so . . . (3) if death results, may be fined not more than $250,000 under this title, and shall be punished by death or imprisonment for any term of years or for life." proposed 18 U.S.C. 1123.

[122] "(a) Any person who, during or in relation to any drug trafficking crime, murders . . . any individual. . . shall be punished, in addition and consecutive to the punishment provided for the drug trafficking crime – (1) in the case of murder, by death or imprisonment for any term of years or for life, a fine under title 18, United States Code, or both. . . . (d) As used in this section. . . (2) the term 'drug trafficking crime' has the meaning given that term in section 924(c)(2) of title 18, United States Code [*i.e.*, any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) or the Maritime Drug Law Enforcement Act (46 U.S.C. 70501 et seq.)]," proposed 21 U.S.C. 865. (H.R. 3150; the wording of H.R. 880 is comparable).

[123] "Any person who, in furtherance or in aid of a criminal street gang, murders. . . any individual . . . shall be punished, in addition and consecutive to the punishment provided for any other violation of this chapter – (1) for murder, by death or imprisonment for any term of years or for life, a fine under this title, or both," proposed 18 U.S.C. 523.

Rather than amend existing non-capital federal terrorist offenses to make them capital offenses when they result in a death, H.R. 855 (Rep. Lungren), H.R. 3156 (Rep. Lamar Smith), and S. 1860 (Sen. Cornyn) would create a new separate federal offense which outlaws the commission of, or attempt or conspiracy to commit various federal terrorist offenses when a death results, proposed 18 U.S.C. 2339E. Violations are punishable by death or imprisonment for any term of years or for life.[124] Its impact is less dramatic than might appear at first glance since many of its predicate offenses are already capital crimes or are elevated to capital offenses elsewhere in the bills. Nevertheless, as a consequence of section 2339E the following would become capital offenses when a death occurs during the course of their commission:

- 18 U.S.C. 81 (arson within special maritime and territorial jurisdiction),
- 18 U.S.C. 175 or 175b (biological weapons),
- 18 U.S.C. 351 (congressional, cabinet, and Supreme Court murder or kidnaping),
- 18 U.S.C. 831 (nuclear materials),
- 18 U.S.C. 842(m) or (n) (plastic explosives),
- 18 U.S.C. 956(a)(1) (conspiracy to murder, kidnap, or maim persons abroad),
- 18 U.S.C. 1030(a)(1), 1030(a)(5)(A)(i)(protection of computers),
- 18 U.S.C. 1361 (destruction of government property or contracts),
- 18 U.S.C. 1362 (destruction of communication lines, stations, or systems),
- 18 U.S.C. 1366(a) (destruction of an energy facility),
- 18 U.S.C. 2155 (destruction of national defense materials, premises, or utilities),
- 18 U.S.C. 2156 (national defense material, premises, or utilities),
- 18 U.S.C. 2332d (financial transactions with terrorist supporting countries),
- 18 U.S.C. 2339 (harboring terrorists),
- 18 U.S.C. 2339A (providing material support to terrorists),[125]
- 18 U.S.C. 2339B (providing material support to terrorist organizations),
- 18 U.S.C. 2339C (financing of terrorism),
- 18 U.S.C. 2339D (military-type training from a foreign terrorist organization),
- 18 U.S.C. 2340A (torture),
- 21 U.S.C. 960a (narco-terrorism),
- 42 U.S.C. 2122 (prohibitions governing atomic weapons),
- 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel),
- 49 U.S.C. 46504 (second sentence)(assault on a flight crew with a dangerous weapon),
- 49 U.S.C. 46505(b)(3) or (c) (explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft),
- 49 U.S.C. 60123(b) (destruction of interstate gas or hazardous liquid pipeline facility).

On the other hand, some of predicate offenses do not outlaw attempts to violate their proscriptions. In these cases section 2339E establishes not only a new federal capital offense but a new federal crime when death results from the attempt:

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[124] Proposed 18 U.S.C. 2339E(a).

[125] In a later section of H.R. 855, the bill amends 18 U.S.C. 2339A to make it punishable by imprisonment for not less than 30 years or for life, if death results from the commission of the offense. A court might conclude that amended section 2339A was intended to create an exception to the application of section 2339E; *i.e.*, section 2339E applies to all federal crimes of terrorism other than 2339A.

- 18 U.S.C. 1203 (hostage taking),
- 18 U.S.C. 2339 (harboring terrorists),
- 18 U.S.C. 2339D (receipt of foreign terrorist military training).

Capital Punishment for Existing Non-Capital Offenses

H.R. 855 (Rep. Lungren), H.R. 3156 (Rep. Lamar Smith), H.R. 3147 (Rep. Wilson), and S. 1860 (Sen. Cornyn) would establish the death penalty as a sentencing option when death results as a consequence of a violation of: 18 U.S.C. 832 (participation in foreign programs involving weapons of mass destruction); 18 U.S.C. 2332g (anti-aircraft missile offenses); 42 U.S.C. 2272 (atomic weapons offenses); 18 U.S.C. 2332h (radiological dispersal device offenses); and 18 U.S.C. 175c (variola virus (small pox) offenses).

The gang bills rewrite the federal criminal gang statute (18 U.S.C. 521) to permit imposition of capital punishment for a death-resulting violation of the newly crafted provisions whose predicate offenses include various crimes of violence, money laundering, drug offenses, credit card fraud, Travel Act violations, and interstate transportation of stolen property, H.R. 880 (Rep. Forbes), H.R. 3150 (Rep. Keller). H.R. 3156 (Rep. Lamar Smith) and S. 1860 (Sen. Cornyn) have the same proposal.

The Travel Act, 18 U.S.C. 1952, among other things, outlaws interstate travel to commit a crime of violence in furtherance of various drug, gambling, or extortion offenses. H.R. 3156 (Rep. Lamar Smith) and S. 1850 (Sen. Cornyn) permit imposition of the death penalty when a violation results in death.[126]

Abolition of Capital Punishment

S. 447 (Sen. Feingold) eliminates the death penalty as a sentencing option for federal and military capital offenses. It prohibits imposition of the death penalty and provides that prisoners under sentence of death at the time of enactment shall be sentenced to life imprisonment without the possibility of release. It repeals the procedures for implementation of the death penalty, 18 U.S.C. ch. 228. It strikes as well 18 U.S.C. 3235 which dictates that the trial of a capital offense be conducted in the county in which it occurred. It amends the statute of limitations of 18 U.S.C. 3281 to list specific previous capital offenses which may be tried at any time. It makes comparable adjustments in the Code of Military Justice.

Statute of Limitations.

The general statute of limitations for federal crimes is 5 years, 18 U.S.C. 3282. Federal crimes punishable by death may be prosecuted at any time, 18 U.S.C. 3281. Federal crimes of terrorism as defined in 18 U.S.C. 2332b(g)(5)(B) that result in death or involve a risk of death may also be prosecuted at any time, 18 U.S.C. 3286(b). Moreover, federal sexual offenses and crimes against children proscribed by 18 U.S.C. 1201 or 18 U.S.C. chs. 109A (sexual abuse), 110 (sexual exploitation

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[126] Proposed 18 U.S.C. 1952(d)(2).

of children), or 117(travel of illicit sexual purposes) may likewise be brought any time, 18 U.S.C. 3299.

S. 447 would replaces the language of section 3281 for crimes carrying the death penalty with a list of federal crimes (now punishable by death) which may be prosecuted at any time notwithstanding the bill's elimination of the death penalty.[127] The list is not exhaustive. Some of the omissions are covered by exceptions for crimes against children, sex offenses, or the federal crimes of terrorism. Some are not. The crimes which now can be prosecuted at any time but which S. 447 appears to make subject to the general 5-year statute of limitations are violations of:

7 U.S.C. 2146 (killing federal animal transportation inspectors)
15 U.S.C. 1825(a)(2)(C) (killing those enforcing the Horse Protection Act)
18 U.S.C. 115(a)(1)(A) (murder of a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)
18 U.S.C. 115(a)(1)(B) (murder of a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)
18 U.S.C. 229 (death resulting from chemical weapons)
18 U.S.C.1119 (murder of a U.S. national by another outside the U.S.)
18 U.S.C.1120 (murder by a person who has previously escaped from a federal prison)
18 U.S.C.1201 (kidnaping where death of an adult results)
18 U.S.C.1503 (murder to obstruct federal judicial proceedings)
18 U.S.C. 1513 (retaliatory murder of a federal witness or informant)
18 U.S.C. 3261(murder committed by members of the United States armed forces or accompanying or employed by the United States armed forces overseas)
21 U.S.C.461(c) (murder of federal poultry inspectors during or because of official duties)
21 U.S.C.675 (murder of federal meat inspectors during or because of official duties)
21 U.S.C. 848(c), 18 U.S.C. 3592b)(major drug kingpins and attempted murder by drug kingpins to obstruct justice)
21 U.S.C.1041(c) (murder of an egg inspector during or because of official duties)
42 U.S.C.2283 (murder of federal nuclear inspectors during or because of official duties).

Appendix

Federal Rules of Criminal Procedure: Rule 12.2.

(a) Notice of an Insanity Defense. A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of

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[127] Proposed 18 U.S.C. 3281.

punishment in a capital case, the defendant must--within the time provided for filing a pretrial motion or at any later time the court sets--notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) Disclosing Results and Reports of Capital Sentencing Examination. The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(3) Disclosing Results and Reports of the Defendant's Expert Examination. After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(4) Inadmissibility of a Defendant's Statements. No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(d) Failure to Comply.

(1) *Failure to Give Notice or to Submit to Examination.* The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) *Failure to Disclose.* The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Federal Crimes Punishable by Death.

7 U.S.C. 2146 (murder of a federal animal transportation inspector)
8 U.S.C. 1324 (death resulting from smuggling aliens into the U.S.)
15 U.S.C. 1825(a)(2)(C) (killing those enforcing the Horse Protection Act)
18 U.S.C. 32 (death resulting from destruction of aircraft or their facilities)

18 U.S.C. 33 (death resulting from destruction of motor vehicles or their facilities used in United States foreign commerce)
18 U.S.C. 36 (murder by drive-by shooting)
18 U.S.C. 37 (death resulting from violence at international airports)
18 U.S.C. 115(a)(1)(A) (murder of a family member of a United States officer, employee or judge with intent to impede or retaliate for performance of federal duties)
18 U.S.C. 115(a)(1)(B) (murder of a former United States officer, employee or judge or any member of their families in retaliation for performance of federal duties)
18 U.S.C. 229 (death resulting from chemical weapons offenses)
18 U.S.C. 241 (death resulting from conspiracy against civil rights)
18 U.S.C. 242 (death resulting from deprivation of civil rights under color of law)
18 U.S.C. 245 (death resulting from deprivation of federally protected activities)
18 U.S.C. 247 (death resulting from obstruction of religious beliefs)
18 U.S.C. 351 (killing a Member of Congress, cabinet officer, or Supreme Court justice)
18 U.S.C. 794 (espionage)
18 U.S.C.844(d) (death resulting from the unlawful transportation of explosives in United States foreign commerce)
18 U.S.C. 844(f) (death resulting from bombing federal property)
18 U.S.C. 844(i) (death resulting from bombing property used in or used in an activity which affects United States foreign commerce)
18 U.S.C. 924(c) (death resulting from carrying or using a firearm during and in relation to a crime of violence or a drug trafficking offense)
18 U.S.C.930(c) (use of a firearm or dangerous weapon a firearm or other dangerous weapon in a federal facility)
18 U.S.C.1091 (genocide when the offender is a United States national)
18 U.S.C.1111 (murder within the special maritime jurisdiction of the United States)
18 U.S.C.1114 (murder of a federal employee, including a member of the United States military, or anyone assisting a federal employee or member of the United States military during the performance of (or on account of) the performance of official duties)
18 U.S.C.1116 (murder of an internationally protected person)
18 U.S.C.1119 (murder of a U.S. national by another outside the U.S.)
18 U.S.C.1120 (murder by a person who has previously escaped from a federal prison)
18 U.S.C.1121(a) (murder of another who is assisting or because of the other's assistance in a federal criminal investigation or killing (because of official status) a state law enforcement officer assisting in a federal criminal investigation)
18 U.S.C.1201 (kidnaping where death results)
18 U.S.C.1203 (hostage taking where death results)
18 U.S.C.1503 (murder to obstruct federal judicial proceedings)
18 U.S.C.1512 (tampering with a federal witness or informant where death results)
18 U.S.C. 1513 (retaliatory murder of a federal witness or informant)
18 U.S.C. 1716 (death resulting from mailing injurious items)
18 U.S.C. 1751 (murder of the President, Vice President, or a senior White House official)
18 U.S.C. 1958 (murder for hire in violation of U.S. law)
18 U.S.C. 1959 (murder in aid of racketeering)
18 U.S.C. 1992 (attacks on railroad and mass transit systems engaged in interstate or foreign commerce resulting in death)
18 U.S.C. 2113 (murder committed during the course of a bank robbery)
18 U.S.C. 2119 (death resulting from carjacking)
18 U.S.C.2241, 2245 (aggravated sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C.2242, 2245 (sexual abuse within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C.2243, 2245 (sexual abuse of a minor or ward within the special maritime and territorial jurisdiction of the United States where death results)

18 U.S.C.2244,2245 (abusive sexual contact within the special maritime and territorial jurisdiction of the United States where death results)
18 U.S.C. 2251 (murder during the course of sexual exploitation of a child)
18 U.S.C. 2280 (a killing resulting from violence against maritime navigation)
18 U.S.C. 2281 (death resulting from violence against fixed maritime platforms)
18 U.S.C. 2282A (murder using devices or dangerous substances in U.S. waters)
18 U.S.C. 2283 (transportation of explosives, biological, chemical, radioactive or nuclear materials for terrorist purposes on the high seas or aboard a U.S. vessel or in U.S. waters)
18 U.S.C. 2291 (murder in the destruction of vessels or maritime facilities)
18 U.S.C. 2332 (killing an American overseas)
18 U.S.C. 2332a (death resulting from use of weapons of mass destruction)
18 U.S.C. 2322b (multinational terrorism involving murder)
18 U.S.C. 2332f (death resulting from bombing of public places, government facilities, public transportation systems or infrastructure facilities)(effective when the terrorist bombing treaty enters into force for the U.S.)
18 U.S.C. 2340A (death resulting from torture committed outside the U.S.)
18 U.S.C. 2381 (treason)
18 U.S.C. 2441 (war crimes)
18 U.S.C. 3261(murder committed by members of the United States armed forces or accompanying or employed by the United States armed forces overseas)
21 U.S.C.461(c) (murder of federal poultry inspectors during or because of official duties)
21 U.S.C.675 (murder of federal meat inspectors during or because of official duties)
21 U.S.C. 848(c), 18 U.S.C. 3592b)(major drug kingpins and attempted murder by drug kingpins to obstruct justice)
21 U.S.C.848(e)(1) (drug kingpin murders)
21 U.S.C.1041(c) (murder of an egg inspector during or because of official duties)
42 U.S.C.2283 (killing federal nuclear inspectors during or because of official duties)
49 U.S.C. 46502 (air piracy where death results)
49 U.S.C.46506 (murder within the special aircraft jurisdiction of the United States)